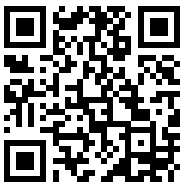
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A TREATISE

ON THE

LAW OF AGENCY

INCLUDING NOT ONLY A DISCUSSION OF THE GENERAL SUBJECT,

BUT ALSO

SPECIAL CHAPTERS

ON

ATTORNEYS, AUCTIONEERS, BROKERS AND FACTORS.

BY

FLOYD R. MECHEM.

CHICAGO:
CALLAGHAN AND COMPANY.
1889.

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TO THE

Hon. BENJAMIN F. GRAVES, LL. D.,

FOR MANY YEARS A

JUSTICE OF THE SUPREME COURT

OF MICHIGAN,

THIS VOLUME IS RESPECTFULLY DEDICATED,

NOT ONLY

AS A TOKEN OF THE GREAT

PERSONAL REGARD

WHICH THE AUTHOR FEELS FOR HIM, BUT ALSO

AS A SLIGHT RECOGNITION

of the appreciation which he, in common with all citizens, feels for one who, in the course of a career extending through every grade of judicial office, from the local magistracy of his town to the chief-justiceship of his State, has so unsparingly devoted the best energies of a long and honorable life to one of the highest of human pursuits,— the pure and impartial administration of justice; and who now, in voluntary retirement from judicial life, is experiencing that satisfaction which must come from the consciousness of such work well done.

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PREFACE.

What here follows is the result of an earnest endeavor to make a reliable, useful and comprehensive statement of the law of Agency, including not only its general form, but certain also of its more important special forms. How far this effort has been successful, those who use the book can alone determine.

The plan pursued has been to state in as clear and accurate form as possible, the principles of law involved, supported by a full citation of the authorities, and to illustrate and fortify these statements by examples and quotations from leading and characteristic cases. Upon doubtful questions there has been given, either in the text or in the notes, a more or less full presentation of the conflicting views, and the writer has endeavored to extract from them what seemed to him to be the true principle. This has involved, in many cases, an expression of his own opinion, for which he is, of course, alone responsible.

For the benefit of those to whom complete libraries are not accessible, — and they embrace the great majority of the profession,—he has, in many instances, made the statements of cases and the excerpts from the opinions of the courts, fuller than might otherwise seem necessary. While this course has added to the size of the book, the writer hopes it has also added proportionately to its value. If he has erred in this regard, it is the error of a too abundant caution. To further increase the practical usefulness of the book he has, at the expense of no little additional labor, given parallel references to those excellent series of reports, the American Decisions, American Reports, American State Reports and Moak's English Reports, as well as to the various Reporters and Law Journals. In several of the States the law of agency has been, to a greater or less extent, reduced

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to the form of a code. The more important of these statutory provisions will be found collected in the Appendix.

The work is divided into five parts or books. Of these, the first four are devoted to a general exposition of the law of Agency, while the fifth contains a consideration of the law applicable to Attorneys, Auctioneers, Brokers, and Factors. That this method of treatment involves something of repetition is true, but in the writer's opinion the advantages of consecutive and separate treatment more than compensate for it. The subjects of ship and bank officers, and others sometimes treated in works upon agency, have not been separately dealt with, not only because they belong more appropriately to other topics, but because the size of the work would not permit of it. Each of the four separate forms treated might well be, as each has been, made the subject of an independent treatise, and to compress them into single chapters prevents exhaustive discussion. It is believed, however, that no important principle has been omitted, and that what these chapters lack will be matter which is cumulative or of detail only. Trusting that his work will be of use to those for whom it was intended, the writer submits it to the profession.

FLOYD R. MECHEM.

DETROIT, OCTOBER 1, 1889.

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THE LAW OF AGENCY.

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THE LAW OF AGENCY.

BOOK I.

OF THE RELATION IN GENERAL; HOW CREATED AND TERMINATED.

CHAPTER I.

DEFINITIONS AND DIVISIONS.

§ 1. Agency defined.
2. Relation to Master and Servant.
3. Other Names employed.
4. Actual and Ostensible Agencies.
5. Classes of Agents.
6. Universal, General and Special Agents.
7. Uses of these Distinctions.
8. Difficulty of Determination.
§ 9. How Question to be determined.
10. Special Forms of Agency.
11. Attorneys at Law.
12. Auctioneers.
13. Brokers.
14. Factors and Commission Merchants.
15. Officers of Ships.
16. Partners.
17. Bank Officers.

§ 1. Agency defined. Agency is a legal relation, founded upon the express or implied contract of the parties,[1] or created

[1] "Agency is founded upon contract, either express or implied, by which one of the parties confides to the other, the management of some business to be transacted in his name or on his account, and by which the other assumes to do the business and to render an account of it." Kent Com., II., p. 784. "An agent is a person duly authorized to act on the behalf of another, or one whose unauthorized act has been duly ratified." Ewell's Evans' Agency, 1. "An agent is one who acts for and in the stead of another, termed the principal, either generally or in some particular business or thing, and either after his own discretion in full or in part, or under a specific command." Bishop, Contracts, § 1027. "In the commoL

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by law,[1] by virtue of which one party,—the *agent*—is employed and authorized to represent and act for the other,—the *principal*—in business dealings with third persons. The distinguishing features of the agent are his representative character and his derivative authority.[2]

§ 2. **Relation to Master and Servant.** The line of demarcation between the relation of principal and agent, and that of master and servant is exceedingly difficult to define.[3] This difficulty arises largely from the fact that the two relations are essentially similar. Indeed, there is much reason for saying that the difference between them is one of degree only, and not of kind. The difficulty is increased by the fact that the same person often assumes to the principal many of the characteristics of both servant and agent, as well as by the fact that most of the principles which govern one relation apply equally to the other.

The true distinction is to be found in the nature of the undertaking, and the time and manner of its performance. Agency

language of life, he, who being competent and *sui juris*, to do any act for his own benefit, or on his own account, employs another person to do it, is called the principal, constituent or employer, and he who is thus employed is called the agent, attorney, proxy or delegate of the principal, constituent or employer. The relation thus created between the parties is termed an agency. Story, Agency, § 3. "Agency is a contract by which one person, with greater or less discretionary powers, undertakes to represent another in certain business relations." Wharton, Agency, § 1. "An agent is one who represents another, called the principal, in dealing with third persons. Such representation is called agency." Code, Cal., § 2295; Dakota, Code, § 1337.

[1] Benjamin *v.* Dockham, 134 Mass. 418. See *post*, § 82.

[2] Ewell's Evans' Agency, 1.

[3] "The word servant," says Mr. Parsons, "seems to have in law two meanings. One is that which it has in common use, when it indicates a person hired by another for wages, to work for him as he may direct. We may call such a person a servant in fact; but the word is also used in many cases to indicate a servant by construction of law; it is sometimes applied to any person employed by another, and is scarcely to be discriminated in these instances from the word agent. This looseness in the use of the word is the more to be regretted, because it seems to have given rise to some legal difficulties and questions which might have been avoided." I. Parsons on Contracts, 101.

"The word servant," says Mr. Wood, "in our legal nomenclature, has a broad significance, and embraces all persons of whatever rank or position who are in the employ and subject to the direction or control of another in any department of labor or business." Wood, Mast. & Serv., § 1.

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properly relates to transactions of business with third persons, and implies more or less of discretion in the agent as to the time and manner of his performance. Service, on the other hand, has reference to actions upon or about things. It deals chiefly with matters of mere manual or mechanical execution, in which the servant acts under the direction and control of the master.[1]

It may be said, perhaps, that this distinction is not altogether

[1] Mr. Wharton in his excellent work illustrates the distinction thus: "Agency, or mandate, as has already been seen, is distinguishable from *Locatio conductio operarum*, or the relationship of master and servant, by the fact that the former relates to business transactions, in which there is more or less discretion allowed to the employee, while the latter relates to manual services, which the employee is, as a rule, obliged to perform under specific orders. Thus, a publisher is the mandatary or agent of the author in printing a book; the compositor is the *locator* or servant of the printer in setting up the type. So a trustee managing an estate is the mandatary or agent of his principal in investing the latter's funds; the trustee's clerk, who keeps his account, is the trustee's *locator* or servant. So a contractor undertakes to build a house for a capitalist; and he is in this the capitalist's mandatary or agent; the mason or the bricklayer who directly lets his labor to the capitalist, is the latter's servant, or *locator*. * * * I employ, for instance, an engine-maker to build for me a particular engine, he having exclusive control over the use of his time when working for me, and pursuing his own mode of working. Or I engage a printer to print for me a particular manuscript, he having like discretion as to time and mode. Or I employ a salesman, he having discretion as to the parties to whom to sell. In each of these cases the employment is agency or mandate, and not that of master and servant, or *locatio conductio operarum*." Wharton on Agency, §§ 19, 20.

The codes distinguish between the two relations thus: "An agent is one who represents another called the principal in dealings with third persons." Cal., § 2295; Dakota, § 1337.

"A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master." Cal., § 2009; Dakota, § 1157.

"A preliminary remark," says Judge Cooley," "is essential regarding the employment, in the law, of the words master and servant. The common understanding of the words and the legal understanding is not the same; the latter is broader and comprehends some cases in which the parties are master and servant only in a peculiar sense, and for certain purposes; perhaps only for a single purpose. In strictness, a servant is one who, for a valuable consideration, engages in the service of another, and undertakes to observe his directions in some lawful business. The relation is purely one of contract, and the contract may contemplate or stipulate for any services, and any conditions of service not absolutely unlawful." Cooley on Torts, 531.

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satisfactory in actual application, inasmuch as it is difficult to conceive of any form of service, except, perhaps, the very lowest, in which more or less of discretion is not allowed the servant; or of any form of agency, except, perhaps, a few forms of independent calling, in which the agent is not, or may not be, subject to the specific control of the principal. In the majority of cases, however, the distinction is sufficiently clear for practical purposes, particularly inasmuch as the same principles of law will, ordinarily, be applied to either relation.

The term of employment and the manner of rendering compensation will, in many cases, assist in the determination of the question. Agents, as a rule, are employed rather as particular occasions may require, than for fixed periods; and receive their compensation rather in fees and commissions than in fixed wages or salary. But these considerations, while of use in many cases, are not in every instance conclusive, as the agent's term of employment may often be a definite period, and his fees or commissions may be commuted by a stated compensation or salary. Thus the general counsel of a railroad company, employed by the year at a fixed salary and devoting to its business his entire time, is not on that account ordinarily considered a servant; nor is the day laborer who works upon his employer's farm, usually deemed to be an agent because his service is rendered at irregular intervals and at varying wages.

In the view that he who executes the will, and is subject to the control, of another, is a servant, agency is but a higher form of service;[1] while in the view that he who acts for and represents another, is an agent, service is but a lower form of agency.[2]

The two relations being thus so closely allied, the consideration of one necessarily implies a more or less full development of the other, and while this volume is devoted to the higher form, illustrations will be freely drawn from the lower.

§ 3. **Other Names Employed.** The names *principal* and *agent* are not the only ones used to designate the parties to this

[1] Blackstone so treats it: "There is yet a fourth species of servants," says he, "if they may be so called, being rather in a superior, a ministerial, capacity; such as stewards, factors and bailiffs; whom, however, the law considers as servants *pro tempore* with regard to such of their acts as affect their master's or employer's property." 1 Com., 427.

[2] Mr. Chitty so treats it. Chitty on Contracts, 209.

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relation. The agent is sometimes called an attorney, proxy, delegate or representative; and the person represented, though usually called the principal, is sometimes designated an employer, constituent or chief.[1]

The contract by which this relation is created, or upon which it is based, is called a contract of agency; the right of the agent so to act for and represent the principal is termed his authority or power; and this authority or power when conferred formally by an instrument in writing is said to be conferred by letter of attorney or, more frequently, by power of attorney.[2]

§ 4. **Actual and Ostensible Agencies.** An agency is sometimes said to be either actual or ostensible.[3] An agency is actual when the agent is really employed by the principal.[4] An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him.[5]

§ 5. **Classes of Agents.** Agents are divided into a variety of classes based upon the extent or nature of their authority, and the character and obligation of their undertakings. The most common and most important of these classifications is that based upon the extent of their authority into *universal*, *general*, and *special* or *particular* agents.[6]

Other classifications, based (*a*) upon the nature of the agency into *mercantile* and *non-mercantile* agents; or (*b*) with regard to their obligations in selling, into *del-credere* agents, and agents *not del-credere;* or (*c*) in regard to the degree of skill required of them, into *gratuitous* and *paid* agents and *professional* and *non-professional* agents, are sometimes made for convenience of treatment.[7]

§ 6. **Universal, General and Special Agents.** An universal agent is one authorized to transact all of the business of his principal of every kind. A general agent is an agent who is empowered to transact all of the business of his principal of a

[1] Story, Agency, § 3.
[2] Evans' Agency, 2.
[3] Cal. Code, § 2298; Dak. Code, 1340.
[4] Cal. Code, § 2299; Dak. Code, 1341.
[5] Cal. Code, § 2300; Dak. Code, 1342.
[6] See Ewell's Evans' Agency, 2; Story on Agency, § 17; Wharton on Agency, § 116.
[7] Ewell's Evans' Agency, 2.

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particular kind or in a particular place. A special agent is one authorized to act only in a specific transaction.[1]

A principal can have but one universal agent. He may have a general agent in each line of his business, and in each of several places. He may employ as many special agents as occasion may require. An universal agency is of very rare occurrence,[2] the great majority of the cases being those which involve some form of general or special agency.

§ 7. **Uses of these Distinctions.** Distinctions of this sort are of use in securing a logical statement of the law, and they are also of importance because of the more or less arbitrary rules which have been based upon them; but unless it be held clearly in mind that they are aids only, and are not conclusive, in controversies between the principal and third persons, they will often prove to be misleading rather than useful.[3]

§ 8. **Difficulty of Determination.** It is often difficult to determine whether a given agency shall be deemed general or special, and cases frequently occur, as will be seen hereafter,[4] where the agency though special as between the principal and the agent, must be regarded as general as between the principal and third persons. The distinction is of chief importance in determining the liability of the agent to his principal, because, as will be seen,[5] the agent by exceeding the limits set to his authority or by violating express instructions may make himself liable to his principal for the loss or damage occasioned thereby.

§ 9. **How Determined.** No abstract presumption of law is

[1] Savings Fund Society v. Savings Bank, 36 Penn. St. 498, 78 Am. Dec. 390; Lobdell v. Baker, 1 Metc. (Mass.) 193, 35 Am. Dec. 358; Wood v. McCain, 7 Ala. 800, 42 Am. Dec. 612; Manning v. Gasharie, 27 Ind. 399; Gilman v. Robinson, Ry. & Moo. 226; Kaye v. Brett, 5 Ex. 269; Brady v. Todd, 9 C. B. (N. S.) 591; Whitehead v. Tuckett, 15 East, 400; Anderson v. Coonley, 21 Wend. (N. Y.) 279; Farmers', &c. Bank v. Butchers', &c. Bank, 16 N. Y. 125, 69 Am. Dec. 678; Tomlinson v. Collett, 3 Blackf. (Ind.) 436; Walker v. Skipwith, Meigs (Tenn.) 502; Savage v. Rix, 9 N. H. 263.

[2] Indeed it has been doubted whether a true universal agency could exist. Story on Agency, § 21. But see an instance of what was called such in Barr v. Schroeder, 32 Cal. 609. An universal agency can only be created by clear and unequivocal language and will not be inferred from any general expressions, however broad. Gulick v. Grover, 33 N. J. L. 463, 97 Am. Dec. 728.

[3] See post Book II, Chap. I.

[4] See post, Book II. Chap. 1.

[5] See post, *Id.*

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made in reference either to the existence or to the nature or extent of an agency. These are facts to be proved. If the agency is created by writing, the question addresses itself to the court; but if it be by parol, it is for the jury to determine both its existence and its character and extent.[1] Where, however, an agency is shown to exist, the presumption would be that the agent's authority was general rather than limited.[2]

§ 10. **Special Forms of Agency.** Certain forms of agency are of such great importance and of such universal use that around each of them has grown up a special body of the law that requires distinctive consideration. Of this class are attorneys, auctioneers, bank officers, brokers, factors, ship masters, and the like, some of which will be specially considered hereafter.

§ 11. **Attorneys at Law.** As has been seen, the term attorney is often used in the law of agency as synonymous with the word agent, particularly when the authority is conferred by a written instrument. An agent of this sort is often further distinguished as an *attorney in fact.*

The term has also its well understood significance of *attorney at law*, by which is meant, in modern times, one whose profession it is to give advice and assistance in legal matters, and to prosecute and defend in courts, the causes of those who may employ him for that purpose.[3]

§ 12. **Auctioneers.** An auctioneer is one whose business it is to sell or dispose of property, rights or privileges at public competitive sale, to the person or persons offering or accepting the terms most favorable to the owner.[4] He differs from a broker in

[1] Dickinson County *v.* Mississippi Valley Ins. Co. 41 Iowa, 286; Savings Fund Society *v.* Savings Bank, 36 Penn. St. 498, 78 Am. Dec. 390; Morrison *v.* Whiteside, 17 Md. 452, 79 Am. Dec. 661; Beringer *v.* Meanor, 85 Penn. St. 223; Bean *v.* Howe, 85 Penn. St. 260; Dale *v.* Pierce, 85 Penn. St. 474. "The existence of an agent's authority, is purely a question of fact. What he may do by virtue of it is a question of law." Glenn *v.* Savage, — Ore. —, 13 Pac. Rep. 442.

[2] Trainor *v.* Morison, 78 Me. 160, 57 Am. Rep. 790; Methuen Co. *v.* Hayes, 83 Me. 169.

[3] Weeks on Attorneys at Law, § 31. See the subject treated at length in the chapter on Attorneys at Law.

[4] Mr. Bishop defines an auctioneer as "one who dealing with assembled persons competing, sells property to those who make or accept the offers most favorable to the owner." As will be observed, the definition in the text is based largely upon this. Of

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several particulars, chief among which are that he is employed to sell or dispose of, only, and that his sales are always public. He is primarily deemed to be the agent of the seller, but in the performance of his functions he becomes the agent of the buyer also, as when he accepts the buyer's bid and enters his name upon the memorandum of the sale.[1]

§ 13. **Brokers.** A broker is one whose occupation it is to bring parties together to bargain, or to bargain for them, in matters of trade, commerce or navigation.[2] He is essentially a middle-man or go-between. He differs from an auctioneer in that he has no special property in the goods which he may be authorized to sell; that he must sell them in the name of the

this definition Mr. Bishop says: "I have not observed in the books any satisfactory definition of an auctioneer. Even Story puts what seems to have been meant for a definition, very loosely, thus: 'An auctioneer is a person who is authorized to sell goods or merchandise at public auction or sale for a recompense or (as it is commonly called) a commission.' Story, Agency, § 27. My definition is silent as to his remuneration, or the manner of it; in which respect Story's is to be preferred if this is really an element in the question. But though ordinarily, an auctioneer, like any other agent, is paid, he is not the less such if he does the work gratuitously. State v. Rucker, 24 Mo. 557. Nor does he cease to be an auctioneer though he sells his own property. Bent v. Cobb, 9 Gray (Mass.) 397. Therefore the definition may well be silent as to the matter of agency. Nor is he less an auctioneer though, selling his own property, he conducts the competition by some method other than outcry. Rex v. Taylor, McClel. 362; 13 Price, 636. Story's definition is defective in not comprehending the auctioneer of real estate. Emmerson v. Heelis, 2 Taunt. 38, 47; Dobell v. Hutchinson, 3 A. & E. 355. It may be a question whether mine is not defective in not extending to such a case as the letting out of the board of paupers to the lowest bidder, and various other cases of procuring a contract other than a purchase of property." Bishop on Contracts, New Ed. § 1131, and note.

"An auctioneer," says Mr. Wharton, "is a person employed to sell at public sale, after public notice, property to the highest bidder." Agency, § 638.

[1] See chapter on Auctioneers, where the subject is separately treated.

[2] "A broker is one, who, as middleman, brings persons together to bargain or bargains for them, in the private purchase or sale of property of of any sort, not ordinarily in his possession." Bishop, Contracts § 1135.

"A broker is a specialist employed as a middleman to negotiate between the parties, a sale or other business contract." Wharton on Agency, § 695.

Judge Story says that a broker "is an agent employed to make bargains and contracts between other persons, in matters of trade, commerce or navigation, for a compensation, commonly called brokerage." Agency, § 28. This definition is the one given by Evans' Agency, 4.

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principal, and that his sales are private and not at auction. He ordinarily receives a compensation or commission, usually called brokerage, but he may also serve gratuitously. He differs from a factor, also, in that he does not ordinarily have the possession of the property which he may be employed to sell and that his contracts are always made in the name of his employer. He is primarily the agent of the person who first employs him, and he cannot, without the full and free consent of both, be, throughout the transaction, the agent of both parties. Without such consent, he can only act as the agent of the other party when the terms of the contract are fully agreed upon between the principals and he is instructed to close it up.

Brokers are of many kinds, according to the particular class of transactions in which they engage. Thus there are money-brokers, stock-brokers, ship-brokers, bill-brokers, insurance-brokers, real estate-brokers, pawnbrokers, and general merchandise-brokers.[1]

§ 14. **Factors or Commission Merchants.** These terms, as is said by a learned writer,[2] are nearly or quite synonymous. The former is the more common in the language of the law, the latter in the language of commerce. A factor is one whose business it is to receive and sell goods for a commission. He differs from a broker in that he is entrusted with the possession of the goods to be sold and usually sells in his own name.[3] He is invested by

[1] See this subject fully discussed in the chapter on Brokers.

[2] Bishop, Contracts, § 1188. See also, Perkins v. State, 50 Ala. 154.

[3] "The distinction between a broker and a factor," said Chief Justice Abbott, "is not merely nominal, for they differ in many important particulars. A factor is a person to whom goods are consigned for sale by a merchant residing abroad, or at a distance from the place of sale, and he usually sells in his own name without disclosing that of his principal. The latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation,—he is not trusted with the possession of the goods and he ought not to sell in his own name." And in the same case it is said by Holroyd, J., that a factor "is a person to whom goods are sent or consigned, and he has not only possession, but in consequence of its being usual to advance money upon them, he has also a special property in them, and a general lien upon them. When, therefore, he sells in his own name it is within the scope of his authority, and it may be right therefore that the principal should be bound by the consequences of such sale—amongst which the right of setting off a debt due from the factor is one. But the case of a

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law with a special property in the goods to be sold and a general lien upon them, for his advances; and unless there be an agreement or usage to the contrary, he may sell upon a reasonable credit.[1]

Del Credere Commission. Not unfrequently, in consideration of an increased commission, the factor guarantees the payment of debts arising through his agency, in which case he is said to sell upon a *del credere* commission.[2]

Supercargo. A factor is called a supercargo when authorized to sell a cargo which he accompanies on the voyage.[3]

§ 15. **Officers of Ships.** Certain officers of ships, as the master and the ship's husband, present well recognized forms of agency, but the consideration of their rights, authority and duties belongs rather to a treatise upon shipping or maritime law than to one upon the subject of agency generally.[4]

§ 16. **Partners.** The transaction of the business of an ordinary partnership furnishes frequent opportunity for the application of the law of agency, but this subject is also deemed to be beyond the scope of the present treatise.

§ 17. **Bank Officers.** Certain officers of banks, and particularly the cashier, also present familiar forms of agency, which will receive attention herein.

broker is different; he has not the possession of the goods and so the vendee cannot be deceived by that circumstance; and besides, the employing of a person to sell goods as a broker does not authorize him to sell in his own name. If, therefore, he sells in his own name, he acts beyond the scope of his authority and his principal is not bound." Baring v. Corrie, 2 B. & Ald. 143.

[1] See the subject discussed in the chapter on Factors.

[2] See the question of his duties and liabilities discussed in the chapter on Factors, post.

[3] Ewell's Evans on Agency, 3.

"Supercargoes are persons employed by commercial companies or private merchants, to take charge of the cargoes they export to foreign countries, to sell them there to the best advantage, and to purchase proper commodities to relade the ships on their return home. For this reason supercargoes generally go out and return home with the ships on board of which they were embarked, and therein differ from factors, who reside abroad at the settlements of the public companies for whom they act." 1 Beawes Lex Merc., 47 (6th ed.)

[4] See Parsons on Maritime Law, Abbott on Shipping.

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CHAPTER II.

FOR WHAT PURPOSES AN AGENCY MAY BE CREATED.

§ 18. General Rule—For any lawful Purpose.
19. Illegal and Personal Acts cannot be delegated.

I. UNDERTAKINGS CONTRARY TO LAW OR OPPOSED TO PUBLIC POLICY.

20. In General—Void.
21. The Element of Contingent Compensation.
22. Lobbying Agents.
23. Same Subject—Legitimate Services.
24. Procuring Contracts from Government and Heads of Departments.
25. Same Subject—Illustrations.
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34. Services in procuring or suppressing Evidence.
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36. Marriage Brokerage Contracts void.
37. Corruption of Agents.
38. Other Cases involving same Principles.
39. Agent must participate in unlawful Purpose.
40. Whole Contract void when entire.

II. POWERS OF A PERSONAL NATURE.

41. Personal Duty, Trust or Confidence cannot be delegated.

§ 18. **General Rule—For any Lawful Purpose.** It may be stated as a general rule that an agency may be created for the transaction of any lawful business, and that whatever a person might lawfully do, if acting in his own right and in his own behalf, he may lawfully delegate to an agent.[1]

§ 19. **Illegal and personal Acts cannot be delegated.** In dealing with this general rule, two principles are important to be considered. One of them results as the direct and natural effect

[1] Story on Agency, § 6; Com. Dig. "Attorney," C. I. "An agent may be authorized to do any acts which his principal might do, except those to which the latter is bound to give his personal attention." Cal. Code, § 2304; Dak. Code, § 1348.

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of the rule itself; the other is an exception to it. These are, 1. That authority cannot be delegated to do an act which is illegal, immoral or opposed to public policy; and 2. That the performance of an act which is personal in its nature cannot de delegated.

I.

UNDERTAKINGS CONTRARY TO LAW, OR OPPOSED TO PUBLIC POLICY.

§ 20. **In general, void.** The law will not sanction the creation, or enforce the performance, of an agency which has for its object, or which naturally and directly tends to promote, the commission of an act which is either illegal or immoral in itself, or which is opposed to the public policy. As to the former class, the rule and its application are obvious and certain. Thus no one can lawfully empower another to violate the rules of law or of morals, as to commit an assault upon, or to defraud a third person, or to corrupt or seduce his servant. As to the latter class, while the scope of the application of the rule is not so readily discerned, the rule itself is enforced with no less certainty and vigor. In considering undertakings of this nature, the law looks with an exceedingly jealous eye. It judges of their validity rather by their general nature and their natural and probable tendencies, than by the question whether, in any particular case, wrong was actually done or intended. It seeks to prevent, not only the evil itself, but the very temptation to evil. It concerns itself rather with the public weal than with individual interest. It refuses, ordinarily, to assist either party, but leaves them both in the situation in which their own cupidity has placed them.[1]

[1] Institutes Justinian, Liber 3, Title 19, Par. 24; Gray *v.* Hook, 4 N. Y. 449; Marshall *v.* Baltimore & Ohio R. R. Co., 16 How. (U. S.) 314; and see generally the cases cited in the following sections.

"Contracts," says DEVENS, J., "which are opposed to open, upright and fair dealing are opposed to public policy. A contract by which one is placed under a direct inducement to violate the confidence reposed in him by another is of this character. No one can be permitted to found rights upon his own wrong, even against another also in the wrong. A promise made to one in consideration of doing an unlawful act, as to commit an assault or to practice a fraud upon a third person, is void in law, and the law will not only avoid contracts the avowed purpose or express object of which is to do an unlawful act, but those made with a view to place, or the necessary effect of which is to place, a person under wrong in-

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These principles which apply here are the well established and familiar ones which regulate the formation and performance of contracts generally. Their application to the law of agency is frequent, and some illustrations will be given in the following sections.

§ 21. **The Element of contingent Compensation.** It will be noticed in many of the illustrations given that particular stress is laid upon the fact that the undertaking was for a compensation contingent upon success. This element is an important but not a conclusive one. Where it exists, the temptation to employ improper means is certainly increased, and of this fact the courts have well taken notice. But contracts of this nature are not robbed of their viciousness because the agent is certain of his compensation; nor is his undertaking any more righteous because it is surely to be paid for. So, on the other hand, legitimate services are not rendered unlawful because the agent is to be rewarded only in case of his success. The nature of the undertaking and its natural, proximate and probable results are the criterion.[1]

§ 22. **Lobbying Agents.** It is of the utmost importance to the preservation and protection of the State that the sources of its legislative enactments be kept uncontaminated by any improper or debasing influence. Considerations of the public good, motives of high policy, arguments based solely upon the true interests of the people, are the only elements which can properly enter into the question of the right discharge of the important functions of the legislator. Personal solicitation, private intrigue, secret persuasion, arguments based upon the legislator's duty or obligations to individuals or societies or parties, to say nothing of offers of personal or pecuniary profit or advancement, are utterly hostile to the public good. Courts of law and equity

fluences, and offer him a temptation which may injuriously affect the rights of third persons. Nor is it necessary to show that injury to third persons has actually resulted from such a contract, for in many cases where it had occurred it would be impossible to be proved. The contract is avoided on account of its necessarily injurious tendency." Rice v. Wood, 113 Mass. 133, 18 Am. Rep. 459.

The general subject of the doctrine of public policy in the law of contracts is ably discussed in the excellent work of Mr. Greenhood.

[1] See cases cited in following sections.

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have not been slow to recognize this evil, or to declare that all attempts to influence the course of legislation by secret or sinister means, or even by using personal influence, solicitation or persuasion with the members of the legislative body, are inconsistent with sound public policy.

Any contract, therefore, for services to be performed in procuring or attempting to procure the passage or defeat of any public or private act by the use of any improper means or the exercise of undue influence, or by using personal solicitation, influence or persuasion with the members is void;[1] and any agree-

[1] Clippinger v. Hepbaugh, 5 Watts & Serg. (Penn.) 315, 40 Am. Dec. 519; Marshall v. Baltimore & Ohio R. R. Co. 16 How. (U. S.) 314; Tool Co. v. Norris, 2 Wall. (U. S.) 45; Trist v. Child, 21 Wall. (U. S.) 441; Weed v. Black, 2 McArthur (D. C.) 268, 29 Am. Rep. 618; McBratney v. Chandler, 22 Kan. 692; Kansas Pacific Ry. Co. v. McCoy, 8 Kan. 538; Harris v. Simonson, 28 Hun, (N. Y.) 318; Mills v. Mills, 40 N. Y. 543; Frost v. Belmont, 6 Allen, (Mass.) 152; Powers v. Skinner, 34 Vt. 274, 80 Am. Dec. 677; Bryan v. Reynolds, 5 Wis. 200, 68 Am. Dec. 55; Elkhart County Lodge v. Crary, 98 Ind. 238, 49 Am. Rep. 746; Oscanyan v. Arms Co. 103 U. S. 261.

In Trist v. Child, *supra*, Mr. Justice Swayne well says, "The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history. The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. They are never to descend to a lower plane. But there is a correlative duty resting upon the citizen. In his intercourse with those in authority, whether executive or legislative, touching the performance of their functions, he is bound to exhibit truth, frankness, and integrity. Any departure from the line of rectitude in such cases, is not only bad in morals, but involves a public wrong. No people can have any higher public interest, except the preservation of their liberties, than integrity in the administration of their government in all its departments.

"The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and considered in connection with the pecuniary interests of the agent at stake, contrary to the plainest principles of public policy. No one has a right, in such circumstances, to put himself in a position of temptation to do what is regarded as so pernicious in its character. The law forbids the inchoate step, and puts the seal of its reprobation upon the undertaking.

"If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the

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ment for the payment of a fee for such services is likewise void,[1] particularly where it is made contingent upon success, because in such a case there would be a stronger incentive to the exercise of personal and sinister means to effect the object.

And so jealously do the courts scrutinize such contracts that they condemn the very appearance of evil, and it matters not that in the particular case nothing improper was done or was expected to be done. It is enough that the employment tends directly to such results.[2]

passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous.

"If the instances were numerous, open, and tolerated, they would be regarded as measuring the decay of the public morals and the degeneracy of the times. No prophetic spirit would be needed to foretell the consequences near at hand. The same thing in lesser legislation, if not so prolific of alarming evils, is not less vicious in itself, nor less to be condemned. The vital principle of both is the same. The evils of the latter are of sufficient magnitude to invite the most serious consideration. The prohibition of the law rests upon a solid foundation. A private bill is apt to attract little attention. It involves no great public interest, and usually fails to excite much discussion. Not unfrequently the facts are whispered to those whose duty it is to investigate, vouched for by them, and the passage of the measure is thus secured. If the agent is truthful, and conceals nothing, all is well. If he uses nefarious means with success, the spring-head and the stream of legislation are polluted. To legalize the traffic of such service, would open a door at which fraud and falsehood would not fail to enter and make themselves felt at every accessible point. It would invite their presence and offer them a premium. If the tempted agent be corrupt himself, and disposed to corrupt others, the transition requires but a single step. He has the means in his hands, with every facility and a strong incentive to use them. The widespread suspicion which prevails, and charges openly made and hardly denied, lead to the conclusion that such events are not of rare occurrence. Where the avarice of the agent is inflamed by the hope of a reward contingent upon success, and to be graduated by a percentage upon the amount appropriated, the danger of tampering in its worst form is greatly increased.

"It is by reason of these things that the law is as it is upon the subject. It will not allow either party to be led into temptation where the thing to be guarded against is so deleterious to private morals and so injurious to the public welfare. In expressing these views, we follow the lead of reason and authority."

[1] Clippinger *v.* Hepbaugh, 5 Watts & Serg. (Penn.) 315, 40 Am. Dec. 519; Wood *v.* McCann, 6 Dana (Ky.) 366; Gil *v.* Williams, 12 La. Ann. 219, 68 Am. Dec. 767.

[2] Clippinger *v.* Hepbaugh, *supra*; Mills *v.* Mills, *supra*; McKee *v.*

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§ 23. **Same Subject—Legitimate Services.** It is not to be understood, however, that every contract for services to be rendered in endeavoring to procure or defeat legislation is unlawful. Services may be rendered, public in their nature and intended to reach the understandings of the legislators rather than to exercise any personal influence over them, which are perfectly legitimate.

Thus a person may lawfully be employed to draft a petition, attend the taking of testimony, collect facts, prepare arguments and to submit them publicly, either before a committee of the legislature or the legislature itself, if permitted to do so, "because," as it is said by a learned judge, "a public discussion could not tend to deceive or corrupt the legislature, while personal solicitation and influence might produce that result."[1]

§ 24. **Procuring Contracts from Government or Heads of Departments.** Employments of this nature rest upon the same principles as those considered in the preceding section. It is legitimate and proper to lay before the officer having the matter in charge, facts, information and arguments intended for the public good and calculated to enlighten the understanding and secure wise and intelligent action. Parties desiring to furnish to the government its necessary supplies, or to undertake the performance of its public works, may lawfully employ an agent to present their bids or offers; to call attention to their facilities for the proper performance of their undertakings, and to make, in

Cheney, 52 Howard Pr. (N. Y.) 144; Gil *v.* Williams, *supra*; Powers *v.* Skinner, *supra*; Atcheson *v.* Mallon, 43 N. Y. 147; 3 Am. Rep. 678; Spence *v.* Harvey, 22 Cal. 337; Thomas *v.* Caulkett, 57 Mich. 392, 58 Am. Rep. 369.

"It matters not," says ROGERS J. in Clippinger *v.* Hepbaugh, *supra*, "that nothing improper was done or was expected to be done by the plaintiff. It is enough that such is the tendency of the contract, that it is contrary to sound morality and public policy, leading necessarily, in the hands of designing and corrupt men, to improper tampering with members, and the use of an extraneous secret influence over an important branch of the government. It may not corrupt all; but if it corrupts, or tends to corrupt some, or if it deceives or tends to deceive or mislead some, that is sufficient to stamp its character with the seal of reprobation before a judicial tribunal."

[1] Bryan *v.* Reynolds, 5 Wis. 200; 68 Am. Dec. 55; Trist *v.* Child, 21 Wall. (U. S.) 441; Sedgwick *v.* Stanton, 14 N. Y. 289; Wildey *v.* Collier, 7 Md. 273; Miles *v.* Thorne, 38 Cal. 335, 99 Am. Dec. 384.

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their behalf, such public and open arguments in favor of their propositions as they may be afforded opportunity.[1]

[1] Trist v. Child, 21 Wall. (U. S.) 441; Stanton v. Embrey, 93 U. S. 548; Lyon v. Mitchell, 36 N. Y. 235, 93 Am. Dec. 502; Pease v. Walsh, 49 How. Pr. (N. Y.) 269.

Thus in Beal v. Polhemus, —Mich. —34 N. W. Rep. 532, Polhemus gave Beal a note to be paid "as soon as the postoffice is moved into" a building which Beal was then erecting on property near that belonging to Polhemus, the latter believing that its location there would enhance the value of his own property. Beal was an active and prominent politician, but while there was some evidence that he had said in relation to similar contracts with other parties that he could control the senators from his State, there was no evidence that he made any such representations to Polhemus or that the using of any such influence constituted any part of the consideration of the contract. The postoffice was duly moved into the building, but Polhemus refused to pay the note, alleging it to be invalid as against public policy. In an action to recover upon it the trial court found as a fact that in securing the postoffice to be placed and located in his building, Beal used no undue influence upon any department or officers of the government, and was not guilty of any corruption or corrupt practice in making the contract, and did no more than any honorable man might do in renting his building to the government for the use of a post-office, and he was allowed to recover. In the Supreme court, MORSE, J. said: "Mr. Beal had a perfect right to be heard before any officer of the government or any department of the same, as to the merits of his building as a place for the location of the post-office. It is not shown by the findings or the evidence in the case that he used any improper means to gain his point, or even that he influenced any senator or representative in congress, or any officer of the government, to interfere in his behalf. He went to Washington personally, and, while there, secured the location of the office where he wanted it; but there is not the slightest testimony that he used any undue means to accomplish his end. We cannot presume that he used his personal power, which is said to have been very great, in a corrupt or unseemly manner, or in violation of any public policy. For aught we know, he appeared as any citizen might and has a right to to do, before the proper office at Washington, and stated the merits of his claim so convincingly and conclusively that the location desired seemed to be the most proper and available one. Certainly there could be nothing wrong in this. It is true, there is evidence in relation to some of the contracts, not in suit, that Beal boasted that he could control the senators from his State, and that he must have money to go to Washington to do so; but there is no testimony that either one of them lifted a hand or said a word in his behalf. And there is nothing to show that in the present case he made any such representations to obtain the contract. The defendant agreed to pay a certain sum upon the accomplishment of an object in which he saw a future benefit to his property. That object was obtained, and he has had the benefit he desired. There is no valid reason why he should not fulfill the contract on his part, as Beal promptly fulfilled his part of the agreement."

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But where the employment contemplates the bringing to bear of improper, sinister or personal influence, or where its natural and legitimate tendency is in that direction, particularly where compensation is made contingent upon success, it is opposed to public policy and void.[1]

§ 25. **Same Subject—Illustrations.** Thus in a leading case decided by the Supreme Court of the United States, one Norris had been employed by the Providence Tool Company to endeavor to obtain from the War Department an order for a large number of muskets, and, for his compensation, he was to receive whatever the Government should agree to pay for each musket above a certain sum. Norris thereupon set himself to work, to use his own language, "concentrating influence at the War Department," and finally succeeded in obtaining a favorable contract. Afterwards a dispute arose between him and the tool company, as to the amount of his commission, and he brought an action to recover it.

The Supreme Court, by Mr. Justice Field, said: "The question then is this: Can an agreement for compensation to procure a contract from the government to furnish its supplies be enforced by the courts? We have no hesitation in answering the question in the negative. All contracts for supplies should be made with those, and with those only, who will execute them most faithfully and at the least expense to the government. Considerations as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the government. No other element can lawfully enter into the transaction so far as the government is concerned. Such is the rule of public policy; and whatever tends to introduce any other element into the transaction is against public policy. That agreements like the one under con-

[1] But in a case very similar to the one last cited, the party had given his notes in consideration that the owners of the building "would use all proper persuasion to secure the location of the postoffice in their room." One of the owners was a personal friend of the postmaster-general and represented to him that the location was a suitable one and urged upon him the propriety of placing the postoffice in their building and this was done. The court, however, held that the agreement was against public policy and that the notes were void. Elkhart County Lodge *v.* Crary, 98 Ind. 238, 49 Am. Rep. 746. See also, Spence *v.* Harvey, 22 Cal. 336, 83 Am. Dec. 69; Hutchen *v.* Gibson, 1 Bush, (Ky.) 270.

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sideration have this tendency is manifest. They tend to introduce personal solicitation and personal influence as elements in the procurement of contracts, and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds. * * * Agreements for compensation contingent upon success suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception."[1]

§ 26. **Services in prosecuting Claims.** Contracts for services to be rendered in the prosecution of claims against governments and municipal bodies stand upon the same footing. As is said by a learned judge in a case involving the right of an attorney to recover upon such a contract: "Professional services, to prepare and advocate just claims for compensation, are as legitimate as services rendered in court in arguing a cause to convince a court or jury that the claim presented, or the defence set up against a claim presented by the other party, ought to be allowed or rejected. Parties in such cases require advocates, and the legal profession must have a right to accept such employment, and to receive compensation for their services; nor can courts of justice adjudge such contracts illegal, if they are free from any taint of fraud, misrepresentation or unfairness."[2]

But where the contract contemplates that the allowance of the claim is to be sought by using improper means or by bringing personal solicitation, influence or persuasion to bear upon the officer vested with the duty of decision, the undertaking is unlawful and the courts will not enforce it.[3]

§ 27. **Compromise of Crime.** It is a high requirement of the public policy that crimes should be investigated and punished, and the law frowns upon all attempts to suppress investigation or to defeat the administration of justice. Any contract, therefore, for services to be rendered for the purpose of stifling prosecutions, or of obstructing, delaying or preventing the due course

[1] Tool Co. v. Norris, 2 Wall. (U. S.) 45; and the same rule was laid down and applied in Oscanyan v. Arms Co., 103 U. S. 261.

[2] CLIFFORD, J. in Stanton v. Embrey, 93 U. S. 548; Burbridge v. Fackler, 2 McArthur (D. C.) 407.

[3] Devlin v. Brady, 32 Barb. (N. Y.) 518.

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of public justice in its efforts to punish crime is opposed to public policy and void.

Thus an agreement with an attorney, for a contingent fee, to settle a criminal case so as to avoid a prosecution;[1] an agreement to pay one for endeavoring to induce the complainant in a prosecution for felony to discontinue the proceedings;[2] an undertaking for compensation to endeavor to prevent the finding of an indictment, and, if found, to endeavor to have the public authorities dismiss it;[3] an agreement for a contingent fee to use one's influence with a prosecuting attorney to induce him to bring about a lighter punishment than otherwise, and to permit the accused to turn State's evidence with the hope of receiving a pardon therefor;[4] and an agreement with an attorney to attempt to induce the sheriff to refrain from arresting A, who is charged with murder, the object being to give A an opportunity to escape,[5] are void.

§ 28. **Services in procuring Appointment to Office.** Contracts to procure the appointment of a person to public office fall within the same principles. These offices are trusts, held solely for the public good, and should be conferred from considerations of the ability, integrity, fidelity and fitness for the position of the appointee. No other considerations can properly be regarded by the appointing power. Whatever introduces other elements to control this power must necessarily lower the character of the appointments to the great detriment of the public good. Agreements for compensation to procure these appointments tend directly and necessarily to introduce such elements. The law, therefore, from this tendency alone, adjudges these agreements inconsistent with sound morals and public policy.[6]

[1] Ormerod *v.* Dearman, 100 Penn. St. 561, 45 Am. Rep. 391.

[2] Rhodes *v.* Neal, 64 Ga. 704, 37 Am. Rep. 93.

[3] Barron *v.* Tucker, 58 Vt. 388, 38 Am. Rep. 684.

[4] Wight *v.* Rindskopf, 43 Wis. 344.

[5] Arrington *v.* Sneed, 18 Tex. 135. See also, Buck *v.* First National Bank, 27 Mich. 293, 15 Am. Rep. 189; Haines *v.* Lewis, 54 Iowa 301, 37 Am. Rep. 202; McMahon *v.* Smith, 47 Conn. 221, 36 Am. Rep. 67; Dodson *v.* Swan, 2 W. Va. 511, 98 Am. Dec. 787.

[6] Tool Co. *v.* Norris, 2 Wall. (U. S.) 45; Gray *v.* Hook, 4 N. Y. 449; Gaston *v.* Drake, 14 Nev. 175, 33 Am. Rep. 548; Filson *v.* Himes, 5 Penn. St. 452; 47 Am. Dec. 422; Faurie *v.* Morin, 4 Martin (La.), 39, 6 Am. Dec. 701; Outon *v.* Rodes, 3 A. K. Marsh. (Ky.) 432, 13 Am Dec. 193; Hager *v.* Catlin, 18 Hun (N. Y.), 448; Haas *v.* Fenlon, 8 Kans. 601; Liness *v.* Hesing, 44 Ill. 113, 92 Am. Dec. 153.

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§ 29. **Same Rule applies to private Offices and Employments.** The same principles apply to contracts to procure private offices and employments, as well as those which are public or political in their nature. Open and fair presentation of an applicant's qualifications for the position is legitimate, and such presentation may lawfully be undertaken for a compensation, where the agent's relations to the subject matter and the appointing power will permit, and the fact that he comes as a hired advocate is disclosed.

But where it is contemplated that the agent is to conceal his agency and assume the position of a disinterested friend or adviser;[1] or where the appointment is to be sought by bringing to bear personal influence or persuasion;[2] or where the undertaking of the commission at all is inconsistent with duties already assumed or imposed by law, the contract is repugnant to the public policy.[3]

Thus where A, an attorney, employed B, the agent of C, to endeavor to persuade C to discharge a certain other attorney he was then employing, and to employ A instead, and promised B, by way of compensation, to divide with him such fees as A might receive, it was held that the agreement was void.[4] So a contract

[1] See Bollman *v.* Loomis, 41 Conn. 581, where A. for a fee from C. undertook to pose as the confidential friend and adviser of B. and thus induce him to purchase property of C.

"This," says Chief Justice SHAW, in Fuller *v.* Dame, 18 Pick. (Mass.) 472, in speaking of this rule, "is founded upon the general consideration of fitness and expediency. Such advice and solicitation, in whatever form the agency may be exerted, are understood to be disinterested and to flow from a single regard to the interests of the parties. They are lawful only so far as they are free and disinterested. If such advice and solicitation, thus understood to be pure and disinterested, may be justly offered from mercenary motives, they would produce all the consequences of absolute misrepresentation and falsehood. It is understood to be the offer of disinterested good offices, and the measure proposed, to be recommended by the unbiased judgment of the person offering it; whereas, it is in fact an offer flowing from unavowed motives of pecuniary interest, and the recommendation is the result of a judgment biased by a hope of a large reward. If rewards might be taken in consideration of the exertion of direct or indirect influence, either by the person acting under it, or by others who should be influenced and moved by him, it would destroy all confidence, it would lead to false and unfair representations and dealings, and be productive of infinite mischief."

[2] See note 4, *post.*

[3] See note 4, 5 and 6, *post.*

[4] Byrd *v.* Hughes, 84 Ill. 174; 25 Am. Rep. 442; Meguire *v.* Corwine, 101 U. S. 108.

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that in consideration of B's purchasing of A certain stock in a corporation, A would procure B's appointment as treasurer[1] or cashier[2] thereof, is void. Such appointments should be made because of the personal fitness of the applicant, and not because the appointing power is open to personal influence or can be bought for a price. So A, who has been requested to recommend to C, a suitable person for employment whom he could endorse as in every way responsible and reliable, cannot lawfully undertake to secure the position for B in consideration of B's paying him a fee.[3]

§ 30. **Services in improperly influencing Elections.** Purity of elections, and the free, fair and intelligent exercise of the ballot, uninfluenced by other considerations than the candidate's fitness and the general good of the community, are of paramount public importance, and any agreement for the rendition of services which have for their object, or which legitimately tend to, the introduction of other elements, as the bribery of voters or the bringing to bear upon them of personal influence, solicitation or persuasion, is, in accordance with the principles already referred to, clearly opposed to public policy and void.

Thus where one who was a candidate for the office of district attorney, employed another to "use all of his influence" with the voters of the county to secure the candidate's election, and who promised as compensation therefor, that if he should be elected, he would divide the fees of the office with the other, the court said: "Such a contract cannot be upheld. Its tendency was to corrupt the people upon whose integrity and intelligence the safety of the state and nation depends,—to lead voters to work for individual interests rather than the public welfare."[4]

So where one agreed to render services in procuring the elec-

[1] Guernsey v. Cook, 120 Mass. 501; Noyes v. Marsh, 123 Mass. 286; Jones v. Scudder, 2 Cin. Sup. Ct. 178.

[2] As of a National Bank, Noel v. Drake, 28 Kans. 265, 42 Am. Rep. 162; see also Railroad Co v. Ryan, 11 Kans. 602; Haas v. Fenlon, 8 Kans. 601; Tool Co. v. Norris, 2 Wall. (U. S.) 45.

[3] Holcomb v. Weaver, 136 Mass. 265, 17 Reporter, 401.

[4] Gaston v. Drake, 14 Nev. 175, 33 Am. Rep. 548; Martin v. Wade, 37 Cal. 168; see also Swayze v. Hull, 3 Halstead (N. J.),54, 14 Am. Dec. 399. An agreement to pay another to "work and canvass" voters for the purpose of securing the promisor's nomination for an office is void. Keating v. Hyde, 23 Mo. App. 555.

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tion of a certain candidate to the office of sheriff upon consideration that if successful he should be appointed deputy, the court held the agreement void.[1] And where one for money or other personal profit, agrees to use his influence in an election against what he believes to be for the public good, the contract is void, though as a matter of fact he uses no unlawful means.[2]

§ 31. **Same Subject—What Services legitimate.** But it is not unlawful for a candidate for a public office, particularly where his candidacy extends over a considerable territory, to employ another to make public speeches in his behalf, or to prepare, print or distribute arguments upon the questions at issue, or to use other open and honorable means to promote the success of his candidacy, where the object is to convince the understandings of the voters by public means and not to bring personal or other improper influences to bear upon their weaknesses or prejudices.[3]

§ 32. **Services in procuring Pardons.** The same general principles which underlie the questions just discussed, govern here. An agent or attorney may lawfully be employed to attend an open or public hearing of the executive or board of pardons, and make such legitimate arguments and present such petitions, memorials, statements of fact and evidence as are appropriate to bring before the pardoning power all the considerations which may be properly taken into account in behalf of the convicted

[1] Stout v. Ennis, 28 Kans. 706. And a like ruling was made in Robertson v. Robinson, 65 Ala. 610, 39 Am. Rep. 17. See also Salling v. McKinney, 1 Leigh (Va.), 42, 19 Am. Dec. 722; Groton v. Waldoborough, 11 Me. 306, 26 Am. Dec. 530.

[2] Nichols v. Mudgett, 32 Vt. 546.

[3] "There is a clear distinction," says LEWIS, P. J., in Keating v. Hyde, 28 Mo. App. 555, "between the purchase of services to be devoted only to an advertising of the fact that one is or desires to be a candidate, and the purchase of services to be employed in advocating his peculiar merit and eligibility so as to influence the choice of the voter. No public policy forbids the making of compensation, under agreement or otherwise, for printing or distributing announcements, or for the employment of any proper agency which may bring the fact of a person's candidacy more prominently before the public eye. The information thus disseminated is essential to the intelligent determination of the voter's choice. But it becomes a very different thing when money is paid or promised for efforts to control the voter's free agency in selecting the object of his suffrage." See also Murphy v. English, 64 How. Pr. (N. Y.) 362.

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person;[1] but all employments having for their object or natural tendency the using of any improper or sinister means, or which contemplate the exercise of personal influence or solicitation, especially if for a contingent fee, are looked upon by the law as demoralizing in their tendency, opposed to public policy and void, even though in the particular case no improper means were used or contemplated.[2]

§ 33. **How when Conviction illegal.** But where the conviction was unwarranted, as because the court had no jurisdiction, or where there was a grave doubt as to the constitutionality of the statute under which the conviction was had, no rule of public

[1] Chadwick *v.* Knox, 31 N. H. 226, 64 Am. Dec. 329; Bremsen *v.* Engler, 49 N. Y. Super. Ct. 172; Formby *v.* Pryor, 15 Ga. 258; Bird *v.* Breedlove, 24 Ga. 623. "It is not at once apparent," says BELL, J., in Chadwick *v.* Knox, *supra*, "that it is not lawful and proper for a party who is suffering the punishment of a crime to apply to the pardoning power for a remission of his sentence; and as far as we are aware, no censure has been regarded as attaching to such an application, either in law or morals. It seems to us equally reasonable for any other person who believes it his duty to make such application in behalf of another, to present the case to the executive, with such petitions, memorials, statements of facts and evidence as are suitable to satisfy the pardoning power of the propriety of the relief desired, and we think no censure can be justly attached to any person for his exertions in such a case if the measures adopted are consistent with the facts of the case, and with the truth and honesty of all parties concerned, while any effort to obtain such pardon by falsehood and misrepresentation, or by any species of fraudulent contrivance, or by prostituting the influence resulting from official station, or from personal relation to the pardoning power, is entirely forbidden by law.

A person in prison can do little to aid himself in bringing his case to the consideration of the executive. For everything that must be done without the walls of the prison, the convict is compelled to rely on the assistance of those who have their liberty. Such assistance may be afforded from motives of charity and compassion, or the motive may be in part kindness and in part an expectation that the party relieved will be ready to afford a suitable compensation for the services and expenses; or the party in prison may employ another to do such acts as may be rightfully and properly done for his relief and contract to pay him for his services, and to repay him his expenses. Such a contract, if the parties contemplate only a resort to legal and proper measures, is free from any just exception, and binding upon the parties."

[2] Hatzfield *v.* Gulden, 7 Watts (Penn.), 152, 32 Am. Dec. 750; Thompson *v.* Wharton, 7 Bush, (Ky.), 563, 3 Am. Rep. 306; Haines *v.* Lewis, 54 Iowa, 301, 37 Am. Rep. 202; Kribben *v.* Haycraft, 26 Mo. 396; McGill's Admr. *v.* Burnett, 7 J. J. Marsh. (Ky.), 640.

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policy would be violated by legitimate endeavor to secure the pardon or release of the accused.[1]

§ 34. **Services in procuring or suppressing Evidence.** Like considerations apply to undertakings to procure evidence for use before legal tribunals. It is entirely lawful and proper for a party to an action or controversy to employ another to ascertain what documentary and other evidence, and what witnesses are available; to obtain the names of the witnesses and a memorandum of their testimony; to cause them to be duly subpœnaed for attendance upon trial, and to take such other steps as may be necessary and proper to enable the party to present all the evidence that is pertinent to his case. This service is legitimate, and tends to promote and secure the due administration of justice.[2]

But contracts by which the agent undertakes, or which have for their object, the procuring or furnishing of evidence sufficient to win the case or to establish a certain fact, or the procuring of witnesses to testify in a certain manner, or to procure the production of testimony which could be produced only by a violation of a legal duty, stand upon a different basis. The intention and methods of the parties in a given case may be honorable and proper, but the natural and probable result of such an undertaking is to defeat the administration of justice and corrupt the morals of the people by putting a premium upon perjury and by holding out a direct incentive to the subornation of witnesses. It requires no extended argument to establish that such undertakings are contrary to sound public policy and void.[3]

[1] Thompson *v.* Wharton, *supra*; Timothy *v.* Wright, 8 Gray, (Mass.) 522.

[2] Chandler *v.* Mason, 2 Vt. 193; Lucas *v.* Pico, 55 Cal. 126; Wilkinson *v.* Oliveira, 1 Scott (Eng. C. P.) 461; Cobb *v.* Cowdery, 40 Vt. 25, 94 Am. Dec. 370.

[3] Gillett *v.* Logan County, 67 Ill. 256; Hoyt *v.* Macon, 2 Col. 502; Lucas *v.* Allen, 80 Ky. 681; Patterson *v.* Donner, 48 Cal. 369.

In Gillett *v.* Logan County, *supra*, the board of supervisors of the county desiring to prove a certain election to have been carried by illegal means employed an agent to procure testimony for that purpose, agreeing to pay him $100 for the first ten votes which the testimony procured by him proved to be illegal, $200 for the next ten votes, and so on, and an additional sum of $1,200, to be paid when the case was decided in the county's favor. These agreements were held to be void. "The contracts themselves," said the court, "are pernicious in their nature. They created a powerful pecuniary inducement on the part of the agents so employed, that testimony should be given of certain facts, and that a

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Equally pernicious, and for similar reasons, are undertakings to suppress or destroy evidence by concealing, removing or tampering with witnesses, or by compassing the destruction of the means of proof.[1]

§ 35. **Unlawful Dealings in Stocks or Merchandise.** So a contract for services to be rendered by a broker in unlawful dealings in stocks or merchandise is void. What dealings are lawful and what are unlawful, are questions which the courts have much discussed, but which are beyond the scope of the present treatise. In general terms, however, it may be said that undertakings which contemplate the creation of fictitious and unnatural values, or the control or monopoly of the traffic, or the prevention of the free and natural competition, in the staple articles of commerce, are void.[2] So undertakings which have for their object the gambling in the values of stocks and merchandise, as the purchase or sale of what are ordinarily called "futures," "margins" and "options," where the purpose of the parties is

peculiar result of the suit should be had. A strong temptation was held out to them to make use of improper means to procure the needful testimony, and to secure the desired result of the suit. The nature of the agreement was such as to encourage attempts to suborn witnesses, to tamper with jurors, and to make use of other base appliances in order to secure the necessary results which were to bring to these agents their stipulated compensation. The tendency of such arrangements must be to taint with corruption the atmosphere of the courts, and to pervert the course of justice. A pure administration of justice is of vital public concern. It tends to evil consequences that any such venal agency, as is constituted by these contracts, should have a part in the conduct of judicial proceedings where the attainment of right and justice is the end. Should contracts of this nature receive countenance, we might, among the multiplying forms of agency of the time, have to witness the scandalous spectacle of a class of agents holding themselves out to the public as professional procurers of desired testimony for litigants in courts for pay, contingent upon success in their suits."

[1] Cobb *v.* Cowdery, *supra;* Bostick *v.* McLaren, 2 Brev. (S. Car.) 275; Badger *v.* Williams, 1 D. Chip. (Vt.) 137; Hoyt *v.* Macon, 2 Col. 502; Valentine *v.* Stewart, 15 Cal. 387.

An agreement to pay an employee his salary and expenses to keep out of the reach of process issued to compel him to be a witness against his employer is void. Bierbauer *v.* Wirth, 5 Fed Rep. 336, 10 Biss. 60.

[2] Raymond *v.* Leavitt, 46 Mich. 447, 41 Am. Rep. 170; Sampson *v.* Shaw, 101 Mass. 145, 3 Am. Rep. 327; Wright *v.* Crabbs, 78 Ind. 487; Craft *v.* McConoughy, 79 Ill. 346; Morris Run Coal Co. *v.* Barclay Coal Co. 68 Penn. St. 173; Arnot *v.* Coal Co. 68 N. Y. 558.

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not that there shall be an actual sale and delivery of the property, but merely a settlement by the payment of the difference in market prices, are opposed to public policy and void.[1]

§ 36. **Marriage Brokerage void.** A marriage brokerage contract is an agreement for the procurement of a marriage for a commission or other compensation. Such contracts are clearly opposed to public policy and void, even though in the given case no fraud was practiced on either party. Their tendency is to bring to pass mistaken and unhappy marriages, to countervail parental influences in the training and education of children, and to tempt the exercise of an undue and pernicious influence in respect to the most sacred of human relations.[2]

§ 37. **Corruption of Agents.** Contracts for services to be rendered in attempting to corrupt, bribe or mislead the servant or agent of another, as by giving him secret gratuities, fees or commissions, to induce him to disregard, slight or ignore his principal's interests, or to be less zealous and watchful in the

[1] Irwin v. Williar, 110 U. S. 499; Stewart v. Schall, 65 Md. 299; 57 Am. Rep. 327; Lyon v. Culbertson, 83 Ill. 33, 25 Am. Rep. 349; Union Nat. Bank v. Car. 15 Fed. Rep. 438; Cobb v. Prell, 15 Fed. Rep. 77; Bigelow v. Benedict, 70 N. Y. 202, 26 Am. Rep. 578; Gregory v. Wendell, 39 Mich. 337, 33 Am. Rep. 390; Whitesides v. Hunt, 97 Ind. 191, 49 Am. Rep. 441; Cunningham v. National Bank, 71 Ga. 400, 51 Am. Rep. 266; Wall v. Schneider, 59 Wis. 352, 48 Am. Rep. 520; Flagg v. Baldwin, 38 N. J. Eq. 219, 48 Am. Rep. 308; Murry v. Ocheltree, 59 Iowa, 435; Barnard v. Backhaus, 52 Wis. 593; Everingham v. Meighan, 55 Wis. 354; Cameron v. Durkheim, 55 N. Y. 425; Pearce v. Foot, 113 Ill. 228; 55 Am. Rep. 414; Crawford v. Spencer, 92 Mo. 498; 1 Am. St. Rep. 745.

"The generally accepted doctrine in this country," says Mr. Justice MATTHEWS in Irwin v. Williar, *supra*, "is * * * that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them, but such a contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer; and, if under guise of such a contract, the real intent be really to speculate in the rise and fall of prices, and the goods are not to be delivered but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole contract constitutes nothing more than a wager, and is null and void."

[2] White v. Equitable Nuptial Benefit Union, 76 Ala. 251, 52 Am. Rep. 325; 20 Cent. L. Jour. 288; Johnson v. Hunt, 81 Ky. 321, 17 Cent. L. Jour. 468; Crawford v. Russell, 62 Barb. (N. Y.) 92.

See also James v. Jellison, 94 Ind. 292, 48 Am. Rep, 151.

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discharge of his duty, or to assume to his principal the appearance of a disinterestedness or candor which he does not in fact feel, or to enter into the secret service of the other party, or in any other manner to violate the trust and confidence reposed in him, are obviously corrupt and void.[1]

§ 38. **Other Cases involving same Principles.** Other cases involving the same principles may be cited. Thus, an employment to sell tickets in a forbidden lottery;[2] an undertaking for a contingent compensation to endeavor to procure the discharge of a drafted man;[3] an agreement for using personal influence with public officers to secure the favorable allowance of an account;[4] an employment for a contingent compensation of one, who ostensibly acted only as a disinterested physician, to use his endeavors in procuring from a railroad company as large damages as possible for one who has been injured in a railroad accident;[5] an agreement to pay one for assuming to be the confidential friend and adviser of another, and in that capacity to advise the latter to buy a piano of the promisor;[6] an undertaking to procure cotton for shipment in violation of the rules of war;[7] to

[1] See Atlee v. Fink, 75 Mo. 100, 42 Am. Rep. 385, where an agreement secretly made by a lumber dealer with one employed to supervise the erection of buildings for another and to pass upon accounts for materials, but not to make purchases, by which the lumber dealer agreed to pay him a commission on sales made to the employer through his influence, was held void as against public policy.

So where a secret gratuity is given to the agent with the intention of influencing his mind in favor of the giver of the gratuity, and the agent on subsequently entering into a contract with such giver on behalf of his principal, is actually influenced by the gratuity in assenting to stipulations prejudicial to the interests of his principal, although the gratuity was not given directly with relation to that particular contract, the transaction is fraudulent as against the principal and the contract is voidable at his option. Smith v. Sorby, 3 Q. B. Div. 552, 28 Eng. Rep. 455. Even though the agent was not in fact influenced against his principal's interests, the contract is corrupt. Harrington v. Victoria Graving Dock Co. 3 Q. B. Div 549, 28 Eng. Rep. 453. See also Bollman v. Loomis, 41 Conn. 581; Western Union Tel. Co. v. Railroad Co. 1 McCrary (U. S. C. C.), 418.

[2] Rolfe v. Delmar, 7 Robt. (N. Y.) 80.

[3] Bowman v. Coffroth, 59 Penn. St. 19; O'Hara v. Carpenter, 23 Mich. 410.

[4] Devlin v. Brady, 32 Barb. (N. Y.) 518.

[5] Thomas v. Caulkett, 57 Mich. 392, 58 Am. Rep. 369.

[6] Bollman v. Loomis, 41 Conn. 581.

[7] Irwin v. Levy, 24 La. Ann. 302; see also Williams v. Gay, 21 La. Ann. 110; Haney v. Manning, 21 La. Ann. 166; Rhodes v. Summerhill, 4 Heisk. (Tenn.) 204.

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assist in carrying on an illegal trade, as the keeping of a saloon,[1] or billiard table,[2] or the running of a lottery;[3] contracts for services to be rendered at times forbidden by the law, as for work upon Sunday,[4] violate the rules of public policy and are void. This list might be greatly extended, but the cases given are sufficient to illustrate the principles.

§ 39. **Agent must participate in unlawful Purpose.** In order, however, to render the undertaking in these cases void, as between the principal and the agent, it is necessary that the agent should have participated in the unlawful purpose of the principal, or that, knowing of that purpose, he has directly assisted in giving it effect. But where the agent, as for example a broker, is employed simply to bring parties together to contract, he is not affected by the illegality of the contract which they alone make, without his aid or participation, although he knew, or had reason to believe, that they intended to enter into an unlawful arrangement.[6] But if he makes or assists in making the unlawful contract for them, or if he brings them together for the very purpose of entering into an illegal arrangement, he is *particeps criminis* with them.[6]

So if the undertaking was lawful on its face, and the agent was ignorant of the facts or the purpose which alone rendered it unlawful, he is not affected by its illegality.[7]

[1] Bixby v. Moor, 51 N. H. 402.

[2] Badgley v. Beale, 3 Watts (Penn.), 268.

[3] Davis v. Caldwell, 2 Rob. (La.) 271.

[4] Watts v. Van Ness, 1 Hill (N. Y.), 76.

[5] Roundtree v. Smith, 108 U. S. 269; Ormes v Dauchy, 45 N. Y. Super. Ct. 85; Patrick v. Littell, 36 Ohio St. 79; DeGroot v. VanDuzer, 17 Wend. (N. Y.) 170; Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132.

[6] "It is certainly true," says MATTHEWS, J., in Irwin v. Williar, 110 U. S. at p. 510, "that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction."

[7] Roys v. Johnson, 7 Gray (Mass.), 162; Wright v. Crabbs, 78 Ind. 487; Haines v. Busk, 5 Taunt. (Eng. C. P.) 521.

Upon the general question of participation in unlawful purposes, see Hubbard v. Moore, 24 La. Ann. 591,

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§ 40. **Whole Contract void when entire.** It is well settled that where a contract is an entire one, and contains some elements which are legal and others which are illegal, it cannot be so apportioned as to select and sustain those elements only which are lawful. If any part of an indivisible promise, or any part of an indivisible consideration for a promise, is illegal, the whole is void, and no action can be maintained upon it.[1] Where, however, the contract is a divisible or apportionable and not an entire one, and the lawful elements can be separated from the unlawful, the legitimate portions may be given effect.[2]

II.

POWERS OF A PERSONAL NATURE.

§ 41. **Personal Duty, Trust or Confidence cannot be delegated.** This exception to the general rule, that whatever one may lawfully do in his own right and in his own behalf, he may lawfully delegate to an agent, is founded upon obvious considerations. Powers which are conferred upon one in consideration of his personal qualities or characteristics, or as the result of special trust and confidence reposed in him, should clearly be executed by him in person.[3] So an authority which is conferred, or a duty which is created by statute, may, by the express terms or necessary effect of the act, be required to be performed by the person only who is named.[4] So, too, a man who is enabled to do a thing by special custom cannot do it by an agent if he is not warranted by the custom in so doing.[5]

18 Am. Rep. 128; Mahood *v.* Tealza, 26 La. Ann. 108, 21 Am. Rep. 546; Michael *v.* Bacon, 49 Mo. 474, 8 Am. Rep. 138; Harris *v.* Woodruff, 124 Mass. 205, 26 Am. Rep. 658.

[1] Parsons on Contracts, I, 486, *et seq.*; Powers *v.* Skinner, 34 Vt. 274, 80 Am. Dec. 677; Filson *v.* Himes, 5 Penn. St. 452, 47 Am. Dec. 422; Rose *v.* Truax, 21 Barb. (N. Y.) 361.

[2] Bishop on Contracts, § 487; Parsons on Contracts, I, 486–488.

[3] See Lyon *v.* Jerome, 26 Wend. (N. Y.) 485, 37 Am. Dec. 271; Newton *v.* Bronson, 13 N. Y. 587, 67 Am. Dec. 89; Merrill *v.* Trust Co., 24 Hun (N. Y.), 300; Litka *v.* Wilcox, 89 Mich. 94.

[4] Thus where the law for the licensing of vessels required that the oath of ownership should be taken by the owner, an oath by the master, acting as agent for the owner, is not sufficient. United States *v.* Bartlett, Dav. (U. S. D. C.) 9.

[5] 9 Co. 76, *b*.

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The principle involved is the same that controls the delegation of authority by an agent to a sub-agent, and as that subject will be considered in its proper place,[1] no extended discussion will be given to this title here.

[1] See *post*, chap. vi.

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CHAPTER III.

WHO MAY BE PRINCIPAL OR AGENT; AND HEREIN OF JOINT PRINCIPALS AND AGENTS.

§ 42. Purpose of Chapter.

I. WHO MAY BE PRINCIPALS.

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44. Same Subject—Corporations.
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46. Incompetency—In general.

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47. Persons of unsound Mind.
48. Exceptions—Innocent Party—Sane Interval.
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75. Inchoate Corporations.

IV. JOINT AGENTS.

76. Authority to Several.
77. Private Agency must be executed by all.
78. Public Trust or Agency may be executed by a Majority.

§ 42. **Purpose of Chapter.** It is proposed in this chapter to determine who are competent to enter into the relation of prin-

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cipal and agent, and to consider briefly the special rules which apply to those cases in which more than one person undertakes to act in either capacity.

I

WHO MAY BE PRINCIPALS.

§ 43. **The general Rule—Every Person competent to act in his own Right.** It may be stated as the general rule that by the common law every person who is competent to act in his own right and in his own behalf may act by an agent.[1]

The relation, as has been seen, is created primarily for the purpose of investing the agent with authority to act for and represent the principal in the transaction of business. For the time and to the extent limited, the agent is to be the *alter ego* of the principal; his act is, in law, to be the act of the principal, and the capacity and character in which the agent is to act are those of the principal. It follows, then, as a necessary conclusion, that the same kind and degree of competency which would be requisite were the principal present and acting in his own person, are necessary when he is present and acts in the person of his agent.

The relation, too, between the parties, is, as has been seen, so far as it is voluntary, a contractual one, being based upon the express or implied contract existing between the principal and the agent. To enter into this relation, therefore, requires on the part of the principal, capacity to contract, and this capacity must be, at least, as great as that which would be requisite in contracts generally.

The converse of these principles, as it finds expression in the general rule already given, also follows as a necessary sequence, that he who has this capacity and who is thus competent to act in person in a given case, may, unless restrained by some statutory prohibition, act in that case through the agent of his choice.

§ 44. **Same Subject—Corporations.** Authority to appoint the necessary and proper agents for the transaction of the corporate

[1] Coombe's Case, 9 Co. Rep. 76; Com. Dig. "Attorney," c. I.

In the language of the codes of California, Dakota and Georgia, "Any person, having capacity to contract, may appoint an agent." Cal. Code, § 2296; Dak. Code, § 1338; Ga. Code, § 2181.

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business is usually conferred upon corporations in express terms, but in the absence of such express authority, the power to appoint will be implied. This power is a necessary incident to the power to carry on the business for which the corporation was created, inasmuch as it is only through the employment of agents that the executive functions of the corporation can be exercised.[1]

§ 45. **Same Subject—Partnerships.** The same general principle applies to partnerships. It is, of course, competent for the partners to provide in their partnership articles, what agents shall be employed and in what manner. So all of the partners acting together may undoubtedly appoint agents for a purpose or in a manner other than that originally contemplated or prescribed. And in the absence of restrictions in the articles, each partner also has implied power to employ for the firm such servants and agents as are necessary and proper for the transaction of the partnership business.[2]

The appointment of an agent for such purposes by one of the partners does not fall within the limits of the maxim, *Delegatus non potest delegare*, for while each partner is the agent of all of the other partners for the transaction of the partnership business, he is also one of the principals in the transaction.

§ 46. **Incompetency—In general.** Incompetency to enter into this relation may arise either from some defect in the mental equipment of the party or from the operation of law. The

[1] Protection Life Ins. Co. *v.* Foote, 79 Ill. 361; Hurlbut *v.* Marshall, 62 Wis. 590; St. Andrews Land Co. *v.* Mitchell, 4 Fla. 192, 54 Am. Dec. 340; Lyman *v.* White River Bridge Co., 2 Aik. (Vt.) 255, 16 Am. Dec. 705; Washburn *v.* Nashville, &c., R. R. Co., 3 Head (Tenn.), 638, 75 Am. Dec. 784.

As is said in Washburn *v.* Nashville, &c., R. R. Co. *supra*, "The corporation of necessity acts through the instrumentality of its officers and agents. If not prohibited by the charter, it may delegate its authority to its officers and agents so far as may be necessary to effect the purposes of its creation. It must act in this mode or not at all."

Extended citation of the cases upon this point belongs rather to works on Corporations. See Morawetz on Corporations, I, § 503; Ang. & Ames on Corporations, § 284.

[2] Beckham *v.* Drake, 9 M. & W. 79; Banner Tobacco Co. *v.* Jenison, 48 Mich. 459; Harvey *v.* McAdams, 32 Mich. 472; Wheatley *v.* Tutt, 4 Kans. 240; Charles *v.* Eshleman, 5 Col. 107; Frye *v.* Saunders, 21 Kans. 26, 30 Am. Rep. 421; Coons *v.* Renick, 11 Tex. 134, 60 Am. Dec. 230; Carley *v.* Jenkins, 46 Vt. 721; Durgin *v.* Somers, 117 Mass. 55; Burgan *v.* Lyell, 2 Mich. 102.

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former type may be chronic or temporary, curable or incurable, and may arise from a variety of causes. This form of incompetency is sometimes termed *natural*, while that arising from the operation of the law is termed *legal* incompetency.

Of the first kind are the defects of idiots, lunatics and drunken persons; while aliens, infants and married women afford illustrations of the latter.[1]

The effect of some of these forms of incompetency, so far as they are applicable to the law of agency, will be noticed here.

a. Persons Naturally Incompetent.

§ 47. **Persons of unsound Mind.** It is the general rule that idiots, lunatics and other persons of unsound mind, cannot appoint an agent.[2] Within the operation of this rule are to be included those persons whose mental powers have been permanently impaired by drunkenness or other cause attributable to their own acts, as well as those whose incapacity arises from the act of God.[3]

§ 48. **Exceptions—Innocent Party—Sane Interval.** An incompetent person may, however, by the decree of the proper court, come to sustain, to a limited extent, the relation of a principal, as by the appointment of a guardian or committee whose authorized acts bind his estate.[4]

The general rule must, also, be subject to the qualification quite generally applied to other contracts with persons of this class, that where the unsoundness of mind is unknown to the other party, who has acted in good faith and taken no advantage of it, the contract will not be set aside, where it has been executed in whole or in part and the parties cannot be altogether restored to their original situation.[5]

[1] Ewell's Evans on Agency, 12.

[2] Story on Agency, § 6.

[3] Bliss *v.* Railroad Co., 24 Vt. 424; Menkins *v.* Lightner, 18 Ill. 282; Bush *v.* Breinig, 113 Penn. St. 310, 57 Am. Rep. 469.

[4] See Anderson *v.* Estate, 42 Vt, 350, 1 Am. Rep. 334.

[5] Molton *v.* Camroux, 4 Exch. 17; Beavan *v.* McDonnell, 9 Exch. 309; Campbell *v.* Hooper, 3 Smale & G. 153; Moss *v.* Tribe, 3 Fost. & F. 297; Young *v.* Stevens, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; Behrens *v.* McKenzie, 23 Iowa, 333, 92 Am. Dec. 428; McCormick *v.* Littler, 85 Ill. 62, 28 Am. Rep. 610; Fay *v.* Burditt, 81 Ind. 433, 42 Am. Rep. 142; Rusk *v.* Fenton, 14 Bush. (Ky.) 490, 29 Am. Rep. 413; Wilder *v.* Weakley, 34 Ind. 181; Northwestern Mut. F. Ins. Co. *v.* Blankenship,

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So the contract of an insane person made during a sane interval is binding upon him,[1] and this principle applies as well to contracts of agency as to others.

§ 49. **Drunken Persons as Principals.** The fact of being a drunkard, or mere drunkenness at the time, does not of itself incapacitate.[2] There must be drunkenness, or the impairment of intellect as the result of drunkenness, to such an extent that the person is incapable of comprehending the nature and effect of his act.[3]

Sober Interval. The contract of an habitual drunkard, however, is binding, if made during a sober interval.[4] His contracts of agency, of course, stand upon the same ground.

§ 50. **Same Subject—Ratification or Disaffirmance.** A contract made by a party during a period of incompetence may be ratified or disaffirmed by him after his competency is restored.[5] And this may be done by the incompetent's guardian or committee also,[6] or by his personal representative after the incompetent's

94 Ind. 535; Riggan *v.* Green, 80 N. Car. 236; Copenrath *v.* Kienby, 83 Ind. 18; Beals *v.* See, 10 Penn. St. 56, 49 Am. Dec. 573; Yauger *v.* Skinner, 14 N. J. Eq. 389; Cribben *v.* Maxwell, 34 Kans. 8, 55 Am. Rep. 233.

But see Hovey *v.* Hobson, 53 Me. 451, 89 Am. Dec. 705; Gibson *v.* Soper, 6 Gray (Mass.), 279, 66 Am. Dec. 414; Bond *v.* Bond, 7 Allen (Mass.), 1; Chew *v.* Bank, 14 Md. 318; Rogers *v* Blackwell, 49 Mich. 192; Edwards *v.* Davenport, 20 Fed. Rep. 756; Henry *v.* Fine, 23 Ark. 417.

[1] Tozer *v.* Saturlee, 3 Grant (Penn.), 162; Lilly *v.* Waggoner, 27 Ill. 395; Beckwith *v.* Butler, 1 Wash. (Va.) 224; Jones *v.* Perkins, 5 B. Monr. (Ky.) 222; *In re* Gangwere, 14 Penn. St. 417, 53 Am. Dec. 554.

[2] Pickett *v.* Sutter, 5 Cal. 412; Henry *v.* Ritenour, 31 Ind. 136; Caulkins *v.* Fry, 35 Conn. 170; Reynolds *v.* Dechaums, 24 Tex. 174; Cavender *v.* Waddingham, 5 Mo. App. 457; Joest *v.* Williams, 42 Md. 565, 13 Am. Rep. 377; Miller *v.* Finley, 26 Mich. 249, 12 Am. Rep. 306.

[3] Bates *v.* Ball, 72 Ill. 108; Van Wyck *v.* Brasher, 81 N. Y. 260; Schramm *v.* O'Connor, 98 Ill. 539; Bush *v.* Breinig, 113 Penn. St. 310, 57 Am. Rep. 469.

[4] Riteer's Appeal, 59 Penn. St. 9.

[5] Gibson *v.* Soper, 6 Gray (Mass.), 279, 66 Am. Dec. 414; Bush *v.* Breinig, 113 Penn. St. 310, 57 Am. Rep. 469; Allis *v.* Billings, 6 Metc. (Mass.) 415, 39 Am. Dec. 744; Arnold *v.* Richmond Iron Works, 1 Gray (Mass.), 434; Carrier *v.* Sears, 4 Allen (Mass.), 337; Howe *v.* Howe, 99 Mass. 98; White *v.* Graves, 107 Mass. 328; Blakeley *v.* Blakeley, 33 N. J. Eq. 508; Nichol *v.* Thomas, 53 Ind. 53; Mohr *v.* Tulip, 40 Wis. 32; Elston *v.* Jasper, 45 Tex. 409; Turner *v.* Rusk, 53 Md. 65; Northwestern Mut. F. Ins. Co. *v.* Blankenship, 94 Ind. 535; Carpenter *v.* Rodgers, 61 Mich. 384, 1 Am. St. Rep. 595.

[6] McClain *v.* Davis, 77 Ind. 419; Campbell *v.* Kuhn, 45 Mich. 518;

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death.[1] Upon this question, the rules governing contracts generally apply.[2]

b. Persons Legally Incompetent.

§ 51. **Infants as Principals.** It has been regarded as the settled doctrine of the law that an infant cannot empower an agent or attorney to act for him.[3] Indeed, the rule deduced from the authorities has been said to be that the only act which an infant is under a legal incapacity to perform is the appointment of an attorney, or, in fact, an agent of any kind.[4] The reason upon which this rule depends, has been well stated by the learned editors of the American Leading Cases, as follows: "The constituting of an attorney by one whose acts are in their nature voidable, is repugnant and impossible, for it is imparting a right which the principal does not possess,—that of doing valid acts. If the acts when done by the attorney remain voidable at the option of the infant, the power of attorney is not operative according to its terms; if they are binding upon the infant, then he has done through the agency of another what he could not have done directly—binding acts. The fundamental principle of law in regard to infants requires that the infant should have the power of affirming such acts done by the attorney as he chooses, and avoiding others, at his option; but this involves an immediate contradiction, for to possess the right of availing himself of any of the acts, he must ratify the power of attorney, and if he

Halley *v.* Troester, 72 Mo. 73; Moore *v.* Hershey, 90 Penn. St. 196.

[1] Campbell *v.* Kuhn, *supra:* Schuff *v.* Ransom, 79 Ind. 458.

[2] See Bishop on Contracts, § 974.

[3] Armitage *v.* Widoe, 36 Mich, 124; Whitney *v.* Dutch, 14 Mass. 457, 7 Am. Dec. 229; Lawrence *v.* McArter, 10 Ohio, 37; Fonda *v.* VanHorne, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; Trueblood *v.* Trueblood, 8 Ind. 195, 65 Am. Dec. 756; Cole *v.* Pennoyer, 14 Ill. 158; Robbins *v.* Mount, 4 Robt. (N. Y.) 553; Mustard *v.* Wohlford's Heirs, 15 Gratt. (Va.) 329, 76 Am. Dec. 209; Dexter *v.* Hall, 15 Wall. (U. S.) 9; Bennett *v.* Davis, 6 Cow. (N. Y.) 393; Robinson *v.* Weeks, 56 Me. 102; Philpot *v.* Bingham, 55 Ala. 435; Wambole *v.* Foote, 2 Dak. 1; Fetrow *v.* Wiseman, 40 Ind. 155; Waples *v.* Hastings, 3 Harr. (Del.) 403; Roof *v.* Stafford, 7 Cow. (N. Y.) 179; Tapley *v.* McGee, 6 Ind. 56; Flexner *v.* Dickerson, 72 Ala. 318; Carnahan *v.* Alderdice, 4 Harr. (Del.) 99; Pyle *v.* Cravens, 4 Litt. (Ky.) 17; Doe *v.* Roberts, 16 M. & W. 778; Bool *v.* Mix, 17 Wend. (N. Y.) 120; Hiestand *v.* Kuns, 8 Blackf. (Ind.) 345; Wainwright *v.* Wilkinson, 62 Md. 146; Deford *v.* State, 30 Md. 200; Knox *v.* Flack, 22 Penn. St. 337; Sadler *v.* Robinson, 2 Stew. (Ala.) 520.

[4] See note to Tucker *v.* Moreland, 1 Am. Lead. Cases, 224. 5th Ed. 280.

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ratifies the power, all that was done under it is confirmed. If he affirms part of a transaction, he at once confirms the power, and thereby, against his intention, affirms the whole transaction. Such personal and discretionary legal capacity as an infant is vested with is, therefore, in its nature, incapable of delegation; and the rule that an infant cannot make an attorney is, perhaps, not an arbitrary or accidental exception to a principle, but a direct, logical necessity of that principle. But if the considerations suggested as the foundation of this rule be not satisfactory, the rate itself is established by a conclusive weight of authority."[1]

§ 52. **Same Subject—Ratification by.** And upon the principle that one cannot subsequently affirm what he could not previously have authorized, it has likewise been held that an infant cannot ratify and confirm what one, as an agent, has assumed to do in his name.[2]

§ 53. **Further of this Rule.** This rule, as has been seen, as well as the rule governing the contracts of infants generally, finds its reason in the law's desire to guard and protect the interests of the infant. Like other rules, its rigor should be abated when the necessity for it no longer exists.

It is difficult to harmonize all of the cases upon this subject, but an examination of the facts of some of the leading ones will disclose the occasions upon which it was invoked, and throw light upon the limits of its application.

Thus it is held that an infant's power of attorney to sell his lands;[3] his warrant of attorney to confess judgment against him;[4] his assent to the act of another in assuming as the infant's agent to sell his property;[5] or to bind him to a purchase of real estate;[6] his authority to another to represent him in court;[7] and any letter of attorney not conveying a present interest,[8] are void.

So, too, the rule has been declared without limitation in many

[1] *Id.* 247, 5th Ed. 305.

[2] Armitage *v.* Widoe, 36 Mich. 124; Fonda *v.* Van Horne, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; Trueblood *v.* Trueblood, 8 Ind. 195, 65 Am. Dec. 756; Doe *v.* Roberts, 16 M. & W. 778. But see Ward *v.* Steamboat, 8 Mo. 358.

[3] Philpot *v.* Bingham, 55 Ala. 435; Trueblood *v.* Trueblood, 8 Ind. 195; 65 Am. Dec. 756; Thompson *v.* Lyon. 20 Mo. 155, 61 Am. Dec. 599.

[4] Bennett *v.* Davis, 6 Cow. (N. Y.) 393; Knox *v.* Flack, 22 Penn. St. 337.

[5] Fonda *v.* Van Horne, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77.

[6] Armitage *v.* Widoe, 36 Mich. 124.

[7] Tapley *v.* McGee, 6 Ind. 56.

[8] Lawrence *v.* McArter, 10 Ohio, 37

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cases where it was not necessary to the decision of the case,[1] being used merely by way of illustration or asserted in order to round out some general proposition in reference to the powers of infants.

§ 54. **Same Subject—Dissent, Exceptions.** This unqualified statement of the rule, however, has not been without dissent in modern times, and judges have in several cases yielded to it only upon the ground that it was long established.[2]

So it has been held that, notwithstanding the rule, an infant might appoint an agent to do an act unquestionably to his advantage,[3]— as to receive seizin of an estate conveyed to him,— and this exception is, in reason, undoubtedly well founded.[4]

So a qualified form of agency may be established by the appointment by a competent court of a guardian for the infant's estate. And upon the doctrine of an agency, implied or created by law, an infant husband may be bound for necessaries purchased by his wife.[5]

§ 55. **In Reason how.** The tendency of modern cases, although they are by no means harmonious, has been to regard all contracts made by an infant, with the exception of his appointment of an agent, in a more liberal spirit, and to treat them as voidable merely, or if void at all, as void only in those cases where they cannot by any possibility be to his advantage.[6]

Why this exception of the appointment of an agent should

[1] Of this class are Cole *v.* Pennoyer; Robbins *v.* Mount; Dexter *v.* Hall; Robinson *v.* Weeks; Fetrow *v.* Wiseman; Flexner *v.* Dickerson; Mustard *v.* Wohlford's Heirs; Roof *v.* Stafford; Fonda *v.* Van Horne; Bool *v.* Mix; Heistand *v.* Kuns; Harner *v.* Dipple; and others cited in § 51, *supra*.

[2] See Philpot *v.* Bingham, 55 Ala. 435; Fetrow *v.* Wiseman, 40 Ind. 155; Hardy *v.* Waters, 38 Me. 450.

[3] Whitney *v.* Dutch, 14 Mass. 457; 7 Am. Dec. 229; Tucker *v.* Moreland, 10 Pet. (U. S.) 58.

[4] Patterson *v.* Lippincott, 47 N. J. L. 457, 54 Am. Rep. 178.

[5] Cantine *v.* Phillips, 5 Harr. (Del.) 428.

[6] In 1 Am. Lead. Cases, cited above, the learned editors say: "The numerous decisions which have been had in this country justify the settlement of the following definite rule as one that is subject to no exceptions. The only contract binding on an infant is the implied contract for necessaries. The only act which he is under a legal disability to perform is the appointment of an attorney. All other acts and contracts, executed or executory, are voidable or confirmable by him at his election." See also Bishop on Contracts, Ed. 1887, § 917–935.

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exist is not made clear by the authorities, nor is any sufficient reason apparent.[1] Indeed no satisfactory reason is perceived why the rule might not well be that, within the limits within which he may bind himself by his contracts, he may also bind himself by the intervention of an agent appointed by him for that purpose. Notwithstanding this, however, the rule of disability, is, as has been seen, firmly established in our law.

§ 56. **Married Women as Principals.** As at the common law, a married woman was incapable of entering into contracts, she could not act by agent;[2] but under the modern statutes removing her disabilities, at least so far as her sole property is concerned, she may undoubtedly appoint an agent to represent her in dealing with those matters in reference to which she is herself competent to act.[3] In this respect, her competency is coextensive with her right to act as *feme sole*. Her capacity to contract, however, is purely statutory, and she cannot confer upon her agent any greater powers than she might herself exercise in the premises. Her agent, therefore, can bind her only while acting within the limits fixed to her capacity.[4]

The appointment of an agent by a married woman may be made in the same manner as by any other principal, and when appointed the same legal consequences and effects result from the

[1] Harner v. Dipple, 31 Ohio St. 72, 27 Am. Rep. 496; Patterson v. Lippincott, 47 N. J. L. 457, 54 Am. Rep. 178; Cummings v. Powell, 8 Tex. 80. See Bishop on Contracts, New Ed. § 930, where the learned author says: "In reason, we shall find it difficult to see why an infant, a person of imperfect capacity, cannot as validly act through another whose capacity has become perfected by age, and therefore presumably furnishing a sort of protection, as by his sole and unguarded self," and he refers to Whitney v. Dutch, and Bool v. Mix, cited, *supra*. See also remarks of HOLMES, J. in Fairbanks v. Snow, 145 Mass. 153, 1 Am. St. Rep. 446, citing Whitney v. Dutch, *supra;* Welch v. Welch, 103 Mass. 562; Moley v. Brine, 120 Mass. 324.

[2] Weisbrod v. Chicago, &c. Ry. Co. 18 Wis. 35, 86 Am. Dec, 743; Dorrance v. Scott, 3 Whart. (Penn.) 313, 31 Am. Dec. 509; Caldwell v. Waters, 18 Penn. St. 79, 55 Am. Dec. 592; Marshall v. Rutton, 8 T. R. 545; Lewis v. Lee, 3 B. & C. 291; Fairthorne v. Blaquire, 6 M. & S. 73; Story on Agency, § 6; Schouler, Dom. Rel. § 58.

[3] Weisbrod v. Chicago, &c. Ry. Co. *supra*; McLaren v. Hall, 26 Iowa, 297; Knapp v. Smith, 27 N. Y. 277; Woodworth v. Sweet, 51 N. Y. 8; Rowell v. Klein, 44 Ind. 290. See cases cited in § 62, *post*.

[4] Kenton Insurance Co. v. McClellan, 43 Mich. 564; Nash v. Mitchell, 71 N. Y. 199. 27 Am. Rep. 38.

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relation which would flow from the appointment by any other principal of like capacity.[1]

II.

WHO MAY BE AGENTS.

a. Competency in General.

§ 57. **General Rule—Any competent Person.** Any person who has sufficient capacity to act for himself is also competent to act as the agent of another.[2] But, subject to limitations hereafter to be stated, the rule may be given a broader scope, for it is certain that many persons who have not the capacity in law to act in their own right and in their own behalf, may act as agents for another, and in the language of a recent case, it may be said, that any person may be an agent, except a lunatic, imbecile or child of tender years.[3] Hence monks, infants, feme coverts, persons attainted, outlawed or excommunicated, slaves or villeins, and aliens, have been held competent to act as agents.[4]

§ 58. **Less Degree of Competency required in Agent than in Principal.** It will be seen from this statement of the rule that a less degree of competency is required in an agent than in the principal. The reason for this, in certain cases, is apparent. Many persons are, in fact, competent to execute what they would be incompetent to conceive or direct; and, in law, a person may be the donee of a power which he had not the legal capacity to create.[5]

The degree of competency required depends, of course, upon the nature of the duty to be performed. Thus the performance may demand the exercise of powers ranging in degree from the purely mechanical, up through the ministerial, to those involving the highest degree of judgment, wisdom and experience. A child may carry a message or deliver a deed as safely and certainly, perhaps, as a person of mature years, for the execution of

[1] See cases cited in § 63, *post*.

[2] Lea v. Bringier, 19 La. Ann. 197; Wharton, Agency, § 13.

[3] Lyon v. Kent, 45 Ala. 656. "Any person may be an agent." Cal. Code § 2296; Dak. Code, § 1338.

[4] Ewell's Evans' Agency, 17; Wharton, Agency, § 14, and see cases cited in sections following.

[5] See Weisbrod v. Chicago, &c. Ry. Co. 18 Wis. 35, 86 Am. Dec. 743; Bac. Abr. "Authority," B.

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this duty requires only the simplest mechanical powers; but the transaction of important affairs of business, involving the exercise of judgment or discretion, cannot be entrusted to children. Agency, as has been seen, properly implies the exercise, on the part of the agent, of more or less discretion and judgment, and no one, who does not possess these faculties, can fulfill the higher functions of an agent.

It is obvious, therefore, that while a person not competent to act as principal may, in many cases, assume the duties of an agent, the relation is one *sub modo* only, partaking more largely of the nature of service than of agency.

At first view, the question of the agent's competency may, perhaps, appear to be of interest chiefly to the principal,—that if the principal is satisfied with the agent's ability, no one else has occasion to complain. But a moment's consideration will demonstrate that this is not always so. For although the principal who has seen fit to employ an agent known by him to be incompetent, ought not to be heard to complain that he has received incompetent service, third persons who may suffer from the same cause, may well hold the principal to account. And where the law imposes upon any person, the performance of a duty to individuals or the public, he must see to it that it is performed, and he cannot escape responsibility by delegating it to an agent.[1]

§ 59. **Infants as Agents.** It has been seen that an infant cannot appoint an agent; an infant, however, above the age of seven years may be an agent, in the absence of statutory prohibitions.[2]

This rule must be qualified by the considerations contained in the preceding section. The duty to be undertaken must, at least so far as the rights of third persons are involved, be one in keeping with the age, capacity and experience of the infant.

It is evident, also, that the relation between a principal and his infant agent is not a perfect one, for though the infant may bind his principal by his acts, and though the principal is bound by his contracts with the infant, the infant himself is incapable of being bound to the principal by the express or implied contractual obligations which an adult agent would assume under like circum-

[1] See *post*, § 747.

[2] Talbot *v.* Bowen, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747; Ewell's Evans' Agency, 17.

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stances.[1] Neither does such a relation afford to third persons who may deal with the infant agent, that protection which would be insured to them if the agent were *sui juris;* for it would not be contended, for example, that, in the absence of fraud, the infant would be bound by an implied warranty of authority, or that, failing to bind his principal, he bound himself.

§ 60. **Slaves as Agents.** So during the existence of slavery, it was held that a slave might act as agent.[2]

§ 61. **Married Women—As Agents for third Persons.** Notwithstanding her incapacity to appoint an agent, a married woman might, at common law, be the agent of third persons,[3] even in their dealings with her husband.[4] Her capacity in this respect, however, like that of other persons not competent to contract generally, was necessarily a limited one, as the married woman was incapable of assuming the reciprocal liabilities and obligations which the perfect relation imposes upon the agent,[5] and as her duties to her husband and her family rendered her assumption of many undertakings impossible.

The effect of the modern statutes has been to enlarge this limited capacity according as they have enlarged her capacity to deal as a *feme sole*, and where the removal of her disabilities is complete, or where with the consent of her husband or of the law, she is competent to carry on business as a *feme sole*, her capacity to bind herself to the same extent by all of the obligations of an agent would seem to be a necessary consequence.[6]

[1] See Derocher *v.* Continental Mills, 58 Me. 217, 4 Am. Rep. 286; Gaffney *v.* Hayden, 110 Mass. 137, 14 Am. Rep. 580; Widrig *v.* Taggart, 51 Mich. 103; Whitemarsh *v.* Hall, 3 Den. (N. Y.) 376; Vent *v.* Osgood, 19 Pick. (Mass.) 572; Lufkin *v.* Mayall, 25 N. H. 82; Robinson *v.* Weeks 56 Me. 102.

[2] Governor *v.* Daily, 14 Ala. 469; Powell *v.* State, 27 Ala. 51; Lyon *v.* Kent, 45 Ala. 656; Chastain *v.* Bowman, 1 Hill. (S. C.) 270.

[3] Hopkins *v.* Mollinieux, 4 Wend. (N. Y.) 465; Singleton *v.* Mann, 3 Mo. 464; Butler *v.* Price, 110 Mass. 97; McKee *v.* Kent, 24 Miss. 131; Whitworth *v.* Hart, 22 Ala. 343; Goodwin *v.* Kelly, 42 Barb. (N. Y.) 194; Gray *v.* Otis, 11 Vt. 628; Sawyer *v.* Cutting, 23 Vt. 486; White *v.* Oeland, 12 Rich. (S. C.) 308.

[4] Story on Agency, § 7.

[5] See Tucker *v.* Cocke, 32 Miss. 184; Carleton *v.* Haywood, 49 N. H. 314.

[6] See cases cited in note 2 to § 63, *post*. Many interesting questions arise in connection with this subject, which are not yet determined, as for example: How far is a married woman acting as agent for her husband or for a third person, bound by an implied or express warranty of her authority? What if she exceeds her

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§ 62. **Same Subject—Wife as Agent for her Husband.** Both at the common law and under the modern statutes, the wife may be the agent of her husband. This agency may be of two kinds: 1. That which the law creates as the result of the marriage relation, by virtue of which the wife is authorized to pledge her husband's credit for the purpose of obtaining those necessaries which the husband himself has neglected or refused to furnish; and, 2. That which arises from the authority of the husband, expressly or impliedly conferred as in other cases.

The wife has, by virtue of the marriage relation alone, no authority to bind her husband by contracts of a general nature, and her authority of the kind first mentioned is limited in its nature and extent by the legal requirements fixed for its creation, of the existence of which those persons who assume to deal with her must take notice at their peril.[1] The full consideration of

authority? What if she conceals her principal? What, if intending to bind her principal, she so executes a written contract, as, in form, to bind herself. How far may she assume responsibility as an agent to third persons without her husband's consent? Upon this point, see Pullman v. State, 78 Ala. 31.

[1] Clark v. Cox, 32 Mich. 204; Eames v. Sweetser, 101 Mass. 78; Raynes v. Bennett, 114 Mass. 424; Manby v. Scott, 1 Mod. 125; Morrison v. Holt, 42 N. H. 478, 80 Am. Dec. 120; Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384.

"A wife, as such," says STORRS, J. in the case last cited, "has no original or inherent power to make any contract, which is obligatory on her husband. No such right arises from the marital relation between them. If, therefore, she possesses a power in any case, to bind him, by her contracts made on his behalf, it must be by virtue of an authority derived from him, and founded on his assent —although such assent may be precedent or subsequent, and express or implied; and this is the light in which such contracts are universally viewed. When such authority is conferred, the relation between them and the consequences of that relation, are analogous to those in the ordinary case of principal and agent. And that she has the capacity to be constituted, by the husband, his agent, and to act as such, equally with any other person, there is no doubt. In Fitz. N. B. 120, G, the law is thus laid down: 'A man shall be charged in debt for the contract of his bailiff or servant, where he giveth authority unto the bailiff or servant to buy or sell for him: and so the contract of the wife, if he give such authority to his wife, otherwise not.' In *Manby v. Scott*, 1 Mod. 125, it is said, by Mr. Justice HYDE, that 'a *feme covert* cannot bind or charge her husband, by any contract made by her without the authority or assent of her husband, precedent or subsequent, express or implied.'

"The law on this subject is stated with great clearness and precision, by Selwyn, in his Nisi Prius, page 288, where he treats of the liability of the husband as to contracts made by the

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this question belongs properly to a treatise upon the marriage relation.[1]

Agencies of the second class rest upon the same considerations which control the creation and existence of the relation between other persons. The wife may be either the general or the special agent of her husband by virtue of his authorization, and this authorization may, as in other cases, be express or implied; and may be conferred by specialty or by parol; or by precedent or subsequent ratification.[2] Her authority in this case, however, when implied, is to be implied from acts and conduct, and not from her position as wife alone; and when based upon subsequent ratification, is to be established by other evidence than that alone which is incident to the relation of the parties. But when the agency is found to exist, the wife may bind her husband-principal to the same extent and in the same manner

wife during coverture. After stating that the relation of husband and wife is, in respect of the wife's contracts, binding the husband, analogous to the relation of master and servant, he says: 'Indeed, in contemplation of law, the wife is the servant of the husband;' and after citing the above passage from Fitzherbert, he says: 'From this passage it appears that the husband is not liable to his wife's contracts, unless he has given his authority or assent;' and adds, 'it is incumbent, therefore, on a creditor, who brings an action against a husband upon a contract made with his wife, to show, that the husband has given such assent, or to lay before a jury such circumstances as will enable them to presume, that such assent has been given; and in the latter case, if such presumption is not rebutted by contrary evidence, the jury may find against the husband, but not otherwise; for the wife has not any power originally to charge the husband.' "

[1] See Stewart on Husband and Wife, §§ 89–98; Bishop on Married Women, Chap. 30; Schouler on Husband and Wife.

[2] Cox *v.* Hoffman, 4 Dev. & Batt. (N. C.) 180; McKinley *v.* McGregor, 3 Whart. (Penn.) 369; Camerlin *v.* Palmer Co., 10 Allen (Mass.), 539; Pickering *v* Pickering, 6 N. H. 124; Abbott *v.* McKinley, 2 Miles (Penn.), 220; Gray *v.* Otis, 11 Vt. 628; Miller *v.* Delamater, 12 Wend. (N. Y.) 433; Mickelberry *v.* Harvey, 58 Ind. 523; Heny *v.* Sargent, 54 Cal. 396; Pullan *v.* State, 78 Ala. 31; Ladd *v.* Newell, 34 Minn. 107; Harper *v.* Dail, 92 N. C. 394; Lang *v.* Waters, 47 Ala. 624; Felker *v.* Emerson, 16 Vt. 633; 42 Am. Dec. 532; Cantrell *v.* Colwell, 3 Head. (Tenn.) 471; Edgerton *v.* Thomas, 9 N. Y. 40; Knapp *v.* Smith, 27 N. Y. 277; Buckley *v.* Wells, 33 N. Y. 518; Singleton *v.* Mann. 3 Mo. 465; Weisbrod *v.* Chicago, &c. Ry. Co. 18 Wis. 35, 86 Am. Dec. 743; Sims *v.* Smith, 99 Ind. 469; 50 Am. Rep. 99; Martin *v.* Rector, 101 N. Y. 77; Penn *v.* Whiteheads, 12 Gratt. (Va.) 74; Miller *v.* Watt, 70 Ga. 385; Vail *v.* Meyer, 71 Ind. 159; Porter *v.* Haley, 55 Miss. 66; Louisville Coffin Co. *v.* Stokes, 78 Ala. 372.

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as any other agent might bind him under the same circumstances.

How far the relation of agent of her husband may impose upon the wife duties and obligations to third persons with whom she deals, is a question suggested in the preceding section. How far the same relation may impose upon her, contract obligations to her husband is a question which belongs rather to a treatise upon their mutual rights and duties than to this.

§ 63. **Husband as Agent for his Wife.** It has been seen that within the limits of her power to enter into contracts, a married woman may act by agent,[1] and it is well settled that her husband may be the agent. A husband has, by virtue of his relation alone, no implied power to act as the agent of his wife in the transaction of her business.[2] Whatever authority he exercises in that capacity must be derived from her prior appointment or subsequent ratification. He may, however, be authorized in the same manner and be invested with the same power and authority as any other agent, and when duly authorized his acts bind her, within the limits of her capacity, to the same extent as though she acted in person.[3]

But because of the relation existing between them and of the

[1] *Ante*, § 56.

[2] Price v. Seydel, 46 Iowa, 696; McLaren v. Hall, 26 Iowa, 297; Anderson v. Gregg, 44 Miss. 170; Crawford v. Redus, 54 Miss. 700.

[3] Rankin v. West, 25 Mich. 195; Wortman v. Price, 47 Ill. 22; Haight v. McVeagh, 69 Ill. 624; Walker v. Carrington, 74 Ill. 446; Patten v. Patten, 75 Ill. 446; Austin v. Austin, 45 Wis. 523; Louisville Coffin Co. v. Stokes, 78 Ala. 372; Hamilton v. Hooper, 46 Iowa, 515, 26 Am. Rep. 161; McLaren v. Hall, 26 Iowa, 297; Rowell v. Klein, 44 Ind. 290; Weisbrod v. Chicago, &c. Ry Co. 18 Wis. 35, 86 Am. Dec. 743; McBain v. Seligman, 58 Mich. 294; Eystra v. Capelle, 61 Mo. 580; Rodgers v. Pike County Bank, 69 Mo. 562; Arnold v. Spurr, 130 Mass. 347; Jones v. Read, 1 La. Ann. 200; Coolidge v. Smith, 129 Mass. 554; Lavassar v. Washburne, 50 Wis. 200; Griffin v. Ransdell, 71 Ind. 440; Cubberly v. Scott, 98 Ill. 88; Bennett v. Stout, 98 Ill. 47; Baxter v. Maxwell (Penn.), 8 Atl. Rep. 581; Foster v. Jones (Ga.), 1 South E. Rep. 275.

Authority given by a married woman to her husband to sign her name as surety for his benefit does not include authority to sign her name as principal. Farmington Savings Bank v. Buzzell, 61 N. H. 612. Nor will authority to manage her plantation authorize him to bind her by negotiable paper. Folger v. Peterkin, La. 2 South. Rep. 579.

The fact of the husband's agency for his wife can not be established by his declarations. Sanford v. Pollock, 105 N. Y. 450; Jarvis v. Schaefer, — Y. —, 11 North E. Rep. 634.

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opportunities which it affords for coercion and evasion, it is held that the evidence of his agency, whether it is sought to be established by the wife's prior appointment or her subsequent ratification, must be clear and satisfactory, and sufficiently strong to explain and remove the equivocal character in which the wife is placed.[1]

§ 64. **Corporations as Agents.** Within the scope of its corporate powers, unless there are express provisions in its charter or constating instruments to the contrary, a corporation may act as agent, either for an individual, a partnership or another corporation.[2] Many of the great corporations of the country are organized for this express purpose under statutes or charters conferring and defining their powers and the methods of executing them; but even in other cases, authority so to act might be implied as auxiliary to their main purposes.

§ 65. **Partnerships as Agents.** And the same rule applies to the case of partnerships. They may be organized expressly for that purpose, or they may, within the limits of their powers, undertake to act as agent as an incident to their general business. Where authority is thus delegated to a firm, it is an appointment

[1] Rowell *v.* Klein, 44 Ind. 290; McLaren *v.* Hall, 26 Iowa, 297; Eystra *v.* Capelle, 61 Mo. 578; Mead *v.* Spalding, — Mo. —, 12 West. Rep. 405.

In McLaren *v.* Hall, *supra*, COLE J. says, at page 305; "the husband may act as agent for the wife. In order to bind her, however, he must be previously authorized to act as her agent, or she must subsequently with express or implied knowledge of his act, ratify it. The evidence necessary to establish a ratification by the wife, of a contract made by her husband as her agent, must be of a stronger and more satisfactory character than that required to establish a ratification by the husband of the act of the wife as his agent, or than as between independent parties. And this for the reason that, (in the general experience of the past, at least, if not in the philosophy of the present), the wife is under the control of, and subordinate to, the husband; and neither good law nor sound reason will require the wife to destroy the peace of her family and endanger the marriage relation by open repudiation or hostile conduct toward her husband, in order to save her property from liability for his unauthorized contracts. Of course it is necessary in every case, in order to bind her that he should, at least, claim to act as her agent; and her ratification should be shown by those unmistakable acts or declarations which evince a knowledge of the contract by which she is sought to be bound, and an intention to adopt or ratify it as her own." See also Sanford *v.* Pollock, 105 N. Y. 450.

[2] McWilliams *v.* Detroit Mills Co. 31 Mich. 275.

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of the partnership as the agent, and not of the individual members as several and separate agents. Hence in the absence of anything to show a contrary intent, either partner may execute the power, and the act of one is the act of the partnership and is in strict pursuance of the power.[1]

b. Disqualification from adverse Interest.

§ 66. **One cannot be Agent if Duty and Interest conflict.** A person will not be permitted to take upon himself the character of an agent, where on account of his relation to others, or on account of his own personal interest, he would be compelled to assume incompatible and inconsistent duties and obligations. An agent owes to his principal a loyal adherence to his interests, and it would be a fraud upon the principal and would contravene the public policy, to permit an agent, without the full knowledge and consent of his principal, to enter into a relation involving such a duty, when his allegiance had already been pledged to one having adverse interests, or when his own personal interests would be antagonistic to those of his principal.[2]

§ 67. **One cannot be Agent of both Parties—When.** A person may act as agent of two or more principals in the same transaction, if his duties to each are not such as to require him to do incompatible things;[3] but wherever from the nature of his employment, each of two principals with opposing interests is entitled to the benefits of the agent's judgment, discretion or personal influence, he will not be permitted to act as agent of both parties, except with their full knowledge and consent.[4] If,

[1] Deakin *v.* Underwood, 37 Minn. 98, 5 Am. St. Rep. 827; Eggleston *v.* Boardman, 37 Mich. 14.

[2] See Rice *v.* Wood, 113 Mass. 133, 18 Am. Rep. 459; Raisin *v.* Clark, 41 Md. 158, 20 Am. Rep. 66; Scribner *v.* Collar, 40 Mich. 375, 29 Am. Rep. 541; Lynch *v.* Fallon, 11 R I. 311, 23 Am. Rep. 458; Bell *v.* McConnell, 37 Ohio, St. 396, 41 Am. Rep. 528; and see generally cases cited in following sections.

[3] Hinckley *v.* Arey, 27 Me. 362; Scott *v.* Mann, 36 Tex. 157; Cottom *v.* Halliday, 59 Ill. 176; Sheperd *v.* Lanfear, 5 La. 336, 25 Am. Dec. 181; Northrup *v.* Germania Fire Ins. Co. 48 Wis. 420, 33 Am. Rep. 815.

[4] Hinckley *v.* Arey, *supra*; Copeland *v.* Mercantile Ins. Co. 6 Pick, (Mass.) 197; New York Ins. Co. *v.* National Ins. Co. 14 N. Y. 85; Meyer *v.* Hanchett, 39 Wis. 419, S. C. 43 Wis. 246; Greenwood *v.* Spring, 54 Barb. (N. Y.) 375, Sumner *v.* Charlotte, &c. R. R. Co. 78 N. C. 289; Shirland *v.* Monitor Iron Works, 41 Wis. 162; Bray *v.* Morse, 41 Wis.

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however, having full knowledge of his relations to each, they see fit mutually to confide in him, there can be no legal objection to such an employment,[1] nor will either of the principals be permitted afterwards to escape responsibility because of such double employment.[2]

§ 68. Cannot be Party and Agent for opposite Party. For the same reason, one cannot be both the party and the agent for the opposite party in the same transaction. Thus, as will be more fully explained hereafter, except with the full knowledge and consent of his principal, an agent appointed to buy lands or goods for his principal cannot buy of himself; and an agent to sell lands or goods for his principal cannot sell to himself,[3] nor can an agent authorized to receive payment for his principal bind the latter by the receipt of money due from himself.[4]

III.

JOINT PRINCIPALS.

§ 69. When Power of Appointment is joint. The power of appointing agents may rest with a single individual or with a

343; Rice *v.* Wood, 113 Mass. 133, 18 Am. Rep. 459; Bell *v.* McConnell, 37 Ohio St. 396; 41 Am. Rep. 528; Stewart *v.* Mather, 32 Wis. 344; Farnsworth *v.* Brunquest, 36 Wis. 202; Farnsworth *v.* Hemmer, 1 Allen (Mass.), 494; 79 Am. Dec. 756; Walker *v.* Osgood, 98 Mass. 348, 93 Am. Dec. 168; Raisin *v.* Clark, 41 Md. 158, 20 Am. Rep. 66; Lynch *v.* Fallon, 11 R. I. 311, 23 Am. Rep. 458; Pugsley *v.* Murray, 4 E. D. Smith (N. Y.), 245; Everhart *v.* Searle, 71 Penn. St. 256; Scribner *v.* Collar, 40 Mich. 375, 29 Am. Rep. 241.

[1] Adams Mining Co. *v.* Senter, 26 Mich. 73; Colwell *v.* Keystone Iron Co. 36 Mich. 53; Fitzsimmons *v.* Southern Express Co. 40 Ga. 330, 2 Am. Rep 577; Rowe *v.* Stevens, 53 N. Y. 621; Joslin *v.* Cowee, 56 N. Y. 626; Rolling Stock Co. *v.* Railroad, 34 Ohio St. 450; Leekins *v.* Nordyke, 66 Iowa, 471; Alexander *v.* Northwestern University, 57 Ind. 466; and cases in preceding note.

[2] Fitzsimmons *v.* Southern Express Co. *supra*; DeSteiger *v.* Hollington, 17 Mo. App. 387; Robinson *v.* Jarvis, 25 Mo. App, 421, and cases in preceding notes.

[3] Ames *v.* Port Huron Log Driving Co. 11 Mich. 139; 83 Am. Dec. 731; Van Epps *v.* Van Epps, 9 Paige, (N. Y.) 237; Dutton *v.* Willner, 52 N. Y. 319; Conkey *v.* Bond, 36 N. Y. 430; Keighler *v.* Savage Mnfg. Co. 12 Md. 383, 71 Am. Dec. 600; Ruckman *v.* Bergholz, 37 N. J. L. 437; Bain *v.* Brown, 56 N. Y. 285; Kerfoot *v.* Hyman, 52 Ill. 512; Parker *v.* Vose, 45 Me. 54; White *v.* Ward, 26 Ark. 445; Stewart *v.* Mather, 32 Wis. 344; Marsh *v.* Whitmore, 21 Wall. (U. S.) 178.

[4] See *post* § 375.

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number of individuals. It rests with a single individual in those cases in which he is the only person authorized to make the appointment, and also in those cases in which he, in common with others or as the representative of others, has the power to make it. It rests with a number of individuals in those cases where the conjoint action of all is necessary in dealing with the subject matter.[1] The general rule that whatever one may lawfully do when acting in his own right and in his own behalf, he may lawfully do by an agent, and the converse of that rule, will aid in determining where the power of appointment lies.

In those cases where the interest of all is common, and each is authorized to act for all, either may ordinarily appoint an agent whose acts will be the acts of all; but in those cases where the interest of each is several, distinct or divided, and in those where the subject matter can only be affected by the united action of all, neither can bind the others by the appointment of an agent.

§ 70. **Partners.** It is one of the fundamental principles in the law of partnership, that within the scope of the partnership business each partner is the agent of all the other partners for the transaction of the partnership affairs, and his acts are the acts of all. His appointment of an agent, therefore, within the same limits, is the appointment of all, and the acts of the agent are the acts of all.[2]

§ 71. **Joint Tenants and Tenants in Common.** In the case of co-tenants, on the other hand, there is no implied authority in each to act for all, and the appointment of an agent by one will, therefore, bind that one only.[3] All may, of course, join in the appointment or subsequently assent to it, and thus make the agent the agent of them all.[4]

§ 72. **Associations, Clubs, Societies and Committees.** The

[1] Ewell's Evans' Agency, 33.

[2] Carley *v.* Jenkins, 46 Vt. 721; Coons *v.* Renick, 11 Tex. 134, 60 Am. Dec. 230; Banner Tobacco Co. *v.* Jenison, 48 Mich. 459; Harvey *v.* McAdams, 32 Mich. 472; Wheatley *v.* Tutt, 4 Kans. 240; Charles *v.* Eshleman, 5 Col. 107; Beckham *v.* Drake, 9 M. & W. 79. See ante, § 45.

The agent of a partnership is not the agent of the partners individually, but of the partnership as a whole. Johnston *v.* Brown, 18 La. Ann. 330; Deakin *v.* Underwood, 37 Minn. 98, 5 Am. St. Rep. 827.

[3] Perminter *v.* Kelly, 18 Ala. 716, 54 Am. Dec. 177; Keay *v.* Fenwick, 1 C. P. Div. 745, 18 Eng. Rep. 294; Corlies *v.* Cumming, 6 Cow. (N. Y.) 181; Noe *v.* Christie, 51 N. Y. 270; Story on Agency, § 39.

[4] Keay *v.* Fenwick, *supra*.

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question frequently arises whether the members of voluntary unincorporated associations, clubs, societies and committees are jointly liable as principals upon contracts purporting to be made in their behalf in carrying out the enterprises which they undertake. Two classes of cases arise in connection with such contracts. One of these is where it is sought to charge the entire membership as principals in dealings had with a smaller number alleged to have been the agents of all. The other is where it is attempted to hold this smaller number — the alleged agents in the former class — directly responsible as principals. It is with the former class only that it is here proposed to deal, the latter being reserved for subsequent consideration.[1]

And in the first place it may be observed that it is now quite generally settled that such organizations are not partnerships[2] and that the members are not liable as partners,[3] but that their liability is to be determined upon the rules of principal and agent.[4] The principle which applies here is the familiar one that

[1] For cases of the other class, see *post*, § 557.

[2] Ash *v.* Guie, 97 Penn. St. 493, 39 Am. Rep. 818; Burt *v.* Lathrop, 52 Mich. 106; Flemyng *v.* Hector, 2 M. & W. 172; Caldicott *v.* Griffiths, 8 Exch. 898; 22 Eng. L. & Eq. 527; Todd *v.* Emly, 7 M. & W. 427, s. c. 8 M. & W. 505; Lafond *v.* Deems, 81 N. Y. 514; Waller *v.* Thomas, 42 How. Pr. (N. Y.) 344.

[3] Lewis *v.* Tilton, 64 Iowa, 220, 52 Am. Rep. 436, and cases cited in foregoing note.

[4] Flemyng *v.* Hector, *supra;* Todd *v.* Emly, *supra*, and cases cited in following note.

In Flemyng *v.* Hector, Lord ABINGER, C. B., says: "I had thought, but without much consideration, at the Assizes, that this sort of institutions were of such a nature as to come under the same view as a partnership, and that the same incidents might be extended to them; that where there were a body of gentlemen forming a club, and meeting together for one common object, what one did in respect of the society bound the others, if he had been requested and had consented to act for them. Several cases have been cited in the course of the argument, which do not apply, with the exception of one of them, to societies of this nature. Trading associations stand on a very different footing. Where persons engage in a community of profit and loss as partners, one partner has the right of property for the whole; so, any of the partners has a right, in any ordinary transactions, unless the contrary be clearly shown, to bind the partnership by a credit;—he might accept a bill of exchange in the name of the firm, and as between the firm and strangers the partnership would be bound, although there might be an understanding in the firm that he was not to accept. It appears to me that this case must stand upon the ground which the defendant put it, as a case between principal and agent and I am the more inclined to look at it in that light, by an observation made * * * in the course of the argument yesterday.

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no person can be charged upon a contract alleged to have been made upon his responsibility, unless it can be shown that to the making of that contract upon his responsibility, he has given his express or implied assent.[1]

This assent may be expressed in a variety of ways, and at one of several times. It may have been given in advance by consenting to be bound by all contracts of a certain kind that may be made in the future; it may be given contemporaneously with the making of the contract; and it may also be inferred from a subsequent ratification.

Thus where it is a part of the scheme or purpose of the organization as provided by its articles of association, charter, constitution or by-laws, that certain contracts or obligations in behalf and upon the credit of the organization, may be entered into, either upon the vote of a majority or at the discretion of a committee or officer, or upon any other lawful contingency or event, every person who becomes a member, by so doing impliedly consents, in advance, to be bound by any contract or obligation of the kind contemplated, entered into under the circumstances prescribed.[2]

Where, however, there is no such undertaking to abide by the action of the majority, or to be bound by contracts entered into by the committee or officers, those only who authorize the making of the contract will be bound. Hence if there be a division

on the subject of bills of exchange. I apprehend that one of the members of this club could not bind another by accepting a bill of exchange, acting as a committee man, even where there might be an apparent necessity to accept, as in the case of a purchase of a pipe of wine: the party might draw a bill, but I do not think he could accept the bill to bind the members of the club. It is, therefore, a question here how far the committee, who are to conduct the affairs of this club as agents, are authorized to enter into such contracts as that upon which the plaintiffs now seek to bind the members of the club at large; and that depends on the constitution of the club, which is to be found in its own rules."

[1] Devoss *v.* Gray, 22 Ohio St. 169; Newell *v.* Borden, 128 Mass. 31; Volger *v.* Ray, 131 Mass. 439; Ash *v.* Guie, *supra;* Ray *v.* Powers, 134 Mass. 22; Ridgely *v.* Dobson, 3 Watts & S. (Penn.) 118; Lewis *v.* Tilton, *supra;* Heath *v.* Goslin, 80 Mo. 310, 50 Am. Rep. 505; Burt *v.* Lathrop, 52 Mich. 106; Rice *v.* Peninsular Club, 52 Mich. 87; Flemyng *v.* Hector, 2 M. & W. 172; Sproat *v.* Porter, 9 Mass. 300.

[2] Todd *v.* Emly, 7 M. & W. 427; Cockerell *v.* Aucompte, 2 Com. B. (N. S.) 440; Flemyng *v.* Hector, 2 M. & W. 172; Devoss *v.* Gray, *supra.*

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of opinion and the contract is authorized by a majority only, the majority only can be held responsible.[1]

But though a member at the time dissents, yet if he subsequently concurs or acquiesces in the making of the contract, he will be bound in the same manner as though his assent had been previously given.[2]

§ 73. **Same Subject—Illustrations.** In a leading case upon this subject, it was sought to hold certain members of an unincorporated club liable for work done and goods supplied to the club upon the order of a standing committee appointed by the club. It appeared that the club, which was one organized for the purpose of furnishing refreshments and entertainment to its members, had adopted certain rules by which each member was to pay admission and annual fees, and was also to pay daily for his accommodations at the club. A committee was appointed to manage the affairs of the club, but it appeared that the rules of the club gave the committee no authority to pledge the personal credit of the members. The plaintiffs attempted to hold the defendants personally responsible by virtue of their membership only, and offered no evidence that they had ever expressly or impliedly assented to the making of the particular contract sued upon. But the court held that in the absence of such evidence, the defendants were not liable and that mere membership in the club was not sufficient.[3] So, where an action was brought to

[1] Todd *v.* Emly, *supra.*

[2] Heath *v.* Goslin, *supra;* Eichbaum *v.* Irons, 6 Watts & S. (Penn.) 67, 40 Am. Dec. 540.

[3] Flemyng *v.* Hector, 2 M. & W. 171; and this case was followed in the similar case of Todd *v.* Emly, 7 M. & W. 427, s. c. 8 *Id.* 505.

In Flemyng *v.* Hector, ALDERSON, B., said: "This question turns simply on the authority which the parties who made the contract had to pledge the credit of the defendants to the plaintiffs. Taking it that the committee have made the contract, and that they are by the rules of the society authorized to manage the affairs of the club, it may follow from that that the defendants have given authority to the committee to discharge the contract out of the funds in their hands: but it is contended on the part of the committee that they had a right to pledge the personal credit of the members, and therefore to make these defendants liable. I think they have not. When I come to look at the rules of the club, which are to be the guide by which we are to act, and which constitute the only authority the committee had, I do not find anything to lead me to the conclusion that the authority of the committee extended to the right of pledging the personal liability of any of the members of it; on the contrary, I find the members of the club carefully provided a fund,

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charge certain members of an unincorporated religious society for services performed in building a church edifice, it was held that even if it were to be assumed that the defendants were members because it was alleged that they were deacons of the church, still their liability as principals would not follow, because a member of an unincorporated religious society cannot be held personally responsible for the debts of the society unless it be shown that in some way he had sanctioned or acquiesced in their creation.[1]

So at a meeting of a voluntary unincorporated association organized for the purpose of encouraging the breeding and exhibition of fowls, a premium list for an exhibition to be given was adopted. An action in equity was afterwards brought to compel the defendants, as members, to contribute their proportion of the expenses incurred in holding the exhibition and paying the premiums. But the court held that mere membership would not bind a member for any further payment than the initiation fee and annual assessment, and that only such members as participated in the vote to hold the exhibition and award the premiums or as assented to be bound by such vote, would be bound thereby. It therefore became a question of fact whether any or all of the defendants so participated or assented. In determining the question of such participation or assent, the testimony of those present was admissible and the formal record of the meeting was not the only means of proof, unless made so by some rule or regulation of the association.[2]

This assent need not always be declared in express terms. It may be, and often is, in this, as in other cases, inferred from the conduct of the parties. Thus a school-board had for years employed and paid the plaintiff as a teacher. The president of the board employed her for another year and she performed the service, but not being paid in full, she brought suit against the

which was to be collected before they became members of the club, and having collected that fund and provided it, the committee are to manage it. Then what is it the committee are to manage? Why, the fund so provided, and to manage the club upon those terms. If that be so, the committee are not authorized to pledge the credit of individual members; and if they do deal on credit, it is their own affair, done on the faith of the money in their hands, which would enable them to pay their accounts."

[1] DeVoss v. Gray, 22 Ohio St. 169.

[2] Ray v. Powers, 134 Mass. 22.

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board for the balance. Some of the defendants objected that they had never authorized the president to make the contract, but the court said: "There is ample (evidence) in the case to submit to the jury from which the knowledge and co-operation of all of the defendants may be justly inferred. They were the acting board intrusted with the management of the school. They had for years been employing and paying this woman. They knew that she was continuing to teach and being paid out of the funds. They had not withdrawn from their self-imposed office as a managing board."[1]

So certain members of a committee were held personally liable for a public dinner ordered by the committee, upon the ground that, though they opposed the resolution while it was under consideration, they had at last submitted to the majority and made the resolution their own.[2]

§ 74. **Same Subject—The Rule stated.** It is believed that the following rule embraces the authorities upon this subject:

1. That mere membership in such an association, society, club or committee does not make the member personally liable upon contracts purporting to be made on its behalf, unless there is something in the charter, by-laws or articles of association authorizing the pledging of the credit of the association, to which he is presumed to have assented by becoming a member, and then only in those cases where the contract is within the limits there prescribed.

2. That except in the case last mentioned, the member can only be made liable upon proof of his express or implied assent

[1] Heath v. Goslin, 80 Mo. 310, 50 Am. Rep. 505.

[2] Eichbaum v. Irons, 6 Watts & S. (Penn.) 67, 40 Am. Dec. 540. In this case, Chief Justice GIBSON said: "Every member present assents beforehand to whatever the majority may do, and becomes a party to acts done, it may be, directly against his will. If he would escape responsibility for them, he ought to protest and throw up his membership on the spot, and there was no evidence that any of the defendants did so. On the contrary they all remained till the meeting was dissolved and the order given." It is evident, however, that the Chief Justice did not mean to be understood as holding that liability attached to the mere fact of membership or that the defendants could be bound without their assent, but that the assent of the defendants was to be inferred from their conduct. In another part of the opinion he says: "Did the defendants then concur in the order given for the dinner in question? If they did not, the plaintiff cannot recover."

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to the contract; but this may be shown either by his previous consent or his subsequent adoption or by his acquiescence in an established course of dealing.

§ 75. **Inchoate Corporations.** A corporation is not responsible for acts performed or contracts entered into before its organization by its promoters or other persons assuming to bind it in advance.[1] Having as yet no corporate existence it is, of course, incapable of entering into contracts, or appointing officers or agents. When its organization is effected, however, it may expressly or impliedly assume the responsibility of such acts or contracts, if within its corporate powers, and thus make them the valid obligations of the corporation. Such an assumption may, as in other cases, be implied where the corporation, with knowledge of the facts, appropriates to itself the benefits and advantages derived from the act or contract of the promoters, for "it cannot take the benefit of the contract, without performing that part of it which the projectors undertook that it should perform."[2]

IV.

JOINT AGENTS.

§ 76. **Authority to Several.** The authority that may be delegated to a single agent may, generally, be likewise delegated to two or more. Most of the rules applicable to a single agent, apply equally when the agency is joint. A distinction, however, is to be made in the manner of the execution of a joint agency based upon the question whether the agency be of a public or a private nature.

§ 77. **Private Agency must be executed by all.** Where authority is conferred upon two or more agents to represent their principal in the transaction of business of a private nature, it

[1] Morawetz on Corporations, § 547; Paxton Cattle Co. *v.* First Nat. Bank, 21 Neb. 621, 59 Am. Rep. 852; Bell's Gap R. R. Co. *v.* Christy, 79 Penn. St. 54, 21 Am. Rep. 39; Rockford, &c., R. R. Co. *v.* Sage, 65 Ill. 328, 16 Am. Rep. 587; New York, &c., R. R. Co. *v.* Ketchum, 27 Conn. 170; Franklin Fire Ins. Co. *v.* Hart, 31 Md. 60; Western Screw Co. *v.* Cousley, 72 Ill. 531.

[2] Bell's Gap R. R. Co. *v.* Christy, *supra;* Rockford, &c., R. R. Co. *v.* Sage, *supra;* Western Screw Co. *v.* Cousley, *supra.* See 16 Am. L. Rev. 357 and 671. See *post*, § 125.

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may well be presumed that it was so conferred upon them all from considerations of a personal nature and in order to derive the benefit of their combined experience, discretion or ability.[1]

It is, therefore, the rule that such an agency will be presumed to be joint, and it can be performed by them only jointly when no intent appears that it may be otherwise executed.[2] If, however, it is shown, by the instrument conferring the power or otherwise, that it was the intention that a part might execute it, such execution will be sufficient.[3] So where the agency is joint or several, it must be executed by all or one, and not by an intermediate number, unless such an intention clearly appears.[4]

[1] Commonwealth v. Commissioners, 9 Watts (Penn.) 470.

[2] Cedar Rapids, &c. R. R. Co. v. Stewart, 25 Iowa, 115; Kupfer v. Augusta, 12 Mass. 185; Caldwell v. Harrison, 11 Ala. 755; Soens v. Racine, 10 Wis. 271; White v. Davidson, 8 Md. 169; 63 Am. Dec. 699; Rogers v. Cruger, 7 Johns. (N. Y.) 557; Damon v. Granby, 2 Pick. (Mass.) 345; Sutton v. Cole, 3 *Id.* 232; Woolsey v. Tompkins, 23 Wend. (N. Y.) 324; Hartford F. Ins. Co. v. Wilcox, 57 Ill. 180; Scott v. Detroit, &c. Society, 1 Doug. (Mich.) 119; Low v. Perkins, 10 Vt. 532, 33 Am. Dec. 217; Towne v. Jaquith, 6 Mass. 46; Heard v. March, 13 Cush. (Mass.) 580; Hawley v. Keeler, 53 N. Y. 114; Johnston v. Bingham, 9 W. & S. (Penn.) 56.

As in the case of arbitrators: Moore v. Ewing, Coxe (N. J.) 144, 1 Am. Dec. 195; Blin v. Hay, 3 Tyler (Vt.), 304, 4 Am. Dec. 738; Green v. Miller, 6 Johns. (N. Y.) 39, 5 Am. Dec. 184; Patterson v. Leavitt, 4 Conn. 50, 10 Am. Dec. 98; Wilder v. Ranney, 95 N. Y. 7; Brennan v. Willson, 71 N. Y. 502; Penn v. Evans, 28 La. Ann. 576.

"It is well settled," says ANDREWS J. in Hawley v. Keeler, *supra*, "as a general doctrine in the law of agency, that when an authority to act in a matter of a private nature is conferred by the principal upon more than one person, all must act in the execution of the power. This is the construction which the law puts upon the power, following the supposed intention of the parties, and there must, ordinarily be a joint execution of the agency. The authority may be conferred in such terms as to authorize a several execution, or an execution by a majority or other number; and in the absence of express words it may have been exercised under such circumstances as will justify the inference that the principal intended that less than the whole number might act; in which case he would be bound to those who had acted upon such inference. The general rule that a joint execution must be had of an authority given to several, has been made to yield for the benefit of trade and to meet supposed necessities, in contracts made by one of several joint owners of ships, and in case of sales made by one of two factors, of goods consigned to them for sale."

[3] Cedar Rapids, &c. R. R. Co. v. Stewart, 25 Iowa, 115; Hawley v. Keeler, 53 N. Y. 114. When usage will justify, see Godfrey v. Saunders, 3 Wils. 94; Willet v. Chambers, Cowp. 814.

[4] Guthrie v. Armstrong, 5 B. & Ald. 628.

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Where, however, the authority is conferred upon a partnership, it may be executed by one of the partners.[1]

Where the agency is clearly joint, the death or disability of one of the agents terminates the agency unless it be coupled with an interest in the survivors.[2]

§ 78. **Public Trust or Agency may be executed by a Majority.** Where, however, the trust or agency is created by law, or is public in its nature, the rule is otherwise, and while all of the trustees or agents must be present to deliberate, or must be duly notified and have an opportunity to be present, yet a majority of them, if present, may act.[3]

The rule which applies to these cases was well stated by Chief Justice Shaw, as follows: "Where a body or board of officers is constituted by law to perform a trust for the public, or to execute a power or perform a duty prescribed by law, it is not necessary that all should concur in the act done. The act of the majority is the act of the body. And where all have due notice of the time and place of meeting in the manner prescribed by law, if so prescribed; or by the rules and regulations of the body itself, if there be any; otherwise, if reasonable notice is given, and no practice or unfair means are used to prevent all from attending and participating in the proceeding, it is no objection that all the members do not attend, if there be a quorum."[4]

[1] Deakin *v.* Underwood, 37 Minn. 98, 5 Am. St. Rep. 827.

[2] Salisbury *v.* Brisbane, 61 N. Y. 617; Boone *v.* Clark, 3 Cranch (U. S. C. C.), 390; Hartford F. Ins. Co. *v.* Wilcox, 57 Ill. 180.

[3] McCready *v.* Guardians of the Poor, 9 Serg. & R. (Penn.) 94, 11 Am. Dec. 667; Scott *v.* Detroit, &c. Society, 1 Doug. (Mich.) 119; Jewett *v.* Alton, 7 N. H. 253; Caldwell *v.* Harrison, 11 Ala 755; Soens *v.* Racine, 10 Wis. 271; Despatch Line *v.* Bellamy Mnfg. Co. 12 N. H. 205, 37 Am Dec. 203; First National Bank *v.* Mount Tabor, 52 Vt. 87, 36 Am. Rep. 734; Withnell *v.* Gartham, 6 T. R. 388; Grindley *v.* Barker, 1 B. & P. 229; Kingsbury *v.* School District, 12 Metc. (Mass.) 99; Cooley *v.* O'Connor, 12 Wall. (U. S.) 391; Baltimore Turnpike, Case of, 5 Binn. (Penn.) 481; Louk *v.* Woods, 15 Ill. 256; Jefferson County *v.* Slagle, 66 Penn. St. 202; Austin *v.* Helms, 65 N. C. 560; People *v.* Nichols, 52 N. Y. 478, 11 Am. Rep. 734; Williams *v.* School District, 21 Pick. (Mass.) 75, 32 Am. Dec. 248.

[4] In Williams *v.* School District, *supra*.

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CHAPTER IV.

OF THE APPOINTMENT OF AGENTS AND THE EVIDENCE THEREOF.

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§ 79. **Purpose of Chapter.** It is the purpose of this chapter to consider the different methods by which an agent may be appointed, and to determine what shall be the evidence of such appointment.

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I.

HOW AGENT MAY BE APPOINTED.

§ 80. **Only by the Will of the Principal.** It has been said to be the general rule of the law that no one can become the agent of another except by the will of the principal.[1] But this rule is subject to the exception of those cases where an agency may be created by law, even against the will of the principal,—an exception which will be hereafter noticed.[2]

§ 81. **How Principal's Will may be expressed.** This will of the principal may be expressed in a great variety of ways; indeed, its form of expression is as various as the methods of entering into contracts generally. Thus an agent may, in a given case, be appointed by a written instrument or by word of mouth. His appointment may be implied from the conduct of the parties, or his previously unauthorized acts may be adopted and ratified by the principal. The written authority may be under seal or otherwise. There will be found cases where the authority must be in writing, and others where the writing must be under seal.

§ 82. **Authority by Law.** An agency may be created by law. Thus it is said by a learned judge: "In those cases where the law authorizes a wife to pledge her husband's credit even against his will, it creates a compulsory agency, and her request is his request."[3]

Authority of Necessity. So it has been said, "if the husband turns his wife away, it is not unreasonable to say that she has an authority of necessity."[4] Of this nature has sometimes been said to be the authority of a ship's master to contract for necessary repairs.

§ 83. **Authority by Implication—Presumption—Estoppel.** A large portion of the transactions of the modern business world is carried on by simple and informal means. A word or look or gesture often suffices to give assent to great undertakings or to set in motion the complicated machinery of commerce.[5] Little,

[1] Evans on Agency, Ewell's Ed. 16; Pole v. Leask, 28 Beav. 562; Stringham v. St. Nicholas Ins. Co. 4 Abb. App. Dec. (N. Y.) 315; McGoldrick v. Willits, 52 N. Y. 612; Graves v. Horton,— Minn. —, 35 N. W. Rep. 568.

[2] *Post*, § 82.

[3] HOLMES, J. in Benjamin v. Dockham, 134 Mass. 418.

[4] POLLOCK, C. B. in Johnston v. Sumner, 3 Hurl. & Nor. 261.

[5] A forcible illustration of this may

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often, is said or written, but that little carries with it a train of legal consequences no less certain and definite than if the whole were included in the spoken or written words. This being so good faith is strenuously insisted upon, and one who by his conduct has led an innocent party to rely upon the appearance of another's authority to act for him, will not be heard to deny the agency to that party's prejudice.[1] Hence it is that in many cases the existence of an agency is implied or presumed from the words or conduct of the parties, and this, too, although the creation of an agency was not within their immediate contemplation.

§ 84. **Same Subject—The Rule stated.** It may therefore be stated as a general rule that whenever a person has held out another as his agent authorized to act for him in a given capacity; or has knowingly and without dissent permitted such other to act as his agent in such capacity; or where his habits and course of dealing have been such as to reasonably warrant the presumption that such other was his agent, authorized to act in that capacity; whether it be in a single transaction or in a series of transactions, his authority to such other to act for him in that capacity will be conclusively presumed, so far as it may be necessary to protect the rights of third persons who have relied thereon in good faith and in the exercise of reasonable prudence, and he will not be permitted to deny that such other was his agent, authorized to do the act that he assumed to do, provided that such act is within the real or apparent scope of the presumed authority.[2]

be seen upon any Board of Trade, where according to local usage or fixed rule, a nod or the holding up of one or more fingers, serves to give assent to the making of a sale and the specifying of the quantity. So the nod of a purchaser at an auction is sufficient to effect a purchase and to authorize the entering of his name upon the memorandum of the sale.

[1] "The general rule," says Judge THOMPSON, "undoubtedly is that the liability of a principal for the contracts of his agent is predicated either upon a previous authorization or a subsequent ratification. But there are cases where a person will become liable for the assumed act of another as his agent on the principle of estoppel by suffering that other to represent himself as his agent with power to make the particular contract." Fanning *v.* Cobb, 20 Mo. App. 577; DeBaun *v.* Atchison, 14 Mo. 543; Rice *v.* Groffman, 56 Mo. 434; Cupples *v.* Whelan, 61 Mo. 583.

[2] Pursley *v.* Morrison, 7 Ind. 356, 63 Am. Dec. 424; Hooe *v.* Oxley, 1 Wash. (Va.) 19, 1 Am. Dec. 425; Eagle Bank *v.* Smith, 5 Conn. 71, 13 Am. Dec. 37, Lyell *v.* Sanbourn, 2 Mich. 109; Thompson *v.* Bell, 10 Exch. 10; Commonwealth *v.* Holmes, 119 Mass. 195; Croy *v.* Busenbark, 72

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§ 85. **Same Subject—Limitations of this Rule.** But it is not to be inferred, however, that authority is, in any case, to be implied without reason, or presumed without cause. The implication must be based upon facts, and cannot arise from any mere argument as to the convenience, utility or propriety of its existence.[1] So, too, the facts from which it is sought to be implied are to be given their natural, legal and legitimate effect, and this effect is not to be expanded or diminished in order to establish or overthrow the agency. And again, when implied, the agency is to be limited in its scope and operation to the reasonable and necessary requirements of the case which called it into being. If implied from the ratification or adoption of acts of a certain kind, its scope is to be limited to the performance of acts of that kind, and it can not be construed as warranting the performance of acts of a different kind.[2]

§ 86. **Same Subject—What sufficient—Instances.** Illustrations of this rule are numerous. Thus where one stands by and permits another, in his presence, to make a contract for him as his agent, without disclosing the want of authority, he will be estopped from denying the authority;[3] and one who knows that another is collecting money on his account and does not object, but allows him to keep it as a loan, makes him his agent to collect it.[4] So where it was shown that a son had for years been signing his

Ind. 48; Meyer v. King, 29 La. Ann. 567; Thurber v. Anderson, 88 Ill. 167; Fay v. Richmond, 43 Vt. 25; Weaver v. Ogletree, 39 Ga. 586; Rimmey v. Getterman, 63 Md. 424; Sorrell v. Brewster, 1 Mich. 373; Grover & Baker Sew. Mach. Co. v. Polhemus, 34 Mich. 247; Connecticut Mut. L. Ins. Co. v. Pulte, 45 Mich. 113; Brockelbank v. Sugrue, 5 C. & P. 21; Savings Fund Society v. Savings Bank, 36 Penn. St. 498, 78 Am. Dec. 390; Farmers' Bank v. Butchers' Bank, 16 N. Y. 145; Kiley v. Forsee, 57 Mo. 390; Kelsey v. National Bank, 69 Penn. St. 426; St. Louis, &c. Co. v. Parker, 59 Ill. 23; Vicksburg, &c. R. R. Co. v. Ragsdale, 54 Miss. 200; Summerville v. Hannibal, &c. R. R. Co. 62 Mo. 391; Walsh v. Pierce, 12 Vt. 130; Chicago, &c. Ry. Co. v. James, 22 Wis. 194; Rice v. Groffmann, 56 Mo. 434; Columbia Bridge Co. v. Geisse, 38 N. J. L. 39; Bronson v. Chappell, 12 Wall. (U. S.) 681; Tier v. Lampson, 35 Vt. 179, 82 Am. Dec. 634.

[1] See Bickford v. Menier, 107 N. Y. 490, 26 Cent. L. Jour. 236.

[2] See Graves v. Horton, Minn. 35 N. W. Rep. 568; McAlpin v. Cassidy, 17 Tex. 449, post §§ 274, 312.

[3] James v. Russell, 92 N. Car. 194.

[4] Simon v. Brown, 38 Mich. 552. One who knowingly permits another to make collections for him is bound by payments made to such other. Sax v. Drake, 69 Iowa, 760; Quinn v. Dresbach, 16 Pac. Rep. 762.

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father's name to his own notes to the knowledge of the father who took no steps to prevent it, and gave no notice that it was unauthorized, the son's authority to so bind the father was presumed;[1] so where a son had been, to his father's knowledge, in the habit of attending the father's store and there selling goods, taking orders, receiving payment for goods sold and ordering goods from wholesale houses, the authority of the son to bind the father by a purchase of goods was inferred, although the son appropriated the goods so purchased to his own use;[2] so where a son, acting for his father in procuring a mortgage, took upon himself with his father's consent the whole negotiation, examined the title, attended to the execution of the papers, received the money from his father and delivered it to the mortgagor, and in short did every thing there was for an agent to do in the matter, and as much as any agent could have done in a similar negotiation, he was conclusively presumed to have been the agent of his father in the transaction.[3]

Again where one charged as defendants' agent was shown to have been for years a clerk in their store, and in many instances as their agent to have done business with the plaintiffs, it was held that there was sufficient proof of a general agency;[4] and where one sent another who desired to purchase lands of him, to his father to make a bargain, with the statement that whatever bargain they might make he would agree to, it was held that this authorized the person thus sent to regard the father as the son's agent, and bound the son by his father's statements.[5]

So in an action to charge a married woman for goods sold and delivered to her husband as her agent, it was held competent to

[1] Weaver *v.* Ogletree, 39 Ga. 586.

"If in consequence of a notorious agency, the agent is in the habit of drawing bills, and the principal in the habit of paying them, this is such an affirmance of his power to draw that a purchaser of his bills has a right to expect payment of them by the principal, and if refused he may coerce it." Hooe *v.* Oxley, 1 Wash. (Va.) 19, 1 Am. Dec. 425.

[2] Thurber *v.* Anderson, 88 Ill. 167. See also Watkins *v.* Vince, 2 Stark. 368.

[3] Matterson *v.* Blackmer, 46 Mich. 393.

[4] Eagle Bank *v.* Smith, 5 Conn., 71, 13 Am. Dec. 37.

[5] Reeves *v.* Kelley, 30 Mich. 133. So if one party refers another to a third person for information, as authorized to answer for him, he will be bound by the statements of the person so referred to. Rosenbury *v.* Angell, 6 Mich. 508; Beebe *v.* Knapp, 28 Mich. 53; Beebe *v.* Young, 14 Mich. 136.

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show that she had paid for similar goods bought by her husband during the same period within which the goods in question were bought;[1] and evidence that a husband who had the management of certain land belonging to his wife, ordered material for building a house thereon, and that the wife knew that the house was being built, and occupied it when finished, was held to warrant a finding that the husband acted as her agent.[2]

So where a person openly and notoriously exercises the functions of a particular agency of a corporation, he will be presumed to have sufficient authority from the corporation to so act;[3] and where a manufacturing company knowingly permitted a person to sell goods in a store-house with their name over the door, though in a town distant from their place of business, and there to sell goods of their manufacture and to buy country produce as their agent, they were charged as his principals in the purchase of such produce.[4] So placing a man in general charge of a retail store is such a holding out of him as general agent as to bind the principal for goods purchased for sale in the store by the agent, although he had agreed with the principal not to buy any goods without the latter's consent.[5] And where it appears that the alleged agent has repeatedly performed acts, like the one in question, which the principal has ratified and adopted, his authority for the performance of the disputed act may be inferred.[6]

[1] Lovell *v.* Williams, 125 Mass. 439.

[2] Arnold *v.* Spurr, 130 Mass. 347. And see Thomas *v.* Wells, 140 Mass. 517.

[3] Singer Mnf'g Co. *v.* Holdfodt, 86 Ill. 455.

Where it appeared that a person had acted for two or three years as the agent of corporation in settling its obligations, it was held that this was sufficient prima facie to establish his agency. "From the natural improbability," said Dickinson, J., "that one should voluntarily, without authority, assume to act for another, settling his obligations for a considerable period of time, and from the fact that such conduct would naturally come to the knowledge of the assumed principal, the fact of agency may be presumed." Neibles *v.* Minneapolis, &c., R. R. Co., — Minn. — 33 N. W. Rep. 332. See also Rockford, &c., R. R. Co. *v.* Wilcox, 66 Ill. 417; Reynolds *v.* Collins, 78 Ala. 94; Summerville *v.* Hannibal, &c., R R. Co., 62 Mo. 391; Vicksburg, &c., R. R. Co. *v.* Ragsdale, 54 Miss. 200.

[4] Gilbraith *v.* Lineberger, 69 N. Car. 145. But this authority does not extend to borrowing money or buying goods for himself. *Id.*

[5] White *v.* Leighton, 15 Neb. 424.

[6] Jewett *v.* Lawrenceburgh, &c., R. R. Co., 10 Ind. 539; Fisher *v.* Campbell, 9 Por. (Ala.) 210; Robinson *v.* Green, 5 Harr. (Del.) 115;

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§ 87. **Same Subject—What not sufficient—Instances.** But the authority of the husband to act as the agent of the wife cannot be inferred from the marital relation alone.[1] The mere making a note payable at a certain bank will not make the bank the agent of the payee to receive payment unless the officers are disposed to accept the agency;[2] nor will the delivery of a subscription list to a person of itself confer authority on such person to collect the money and discharge the subscribers;[3] nor is authority to collect a debt to be implied merely from the possession by the party claiming the authority, of a copy of the account.[4]

So an agency will not be presumed from a previous employment in a similar matter where it does not appear that the former employment was with the principal's knowledge, although he may have accepted the advantages resulting from such previous employment.[5]

And if a debtor employs an agent to carry money to his creditor, the creditor by accepting the money, does not so make the messenger his agent that if at any future time the messenger should appropriate money so sent, the loss would be that of the creditor and not of the debtor;[6] and if a debtor leaves with A money to pay a note, informing the creditor of that fact, and the creditor thereupon writes to A to bring or send the money to him, this does not make A the agent of the creditor so as to impose upon the latter the loss of the money while in A's possession.[7]

Nor will the fact that one as a father or friend merely gives information or advice in reference to a land trade, make such father or friend the agent of the person to whom such advice or information is given.[8]

Rawson *v.* Curtiss, 19 Ill. 456; Emerson *v.* Coggswell, 16 Me. 77; Odiorne *v.* Maxcy, 15 Mass. 39; Walsh *v.* Pierce, 12 Vt. 130; Downer *v.* Morrison, 2 Gratt. (Va.) 237.

[1] Price *v.* Seydel, 46 Iowa, 696; Anderson *v.* Gregg, 44 Miss. 170; Crawford *v.* Redus, 54 Miss. 700.

[2] Pease *v.* Warren, 29 Mich. 9.

[3] Antram *v.* Thorndell, 74 Penn. St. 442.

[4] Dutcher *v.* Beckwith, 45 Ill. 460, 92 Am. Dec. 232.

[5] Cobb *v.* Hall, 49 Iowa, 366. And see Abrahams *v.* Weiller, 87 Ill. 179.

[6] Fisher *v.* Lodge, 50 Iowa, 459.

[7] First National Bank *v.* Free, 67 Iowa, 11.

[8] McNamara *v*, McNamara, 62 Ga. 200.

See also upon this general subject, Whitehead *v.* Tuckett, 15 East, 400; Hazard *v.* Treadwell, 1 Stra. 506; Burt *v.* Palmer, 5 Esp. 145; Peto *v.* Hague, *Id.* 134; Anderson *v.* Sanderson, 2 Stark. 204; Clifford *v.* Burton,

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§ 88. **Authority by express, unwritten Appointment.** It has been seen in the preceding sections how an authority may arise from implication, presumption or estoppel. Authority may also be conferred by express words spoken with that intent.

And it is the general rule of law that, with the exception of those cases in which the authority is required to be in writing and in which it must be under seal,—exceptions hereafter to be noticed,—authority for the doing of any act lawful to be done may be created by parol.[1]

§ 89. **By Parol—To sell or lease Lands.** Thus, except in those States[2] where the statutes expressly require the authority to be in writing, an agent may be authorized by parol to make a valid contract for the sale[3] or the leasing[4] of his principal's lands. But it has been said that parol authority to thus charge a principal's realty ought to be express and clearly established.[5]

§ 90. **By Parol—To demand and collect Rents.** So parol authority is sufficient to authorize a person to act as agent for a lessor in the collection of rent or in demanding its payment.[6]

§ 91. **By Parol—To execute written Instruments not under Seal.** And so, except in those cases in which the authority is by some statute required to be in writing, and except where the

1 Bing. 199; Fenner *v.* Lewis, 10 Johns. (N. Y.) 38; Bryan *v.* Jackson, 4 Conn. 291.

[1] Story on Agency, § 47; Ewell's Evans' Agency, 24.

[2] As in Alabama, Arkansas, California, Colorado, Illinois, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, Ohio, and Pennsylvania.

[3] Lawrence *v.* Taylor, 5 Hill (N.Y.) 107; Champlin *v.* Parish, 11 Paige (N. Y.) 405; McWhorter *v.* McMahan, 10 Paige (N. Y) 386; Newton *v.* Bronson, 13 N. Y. 587, 67 Am. Dec. 89; Worrall *v.* Munn, 5 N. Y. 229, 55 Am. Dec. 330; Curtis *v.* Blair, 26 Miss. 309, 59 Am. Dec. 257; Morrow *v.* Higgins, 29 Ala. 448; Dodge *v.* Hopkins, 14 Wis. 630; Watson *v.* Sherman, 84 Ill. 263; Brown *v.* Eaton, 21 Minn. 409; Dickerman *v.* Ashton, *Id.* 538; Johnson *v.* Dodge, 17 Ill. 433; Hawkins *v.* Chace, 19 Pick. (Mass.) 502; Talbot *v.* Bowen, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747; Ulen *v.* Kittredge, 7 Mass. 233; Heard *v.* Pilley, 4 Ch. App. Cases, 548; Taylor *v.* Merrill, 55 Ill. 52; Rutenberg *v.* Main, 47 Cal. 213; Moody *v.* Smith, 70 N. Y. 598; Riley *v.* Minor, 29 Mo. 439; Rottman *v.* Wasson, 5 Kan. 552.

[4] Lake *v.* Campbell, 18 Ill. 106; McComb *v.* Wright, 4 Johns. Ch. (N.Y.) 667.

[5] Lauer *v.* Brandow, 43 Wis. 556; Challoner *v.* Bouck, 56 Wis. 652; Union Mutual Life Ins. Co. *v.* Masten, 3 Fed. Rep. 881; Bosseau *v.* O'Brien, 4 Biss. (U. S. C. C.) 395, 1 Myers Fed. Dec. § 58.

[6] Sheets *v.* Selden, 2 Wall. (U. S.) 177.

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instrument to be executed is to be under seal, authority may be conferred by parol to execute bills, notes and all other contracts in writing.[1]

§ 92. **What Writing sufficient when Writing required.** But even in those cases in which the authority is, by the statute, required to be conferred by writing, it need not, except when the instrument to be executed is under seal, be by a formal or a sealed writing. It may be conferred by letter[2] or telegram.[3]

§ 93. **Authority to execute sealed Instruments must be under Seal.** Where, however, an instrument under seal is to be executed the rule is well settled that the authority must be conferred by an instrument of equal dignity and solemnity, and it must therefore be under seal.[4] But while this rule is firmly established,

[1] Stackpole v. Arnold, 11 Mass. 27, 6 Am. Dec. 150; Emerson v. Providence Hat Mnf'g. Co. 12 Mass. 237, 7 Am. Dec. 66; New England Marine Ins. Co. v. DeWolf, 8 Pick. (Mass.) 56; Shaw v. Hudd, 8 Pick. (Mass.) 9; Small v. Owings, 1 Md. Ch. 363; Welch v. Hoover, 5 Cranch, (U. S. C. C.) 444; Webb v. Browning, 14 Mo. 354; Wagoner v. Watts, 44 N. J. L. 126; Hammond v. Hannin, 21 Mich. 374.

[2] Thus where the owner of land in Kansas City wrote from Chicago, where he resided, to his agent in Kansas City, "I leave the sale of the lots pretty much with you; if the party, or any one is willing to pay sixty dollars a foot, one-third cash, and the balance in one and two years, interest seven per cent. per annum, and pay commission of sale, I think I am willing to have you make out a deed, and I will perfect it, hold till then"— it was held that this authorized the agent to make a contract binding upon the owner for a present sale of the lots. Smith v. Allen, 86 Mo. 178, citing Stewart v. Wood, 63 Mo. 256; Lyon v. Pollock, 99 U. S. 668; Johnson v. Dodge, 17 Ill. 441; Lawrence v. Taylor, 5 Hill (N. Y.) 107; Hawkins v. Chace, 19 Pick. (Mass.) 502. In Lyon v. Pollock, cited by the court, A wrote to C at San Antonio, Texas, "I wish you to manage my property as you would your own. If a good opportunity offers to sell everything I have, I would be glad to sell. It may be parties will come into San Antonio who will be glad to purchase my gas stock and real estate." It was held that C was thereby authorized to contract for the sale of the real estate but not to convey it. See also Brown v. Eaton, 21 Minn. 409; Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89. See also *post*, § 318.

[3] Godwin v. Francis, L. R. 5 C. P. 295.

[4] Elliott v. Stocks, 67 Ala. 336; Watson v. Sherman, 84 Ill. 263; Johnson v. Dodge, 17 Ill. 433; Peabody v. Hoard, 46 Ill. 242; Harshaw v. McKesson, 65 N. C. 688; Rowe v. Ware, 80 Ga. 278; Maus v. Worthing, 3 Scam. (Ill.) 26; Rhode v. Louthain, 8 Blackf. (Ind.) 413; Reed v. Van-Ostrand, 1 Wend. (N. Y.) 424, 19 Am. Dec. 529; Blood v. Goodrich, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121; Wells v. Evans, 20 Wend. (N. Y.) 251; Despatch Line v. Bellamy Mnf'g Co.,

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it is highly technical in its nature and confessedly stands upon very narrow ground. The whole theory of the solemnity of a seal is totally unsuited to the business methods of the present day and the constant tendency of courts and legislatures is to ignore the distinctions formerly founded upon its use.[1]

§ 94. **Same Subject—Authority to fill Blanks in Deeds.** Following the rule laid down in the preceding section, and as a necessary consequence of it, it is held in many cases that authority to fill blanks in deeds can be conferred only by an instrument under seal.[2] This rule, however, like the other, has met with

12 N. H. 205, 37 Am. Dec. 203; Heath v. Nutter, 50 Me. 378; Hanford v. McNair, 9 Wend. (N. Y.) 54; Cooper v. Rankin, 5 Binn. (Penn.) 613; Gordon v. Bulkeley, 14 Serg. & R. (Penn.) 331; Stetson v. Patten, 2 Greenl. (Me.) 358, 11 Am. Dec. 111; Drumright v. Philpot, 16 Ga. 424, 60 Am. Dec. 738; Graham v. Holt, 3 Iredell's (N. Car.) Law 300, 40 Am. Dec. 408; Paine v. Tucker 21 Me. 138, 38 Am. Dec. 255; Williams v. Crutcher, 5 How. (Miss.) 71; 35 Am. Dec. 422; Wheeler v. Nevins, 34 Me. 54; Baker v. Freeman, 35 Me. 485; Shuetze v. Bailey, 40 Mo. 69; Smith v. Perry, 5 Dutcher (N. J.) 74; Gage v. Gage, 10 Fost. (N. H.) 420; Spurr v. Trimble, 1 A. K. Marsh. (Ky.) 278; McMurtry v. Brown, 6 Neb. 368; Adams v. Power, 52 Miss. 828; McNaughten v. Partridge, 11 Ohio 223; Smith v. Dickinson, 6 Hump. (Tenn.) 261; Mitchell v. Sproul, 5 J. J. Marsh. (Ky.) 264; McMurtry v. Frank, 4 T. B. Monr. (Ky.) 39; Long v. Hartwell, 5 Vroom (N. J.) 116; Piatt v. McCullough, 1 McLean (U. S. C. C.) 69.

[1] "In modern times," says CHAMPLIN, J., in Barton v. Gray, 57 Mich. p. 634, "the attaching of a seal to a signature is not regarded with that reverence which was formerly the case, and when the Legislature enacted that a seal or wafer was unnecessary, but that a scroll or other device should be sufficient, the solemnity attending the execution of such contract vanished; and when the Legislature further provided that no instrument should be held invalid for want of a seal, and it became under the statute mere prima facie evidence of consideration, the affixing of seals, except to instruments required by law to be under seal, became of no practical importance.

[2] Williams v. Crutcher, 5 How. (Miss.) 71, 35 Am. Dec. 422; Davenport v. Sleight, 2 Dev. & Bat. (N. C.) L. 381, 31 Am. Dec. 420; Burns v. Lynde, 6 Allen (Mass.), 305; Preston v. Hull, 23 Gratt. (Va.) 600, 14 Am. Rep. 153; Wunderlin v. Cadogan, 50 Cal. 613; Adamson v. Hartman, 40 Ark. 58; Upton v. Archer, 41 Cal. 85, 10 Am. Rep. 266; Hibblewhite v. McMorine, 6 M. & W. 200.

The reasons upon which this rule is based are well stated by STAPLES, J., in Preston v. Hull, *supra*, as follows: "A bond is a deed whereby the obligor promises to pay a certain sum of money to another at a day appointed. 2 Black. Com. 346. An obligor and obligee are essential to the existence and constitution of such an instrument. It is not indispensable that the party to whom the promise is made should be mentioned *eo nomine*, that his name of baptism and surname shall be given, but he must

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much disapproval in modern times, and though it may still be said to be the general rule there has been manifested in the more

be in some unmistakable manner designated in the instrument. A writing, though executed with all the solemnities of a deed, without such obligee, is a mere nullity. It imposes no liability upon the party issuing it. It confers no rights upon him who receives or holds it. It is not simply an imperfect deed; it is no deed at all. It only becomes a deed when the name of an obligee is inserted, and delivery made by the obligor or by some one legally authorized by him. If the blank is filled by an agent, then the agent as certainly makes a deed as though the entire obligation had been written, signed, sealed and delivered by him. His act binds a princpal not before bound. It creates a contract having no previous existence. It is true the act in question is merely the insertion of a name. Still its effect is to impart vitality to a piece of waste paper. It calls new rights and obligations into existence. It is followed by all the consequences resulting from the execution of the most solemn instruments.

"The argument sometimes advanced, that there can be no danger or difficulty in conferring the power by parol, when nothing remains to be done but the insertion of a name to render the instrument complete, does not meet the real issue. The question is not one of trust and confidence reposed, but of power conferred. In the numerous and diversified transactions of mankind, agencies of the gravest character are often created by parol. A partner may bind his copartner to any amount, for any matter within the scope of the partnership, by a note executed in the partnership name. The authority of an agent to sell the land of his principal may be conferred without writing, and the latter may thus be bound irrevocably for his entire estate. In the execution and indorsation of negotiable paper, powers may be and are often conferred by parol upon agents, involving liabilities to the amount of millions. The law recognizes such agencies as essential to the commerce of the world. Why may not the agent, in all these cases, impose the same liabilities by deed, in the name of his principal? If he may sell the land, fix the price, and agree upon all the terms of the contract, why may he not perform the more formal act of executing the conveyance? The answer is, the authority of the agent must be commensurate with the act he performs. The stream can never be higher than its source. If the act of the agent is the execution and delivery of a deed, his authority must be by deed. It does not matter how much of the instrument may have been written by the principal, if it is a mere nullity when it leaves his hands, and only becomes operative by act of the agent; upon every principle of sound legal reasoning the result must inevitably be the same. Whenever the agent undertakes to bind his principal by an act, his authority, in point of dignity, must be co-equal with the act. The question is not, therefore, whether it is expedient that a mere parol agent shall have power to fill the blanks with the name of an obligee; but whether it can be done and sustained without violating the well-established principles of law.

"A little reflection will show that these principles are not without substantial reasons to support them. At

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recent cases a strong disposition to disregard it as based upon what has now become a meaningless technicality.[1] To the extent

common law a sealed instrument imposed peculiar liabilities. It was not affected by any statutes of limitations. It operated as an estoppel. The obligee was not permitted to aver any want of consideration to avoid it; nor could he defeat an action at law therein by showing any failure of title, or breach of contract, or mistake, or fraud in the procurement of the bond. It is true that some of these obstacles have been removed by statute, and parties may now defend themselves in the common law courts upon grounds purely equitable; but both in Virginia and in England sealed instruments confer rights and impose obligations, which can never grow out of the execution of any mere parol contracts. It is reasonable and just, therefore, that a party setting up a deed, and seeking to enforce it, shall be prepared to show, if necessary, that it is the act of the grantor himself, or of some one empowered by an instrument of equal dignity with the deed."

[1] Thus it is held "that parol authority is sufficient to authorize the filling of a blank in a sealed instrument and that such authority may be given in any way by which it might be given in case of an unsealed instrument." State *v.* Young, 23 Minn. 551; Drury *v.* Foster, 2 Wall. (U. S.) 24. See also South Berwick *v.* Huntress, 53 Me. 89, 87 Am. Dec. 535; Wiley *v.* Moor, 17 S. & R. (Penn.) 438, 17 Am. Dec. 696; Commercial Bank *v.* Kortright, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317; Wooley *v.* Constant, 4 Johns. (N. Y.) 54, 4 Am. Dec. 246; Ex parte Decker, 6 Cow. (N. Y.) 60; Ex parte Kerwin, 8 Id. 118; Humphreys *v.* Guillow, 18 N. H. 385, 38 Am. Dec. 499.

In South Berwick *v.* Huntress, *supra*, KENT, J., says: "The examination of various cases in this country and in England shows that whilst in some of them the strict rule has been recognized, yet there are none that deny the proposition that in some cases blanks may be filled in sealed instruments by a third person who is not authorized by power under seal. The only distinction taken between parol contracts and those under seal is a purely technical one, viz., that an authority to make a deed or execute a sealed instrument for another must be of as high a character as the instrument, *i. e.*, be under seal. It is an unquestioned doctrine of the common law that a person not authorized by power under seal cannot execute a sealed instrument for another, or change a parol contract into a specialty. Now, if it is the absence of the seal on the authority that prevents the validity of the execution, it would seem that nothing could supply it, not even consent by parol. And yet, as before stated, all the cases seem to recognize the validity of such filling up, if done in the presence of the grantor or obligor. A distinction is taken between express consent inferred from the act being done in the presence of the grantor, and consent given before or after, or implied consent. Warring *v.* Williams, 8 Pick. 322; S. C., Id. 325; Hudson *v.* Revett, 5 Bing. 368, 15 Eng. Com. L. 467.

"In these cases it is assumed that the act is done by the assent and authority of the grantor because he is present when it is done by another. And yet, if the authority must be under seal, where is the evidence of it? The whole evidence is parol; the fact of the presence and assent is

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that statutory enactments have dispensed with the necessity of a seal or have robbed it of its former significance, the rule itself must be regarded as without foundation.

But although the rule might otherwise prevail, the principal may by his conduct estop himself from relying upon it. Thus where a grantor signs and seals a deed, leaving unfilled blanks, and gives it to an agent with authority to fill the blanks and deliver it, and the agent fills the blanks as authorized and delivers it to an innocent grantee for value and without knowledge, the grantor will be estopped from asserting as against such grantee, that the agent's authority was insufficient.[1]

§ 95. **Same Subject—How when Seal superfluous.** But if a seal was not essential to the validity of the instrument executed by the agent, its presence will ordinarily be treated as a mere redundancy, and if the agent's authority to execute it, or to fill blanks in it, if it were without seal, was ample, the seal will be disregarded, and the instrument will stand as a simple contract.[2]

proved by parol. The act derives its efficacy only from authority dependent on other sources than a seal. It is consent that gives it vitality, and that consent, it is proved by parol, was given by parol. Why may not consent be established by proof that the authority was directly given before the act was done, and when the paper was not before him? There is no clearer parol authority in one case than in the other. It is, after all, a mere question of assent. Now, consent may be implied as well as expressed, and when fairly and legally inferred, it is actual and effective consent as much so as when direct authority is shown by parol. It would seem to follow that the rule requiring authority under seal should either be strictly enforced in all cases of bonds or deeds, so that no interlineations or insertions can be legally made without such power, or the rule should be that such filling up may be made when authority or consent is clearly established by parol. And this on the ground that, if necessary, the act may be considered as having been done, in substance, by the grantor himself. When the instrument is a sealed instrument when signed by the party, the filling in of the blanks afterwards by another is not, strictly speaking, the execution of a sealed instrument. That has already been done by the party himself. The third party does not make it a specialty by his act. It was one before. The filling up merely perfects an imperfect sealed deed or bond."

[1] Swartz v. Ballou, 47 Iowa, 188, 29 Am. Rep. 470; Phelps v. Sullivan, 140 Mass. 36, 54 Am. Rep. 442; Field v. Stagg, 52 Mo. 534, 14 Am. Rep. 435; Van Etta v. Evenson, 28 Wis. 33, 9 Am. Rep. 486.

[2] Wagoner v. Watts, 44 N. J. L. 126; Long v. Hartwell, 5 Vroom, (N. J.) 116; Morrow v. Higgins, 29 Ala. 448; Dutton v. Warschauer, 21 Cal. 609; Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330; Thomas v. Joslin, 30 Minn. 388; Wood v. Auburn, &c.,

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§ 96. **How in Principal's Presence and by his Direction.** What, however, is done in the presence and by the express or implied direction of the principal, is, in law, his act, and an agent may therefore be authorized by parol to bind his principal even upon sealed instruments, if the instrument be executed in the presence of the principal and by his direction or tacit consent.[1] This rule extends also to the filling of blanks in deeds and other instruments when done under like circumstances.[2]

§ 97. **Appointment by Corporations.** It was the doctrine of the common law that a corporation could contract only by deed under its corporate seal, and that its appointment of an agent could be made only in the same manner. This doctrine, however, is now quite universally abandoned, both in England and in this country, and, in the absence of contrary provisions in its constating instruments or in the laws of the State, a corporation may confer authority upon an agent for the performance of any act within the scope of its corporate powers by unsealed writing or by parol; and such authority may also be implied, as in other cases, from the acquiescence of the corporation or from its adoption or recognition of the act.[3]

R. R. Co., 8 N. Y. 160; Adams v. Power, 52 Miss. 828.

[1] Eggleston v. Wagner, 46 Mich. 610; Just v. Wise, 42 Mich. 573; Johnson v. Van Velsor, 43 Mich. 208; Harshaw v. McKesson, 65 N. C. 688; Croy v. Busenbark, 72 Ind. 48; Meyer v. King, 29 La. Ann. 567; Handyside v. Cameron, 21 Ill. 588, 74 Am. Dec. 119; Gardner v. Gardner, 5 Cush. (Mass.) 483; 52 Am. Dec. 740; Ball v. Dunsterville, 4 T. R. 313; King v. Longnor, 1 Nev. & M. 576, S. C. 4 Barn. & Adol. 647; Wood v. Goodridge, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; Jansen v. McCahill, 22 Cal. 565; Mutual Ben. L. Ins. Co. v. Brown, 30 N. J. Eq. 202; Mackay v. Bloodgood, 9 Johns. (N. Y.) 285; McMurtry v. Brown, 6 Neb. 368.

[2] Hudson v. Revett, 5 Bing. 368; McMurtry v. Brown, 6 Neb. 368; Harshaw v. McKesson, 65 N. C. 688; Ball v. Dunsterville, 4 T. R. 313; Mackay v. Bloodgood, 9 Johns. (N. Y.) 285.

[3] Detroit v. Jackson, 1 Doug. (Mich.) 106; Jhons v. People, 25 Mich. 499; Taymouth v. Koehler, 35 Mich. 26; Bank of United States v. Dandridge, 12 Wheat. (U. S.) 64; Yarborough v. Bank of England, 16 East 6; Burrill v. Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; Ross v. City of Madison, 1 Ind. 281, 48 Am. Dec. 361; Rockford, &c. R. R. Co. v. Wilcox, 66 Ill. 417; Kiley v. Forsee, 57 Mo. 390; Smiley v. Mayor, 6 Heisk. (Tenn.) 604; Gowen Marble Co. v. Tarrant, 73 Ill. 608; Maine Stage Co. v. Longley, 14 Me. 444; Peterson v. Mayor, 17 N. Y. 449; Warren v. Ocean Ins. Co. 16 Me. 439, 33 Am. Dec. 674; Southgate v. Atlantic & Pacific R. R. Co. 61 Mo. 89.

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§ 98. **Same Subject—To execute Deed of corporate Realty.** And it is not necessary that the authority of the agent even to execute a deed of the corporate real estate should be under seal. The authority to convey may be conferred by a vote of the trustees or other managing officers, and authority to convey carries with it authority to execute suitable and proper instruments for that purpose, and to affix the corporate seal to an instrument requiring it.[1] And the same rule extends to municipal and *quasi* municipal corporations.[2]

II.

EVIDENCE OF APPOINTMENT.

§ 99. **Purpose of this Subdivision.** Some illustrations have already been given of the nature of the evidence that may be competent upon the question whether an agency exists or not, and many others will hereafter appear. But it is necessary to consider here a few of the general rules which apply to this branch of the subject.

§ 100. **Agent's Authority cannot be established by his own Statements or Admissions.** The authority of an agent, where the question of its existence is directly involved, can only be established by tracing it to its source in some word or act of the alleged principal. The agent certainly cannot confer authority upon himself. Evidence of his own statements or admissions, therefore, is not admissible against his principal for the purpose

[1] Burrill *v.* Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; Inhabitants of Nobleboro *v.* Clark, 68 Me. 87, 28 Am. Rep. 22; Marr *v.* Given, 23 Me. 55; Valentine *v.* Piper, 22 Pick. (Mass.) 85, 33 Am. Dec. 715; People *v.* Boring, 8 Cal. 407; Hemstreet *v.* Burdick, 90 Ill. 450.

[2] Thus it appeared by the records of the meeting that the inhabitants of a town at a legal town meeting chose H "agent to settle with the railroad company and sell the balance of the town landing if he thinks it will be for the interest of the town to do so, and to settle all other matters with the railroad company;" and it was held that by this vote, H had authority to sell the town landing and to execute a proper deed of conveyance thereof in behalf of the town. Inhabitants of Nobleboro *v.* Clark, 68 Me. 87, 28 Am. Rep. 23. See also Ross *v.* City of Madison, 1 Ind. 281, 48 Am. Dec. 361.

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of establishing,[1] enlarging[2] or renewing[3] his authority; nor can his authority be established by showing that he acted as agent or that he claimed to have the powers which he assumed to exercise.[4]

So where his authority is in writing he cannot extend its scope by his own declarations.[5] His acts and statements cannot be made use of against the principal until the fact of the agency has been shown by other evidence.[6]

His statements and admissions would, however, in any proper case be admissible against himself.[7] So the statements and dealings of the principal with third persons in recognition of the alleged agency are admissible against the principal.[8]

§ 101. **Agent's Authority cannot be proved by general Reputation.** The authority of a private agent to represent his principal cannot be established by proof that he was generally reputed to be so authorized.[9]

[1] Hatch v. Squires, 11 Mich. 185; Kornemann v. Monaghan, 24 Mich. 36; Reynolds v. Continental Ins. Co. 36 Mich. 131; Harker v. Dement, 9 Gill (Md.) 7, 52 Am. Dec. 670; Maxey v. Heckethorn, 44 Ill. 438; Rawson v. Curtiss, 19 Ill. 474; Chicago, &c. R. R. Co. v. Fox, 41 Ill. 106; Carter v. Burnham, 31 Ark. 212; Howe Machine Co. v. Clark, 15 Kan. 492; Dawson v. Landreaux, 29 La. Ann. 363; Peck v. Ritchey, 66 Mo. 114; Stringham v. St. Nicholas Ins. Co. 4 Abb. App. Dec. 315: Stollenwerck v. Thacher, 115 Mass. 224; Grover & Baker S. M. Co. v. Polhemus, 34 Mich. 247; French v. Wade, 35 Kan. 391; Jaeger v. Kelley, 52 N. Y. 274; Mussey v. Beecher, 3 Cush. (Mass.) 517; Brigham v. Peters, 1 Gray (Mass.), 145; Wood Mow. & Reap. Machine Co, v. Crow, 70 Iowa, 340; Nelson v. Tumlin, 74 Ga. 171.

[2] Stollenwerck v. Thacher, 115 Mass. 224; Mussey v. Beecher, 3 Cush. (Mass.) 511.

[3] Van Dusen v. Mining Co. 36 Cal. 571, 95 Am. Dec. 209.

[4] James v. Stookey, 1 Wash. (U. S C. C.) 330; Harker v. Dement, *supra*; Grover & Baker S. M. Co. v. Polhemus, *supra*; Bacon v. Johnson, 56 Mich. 182; North v. Metz, 57 Mich. 612; Doonan v. Mitchell, 26 Ga. 472; McDougald v. Dawson, 30 Ala. 553; Coburn v. Paine, 36 Me. 105.

[5] Mapp v. Phillips, 32 Ga. 72.

[6] Hatch v. Squires, 11 Mich. 185; McClung v. Spotswood, 19 Ala. 165; South & North Ala. R. R. Co. v. Henlein, 52 Ala. 606. Peck v. Ritchey, 66 Mo. 114; Francis v. Edwards, 77 N. C. 371; Galbreath v. Cole, 61 Ala. 139.

But if after the evidence has been admitted, the agency is otherwise proved, the error will be cured. Rowell v. Klein, 44 Ind. 291; McCormick v. Roberts, 36 Kan. 552; 13 Pac. Rep. 827.

[7] Like other declarations or admissions against interest. Greenleaf Ev., Chaps. X. XI.

[8] Haughton v. Maurer, 55 Mich. 323.

[9] Blevins v. Pope, 7 Ala. 871;

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§ 102. **Agent must be called as a Witness.** If it is deemed essential to prove the authority by the agent himself, he must be called as a witness; his testimony as to the nature and extent of his authority, where it rests in parol, being as competent as that of any other witness.[1] The rule upon this subject has been stated by a learned judge as follows: "It is competent to prove a parol agency and its nature and scope by the testimony of the person who claims to be the agent. It is competent to prove a parol authority of any person to act for another, and generally, to prove any parol authority of any kind by the testimony of the person who claims to possess such authority. But it is not competent to prove the supposed authority of an agent for the purpose of binding his principal by proving what the supposed agent has said at some previous time. Nor is it competent to prove a supposed authority of any kind, as against the person from whom such authority is claimed to have been received, by proving the previous statements of the person who, it is claimed, had attained such authority."[2]

§ 103. **Written Authority must be produced—When.** Where the authority is conferred by a power of attorney or other written instrument, and where from the nature of the case the authority must be in writing, the writing is, of course, the best evidence of the fact, nature and extent of the agency, and where these questions are directly involved, the writing, in accordance with familiar rules, must be produced or its absence accounted for.[3]

Collateral Inquiry. But where the fact of the agency is only collaterally or incidentally involved, it may be proved by the acts, declarations or conduct of the parties as in other cases, although it was conferred by written instrument.[4]

Graves v. Horton, — Minn. —, 35 N. W. Rep. 568.

[1] Thayer v. Meeker, 86 Ill. 470; French v. Wade, 35 Kan. 391; Piercy v. Hendrick, 2 W. Va. 458, 98 Am. Dec. 774; Gould v. Norfolk Lead Co. 9 Cush. (Mass.) 338, 57 Am. Dec. 50. The principal may show by the testimony of the agent that the alleged authority had not been conferred upon him, Dowell v. Williams, 33 Kans. 319.

[2] VALENTINE J. in Howe Machine Co. v. Clark, 15 Kan. 492.

[3] Neal v. Patten, 40 Ga. 363; Columbia Bridge Co. v. Geisse, 38 N. J. L. 39; Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611.

[4] Columbia Bridge Co. v. Geisse, *supra*.

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§ 104. **Construction of Writing for Court.** Whether a certain writing creates an agency or not, and if so, what is the nature and extent of the power conferred, the writing being produced, are questions of law for the decision of the court.[1]

§ 105. **Effect of undisputed Facts to be determined by Court.** And so where the facts are undisputed, the court must determine whether they create an agency, and if so with what powers and limitations, and this is equally true whether it is sought to establish the agency by previous authorization or by subsequent ratification.[2]

§ 106. **In other Cases Question is for the Jury.** Where, however, the authority was not conferred by written instrument and the facts are in dispute, it is for the jury to determine under proper instructions from the court, not only whether an agency exists, but, if so, what is its nature and extent.[3]

It is impossible to lay down any inflexible rule by which it can be determined what evidence shall be sufficient to establish an agency in any given case, but it may be said in general terms that whatever evidence has a tendency to prove the agency is admissible,[4] even though it be not full and satisfactory,[5] as it is the province of the jury to pass upon it. So if evidence has first been introduced tending to prove the agency or to make out a prima facie case thereof, the admissions and declarations of the alleged agent, if otherwise competent, may then be shown, and the whole case be passed upon by the jury.[6]

§ 107. **Authority by Ratification.** The authority of an agent in a given case may also be established by proof that his performance of the act in question has subsequently been ratified and approved by the person alleged to be his principal. Some-

[1] Savings Fund Society v. Savings Bank, 36 Penn. St. 498, 78 Am. Dec. 390; Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611.

[2] Gulick v. Grover, 33 N. J. L. 463, 97 Am. Dec. 728; Savings Fund Society v. Savings Bank, *supra*.

[3] Savings Fund Society v. Savings Bank, *supra;* South & North Ala. R. R. Co. v. Henlein, 52 Ala. 606; Roberts v. Pepple, 55 Mich. 367.

[4] South & North Ala. R. R. Co. v. Henlein, *supra*.

[5] Morrison v. Whiteside, 17 Md. 452, 79 Am. Dec. 661.

[6] National Mechanics' Bank v. National Bank, 36 Md. 5; York Co. Bank v. Stein, 24 Md. 447; Henderson v. Mayhew, 2 Gill (Md.) 393, 41 Am. Dec. 434; Central Penn. Tel. Co. v. Thompson, 112 Penn. St. 118.

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thing of the scope and application of this mode of authentication has been incidentally developed in the preceding pages, but its full treatment will be reserved for the following chapter.

§ 108. **Acceptance of Agency by Agent.** It has been seen that, as a general rule, one cannot become the principal in this relation against his will;[1] and the same general rule applies to the agent. To constitute one an agent there must be consent on the part of the agent, either expressed by words or inferable from something done.[2] This consent, of course, may be inferred from the acts of the agent. Thus where he is found performing the agency, his acceptance of it will be presumed.

[1] *Ante*, § 108.

[2] First National Bank v. Free, 67 Iowa, 11.

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CHAPTER V.

OF RATIFICATION.

§ 109. Purpose of Chapter.

I. What is Meant by Ratification.

110. What Ratification is.

II. What Acts may be Ratified.

111. In general.
112. The general Rule.
113. Torts may be ratified.
114. Void Acts cannot be ratified—Voidable Acts may be.
115. Illegal Acts cannot be ratified.
116. Ratification of Forgery.

III. Who may Ratify.

117. General Rule.
118. Corporations may ratify.
119. Partners may ratify.
120. Infant cannot ratify.
121. When Agent may ratify.
122. Ratification by incompetent Person.
123. Ratification by Guardian or Executor.

IV. Conditions of Ratification.

124. 1. Principal must have been identified.
125. 2. Principal must have been in Existence.
126. 3. Principal must have present Ability.
127. 4. Act must have been done as Agent.
128. 5. Knowledge of material Facts.
129. Same Subject—General Rule.
130. 6. No Ratification of Part of Act.
§ 131. 7. Rights of other Party must be prejudiced.
132. Burden of Proof.
133. Relief of Principal when Facts not fully known.

V. What amounts to a Ratification.

134. Importance of Question.
135. Written — unwritten ; — Express—implied.

a. Express Ratification.

136. General Rule.
137. Deed at Common Law ratified only by Instrument under Seal.
138. Same Subject—Rule relaxed in Partnership Cases.
139. Same Subject—Massachusetts Rule.
140. Same Subject—Modern Rule more liberal.
141. Unnecessary Seal may be disregarded.
142. By Authority subsequently conferred.
143. By Answer in Chancery.
144. Contract for sale or leasing of Land ratified by Parol.
145. "Lawfully authorized" under Statute of Frauds.

b. Implied Ratification.

146. In general.
147. Variety of Methods.
148. By accepting Benefits.
149. Same Subject—Instances.
150. Same Subject—Other Instances.

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§ 151. By bringing Suit based on Agent's Act.
152. Mere Delay in suing, no Ratification.
153. Ratification by Acquiescence —Silence.
154. Same Subject—Election.
155. Same Subject—Must elect within a reasonable Time.
156. Same Subject—Sleeping on Rights.
157. Same Subject—Rules.
158. Same Rule applies to private Corporations.
159. And to Municipal and Quasi Municipal Corporations.
160. How when assumed Agent is a mere Stranger.
161. Same Subject—True Rule.
162. Silence does not ratify if Stranger acts in his own Name.
163. Information by Letter.
164. Ratification by Acquiescence —Illustrations.
165. Rule applies only to Principals.

VI. The Results of Ratification.

166. What for this Subdivision.

1. In General.

167. Equivalent to precedent Authority.
§ 168. Cannot affect intervening Rights.
169. Ratification irrevocable.

2. As between Principal and Agent.

170. In general.
171. The general Rule.
172. Agent's Motives unimportant.
173. Efforts to avoid Loss, no Ratification.
174. Ratification must be *in toto*.
175. Ratification of Appointment of Subagent.
176. Ratification of Torts does not discharge Agent's Liability to third Persons.
177. Acts of Ratification liberally construed.

3. As between Principal and the other Party.

178. a. Other Party against Principal.
179. b. Principal against the other Party.

4. As between Agent and the other Party.

180. In general.
181. Ratification releases Agent in Contract.
182. Otherwise in Tort.

§ 109. **Purpose of Chapter.** It is the purpose of this chapter to discuss what is sometimes called the Doctrine of Ratification. There has been seen in the preceding chapters something of its place and scope, but it will be here considered more in detail. For convenience of treatment the matter may be arranged under the following heads:

I. What is meant by ratification; II. What acts may be ratified; III. Who may ratify; IV. Conditions of ratification; V. What amounts to ratification; and VI. The results of ratification.

I.

WHAT IS MEANT BY RATIFICATION.

§ 110. **What Ratification is.** What is assumed to be done for, or on behalf of another, without his authority, is not bind-

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ing upon him. It may be that the person who so assumes to represent the other is, in reality, the agent of the latter, but has exceeded the limits of his authority; or he may be a mere stranger. In either case, however, his assumption of an authority which he does not in fact possess, confers no rights against the alleged principal.

But when the facts connected with the doing of the act are brought to the knowledge of him on whose behalf it was so done, he may decide to sanction and confirm it and adopt it as his own; or without expressly deciding about it at all, he may so conduct himself that for the protection of innocent third persons or of the assumed agent himself, the law will presume that he did so sanction and confirm such act, and adopt it as his own.

It is this express or implied act in giving force and effect to what was before unauthorized and of no effect, that is here meant by ratification.

It will be kept in mind that we are not now dealing with the question of the liability of the person who has so assumed to act without authority. That is reserved for subsequent treatment.[1]

II.

WHAT ACTS MAY BE RATIFIED.

§ 111. **In general.** The power to ratify an act done for and in behalf of another, necessarily presupposes in that other the power to do the act himself, both in the first instance[2] and at the time of ratification;[3] it also presupposes the power in that other to have authorized the doing of the act in the first instance and also to authorize its doing at the time of ratification.[4] Hence—

§ 112. **The general Rule.** It is, therefore, the general rule that one may ratify the previous unauthorized doing by another in his behalf, of any act which he might then and could still lawfully do himself, and which he might then and could still lawfully delegate to such other to be done.[5]

[1] See *post*, §§ 540–557.

[2] Davis *v.* Lane, 10 N. H. 156.

[3] Cook *v.* Tullis, 18 Wall. (U. S.) 332.

[4] *Post*, § 126.

[5] Zottman *v.* San Francisco, 20 Cal. 96, 81 Am. Dec. 96; McCracken *v.* San Francisco, 16 Cal. 619; Brady *v.* Mayor, 16 How. (N. Y.) Pr. 432; O'Conner *v.* Arnold, 53 Ind. 205; Armitage *v.* Widoe, 36 Mich. 124; Supervisors *v.* Arrighi, 54 Miss. 668; Taymouth *v.* Koehler, 35 Mich. 22; Clarke *v.* Lyon Co. 8 Nev. 188.

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§ 113. **Torts may be ratified.** It is immaterial whether the unauthorized act arises from a contract or is founded upon a tort. Whoever, with knowledge of the facts, adopts as his own or knowingly appropriates the benefits of, a wrongful act which another has, without authority, assumed to do in his behalf, will be deemed to have assumed the responsibility of the act.[1]

§ 114. **Void Acts cannot be ratified—Voidable Acts may be.** An act which was absolutely void at the time it was done cannot be ratified. If the principal himself could not lawfully have done the act, or if it could not lawfully have been done by anyone, no subsequent ratification or confirmation can give it force or effect.[2] If, however, the act were voidable merely it can, of course, be rendered valid.

§ 115. **Illegal Acts cannot be ratified.** It is but a re-statement of the same rules to say that an act done in violation of law or in contravention of public policy, the performance of which, as has been seen, could not lawfully be delegated to an agent,[3] cannot be lawfully ratified.[4]

§ 116. **Ratification of Forgery.** Whether a forgery is capable of ratification is a question upon which there is a conflict of opinion, but it is believed that this arises rather from a failure to discriminate between the different phases of the question than from any dispute over the principles involved. In every forgery there are two parties interested, the State in its efforts to detect and punish it as a crime; and the person whose responsibility has been pledged without his authority.

So far as the right of the State to pursue and punish the forger as a criminal is involved, it is certain that a subsequent ratification by the individual sought to be charged, will be un-

[1] Wilson v. Tumman, 6 Man. & G. 242; Morehouse v. Northrop, 33 Conn. 380, 89 Am. Dec. 211; Griswold v. Haven, 25 N. Y. 595, 82 Am. Dec. 380; Lee v. West, 47 Ga. 311; National Life Ins. Co. v. Minch, 53 N. Y. 144; Lane v. Black, 21 W. Va. 617; Tucker v. Jerris, 75 Me. 184.

[2] Armitage v. Widoe, 36 Mich. 124; Chapman v. Lee, 47 Ala. 143; Day v. McAllister, 15 Gray (Mass.) 433; Workman v. Wright, 33 Ohio St. 405; 31 Am. Rep. 546; Decuir v. Lejeune, 15 La. Ann. 569; Harrison v. McHenry, 9 Ga. 164, 52 Am. Dec. 435; Bird v. Brown, 4 Ex. 786.

[3] See *ante*, Chap. II.

[4] State v. Matthis, 1 Hill (S. C.) 37; Turner v. Phœnix Ins. Co. 55 Mich. 237; Harrison v. McHenry, *supra*.

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availing.[1] Any undertaking to suppress the crime would, as has been seen, be contrary to public policy and void.[2]

But viewed in its other aspect as a mere unauthorized writing, no satisfactory reason is perceived why it may not be ratified like any other unauthorized act.[3] No principle of public policy can

[1] In McKenzie *v.* British Linen Co. 6 App. Cas. 82, 34 Eng. Rep. 301, Lord BLACKBURN says: "I wish to guard against being supposed to say that if a document with an unauthorized signature was uttered under such circumstances of intent to defraud that it amounted to the crime of forgery, it is in the power of the person whose name was forged to ratify it so as to make a defense for the forger against a criminal charge. I do not think he could. But if the person whose name was without authority used chooses to ratify the act, even though known to be a crime, he makes himself civilly responsible just as if he had originally authorized it. It is quite immaterial whether this ratification was made to the person who seeks to avail himself of it or to another."

[2] See *ante*, Chap. II.

[3] In Greenfield Bank *v.* Crafts, 4 Allen (Mass.) 447, the court says: "The only question upon this part of the case is, whether a signature made by an unauthorized person under such circumstances as show that the party placing the name upon the note was thereby committing the crime of forgery, can be adopted and ratified by any acts and admissions of the party whose name appears on the note, however full and intentionally made and designed to signify an adoption of the signature. The defendant insists that it cannot by such evidence as would, in other cases, warrant the jury in finding an adoption; and that nothing short of an estoppel, having the element of actual damages from delay or postponement, occasioned by the acts of the person whose name is borne upon the note, misleading the holder of it, will have this effect. As to the person himself whose name is signed, it is difficult to perceive any sound reason for the proposed distinction, as to the effects of ratifying an unauthorized act, in the two supposed." (The other case supposed was that of an agent honestly exceeding his authority.) "In the first case the actor has no authority any more than in the last. The contract receives its whole validity from the ratification. It may be ratified where there was no pretense of agency. In the other case, the individual who presents the note thus signed, passes the note as a note signed by the promisor, either by his own proper hand or by some one by his authority. It was clearly competent, if duly authorized, thus to sign the note. It is, as it seems to us, equally competent for the party, he knowing all the circumstances as to the signature and intending to adopt the note, to ratify the same, and thus confirm what was originally an unauthorized and illegal act. We are supposing the case of a party acting with full knowledge of the manner in which the note was signed, and the want of authority on the part of the actor to sign his name, but who understandingly and unequivocally adopts the signature, and assumes the note as his own. It is difficult to perceive why such adoption should not bind the party whose name is placed on the note as promisor, as

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be contravened unless the ratification is made upon the condition or for the purpose of preventing the prosecution of the offender. And even in cases where the intention is to prevent the act from being treated as a forgery, as between the parties, it is not easy to see how the public interests can be endangered where the result is that the holder of the paper is protected against loss and the delinquent agent is saved from exposure and ruin.

But whatever may be regarded as the true rule in the abstract, it is certain that the principal may, upon the discovery of the forgery, so conduct himself, as by permitting the paper to be taken upon the strength of his assertion of its genuineness; or by inducing the holder to change his position or intermit some remedial proceeding upon an assurance of its validity or a promise of protection; or, generally, by remaining silent as to its invalidity when in equity and good conscience he ought to have spoken, as to estop himself from asserting that it is not binding upon him.[1]

effectually as if he had adopted the note when executed by one professing to be authorized, and to act as an agent, as indicated by the form of the signature, but who in fact had no authority. It is however urged that public policy forbids sanctioning the ratification of a forged note, as it may have a tendency to stifle a prosecution for the criminal offense. It would seem, however, that this must stand upon the general principles applicable to other contracts, and is only to be defeated where the agreement was upon the understanding that if the signature was adopted, the guilty party was not to be prosecuted for the criminal offense."

And see generally to the same effect: Hefner *v.* Vandolah, 62 Ill. 483, 14 Am. Rep. 106; Commercial Bank *v.* Warren, 15 N. Y. 577; Howard *v.* Duncan, 3 Lans. (N. Y.) 175; Thorne *v.* Bell, Lalor's Sup. (N. Y.) 430; Livings *v.* Wiler, 32 Ill. 387; Cravens *v.* Gillilan, 63 Mo. 28; First National Bank *v.* Gay, 63 Mo. 33; Harper *v.* Devene, 10 La. Ann. 724; Wellington *v.* Jackson, 121 Mass. 157; Forsythe *v.* Bonta, 5 Bush (Ky.) 547,

But, *contra*, except where estoppel is involved or there is a new consideration: — McHugh *v.* Schuylkill County, 67 Penn. St. 391, 5 Am. Rep. 445; Shisler *v.* Vandike, 92 Penn. St. 447, 37 Am. Rep. 702; Workman *v.* Wright, 33 Ohio St. 405, 31 Am. Rep. 546; Brook *v.* Hook, L. R. 6 Exch. 89; Corser *v.* Paul, 41 N. H. 24; Woodruff *v.* Munroe, 33 Md. 146; Williams *v.* Bailey, L. R., 1 H. L. 200; Henry *v.* Heeb, 114 Ind. 275, 5 Am. St. Rep. 613.

[1] That the principal may be estopped from asserting the forgery:— M'Kenzie *v.* British Linen Co., 6 App. Cas. 82, 34 Eng. Rep. 301; Casco Bank *v.* Keene, 53 Me. 103; Union Bank *v.* Middlebrook, 33 Conn. 95; Forsyth *v.* Day, 46 Me. 176; Crout *v.* DeWolf, 1 R. I. 393; Rudd *v.* Matthews, 79 Ky. 479, 42 Am. Rep. 231; Cohen *v.* Teller, 12 Norris (Penn.) 123. No ratification where statements were equivocal:—Smith *v.* Tramel, 68 Iowa, 488.

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III.

WHO MAY RATIFY.

§ 117. The subdivisions of this chapter are so intimately connected that much which is applicable to one is equally true of another. Thus carrying out the line of the last subdivision it may be said to be the

General Rule, that whoever was capable of entering into a contract which another, unauthorized, has assumed to make for him as his agent, and who is still capable of entering into it, is capable of ratifying that contract, thereby rendering it good from the beginning and the same as though he had originally authorized or made it.[1]

§ 118. **Corporations may ratify.** And this rule is as true in the case of a corporation as of an individual. An act not within the corporate powers of the corporation cannot be rendered operative by ratification,[2] but if the act were one which the corporation might lawfully have done or authorized in the first instance, its unauthorized performance, in its behalf, may be ratified in the same manner and with the like effect as by an individual.[3]

So as in the case of an individual, it is not necessary that there should be a direct proceeding, with an express intention to ratify. It may be done indirectly, and by acts of recognition or acquiescence, or by acts inconsistent with repudiation or disapproval.[4]

[1] Wilson v. Dame, 58 N. H. 392; Williams v. Butler, 35 Ill. 544; Indianapolis, &c., R. R Co. v. Morris, 67 Ill. 295; Pollock v. Cohen, 32 Ohio St. 514; Sentell v. Kennedy, 29 La. Ann, 679; McCracken v. San Francisco, 16 Cal. 591.

[2] Taymouth v. Koehler, 35 Mich. 22; Highway Commissioners v. Van Dusan, 40 Mich. 439; Supervisor v. Arrighi, 54 Miss. 668; Smith v. Newburgh, 77 N. Y. 130; Green v. Cape May, 41 N. J. L. 45; Hague v. Philadelphia, 48 Penn. St. 528; Bangor Boom Co. v. Whiting, 29 Me. 123.

[3] Kelsey v. National Bank, 69 Penn. St. 426; Fleckner v. U. S. Bank, 8 Wheat. (U. S.) 363; Salem Bank v. Gloucester Bank, 17 Mass. 1, 9 Am. Dec. 111; Bulkley v. Derby Fishing Co., 2 Conn. 252, 7 Am. Dec. 271; Peterson v. Mayor, 17 N. Y. 449; Baker v. Cotter, 45 Me. 236; Despatch Line v. Bellamy Mnf'g Co., 12 N. H 205, 37 Am. Dec. 203; Whitewell v. Warner, 20 Vt. 425; City of Detroit v. Jackson, 1 Doug. (Mich.) 106; Church v. Sterling, 16 Conn. 388; Planters' Bank v. Sharp, 4 Smedes & M. (Miss.) 75, 43 Am. Dec. 470.

[4] Scott v. Methodist Church, 50 Mich. 528; Taymouth v. Koehler, 35 Mich. 22; Sherman v. Fitch, 98 Mass. 59; Lyndeborough Glass Co. v. Massachusetts Glass Co., 111 Mass. 315; Brown v. Winnisimmet Co., 11 Allen

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§ 119. **Partners may ratify.** Partners, also, are undoubtedly competent to ratify what they might properly have authorized, and within the same limits, one partner may ratify for the firm, and the ratification of the whole partnership may be implied from acquiescence after knowledge brought home to one, under such circumstances as to make the knowledge of one the knowledge of all.[1]

§ 120. **Infant cannot ratify.** As has been seen,[2] it is held that, as an infant cannot appoint an agent he cannot ratify the act of one who has, unauthorized, assumed to act for him.

§ 121. **When Agent may ratify.** An agent cannot ratify his own unauthorized act;[3] nor can one of two joint agents ratify the act of his coagent;[4] but where the act, which when done by one agent was unauthorized, is within the general power of another agent of the same principal, the doing of the act by the first agent may be ratified by the second.[5] This doctrine is frequently applied to the ratification of the acts of subordinate agents by the superior agents of corporations.[6]

§ 122. **Ratification by incompetent Person.** A contract made

(Mass.) 326; Arlington *v.* Peirce, 123 Mass. 270; Hoyt *v.* Thompson, 19 N. Y. 307; Scott *v.* Middletown, &c., R. R. Co. 86 N. Y. 200; Gold Mining Co. *v.* National Bank, 96 U. S. 640; Law *v.* Cross, 1 Black (U. S.) 533.

[1] Forbes *v.* Hagman, 75 Va. 168. See Chouteau *v.* Goddin, 39 Mo. 229, 90 Am. Dec. 462; Baldwin *v.* Leonard, 39 Vt. 260, 94 Am. Dec. 324.

[2] *Ante*, § 52.

[3] Trudo *v.* Anderson, 10 Mich. 357, 81 Am. Dec. 795; Hotchin *v.* Kent, 8 Mich. 526.

[4] Penn *v.* Evans, 28 La. Ann. 576.

[5] Mound City Mutual L. Ins. Co. *v.* Huth, 49 Ala. 530; Whitehead *v.* Wells, 29 Ark. 99; Dorsey *v.* Abrams, 85 Penn. St. 299; Palmer *v.* Cheney, 35 Iowa, 281.

[6] Thus see Cairo & St. L. R. R. Co. *v.* Mahoney, 82 Ill. 73, 25 Am. Rep. 299; Toledo, Wab. & West. R. R. Co. *v.* Rodrigues, 47 Ill. 188; Toledo, &c., R. R. Co. *v.* Prince, 50 Ill. 26; Ballston Spa Bank *v.* Marine Bank, 16 Wis. 129; Anglo-Californian Bank *v.* Mahoney Mining Co., 5 Sawy. (U. S. C. C.) 255, s. c. 104 U. S. 192; Sherman *v.* Fitch, 98 Mass. 59; Walworth Co. Bank *v.* Farmers' L. & T. Co., 16 Wis. 629; Hoyt *v.* Thompson, 19 N. Y. 207; Darst *v.* Gale, 83 Ill. 136; First National Bank *v.* Kimberlands, 16 W. Va. 555; Burrill *v.* Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; Wood *v.* Whelen, 93 Ill. 155; Chouteau *v.* Allen, 70 Mo. 290; Reichwald *v.* Commercial Hotel Co., 106 Ill. 439; Lyndeborough Glass Co. *v.* Mass. Glass Co., 111 Mass. 315; Olcott *v.* Tioga R. R. Co., 27 N. Y. 546; Union Mutual Life Ins. Co. *v.* Masten, 3 Fed. Rep. 881.

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by or for a party during a period of incompetence may be ratified by him after his competency is restored.[1]

§ 123. **Ratification by Guardian or Executor.** And this may be done, as has already been stated, by the incompetent's guardian or committee, or by his personal representatives after the incompetent's death.[2]

IV.

CONDITIONS OF RATIFICATION.

§ 124. **1. Principal must have been identified.** The act to be ratified must have been done by one claiming to represent the person ratifying or persons of his description.[3] It is not necessary that the intended principal be known to the agent at the time, but it is necessary that the person for whom the agent professes to act must be a person who is then capable of being ascertained. Neither is it necessary that he should have been named, but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound.[4]

§ 125. **2. Principal must have been in Existence.** It follows necessarily from the doctrine of the preceding section that the principal must also have been in existence at the time the act to be ratified was done. A principal, *e. g.*, a corporation, subsequently coming into existence may become liable upon contracts assumed to have been made in its behalf before its organization by persons who undertook to bind it in advance, as where the corporation when organized, with knowledge of the facts, appropriates and retains the benefits of the contracts so made on its account;[5] but this liability is rather that of a new implied contract than the ratification of one which was made before the corporation had acquired a legal existence.[6]

[1] *Ante*, § 50.

[2] *Ante*, § 50.

[3] Foster v. Bates, 12 M. & W. 226.

[4] Watson v. Swann, 11 C. B. (N. S.) 771; 103 Eng. Com. Law Rep. 770; Kelner v. Baxter, L. R. 2 C. P. 174.

[5] Rockford, &c., R. R. Co. v. Sage, 65 Ill. 328, 16 Am. Rep. 587; Bell's Gap R. R. Co. v. Christy, 79 Penn. St. 54, 21 Am. Rep. 39; Paxton Cattle Co. v. First National Bank, 21 Neb. 621, 59 Am. Rep. 852; Western Screw Co. v. Cousley, 73 Ill. 531; New York, &c., R. R. Co. v. Ketchum, 27 Conn. 170.

[6] Morawetz on Corporations, § 548. See also *ante*, § 75.

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§ 126. 3. **Principal must have present Ability.** As has been seen, the power to ratify presupposes a present ability in the principal to do the act himself or to authorize it to be done.[1] If, therefore, for any reason, the principal has become, since the doing of the act to be ratified, incapable of doing the act himself and of authorizing it to be done, he is incapable of ratifying it.[2]

And so if third persons acquire rights after the act is done and before it has received the sanction of the principal, the ratification cannot operate retrospectively so as to overreach and defeat those rights.[3]

§ 127. 4. **Act must have been done as Agent.** The act ratified must also have been done by the assumed agent as agent and in behalf of the principal. If the act was done by him as principal and on his own account, it cannot thus be ratified.[4]

§ 128. 5. **Knowledge of material Facts.** It will be seen hereafter that the ratification of an unauthorized act may be express or implied. It may be the intentional act of the principal, and it may also be, in a measure, an unintentional act. Upon learning of the unauthorized act of his agent, the principal, deeming the act to be to his advantage, may expressly ratify it and avail himself of its benefits; or, deeming it to be to his detriment, he may expressly repudiate it; or, as is more often the case, he may take no decisive step in either direction, but tacitly leave his intention to be determined by his subsequent acts. He is under no obligation to expressly affirm,[5] but if he decides to do so, he may

[1] Zottman *v.* San Francisco, 20 Cal. 96, 81 Am. Dec. 96. "Ratification can only be made when the principal possesses at the time the power to do the act ratified. He must be able at the time to make the contract to which, by his ratification he gives validity." FIELD, J., in McCracken *v.* San Francisco, 16 Cal. 591. See also Grogan *v.* San Francisco, 18 Cal. 590; Marsh *v.* Fulton County, 10 Wall. (U. S.) 676; Davis *v.* Lane, 10 N. H. 158.

[2] Cook *v.* Tullis, 18 Wall. (U. S.) 332.

[3] Wood *v.* McCain, 7 Ala. 800, 42 Am. Dec. 612; Stoddart's Case, 4 Ct. of Cl. 511. See also *post*, § 168.

[4] Collins *v.* Suau, 7 Robt. (N. Y.) 623; Hamlin *v.* Sears, 82 N. Y. 327; Pittsburg, &c., R. R. Co. *v.* Gazzam, 32 Penn. St. 340; Collins *v.* Waggoner, Breese (Ill.) 26; Beveridge *v.* Rawson, 51 Ill. 504; Commercial Bank *v.* Jones, 18 Tex. 811; Grund *v.* Van Vleck, 69 Ill. 479; Harrison *v.* Mitchell, 13 La. Ann. 260; Roby *v.* Cossitt, 78 Ill. 638; Allred *v.* Bray, 41 Mo. 484; Vanderbilt *v.* Turnpike Co. 2 N. Y. 479; Brainerd *v.* Dunning, 30 N. Y. 211.

[5] Combs *v.* Scott, 12 Allen (Mass.) 493.

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fully inform himself of all the material facts, or he may intentionally assume the risk without inquiry,[1] or he may deliberately ratify upon such knowledge as he possesses without caring for more.[2] If he determines expressly to repudiate the contract he must either ascertain the facts or incur the risk of having the contract subsequently shown to be within the agent's powers and enforced against him, notwithstanding his attempted repudiation.

But by far the most numerous and troublesome class of cases is that where it is attempted by third persons to hold the principal liable, upon the basis of an implied affirmance. The principal may in fact have had a positive intention not to ratify the contract, and yet he may have so conducted himself with reference to third parties that he will be presumed to have ratified it. What shall amount to a ratification and what shall be deemed to be sufficient evidence thereof, are questions reserved for consideration hereafter.

§ 129. **Same Subject—General Rule.** It may therefore be stated as the general rule, that, except in those cases where the principal intentionally assumes the responsibility without inquiry, or deliberately ratifies, having all the knowledge in respect to the act which he cares to have,[3] any ratification of an unauthorized contract, in order to be made effectual and obligatory upon the alleged principal, must be shown to have been made by him with a full knowledge of all the material facts connected with the transaction to which it relates; and especially must it appear that the existence of the contract and its nature and consideration were known to him.[4] It is not necessary, however, that he should also

[1] Lewis v. Read, 13 M. & W. 834.

[2] Kelley v. Newburyport Horse R. R. Co., 141 Mass. 496.

[3] Lewis v. Read, 13 M. & W. 834; Kelley v. Newburyport Horse R. R. Co., 141 Mass. 496.

[4] Dickinson v. Conway, 12 Allen (Mass.) 491; Combs v. Scott, Id. 493; Owings v. Hull, 9 Pet. (U. S.) 607; Hardeman v. Ford, 12 Ga. 205; Mapp v. Phillips, 32 Ga. 72; Mathews v. Hamilton, 23 Ill. 470; Tidrick v. Rice, 13 Iowa, 214; Dodge v. McDonnell, 14 Wis. 553; Fletcher v. Dysart, 9 B. Monr. (Ky.) 413; Woodbury v. Larned, 5 Minn. 339; Humphrey v. Havens, 12 Id. 298; Seymour v. Wyckoff, 10 N. Y. 213; Brass v. Worth, 40 Barb. (N. Y.) 648; Roach v. Coe, 1 E. D. Smith (N. Y.) 175; Pittsburg, &c., R. R. Co. v. Gozzam, 32 Penn. St. 340; Dupont v. Wertheman, 10 Cal. 354; Billings v. Morrow, 7 Cal. 171, 68 Am. Dec. 235; Ward v. Williams, 26 Ill. 447, 79 Am. Dec. 385; Manning v. Gasharie, 27 Ind. 399; Ætna Ins. Co. v. N. W. Iron Co., 21 Wis. 458; McCants v. Bee, 1

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be informed of the legal effect of the facts. If he knows the facts, it is enough. But if the material facts were suppressed, or were unknown to him, except as the result of his intentional and deliberate act, the ratification will be invalid because founded upon mistake or fraud.[1] And the same rule applies to the settlement of the liability of the agent to his principal for his unauthorized act.[2]

§ 130. **6. No Ratification of Part of Act.** It is a fundamental

McCord Ch. 383, 16 Am. Dec. 610; White v. Davidson, 8 Md. 169, 63 Am. Dec. 699; Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96; Pennsylvania Steam Nav. Co. v. Dandridge, 8 Gill & John. (Md.) 248, 29 Am. Dec. 543; Bohart v. Oberne, 36 Kan. 284; Spooner v. Thompson, 48 Vt. 259; Reynolds v. Ferree, 86 Ill. 570; Adams Exp. Co. v. Trego, 35 Md. 47; Lester v. Kinne, 37 Conn. 9; Delaney v. Levi, 19 La. Ann. 251; Williams v. Storm, 6 Cold. (Tenn.) 203; Miller v. Board of Education, 44 Cal. 166; Commercial Bank v. Jones, 18 Tex. 811; Bannon v. Warfield, 42 Md. 23; Bosseau v. O'Brien, 4 Biss. (U. S. C. C.) 395; Union Gold Min. Co. v. Rocky Mt. Nat. Bank, 2 Col. 565; Bank of Owensboro v. Western Bank, 13 Bush. (Ky.) 526, 26 Am. Rep. 211; Meyer v. Baldwin, 52 Miss. 263; Kerr v. Sharp, 83 Ill. 199; Stein v. Kendall, 1 Ill. App. 103; Snow v. Grace, 29 Ark. 131; Turner v. Wilcox, 54 Ga. 593; Craighead v. Peterson, 72 N. Y. 279, 28 Am. Rep. 150; Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157; Baldwin v. Burrows, 47 N. Y. 212; Silverman v. Bush, 16 Ill. App. 437; Hovey v. Dover, 59 N. H. 522; Curry v. Hale, 15 W. Va. 869: Bell v. Cunningham, 3 Pet. (U. S.) 69; Pacific Rolling Mill Co. v. Dayton, 7 Sawyer, (U. S. C. C.) 67, 5 Fed Rep. 852; Forrestier v. Bordman, 1 Story, (U. S. C. C.) 52; Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611; Bennecke v. Ins. Co. 105 U. S. 355; Fuller v. Ellis, 39 Vt. 345, 94 Am. Dec. 327; Deihl v. Adams Ins. Co. 58 Penn. St. 443; Bevin v. Conn. Mut. L. Ins. Co. 23 Conn. 244; International Bank v. Ferris, 118 Ill. 465. But see Scott v. Middletown, &c., R. R. Co. 86 N. Y. 200, as to when knowledge will be presumed.

[1] In a recent case in Massachusetts it is held that it is not necessary that the principal should have knowledge not only of all of the facts, but also of the legal effect of the facts, and that he should then, with a knowledge of both law and facts, have ratified the contract by some independent and substantive act. "It is sufficient," says ALLEN, J., "if a ratification is made with a full knowledge of all the material facts. Indeed, a rule somewhat less stringent may properly be laid down where one purposely shuts his eyes to means of information within his own possession and control, and ratifies an act deliberately, having all the knowledge in respect to it which he cares to have." In Kelley v. Newburyport Horse R. R. Co., 141 Mass. 496, citing Combs v. Scott, 12 Allen (Mass.) 493; Phosphate of Lime Co. v. Green, L. R. 7, C. P. 43, 1 Eng. Rep. 89.

[2] Bank of Owensboro v. Western Bank, 13 Bush. (Ky.) 526, 26 Am. Rep. 211; Hoffman v. Livingston, 46 N. Y. Super. Ct. 552.

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rule that if the principal elects to ratify any part of the unauthorized act he must ratify the whole of it. He cannot avail himself of it so far as it is advantageous to him, and repudiate its obligations; and this rule applies not only when his ratification is express but also when it is implied.[1]

§ 131. **7. Rights of other Party must be prejudiced.** The acts claimed to effect a ratification must be of such a nature that the rights of the other party who has relied upon them will be prejudiced if a ratification has not taken place.[2]

§ 132. **Burden of Proof.** The burden of proving a ratification rests upon the party alleging it.[3]

§ 133. **Relief of Principal when Facts not fully known.** It follows necessarily from the authorities cited to the general rule that, except in those cases in which the principal intentionally assumes the risk without inquiry, or deliberately ratifies without caring for further information, the principal will, to the extent that the alleged ratification was without full knowledge on his part of the material facts, be relieved from the effect of it.[4]

V.

WHAT AMOUNTS TO A RATIFICATION.

§ 134. **Importance of Question.** It is obvious that this is the most important question to be considered in this chapter, and that within it are embraced, to a greater or less degree, all of the preliminary topics that have just been considered. Given the proper parties and the right conditions, does this writing, this

[1] McClure *v.* Briggs, 58 Vt. 82; Eberts *v.* Selover, 44 Mich. 519; Rudasill *v.* Falls, 92 N. C. 222; Tasker *v.* Kenton Ins. Co. 59 N. H. 438; Barhydt *v.* Clark, 12 Ill. App. 646; Southern Express Co. *v.* Palmer, 48 Ga. 85; Krider *v.* Western College, 31 Iowa, 547; Crawford *v.* Barkley, 18 Ala. 270; Hodnett *v.* Tatum, 9 Ga. 70; Henderson *v.* Cummings, 44 Ill. 325; Elam *v.* Carruth, 2 La. Ann. 275; Widner *v.* Lane, 14 Mich. 124; Peninsular Bank *v.* Hanner, *Id.* 208; Coleman *v.* Stark, 1 Oregon, 115; Crans *v.* Hunter, 28 N. Y. 389; Ruffner *v.* Hewett, 7 W. Va. 585; Mercier *v.* Copelan, 73 Ga. 636; Hutchings *v.* Ladd, 16 Mich. 493.

[2] Doughaday *v.* Crowell, 11 N. J. Eq. 201.

[3] Reese *v.* Medlock, 27 Tex. 120, 84 Am. Dec. 611.

[4] Miller *v.* Board of Education, 44 Cal. 166; Dean *v.* Bassett, 57 Cal. 640; Adams Express Co. *v.* Trego, 35 Md. 47; and see generally cases cited in § 129, *supra*.

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conduct, this speaking, this silence, amount to a ratification of this unauthorized contract? is the vital question to which all the preliminary considerations lead.

§ 135. **Written or unwritten—Express or implied.** As has been seen and will hereafter be more clearly seen, the ratification of an unauthorized act is deemed to be equivalent to a prior authority to perform it; and as that prior authority may have been written or unwritten, express or implied, so this ratification may be effected in the same way.[1]

Where the facts are undisputed, the question whether or not they amount to a ratification, is one of law for the court; but in other cases the question of ratification or not becomes one of fact to be determined by the jury.[2]

a. Express Ratification.

§ 136. **General Rule.** It is the general rule that the act of ratification must be of the same nature as that which would be required for conferring the authority in the first instance.[3] If, therefore, sealed authority was indispensable, sealed ratification must be shown; and if written authority was required, written ratification must appear.[4]

§ 137. **Deed at Common Law ratified only by Instrument under Seal.** Thus, as authority to execute an instrument under seal could only be conferred by authority under seal,[5] it was the doctrine of the common law that the unauthorized deed of an agent could only be ratified by an instrument under seal.[6]

[1] Goss *v.* Stevens, 32 Minn. 472; *Post*, Subd. *a* and *b*; Taylor *v.* Conner, 41 Miss. 722, 97 Am. Dec. 419.

[2] Swartwout *v.* Evans, 37 Ill. 443; Trustees *v.* McCormick, 41 Ill. 323; Marine Co. *v.* Carver, 42 Ill. 66; Paul *v.* Berry, 78 Ill. 158; Henderson *v.* Cummings, 44 Ill. 325.

[3] "A ratification of an act done by one assuming to be an agent relates back and is equivalent to a prior authority. When therefore the adoption of any particular form or mode is necessary to confer the authority in the first instance there can be no valid ratification except in the same manner." PARKER, C. J. in Despatch Line *v.* Bellamy Mfg. Co. 12 N. H. 205; 37 Am. Dec. 203.

[4] Pollard *v.* Gibbs, 55 Ga. 45; Grove *v.* Hodges, 55 Penn. St. 504; Palmer *v.* Williams, 24 Mich. 328; and cases cited in following section. Where a statute required that the authority of an agent to make contracts of suretyship should be in writing, a subsequent parol ratification was held insufficient. Ragan *v.* Chenault, 78 Ky. 545.

[5] *Ante*, § 82.

[6] Despatch Line *v.* Bellamy Mfg. Co. *supra*; Spoffard *v.* Hobbs, 29 Me.

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§ 138. **Same Subject—Rule relaxed in Partnership Cases.** This rule has been greatly relaxed in partnership cases, and it is now quite universally held that the act of one partner in executing, in the name of the firm, an instrument under seal, may be ratified by the other partner by parol. Said BREESE C. J.: "We think it may be safely said that the modern rule is that one partner may, in furtherance of the partnership business and for its benefit, execute a deed under seal which will be binding on the other if he has foreknowledge, or subsequently ratifies it, and this may be proved by acts and circumstances or by his verbal declarations and admissions." [1]

§ 139. **Same Subject—Massachusetts Rule.** And in Massachusetts the court has gone still further, and it is said that the law is settled in that commonwealth that the unauthorized execution of a deed in the name either of a partnership or of an individual may be ratified by parol.[2]

§ 140. **Same Subject—Modern Rule more liberal.** As has been already stated, the tendency in modern times is to attach less importance to the presence of a seal, and to mitigate the severity of those technical rules of the common law which were based upon reasons no longer applicable to the conditions and methods of the present day. In many of the States statutes have

148, 48 Am. Dec. 521; Bellas *v.* Hays, 5 Serg. & R. (Penn.) 427, 9 Am. Dec. 385; Stetson *v.* Patten, 2 Greenl. (Me.) 358; 11 Am. Dec. 111; Blood *v.* Goodrich, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121; McDowell *v.* Simpson, 3 Watts (Penn.), 129, 27 Am. Dec. 338; Heath *v.* Nutter, 50 Me. 378; Paine *v.* Tucker, 21 *Id.* 138, 38 Am. Dec. 255; Hanford *v.* McNair, 9 Wend. (N. Y.) 54; Taylor *v.* Robinson, 14 Cal. 400; Ingram *v.* Little, 14 Ga. 173, 58 Am. Dec. 549; Drumright *v.* Philpot, 16 Ga. 424, 60 Am. Dec. 738; Pollard *v.* Gibbs, 55 Ga. 45; Grove *v.* Hodges, 55 Penn. St. 504; McCracken *v.* San Francisco, 16 Cal. 591; and upon analogous reasoning is Ragan *v.* Chenault, 78 Ky. 545.

But a parol acknowledgment of an authority under seal is sufficient. Blood *v.* Goodrich, 12 Wend. (N. Y.) 525, 27 Am. Dec. 152.

[1] Peine *v.* Weber, 47 Ill. 45; and to the same effect are McIntyre *v.* Park, 11 Gray (Mass.) 102, 71 Am. Dec. 690; Cady *v.* Shepherd, 11 Pick. (Mass.) 400, 22 Am. Dec. 379; Skinner *v.* Dayton, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286; Holbrook *v.* Chamberlain, 116 Mass. 155, 17 Am. Rep. 146; Russell *v.* Annable, 109 Mass. 72, 12 Am. Rep. 665; Kendall *v.* Carland, 5 Cush. (Mass.) 79; Swan *v.* Stedman, 4 Metc. (Mass.) 552; Dillon *v.* Brown, 11 Gray (Mass.) 179.

[2] GRAY, C. J. in Holbrook *v.* Chamberlain, 116 Mass. 155, 17 Am. Rep. 146; McIntyre *v.* Park, 11 Gray (Mass.) 102, 71 Am. Dec. 690.

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been enacted by which the absence of a seal from an instrument formerly requiring it is declared to be immaterial, or by which all of the old distinctions between sealed and unsealed instruments are swept away.[1] Where such statutes prevail, the technical rule requiring a ratification under seal would have no force.

§ 141. **Unnecessary Seal may be disregarded.** In accordance with rules previously referred to,[2] if the instrument executed by the agent, though under seal, be one upon which no seal was required, the seal may be disregarded and the instrument ratified as a simple contract.[3]

§ 142. **By Authority subsequently conferred.** The unauthorized execution of a deed may be expressly ratified by a power of attorney subsequently executed authorizing its execution and dated back prior to the date of the deed. Thus, where an attorney appointed by parol, executed a bond in the name of his principal, and afterwards his principal gave him a power of attorney dated prior to the bond and authorizing its execution, this was held to be a good ratification of the bond and that the principal was estopped to assert that the power of attorney was, as a matter of fact, executed subsequently to the bond.[4] So a letter from a principal authorizing certain acts, but received after the performance, will be a ratification.[5]

§ 143. **By Answer in Chancery.** So where a sheriff under the authority and by the direction of B sold certain lands in which B had an interest, making a deed thereof in B's name,

[1] Provisions of this nature are found in Arkansas, California, Dakota, Indiana, Iowa, Kansas, Michigan, Mississippi, Montana, Nebraska, Tennessee, Texas, and probably in other States.

[2] *Ante*. § 95.

[3] Adams *v.* Power, 52 Miss. 828, citing Worrall *v.* Munn, 5 N. Y. 229, 55 Am. Dec. 330; Lawrence *v.* Taylor, 5 Hill (N. Y.), 113; Randall *v.* Van Vechten, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; Evans *v.* Wells, 22 Wend. (N. Y.) 340. And to the same effect are State *v.* Spartansburg, &c. R. R. Co. 8 S. C. 129; Hammond *v.* Hannin, 21 Mich. 374, 4 Am. Rep. 490. But, *contra*, Rowe *v.* Ware, 80 Ga. 278; Pollard *v.* Gibbs, 55 Ga. 45.

[4] Milliken *v.* Coombs, 1 Greenl. (Me.) 343, 10 Am. Dec. 70; United States Express Co. *v.* Rawson, 106 Ind. 215; Riggin *v.* Crain, — Ky. —, 5 S. W. Rep. 561.

[5] Rice *v.* McLarren, 42 Me. 157. But in Moore *v.* Lockett, 2 Bibb (Ky.) 67, 4 Am. Dec. 683, it was held that a letter giving an agent power to sell but written subsequently to an unauthorized sale under an insufficient power, did not ratify the previous sale. And see Stillman *v.* Fitzgerald, — Minn —, 33 N. W. Rep. 564.

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and B, in his answer to a bill in chancery filed in relation to this transaction, admitted the sale as aforesaid, the court held the admission to be a confirmation of the sale of B's interest.[1]

§ 144. **Contract for Sale or leasing of Land ratified by Parol.** It has been seen that in many of the States, authority to make contracts for the sale or leasing of land of the principal is not required to be in writing,[2] and it has, therefore, been held that in these States the unauthorized making of such contracts may be subsequently ratified without writing.[3] And even in a State where the agent's authority was required to be in writing it was held that such a contract might be ratified by parol.[4]

§ 145. **"Lawfully authorized" under Statute of Frauds.** And it has been held sufficient to satisfy that provision of the Statute of Frauds which requires that the contract shall be in writing, signed by the principal or by some one thereunto by him *lawfully authorized*, to show a subsequent ratification of the act of the agent in signing such a contract.[5]

b. Implied Ratification.

§ 146. **In general.** But since, as has been seen, authority for the doing of any lawful act,—except in those cases in which an authority in writing or under seal is expressly required,—can be conferred by parol, and since the existence of such authority may be presumed from the conduct of the parties, so also, with the same exceptions, the unauthorized doing of any such act may be ratified by parol, and the fact of such ratification may likewise be presumed from the conduct of the parties. In this case also, as in the other, it will be found that this is the most usual method by which the result is effected.

The reasons, too, are similar. Whoever by his acts, his words or his silence, has led an innocent third person reasonably to conclude that the act of another in his behalf has been adopted and sanctioned by him, and has permitted such third person to rely thereon in such a manner as to prejudice his rights if the conclu-

[1] Stoney *v.* Shultz, 1 Hill Ch. (S.C.) 465, 27 Am. Dec. 429.

[2] *Ante*, § 89.

[3] McDowell *v.* Simpson, 3 Watts (Penn.) 129, 27 Am. Dec. 338.

[4] Hammond *v.* Hannin, 21 Mich. 374, 4 Am. Rep. 490.

[5] McLean *v.* Dunn, 4 Bing. 722; Soames *v.* Spencer, 1 Dowl. & R. 32.

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sion is not correct, ought not to be heard to assert that the fact is otherwise than he has caused or permitted it to appear.

Ratification, like authorization of which it is the equivalent, is generally the creature of intent, but that intent may often be presumed by the law in cases where the principal, as matter of fact, either had no express intent at all, or had an express intent not to ratify.

These acts, words, silence of the principal are sometimes spoken of as in themselves a ratification. As a rule, however, this is not strictly accurate. They are rather the evidence of a ratification, than the ratification itself.

§ 147. **Variety of Methods.** The methods by which a ratification may be effected are as numerous and as various as the complex dealings of human life. It is impossible to state them all. But certain forms that have been judicially passed upon may be grouped, and instances be given which may furnish a rule for future cases.

§ 148. **By accepting Benefits.** It is a rule of quite universal application that he who would avail himself of the advantages arising from the act of another in his behalf must also assume the responsibilities. If the principal has knowingly appropriated and enjoyed the fruits and benefits of an agent's act he will not afterwards be heard to say that the act was unauthorized. One who voluntarily accepts the proceeds of an act done by one assuming, though without authority, to be his agent, ratifies the act and takes it as his own with all its burdens as well as all its benefits. He may not take the benefits and reject the burdens, but he must either accept them or reject them as a whole.[1] But

[1] Ruggles v. Washington Co. 3 Mo. 496; Hastings v. Bangor House, 18 Me. 436; Low v. Conn., &c., R. R. Co., 46 N. H. 284; Reid v. Hibbard, 6 Wis. 175; Cushman v. Loker, 2 Mass. 106; Narragansett Bank v. Atlantic Co., 3 Metc. (Mass.) 282; Codwise v. Hacker, 1 Cai. (N. Y.) 526; Moss v. Rossie Co., 5 Hill (N. Y.) 137; Palmerton v. Huxford, 4 Den. (N. Y.) 166; Houghton v. Dodge, 5 Bosw. (N. Y.) 326; Farmers', &c., Bank v. Sherman, 6 Id. 181; State v. Perry, Wright (Ohio) 662; Davis v. Krum, 12 Mo. App. 279; Parish v. Reeve, 63 Wis. 315; Hauss v. Niblack, 80 Ind. 407; Rich v. State Natl. Bank, 7 Neb. 201; Fowler v. N. Y. Gold Exchange, 67 N. Y. 138; Snow v. Grace, 29 Ark. 131; State v. Smith, 48 Vt. 266; Dunn v. Hartford, &c., R. R. Co., 43 Conn. 434; Hurd v. Marple, 2 Ill. App. 402; Ely v. James, 123 Mass. 36; Aurora Agl. Soc. v. Paddock, 80 Ill. 263; Bacon v. Johnson, 56 Mich. 182; Eadie v. Ashbaugh, 44 Iowa, 519; Mun-

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here, as in other cases, it is indispensable that the principal should have had full knowledge of the material facts, or that he should have intentionally accepted the benefits without inquiry. Otherwise the receipt and retention of the benefits of the unauthorized act, is no ratification of it.[1]

§ 149. **Same Subject—Instances.** Thus a principal who, with full knowledge of the facts, receives and appropriates to his own use without objection, the purchase price or rent of land or other property sold or rented by one assuming to act on his behalf as his agent, ratifies the act.[2] But the mere receipt of a portion of the money, realized from an unauthorized sale by a sheriff, will not ratify the sale;[3] nor will the receipt of money ratify the sale where the principal would have the right to receive the money without ratifying the sale;[4] nor if the principal demand from the agent, money which the agent has misapplied, will such demand ratify the misapplication.[5] But where the owner of a judgment with knowledge of the facts retains the proceeds of an unauthorized assignment of it, he will be assumed to have ratified the assignment.[6] And so where the owner of a mortgage voluntarily accepted the proceeds of an unauthorized discharge of it, the discharge was held to be ratified.[7] And again, where the principal knowingly accepts of security taken by an agent in

dorff v. Wickersham, 63 Penn. St. 87, 3 Am. Rep. 531; Waterson v. Rogers, 21 Kan. 529.

[1] Bohart v. Oberne, 36 Kans. 284; Schutz v. Jordan, 32 Fed. Rep. 55; Kelley v. Newburyport Horse R. R. Co., 141 Mass. 496; Combs v. Scott, 12 Allen (Mass.) 493; Phosphate of Lime Co. v. Green, L. R. 7 C. P. 43, and cases cited in preceding note.

[2] Lindroth v. Litchfield, 27 Fed. Rep. 894; Reynolds v. Davison, 34 Md. 662; Abbott v. May, 50 Ala. 97; Snow v. Grace, 29 Ark. 131; Turner v. Wilcox, 54 Ga. 593; Seago v. Marten, 6 Heisk. (Tenn.) 308; Roby v. Cossitt, 78 Ill. 638; Warden v. Eichbaum, 3 Grant (Penn.) Cases, 42; Lyman v. Norwich University, 28 Vt. 560; Pierce v. O'Keefe, 11 Wis. 180. See also Walworth, &c. Bank v. Farmers' &c. Co., 16 Wis. 629; Powell v. Gossom, 18 B. Monroe (Ky.) 179; Baines v. Burbridge, 15 La. Ann. 628; Breithhaupt v. Thurmond, 3 Rich. (S. C.) 216; Harris v. Simmerman, 81 Ill. 413.

[3] Harris v. Miner, 28 Ill. 135; Smith v. Tracy, 36 N. Y. 79.

[4] White v. Sanders, 32 Me. 188.

[5] Blevins v. Pope, 7 Ala. 371.

[6] Wallace v. Lawyer, 90 Ind. 499. And where a bank appropriates to its own use, bonds purchased by its cashier without authority, it cannot afterwards repudiate the cashier's act. Logan County Bank v. Townsend, — Ky. —, 3 S. W. Rep. 122.

[7] Tooker v. Sloan, 30 N. J. Eq. 394.

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pursuance of an arrangement made with a debtor, the arrangement so made will be deemed to be ratified;[1] and so the voluntary acceptance of the avails of a compromise made by an agent will ratify the compromise,[2] and the voluntary retention of a conveyance of lands which an agent has taken from a debtor in payment of a debt, will sanction such payment.[3] So where a principal shipped cotton to his broker with instructions not to sell at less than a certain price, and the broker sold for less than that rate and immediately notified his principal, it was held that the principal by drawing the proceeds of the sale without objection, ratified the act of the broker in selling at the smaller price.[4]

Where an agent sold his principal's property without authority and embezzled the proceeds, and the principal, with full knowledge of the facts, took from the agent something in satisfaction of the wrong, it was held that the principal had ratified the sale made by the agent, and could not afterwards pursue the property sold.[5] But where a principal without full knowledge of the facts, took from an agent security for money collected by the agent from debtors of the principal, and wrongfully appropriated to his own use, it was held that this would not ratify the payments to the agent because done without full knowledge of the facts;[6] and for the same reason where one who was in the possession of the plaintiff's horse sold him without authority to the defendant, receiving in payment therefor a check which he endorsed and gave to the plaintiff in payment of a debt he owed him, but did not inform him of its origin, it was held that the plaintiff by collecting the check, and applying the proceeds to the payment of the debt, without knowledge of the sale of the horse had not ratified such sale.[7]

§ 150. **Same Subject—Other Instances.** So where one, on whose account an agent has bought goods without authority, with full knowledge of the facts, accepts, uses and sells them, he will

[1] Keeler v. Salisbury, 33 N. Y. 648.
[2] Strasser v. Conklin, 54 Wis. 102.
[3] Miles v. Ogden, 54 Wis. 573.
[4] Meyer v. Morgan, 51 Miss. 21, 24 Am. Rep. 617.
[5] Ogden v. Marchand, 29 La. Ann. 61.
[6] Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157.
[7] Thacher v. Pray, 113 Mass. 291; 18 Am. Rep. 480. And to the same effect is Penn., &c., Co. v. Dandridge, 8 Gill & John. (Md.) 248, 29 Am. Dec. 543.

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be deemed to have ratified the purchase and will be liable for the price.[1] In such a case the court said: "If one purchase goods for another without authority, and the person for whom they are purchased receives them and uses or sells them on his own account, after being informed that they were purchased for him, this is an implied ratification of the agency. And if, on receiving the goods, and being informed that they were purchased in his name, he merely informs the seller that the purchase was unauthorized, this is not enough. He should either restore the goods to the seller or pay for them if he converts them to his own purpose."[2]

But where an agent had purchased goods without authority and added them to his principal's stock, and the principal, upon discovering the fact, attempted to select such of the goods as remained unsold, for the purpose of returning them to the vendor, but was unable to identify them, it was held that his retention of the goods under such circumstances was no ratification of the agent's purchase.[3]

And where one, to whom certain goods were sent by an agent's order on approval, claimed to be the owner of the goods at the time of an attempted levy upon them as the property of another, he was held to have ratified the agent's act and accepted the goods.[4] So where an agent exchanged a mule for a horse without authority, the principal's subsequent assertion of title to the horse was held to be a ratification of the trade.[5] So in a case involving the ratification of a loan made by a committee of an

[1] Pike v. Douglass, 28 Ark. 59; McDowell v. McKinzie, 65 Ga. 630; Hastings v. Bangor House, 18 Me. 436.

[2] Pike v. Douglass, *supra*. See also Ketchum v. Verdell, 42 Ga. 534, where it was said by McKay, J., "The general rule, as I understand it, is that where one professes to act as agent of another, even if he has no authority at all, and as such agent obtains goods which in fact go to the use and benefit of the principal, the seller may at any time before the principal has settled with the pretended agent, notify the principal of the truth of the case and demand payment. If the principal accepts the property, knowing all the facts, that is a ratification of the agency; but even if he knows nothing of the facts, but accepts the property as sold him by the agent, yet if the agent was not in fact the true owner and the seller so notifies the purchaser before any settlement, the right of action in the seller exists."

[3] Schutz v. Jordan, 32 Fed Rep. 55.

[4] Brooks v. Fletcher, 56 Vt. 624.

[5] Jones v. Atkinson, 68 Ala. 167. See also Cochran v. Chitwood, 59 Ill. 53.

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agricultural association, BRICKELL, C. J., said: "It is shown very fully that the association ratified and approved all the acts of the executive committee in this transaction, not only the mode adopted in borrowing the money but the execution of the mortgage. We do not mean that it was shown that there was assent to, and confirmation of the transaction expressed in words. That is not essential, for ratification is more often implied from the acts and conduct of parties having an election to avoid or confirm than found expressed in words. And it is implied, whenever the acts and conduct of the principal having full knowledge of the facts are inconsistent with any other supposition than that of previous authority or an intention to abide by the act though it was unauthorized. Here the association accepted all the benefits of the transaction, received and appropriated to its own uses the money obtained on the promissory notes and has acquiesced in all that was done by the executive committee, not even now objecting that it was unauthorized. A corporation has as full capacity as a natural person to ratify the unauthorized or defectively executed act of its agents and the ratification is the equivalent of a prior authority. Having received and retained the benefits of the transaction with full knowledge of all the facts, the association has ratified and confirmed it unless intentional fraud is shown for which there is neither room nor reason."[1]

§ 151. **By bringing Suit based on Agent's Act.** One of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action at law based upon such act. Thus a demand made by an agent will be deemed to be ratified by the principal, if he brings an action founded upon such demand,[2] and ratification by a bank of its cashier's endorsement of a note is established by the fact that the bank prosecutes an action on the note in the name of the endorsee;[3] so if the principal appear in court and prosecute an action of attachment begun in his name by one assuming to act as his agent, he will be held to have ratified the act of such agent in signing his name to the

[1] Taylor v. A. & M. Association, 68 Ala. 229. And to the same effect is Maddux v. Bevan, 39 Md. 485.

[2] Ham v. Boody, 20 N. H. 411, 51 Am. Dec. 235; Payne v. Smith, 12 N. H. 34; Town of Grafton v. Follansbee, 16 N. H. 450, 41 Am. Dec. 736.

[3] Corser v. Paul, 41 N. H. 24, 77 Am. Dec. 753.

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attachment bond.[1] And where a vendor who has been defrauded in a sale of his goods made by an agent, proceeds to judgment against the vendee after being fully apprised of the fraud, he ratifies the sale.[2] And where an agent without authority had consigned his principal's goods for sale, and the principal brought an action against the agent for the price and value of the goods so consigned, it was held a prima facie ratification of the consignment,[3] and an action to enforce a contract made by an agent, is sufficient evidence of the agent's authority to make it.[4] And an action to recover upon a note taken in payment of goods sold by an agent, ratifies the sale, and with it, in cases where the agent would have authority to warrant, a warranty made by the agent as a part of the sale.[5] And bringing an action on a mortgage taken by an agent, ratifies his act in taking it.[6] So a principal's abandonment of a suit upon a compromise of the cause of action by an agent ratifies the compromise.[7]

§ 152. **Mere Delay in suing, no Ratification.** Where, however, the principal has expressly repudiated an unauthorized act, mere delay in bringing a necessary suit cannot be construed into a ratification.[8]

§ 153. **Ratification by Acquiescence—Silence.** It is a maxim of the law that he who remains silent when in conscience he ought to speak, will be debarred from speaking when in conscience he ought to remain silent, and this rule is of frequent application in determining whether or not an alleged principal has set the seal of his sanction upon a transaction assumed to have been done in his behalf.

§ 154. **Same Subject—Election.** A principal upon being informed of the unauthorized act of another in his behalf, has the

[1] Bank of Augusta v. Conrey, 28 Miss. 667; Dove v. Martin, 23 Miss. 588.

[2] Lloyd v. Brewster, 4 Paige (N. Y.) 537; Bank of Beloit v. Beale, 34 N. Y. 473.

[3] Frank v. Jenkins, 22 Ohio St. 597.

[4] Dodge v. Lambert, 2 Bosw. (N. Y.) 570; Benson v. Liggett, 78 Ind. 452.

[5] Franklin v. Ezell, 1 Sneed (Tenn.) 497; Cochran v. Chitwood, 59 Ill. 53 Smith v. Tracy, 36 N. Y. 79.

[6] Partridge v. White, 59 Me. 564. And see Beidman v. Goodell, 56 Iowa, 592.

[7] Hoit v. Cooper, 41 N. H. 111.

[8] McClure v. Evartson, 14 Lea (Tenn.) 495.

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right to elect whether he will ratify or repudiate the act.[1] And this right of election belongs in the first instance to him alone, and so long as the condition of all parties remains unchanged, he cannot be prevented from ratifying because the other party may, for any reason, prefer to treat the act as invalid.[2] And even though at first he may disapprove, he may afterwards, if the condition of all parties remains unchanged, elect to give confirmation to the act.[3]

§ 155. **Same Subject—Must elect within a reasonable Time.** But where the rights and obligations of third persons may depend on his election, it is obvious that he is bound to act or suffer the necessary consequences of inaction, and that if, after knowledge, he remains entirely passive in regard to the transaction, it is but just, when the protection of third persons may require it, to presume that what upon knowledge he has failed to repudiate, he has at least tacitly confirmed.[4] If therefore he would escape responsibility for the act, he must give notice of his non-concurrence. The time within which this notice is to be given has not been settled with absolute harmony by the courts. Many cases hold that the principal is bound to act at once upon receiving knowledge,[5] but the better rule and the one supported by the majority of the authorities, is, that if the principal desires to repudiate the transaction he must give notice thereof within a reasonable time after becoming fully informed; and that if he does not so dissent his silence will afford conclusive evidence of his approval.[6] What shall be deemed to be a reasonable time

[1] Andrews v. Ætna L. Ins. Co. 92 N. Y. 596.

[2] Idem. But see *post*, § 179.

[3] Woodward v. Harlow, 28 Vt. 388.

[4] Saveland v. Green, 40 Wis. 431.

[5] Ward v. Williams, 26 Ill. 447, 79 Am. Dec. 385; Johnston v. Berry, 8 Ill. App. 256; Pitts v. Shubert, 11 La. 286, 30 Am. Dec. 718; Kehlor v. Kemble, 26 La. Ann. 713; Foster v. Rockwell, 104 Mass. 167; Crane v. Bedwell, 25 Miss. 507; Bredin v. Dubarry, 14 Serg. & R. (Penn.) 27; Kelsey v. National Bank of Crawford Co. 69 Penn. St. 426; Williams v. Storm, 6 Cold. (Tenn.) 203; Fort v. Coker, 11 Heisk. (Tenn.) 579; Hart v. Dixon, 5 Lea (Tenn.), 336; Meister v. Cleveland Dryer Co. 11 Ill. App. 227.

[6] Saveland v. Green, 40 Wis. 431; Heyn v. O'Hagen, 60 Mich. 157; Mobile & Montgomery Ry. Co. v. Jay, 65 Ala. 113; Miller v. Excelsior Stone Co. 1 Ill. App. 278; Hamlin v. Sears; 82 N. Y. 327; Meyer v. Morgan, 51 Miss. 21; 24 Am. Rep. 617; Wright v. Boynton, 37 N. H. 9; Gold Mining Co. v. National Bank, 96 U. S. 640; Parish v. Reeve, 63 Wis. 315; Alexander v. Jones, 64 Iowa, 207; Lafitte v. Godchaux, 35 La. Ann. 1161; Breed v. Central City Bank, 6 Col. 235; Gold

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depends in this case as in others upon the situation of the parties and the facts and circumstances of the case.[1]

§ 156. **Same Subject—Sleeping on Rights.** This rule is the familiar one of reasonable promptness. Parties must not sleep upon their rights. To use the forcible language of a Louisiana judge, "The genius of our law does not favor the claims of those who have long slept upon their rights and who after years of inertia conveying an assurance of acquiescence in a given state of things suddenly wake up at the welcome vision of an unexpected advantage and invoke the aid of the courts for relief under the operation of a newly discovered technical error in some ancient transaction or settlement." [2]

§ 157. **Same Subject—Rules.** This subject is of so much importance as to appear to warrant a somewhat full exposition of the different statements of the rule which governs it.

Thus it was said by a distinguished judge, "We suppose acquiescence or tacit assent to mean the neglect to promptly and actively condemn the unauthorized act, and to seek judicial redress after the knowledge of the committal of it, whereby innocent third parties may have been led to put themselves in a position from which they cannot be taken without loss. It is the doctrine of equitable estoppel." [3]

And by another, "The rule as to what amounts to ratification of an unauthorized act is elementary and may be safely stated thus: Where a person assumes in good faith to act as agent for another in any given transaction, but acts without authority, whether the relation of principal and agent does or does not exist between them, the person in whose behalf the act was done, upon

Mining Co. v. Rocky Mt. Nat. Bank, 2 Col. 565; Law v. Cross, 1 Black (U. S.) 533; Norris v. Cook, 1 Curt. (U. S. C. C.) 464; Abbe v. Rood, 6 McLean (U. S. C. C.) 106; Brigham v. Peters, 1 Gray (Mass.) 139; Lorie v. North Chicago City Ry. Co., 32 Fed. Rep. 270; Bray v. Gunn, 53 Ga. 144; Oliver v. Johnson, 24 La. Ann. 460; Reese v. Medlock, 27 Tex. 120; 84 Am. Dec. 611; Clay v. Spratt 7 Bush (Ky.) 334; Cooper v. Schwartz, 40 Wis. 54; Hepburn v. Dunlop, 1 Wheat. (U. S.) 179; Connett v. Chicago, 114 Ill. 233; Booth v. Wiley, 102 Ill, 84; Johnston v. Wingate, 29 Me. 404; Farwell v. Howard, 26 Iowa, 381; International Bank v. Ferris, 118 Ill, 465.

[1] McDermid v. Cotton, 3 Ill. App. 297; Philadelphia, &c. R. R. Co. v. Cowell, 28 Penn. St. 329, 70 Am. Dec. 128; Reese v. Medlock, *supra*.

[2] Lafitte v. Godchaux, 35 La. Ann. 1161,

[3] FOLGER, J., in Kent v. Quicksilver Mining Co., 78 N Y. 137.

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being fully informed thereof, must within a reasonable time disaffirm such act, at least in cases where his silence might operate to the prejudice of innocent parties, or he will be held to have ratified such unauthorized act."[1]

And again, "The correct rule seems to be that when the principal has full knowledge of the acts of his agent from which he receives a direct benefit he must dissent and give notice of his non-concurrence within a reasonable time, or his assent and ratification will be presumed."[2]

§ 158. **Same Rule applies to private Corporations.** And, as has been seen, these rules apply as well to corporations within the scope of their corporate powers as to individuals.[3]

"It seems to be now well settled," says Chief Justice Shaw, "since the great multiplication of corporations, extending to almost all the concerns of business, that trading corporations, whose dealings embrace all transactions from the largest to the minutest and affect almost every individual in the community, are affected like private persons with obligations arising from implications of law, and from equitable duties which imply obligations; with constructive notice, implied assent, tacit acquiescence, ratifications from acts and from silence, and from their acting upon contracts made by those professing to be their agents; and generally by those legal and equitable considerations which affect the rights of natural persons."[4]

§ 159. **And to Municipal and Quasi Municipal Corporations.** The same rules apply also to municipal and *quasi* municipal corporations, although from their nature, a ratification by acquies-

[1] LYON, J., in Saveland v. Green, 40 Wis. 431; cited with approval, except as to the element of good faith, in Heyn v. O'Hagen, 60 Mich., at p. 157.

[2] Mobile & Montgomery Ry Co. v. Jay, 65 Ala. 113, modifying Powell's Admr. v. Henry, 27 Ala. 612.

[3] Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Co., 90 N. Y. 607; Kelsey v. National Bank of Crawford Co., 69 Penn. St. 426.

[4] Melledge v. Boston Iron Co., 5 Cush. (Mass.) 158, 51 Am. Dec. 59. "The law is well settled that a principal who neglects promptly to disavow an act of his agent by which the latter has transcended his authority, makes the act his own; and the maxim which makes ratification equivalent to a precedent authority, is as much predicable of ratification by a corporation as it is of ratification by any other principal, and it is equally to be presumed from the absence of dissent." WILLIAMS, J., in Kelsey v. National Bank, *supra*.

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cence is not so readily to be inferred as in the case of individuals or of private corporations. The numbers composing the municipal corporation being large and their direct participation in municipal affairs being less, the evidence of ratification, where it is based upon acquiescence, must manifestly be sufficient to show the approval of the corporation as such. It cannot be based alone upon the acquiescence of unofficial individuals who have no authority to act for or bind the entire body.[1]

§ 160. **How when assumed Agent is a mere Stranger.** While it is abundantly settled that acquiescence may result in the ratification of the act of an agent, it has been much questioned whether the same result would follow if the person assuming to act for the other was a stranger. All of the authorities agree that the relations of the parties have much to do in determining whether or not there has been a ratification, but it is held by several of the courts that when he who assumes to act for another is not one sustaining to him the relation of an agent but is a mere volunteer, no duty exists on the part of the other to repudiate the act on its being brought to his notice, and that nothing short of a positive affirmance will make it binding upon him. Thus it is said in an Illinois case, "In general where an agent is authorized to do an act and he transcends his authority, it is the duty of the principal to repudiate the act as soon as he is fully informed of what has been thus done in his name by the agent, else he will be bound by the act as having ratified it by implication; but where a stranger, in the name of another, does an unauthorized act, the latter need take no notice of it, although informed of the act thus done in his name, and he shall only be bound by an affirmative ratification."[2] And this view is supported by eminent judges and text writers.[3]

But the contrary view is also maintained by judges of great ability. Thus it is said by Woodward, J., "I do not understand counsel to mean that there can be no valid ratification unless one

[1] School District v. Ætna Ins. Co., 62 Me. 330; Chamberlain v. Dover, 13 Me. 466, 29 Am. Dec. 517; Davis v. School District, 24 Me. 349; White v. Sanders, 32 Me. 188; Fisher v. School District, 4 Cush. (Mass.) 494; Bliss v. Clark, 16 Gray (Mass.) 60.

[2] Ward v. Williams, 26 Ill. 447, 79 Am. Dec. 385, approved in Searing v. Butler, 69 Ill. 575.

[3] Evans' Agency, 68; Livermore's Agency, §§ 255, 258; Duer, Vol. II, 151–154.

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of the conditions specified—either prior agency or possession of principal's property—has existed, but that silence, after knowledge of the act done, is evidence of ratification only in such cases. It must be admitted that the act of a mere stranger or volunteer is capable of ratification, for all the authorities are so; but the argument is that the silence of the party to be affected, whatever the attending circumstances, cannot amount to ratification of the act of a stranger. * * * * If then the principle of law be that I can ratify that only which is done in my name, but when I have ratified whatever is done in my name, I am bound for it, as by the act of an authorized agent, it is apparent that my silence in view of what has been done, is to be regarded simply as evidence of ratification more or less expressive, according to the circumstances in which it occurs. It is not ratification of itself but only evidence of it, to go to the jury along with all the circumstances that stand in immediate connection with it. Among these the prior relations of the parties are very important. If the party to be charged has been accustomed to contract through the agency of the individual assuming to act for him, or has intrusted property in his keeping, or if he were a child or servant, partner or factor, the relation *conjunctionis favor* would make silence strong evidence of assent. On the other hand, if there had been no former agency and no peculiarity whatever in the prior relations of the parties, silence,—a refusal to respond to mere impertinent interference,—would be very inconclusive but not an absolutely irrelevant circumstance. The man who will not speak when he sees his interests affected by another must be content to let a jury interpret his silence. It is a clear principle of equity that where a man stands by knowingly and suffers another person to do acts in his own name without any opposition or objection, he is presumed to have given authority to do those acts. * * * * If mental assent may be inferred from circumstances, silence may indicate it as well as words or deeds. To say that silence is no evidence of it is to say that there can be no implied ratification of an unauthorized act—or at the least to tie up the possibility of ratification to the accident of prior relations. Neither reason nor authority justifies such a conclusion. A man who sees what has been done in his name and for his benefit, even by an intermeddler, has the same power to ratify and confirm it that he would have to make a similar contract for himself

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and if the power to ratify be conceded to him the fact of ratification must be provable by the ordinary means."[1]

§ 161. **Same Subject—True Rule.** Keeping in mind that the question in these cases is, not whether the silence is of itself a ratification, but whether it is any evidence from which, in connection with other facts, a ratification may be inferred, it is undoubtedly the better rule that while the relations of the parties are very significant they are not conclusive, and that even in the case of a mere stranger a ratification may be established by the same kind of evidence that is admissible in other cases, although the presumptions arising from acquiescence are much stronger in a case where an agency exists than in the case of a stranger.[2]

§ 162. **Silence does not ratify if Stranger acts in his own Name.** Where, however, the stranger does not assume to act in the behalf of the alleged principal but in his own name and behalf, the silence of the alleged principal will not be evidence of a ratification of the stranger's act.[3]

§ 163. **Information from Letter.** Though omitting to answer a written communication is in general no evidence of the truth of the facts therein stated,[4] yet the information as to the acts of

[1] Philadelphia, &c. R. R. Co. *v.* Cowell, 28 Penn. St., 329, 70 Am. Dec. 128.

[2] Union Gold Mining Co. *v.* Rocky Mt. Nat. Bank, 2 Col. 248; Ladd *v.* Hildebrant, 27 Wis. 135, 9 Am. Rep. 445; Saveland *v.* Green, 40 Wis. 431; Southern Ex. Co. *v.* Palmer, 48 Ga. 85; Greenfield Bank *v.* Crafts, 4 Allen (Mass.) 447; Heyn *v.* Hagen, 60 Mich. 150. In this case CHAMPLIN, J. says: "Whether silence operates as presumptive proof of ratification of the act of a mere volunteer, must depend upon the peculiar circumstances of the case. If those circumstances are such that the inaction or silence of the party sought to be charged as principal would be likely to cause injury to the person giving credit to, and relying upon, such assumed agency, or to induce him to believe such agency did in fact exist, and to act upon such belief to his detriment, then such silence or inaction may be considered as a ratification of the agency." See also Hurley *v.* Watson, —Mich.—, 13 West. Rep. 543; Carson *v.* Cummings, 69 Mo. 325.

[3] Hamlin *v.* Sears, 83 N. Y. 327; Garvey *v.* Jarvis, 46 N. Y. 310, 7 Am. Rep. 335.

[4] Commonwealth *v.* Eastman, 1 Cush. (Mass.) 189; Fearing *v.* Kimball, 4 Allen (Mass.) 125; Learned *v.* Tillotson, 97 N. Y. 1; Canadian Bank of Commerce *v.* Coumbe, 47 Mich. 358. None of these being a case of agency.

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the assumed agent may be imparted to the principal by letter as well as by any other means.[1]

§ 164. **Ratification by Acquiescence—Illustrations.** The cases in which this principle has been applied are very numerous, but a few of them are given here as illustrations of its nature and effect. Thus where one in the presence of the principal sold the goods of the principal as his agent without objection, the tacit consent of the principal was presumed.[2] And where a son without authority exchanged his father's horse for another with a near neighbor and the father, although he saw the neighbor frequently, kept the horse so acquired and used it as his own for about three months without expressing any dissent, it was held that a ratification of the exchange must be presumed.[3] And so where a son assuming to act for his father, but without authority, sold a half interest in his father's mowing and reaping machine, and for two years thereafter the father and the purchaser used and kept the machine in repair as joint owners, it was held that the father could not complain that the sale was unauthorized.[4] Again, where an agent without authority sold the land of the principal to the knowledge of the latter, who made no objections for more than four years, during which time the purchaser had been occupying and improving the land, the principal was held to have acquiesced in the sale.[5] So where a railroad company used and partly paid for a quantity of material purchased by one assuming to be its agent, the purchase was held to be ratified;[6] and under like circumstances it was held that knowledge of the purchase on the part of the company would be presumed.[7] And where the president of a railroad company, without authority, made a sale of property belonging to the company, in part payment of a debt owed by it, and the fact of the sale was communicated to the board of directors and talked over publicly at one

[1] Foster v. Rockwell, 104 Mass. 167; Cooper v. Schwartz, 40 Wis. 54; Ruffner v. Hewitt, 7 W. Va. 585. See also Searing v. Butler, 69 Ill. 575; Ward v. Williams, 26 Ill 447, 79 Am. Dec. 385; Kehlor v. Kemble, 26 La. Ann. 713; Pittsburgh, &c. R. R. Co. v. Woolley, 12 Bush. (Ky.) 451; Jennison v. Parker, 7 Mich. 355.

[2] Owsley v. Woolhopter, 14 Ga. 124; Gillinger v. Lake Shore Traffic Co. 67 Wis. 529.

[3] Hall v. Harper, 17 Ill. 82.

[4] Swartwout v. Evans, 37 Ill. 442.

[5] Alexander v. Jones, 64 Iowa, 207.

[6] Evans v. Chicago, &c. R. R. Co. 26 Ill. 189.

[7] Scott v. Middletown, &c. Ry, 86 N. Y. 200.

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of their meetings, but they did nothing to disaffirm it, it was held to be ratified.[1] Other cases involving the same principle are cited in the note,[2] and it may be said generally that ratification will be presumed whenever the acts of the principal are inconsistent with any other hypothesis.[3]

§ 165. **Rule applies only to Principals.** The doctrine of ratification by aquiescence applies only to the principals in the transaction, and cannot therefore operate to effect a ratification upon the ground of the acquiescence of one of two joint agents in the acts of his coagent.[4]

VI.

THE RESULTS OF RATIFICATION.

§ 166. **What for this Subdivision.** Having thus considered the preliminary questions, it remains to determine what are the results of a ratification made in conformity to the rules heretofore laid down. It is obvious that there are several parties whose rights and obligations may be affected by a ratification, and we shall consider the question,—I. In general. II. As between principal and agent. III. As between the principal and the other party. IV. As between the agent and the other party.

1. *In General.*

§ 167. **Equivalent to precedent Authority.** By ratifying the unauthorized act the principal assumes and adopts it as his own, and as has been seen,[5] this adoption extends to the whole of the act,—it goes back to its inception and continues to its legitimate end. Subject therefore to an exception to be immediately noticed, it is the universal rule that as against the principal the rati-

[1] Walworth County Bank *v.* Farmers, &c. Co. 16 Wis. 629.

[2] Williams *v.* Merritt, 28 Ill. 623; Bogel *v.* Teutonia Bank, 28 La. Ann. 953; Matthews *v.* Fuller, 123 Mass. 446; Marshall *v.* Williams, 2 Biss. (U. S. C. C.) 255; Hanks *v.* Drake, 49 Barb. (N. Y.) 186; Maddux *v.* Bevan, 39 Md. 485; Farwell *v.* Howard, 26 Iowa, 381; Pittsburgh *v.* Woolley, 12 Bush (Ky.) 451 Lafitte *v.* Godchaux, 35 La. Ann. 1161; Meyer *v.* Morgan, 51 Miss. 21, 24 Am. Rep. 617; Hawkins *v.* Lange, 23 Minn. 557; Johnston *v.* Berry, 3 Ill. App. 256; Marsh *v.* Whitmore, 21 Wall. (U. S.) 178; Hoyt *v.* Thompson, 19 N. Y. 218; Law *v.* Cross, 1 Black (U. S.) 533.

[3] Maddux *v.* Bevan, 39 Md. 488; Scott *v.* Methodist Church, 50 Mich. 528.

[4] Penn *v.* Evans, 28 La. Ann. 576. See *ante*, § 121.

[5] *Ante*, § 130.

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fication is retroactive and equivalent to a prior authority,[1] or to use the language of a distinguished writer and judge, "No maxim is better settled in reason and law than the maxim *omnis ratihabitio retrotrahitur, et mandato priori equiparatur;* at all events where it does not prejudice the rights of strangers."[2]

"The ratification operates upon the act ratified precisely as though the authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification."[3] And this rule applies as well to corporations as to individuals.[4]

It has been seen also, that the principal cannot avail himself of the benefits of the act and repudiate its obligations.[5] Having with full knowledge of all the material facts ratified, either expressly or impliedly, the act assumed to be done in his behalf, he thenceforward stands responsible for the whole of it to the full extent to which the agent assumed to act, and he must abide by it whether the act be a contract or a tort,[6] and whether it results to his advantage or detriment.[7]

But, as will be seen in a following section, a principal, not himself bound by the agent's act or contract, will not, by mere ratification alone, and while the contract remains executory, be able to build up affirmative rights against the other party.[8]

[1] Fleckner v. Bank of U.S., 8 Wheat. (U. S.) 338; Cook v. Tullis, 18 Wall. (U. S.) 332; Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Clealand v. Walker, 11 Ala. 1058, 46 Am. Dec. 238; McMahan v. McMahan, 13 Penn. St. 376, 53 Am. Dec. 481; Pearsons v. McKibben, 5 Ind. 261, 61 Am. Dec. 85; Wood v. McCain, 7 Ala. 800, 42 Am. Dec. 612; Planters' Bank v. Sharp, 4 Smedes & M. (Miss.) 75, 43 Am. Dec. 470; Starks v. Sikes, 8 Gray (Mass.) 609, 69 Am. Dec. 270; Goss v. Stevens, 32 Minn. 472; United States Express Co. v. Rawson, 106 Ind. 215; Bronson v. Chappell, 12 Wall (U. S.) 681; Lawrence v. Taylor, 5 Hill (N. Y.) 107; Lowry v. Harris, 12 Minn. 255; Hankins v. Baker, 46 N. Y. 666; Hammond v. Hannin, 21 Mich. 374, 4 Am. Rep. 490; McIntyre v. Park, 11 Gray (Mass.) 102, 71 Am. Dec. 690; Louisville, &c. Ry. Co. v. McVay, 98 Ind. 391, 49 Am. Rep. 770.

[2] Story, J. in Fleckner v. Bank, *supra.*

[3] Field, J. in Cook v. Tullis, *supra.*

[4] Planters' Bank v. Sharp, *supra;* Despatch Line v. Bellamy Mfg. Co. *supra;* Leggett v. N. J. Mfg. and Banking Co. 1 Saxt. Ch. (N. J.) 541, 23 Am. Dec. 728; Frankfort S. T. Co. v. Churchill, 6 T. B. Monroe (Ky.) 427, 17 Am. Dec. 159; Everett v. United States, 6 Port. (Ala.) 166; 30 Am. Dec. 584.

[5] *Ante,* § 130.

[6] Cooley on Torts, 127.

[7] Wood v. McCain, and cases cited in note 2 above.

[8] See *post,* § 179.

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§ 168. **Cannot affect intervening Rights.** Until ratification the principal has not been a party to the transaction. Although done in his name, the act had no binding force as to him until he sanctioned it. And although in ordinary cases the ratification extends back to the beginning and operates upon all that has since been done, yet it is obviously just and reasonable that where prior to his ratification,—before he has given his sanction,—third persons have in good faith acquired such substantial rights or have been placed in such position in reference to the same transaction that they will be prejudiced by such retroactive effect, the ratification should not be allowed to overreach and defeat those rights. And such is the rule of law. The intervening rights of third persons cannot be defeated by the ratification. If prior to the ratification the principal has put it out of his power to perform the contract ratified, by conveying the subject-matter thereof to a third person who took the same in good faith,[1] or if third parties have in good faith acquired an estate, or interest in, or a lien or claim upon the subject-matter by attachment,[2] judgment or otherwise, these rights cannot be cut off at the mere volition of the principal.[3] Nor will the principal by ratifying be permitted to impose substantial duties or obligations upon third persons which would not exist if ratification had not taken place.

§ 169. **Ratification irrevocable.** As has been seen, the principal upon being fully informed of the unauthorized act of one assuming to be his agent has the right to elect whether he will ratify such act or not; but when he has once exercised this right the election is final. If therefore he adopts the act, even for a moment, he adopts it forever, and he will not be allowed, at least where the rights of other parties may be affected thereby, to revoke his ratification.[4]

[1] McCracken v. City of San Francisco, 16 Cal. 624.

[2] Wood v. McCain, 7 Ala. 800, 42 Am. Dec. 612; Taylor v. Robinson, 14 Cal. 396.

[3] Cook v. Tullis, 18 Wall. (U. S.) 332; McMahan v. McMahan, 13 Penn. St. 376, 53 Am. Dec. 481; Stoddard's Case, 4 Ct. of Cl. 511; Pollock v. Cohen, 32 Ohio St. 514.

[4] Jones v. Atkinson, 68 Ala. 167; Smith v. Cologan, 2 T. R. 189; Clarke v. Van Reimsdyk, 9 Cranch (U. S. C. C.) 153; Hazelton v. Batchelder, 44, N. Y. 40; Brock v. Jones, 16 Tex. 461; Beall v. January, 62 Mo. 434.

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2. *As between Principal and Agent.*

§ 170. **In general.** The general result of a ratification has already been stated. It is now to be considered what special results ensue affecting the mutual rights and obligations of the principal and the agent. It will readily be seen that these results are of great consequence to the agent. Whether he was an agent who had exceeded the authority conferred upon him, or whether he was a mere stranger with no semblance of authority at all, his acts were not binding upon the assumed principal. He had undertaken to act for another from whom he had no authority at all, or with authority insufficient to justify the act assumed to be done, and he would himself be liable either to the parties to whom he had failed to bind the principal, or to that principal for damages occasioned by exceeding the authority with which he was invested. From this dilemma, however, the ratification relieves him. Thenceforward the principal assumes the responsibility of the transaction with all of its advantages and all of its burdens.

§ 171. **The general Rule** therefore is that by such ratification the principal absolves the agent from all responsibility for loss or damage growing out of the unauthorized transaction.[1] Here, as in other cases, the ratification must have been made with full knowledge of all the material facts, and if the agent has kept back or suppressed any such facts, the ratification of the principal made in ignorance of them is no defense to the agent.[2] And even if the agent communicate to his principal all the facts known to him at the time, but if afterwards it turns out that the facts so communicated were not the real facts of the

[1] Hoffman *v.* Livingston, 46 N. Y. Super. Ct. 552; Courcier *v.* Ritter, 4 Wash. C. C. 549; Cairnes *v.* Bleecker, 12 Johns. (N. Y.) 300; Pickett *v.* Pearsons, 17 Vt. 470; Hanks *v.* Drake, 49 Barb. (N. Y.) 202; Vianna *v.* Barclay, 3 Cow. (N. Y.) 283; Towle *v.* Stevenson, 1 Johns. (N. Y.) Cas. 110; Ward *v.* Warfield, 3 La. Ann. 471; Flower *v.* Downs, 6 *Id.* 538; Oliver *v.* Johnson, 24 *Id.* 460; Hazard *v.* Spears, 4 Keyes (N. Y.) 485; Woodward *v.* Suydam, 11 Ohio, 360; Green *v.* Clark, 5 Denio (N. Y.) 503; Skinner *v.* Dayton, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286; Bray *v.* Gunn, 53 Ga. 144; Foster *v.* Rockwell, 104 Mass. 172; Clay *v.* Spratt, 7 Bush (Ky.) 335; Bank of St. Mary's *v.* Calder, 3 Strob. (S. C.) 403; Ætna Ins. Co. *v.* Sabine, 6 McLean (U. S. C. C.) 393.

[2] Bell *v.* Cunningham, 3 Pet. (U. S.) 69, and cases last cited; Bank of Owensboro *v.* Western Bank, 13 Bush. (Ky.) 526, 26 Am. Rep. 211.

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case, the agent is not relieved by a ratification made under such a misapprehension,[1] although the facts and circumstances may have been innocently concealed or inadvertently misrepresented.[2] In such a case the assumed condition is not that claimed to have been ratified.

§ 172. **Agent's Motives unimportant.** The motives of the agent in the transaction are of no importance. If he has deviated from his duty he becomes liable to his principal for such losses as are the direct and natural consequences of such deviation, whether his motives were good or bad; and he is only released from such liability where the principal with full knowledge of all the material facts ratifies such departure from his duty.[3]

§ 173. **Efforts to avoid Loss, no Ratification.** The mere effort of the principal, having knowledge of the agent's deviation from his instructions, to avoid loss thereby or to make the loss as small as possible, will not constitute such a ratification as will release the agent. Thus where an agent for the collection and transmission of a sum of money, who was given specific instructions by his principal to remit it by express, purchased a check drawn by parties then in good standing and credit in New York and sent the same to his principal who forwarded it to New York for collection, but before it was cashed the drawers had become insolvent and the check was dishonored, it was held that the agent having violated his instructions in regard to the mode of sending the money was liable to the principal for the loss sustained, and that the sending of the check to New York for collection was not an absolute ratification of the act of the agent in transmitting the money in that way.[4]

§ 174. **Ratification must be in toto.** Here also applies the rule of a ratification *in toto*. If the principal adopts a portion of the agent's act he adopts the whole of it, and therefore relieves the agent from all responsibility. Hence if the agent has incurred expenses in departing from his authority and the prin-

[1] Bank of Owensboro v. Western Bank, *supra*.

[2] Vincent v. Rather, 31 Tex. 77, 98 Am. Dec. 516.

[3] Bank of Owensboro v. Western Bank, *supra*.

[4] Walker v. Walker, 5 Heisk. (Tenn.) 425.

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cipal afterwards ratify such departure, the agent is entitled to be reimbursed for the expenses so incurred.[1]

§ 175. **Ratification of Appointment of Subagent.** So if the agent without authority has employed a subagent, the ratification will embrace the appointment and acts of the subagent.[2]

§ 176. **Ratification of Torts does not discharge Agent's Liability to third Persons.** But as will be seen hereafter, the ratification by the principal of a tort committed by the agent does not relieve the agent from liability to third persons.[3]

§ 177. **Acts of Ratification liberally construed.** The conduct of the principal will be liberally construed in favor of the agent in effecting a ratification.[4]

3. *As between Principal and the other Party.*

§ 178. *a.* **Other Party against Principal.** As soon as the unauthorized act is ratified, he who before was only nominally a party to the transaction, becomes in reality the party responsible. From this time on, he is subject to all the obligations that pertain to the transaction in the same manner and to the same extent that he would be had the act been done originally by him in person, or by his express authority. The other party therefore may demand and enforce on the part of the principal the full performance of the contract entered into by his agent.[5] And if the act or contract of the agent was tainted or procured by fraud, the principal by ratification assumes responsibility for the fraud.[6] It is unnecessary to cite instances of this. What has been or may be hereafter said of the obligations of the principal, applies as well to one who became such by ratification as to one who was such by original agreement.

§ 179. *b.* **Principal against the other Party.** Where, however, the principal attempts, by means of a subsequent ratification, to build up affirmative rights against the other party,

[1] Trixione *v.* Tagliaferro, 10 M. P. C. C. 175.

[2] Eggleston *v.* Boardman, 87 Mich. 14, 20; Blantin *v.* Whitaker, 11 Hump. (Tenn.) 313; Sheldon *v.* Sheldon, 3 Wis. 699.

[3] See *post*, § 183.

[4] Szymanski *v.* Plassan, 20 La. Ann. 90, 96 Am. Dec. 382; Flower *v.* Jones, 7 Martin, (La.) N. S. 143.

[5] See cases cited in § 167, *ante*.

[6] National Life Ins. Co. *v.* Minch, 53 N. Y. 144; Elwell *v.* Chamberlin, 31 N. Y. 611; Smith *v.* Tracy, 36 N. Y. 79; Lane *v.* Black, 21 W. Va. 617.

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different considerations apply. As a rule the obligations of a contract must be mutual,—both parties must be bound or neither. Hence if the contract made by the agent was not binding upon the principal because of the agent's want of authority, the contract lacks this element of mutuality, and the principal not being bound the other party is free also.

The principal, however, as has been seen, may by his subsequent affirmance become bound by the contract, but it is obvious that unless the other party has expressly agreed to that effect, it cannot rest with the principal alone to bind the other party also to the contract. That can be done only by some act on the part of the other party signifying his present consent to be bound. His attempt to enforce the contract against the principal upon the basis of the latter's affirmance of it, or his acceptance of the principal's performance of it, would be such an act, and, as in the case of the principal, if he elects to avail himself of the benefits, he must also assume the obligations.

The principal, therefore, when the other party thus evinces his affirmance of the contract, is invested with all the rights against such other party which the contract confers, and may enforce its performance in the same manner as though it had been originally made with him in person.[1] But in the absence of this affirmance by the other party, the principal cannot, while the contract remains purely executory, by his affirmance alone, create obligations in his behalf against the other party.[2]

[1] Soames v. Spencer, 1 D. & R. 32; State v. Torinus, 26 Minn. 1.

[2] Thus in Dodge v. Hopkins, 14 Wis. 630, a person assuming to act as plaintiff's agent, had, without sufficient authority, entered into a contract with defendant, by which defendant agreed to purchase of plaintiff certain real estate and to pay therefor certain sums of money. Plaintiff seeking to enforce the contract, brought an action against the defendant to recover certain installments of the purchase price which defendant had refused to pay. Defendant resisted upon the ground that as the contract, owing to the agent's lack of authority, did not bind the plaintiff to sell, defendant was not bound to purchase. The court found that the agent's authority was insufficient, and thereupon, by DIXON, C. J., said:—"We are next to ascertain the effect of this want of authority upon the rights of the defendant. It is very clear, in the present condition of the case, that the plaintiff was not bound by the contract and that he was at liberty to repudiate it at any time before it had actually received his sanction. Was the defendant bound? And if he was not, could the the plaintiff by his sole act of ratification, make the contract obligatory upon him? We answer both these questions in the negative. The cov-

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Thus if an agent, without authority, enter into a contract with another by which, on account of such lack of authority the alleged principal is not bound, the principal cannot, when he afterwards finds that the contract is advantageous to him, affirm

enants were mutual—those of the defendant for the payment of money being in consideration of that of the plaintiff for the conveyance of the lands. The intention of the parties was that they should be mutually bound—that each should execute the instrument so that the other could set it up as a binding contract against him, at law as well as in equity, from the moment of its execution. In such cases it is well settled both on principle and authority, that if either party neglects or refuses to bind himself, the instrument is void for want of mutuality, and the party who is not bound cannot avail himself of it as obligatory upon the other. Townsend *v.* Corning, 23 Wend. 435, and Same *v.* Hubbard, 4 Hill, 851, and cases there cited.

The same authorities also show that where the instrument is thus void in its inception, no subsequent act of the party who has neglected to execute it can render it obligatory upon the party who did execute, without his assent. The opinion of Judge BRONSON in the first named case is a conclusive answer to all arguments to be drawn from the subsequent ratification of the party who was not originally bound. In that case as in this, the vendors had failed to bind themselves by the agreement. He says: 'It would be most extraordinary if the vendors could wait and speculate upon the market, and then abandon or set up the contract as their own interests might dictate. But without any reference to prices and whether the delay was long or short, if this was not the deed of the vendee at the time it was signed by himself and Baldwin (the agent), it is impossible that the vendors, by any subsequent act of their own without his assent could make it his deed. There is, I think, no principle in the law which will sanction such a doctrine.' The only point in which the facts in that case differ materially from those here presented, is, that no part of the purchase money was advanced to the agent. But that circumstance cannot vary the application of the principle. The payment of the money to the agent did not affect the validity of the contract, or make it binding upon the plaintiff. He was at liberty to reject the money, and his acceptance of it was an act of ratification with which the defendant was in no way connected, and which, although it might bind him, imposed no obligation upon the defendant until he actually assented to it. It required the assent of both parties to give the contract any vitality or force."

"I am well aware that there are *dicta* and observations to be found in the books, which, if taken literally, would overthrow the doctrine of the cases to which I have referred. It is said in Lawrence *v.* Taylor, 5 Hill, 113, that 'such adoptive authority relates back to the time of the transaction, and is deemed in law the same to all purposes as if it had been given before.' And in Newton *v.* Bronson, 3 Kern. 594, (67 Am. Dec. 87), the court says: 'That a subsequent ratification is equally effectual as an original authority, is well settled.' Such expressions are no doubt of frequent occurrence, and although they display too much carelessness in the use of language, yet if they are understood

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the contract so made and compel the other party to perform it on his part.[1] (a)

A well recognized illustration of this rule exists, also, in the case of landlord and tenant. Thus a subsequent assent on the part of a landlord will not establish by relation an unauthorized notice to quit given by his agent. The tenant must act upon the notice at the time it is given, and the notice must, therefore, at that time, be such as he can act upon with security; otherwise the tenant would be subjected to the injustice of being left in doubt as to his action until the ratification or disavowal of the principal.[2]

as applicable only to the cases in which they occur, they may be considered as a correct statement of the law. The inaccuracy consists in not properly distinguishing between those cases where the subsequent act of ratification is put forth as the *foundation of a right in favor* of the party who has ratified, and those where it is made the basis of a demand *against* him. There is a broad and manifest difference between a case in which a party seeks to avail himself, by subsequent assent, of the unauthorized act of his own agent, in order to enforce a claim against a third person, and the case of a party acquiring an inchoate right against a principal, by an unauthorized act of his agent, to which validity is afterwards given by the assent or recognition of the principal. Paley on Agency, 192, note. The principal in such a case may, by his subsequent assent, bind himself, but if the contract be executory, he cannot bind the other party. The latter may, if he choose, avail himself of such assent *against* the principal, which if he does, the contract, by virtue of such *mutual* ratification, becomes *mutually* obligatory. There are many cases where the acts of parties, though unavailable for their own benefit, may be used against them. It is upon this obvious distinction, I apprehend, that the decisions which I have cited are to be sustained. Lawrence *v.* Taylor and Newton *v.* Bronson were both actions in which the *adverse* party claimed rights through the agency of individuals whose acts had been subsequently ratified. And the authorities cited in support of the proposition laid down in the last case (Weed *v.* Carpenter, 4 Wend. 219; Episcopal Society *v.* Episcopal Church, 1 Pick. 372; Corning *v.* Southland, 3 Hill, 552; Moss *v.* Rossie Lead Mining Co., 5 Id. 137; Clark *v.* Van Riemsdyk, 9 Cranch, 153, and Willinks *v.* Hollingsworth, 6 Wheat. 241), will, when examined, be found to have been cases where the subsequent assent was employed against the persons who had given it and taken the benefit of the contract."

[1] Dodge *v.* Hopkins, 14 Wis. 630, affirmed in Atlee *v.* Bartholemew, 69 Wis. 43, 5 Am. St. Rep. 103. See also Wilkinson *v.* Heavenrich, 58 Mich. 574, 55 Am. Rep. 708.

[2] Brahn *v.* Jersey City Forge Co. 38 N. J. L. 74; Right *v.* Cuttrel, 5 East, 491; Doe *v.* Walters, 10 B. & C. 625; Doe *v.* Goldwin, 2 Q. B. 143.

Contra, Roe *v.* Pierce, 2 Camp. 96; Goodtitle *v.* Woodward, 3 B. & Ald. 689.

(a) This rule is criticized in note to 5 Am. St. Rep. 113, upon the authority of Maclean *v.* Dunn, 4 Bing. 722; Soames *v.* Spencer, 1 Dowl. & R. 32; Hammond *v.* Hannin, 21 Mich. 273; Andrews *v.* Ætna L. Ins. Co., 92 N. Y. 596; but these cases do not, in the writer's opinion antagonize the rule. See 24 Am. L. Rev. 580.

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4. *As between Agent and the other Party.*

§ 180. **In general.** It is the general rule, as will be more fully seen hereafter, that when one assumes to act as agent of another but fails to bind that other as assumed on account of a lack of authority, he will himself become personally liable to the party who relied upon his pretended authority for all losses and damages which he may sustain by reason of such failure.[1] As between the principal and agent, as has been seen, this lack of authority is fully supplied by ratification. But as between the agent and third persons a distinction is made between cases of contract and those of tort.

§ 181. **Ratification releases Agent on Contract.** Where the contract has been made in the name and on behalf of the alleged principal, and the latter, with full knowledge of the facts, has ratified it, the contract then becomes in fact, so far as the rights of the other party are concerned, what at first it only assumed to be,—the contract of the principal. The other party has then what he contracted for,—the liability and responsibility of the principal; and he can obviously suffer no injury from the fact that the agent's act was originally unauthorized. The agent, therefore, drops out of sight. His identity is thereafter merged in that of the principal and he cannot personally call upon the other party for performance, nor can performance be demanded of him. He cannot sue in his own right, nor can he be rendered personally liable upon the ground of the failure of an assumed authority.[2]

But if, for any reason, the ratification fails, as where it is made in ignorance of material facts, there would seem to be no reason why the rights of the other party, who has done no more to release the agent than to attempt in good faith to realize what the agent had assumed to assure to him, should not thereupon be revived as against the agent.

§ 182. **Otherwise in Tort.** But while, by ratifying the tort committed by his agent the principal becomes liable therefor, this is an additional liability and not a substituted one. The agent still remains liable to third persons and satisfaction may be

[1] See *post*, §§ 541, 550.

[2] See East India Co. v. Hensley, 1 Esp. 112; Polhill v. Walter, 3 B. & Ad. 114; Bowen v. Morris, 2 Taunt. 374.

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demanded either of the principal or of the agent or of both. It is no defence to one who is sued for committing a trespass to reply that he acted as the agent of another. [1]

[1] Stephens v. Elwall, 4 M. & S. 259; Perminter v. Kelly, 18 Ala. 716, 54 Am. Dec. 177; Josselyn v. McAllister, 22 Mich. 300; Wright v. Eaton, 7 Wis. 595; Thorp v. Burling, 11 Johns. (N. Y.) 285; Richardson v. Kimball, 28 Me. 463; Burnap v. March, 18 Ill. 535.

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CHAPTER VI.

OF DELEGATION OF AUTHORITY.

§ 183. In general.
I. Delegation by the Principal.
II. Delegation by the Agent.
184. *Delegatus non potest delegari.*
185. General Rule.
186. Same Subject—Judgment and Discretion cannot be delegated.
187. Attorneys cannot delegate personal Undertakings.
188. Arbitrators cannot delegate their Powers.
189. Executors, &c. cannot delegate personal Trusts.
190. Same Rule applies to Municipal Corporations.
191. And to private Corporations.
192. Exceptions and Modifications.
193. 1. Sub-agent may be employed when Duties are mechanical or ministerial merely.
194. 2. When Necessity requires it.
195. 3. When justified by Usage or Course of Trade.
196. 4. When originally contemplated.
197. Effect of Appointment.

§ 183. **In general.** The authority which one assumes to exercise on the behalf of another may be derived either from the principal himself, or from some person to whom the principal has confided it. It is obvious therefore that a complete view of the doctrine of the delegation of authority embraces: 1. Delegation by the principal, and, 2. Delegation by the agent.

I.

DELEGATION BY THE PRINCIPAL.

The original delegation of authority by the principal has been quite fully discussed in preceding sections, and needs no separate attention here. Who may be a principal, and how he may confer authority upon his agents, have been the subjects of special examination.

II.

DELEGATION BY THE AGENT.

§ 184. **Delegatus non potest delegari.** The appointment of an agent in any particular case is made, as a rule, because he is

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supposed by his principal to have some fitness for the performance of the duties to be undertaken. In certain cases his appointment is owing to the fact that he is considered to be especially and particularly fit. The undertaking demands judgment and discretion, which he is supposed to possess; or it requires the skill and learning of an expert, which he assumes to be; or personal force and influence are desirable, and these the agent is thought to be able to exercise. Here is the *delectus personæ*, and it is obvious that unless the principal has expressly or impliedly consented to the employment of a substitute, the agent owes to the principal the duty of a personal discharge of the trust.

§ 185. **General Rule.** Hence it is the general rule of the law that in the absence of any authority, either express or implied, to employ a subagent, the trust committed to the agent is presumed to be exclusively personal and cannot be delegated by him to another so as to affect the rights of the principal.[1]

But this general rule is, as will be seen, subject to be modified by the peculiar circumstances and necessities of each particular case, from which or from the usage of trade, a power to delegate the authority may be inferred.[2]

§ 186. **Same Subject—Judgment and Discretion not to be delegated.** The reasons for this rule are particularly applicable to those cases where the performance of the agency requires, upon the part of the agent, the exercise of special skill, judgment or

[1] Appleton Bank *v.* McGilvray, 4 Gray (Mass.) 518, 64 Am. Dec. 92; McCormick *v.* Bush, 38 Tex. 314; White *v.* Davidson, 8 Md. 169, 63 Am. Dec. 699; Lyon *v.* Jerome, 26 Wend. (N. Y.) 485, 37 Am. Dec. 271; Wright *v.* Boynton, 37 N. H. 9, 72 Am. Dec. 319; Smith *v.* Sublett, 28 Tex. 163; Stoughton *v.* Baker, 4 Mass. 522, 3 Am. Dec. 236; Lynn *v.* Burgoyne, 13 B. Mon. (Ky.) 400; Loomis *v.* Simpson, 13 Iowa 532; Connor *v.* Parker, 114 Mass. 331; Gillis *v.* Bailey 21 N. H. 149; Furnas *v.* Frankman, 6 Neb. 429; Harralson *v.* Stein, 50 Ala. 347.

"One who has a bare power of authority from another to do any act, must execute it himself, and cannot delegate it to a stranger; for this being a trust or confidence reposed in him personally, it cannot be assigned to one whose integrity or ability may not be known to the principal, and who, if he were known, might not be selected by him for such a purpose. The authority is exclusively personal unless from the express language used or from the fair presumptions growing out of the particular transaction a broader power was intended to be conferred." BELL, J., in Wright *v.* Boynton, *supra*.

[2] See post, § 192, *et seq.*

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discretion. Such relations are obviously created because the principal places special confidence in the particular agent selected, and there is abundant reason why the trust should not be transferred to another of whose fitness or capacity the principal may have no knowledge, without the latter's express consent.[1]

Thus where an agent had been entrusted with the general administration of the affairs of a trading company, but no power to substitute others in his place had been given him, it was held that no such power could be implied, because there was evidently a confidence reposed in him which the company might not be willing to repose in others.[2] For the same reasons the agent who has been given the important power to bind his principal by the execution of promissory notes cannot delegate the power to a subagent.[3]

A bailment of personal property to an agent with power to sell, also creates a personal trust which cannot be delegated.[4] So where an agent had been authorized to sell real estate, but in his absence and without his knowledge, the land was sold by one falsely assuming to be a subagent, it was held that the sale was binding neither upon the principal nor the agent, as the principal was entitled to the judgment and discretion of the agent in making the sale.[5]

§ 187. **Attorneys cannot delegate personal Undertaking.** The appointment of an attorney to argue or conduct a cause creates a personal trust, and he can neither entrust the performance of this duty to another attorney of his own selection, nor let the case out on shares, without the express consent of his principal.[6]

This rule, however, does not demand that the attorney shall perform, in person, all of the merely mechanical or ministerial work involved in the case. As will be seen in a subsequent section, the performance of such duties through the agency of

[1] Emerson v. Providence Hat Co. 12 Mass. 237, 7 Am. Dec. 66; Paul v. Edwards, 1 Mo. 30; Lewis v. Ingersoll, 3 Abb. (N. Y.) App. Dec. 55; Sayre v. Nichols, 7 Cal. 535, 68 Am. Dec. 280; Commercial Bank v. Norton, 1 Hill (N. Y.) 501; Dorchester, &c., Bank v. New England Bank, 1 Cush. (Mass.) 177; Planters &c., Bank v. First National Bank, 75 N. C. 534; Pendall v. Rench, 4 McLean (U. S. C. C.) 259.

[2] Emerson v. Providence Hat Co., *supra*.

[3] Idem.

[4] Hunt v. Douglass, 22 Vt. 128.

[5] Barret v. Rhem, 6 Bush. (Ky.) 466.

[6] Eggleston v. Boardman, 37 Mich. 14.

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others, falls under a well recognized exception to the general rule.[1]

§ 188. **Arbitrators cannot delegate their Powers.** This rule also applies with special force to arbitrators. They are selected by parties who have placed particular confidence in their personal judgment, discretion and ability, and it would be a palpable injustice if they were to be permitted to delegate their responsibilities and powers to others.[2] But it is entirely proper for arbitrators, in a case requiring it, to obtain from disinterested persons of acknowledged skill such information and advice in reference to technical questions submitted to them, as may be necessary to enable them to come to correct conclusions, provided that the award is the result of their own judgment after obtaining such information.[3] They may also avail themselves of such mechanical or ministerial assistance as the nature of their duties may require.[4]

§ 189. **Executors, &c., cannot delegate personal Trusts.** This principle is, likewise, of frequent application to the case of persons upon whom the *law* has devolved discretionary or fiduciary powers, such as executors, guardians and public trustees. Such powers cannot be delegated without express authority.[5]

§ 190. **Same Rule applies to Municipal Corporations.** The same rule applies to the powers and duties conferred upon municipal corporations and municipal officers. Wherever judgment and discretion are to be exercised, the body or officer entrusted with the duty must exercise it; it cannot be delegated or farmed out.[6]

[1] See *post* § 193; Eggleston v. Boardman, *supra*.

[2] Lingwood v. Eade, 2 Atk. 501; Proctor v. Williams, 8 C. B. (N. S.) 386; Whitmore v. Smith, 5 H. & N. 824; Little v. Newton, 2 Scott N. R. 509.

[3] Soulsby v. Hodgson, 3 Burr. 1474; Caledonia Ry Co. v. Lockhart, 3 Macq. 808; Anderson v. Wallace, 3 Cl. & Fin. 26; Eads v. Williams, 4 DeGex. Mac. & Gor. 674.

[4] Thorp v. Cole, 2 Cr. M. & R. 367; Harrey v. Shelton, 7 Beav. 455; Moore v. Barnett, 17 Ind. 349.

[5] Berger v. Duff, 4 Johns. (N. Y.) Ch. 369; Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89; Lyon v. Jerome, 26 Wend. (N. Y.) 485, 37 Am. Dec. 271; Hicks v. Dorn, 42 N. Y. 51; St. Peter v. Denison, 58 N. Y. 421; Curtis v. Leavitt, 15 N. Y. 190; The California, 1 Sawyer, 603; White v. Davidson, 8 Md. 169, 63 Am. Dec. 699; Merrill v. Farmers, &c., Co. 24 Hun (N. Y.) 300; Stoughton v. Baker, 4 Mass. 522, 3 Am. Dec. 236.

[6] State v. Hauser, 63 Ind. 155; State v. Bell, 34 Ohio St. 194; Birdsall v. Clark, 73

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§ 191. **And to private Corporations.** "The general supervision and direction of the affairs of a corporation," says Mr. Morawetz, "are especially intrusted by the shareholders to the board of directors; it is upon the personal care and attention of the directors that the shareholders depend for the success of their enterprise. It follows that authority to delegate these general powers of management cannot be implied."[1]

§ 192. **Exceptions and Modifications.** But the general rule above given is subject to certain exceptions and modifications growing out of the nature of the authority or the exigencies and necessities of the case, or based upon the custom and usage of trade in similar cases. Thus—

§ 193. 1. **Subagent may be employed when Duties are mechanical or ministerial merely.** Where in the execution of the authority an act is to be performed which is of a purely mechanical, ministerial or executive nature, involving no elements of judgment, discretion or personal skill, the power to delegate the performance of it to a subagent may be implied.[2]

Thus an agent empowered to execute a promissory note,[3] or to bind his principal by an accommodation acceptance,[4] or to sign his name to a subscription agreement,[5] having himself first determined upon the propriety of the act, may direct another to perform the mechanical act of writing the note or signing the accept-

N. Y. 73, 29 Am. Rep. 105; Brooklyn v. Breslin, 57 N. Y. 591; Matthews v. Alexandria, 68 Mo. 115, 30 Am. Rep. 776; Maxwell v. Bay City Bridge Co., 41 Mich. 453; Clark v. Washington, 12 Wheat. (U. S.) 54; Thompson v. Schermerhorn, 6 N. Y. 92; Davis v. Read, 65 N. Y. 566; Supervisors v. Brush, 77 Ill. 59; Thompson v. Boonville, 61 Mo. 282; State v. Fiske, 9 R. I. 94; State v. Paterson, 34 N. J. L. 168; Hydes v. Joyes, 4 Bush. (Ky.) 464; Oakland v. Carpentier, 13 Cal. 540; Whyte v. Nashville, 2 Swan (Tenn.) 364; Lord v. Oconto, 47 Wis. 386; Lauenstein v. Fond du Lac, 28 Wis. 336; Gale v. Kalamazoo, 23 Mich. 344; Indianapolis v. Indianapolis Gas Co., 66 Ind. 396; Ruggles v. Collier, 43 Mo. 353; Meuser v. Risdon, 36 Cal. 239; Darling v. St. Paul, 19 Minn. 389; St. Louis v. Clemens, 43 Mo. 395, S. C. 52 Mo. 133.

[1] Morawetz on Corporations, § 536.

[2] Williams v. Woods, 16 Md. 220; Grinnell v. Buchanan, 1 Daly (N. Y.), 538; Eldridge v. Holway, 18 Ill. 445; Joor v. Sullivan, 5 La. Ann. 177. Grady v. American Cent. Ins. Co., 60 Mo. 116; Newell v. Smith, 49 Vt. 255.

[3] Sayre v. Nichols, 7 Cal. 535, 68 Am. Dec. 280.

[4] Commercial Bank v. Norton, 1 Hill (N. Y.) 501.

[5] Norwich University v. Denny, 47 Vt. 13.

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ance or subscription, and the act so performed will be binding upon the principal.

So an agent authorized to sell real estate, who exercises his own discretion as to the price and the terms, may employ a subagent to look up a purchaser,[1] and an insurance agent may employ clerks, and authorize them to solicit risks, deliver policies, collect premiums and give credit for the same.[2]

§ 194. 2. **When Necessity requires it.** It is obvious, too, that there are many cases where from the very nature of the duty, or the circumstances under which it is to be performed, the employment of subagents is imperatively necessary, and that the principal's interests will suffer if they are not so employed. In such cases, the power to employ the necessary subagents will be implied.[3] The authority of the agent is always construed to include the necessary and usual means to execute it properly.

Thus if a note be sent to a bank for collection, and for the protection of the principal it becomes necessary to have the note protested, the authority of the bank to employ the proper officer will be implied;[4] and so if a note or draft be sent to a bank, to be collected at a distant point, the authority of the bank to employ a subagent at the place of collection, and to forward the note or draft to him there, would be presumed.[5]

So an agent employed to collect a demand by suit would have implied power to employ the necessary attorneys;[6] or if authorized to sell goods, to employ a broker or auctioneer;[7] or if authorized to charter a vessel, to employ a vessel broker to assist him in securing the charter.[8]

§ 195. 3. **When justified by Usage or Course of Trade.** Again

[1] Renwick v. Bancroft, 56 Iowa, 527.

[2] Bodine v. Exchange Ins. Co., 51 N. Y. 123; Grady v. American Cent. Ins. Co. *supra*.

[3] Dorchester, &c. Bank v. New England Bank, 1 Cush. (Mass.) 177; Johnson v. Cunningham, 1 Ala. 249; Gray v. Murray, 3 Johns. (N.Y.) Ch. 167; Rossiter v. Trafalgar Life Assur. Ass'n, 27 Beavan, 377.

[4] Tiernan v. Commercial Bank, 7 How. (Miss.) 648, 40 Am. Dec. 83.

[5] Appleton Bank v. McGilvray, 4 Gray (Mass.) 518, 64 Am. Dec. 92; Baldwin v. Bank of Louisiana, 1 La. Ann. 18, 45 Am. Dec. 72; Commercial Bank v. Martin, 1 La. Ann. 344, 45 Am. Dec. 87.

[6] Commercial Bank v. Martin, *supra*; Buckland v. Conway, 16 Mass. 396.

[7] Harralson v. Stein, 50 Ala. 347; Strong v. Stewart, 9 Heisk. (Tenn.) 147.

[8] Saveland v. Green, 40 Wis. 431.

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the appointment of a subagent may be justified by a known and established usage or course of dealing.[1] Parties contracting in reference to a subject-matter concerning which there is such a usage may well be presumed to have it in contemplation. *In contractis tacite insunt quae sunt moris et consuetudinis*, is a maxim of law.[2]

Thus where goods were entrusted by the plaintiff to a merchandise broker to sell, deliver and receive payment, and the broker deposited them in accordance with an usage with a commission merchant connected with an auctioneer, taking his note therefor, and some of the goods were afterward sold at a less price than the broker was authorized to sell them for, it was held that the principal was bound by such act of the broker and that he could not maintain trover against the commission merchant. Said the court: "Business to an immense amount has been transacted in this way, and the usage being established, it follows that when the plaintiff authorized his broker to sell, he authorized him to sell according to the usage; and when the defendants dealt with the broker, even if they had known that the goods were not his own, they had a right to consider him as invested with power to deal according to the usage."[3]

The power of a bank receiving a note for collection at another place, to forward the note to a bank at that place for payment, may also be derived from the same source, as may other powers referred to in the preceding section.[4] Usage, however, will not be permitted to contravene express instructions, and if the agent has been denied the power of delegation, usage can not confer it.[5] Nor can usage justify the agent in violating the funda-

[1] Buckland *v.* Conway, 16 Mass. 396; Smith *v.* Sublett, 23 Tex. 163; Lynn *v.* Burguoyne, 13 B. Mon. (Ky.) 400; Moon *v.* Guardians, 3 Bing. N. Cas. 814; Gray *v.* Murray, 3 Johns. (N. Y.) Ch. 167; Darling *v.* Stanwood, 14 Allen (Mass.) 504, Johnson *v.* Cunningham, 1 Ala. 249.

[2] See Ewell's Evans' Agency, 58.

[3] Laussatt *v.* Lippincott, 6 Serg. & R. (Penn.) 386, 9 Am. Dec. 440.

[4] Wilson *v.* Smith, 3 How. (U. S.) 763, where the court speaks of it as an authority fairly to be implied from the usual course of trade or the nature of the transaction.

[5] Barksdale *v* Brown, 1 Nott. & McC. (S. C.) 517, 9 Am. Dec. 720; Bliss *v.* Arnold, 8 Vt. 252, 30 Am. Dec 467; Hall *v.* Storrs, 7 Wis. 253; Day *v.* Holmes, 103 Mass. 306; Parsons *v* Martin, 11 Gray (Mass.) 112; Clark *v.* Van Northwick, 1 Pick. (Mass) 343; Leland *v.* Douglass, 1 Wend. (N. Y.) 490; Catlin *v.* Smith, 24 Vt. 85; Hutchings *v.* Ladd, 16 Mich. 493.

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mental duties which he owes to his principal or to change the intrinsic character of the contract existing between them.[1]

§ 196. **4. When originally contemplated.** If the appointment of a subagent was contemplated by the parties at the time of the creation of the agent's authority, or if it was then expected that subagents might or would be employed, this would be treated as at least implied authority for such an appointment.[2]

§ 197. **Effect of Appointment.** It is not the purpose here to go minutely into the mutual rights and obligations of the principal, agent, and subagent. This subject is reserved for subsequent consideration. But—

In general.—If an agent employs a subagent for his principal, and by his authority, expressed or implied, then the subagent is the agent of the principal and is directly responsible to the principal for his conduct, and if damage results from the conduct of such subagent, the agent is only responsible in case he has not exercised due care in the selection of the subagent.

But if the agent, having undertaken to transact the business of his principal, employs a subagent on his own account to assist him in what he has undertaken to do, he does so at his own risk, and there is no privity between such subagent and the principal. The subagent is, therefore, the agent of the agent only and is responsible to him for his conduct, while the agent is responsible to the principal for the manner in which the business has been done, whether by himself, or his servant or his agent.[3]

[1] Robinson *v.* Mollett, L. R. 7 H. of L. 802, 14 Eng. Rep. 177; Minnesota Cent. R. R. Co. *v.* Morgan, 52 Barb. (N. Y.) 217.

[2] Johnson *v.* Cunningham, 1 Ala. 249; Duluth Nat. Bank *v.* Fire Ins. Co. 85 Tenn. 76, 4 Am. St. Rep. 744.

[3] Appleton Bank *v.* McGilvray, 4 Gray (Mass.) 518; 64 Am. Dec. 92: Sexton *v.* Weaver, 141 Mass. 273; Campbell *v.* Reeves, 3 Head (Tenn.) 226; Commercial Bank *v.* Jones, 18 Tex. 811; Barnard *v* Coffin, 141 Mass. 37; 55 Am. Rep. 443; Warren Bank *v.* Suffolk Bank, 10 Cush. (Mass.) 582; Pownall *v.* Bair, 78 Penn. St. 403; Darling *v.* Stanwood, 14 Allen (Mass.) 504; Stephens *v.* Babcock, 3 B. & Adol. 354; McCants *v.* Wells, 4 S. C. 381.

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CHAPTER VII.

OF THE TERMINATION OF THE RELATION.

§ 198. Purpose of Chapter.
199. Variety of Methods.

I. By Original Agreement.

200. 1. By Efflux of Time.
201. 2. By Accomplishment of Object.
202. Same Subject.

II. By Act of the Parties.

1. *Revocation by the Principal.*

A. Private Agency.

204. General Rule — As between Principal and Agent, Agency is revocable at any Time if not coupled with an Interest.
205. What Interest sufficient.
206. Same Subject—Instances.
207. What Interest not sufficient—Instances.
208. Same Subject—Bare Powers.
209. Power to revoke—How distinguished from Right to revoke.
210. When Right to revoke exists.
211. What amounts to Contract for definite Time — Unilateral Agreements.
212. Same Subject—When definite Time will be implied.
213. Agency terminable for Agent's Incompetence.
214. When Agency may be terminated for Agent's Misconduct.
215. Same Subject—Illustrations.
216. How the Authority may be revoked.
§ 217. Same Subject.—By sealed Instrument.
218. Same Subject.—Express revocation not required.
219. Revocation may be implied.
220. By disposing of Subject-matter.
221. By Dissolution of Partnership or Corporation.
222. By Severance of joint Interest.
223. Notice of Revocation.

a. To Third Persons.

224. When Authority was general.
225. Where Authority was special.

b. To Agents.

226. Notice must be given to Agent.

c. To Subagents.

227. Notice must be given to Subagents—When.
228. Notice — How given — What sufficient.
229. When Evidence of Agency recorded, Revocation should be recorded.
230. Notice should be unequivocal.
231. How Sufficiency of Notice determined.

B. Public Agency.

232. Statutory Agency not revocable at Will of Principal.

2. *Renunciation by Agent.*

233. General Rule—Agent may renounce at any Time.
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§ 235. Abandonment may be treated as Renunciation.
236. Agent may abandon if required to do unlawful Act.
237. Notice of Renunciation.

III. By Operation of Law.

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a. By Death of the Principal.

239. In general.
240. General Rule—Death of Principal terminates Agency.
241. Same Subject — Not when coupled with an Interest.
242. Same Subject—What Interest sufficient.
243. Same Subject—What Interest sufficient—Instances.
244. Same Subject—What Interest not sufficient—Instances.
245. How when Death unknown.
246. Same Subject—Instances.
247. Death of Partner or joint Owner dissolves Agency.
248. Death of Principal dissolves Authority of Substitute.

b. By death of the Agent.

249. General Rule—Death of Agent terminates Agency.
250. Not when coupled with an Interest.
251. When Death of one of two Agents terminates Agency.
252. Effect on Substitute.

2. *By Insanity of one of the Parties.*

a. By Insanity of the Principal.

253. In general.
254. General Rule.
255. But—Ignorance of Insanity.
256. When coupled with an Interest.
257. What Evidence of Insanity sufficient.

b. By Insanity of the Agent.

258. In general.
259. General Rule — Terminates Agency unless coupled with an Interest.
260. How when Insanity unknown.
261. Insanity of one of two or more Agents.
262. Subagents.

3. *By Bankruptcy of one of the Parties.*

a. Bankruptcy of Principal.

263. General Rule—Bankruptcy of Principal terminates Agent's Authority.
264. Mere Insolvency not enough.
265. Agent's Authority not dissolved when coupled with an Interest.
266. How when Bankruptcy unknown.

b. Bankruptcy of the Agent.

267. General Rule.

4. *By Marriage.*

268. In general.

5. *By War.*

269. In general.

6. *By Termination of the Principal's Authority.*

270. Principal's Removal from Office removes Subordinates.

§ 198. **Purpose of Chapter.** Having heretofore considered in what manner and under what conditions the relation of principal and agent may be created, it now remains to be seen in what manner and under what conditions that relation may be terminated, and also to ascertain what results may follow from such termination.

§ 199. **Variety of Methods.** The termination of the author-

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ity may be effected by a variety of methods. Thus the agency may have been created to endure only for a limited period, and at the expiration of that period would come to a close by the mere efflux of time; or it may have been called into being for the express purpose of performing a single act or a series of acts, and these being performed the agency would be terminated by the accomplishment of that for which it was created. Again, under certain circumstances, the agency may be concluded by the act of the parties, as where the principal revokes or the agent renounces it. So subsequent changes in the condition or relation of the parties may render the continuance of the agency inconsistent or impossible, and it will be terminated by operation of law.

For convenience of treatment these various methods may be distributed under three heads: I. By original agreement. II. By act of the parties, and, III. By operation of law.

I.

BY ORIGINAL AGREEMENT.

§ 200. **1. By Efflux of Time.** Where the agency was originally created to endure during a given period or until the happening of a certain event, the expiration of that period and the happening of that event would respectively operate to terminate the agency.

Where the language used by the parties is express as to the length of time the agency is to continue, there can of course be no doubt as to its duration; but this result may also be reached where the period is not expressly fixed but must be determined by the facts and circumstances of the case.

Thus where a resident of Australia who was possessed of estates in England, executed a written power of attorney to a firm of English solicitors, in which he recited, "Whereas I am about to return to South Australia and am desirous of appointing attorneys to act for me during my absence from England in the care and management of the said estate * * * * and generally to act for me in the management and dealings with any property belonging to me during my absence from England," and then proceeded by the operative part of the instrument to convey such a power, but without any limitations as to

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time, it was held that the recital controlled the general language used in the operative part of the instrument and limited the exercise of the powers of the attorneys to the period of the principal's absence from England. KAY, J., said: "The operative part of the instrument does not refer in any way to the duration of the power, therefore a statement in the recital or any other part of it that it was only intended to have effect during the donor's absence from England would not be repugnant to anything in the operative part. It is only a conclusion of law that if such a power is silent as to its duration it must last during the donor's life, or until he revokes it. I asked during the argument if the recital had contained a stipulation in the most express words that could be employed, that the power should only be used during the donor's absence or other limited time, whether that could be disregarded, and the answer was that it could. With that I am unable to agree. A power of attorney like a release or a bond, as in the case of Lord Arlington *v.* Merricke,[1] seems to me precisely the kind of instrument which may be limited by a recital. And the only question upon which it appears to me there can be any reasonable doubt is whether that is the true effect of the recital in this power.

"It is said that it was only inserted for the purpose of showing the motive for giving the power of attorney, but I can see no object in introducing the recital for that purpose. And after the best consideration I can give the matter, I come to the conclusion that the words 'during my absence from England' which occur twice in this recital are there used for expressing the limit of time during which the power was to be exercised."[2]

So where an agreement creating an agency for the sale of machines, made no provisions as to the time of its continuance, but did provide that the agency should extend over a certain section of the country, and that the principal agreed to furnish to the agent "such number of machines as he may be able to sell as their agent, prior to October 1st, 1867," it was held in an action against the agent's sureties, that a fair and reasonable construction of the agreement created an agency only until the first day of October, 1867.[3]

[1] Williams Saunders, 813.

[2] Danby *v.* Coutts, L. R., 29 Ch. Div. 500.

[3] Gundlach *v.* Fischer, 59 Ill. 172. An agency may be revoked in pursuance of a stipulation to that effect.

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§ 201. **2. By Accomplishment of Object.** Where the agency was created for the purpose of performing some specific act or acts, it will be terminated by the accomplishment of the purpose which called it into being. Having fulfilled its mission it is henceforth *functus officio*.

Thus is an Iowa case, the firm of A & B had been employed by one S to negotiate for him the purchase of some land. In the month of July they made the purchase and delivered to S the contract of sale, and S then gave them one-half of the purchase price for payment to the vendor, and paid them for their services. In August a deed for the land was sent to them and they delivered it to S, who then paid the balance of the purchase price. In October following, A bought the same land at a sale thereof for taxes, and subsequently brought an action to recover the land of the vendee of S, and it was attempted to defeat the action upon the ground that A & B were still the agents of S at the time A made the purchase at the tax sale. But the court said that upon these facts it was quite clear that the agency of the plaintiff, or of A & B for the purchase of the land for S, terminated at the time they delivered to him the written contract for the conveyance of the land on receipt of one-half of the purchase money and the payment of their fee for the services performed. When this was accomplished A & B had done all they had been employed to do. They had made the purchase as S had desired them to do, delivered to him the written contract sent to them for S and had received the first payment as per agreement. This completed the services they had undertaken. S himself so regarded it, for when these things were done, he inquired how much they charged for their services, and on being informed of the amount he paid the same. They had performed the business for which the agency had been constituted, and by operation of law, the agency was terminated. This was in July. The purchase at the tax sale was not made until October of the same year. At that time they were as free to purchase the same as any other persons. Their agency no longer existed.[1]

So where an agent was employed to find a purchaser for land

in the contract of employment. Oregon Mortgage Co. *v.* American Mortgage Co. 35 Fed. Rep. 22.

[1] Moore *v.* Stone, 40 Iowa, 259. And a like ruling was made in the similar case of Walker *v.* Derby, 5 Bissell, 134. See also Blackburn *v.* Scholes, 2 Camp. 343.

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at a fixed price, which he did, it was held that thereupon his agency to the seller terminated, and he was at liberty to undertake the service of the purchaser in attending to the due execution of the conveyance.[1]

So a power delegated to an agent to "fix and determine" a matter in which he has no power of his own outside of the agency, is expended when he has once acted upon it.[2]

§ 202. **Same Subject.** Again where the object for which the agency was created is accomplished by other means before the agent has acted, there is nothing left for him to act upon, and his authority is therefore terminated. Thus where the inhabitants of a town authorized their treasurer to borrow money for the adjustment of a State tax, but the tax was adjusted in another way before the treasurer had acted, it was held that his authority to borrow money was thereby terminated.[3] So where before one of two agents separately authorized to sell real estate had found a purchaser, the principal had effected a sale of the land to a purchaser produced by the other agent, it was held that the first agent's authority to sell was terminated by the sale.[4]

II.

BY ACT OF THE PARTIES.

§ 203. It has been said above that the relation of principal and agent may, under certain circumstances, be terminated by the act of one or other of the parties, as by revocation of the agency by the principal, or its renunciation by the agent.

It is now proposed to consider each of these cases and determine when and under what conditions each party may exercise this right.

1. *Revocation by the Principal.*

A. Private Agency.

§ 204. **General Rule—As between Principal and Agent, Authority is revocable at any Time if not coupled with an Interest.** The authority of the agent to represent the principal depends

[1] Short v. Millard, 68 Ill. 292.
[2] Douvielle v. Supervisors, 40 Mich. 585.
[3] Benoit v. Conway, 10 Allen (Mass.) 528.
[4] Ahern v. Baker, 34 Minn. 98.

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upon the will and license of the latter. It is the act of the principal which creates the authority; it is for his benefit and to subserve his purposes, that it is called into being; and, unless the agent has acquired with the authority an interest in the subject-matter, it is in the principal's interest alone that the authority is to be exercised. The agent, obviously, except in the instance mentioned, can have no right to insist upon a further execution of the authority if the principal himself desires it to terminate.[1]

It is the general rule of law, therefore, that as between the agent and his principal, the authority of the agent may be revoked by the principal at his will at any time, and with or without good reason therefor, except in those cases where the authority is coupled with a sufficient interest in the agent.[2] And this is true even though the authority be in express terms declared to be "exclusive"[3] or "irrevocable."[4] But although the principal has the *power* thus to revoke the authority, he may subject himself to a claim for damages if he exercises it contrary to his express or implied agreement in the matter.

An agency is sometimes said to be irrevocable when it is conferred for a valuable consideration. It is believed, however, that this is only another form of stating the general rule that it must be coupled with an interest.

This right to revoke exists when the State is the principal as well as when the principal is a private individual.[5]

[1] Hunt *v.* Rousmanier, 8 Wheat. (U. S.) 201; State *v.* Walker, 88 Mo. 379.

[2] Posten *v.* Rassette, 5 Cal. 467; Hynson *v.* Noland, 14 Ark. 710; Barr *v.* Schroeder, 32 Cal. 609; Bonney *v.* Smith, 17 Ill. 531; Hutchins *v.* Hebbard, 34 N. Y. 24; Brookshire *v.* Voncannon, 6 Ired. (N. C.) 231; Wheeler *v.* Knaggs, 8 Ohio, 169; Hartley's Appeal, 53 Penn. St. 212; Blackstone *v.* Buttermore, Id. 266; Brown *v.* Pforr, 38 Cal. 550; Shiff *v.* Lesseps, 22 La. Ann. 185; Chambers *v.* Seay, 73 Ala. 372; Tucker *v.* Lawrence, 56 Vt. 467; Simpson *v.* Carson, 11 Oregon, 361; Darrow *v.* St. George, 8 Col. 592; Hunt *v.* Rousmanier, *supra;* Attrill *v.* Patterson, 58 Md. 226; Simpson *v.* Lamb, 84 Eng. Com. L. 603; Creager *v.* Link, 7 Md. 259; Hartshorne *v.* Thomas, — N. J. Eq. —, 10 Atl. Rep. 843; Kirk *v.* Hartman, 63 Penn. St. 97; Coffin *v.* Landis, 10 Wright (Penn.) 426.

[3] Chambers *v.* Seay, *supra.* Contract to give an agent the "exclusive" agency in certain territory, does not prevent the principal from selling there. Packing Co. *v.* Farmers' Union, 55 Cal. 606.

[4] Chambers *v.* Seay; Blackstone *v.* Buttermore, *supra:* Frink *v.* Roe, 70 Cal. 296; McGregor *v.* Gardner, 14 Iowa, 326; Walker *v.* Denison, 86 Ill. 142; Attrill *v.* Patterson, *supra.*

[5] State *v.* Walker, 88 Mo. 279.

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§ 205. **What Interest sufficient.** What interest in the agent will be sufficient to render the authority irrevocable is not easy of exact and comprehensive definition. Certain it is, however, that it is not *any* interest which will suffice.[1] But it must be an interest or estate in the thing itself or in the property which is the subject of the power; the power and the estate must be united and co-existent, and, generally, of such a nature that the power would survive the principal in such a way as to be capable of execution in the agent's name after the death of the principal.[2]

§ 206. **Same Subject—Instances.** In the following cases the agent has been held to have such an interest in the power as to render it, to the extent of the agent's interest, irrevocable at the will of the principal: Where the agent has authority to collect a debt and out of the proceeds to reimburse himself for advances made by him to the principal;[3] where the authority is given to the agent to sell real or personal property and apply the proceeds in payment of a debt due him from the principal;[4] where the authority forms a part of the contract and is given as security for money or to effectuate a security;[5] or where it is conferred to enable the agent, as for instance a factor, to reimburse himself for prior advances;[6] and where it is given to indemnify a surety against loss.[7]

§ 207. **What Interest not sufficient—Instances.** But a mere interest in the results or proceeds of the execution of the authority, as by way of compensation, is not enough.

Thus where one is given authority to sell the lands or other

[1] Chambers v. Seay, 73 Ala. 372.

[2] Hunt v. Rousmanier, 8 Wheat. (U. S.) 175; Blackstone v. Buttermore, 53 Penn. St. 266; Bonney v. Smith, 17 Ill. 531; Mansfield v. Mansfield, 6 Conn. 559; Raleigh v. Atkinson, 6 M. & W. 670; Chambers v. Seay, *supra;* Attrill v. Patterson, *supra.*

[3] Marizou v. Pioche, 8 Cal. 522; Postin v. Rassette, 5 Cal. 467.

[4] Gaussen v. Morton, 10 B. & C. 731; Watson v. King, 4 Cowp. 272; Barr v. Schroeder, 32 Cal. 609.

[5] Hunt v. Rousmanier, 8 Wheat. (U. S.) 175; Walsh v. Whitcomb, 2 Esp. 565; Drinkwater v. Goodwin, Cowp. 251; Beecher v. Bennett, 11 Barb. (N. Y.) 380; Hutchins v. Hebbard, 34 N. Y. 27; Knapp v. Alvord, 10 Paige (N. Y.) Ch. 205, 40 Am. Dec. 241; Evans v. Fearne, 16 Ala. 689, 50 Am. Dec. 197.

[6] Smart v. Sanders, 5 C. B. 895; Raleigh v. Atkinson, 6 M. & W. 570; De Comas v. Prost, 3 Moore, P. C. N. S. 158.

[7] Hynson v. Noland, 14 Ark. 710.

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property of another, and is to have a certain commission or share out of the proceeds for making the sale, the authority may be revoked at the will of the principal, even though in terms it was declared to be exclusive or irrevocable;[1] and so where one was authorized to collect a debt and was to have one-half of what he collected for his services, the power was held not to be coupled with a sufficient interest and was therefore revocable by the principal at will.[2] The interest in the commissions to be earned and in the moneys expended in endeavoring to carry out the agency, is not sufficient to prevent revocation. And so a mere power of attorney to confess judgment in favor of a third person not shown to have been executed on any consideration or to have been given as a security for any demands or to render a security effectual, is revocable at the will of the principal.[3]

§ 208. **Same Subject—Bare Powers.** A bare power, not connected with any interest in the agent, may, therefore, be revoked without liability at any time before its execution. Thus where a debtor, or one on his behalf, without consideration, deposits money with another to be paid to a creditor of the debtor, or to compromise an action against him, the relation of principal and agent arises between the debtor and the person with whom the money is so deposited. In such a case the money remains the property of the principal and he may revoke the authority at any time until the agent has actually paid the money to the creditor, or until the agent has given and the creditor has taken credit for it.[4] And any disposition of the money by the debtor, before such payment or credit, inconsistent with the appropriation first intended, as by an assignment for the benefit of creditors, will operate as a revocation.[5] So a deposit of stock with the officers

[1] Chambers v. Seay, 73 Ala. 372; Barr v. Schroeder, 32 Cal. 609; Hartley's Appeal, 53 Penn. St. 212; Gilbert v. Holmes, 64 Ill. 550; Hunt v. Rousmanier, 8 Wheat. (U. S.) 175; Darrow v. St. George, 8 Col. 609; Simpson v. Carson, 11 Oregon, 361; Blackstone v. Buttermore, 53 Penn. St. 266; Bonney v. Smith, 17 Ill. 531; Brown v. Pforr, 38 Cal. 550; Frink v. Roe, 70 Cal. 296.

[2] Hartley's Appeal, *supra*; Flanagan v. Brown, 70 Cal. 254.

[3] Evans v. Fearne, 16 Ala. 689, 50 Am. Dec. 197; Woodruff v. Dubuque, &c., R. R. Co., 30 Fed. Rep. 91.

[4] Howard College v. Pace, 15 Ga. 486; Phillips v. Howell, 60 Ga. 411; Simonton v. First National Bank, 24 Minn. 216.

[5] Simonton v. First National Bank, *supra*.

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of a corporation to enable it to be voted upon and sold, is but a bare power and may be revoked at any time before sale.[1]

§ 209. **Power to revoke—How distinguished from Right to revoke.** Where, then, the authority is not coupled with an interest, the principal has the power to revoke it at his will at any time. But this *power* to revoke is not to be confounded with the *right* to revoke. Much uncertainty has crept into text books and decisions from a failure to discriminate clearly between them.

Except in those cases where the authority is coupled with an interest, the law compels no man to employ another against his will. As it has been seen, the relation of the agent to his principal is founded in a greater or less degree upon trust and confidence. It is essentially a *personal* relation. If then for any reason the principal determines that he no longer desires or is able to trust and confide in the agent, it is contrary to the policy of the law to undertake to compel him to do so. Trust and confidence come at no man's command, nor can the decree of a court arouse and keep in life those sentiments and feelings which are based upon our natural human instincts. It is the rule of law, therefore, that contracts of agency, like those creating other personal relations, will not be specifically enforced.[2] Nor does it make any difference in this view, that the principal has expressly agreed that he will continue to confide in the agent for a definite period. It is no less difficult, on that account, to coerce compliance. Confidence, like "honest instinct," only "comes a volunteer." The law, therefore, leaves the principal in such cases to determine for himself how long the relation shall continue.

This, then, is what is meant when it is said that the principal may revoke the authority at any time.

But it by no means follows that, though possessing the power, the principal has the right to exercise it without liability regardless of his contracts in the matter. It is entirely consistent with the existence of the power that the principal may agree that for a definite period he will not exercise it, and for the violation of such an agreement the principal is as much liable as for the breach of any other contract.[3] It is in this view, therefore, that the question of the right to revoke the authority arises.

[1] Woodruff *v.* Dubuque, &c., R. R. Co. 30 Fed. Rep. 91.

[2] See Waterman on Spec. Per. § 33.

This subject will be more fully treated in § 615, *post.*

[3] See *post*, §§ 620–625.

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§ 210. **When Right to revoke exists.** Where no express or implied agreement exists that the agent shall be retained for a definite time the power and the right of revocation coincide. Such employments are deemed to be at will merely and may therefore be terminated at any time by either party without violating contract obligations or incurring liability.[1] The law presumes that all general employments are thus at will merely, and the burden of proving an employment for a definite period rests upon him who alleges it.

It is not uncommon to provide that the agency, although otherwise for a definite period, shall cease or may be terminated by either party upon the happening of a certain event or the arising of a certain contingency, and when the agency does so cease, or is so terminated, no liability attaches to either party. Thus it is competent to provide that the relation shall continue only so long as one or either of the parties is satisfied, and where such is the agreement, the dissatisfaction of the party to be satisfied, if it be *bona fide*, is a sufficient ground for terminating the relation without liability.[2]

So there are certain implied conditions which enter into every contract of agency, for a violation of which the principal may rightfully revoke the authority. The most important of these are those which relate to the questions of the agent's ability to perform the appointed service, and the fidelity with which he employs the powers entrusted to him.

But where the agent has been employed for a fixed period the agency cannot be rightfully terminated before the expiration of that period at the mere will of the principal, but only in accordance with some express or implied condition of its continuance. Any other termination of such an agency by the act of the principal will subject him to liability to the agent for the damages he has sustained thereby.[3] The principal will also be liable to the agent for his compensation up to the time of the wrongful revocation and for any liabilities and expenses which the agent

[1] Kirk *v.* Hartman, 63 Penn. St. 97; Coffin *v.* Landis, 10 Wright (Penn.) 426; Jacobs *v.* Warfield, 23 La. Ann. 395. See generally upon this subject *post*, § 616.

[2] Tyler *v.* Ames, 6 Lans. (N. Y.) 280; Adriance *v.* Rutherford, 57 Mich. 170; Hotchkiss *v.* Gretna Gin. & Compress Co. 36 La. Ann. 517.

[3] See *post*, §§ 620–622.

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has fairly and in good faith incurred on the principal's account in the execution of the authority before its revocation.[1]

§ 211. **What amounts to Contract for definite Time—Unilateral Agreements.** It is, in many cases, difficult to determine whether the parties have made a definite agreement for a fixed time or not. It is not indispensable that they should, in the first instance, be both bound for the same period. It may lawfully be made to rest with either party to determine, at his option, that the agreement shall be one for a certain time. So it has been held that the appointment of an agent to do certain acts during a given period does not, of itself, amount to an agreement that he should be permitted to continue to act during that period.

Thus where an agent agreed to transport all the goods that might be "presented to him" for that purpose during one year, but the principal did not expressly agree to furnish any goods for transportation, it was held that the agreement was binding upon the agent only, and that the principal might, at any time, refuse to furnish any goods, and thus, practically, terminate the agency during the year without liability;[2] and so where the owner of coal mines appointed agents for the sale of the coal at Liverpool for seven years, but did not agree to furnish them any coal to sell during that period, it was held that the owner might sell his mines and terminate the agency even though the seven years had not expired, without liability to the agents.[3] So where a travel-

[1] See *post*, §§ 620–622.

[2] Burton *v.* Great Northern Ry Co. 9 Excheq. 507.

[3] Rhodes *v.* Forwood, L. R. 1 App. Cas. 256, 15 Eng. Rep. (Moak) 124. See also Churchward *v.* The Queen. L. R. 1 Q. B. 173; *Ex parte* Maclure, L. R. 5 Ch. 737.

So where it was agreed between A and B that A should manufacture cement for the use of B of a specified quality; that B should pay A a certain weekly sum for two years from the agreement, and another weekly sum for one year after, and should receive A into partnership in the business of manufacturing cement at the end of three years; and that A should instruct B in the art of manufacturing cement. *Held*, on action brought by A assigning as a breach of this agreement that B wrongfully discharged him, the plaintiff, from his service, and from manufacturing cement for the use of the defendant, and from any longer instructing the plaintiff in the art of manufacturing cement, before the expiration of two years from the agreement, that this agreement did not raise an implied contract of hiring and service for three years between the parties, and therefore the action was not maintainable. Aspdin *v.* Austin, 1 Dav. & M. 515; s. c. 5 Q. B. 671, 48 Eng. Com. Law Rep. 671, s. c. 5 A. & E. 671.

So where it appeared that by in-

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ing salesman, "in consideration of the sum of $2,100 for the year 1873, and $2,400 for the year 1874, to be paid in semi-monthly or monthly installments, agreed to devote his whole time and attention solely to the interests of" a certain firm, and entered into their service and continued until June 11, 1873, at which date the firm became bankrupt and suspended business, and the salesman was discharged, it was held, in an action brought by the salesman to recover damages for his discharge, that the contract contained no undertaking on the part of the firm to retain or continue him in their employ for any definite term and that hence he could not recover. Said SCOTT J.: "Their undertaking is to pay him at a certain rate of compensation, if he shall discharge the duties assumed by him to be performed. No doubt it is true each party contracted on the supposition the business would continue through the space of two years, but appellants' firm did not obligate themselves to continue it for that length of time. As a matter of fact, it terminated much sooner. We have no authority to add to the contract as the parties have made it, enlarging the liability of either one of them, and have no disposition to do so."[1]

But where one had been appointed general agent of a life insurance company for five years, but without any express agreement on the part of the company to employ him for any definite period, and the company, after the time had partly expired, became insolvent, abandoned the business and discharged the agent,

denture between defendant of the first part, J. D. son of plaintiff, of the second part, and plaintiff of third part, plaintiff, covenanted that his son should be assistant to the defendant, a dentist, for five years, and do all such service as defendant should order to be performed in the way of his art; and that defendant, for the services to be done by the son, covenanted during the term, and in case the son should perform his part of the agreement, that he, defendant would pay the son a certain sum weekly during the term as compensation for the services aforesaid. That the son entered upon the service, and that he and the plaintiff performed their part of the agreement, and were ready and willing to continue such performance during the term. And the breach alleged was that defendant refused to permit the son to continue in the service and dismissed him.

It was held there was no implied covenant by the defendant to retain the son in the service during the five years. Dunn v. Sayles, 1 Dav. & M. 579; s. c. 5 Q. B. 685, s. c. 5 A. & E. 685.

[1] Orr v. Ward, 78 Ill 818, citing Williamson v. Taylor, 5 A. & E. 175, and Aspdin v. Austin, *supra*.

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a different conclusion was reached. In an action brought by the agent to recover damages for the discharge, it was argued on behalf of the defendant that by the terms of the contract sued on, the plaintiff was merely appointed agent for the company for five years, and as the company did not expressly bind itself to continue in business for that length of time, its inability to act and execute the whole stipulation on its part constituted no breach. But it was said in reply by the learned judge who rendered the opinion of the court: "It is true there was no positive and direct covenant, on the part of the company, to carry on the business for any definite time. But the plaintiff agreed to act exclusively for the company for the period of five years, and had he neglected or failed, he would have been liable in damages. If he was bound for that length of time, it necessarily follows that the company must also have been bound, for mutuality was essential to the validity of the agreement. It very frequently happens that contracts on their face and by their express terms appear to be obligatory on one party only; but in such cases if it be manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a corresponding and correlative obligation on the other party, such corresponding and correlative obligation will be implied. As, if the act to be done by the party binding himself can only be done upon a corresponding act being done or allowed by the other party, an obligation by the latter to do, or allow to be done, the act or things necessary for the completion of the contract will necessarily be implied.[1] When the plaintiff bound himself to give his exclusive services to the defendant for the period of five years, there was a correlative and corresponding obligation upon the part of the defendant to give him employment and allow him to pursue and execute the terms of the contract. This was manifestly the intention of the parties.

"The defendant's insolvency or inability furnished no excuse for its breach of the contract. Had it desired to be exempted from liability in such an event, it should have stipulated for the exemption upon the happening of the contingency. The criterion

[1] Citing, Pordage v. Cole, 1 Wm. Saund. 319; Churchward v. The Queen, 6 B. & S. 807; Black v. Woodrow, 39 Md. 194.

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of damages would be to ascertain how much the plaintiff has lost by the defendant's breach of the contract."[1]

Mutuality under Statute of Frauds.—Cases under this head frequently arise in which the Statute of Frauds becomes an important element. Thus in a recent case[2] it appeared that the defendants had entered into a written contract with the plaintiff as follows:

"We promise and agree to pay Thomas Wilkinson wages or salary at the rate of $3,500 a year for three years from the second day of October, 1882, in consideration of his working for us that length of time as cutter in our merchant tailoring department in the city of East Saginaw, Michigan. Payments to be made as earned, in such sums and at such times as he may desire.

"Dated October 14, 1882.

"HEAVENRICH BROS. & Co."

Plaintiff alleged that he entered upon and continued in the employment under the contract until on or about July 5, 1884, when he was discharged without cause and against his protest. On July 8, he wrote to defendants, saying: "I hereby protest against your attempt to cancel our contract. I hold your written agreement for a three years' term of service, from October 2d, 1882. That contract I am ready and willing to perform on my part, and I hereby offer to continue, and request you to furnish me employment under the terms of that agreement."

In an action brought to recover damages for the discharge, the trial judge held that as the plaintiff had not also signed the contract, it was not binding as to him under the Statute of Frauds; and that as he was not bound to stay three years, there was no mutuality in the agreement and that hence the defendants were not bound. A verdict was therefore directed for the defendants, and plaintiff appealed.

In delivering the opinion of the court, CHAMPLIN, J., said: "The conflict of authority upon questions of the kind raised upon this record is truly bewildering, and the cases are incapable of being reconciled with each other; a large and respectable class holding that a contract which the Statute of Frauds declares

[1] WAGNER, J. in Lewis v. Atlas Mut. L. Ins. Co., 61 Mo. 534, 538. That the principal's insolvency furnishes no excuse for a breach of the contract. See Vanuxem v. Bostwick, — Penn. St. —, 7 Atl. Rep. 598.

[2] Wilkinson v. Heavenrich, 58 Mich. 574, 55 Am. Rep. 708.

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shall not be valid unless in writing and signed by the party to be charged therewith, need only to be signed by the party defendant in the suit, and that it is no objection to maintaining such suit and recovering upon such contract, that the other party did not also sign and was not bound by its terms.[1] Another and equally respectable class of jurists hold that unless the party bringing the action is bound by the contract, neither is bound because of the want of mutuality.[2]

"I shall not attempt a reconciliation where reconciliation is impossible; but as the question is new in this State, the court is left to adopt such view as appears to rest upon principle. It is a general principle in the law of contracts, but not without exception, that an agreement entered into between parties competent to contract, in order to be binding, must be mutual; and this is especially so when the consideration consists of mutual promises. In such cases, if it appears that one party never was bound on his part to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality.[2]

"Such was the case here. The consideration consisted of mutual promises of the parties, not to be performed within a year from the making thereof. The defendants' promise was in

[1] Citing, 2 Kent's Com. 510; 2 Stark. Ev. 614; Smith's Appeal, 69 Penn. St. 480; Tripp v. Bishop, 56 Penn. St. 424; Perkins v. Hadsell, 50 Ill. 217; Old Colony R. R. Corp. v. Evans, 6 Gray (Mass.) 31, 66 Am. Dec. 394; Williams v. Robinson, 73 Me. 186, 40 Am. Rep. 352. See also Mason v. Decker, 72 N. Y. 595, 28 Am. Rep. 190; Justice v. Lang, 42 N. Y. 493, 1 Am. Rep. 576; Shirley v. Shirley, 7 Blackf. (Ind.) 452; Douglass v. Spears, 2 N. & McC. (S. C.) 207; 10 Am. Dec. 588; Morin v. Martz, 13 Minn. 191; Anderson v. Harold, 10 Ohio, 399; Barstow v. Gray, 3 Greenl. (Me.) 409; Allen v. Bennett, 3 Taunt, 175; Laythoarp v. Bryant, 2 Bing. N. C. 735; Saunderson v. Jackson, 2 Bos. & Pul. 238.

[2] Citing, Lees v. Whitcomb, 3 C. & P. 289; Sykes v. Dixon, 9 Ad. & El. 693, 36 Eng. Com. L. 366; Krohn v. Bantz, 68 Ind. 277; Stiles v. McClelland, 6 Col. 89; and as bearing upon the question, Hall v. Soule, 11 Mich. 496; Scott v. Bush, 26 Mich. 418; Liddle v. Needham, 39 Mich. 147, McDonald v. Bewick, 51 Mich. 79. See also, Corbitt v. Salem Gaslight Co. 6 Oreg. 405, 25 Am. Rep. 541 and note.

[3] Citing, Hopkins v. Logan, 5 M. & W. 241; Dorsey v. Packwood, 12 How. (U. S.) 126; Ewins v. Gordon, 49 N. H. 444; Hoddesdon Gas Co. v. Haselwood, 6 C. B. (N. S.) 239; Souch v. Strawbridge, 2 M. G. & S. 808; Callis v. Bothamly, 7 Wk. Rep. 87; Sykes v. Dixon, 9 Ad. & El. 693; Addison, Cont. § 18; Parsons, Cont. 449; Utica, &c. R. Co. v. Brinckerhoff, 21 Wend. (N. Y.) 139; Lester v. Jewett, 12 Barb. (N. Y.) 502.

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writing, and signed by them; but the plaintiff's promise does not appear in the writing signed by the defendants, nor was any note or memorandum made and signed by him promising to labor for defendants three years or any length of time. Plaintiff was never bound by the agreement. There never was, then, any consideration to support defendants' promises. The agreement was void for want of mutuality. The plaintiff was under no legal obligation to work for defendants a moment longer than he chose, and the defendants were under none to keep him in their employment. The plaintiff could neither revive nor make a contract with defendants after he was discharged by them, without their consent and concurrence. The letter written after he was discharged was of no avail."

The weight of authority, however, seems to be against the view taken by the court in this case as to the necessity of the signing by both parties.[1]

§ 212. **Same Subject—When definite Time will be implied.** But a contract to retain the agent for a definite time will be implied, although not clearly expressed, where from the facts and circumstances surrounding the case, such appears to have been the intention of the parties.

Thus in a leading case where it appeared that the plaintiff had entered into a contract with a joint stock company whereby he agreed that from a certain date he would act as the attorney and solicitor of the company for a salary of 100l. a year, and the company on its part agreed to retain and employ him as such attorney and solicitor on the terms aforesaid, it was held, although no time for the continuance of the relation was agreed upon, that it must be construed to be a retainer for at least one year.[2] So where an offer of employment as superintendent of ships was made by a letter stating that the wages would be one hundred dollars per month, "and if you give me satisfaction at the end of the first year, I will increase your salary accordingly," it was held that this was a contract for a yearly hiring.[3] So a letter engaging a person as a hotel manager at a salary of one hundred and twenty-five dollars per month, and showing upon its face that

[1] See Wood on the Statute of Frauds, § 405, and cases cited.

[2] Emmens v. Elderton, 13 Com. B. 495, 76 Eng. Com. L. 495.

[3] Morton v. Cowell, 65 Md. 359, 57 Am. Rep. 331.

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the engagement contemplated his giving up another situation and removing, with his family, several hundred miles to a hotel, and there undertaking, besides the duties of a manager, those of secretary and treasurer of the hotel company, was held to import an engagement for at least a year.[1]

The mere fixing of the salary by the year or other interval is not, however, enough to make the employment one for such interval, unless the nature of the undertaking or the surrounding circumstances indicate that such was the evident intent of the parties.[2]

A person who has been previously employed by the month, year or other fixed interval, and who is permitted to continue in the employment after the period limited by the original employment has expired, will, in the absence of anything to show a contrary intention, be presumed to be employed until the close of the current interval and upon the same terms.[3]

§ 213. **Agency terminable for Agent's Incompetence.** As will be seen hereafter, there is an implied covenant on the part of every agent that he possesses and will exercise in the execution of his undertaking, a reasonable degree of skill, knowledge and ability.[4] If, therefore, the agent, though employed for a definite period, proves not to possess that reasonable degree of skill, or, if possessing it, he neglects or refuses to exercise it, the principal may properly terminate his authority therefor without liability for a breach of the contract.[5] *A fortiori* would this be true where the covenant for competency was express instead of implied. Any other rule would, as can readily be seen, place the principal at the mercy of an incompetent agent, and compel him to suffer, perhaps for a long period, a constant and increasing loss and injury from the inefficiency of an agent who had impliedly, if not expressly, warranted himself to be competent.

If, however, at the time of the employment, the principal knew

[1] Smith *v.* Theobald, — Ky. —, 5 S. W. Rep. 894.

[2] Palmer *v.* Marquette Rolling Mill Co. 32 Mich. 274; Franklin Mining Co. *v.* Harris, 24 Mich. 115; De Briar *v.* Minturn. 1 Cal. 450; Tatterson *v.* Suffolk Mnfg. Co. 106 Mass. 56; Haney *v.* Caldwell, 35 Ark. 156.

[3] Sines *v.* Superintendents of the Poor, 58 Mich. 503; Tallon *v.* Mining Co. 55 Mich. 147; Tatterson *v.* Suffolk Mnfg. Co. 106 Mass. 56; Alba *v.* Moriarty, 36 La. Ann. 680; McCullough Iron Co. *v.* Carpenter, 67 Md. 554, 11 Atl. Rep. 176; Weise *v.* Milwaukee County Supervisors, 51 Wis. 564.

[4] See *post*, §§ 488–508.

[5] See *post*, §§ 618, 488–508.

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of the agent's incompetence, he could not discharge him on that ground, unless the incompetence were greater than the principal knew or had reasonable grounds to suppose. If a man knowingly chooses incompetent agents, he has no reason to complain if he receives incompetent service.[1]

§ 214. **When Agency may be terminated for Agent's Misconduct.** It is also an implied condition in every contract of agency, that the agent will not wilfully disobey or disregard the reasonable and lawful instructions of his principal; that he will not willingly permit to suffer his principal's interests committed to his care; that he will be honest and faithful, and will exercise reasonable care and diligence in the performance of his duties; and that he will not intentionally violate the established principles of morality or the laws of the land.[2]

If, therefore, the agent, though employed for a definite time violates this condition, the principal may discharge him therefor without incurring liability on account of such discharge.[3]

This rule is indispensable for the protection of the principal. The agency is created by him for the furtherance of his interests. It is *his* will that is to be executed, *his* object that is to be accomplished. Within reasonable and lawful limits, he has, and of necessity must have, the right to determine the time, the methods and the means to be employed. He has a right to have the business performed in his own way, if it be a lawful way, although the agent may think or know that there is a very much better way; and if the agent is not willing to conform to the principal's desires, he should decline the agency.

The principal is also entitled to the undivided and unreserved loyalty of the agent. The relation, as has been seen, is founded upon trust and confidence, and cannot exist in its true character if the agent is to be permitted to undermine or overreach his principal, or to use his position or its opportunities to make gain for himself at the expense of his principal.

Neither can the principal be rightly required to retain or

[1] See *post*, §§ 615–625.

[2] Callo *v.* Brouncker, 4 C. & P. 518; Atkin *v.* Acton, 4 C. & P. 208; Bixby *v.* Parsons, 49 Conn. 483, 44 Am. Rep. 246.

[3] Chicago, &c. Ry. Co. *v.* Bayfield, 37 Mich. 205; Dieringer *v.* Meyer, 42 Wis. 311, 24 Am. Dec. 415; Henderson *v.* Hydraulic Works, 9 Phila. (Penn.) 100.

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employ an agent who is devoid of moral principles or who is guilty of criminal acts or practices.

§ 215. **Same Subject—Illustrations.**—In accordance with these principles it has been held that where an agent with power to sell property, ran off with it and, having sold it, embezzled the proceeds, such fraudulent conduct of itself operated to terminate the agent's authority,[1] and so where an insurance agent wrongfully appropriated and converted to his own use, the money of his principal which came into his hands by reason of his employment, it was held that he might lawfully be discharged therefor.[2]

So it is well settled that if an agent who has contracted his entire time to his principal, without the consent of his principal, engage in an employment or business for himself or another, which may tend to injure his principal's trade or business, he may be lawfully discharged before the expiration of the agreed term of service. This is so because it is the duty of the agent not only to give his time and attention to his principal's business, but, by all lawful means at his command, to protect and advance his principal's interests. When the agent engages in a business which brings him into direct competition with his principal, the tendency is to injure or endanger, not to protect and promote, the interests of the latter. And it makes no difference in such a case that the agent gives his whole time and services to the business of his principal; his interest in the other business, though actually conducted by agents of his own, is hostile to his principal's interests.[3]

So where a clerk and traveling agent, employed by the year, assaulted his principal's maid servant with intent to ravish her,

[1] Case *v.* Jennings, 17 Tex. 661.

[2] Phœnix Mut. L. Ins. Co. *v.* Halloway, 51 Conn. 311, 50 Am. Rep. 20.

[3] Dieringer *v.* Meyer, 42 Wis. 311, 24 Am. Rep. 415, citing Singer *v.* McCormick, 4 W. & S. (Penn.) 265; Jaffray *v.* King, 34 Md. 217; Adams Express Co. *v.* Trego, 35 Md. 47; Lacy *v.* Osbaldiston, 8 C. & P. 80; Read *v.* Dunsmore, 9 C. & P. 588; Nichol *v.* Martyn, 2 Esp. 732; Gardner *v.* McCutcheon, 4 Beav. 534; Ridgway *v.* Market Co. 3 Ad. & E. 171; Amor *v.* Fearon, 9 Ad. & E. 548; Horton *v.* McMurtry, 5 Hurl. & N. 667.

Thus where it appeared that a travelling salesman who had contracted his entire time to his employer, had been secretly taking orders for another firm, it was held that this would justify his discharge though employed for a fixed term. Orr *v.* Ward, 73 Ill. 318, citing Ridgeway *v.* Market Co. *supra*; Spotswood *v.* Barrow, 5 W. H. & G. 110.

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it was held that this was a good cause for his dismissal without notice, and that he was not entitled to recover wages for the time he had served.[1] This decision was based upon the ground that the agent by his misconduct had broken the implied agreement which formed part of the contract of hiring and gave the principal the right to rescind it. So where an agent seduced the minor daughter of his principal it was held that this was a good cause for his discharge and that the principal might recoup against the agent's claim for wages, the damages sustained by the seduction.[2]

So if the agent proves to be wilfully or habitually disobedient or disregardful of his principal's reasonable instructions or directions;[3] or if he proves to be an habitual drunkard, or if he becomes a drunkard to such an extent as to incapacitate him for the performance of his undertaking,[4] he may properly be discharged. And so if he becomes a gambler upon the stock exchange.[5]

But it is not for every slight offense, or for every default causing no serious injury, that the agent is to be discharged. The question of the sufficiency of the reason in such a case is ordinarily one of fact and law to be determined from all the facts and circumstances of each particular transaction. The disobedience of the agent ought to be such as to show such a spirit of insubordination or of reckless and careless disregard for proper instructions as reasonably to indicate that he could not be relied upon for faithful and efficient service.[6]

§ 216. **How the Authority may be revoked.** The means by which the authority may be revoked are as various as the methods by which it may be conferred. It may be done by a solemn instrument under seal, or by a writing not under seal, or by a public and formal announcement or proclamation, or by a simple

[1] Atkin *v.* Acton, 4 C. & P. 208.

[2] Bixby *v.* Parsons, 49 Conn. 488, 44 Am. Rep. 246.

[3] Ford *v.* Danks, 16 La. Ann. 119; Edwards *v.* Levy, 2 Fost. & Fin. 94; Callo *v.* Brouncker, 4 C. & P. 518. Where an agent wilfully sells his principal's goods for less than the fixed price or so conducts himself as to drive away his principal's customers, the principal is justified in discharging him. Newman *v.* Reagan, 65 Ga. 512.

[4] McCormick *v.* Demary, 10 Neb. 515; Physioc *v.* Shea, 75 Ga. 466; Nolan *v.* Thompson, 11 Daly (N. Y.) 314; Bass Furnace Co. *v.* Glasscock, 82 Ala. 452, 2 South. Rep. 315, 60 Am. Rep. 748.

[5] Pearce *v.* Foster, 7 Q. B. Div. 536.

[6] Shaver *v.* Ingham, 58 Mich. 649, 55 Am. Rep. 712.

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and private declaration. It may also be inferred from circumstances.

The precise mode to be adopted in any given case, or the mode which, having been adopted, shall be deemed sufficient in such case, is to be determined largely by considering the object with which an authority is revoked. A revocation is not effected by the mere operation of the principal's will. That will must be expressed, and its expression must be brought to the attention of those whom it is desired to affect. This leads to the necessity of giving notice of the revocation, a question hereafter to be considered. It will be evident, too, that the mode adopted for accomplishing the revocation must not only be co-extensive with the degree to which by length of time or widespread operations or publicity of appointment, the knowledge of the authority has been disseminated, but that it must also be adapted to the particular means by which such dissemination was effected.

§ 217. **Same Subject—By sealed Instrument.** It is very customary to revoke a power of attorney under seal by an instrument executed with the same degree of solemnity, and the statutes of many States provide for giving constructive notice of the revocation of a recorded power of attorney by recording the instrument of revocation in the same office with the power. But a revocation under seal is not necessary even where the authority was conferred by deed. A parol revocation will suffice,[1] and particularly so when the seal upon the power to be revoked was superfluous, not being required by the nature of the act to be performed.[2]

§ 218. **Same Subject — Express Revocation not required.** Neither is it necessary that the revocation, in absence of a statute requiring it, should be in writing, or should be couched in any formal phrase. It is not necessary that the word "revoke," or other similar words, should be used. A request to resign will amount to a revocation. Thus the words "I am very sorry to have to ask you to resign your position" in a letter from a principal to his agent were held by the court to be a civil form but none the less a peremptory discharge of the agent, and that he rightly treated it as such.[3]

[1] Brookshire v. Brookshire, 8 Ired. (N. C.) Law, 74, 47 Am. Dec. 341; Copeland v. Mercantile Ins. Co. 6 Pick. (Mass.) 198.

[2] Brookshire v. Brookshire, *supra*.

[3] Jones v. Graham, &c. Transp. Co. 51 Mich. 539.

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§ 219. **Revocation may be implied.** So a revocation may be implied from the circumstances of the case. Thus if the powers conferred upon one agent are subsequently given to another, it will, in general, operate as a revocation of the authority of the first, as where a power is given to an agent to sell the interest of a principal in a vessel and the principal afterwards confers the same power upon the first agent jointly with another.[1] But an employment by written contract to do a specified thing is not necessarily revoked by a subsequent general employment to attend to all the principal's business;[2] nor is a power of attorney executed by a widow and heirs at law of a decedent empowering the agent to complete an engagement entered into by the decedent, necessarily revoked by a subsequent grant of administration to the widow;[3] nor will a second power given to one of two previously appointed agents necessarily revoke the authority of the other, where the second appointment confers no new or additional authority in reference to the subject-matter of the agency;[4] nor will an authority given by a principal to an agent to collect a sum of money, be necessarily revoked by the mere appointment of another agent to collect the same sum.[5]

§ 220. **By disposing of Subject-matter.** Where the principal, before the execution of the authority, disposes of the subject-matter upon which the agency was to operate, a revocation of the power will be implied. Thus if a principal authorizes an agent to sell his real estate,[6] or his interest in a patent,[7] but before the agent has found a purchaser the principal sells the same himself, there is nothing left to support the agency and the revocation will be presumed.[8]

§ 221. **By Dissolution of Partnership or Corporation.** So where a firm or corporation which has appointed an agent, is subsequently dissolved, the dissolution will operate as a revocation of the power;[9] but a mere change in the name of the firm, where

[1] Copeland v. Mercantile Ins. Co. 6 Pick. (Mass.) 198.

[2] Smith v. Lane, 101 Ind. 449.

[3] Jones v. Commercial Bank, 78 Ky. 413.

[4] Cushman v. Glover, 17 Ill. 600, 52 Am. Dec. 461.

[5] Davol v. Quimby, 11 Allen (Mass.) 208.

[6] Gilbert v. Holmes, 64 Ill. 548; Ahern v. Baker, 34 Minn. 98.

[7] Walker v. Denison, 86 Ill. 142.

[8] Bissell v. Terry, 69 Ill. 184.

[9] Schlater v. Winpenny, 75 Penn. St. 321; Montross v. Roger Williams Ins. Co. 49 Mich. 477; Whitworth v. Ballard, 56 Ind. 279; Meyer v. Atkins,

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the new firm is composed of the same members as the old, does not operate to revoke an agency conferred upon it, the identity remaining the same.[1]

§ 222. **By Severance of a joint Interest.** Upon the same ground, it is held that where two or more principals jointly appoint an agent for the transaction of some business in which they are jointly interested, a severance of this joint interest will operate to revoke the agency.[2]

§ 223. **Notice of Revocation.** In order to render the revocation effectual, notice of it must be given to those parties whom the revocation is desired to affect, and these parties are the agent himself and those persons who, from knowledge of his authority or from previous dealings with him as such, would be likely to continue to deal with him in good faith upon the strength of the previous authority.

a. To Third Persons.

§ 224. **Where Authority was general.** Where a general authority is once shown to have existed, it may be presumed to continue until it is shown to have been revoked,[3] and persons who have dealt with the agent as such, or who have had notice of his authority, may very properly expect that if the authority be withdrawn, they will be given reasonable and timely notice of that fact, and they may therefore lawfully presume, in the absence of such notice, that the authority still continues.

General Rule. And it is therefore the general rule of the law that the acts of a former general agent within the scope of his original authority will, notwithstanding its revocation, continue to bind the former principal to those parties who have been and still are dealing with him in good faith in reliance upon his former authority until they have had notice of its revocation.[4] But this

29 La. Ann. 586; Vaccaro v. Toof, 9 Heisk. (Tenn.) 194.

[1] Billingsley v. Dawson, 27 Iowa, 210.

[2] Rowe v. Rand, 111 Ind. 206, 12 N. E. Rep. 377.

[3] Insurance Co. v. McCain, 96 U. S. 84; McNeilly v. Insurance Co., 66 N. Y. 23.

[4] Lamothe v. St. Louis, &c., Co., 17 Mo. 204; Hancock v. Byrne, 5 Dana (Ky.) 518; Beard v Kirk, 11 N. H. 397; Diversy v. Kellogg, 44 Ill. 114; Longworth v. Conwell, 2 Blackf. (Ind.) 469; Baltimore v. Eschbach, 18 Md. 276; Planters' Bank v. Cameron, 3 Sm. & M. (Miss.) 609; Munn v. Commission Co., 15 Johns. (N. Y.) 44; Murphy v. Ottenheimer, 84 Ill. 39; Marsh v. Gilbert, 4 Thomp.

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rule has no application where the act done is beyond the scope of the agent's former authority, and particularly so where the act is in excess of the power which the agent himself claimed to possess.[1]

§ 225. **Where Authority was special.** Where, however, the authority was special or limited, a different rule applies. As has been seen, an authority created for the performance of a specific act exhausts itself in the accomplishment of the purpose for which it was created. No such presumption can arise from the performance of a single act, as from a continuous course of dealing.

General Rule.—It is therefore the general rule that no notice is required to be given to third persons of the revocation of the authority of a special agent.[2]

This rule, however, would be subject to the exception that if the revocation is effected after the agent has entered upon the performance of his agency, notice thereof should be given to those persons with whom the agent had occasion to deal while so engaged in the performance.

b. To Agents.

§ 226. **Notice must be given to Agent.** Notice of the revocation of his authority, whether general or special, must be given by the principal to the agent. As between the agent and his principal, the revocation becomes operative as to the agent from

& Cook (N. Y.), 259; McNeilly *v.* Ins. Co., 66 N. Y. 23; Claflin *v.* Lenheim, Id. 301; Barkley *v.* Renselaer, &c., Co., 71 N. Y. 205; Packer *v.* Hinckley Locomotive Works, 123 Mass. 484; Hatch *v.* Coddington, 95 U. S. 48; Rice *v.* Barnard, 127 Mass. 241; Insurance Co. *v.* McCain, 96 U. S. 84; Braswell *v.* American L. Ins. Co., 75 N. C. 8; Ulrich *v.* McCormick, 66 Ind. 243; Meyer *v.* Hehner, 96 Ill. 400; Fellows *v.* Hartford, &c., Co., 38 Conn. 197; Rice *v.* Isham, 4 Abb. App. (N. Y.) 37; Wright *v.* Herrick, 128 Mass. 240; Tier *v.* Lampson, 35 Vt. 179, 82 Am. Dec. 634; Girard *v.* Hirsch, 6 La. Ann. 651; Harris *v.* Cuddy, 21 La. Ann. 388; Baudouine *v.* Grimes, 64 Iowa, 370; Capen *v.* Pacific Mut. Ins. Co., 1 Dutch. (N. J.) 67, 64 Am. Dec. 412. See also Cupples *v.* Whelan, 61 Mo. 583; Summerville *v.* Hannibal, &c. R. R. Co., 62 Id. 391; Howe Machine Co. *v.* Simler, 59 Ind. 307; Van Dusen *v.* Star Quartz Mining Co., 36 Cal. 571, 95 Am. Dec. 209.

[1] Baudouine *v.* Grimes, 64 Iowa, 370.

[2] Watts *v.* Kavanagh, 35 Vt. 34; Strachan *v.* Muxlow, 24 Wis. 21; Fellows *v.* Hartford & N. Y. Steamboat Co., 38 Conn. 197.

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the time it is actually made known to him.[1] If it be given by letter, it takes effect from the time the agent receives the letter, and not from the time of its mailing.[2] But after revocation of the agent's authority, the principal is not bound, as between himself and the agent, to notify the latter of his dissent from acts which the agent thereafter assumes to do by virtue of the original authority.[3]

c. To Subagents.

§ 227. **Notice must be given to Subagent—When.** Where the subagent derives his authority solely from the agent, no notice is required to be given by the principal to the subagent of the revocation of the agent's authority; but where the subagent was appointed by and with the authority of the principal, he is, as has been seen, the agent of the principal, and notice should be given to him of the revocation of his authority.[4]

§ 228. **Notice—How given—What sufficient.** What shall be deemed sufficient notice in any case, and how it shall be given, are questions concerning which it is impossible to lay down any general rule, which shall be both comprehensive and precise. It is evident that these questions must be largely determined by the facts and circumstances of each particular case. What would be sufficient notice of the revocation of the authority of a clerk to buy butter and eggs of the farmers of a single township in a country store, would not be adequate to the revocation of the authority of the general agent of a great railroad or insurance company whose transactions extended over states or continents. Yet the principle involved in each case would be the same. All must be done that may reasonably be required to make the knowledge of the revocation co-extensive with the knowledge of the authority.

The case is analogous to that of the dissolution of a partnership, and is governed by the same rules.[5] To all persons who have had actual dealings with the agent, actual notice must be given, or such knowledge of the fact must be brought home to

[1] Weile v. United States, 7 Ct. of Cl. 535; Harper v. Little, 2 Greenl. (Me) 14, 11 Am. Dec. 25; Jones v. Hodgkins, 61 Me. 480.

[2] Robertson v. Cloud, 47 Miss. 208.

[3] Kelly v. Phelps, 57 Wis. 425.

[4] Story on Agency, § 469.

[5] Claflin v. Lenheim, 66 N. Y. 301, 305.

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them as would be sufficient to put an ordinarily prudent man upon inquiry. To persons who have had no actual dealings, notice may be given by publication in some newspaper of general circulation. Notice by publication is sufficient even to those who have had dealings with the agent if it can be shown that they saw it; otherwise not.[1]

§ 229. **When Evidence of Agency recorded, Revocation should be recorded.** It is a common provision of the statutes of the various States, that powers of attorney or other instruments conferring authority upon the agent to deal with the principal's real estate, shall or may be recorded in the proper recording office of the county or district in which the land is situated. These statutes commonly provide also that any instrument revoking such a power shall or may be recorded in the same office, and make such recording in either case constructive notice of the facts which the record discloses. Where such statutes prevail, the recording of a revocation of the agent's authority is notice to all who may subsequently have occasion to deal with him;[2] and where the statute is imperative, the revocation cannot be given effect in any other way, unless by express notice.[3]

§ 230. **Notice of Revocation should be unequivocal.** But whatever may be the form adopted, the notice should be unequivocal and not leave the parties in doubt as to the principal's intentions. Any ambiguity or uncertainty in such a case should be construed most strongly against the principal, in whose power it lay to prevent such a result.

As was said by a distinguished judge in a case involving the revocation of an express power to draw bills, "Nothing could be more inconsistent with that candor and good faith which ought to mark the transactions of mercantile men, than to favor the revocation of an explicit contract on the construction of a corre-

[1] Ewell's Lindley on Partnership, 414–416; Claflin *v.* Lenheim, *supra;* Braswell *v.* American L. Ins. Co., 75 N. C. 8; Fellows *v.* Hartford, &c., Co., 38 Conn. 197; Williams *v.* Birbeck, Hoffman (N. Y.) Ch. 359.

[2] Arnold *v.* Stevenson, 2 Nev. 234.

[3] The statute of Michigan, for example, provides that "No letter of attorney or other instrument so recorded, shall be deemed to be revoked by any act of the party by whom it was executed, unless the instrument containing such revocation be also recorded in the same office in which the instrument containing the power was recorded." How. Stats., § 5692.

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spondence nowhere avowing that object. It was in the defendant's power to have revoked his assumption, at any time prior to its execution; but it was incumbent on him to have done so avowedly, and in language that could not be charged with equivocation."[1]

§ 231. **How Sufficiency of Notice determined.** Where the circumstances are controverted, or where notice is sought to be inferred as a fact from circumstances, the question is for the jury; they must determine as a question of fact whether the party claiming against the principal did or did not have notice of revocation; and if there be some evidence of this fact, it must be submitted to the jury. Where, however, the facts are undisputed, and the only question is whether they amount to constructive notice, or are sufficient to put the party upon inquiry, the question is not for the jury, but for the court.[2]

B. Public Agency.

§ 232. **Statutory Agency not revocable at Will of Principal.** Where the State requires the creation and maintenance of an agency to subserve some purpose in which its citizens may have an interest, the authority of an agent appointed in pursuance of such a requirement cannot be revoked at the mere will of the principal, unless for the appointment of another in his place, while the exigency continues against which the statute was intended to provide.

Thus where a statute required any foreign insurance company doing business within the State, to appoint an agent within the State upon whom process against the company might be served, it was held that the company having appointed such an agent, could only revoke his authority upon the appointment of another. Said the court: "Taking into consideration its evident purpose, and its utter futility if a company appointing an agent to receive service could by any act, known only to the agent and itself, withdraw his powers, it must be held that this appointment was irrevocable, unless the revocation might be made by the appointment, duly notified upon the records, of a new agent,

[1] JOHNSON, J., in Lanusse v. Barker, 3 Wheat. (U. S.) 101, 143; See Hatch v. Coddington, 95 U. S. 48, 56; Claflin v. Lenheim, 66 N. Y. 301.

[2] Claflin v. Lenheim, 66 N. Y. 301.

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who should be competent to receive service of process in regard to any controversies arising upon contracts previously entered into." [1]

2. *Renunciation by Agent.*

§ 233. **General Rule—Agent may renounce at any Time.** The agent may, in general, renounce his agency at any time. His *power* to do this, in the sense that his further performance will not be specifically enforced, is co-extensive with the principal's power to revoke; but his *right* to do so, is, like the principal's right to revoke, limited by his contracts in the premises. Where the agency is indefinite in duration the agent may, upon giving reasonable notice, sever the relation at any stage without liability to the principal,[2] and will be entitled to compensation and reimbursement for his services and expenses up to that time.[3] Where, however, the agency was created for a definite period, or was undertaken for a valuable consideration, the agent who renounces before the expiration of that period, or before the performance of his undertaking, will be liable to his principal for the damages he may sustain thereby.[4]

[1] Gibson *v.* Manufacturers' Ins. Co. 144 Mass. 81, 10 N. East. Rep. 729; and to the same effect see Michael *v.* Mutual Ins. Co., 10 La. Ann. 737.

[2] Barrows *v.* Cushway, 37 Mich. 481; United States *v.* Jarvis, Davies (U. S. D. C.) 274; Coffin *v.* Landis, 46 Penn. St. 426.

[3] See *post*, § 632.

[4] United States *v.* Jarvis, *supra;* Coffin *v.* Landis, *supra*. The language of WARE, J., in United States *v.* Jarvis, *supra*, is worthy of full quotation upon the subject of revocation and renunciation: "There is no doubt, as a general rule, that the appointment of an agent may at any time be revoked by the principal without giving a reason for it, because it is the right of every man to employ such agents as he sees fit. The agent, also, has the same general right to renounce the agency at his own will, for it is an engagement at the will of both parties. But the contract of agency involves mutual obligations between the parties, and these commence, if not as soon as the appointment is made, at least as soon as the agent commences the execution of the agency. If he has entered on the business, even if he does not accomplish prosperously what he has undertaken, he will be entitled from the principal to an indemnity for his expenses and services, if the failure does not arise from his own fault.

After he has engaged in the business of the agency, the principal may at any time revoke his powers and dismiss him from his service. But if his power is thus revoked, the principal will be responsible to him for any engagements he may have entered into and any liabilities he may have incurred, in good faith in the proper business of the agency,

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§ 234. **By mutual Consent.** The relation of principal and agent may, of course, be terminated at any time by the mutual consent of the parties without liability on either side.[1]

§ 235. **Abandonment may be treated as Renunciation.** If the agent abandon the agency he may not complain if the principal treats this as a renunciation, and appoints another in his stead. Thus where an agent in Philadelphia wrote to his principal in New York that he had decided to give up the business and requested him to come or to send some one to take charge of it, it was held that the principal might treat this as an abandonment and appoint a new agent.[2] So where an agent was arrested upon a criminal charge and kept in jail for two weeks during the busiest part of the season, it was held that the principal might lawfully treat the employment as abandoned, although it subsequently proved that the imprisonment was unauthorized.[3]

§ 236. **Agent may abandon if required to do unlawful Act.** If the principal requires of the agent the performance of an illegal or immoral act, the agent may lawfully renounce his agency. As is said by a learned judge: "*Honeste vivere* is a part of the law of principal and agent."[4]

§ 237. **Notice of Renunciation.**—Notice of the renunciation must be given by the agent to the principal, and as between the parties the renunciation will be operative from the time the principal receives the notice of it. The principal must also for his own protection give notice to third persons of the termination of the authority by renunciation in the same manner as where the authority is revoked.[5]

before he had notice of the revocation. And so the agent, after entering upon the business, may renounce the agency. But this must be done in good faith, and be preceded by reasonable notice, or the agent will be liable to the principal for any loss that may result to him from this cause. The agent cannot withdraw himself from his engagement wantonly and without reasonable cause without rendering himself responsible for the consequences."

See also *post*, § 633.

[1] Conrey *v.* Brandegee, 2 La. Ann. 132.

[2] Stoddart *v.* Key, 62 How. Pr. (N. Y.) 137.

[3] Leopold *v.* Salkey, 89 Ill. 412.

[4] Conrey *v.* Brandegee, 2 La Ann. 132; See also *post*, § 632.

[5] Capen *v.* Pacific Mut. Ins. Co. 1 Dutch. (N. J. Law) 67, 64 Am. Dec. 412.

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III.

BY OPERATION OF LAW.

§ 238. But the intentional act of the parties does not furnish the only means by which the relation of principal and agent may be dissolved. Such changes in condition, capacity and surroundings of the parties, or the subject-matter may occur as to render the further continuance of the relation inconsistent or impossible, and the agency will thereupon be terminated or dissolved by the operation of law.

Thus one or both parties to the relation may die, or become insane, or bankrupt. War may interrupt the commercial transactions between citizens of different states or countries, or the subject-matter of the agency may cease to exist or it become impossible or unlawful to be performed. Each of these contingencies it is important to consider.

1. *By Death of One of the Parties.*

a. By the Death of the Principal.

§ 239. **In general.** The relation of principal and agent necessarily presupposes at least two existing and competent parties, —one competent to act for himself and in his own behalf, but preferring for reasons of convenience or otherwise to delegate this power to another; the other likewise competent, ordinarily, to act for himself, but undertaking for the time being to assume a representative character and to act in the name and for the benefit of the person represented;—one supplying authority, the other exercising it.

By the death of either of these parties, therefore, it is obvious that the relation must ordinarily be terminated. If the principal dies, there is thenceforward no one to be represented; no one in whose name the agent can act; no one from whom the supply of power can continue to flow, and unless there is something in the nature of the authority by which it can survive a severance from its source, it must perish with it.

§ 240. **General Rule—Death of Principal terminates Agency.** It is therefore the general rule that the authority of an agent, not coupled with an interest, is instantly terminated by the death of the principal, even though it may have been irrevocable in his

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life-time; and that any attempted execution of the authority after that event is not binding upon the heirs or representatives of the deceased principal.[1]

The relation being thus terminated by the act of God, the agent can maintain no claim for damages thereby, although he had been employed for a fixed term which had not yet expired.[2]

Of course where the authority has been fully executed before the principal's death, that event cannot affect the rights of the other party. So if before the principal's death, the authority has been executed in part, his death cannot operate as a revocation of the executed portion, nor, if the authority be entire, of that which yet remains unexecuted.[3]

§ 241. Same Subject—Not when coupled with an Interest. Where, however, the authority of the agent is coupled with an interest in the subject-matter of the agency, it is not terminated by the death of the principal, and a subsequent execution of it by the agent will be good.[4]

[1] Saltmarsh *v.* Smith, 32 Ala. 404; Boone *v.* Clarke, 3 Cranch (U. S. C. C.) 389; Hunt *v.* Rousmanier, 8 Wheat. (U. S.) 174; Ferris *v.* Irving, 28 Cal., 645; McDonald *v.* Black, 20 Ohio, 185; Primm *v.* Stewart, 7 Tex. 178; Michigan Ins. Co. *v.* Leavenworth, 30 Vt. 11; McGriff *v.* Porter, 5 Fla. 373; Lewis *v.* Kerr, 17 Iowa 73; Gale *v.* Tappan, 12 N. H. 145, 37 Am. Dec. 194; Merry *v.* Lynch, 68 Me. 94; Darr *v.* Darr, 59 Iowa 81; Lincoln *v.* Emerson, 108 Mass. 87; Huston *v.* Cantril, 11 Leigh (Va.) 136; Harper *v.* Little, 2 Greenl. (Me.) 14, 11 Am. Dec. 25; Staples *v.* Bradbury, 8 Greenl. (Me.) 181, 23 Am. Dec. 494; Jenkins *v.* Atkins, 1 Humph. (Tenn.) 294, 34 Am. Dec. 648; Wellborn *v.* Weaver, 17 Ga. 267, 63 Am. Dec. 235; Clayton *v.* Merrett, 52 Miss, 353; Davis *v.* Windsor Savings Bank, 46 Vt. 728; Travers *v.* Crane, 15 Cal. 12; Marlett *v.* Jackman, 3 Allen (Mass.) 287; Johnson *v.* Wilcox, 25 Ind. 182; Turnan *v.* Temke, 84 Ill. 286; Cleveland *v.* Williams, 29 Tex. 204, 94 Am. Dec. 274; Doe *v.* Smith, 1 Jones (N. C.) L. 185, 59 Am. Dec. 581; Cassiday *v.* McKenzie, 4 W. & S. (Penn.) 282, 39 Am. Dec. 76; Wilson *v.* Edmonds, 24 N. H. 517; Easton *v.* Ellis, 1 Handy (Ohio.) 70; Scruggs *v.* Driver, 31 Ala. 274.

[2] Yerrington *v.* Greene, 7 R. I. 589, 84 Am. Dec. 578; but in Fereira *v.* Sayres, 5 W.& S.(Penn.) 210, 40 Am. Dec. 496, it was held that the death of one of two partners did not absolve the firm from liability to an agent who had been employed for a term which had not yet expired. But a contrary result to that of the last case was reached in Tasker *v.* Shepherd, 6 H. & N. 575; Burnet *v.* Hope, 9 Ont. Rep. 10.

[3] Garrett *v.* Trabue, 82 Ala. 227; Story on Agency, § 466.

[4] Hunt *v.* Rousmanier, 8 Wheat. (U. S.) 174; Merry *v.* Lynch, 68 Me. 94; Bergen *v.* Bennett, 1 Caine's Cases (N. Y.) 1, 2 Am. Dec. 281; Knapp *v.* Alvord, 10 Paige (N. Y.)

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§ 242. **Same Subject—What Interest sufficient.**—The same difficulty is experienced here that was met with in defining the interest which would protect an authority from revocation during the principal's life-time.[1] But it must, in general terms, be an interest in the thing itself which is the subject of the agency and be capable of execution in the name of the agent. A mere power, though irrevocable by the principal in his life-time, is, nevertheless, terminated by his death. But as is said by Chief Justice MARSHALL: "This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an 'interest' it survives the person giving it and may be executed after his death. As this proposition is laid down too positively in the books to be controverted, it becomes necessary to inquire what is meant by the expression 'a power coupled with an interest'? Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear that the interest which can protect a power after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing.

"The words themselves would seem to import this meaning. 'A power coupled with an interest' is a power which accompanies or is connected with an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest' an interest in that which is to be produced by the exercise of the power, then they are never united. The power to produce the interest must be exercised, and by its exercise is extinguished. The power ceases when the interest commences, and therefore cannot, in accurate law language, be said to be 'coupled' with it.

"But the substantial basis of the opinion of the court on this point is found in the legal reason of the principle. The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which in such a case is the act of the

205. 40 Am. Dec. 241; Leavitt v. Fisher, 4 Duer (N. Y.) 1; Hough-taling v. Marvin, 7 Barb. (N. Y.) 412.

[1] *Ante*, § 205.

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principal, to be legally effectual, must be in his name, and must be such an act as the principal himself would be capable of performing, and which would be valid if performed by him. Such a power necessarily ceases with the life of the person making it. But if the interest or estate passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. The estate being in him, passes from him by a conveyance in his own name. He is no longer a substitute acting in the place and name of another, but he is a principal acting in his own name in pursuance of powers which limit his estate. The legal reason which limits the power to the life of the person giving it, exists no longer; and the rule ceases with the reason on which it is founded."[1]

Again it is said by a learned judge, "A power is simply collateral and without interest, or a naked power, when to a mere stranger, authority is given to dispose of an interest in which he had not before, nor has by the instrument creating the power, any estate whatsoever; but when the power is given to a person who derives under the instrument creating the power or otherwise, a present or future interest in the property, the subject on which the power is to act, it is then a power coupled with an interest."[2]

§ 243. **Same Subject — What Interest sufficient — Instances.** Thus the indorsement and delivery for the purpose of collection of a promissory note passes the legal title in trust, and the agent may sue upon it in his own name after the death of the principal.[3] So the power of sale conferred by a mortgagor upon the mortgagee is one coupled with an interest and is not revoked by the mortgagor's death.[4]

§ 244. **Same Subject—What Interest not sufficient—Instances.** But a power of attorney not containing any words of conveyance or assignment but a simple authority to sell and convey, although

[1] Hunt v. Rousmanier, 8 Wheat. (U. S.) 174.

[2] Thompson, J., in McGriff v. Porter, 5 Fla. 373, 379.

[3] Moore v. Hall, 48 Mich. 143; Boyd v. Corbitt, 37 Mich. 52.

[4] Conners v. Holland, 113 Mass. 50; Varnum v. Meserve, 8 Allen (Mass.) 158; Berry v. Skinner, 30 Md. 567; Beatie v. Butler, 21 Mo. 313; Bradley v. Chester Valley R. R. Co., 36 Penn. St. 141; Bergen v. Bennett, 1 Caines' Cas. (N. Y.) 1, 2 Am. Dec. 281; Wilson v. Troup, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458.

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given as collateral security for the payment of certain notes executed by the principal to the attorney and authorizing him to sell the property named in case of default and reimburse himself, is not a mortgage but a bare power and is terminated by the death of the principal before execution;[1] so where to secure the loan of money the borrower executed an instrument in writing, authorizing the lender, upon default in payment, to enter upon the premises of the borrower and take away certain slaves therein specified, and to sell and dispose of them and out of the proceeds of the sale to reimburse himself for the loan and all expenses, and to return the surplus, if any, to the borrower, the same ruling was made;[2] and again where a principal debtor gave his surety a written power of attorney authorizing him to sell certain lands to pay the debt, but the surety did not exercise the power during the grantor's life-time, it was held that the authority was utterly dissolved by the latter's death;[3] so a power given by a debtor to his creditor authorizing him to collect a debt, due to the debtor, and to apply it on his claim, but containing no conveyance or assignment of the debt, is terminated by the debtor's death.[4]

A fortiori, is this so where the authority conveyed is a mere power, or where the only interest is that in compensation to be gained from the proceeds of the sale of property or the collection of a debt.[5]

Of the former class, an authority to occupy land as an agent;[6] a power to sell a chattel;[7] an authority by a landlord to his tenant to make repairs;[8] a power of attorney to demand payment of a note,[9] or to receive notice of its dishonor;[10] a power of attorney to procure a patent,[11] are examples, and expire with the life of him who granted them.

[1] Hunt v. Rousmanier, 8 Wheat. (U. S.) 174.

[2] McGriff v. Porter, 5 Fla. 373.

[3] Huston v. Cantril, 11 Leigh (Va.) 136.

[4] Houghtaling v. Marvin, 7 Barb. (N. Y.) 412.

[5] Harper v. Little, 2 Greenl (Me.) 14, 11 Am. Dec. 25; Saltmarsh v. Smith, 32 Ala. 404; Travers v. Crane, 15 Cal. 12; Ferris v. Irving, 28 Cal. 645; Coney v. Sanders, 28 Ga. 511; Lewis v. Kerr, 17 Iowa, 73; Primm v. Stewart, 7 Tex. 178.

[6] Lincoln v. Emerson, 108 Mass. 87.

[7] McDonald v. Black, 20 Ohio, 185.

[8] Wilson v. Edmonds, 24 N. H. 517.

[9] Gale v. Tappan, 12 N. H. 145, 37 Am. Dec. 194.

[10] Bank of Washington v. Peirson, 2 Cranch. (U. S. C. C.) 685.

[11] Eagleston Mnfg. Co. v. West Mnfg. Co., 18 Blatch. (U. S. C. C.) 223.

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§ 245. **How when Death unknown.** When the authority has thus been dissolved by the death of the principal, all subsequent attempts to execute it, or to act by virtue of it, even though made in good faith and in ignorance of the fact of the death, are ineffectual to bind the estate of the principal. Where the authority is one which must be executed in the name of the principal, as by executing deeds, this rule is unquestioned[1] but where the act is one which, while it is done for the principal, is not expressly required to be done in his name, it has been criticised and even denied by some text writers and judges.[2] Even in the latter case, however, the rule is supported by an undoubted preponderance of authority.[3]

By the civil law, the act of an agent done in good faith in ignorance of the death of the principal, is binding upon his representatives. There the death does not necessarily and *ipso facto* operate as a dissolution of the agency, but the agency, as in the case of an express revocation, determines only from the time of notice.[4] But by the common law, the rule is different, as has been seen, and the death, except in cases coupled with an interest, works an instantaneous dissolution of the relation. Some tendency has been manifested to apply the rule of the civil law in certain cases as being more consonant with reason and justice. Thus in Cassiday *v.* McKenzie,[5] it was held that the payment made by an agent after the death of the principal, but in ignorance of it, was good. So in Dick *v.* Page,[6] the deposit of collaterals made by an agent as security for advances made after the principal's death, but all the parties being in ignorance of it, was held to be valid as against the executor of the principal, and the same principle was enforced in Ish *v.* Crane.[7]

[1] Harper *v.* Little, 2 Greenl. (Me.) 14, 11 Am. Dec. 25; Travers *v.* Crane, 15 Cal. 12; Ferris *v.* Irving, 28 Cal. 645; Coney *v.* Sanders, 28 Ga. 511; Lewis *v.* Kerr, 17 Iowa, 73.

[2] Story on Agency, § 495; Wharton on Agency, § 102; Cassiday *v.* McKenzie, 4 W. & S. (Penn.) 282, 39 Am. Dec. 76; Dick *v.* Page, 17 Mo. 234; Ish *v.* Crane, 8 Ohio St. 520, S. C. 13 Id. 574.

[3] Clayton *v.* Merrett, 52 Miss, 353; Galt *v.* Galloway, 4 Pet. (U. S.) 331; Cleveland *v.* Williams, 29 Tex. 204, 94 Am. Dec. 274; Michigan Ins. Co. *v.* Leavenworth, 30 Vt. 11; Davis *v.* Windsor Savings Bank, 46 Vt. 728; Jenkins *v.* Atkins, 1 Humph. (Tenn.) 294, 34 Am. Dec. 648; Rigs *v.* Cage, 2 Humph. (Tenn.) 350, 37 Am. Dec. 559.

[4] Inst. 3, 27, 10; Digest, 17, 1, 6; 1 Domat b. 1. Tit. 15, § 4.

[5] *Supra.*

[6] *Supra.*

[7] *Supra.*

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But these cases have not been followed by other courts, and it is said of them by a learned judge, that "in as far at least as they announce the doctrine under discussion they are exceptional. The Pennsylvania case is believed to stand almost if not quite alone, in announcing the principle in its broadest scope. The overwhelming weight of authority is to the effect that the death of the principal operates as an instantaneous revocation of the agency where it is a naked power unaccompanied with an interest, and every act of the agent thereafter performed is null so far as the estate of the principal is concerned. This rule frequently operates very unjustly and produces very great hardships. A party dealing with an insolvent agent, upon the faith of his well known authority from a wealthy and distant principal, is suddenly confronted with the fact that the authority had ceased by the death of the principal, one day or perhaps one hour before his transactions occurred. Impressed with the hardship of such a case, the civil law adopts the rule contended for in the case at bar and renders valid a contract executed or a payment made under such circumstances," but he goes on to say that "however great the injustice produced in particular cases, undoubtedly the common law rule is that death revokes the agency and nullifies all acts thereafter performed. This doctrine rests upon the obvious principle that as a dead man can do no act for himself, so no man can do an act for him. When, therefore, the agent undertakes to act in his name, he is acting for a being not in existence. To hold his act valid is not to bind the dead man but his heirs and representatives, who are thus held liable for the acts of one whom they never appointed and whom perhaps they would be unwilling to trust. Whether a system of jurisprudence which would accomplish this result would be found in the long run less productive of injustice than our present rule may well be doubted. At all events we are satisfied that such is not the law."[1]

Of the reason of the common law rule, it has been said, "Though it may be true that when a power is revoked by the act of the party, notice may be necessary, yet when revoked by his death, the revocation at once takes effect, and if any act is subsequently done under the power, though without notice of the death of the

[1] Chalmers, J., in Clayton *v.* Merrett, *supra*.

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party, the act is void, and there is the best reason in the world for this fundamental distinction. It is an event of which each party has equal means of knowledge, and must take notice of it at his peril."[1]

§ 246. **Same Subject—Instances.** In accordance with the rule of the common law, therefore, it has been held that a payment made to an agent after the death of his principal, though the party paying did so in good faith and without notice of the death of the principal, was not sufficient, and that the administrator of the principal was entitled to recover it;[2] that the discount in good faith and without notice of the principal's death, of a note put into circulation by an agent after that event, conferred no right against the estate of the principal;[3] that the sale of real estate by an agent after the death of his principal, but in ignorance of it, was not binding upon the estate,[4] and hence not upon the purchaser;[5] that the act of an agent in separating, measuring and delivering, after the death of his principal, a quantity of corn that had been bargained by the principal in his lifetime, but the title to which, by want of such separating, measuring and delivering, had not passed to the other party, was not good against the principal's estate;[6] that an agent's power to buy goods for his principal ceases with his death, and that the seller could not recover against the administrators of the principal's estate, though the fact of the death was unknown both to the seller and the agent.[7]

But where an agent, authorized to buy goods, sent an order for them by mail on the day before the principal died, to a non-resident merchant with whom he had a general arrangement to supply goods on such orders, and the merchant filled the order within a reasonable time in ignorance of the principal's death, it was held that the contract was binding as of the day on which the order was deposited in the mail, and that the principal's estate

[1] Bennett, J., in Michigan Ins. Co. v. Leavenworth, *supra*.

[2] Davis v. Windsor Savings Bank, 46 Vt. 728; Clayton v. Merrett, 52 Miss. 353.

[3] Michigan Ins. Co. v. Leavenworth, 30 Vt. 11.

[4] Jenkins v. Atkins, 1 Humph. (Tenn.) 294, 34 Am. Dec. 648.

[5] Lewis v. Kerr, 17 Iowa, 73.

[6] Cleveland v. Williams, 29 Tex. 204, 94 Am. Dec. 274.

[7] Rigs v. Cage, 2 Humph. (Tenn.) 350, 37 Am. Dec. 559.

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was bound, notwithstanding the order was not received by the merchant until after the death of the principal.[1]

§ 247. **Death of Partner or joint Owner dissolves Agency.** The death of one partner ordinarily operates to dissolve the partnership, and the partnership being dissolved, the authority of an agent appointed by the firm thereupon ceases, where the authority is not coupled with an interest.[2] The same effect would also ordinarily follow from the death of one of two joint owners, their joint interest being thereby severed.[3]

It has been held that the death of one of two partners does not relieve the firm of liability to an agent who has been engaged for a definite period,[4] but a contrary result has also been reached.[5]

§ 248. **Death of Principal dissolves Authority of Substitute.** The death of the principal not only dissolves the authority of the agent within the limits referred to, but also that of a substitute or subagent appointed by the agent, whether appointed with the consent and authority of the principal or not.[6]

b. By Death of the Agent.

§ 249. **General Rule — Death of Agent terminates Agency.** Upon the death of the agent invested with a mere power, the agency is terminated. There is then no one to exercise the derivative authority which must of course cease to flow. If the agent were one selected for his skill, judgment or discretion, this furnishes an additional reason why the authority should be held not to descend to the personal representatives of the agent, with whom the principal may be unacquainted and to whom he might be unwilling to confide the power.[7]

§ 250. **Not when coupled with an Interest.** Where, however,

[1] Garrett *v.* Trabue, 82 Ala. 227; Hatchett *v.* Molton, 76 Ala. 410.

[2] See *ante*, § 221; McNaughton *v.* Moore, 1 Hayw. (N. C.) 189. See Bank of New York *v.* Vanderhorst, 32 N. Y. 553.

[3] See *ante*, § 222; Rowe *v.* Rand, 111 Ind. 206.

[4] Fereira *v.* Sayres, 5 Watts & Serg. (Penn.) 210, 40 Am. Dec. 496.

[5] Tasker *v.* Shepherd, 6 H. & N. 575; Burnet *v.* Hope, 9 Ont. Rep. 10.

[6] Peries *v.* Aycinena, 3 W. & Serg. (Penn.) 79.

[7] Gage *v.* Allison, 1 Brev. (S. C.) 495, 2 Am. Dec. 682; Merrick's Estate 8 Watts & Serg. (Penn.) 402; Adriance *v.* Rutherford, 57 Mich. 170.

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the agent has acquired with the power an estate or interest in the thing which is the subject of the agency, his death will not operate to defeat it. Thus the power of sale conferred upon a mortgagee is not revoked by his death, but may be exercised by his representatives or assigns.[1]

§ 251. **When Death of one of two Agents terminates Agency.** As has been seen, a power confided to two or more private agents must ordinarily be exercised by all of them jointly; the death of one of them therefore, where the authority is joint, renders the further execution of the agency impossible, and it is therefore terminated.[2] Where however the agency is joint and several, the death of one agent does not terminate it.[3]

§ 252. **Effect on Substitute.** Where the agent has appointed a substitute or subagent without direct authority, and for his own convenience merely, the death of the agent annuls the authority of the subagent or substitute,[4] and this rule also applies even though the agent was expressly given the right of substitution.[5] Where, however, the subagent, though appointed by the agent, derives his authority directly from the principal, it will not be effected by the death of the agent.[6]

II.

BY INSANITY OF ONE OF THE PARTIES.

1. *By Insanity of the Principal.*

§ 253. **In general.** The act of every agent exercising a bare power of authority necessarily presupposes, as has been seen, the existence of a principal competent to perform the same act himself in his own behalf. It is his will that is being carried out through the medium of the agent. If for any reason, therefore,

[1] Collins v. Hopkins, 7 Iowa, 463; Harnickell v. Orndorff, 35 Md. 341; Merrin v. Lewis, 90 Ill. 505; Lewis v. Wells, 50 Ala. 198.

[2] Hartford Fire Ins. Co. v. Wilcox, 57 Ill. 180; Martine v. International L. Ins. Society, 53 N. Y. 339, 13 Am. Rep. 529; Rowe v. Rand, 111 Ind. 206, 12 N. East. Rep. 377.

[3] Wilson v. Stewart, 5 Penn. L. J. Rep. 450; Bank v. Vanderhorst, 32 N. Y. 553.

[4] Jackson Ins. Co. v. Partee, 9 Heisk. (Tenn.) 296.

[5] Lehigh Coal & Nav. Co. v. Mohr, 83 Penn. St. 228, 24 Am. Rep. 161; Watt v. Watt, 2 Barb. (N. Y.) Ch. 371; Peries v. Aycinena, 3 Watts & Ser. (Penn.) 79.

[6] Smith v. White, 5 Dana (Ky.) 376.

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the principal becomes incapable of acting and exercising an intelligent will in regard to the transaction, it is evident that an essential element in the relation is lacking, and while that element remains absent, the further exercise of the relation must be suspended.

§ 254. **General Rule.** It is the general rule, therefore, that the after-occurring insanity of the principal, or his incapacity to exercise any volition upon the subject by reason of an entire loss of mental power, operates as a revocation or suspension for the time being, of the authority of an agent acting under a bare power. If, on the recovery of the principal, he manifests no will to terminate the authority, it may be considered as a mere suspension, and his assent to acts done during the suspension may be inferred from his forbearing to express dissent when they come to his knowledge.[1]

§ 255. **But—Ignorance of Insanity.** But this general rule is subject to the exception ordinarily made in dealing with an insane person, that when third persons in good faith, relying upon an apparent authority and in ignorance of the principal's insanity have given a consideration of value, they will be protected.[2]

§ 256. **When coupled with an Interest.** And where the authority of the agent is coupled with such an estate or interest that he may exercise it in his own name, the after-occurring insanity of the principal will not affect it.[3] Thus a mortgagee's power of sale is not revoked by the after-occurring insanity of the mortgagor.[4]

§ 257. **What Evidence of Insanity sufficient.** It has been held that the insanity of the principal must be established as a fact by an inquisition before it would revoke the agency,[5] and

[1] Davis v. Lane, 10 N. H. 156, 160; Matthiesson, &c. Co. v. McMahon, 38 N. J. L. 536; Hill v. Day, 34 N. J. Eq. 150; Bunce v. Gallagher, 5 Blatch. (U. S. C. C.) 481; Drew v. Nunn, 4 Q. B. Div. 661, 29 Eng. Rep. (Moak.) 92.

[2] Matthiesson v. McMahon, 38 N. J. L. 536; Davis v. Lane, 10 N. H. 156; Drew v Nunn, 4 Q. B. Div. 661, 29 Eng. Rep. 92.

[3] Davis v. Lane, 10 N. H. 156; Matthiesson v. McMahon, 38 N. J. L. 536; Hill v. Day, 34 N. J. Eq. 150; Wallis v. Manhattan Co. 2 Hall (N. Y.) 495.

[4] Berry v. Skinner, 30 Md. 567.

[5] Wallis v. Manhattan Co. 2 Hall (N. Y.) 495.

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this view is approved by Chancellor Kent [1] in his Commentaries, but it is believed that the weight of authority, as well as sound reasoning, leads to the conclusion that the after-occurring insanity of the principal operates, *per se*, as a revocation or suspension of the agency, except in cases where a consideration has previously been advanced in the transaction which was the subject-matter of the agency so that the power became coupled with an interest, or where a consideration of value is given by a third person, trusting to an apparent authority in ignorance of the principal's incapacity.[2] The mere fact that a guardian has been appointed over the principal as an insane person is not sufficient without proof that the insanity was of such a character as disqualified him from making a valid contract.[3]

2. *By Insanity of the Agent.*

§ 258. **In general.** The proper exercise of the authority conferred implies in every case the exercise of more or less intelligence upon the part of the agent, and the subsequent loss of that intelligence by the agent renders the proper performance of his duty thereafter impossible. This is especially true where the agent was selected for his mental capacity or endowments, as in the case of an attorney, architect or author.

§ 259. **General Rule—Terminates Agency unless coupled with an Interest.** The after-occurring insanity of the agent to such a degree as to incapacitate him from further execution of the agency operates as a dissolution or suspension for the time being, of his authority in all cases except he has with it an estate or interest in the thing which is the subject-matter of the agency. Mere partial derangement or monomania would not necessarily have that effect, unless the mania related to the subject-matter of the agency or destroyed the agent's capacity for its proper execution.

§ 260. **How when Insanity unknown.** Executed dealings had by third persons with the agent in good faith and in ignorance of his insanity, could not be affected by it, where no advantage had been taken of it and the parties could not be restored to their original situation.[4]

[1] II Kent's Com. 645.

[2] Matthiesson *v.* McMahon, 38 N. J. L. 536; Davis *v.* Lane, 10 N. H. 156; Bunce *v.* Gallagher, 5 Blatch. (U. S. C. C.) 481.

[3] Motley *v.* Head, 43 Vt. 633.

[4] See ante, § 255.

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§ 261. **Insanity of one of two or more Agents.** For the same reason that the death of one of two or more joint agents operates to dissolve the agency, the insanity of one of two or more joint agents has the same effect.[1] If, however, the agency was joint and several, it may be executed by the others.

§ 262. **Effect on Subagents.** The termination of the agent's authority would also bring to an end the authority of the substitutes and subagents who derived their powers from him. But if the subagent was appointed with the authority of the principal, the insanity of the agent would not necessarily operate to dissolve the subagent's authority.

3. *By Bankruptcy of one of the Parties.*

a. Bankruptcy of Principal.

§ 263. **General Rule—Bankruptcy of Principal terminates Agent's Authority.** The legal bankruptcy of the principal or his assignment for the benefit of creditors of the subject-matter of the agency, operates to revoke the authority of the agent for the transaction of the principal's business. By this event the principal's control and management of his affairs is divested and confided to the assignee or trustee for the benefit of his creditors, who is thereupon entitled to collect and possess the bankrupt's credits and property, and the subject-matter of the agency passes under his control.[2]

§ 264. **Mere Insolvency not enough.** The mere insolvency, or inability of the principal to pay his debts when due, would not have this effect. It only results from the operation of the law when, either voluntarily or involuntarily, the principal surrenders and the law assumes the control of his affairs.

§ 265. **Agent's Authority not dissolved when coupled with an Interest.** Where however the authority of the agent is coupled with an interest, the bankruptcy of the principal will not dissolve it. Thus the power of sale conferred upon a mortgagee is not revoked by the mortgagor's bankruptcy.[3]

[1] Salisbury v. Brisbane, 61 N. Y. 617; Rowe v. Rand, 111 Ind. 206, 12 N. East. Rep. 377.

[2] Minett v. Forrester, 4 Taunt, 541; Drinkwater v. Goodwin, Cowper 251; Parker v. Smith, 16 East 382.

[3] Hall v. Bliss, 118 Mass. 554; Dixon v. Ewart, 3 Meriv. 322.

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§ 266. **How when Bankruptcy unknown.** Where after the act of bankruptcy but before adjudication, the agent deals by virtue of the power with third persons who are ignorant of the bankruptcy and who with good faith part with value upon the strength of the agent's authority, their rights will be protected.[1]

b. Bankruptcy of the Agent.

§ 267. **General Rule.** The bankruptcy of a business agent, as for example, an agent appointed to sell merchandise,[2] or to receive payment of money due his principal,[3] operates as a revocation of his authority, but not where his authority is merely to do some formal act, as the execution of a deed in the name of his principal, or the carrying out of some existing trust which is incumbent upon him.[4]

4. *By Marriage.*

§ 268. **In general.** The marriage of the principal will, in certain cases, operate to revoke a power previously given, where the power will defeat or impair rights acquired by the marriage.

Thus where a man gave a power of attorney to another to sell his homestead, but before a sale was effected the principal married, it was held that the marriage operated as a revocation of the power. By the marriage the wife acquired interests in the property of which she could only be divested with her consent, evidenced by her joining in the deed, or in the power of attorney by virtue of which the deed was executed.[5]

So at the common law, the subsequent marriage of a *feme sole* operated to revoke a power of attorney previously executed by her, and the same rule would still apply wherever the modern married woman's acts have not clothed her with full capacity to deal as *sole* with her own property.[6]

5. *By War.*

§ 269. **In general.** Every kind of trading, or commercial

[1] *Ex parte* Snowball, L. R. 7 Ch. App. 548.

[2] Audenried *v.* Betteley, 8 Allen (Mass.) 302; Scott *v.* Surman, Willes (K. B.) 400; Hudson *v.* Granger, 5 Barn. & Ald. 27.

[3] Hudson *v.* Granger, *supra.*

[4] Dixon *v.* Ewart, 3 Mer. 322; Hudson *v.* Granger, *supra.*

[5] Henderson *v.* Ford, 46 Tex. 627.

[6] Wambole *v* Foote, 2 Dak. 1.

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dealing, or intercourse, whether by transmission of money or goods, or of orders for the delivery of either, between two countries at war, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission are prohibited.[1]

It results, therefore, that war between the state or country of the principal and that of the agent, as a general rule, renders further prosecution of the agency unlawful and operates to dissolve the relation.

It is said by a learned judge:[2] "That war suspends all commercial intercourse between the citizens of two belligerent countries or states, except so far as may be allowed by the sovereign authority, has been so often asserted and explained in this court within the last fifteen years, that any further discussion of that proposition would be out of place. As a consequence of this fundamental proposition it must follow that no active business can be maintained either personally or by correspondence or through an agent, by the citizens of one belligerent with the citizens of the other. The only exception to the rule recognized in the books, if we lay out of view contracts for ransom and other matters of absolute necessity, is that of allowing the payment of debts to an agent of an alien enemy, where such agent resides in the same state with the debtor. But this indulgence is subject to restrictions. In the first place it must not be done with the view of transmitting the funds to the principal during the continuance of the war, though if so transmitted without the debtor's connivance, he will not be responsible for it.

"In the next place, in order to the subsistence of the agency during the war, it must have the assent of the parties thereto,—the principal and the agent. As war suspends all intercourse between them, preventing any instructions, supervision, or knowledge of what takes place on the one part, and any report or application for advice on the other, this relation necessarily ceases on the breaking out of hostilities even for the limited purpose before mentioned, unless continued by the mutual assent of the parties. It is not compulsory; nor can it be made so

[1] Kershaw v. Kelsey, 100 Mass. 561, 1 Am. Rep. 142; Woolsey International Law, §117; Montgomery v. United States, 15 Wall. (U. S.) 395, 400.

[2] BRADLEY, J. in Insurance Co. v. Davis, 94 U. S. 425.

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on either side, to subserve the ends of third parties. If the agent continues to act as such, and his so acting is subsequently ratified by the principal, or if the principal's assent is evinced by any other circumstances, then third parties may safely pay money for the use of the principal into the agent's hands; but not otherwise. It is not enough that there was an agency prior to the war. It would be contrary to reason that a man without his consent should continue to be bound by the acts of one whose relations to him have undergone such a fundamental alteration as that produced by a war between the two countries to which they respectively belong; with whom he can have no correspondence, to whom he can communicate no instructions, and over whom he can exercise no control. It would be equally unreasonable that the agent should be compelled to continue in the service of one whom the law of nations declares to be his public enemy. If the agent has property of the principal in his possession or control, good faith and fidelity to his trust will require him to keep it safely during the war and to restore it faithfully at its close. This is all. * * *

"What particuliar circumstances will be sufficient to show the consent of one person that another shall act as his agent to receive payment of debts in an enemy's country during war may sometimes be difficult to determine. Emerigon says that if a foreigner is forced to depart from one country in consequence of a declaration of war with his own, he may leave a power of attorney to a friend to collect his debts and even to sue for them.[1] But though a power of attorney, to collect debts, given under such circumstances, might be valid, it is generally conceded that a power of attorney cannot be given during the existence of war by a citizen of one of the belligerent countries resident therein, to a citizen or resident of the other; for that would be holding intercourse with the enemy which is forbidden. Perhaps it may be assumed that an agent *ante bellum*, who continues to act as such during the war in the receipt of money or property on behalf of his principal where it is the manifest interest of the latter that he should do so, as in the collection of rents and other debts, the assent of the principal will be presumed unless the contrary be shown; but that where it is against his interests, or would im-

[1] Traité des Assurances, Vol. 1, 567.

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pose upon him some new obligations or burdens, his assent will not be presumed, but must be proved, either by his subsequent ratification or in some other manner. In some way, however, it must appear that the alleged agent assumed to act as such and that the alleged principal consented to his so acting." [1]

6. *By Termination of Principal's Authority.*

§ 270. **Principal's Removal from Office removes Subordinates.** Where the principal's power of appointing agents is derived from his occupying an office or position of a fiduciary character, his ceasing to longer occupy the position operates to determine the authority of those also who were his subordinates in the performance of the trust.[2]

[1] Upon this question see also New York L. Ins. Co. v. Statham, 93 U. S. 24; Ward v. Smith, 7 Wall. (U. S.) 447; Brown v. Hiatts, 15 Wall (U. S.) 177; Fretz v. Stover, 22 Id. 198. The decisions in the state courts do not seem to be altogether harmonious. See, Shelby v. Offutt, 51 Miss. 128; Darling v. Lewis, 11 Heisk. (Tenn.) 125; Howell v. Gordon, 40 Ga. 302; Robinson v. Life Ass. Co. 42 N. Y. 54, 1 Am Rep. 490; Sands v. Life Ins. Co. 50 N. Y. 626, 10 Am. Rep. 535; Manhattan Life Ins. Co. v. Warrick, 20 Gratt. (Va.) 614, 8 Am. Rep. 218; Jones v. Harris, 10 Heisk. (Tenn.) 98; Blackwell v. Willard, 65 N. C. 555, 6 Am. Rep. 749.

[2] 2 Livermore on Agency, § 307.

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BOOK II.

OF THE AUTHORITY CONFERRED; ITS NATURE AND EFFECT.

CHAPTER I.

OF THE NATURE OF THE AUTHORITY.

§ 271. Purpose of Book II.
272. Nature and Extent of the Authority.

I. Of Express and Implied Authority.

273. Where Authority is express.
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II. Universal, General and Special Agencies.

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277. Different Aspects of Question.
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279. The Province of Instructions—Apparent Authority cannot be limited by secret Instructions.
280. The Doctrine of implied Powers.
§ 281. Powers conferred by Usage.
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283. General and special Authority.
284. Same Subject.
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289. Third Persons must act in good Faith.
290. Person dealing with Agent must exercise reasonable Prudence.
291. Same Subject — Must ascertain whether necessary Conditions exist.
292. Same Subject — Authority of Public Agents must be ascertained.

§ 271. **Purpose of Book II.** It has heretofore been seen how the relation of principal and agent may be created and how it may be terminated. The purpose of creating the agency is to confer authority upon the agent,—to clothe him to a greater

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or less extent, and for a shorter or longer period, with a portion of that power with which nature and the laws of society have invested the principal. For the time being, and in some capacity, the principal has another self, who, by his will and act is invested with the power to speak and do with like effect as if he himself should speak or do.

It will be very evident that to those persons who may have occasion to deal with the principal through this other self, the question of how fully, how certainly and for how long a time, he has invested the latter with his own personality, becomes exceedingly important. And not only this, but these matters being ascertained, it is no less important to determine whether any given act assumed to be done by virtue thereof, is, in reality, within the fullness, the certainty and the term of the investment.

It will be equally evident that these are questions not always easy of solution, not only because men are notoriously careless and indefinite in their words and acts, but because even if, in a given case, a power has been conferred in terms the most express and definite, the questions may still arise whether the express words embrace the act assumed to be done by virtue of them; whether the mode of doing has been that contemplated by the language used; whether subsequent changes in the circumstances of the parties, or the condition of the subject matter have warranted any departure from that mode; whether in consideration of the nature of the act to be done, or the time and place of doing it, custom or necessity have added to, or subtracted from, the powers originally conferred.

It is the purpose of Book II to ascertain the principles upon which the solution of these questions rests.

§ 272. **Nature and Extent of the Authority.** In determining these principles much must depend upon the general nature and extent of the authority conferred. In its nature, the authority may be either express or implied; in its extent, it may be universal, general or special.

I.

OF EXPRESS AND IMPLIED AUTHORITY.

§ 273. **Where Authority is express.** It has been seen in the preceding book how the creation of an authority may be either

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express or implied, and nothing more need now be said upon that particular subject. But in determining the scope of the authority the question whether it is express or implied becomes important.

If the power be an express one, the extent of the authority conferred, and the time, place and manner of its exercise may be expected to be clearly defined. And to the degree to which this is done, the limits fixed are necessarily conclusive upon all parties who have notice of them.[1] So, to the extent to which the power is express it is exclusive of every other main power, for while usage and necessity may often determine the mode in which the power is to be exercised, they cannot operate to change the essential character of the authority conferred.[2] Parties dealing with an agent known by them to be acting under an express power, whether the authority conferred be general or special, are bound to take notice of the nature and extent of the authority conferred. They must be regarded as dealing with that power before them, and are bound at their peril to notice the limitations thereto prescribed either by its own terms or by construction of law.[3] So where the act assumed to be done by the agent is one for which the authority is required by law to be conferred by a written instrument or by a writing under seal, the parties dealing with him must take notice of that fact and they will be bound by any limitations or restrictions contained therein, although they have not had actual knowledge of them.[4]

§ 274. **Where Authority is implied.** Although, as has been

[1] Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Brown v. Johnson, 12 Smedes & M. (Miss.) 398, 51 Am. Dec. 118; Hurley v. Watson, — Mich. —, 13 West. Rep. 543; Chaffe v. Stubbs, 37 La. Ann. 656; Rust v. Eaton, 24 Fed. Rep. 830; Stainback v. Read, 11 Gratt. (Va.) 281, 62 Am. Dec. 648; Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96; Wood Mow. & Reap. Machine Co. v. Crow, 70 Iowa, 340; Siebold v. Davis, 67 Iowa, 561; Bohart v. Oberne, 36 Kans. 284.

[2] Robinson v. Mollett, L. R. 7 H. of L. 802, 14 Eng. Rep. (Moak.) 177, reversing the same case in L. R. 7 C. P. 84, 1 Eng. Rep. 335.

[3] Stainback v. Read, 11 Gratt. (Va.) 281, 62 Am. Dec. 648; The Floyd Acceptances, 7 Wall. (U. S.) 666; Whiteside v. United States, 93 U. S. 247; Lewis v. Commissioners, 12 Kans. 186; Craycraft v. Selvage, 10 Bush. (Ky.) 696; Dozier v. Freeman, 47 Miss. 647; Baxter v. Lamont, 60 Ill. 237; Cruzan v. Smith, 41 Ind. 288; Blackwell v. Ketcham, 53 Ind. 184; Silliman v. Fredericksburg, &c., R. R. Co. 27 Gratt. (Va.) 120; Snow v. Warner, 10 Metc. (Mass.) 132, 43 Am. Dec. 417.

[4] Peabody v. Hoard, 46 Ill. 242; Weise's Appeal, 72 Penn. St. 351; National Iron Armor Co. v. Bruner, 19 N. J. Eq. 331; Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611.

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seen, authority may be implied from the words and conduct of the parties, or from the circumstances of the case, yet the extent of the authority so implied cannot exceed the necessary and legitimate effect of the facts from which it is inferred, but must be limited to the performance of like acts under like circumstances.[1]

And so, as has been elsewhere noticed, the authority, if implied at all, can only be implied from facts. It is not to be created by mere presumption, nor by any abstract considerations, however potent, that it would be expedient or proper or convenient that the authority should exist.[2] The authority if it exists at all must find its source in the intention of the principal, either expressed or implied. If that intention cannot be shown, the authority cannot exist.[3]

[1] See Graves v. Horton, — Minn. —, 35 N. W. Rep. 568, where MITCHELL, J., says: "It is true that agency may be proved from the habit and course of dealing between the parties; that is, if one has usually or frequently employed another to do certain acts for him, or has usually ratified such acts when done by him, such person becomes his implied agent to do *such acts;* as, for example, the case of the manager of a plantation in buying supplies for it, or the superintendent of a sawmill in making contracts for putting in logs for the use of the mill, which are the cases cited by respondent. It is also true, as was said in Wilcox v. Railroad Co., 24 Minn. 269 (which involved the question of the authority of the person to whom goods were delivered to receive them), a single act of an assumed agent, and a single recognition of it, may be of so unequivocal and of so positive and comprehensive a character as to place the authority of the agent to do *similar* acts for the principal beyond question. It is also true that the performance of subsequent as well as prior acts, authorized or ratified by the principal, may be evidence of agency, where the acts are of a similar kind, and related to a continuous series of acts embracing the time of the act in controversy, as indicating a general habit and course of dealing; as for example, the acts of the president of a railroad company in making drafts in the name of the company, which were honored by it, which was the case of Olcott v. Railroad Co., 27 N. Y. 546, cited by counsel. But we think the books will be searched in vain for a case where it was ever held that authority to negotiate for the sale of property to one person at one time on certain terms, the transfer to be made by the principal in person, was evidence of authority to sell and transfer the same property at some former time to another person on different terms." See also Rusby v. Scarlett, 5 Esp. 76; Baines v. Ewing, L. R. 1 Exch. 320; Day v. Boyd, 6 Heisk. (Tenn.) 458; Cooley v. Willard, 34 Ill. 68, 85 Am. Dec. 296; Johnson v. Wingate, 29 Me. 404; Surles v. Pipkin, 69 N. C. 513; Washington Bank v. Lewis, 22 Pick. (Mass.) 24. See also *post*, § 312.

[2] Bickford v. Menier, 107 N. Y. 490.

[3] Law v. Stokes, 3 Vroom (N. J.) 249, 90 Am. Dec. 655.

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II.

UNIVERSAL, GENERAL AND SPECIAL AGENCIES.

§ 275. **In general.** The classification of agencies, based upon the extent of the authority conferred, into universal, general and special, has already been referred to. Cases of true universal agency are very rare. They can only be created by clear and unequivocal language and will not be inferred from any general expressions, however broad.[1] No special attention therefore will be given to them in this connection, what may be said in reference to general agencies applying *a fortiori* to the universal.

§ 276. **Persons dealing with Agent must ascertain his Authority.** In approaching the consideration of the inquiry whether an assumed authority exists in a given case, there are certain fundamental principles which must not be lost sight of. Among these are, as has been seen, that the law indulges in no bare presumptions that an agency exists; it must be proved or presumed from facts; that the agent cannot establish his own authority, either by his representations or by assuming to exercise it; that an authority cannot be established by mere rumor or general reputation; that even a general authority is not an unlimited one, and that every authority must find its ultimate source in some act of the principal. Persons dealing with an assumed agent therefore, whether the assumed agency be a general or special one, are bound at their peril, to ascertain not only the fact of the agency but the extent of the authority, and in case either is controverted, the burden of proof is upon them to establish it.[2]

§ 277. **Different Aspects of Question.** The authority of an agent in a given case has three aspects; one, looking to the relations between the agent and his principal; another, to the rela-

[1] Gulick *v.* Grover, 33 N. J. L. 463, 97 Am. Dec. 728.

[2] Rice *v.* Peninsular Club, 52 Mich. 87; Chaffe *v.* Stubbs, 37 La. Ann. 656; Rust *v.* Eaton, 24 Fed. Rep. 830; Reitz *v.* Martin, 12 Ind. 306, 74 Am. Dec. 215; Hurley *v.* Watson, — Mich. —, 18 West. Rep. 543; Snow *v.* Warner, 10 Metc. (Mass.) 132, 43 Am. Dec. 417; Dickinson County *v.* Mississippi Valley Ins. Co., 41 Iowa, 286; Beringer *v.* Meanor, 85 Penn. St. 223; Weise's Appeal, 72 Penn. St. 351; Dozier *v.* Freeman, 47 Miss. 647; Davidson *v.* Porter, 57 Ill. 300.

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tions between the agent and third persons; and the third, to the relations between the principal and third persons; and no two of these aspects will always be identical. Thus the agent may bind himself to third persons by assuming to have an authority which he does not in fact possess, but he cannot bind his principal by any such assumption. He may, however, bind his principal to third persons, in certain cases, even though the act done exceeded or violated his instructions from his principal; but in so doing he may also make himself liable to his principal for damages sustained by the latter on account of such violation.

§ 278. **Authority an Attribute of Character bestowed by the Principal.** By the creation of the agency, the principal bestows upon the agent a certain character. For some purpose, during some time and to some extent, the agent is to be the *alter ego*,—the other self, of the principal. This purpose, time and extent are determined by the principal to suit the needs or objects which he has in view, and which the agent is expected to accomplish. These, however, are matters in which third persons have no part; they are considered and determined by the principal alone. What third persons are interested in, is, not the secret processes of the principal's mind, but the visible result of those processes, —the character in which the agent is held out by the principal to those who may have occasion or opportunity to deal with him. This character is a tangible, discernible thing, and, so far as third persons are concerned, must be held to be the authorized, as it is the only, expression and evidence from which the principal intends that they shall determine his purposes and objects. They must conclude, and have a right to conclude, that the principal intends the agent to have and exercise those powers, and those only, which necessarily, properly and legitimately belong to the character in which he holds him out.

The authority of an agent in any given case, therefore, is an attribute of the character bestowed upon him in that case by the principal. Thus if the principal has by his express act, or as the logical and legal result of his words or conduct, impressed upon the agent the character of one authorized to act or speak for him in a given capacity, authority so to speak and act, follows as a necessary attribute of the character, and the principal having conferred the character will not be heard to assert, as against third persons who have relied thereon in good faith, that he did

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not intend to impose so much authority, or that he had given the agent express instructions not to exercise it. The latter question is one to be settled between the agent and himself. It rested with the principal to determine in the first instance what character he would impart, but having made the determination and imparted the character, he must be held to have intended also the usual and legal attributes of that character.

§ 279. **The Province of Instructions—Apparent Authority cannot be limited by secret Instructions.** It is not to be inferred, however, that third persons have the right to attribute to the agent any powers they please, and by so doing bind the principal. It is lawful for the principal to confer as much or as little authority as he sees fit. He may impose all such lawful restrictions and limitations upon it as he thinks desirable, and these restrictions and limitations will be as binding and conclusive upon third persons who have notice of them as upon the agent, provided the principal has done nothing to waive or nullify them. But on the other hand, instructions or limitations which are not disclosed cannot be permitted to affect apparent powers.

The criterion in this case, as in others, is the character bestowed by the principal. He may not hold the agent out in the character of one having a general or a special power, and bind third persons who have relied thereon in good faith, by secret limitations and restrictions upon the agent's authority which are inconsistent with the character bestowed. Although the agent violates his instructions or exceeds the limits set to his authority, he will yet bind his principal to such third persons, if his acts are within the scope of the authority which the principal has caused or permitted him to appear to possess. But if the agent be not held out as one possessing other than the limited and restricted power, then the instructions and the authority may coincide.[1]

[1] Munn *v.* Commission Co. 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; Rossiter *v.* Rossiter, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; Walker *v.* Skipwith, Meigs (Tenn.) 502, 33 Am. Dec. 161; Commercial Bank *v.* Kortright, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317; Topham *v.* Roche, 2 Hill (S. C.) 307, 27 Am. Dec. 387; Lobdell *v.* Baker, 1 Metc. (Mass.) 193, 35 Am. Dec. 358; Towle *v.* Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Bryant *v.* Moore, 26 Me. 84, 45 Am. Dec. 96; Merchants Bank *v.* Central Bank, 1 Ga. 418, 44 Am. Dec. 665; Williams *v.* Getty, 31 Penn. St. 461, 72 Am. Dec. 757; Lister *v.* Allen, 31 Md. 543, 100 Am. Dec. 78; Carmichael *v.* Buck, 10 Rich. (S. C.) L. 332, 70 Am. Dec. 226; Butler *v.* Maples, 9 Wall.

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§ 280. **The Doctrine of implied Powers.** It is a fundamental principle in the law of agency that every delegation of power carries with it the authority to do all those things which are reasonably necessary and proper to carry into effect the main power conferred, and which are not forbidden.[1] The reasons and purposes of this rule will be more fully considered hereafter, but it requires to be mentioned in this place as one of the elements which go to make up the authority of the agent in a given case.

§ 281. **Powers conferred by Usage.** Where the principal confers upon his agent an authority of a kind, or empowers him to transact business of a nature, in reference to which there is a well defined and publicly known usage, it is the presumption of the law, in the absence of anything to indicate a contrary intent, that the authority was conferred in contemplation of the usage, and third persons, therefore, who deal with the agent in good faith and in the exercise of reasonable prudence, will be protected against limitations upon the usual authority, of which they had no notice.[2]

(U S.) 766; Union Mut. Ins. Co. *v.* Wilkinson, 13 Wall. (U. S.) 222; Paine *v.* Tillinghast, 52 Conn. 532; Abbott *v.* Rose, 62 Me. 194; Home Life Ins. Co. *v.* Pierce, 75 Ill. 426; Murphy *v.* Southern Life Ins. Co. 3 Baxter (Tenn.) 440; Cruzan *v.* Smith, 41 Ind. 288; Bell *v.* Offutt, 10 Bush (Ky.) 632; Cosgrove *v.* Ogden. 49 N. Y. 255; Morton *v.* Scull, 23 Ark. 289; Furnas *v.* Frankman, 6 Neb. 429; Willard *v.* Buckingham, 36 Conn. 395; Golding *v.* Merchant, 43 Ala. 705; Adams Express Co. *v.* Schlesinger, 75 Penn. St. 246; Palmer *v.* Cheney, 35 Iowa, 281; Williams *v.* Mitchell, 17 Mass. 98; Odiorne *v.* Maxcy, 13 Mass. 178; Hough *v.* Doyle, 4 Rawle (Penn.) 291; Shellhamer *v.* Thomas, 7 Serg. & R. (Penn.) 106; Wilcox *v.* Routh, 9 Smedes & M. (Miss.) 476; Howry *v.* Eppinger, 34 Mich. 29; Davenport *v.* Peoria, &c. Ins. Co. 17 Iowa, 276.

[1] See *post*, § 311.

[2] Adams *v.* Pittsburgh Ins. Co., 95 Penn. St. 348, 40 Am. Rep. 663; Pickering *v.* Busk, 15 East 38; Whitehead *v.* Tuckett, 15 East 400; Williams *v.* Getty, 31 Penn. St. 461, 72 Am. Dec. 757; York County Bank *v.* Stine, 24 Md. 447; Wright *v.* Solomon, 19 Cal. 64, 79 Am. Dec. 196; Chouteaux *v.* Leech, 18 Penn. St. 224, 57 Am. Dec. 602; McMasters *v.* Pennsylvania R. R. Co. 69 Penn. St. 374, 8 Am. Rep. 264; Minor *v.* Mechanics Bank, 1 Pet. (U. S.) 46; Mount Olivet Cemetery *v.* Shubert, 2 Head (Tenn.) 116; Schuchardt *v.* Allens, 1 Wall (U. S.) 359; Greely *v.* Bartlett, 1 Greenl. (Me.) 172, 10 Am. Dec. 54; Day *v.* Holmes, 103 Mass. 306; Daylight Burner Co. *v.* Odlin, 51 N. H. 56, 12 Am. Rep. 45; Smith *v.* Tracy, 36 N. Y. 79; Goodenow *v.* Tyler, 7 Mass. 36, 5 Am. Dec. 22; Frank *v.* Jenkins, 22 Ohio St. 597; Willard *v.* Buckingham, 36 Conn. 395; Randall *v.* Kehlor, 60 Me. 37; Upton *v.* Suffolk County Mills, 11 Cush. (Mass.) 586; 59 Am. Dec.

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In order to give the usage this effect it must be reasonable;[1] it must not violate positive law;[2] and it must have existed for such a time, and become so widely and generally known, as to warrant the presumption that the principal had it in his view at the time of the appointment of the agent.[3] But if the usage was a purely local and particular one, the principal may repel this presumption of knowledge by showing that in fact he had no notice of it.[4]

Usage, however, cannot operate to change the intrinsic character of the relation,[5] nor will it be permitted as between the principal and the agent, or as between the principal and third persons having notice of them, to contravene express instructions,[6] or to contradict an express contract [7] to the contrary. So a usage not known to the principal, cannot operate to authorize the making of an invalid instead of a valid contract, or to bind him to take one thing when he has ordered another.[8]

§ 282. **What constitutes Authority.** The authority of the agent, so far as it concerns the rights of third persons, may thus

163; Brady v. Todd, 9 C. B. (N. S.) 592; Pickert v. Marston, 68 Wis. 465, 60 Am. Rep. 876; American Cent. Ins. Co. v. McLanathan, 11 Kans. 533; Bailey v. Bensley, 87 Ill. 556; Phillips v. Moir, 69 Ill. 155.

[1] Knowles v. Dow, 22 N. H. 387, 55 Am. Dec. 163; Minnesota Cent. R. R. Co. v. Morgan, 52 Barb. (N. Y.) 217; Wadley v. Davis, 63 Barb. (N. Y.) 500.

[2] Raisin v. Clark, 41 Md. 158, 20 Am. Rep. 66; Farnsworth v. Hemmer, 1 Allen (Mass.) 494, 79 Am. Dec. 756.

[3] Adams v. Pittsburgh Ins. Co., 95 Penn. St. 248, 40 Am. Rep. 663; Citizens Bank v. Grafflin, 31 Md. 507, 1 Am. Rep. 66; Smith v. Wright, 1 Caines (N. Y.) 43, 2 Am. Dec. 162; Porter v. Hills, 114 Mass. 106; Fowler v. Pickering, 119 Mass. 33.

[4] Walls v. Bailey, 49 N. Y. 464, 10 Am. Rep. 407; Bradley v. Wheeler, 44 N. Y. 500; Higgins v. Moore, 34 N. Y. 417; Barnard v. Kellogg; 10 Wall. (U. S.) 383; Fisher v. Sargent, 10 Cush. (Mass.) 250; Caldwell v. Dawson, 4 Metc. (Ky.) 121.

[5] Robinson v. Mollett, L. R. 7 H. of L. 802, 14 Eng. Rep. (Moak.) 177.

[6] Barksdale v. Brown, 1 Nott. & M. (S. C.) 517, 9 Am. Dec. 720; Hall v. Storrs, 7 Wis. 253; Bliss v. Arnold, 8 Vt. 252, 30 Am. Dec. 467; Hutchings v. Ladd, 16 Mich. 493; Leland v. Douglass, 1 Wend. (N. Y.) 490; Clark v. Van Northwick, 1 Pick. (Mass) 343; Catlin v. Smith, 24 Vt. 85; Day v. Holmes, 103 Mass. 306; Parsons v. Martin, 11 Gray (Mass.) 112.

[7] Brown v. Foster, 113 Mass. 136, 18 Am. Rep. 463, Randall v. Smith, 63 Me. 105, 18 Am. Rep. 200; Rogers v. Woodruff, 23 Ohio St. 632, 13 Am. Rep. 276; Grinnell v. Western Union Tel. Co. 113 Mass. 299, 18 Am. Rep. 485.

[8] Perry v. Barnett, 15 Q. B. Div. 388.

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be a composite matter made up of a number of elements. It consists—

First, and primarily, of the powers directly and intentionally conferred by the voluntary act of the principal.[1]

Second, of those incidental powers which are reasonably necessary and proper to carry into effect the main powers conferred and which are not known to be prohibited.[2]

Third, of those powers which usage and custom have added to the main powers, and which the parties are to be deemed to have had in contemplation at the time of the creation of the agency, and which are not known to have been forbidden.[3]

Fourth, of all such other powers as the principal has, by his direct act or by negligent omission or acquiescence, caused or permitted persons dealing with the agent reasonably to believe that the principal had conferred.[4]

Fifth, of all those other powers whose exercise by the agent, the principal has subsequently, with full knowledge of the facts, ratified and confirmed.[5]

For the acts done in pursuance of those powers which were directly conferred or which were incidental to those powers and not prohibited, the principal is of course responsible, because they are the direct result of his voluntary and intentional act. He is likewise responsible, and for the same reasons, for those acts which he has intentionally led third persons to believe that he had authorized. He is responsible for the acts of the agent which he has, by negligent omission or acquiescence, led the persons dealing with the agent to believe he has authorized, because to deny them would be a fraud upon innocent persons.[6] He is

[1] This of course follows directly as the result of the maxim, *Qui facit per alium, facit per se.*

[2] See *ante*, § 280.

[3] See *ante*, § 281.

[4] "The scope of an agency is to be determined not alone from what the principal may have told the agent to do, but from what he knows, or in the exercise of ordinary care and prudence ought to know, the agent is doing in the transaction." Kingsley v. Fitts, 51 Vt. 414. See cases cited in § 84, *ante*.

[5] See *ante*, Chapter on Ratification.

[6] The general rule is so well stated by DEPUE, J., in Law v. Stokes, 3 Vroom (N. J.) 249, 90 Am. Dec. 655, as to warrant its full quotation: "A principal is bound by the acts of his agent within the authority he has actually given him, which includes not only the precise act which he expressly authorizes him to do, but also whatever usually belongs to the doing of it or is necessary to its performance. Beyond that he is liable for the acts of the agent within the

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responsible for those acts which he has subsequently ratified and confirmed upon the ground that such a ratification is equivalent to a precedent authority.

As between the agent and the principal the authority would consist of the same elements as in the case of third persons, with the exception that the forbidden powers and secret limitations which would not affect third persons who were ignorant of them, bind the agent who must necessarily have knowledge of them.

283. **General and Special Authority.** These principles apply to all cases. If by express appointment, or by long acquiescence, recognition or course of dealing, one man has held another out to the world in the character of one possessing the requisite authority to represent him in a general way in the transaction of all of his business of a certain kind, he must be held to have conferred upon him the attributes and powers inherent in the character so bestowed. Such an agent, the law denominates, for convenience sake, a general agent.

But if, on the other hand, in a single instance, either by express terms or by his conduct, he holds the other out to the world in the character of one having authority to do a single thing, perhaps in a specific way, he must be held to have conferred upon him those attributes and powers, and those only, which are inherent in that character. This agent, for the same convenience, is termed a special agent.

In either case, the question of the authority of the agent must depend, so far as it involves the rights of innocent third persons who have relied thereon, upon the *character* bestowed and not upon the *instructions* given. Or, in other words, the principal

appearance of authority which the principal himself knowingly permits the agent to assume, or which he holds the agent out to the public as possessing. For the acts of his agent, within his express authority, the principal is liable, because the act of the agent is the act of the principal. For the acts of the agent within the scope of the authority he holds the agent out as having, or knowingly permits him to assume, the principal is made responsible; because to permit him to dispute the authority of the agent in such cases would be to enable him to commit a fraud upon innocent persons. In whichever way the liability of the principal is established, it must flow from the act of the principal. And when established it cannot, on the one hand be qualified by the secret instructions of the principal, nor on the other hand be enlarged by the unauthorized representations of the agent."

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is bound to third persons who have relied thereon in good faith and in ignorance of any limitations or restrictions, by the *apparent* authority he has given to the agent, and not by the *actual* or *express* authority where that differs from the apparent, and this, too, whether the agency be a general or a special one.[1]

But it is not by any means to be inferred that the apparent and the actual authority can never coincide, or that the agent has, in all cases, an indefinite quantum of power beyond or regardless of his instructions. The actual and the apparent authority are naturally and primarily the same, and if, in any given case, it be held that the apparent exceeds the actual, it is because the principal

[1] It has been said by a learned judge: "The authority of a general agent may be more or less extensive; and he may be more or less limited in his action within the scope of it. The limitation of his authority may be public or private. If it be public, those who deal with him must regard it, or the principal will not be bound. If it be private the principal will be bound when agent is acting within the scope of his authority, although he should violate his secret instructions. A special agent is one employed for a particular purpose only. He also may have a general authority to accomplish that purpose, or be limited to do it in a particular manner. If the limitation respecting the manner of doing it be public or known to the person with whom he deals. the principal will not be bound if the instructions are exceeded or violated. If such limitation be private, the agent may accomplish the object in violation of his instructions, and yet bind his principal by his acts." SHEPLEY, J., in Bryant *v.* Moore, 26 Me. 84, 45 Am. Dec. 96. And by another: "Where the authority is limited in a *bona fide* manner, and the limitation is to be disclosed by the agent and is disclosed either with or without inquiry, any departure from such authority or instructions will not bind the principal; but where the authority or instructions given are in the nature of private instructions and so designed to be, they will not be binding upon the parties dealing with the agent. And if the instructions are of such a nature that they would not be communicated if an inquiry was made, (even though it be the duty of the person dealing with the agent to make the inquiry) it is not necessary that it should be made for it would not be communicated if made." EASTMAN, J., in Towle *v.* Leavitt, 23 N. H. 360, 55 Am. Dec. 195.

"While the rule is that an agent must act within the scope of his authority, yet when the agent's act affects innocent third parties the principal will be bound to the extent of the apparent authority conferred by him on his agent. A principal is bound equally by the authority which he actually gives, and by that which by his own act he appears to give." Webster *v.* Wray, 17 Neb. 579. See also Van Duzer *v.* Howe, 21 N. Y. 531; Redlich *v.* Doll, 54 N. Y. 234; Garrard *v.* Haddan, 67 Penn. St. 82, 5 Am. Rep. 412; Hatch. *v.* Taylor, 10 N. H. 538; Carmichael *v.* Buck, 10 Rich. (S. C.) 332, 70 Am. Dec. 226.

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has, by his own act or omission, caused it to be so. The law never indulges in the bare presumption that they are not identical. Indeed, this distinction between the actual and apparent authority is in this connection misleading. So far as third persons are concerned the apparent authority must be regarded as the real authority, where they have no knowledge or notice to the contrary.

§ 284. **Same Subject.** The distinction between a general and a special agency has been deemed to be one of great importance, and a large number of decisions have been made to turn upon it. It is believed, however, that the distinction, as it is ordinarily drawn, is highly artificial and unsatisfactory, if not positively misleading, and that it might well be dispensed with.

The importance of this distinction, has been said by Mr. Parsons,[1] whose language has been much quoted, to lie in the rule that "if a particular agent exceed his authority, the principal is not bound; but if a general agent exceed his authority, the principal is bound, provided the agent acted within the ordinary and usual scope of the business he was authorized to transact, and the party dealing with the agent did not know that he exceeded his authority." This rule, however, cannot be regarded as strictly accurate. So far as the rights of third persons, who have no knowledge of limitations on his authority are concerned,—and this is what the rule given contemplates,—the agent must be deemed to have authority to do those acts which are within the ordinary and usual scope of the business he was empowered to transact. Such an act therefore cannot be deemed to be in excess of his authority. The very fact that it is, under such circumstances, declared to be binding upon the principal necessarily presupposes that it was authorized. On the other hand, if the agent really exceeded his authority the principal could not be bound whether the agency be a general or a special one. The difficulty with this rule is that it fails to discriminate between *instructions* and *authority*.

But many statements of the rule go still further and it is frequently declared that if the special agent exceeds his instructions the principal is not bound; while if the general agent exceeds his instructions, the principal will be bound. This statement is still more misleading than the other, and no little confusion has

[1] Parsons on Contracts, Vol. I., p. 42.

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crept in to the books because of it. As has been seen instructions, even in case of a special agent, are not in every case the measure of power. They *may* exactly encompass the authority, but they do not *necessarily* do so. They may be intentionally or negligently waived or disregarded by the act of the principal. Even in the case of a special agent, it is the character bestowed, —the apparent authority conferred,—which is the test, and not the instructions given.

That Mr. Parsons himself was not misled by this distinction is evident from what he says further on: "We think the distinction between a general agency and a special agent useful, and sufficiently definite for practical purposes, although it may have been pressed too far, and relied upon too much in determining the responsibility of a principal for the acts of an agent. It may, indeed, be said that every agency is, under one aspect, special, and under another, general. No agent has authority to be in all respects and for all purposes an *alter ego* of his principal, binding him by whatever the agent may do in reference to any subject whatever; and, therefore the agency must be special so far as it is limited by place or time, or the extent or character of the work to be done. On the other hand every agency must be so far general that it must cover not merely the precise thing to be done, but whatever usually and rationally belongs to the doing of it Of late years, courts seem more disposed to regard this distinction and the rules founded upon it, as altogether subordinate to that principle which may be called the foundation of the law of agency, namely, that a principal is responsible, either when he has given to an agent sufficient authority, or, when he justifies a party dealing with his agent in believing that he has given to this agent this authority." [1]

§ 285. **Same Subject—The true Distinction.** But it is none the less true that the scope of the authority of a special agent is ordinarily much more restricted than that of a general agent. The fact that the authority is conferred in a special instance, to

[1] Contracts, Vol. I., pp. 43, 44. "There are in the books many loose expressions concerning the distinction between a general and a special agency. The distinction itself is highly unsatisfactory and will be found quite insufficient to solve a great variety of cases. It is unprofitable to dwell on that distinction." COMSTOCK, J., in Mechanics' Bank v. New York, &c., R. R. Co., 13 N. Y. 632.

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do a specific act naturally leads to, if it does not positively require, much more minuteness of direction and much greater restrictions and limitations. From the very nature of the case, particularity of instructions and singleness of method are to be expected, and of this persons dealing with the agent may well be required to take notice.

On the other hand, where the agent is authorized to transact all the principal's business of a certain kind, the very breadth of the employment and the variety of the duties to be performed necessarily involve more or less of discretion and choice of methods, and render impracticable, if not impossible, much of particularity or precision, either as to the exact means and method to be employed, or as to the scope or extent of the authority itself. Where so little is expressed, more may well be implied. The fact of such an authority, of itself, presupposes a general confidence bestowed upon the agent, and a general committal to his discretion and judgment of all beyond the essential objects to be attained and the outlines of the course to be pursued. It may not unreasonably be presumed, where nothing is indicated to the contrary, that such an agent possesses those powers which are commensurate with his undertaking, and which are usually and properly exercised by other similar agents under like circumstances. This presumption may well be and is constantly relied upon by persons dealing with such agents, and so reasonable, proper and necessary is this reliance, that it may justly be required that if the principal would impose unusual restrictions upon the authority of such an agent, he should make them known to persons who may have occasion to deal with the agent.

And herein, it is believed, lies the true distinction between these two classes of agents. One is in its nature limited and implies limitations of power. Of these limitations third persons must inform themselves, unless the principal has by his words or conduct held out the agent as one upon whose authority such limitations are not imposed. The other is, in its nature, general and unrestricted by other limitations that those which confine the authority within the bounds of what is usual, proper and necessary under like circumstances. If there are other limitations, the principal must disclose them.

Neither of these rules dispenses with that which devolves upon every person the duty of ascertaining not only the fact of the

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agency but also the nature and extent of the authority which the principal has apparently conferred. And neither of them permits that authority to be defeated by secret limitations.

§ 286. **General Agency not unlimited.** It is not, however, to be supposed that the general agent's authority is entirely unlimited. He is far from being a universal agent or a mere autocrat, and while his authority is not to be constricted by undisclosed limitations, it must, on the other hand, be confined to such transactions and concerns as are incident and appurtenant to the business of his principal and to that branch of the business which is entrusted to his care.[1] As has been stated, a principal can have but one universal agent, but he may have many general agents neither of whom can encroach upon the province of the others.

§ 287. **General Agent binds Principal only within the Scope of his Authority.** The general agent, therefore, binds his principal when, and only when, his act is justified by the authority conferred upon him. This authority being in its nature general and not specific; being often gathered from a variety of sources and composed of different elements, the question of its sufficiency becomes largely one of fact, and may be stated thus:—Viewing all the facts and circumstances; taking into consideration the object to be attained and the means to be adopted; giving due weight to such usages as were had in contemplation; considering whatever of extension or of modification has been wrought by subsequent conduct; is the act in controversy included within the limits, or, as it is ordinarily stated, within the scope, of this authority? If it is, the principal is bound; if it is not, the act of the agent binds himself alone or no one.[2]

[1] Odiorne v. Maxcy, 13 Mass. 178; Stewart v. Woodward, 50 Vt. 78, 28 Am. Rep. 488.

[2] Munn v. Commission Co., 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; Rossiter v. Rossiter, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; Jeffrey v. Bigelow, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; Goodloe v. Godley, 13 Smedes & M. (Miss.) 233, 51 Am. Dec. 159; Keener v. Harrod, 2 Md. 63, 56 Am. Dec. 706; McCoy v. McKowen, 26 Miss. 487, 59 Am. Dec. 264; Carmichael v. Buck, 10 Rich. (S. C.) L 332, 70 Am. Dec. 226; Savings Fund Society v. Savings Bank, 36 Penn. St. 498, 78 Am. Dec. 390; Coweta Falls Mnfg. Co. v. Rogers, 19 Ga. 416, 65 Am. Dec. 602; Asher v. Sutton, 31 Kans. 286; Robinson v. Chemical Nat. Bank, 86 N. Y. 404; Reed v. Ashburnham R. R. 120 Mass. 43; Abrahams v. Weiller, 87 Ill. 179; Lewis v. Shreveport, 108 U. S. 282; Booth v. Wiley, 102 Ill. 84; Nicholson v. Moog, 65 Ala. 471; American

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§ 288. **Special Agent's Authority must be strictly pursued.** The authority of the special agent being in its nature limited, its scope is much more easy of determination and must not be exceeded; or, as the rule is ordinarily stated, his authority must be strictly pursued, and if it is not, the principal will not be bound.[1]

It is none the less true, however, as has been seen, that the scope of the general agent's authority must not be exceeded. Each acting within the scope of the authority conferred, binds his principal; each acting beyond that scope binds only himself. But while these rules applying to the two classes are alike in kind, they differ, as has been shown, in degree. It is believed, however, that the difference is one of degree only, and not of principle.

§ 289. **Third Persons must act in good Faith.** It is evident that these rules are established for the protection of third persons who act in good faith. As has been stated, every person dealing with an agent is bound to ascertain the nature and extent of his authority.[2] He must not trust to the mere presumption of

Express Co. *v.* Milk, 73 Ill. 224; Kelton *v.* Leonard, 54 Vt. 230; Lewis *v.* Bourbon, 12 Kans. 186; Dodge *v.* McDonnell, 14 Wis. 553; Rhoda *v.* Annis, 75 Me. 17, 46 Am. Rep. 354; Ward's, &c. Co. *v.* Elkins, 34 Mich. 439; New York Life Ins. Co. *v.* McGowan, 18 Kans. 300; Morton *v.* Scull, 23 Ark. 289; Massachusetts Life Ins. Co. *v.* Eshelman, 30 Ohio St. 647; Planters' Ins. Co. *v.* Sorrells, 1 Baxter (Tenn.) 352; Noble *v.* Cunningham, 74 Ill. 51. This list might be very greatly extended but other illustrations will appear in subsequent portions of the work.

[1] Blane *v.* Proudfit, 3 Call (Va.) 207, 2 Am. Dec. 546; Thompson *v.* Stewart, 3 Conn. 171, 8 Am. Dec. 168; Beals *v.* Allen, 18 Johns. (N. Y.) 363, 9 Am. Dec. 221; Towle *v.* Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Baring *v.* Peirce, 5 Watts & Serg. (Penn.) 548, 40 Am. Dec. 534; Brown *v.* Johnson, 12 Smedes & M. (Miss.) 398, 51 Am. Dec. 118; Pursley *v.* Morrison, 7 Ind. 356, 63 Am. Dec. 424; Carmichael *v.* Buck, 10 Rich. (S. C.) L. 332, 70 Am. Dec. 226; Savings Fund Society *v.* Savings Bank, 36 Penn. St. 498, 78 Am. Dec. 390; Thomas *v.* Atkinson, 38 Ind. 256; Blackwell *v.* Ketcham, 53 Ind. 186; Baxter *v.* Lamont, 60 Ill. 237; Adams *v.* Bourne, 9 Gray (Mass.) 100; Silliman *v.* Fredericksburg, &c., R. R. Co. 27 Gratt. (Va.) 119; Wooding *v.* Bradley, 76 Va. 614; Strawn *v.* O'Hara, 86 Ill. 53; Campbell *v.* Sherman, 49 Mich. 534; Saginaw, &c., R. R. Co. *v.* Chappell, 56 Mich. 190.

[2] "Whoever deals with an agent is put on his guard by that very fact, and does so at his risk. It is his right and duty to inquire into and ascertain the nature and extent of the powers of the agent, and to determine whether the act or contract about to be consummated comes within the province of the agency and will or not bind the principal." Bermudez, C. J., in Chaffe *v.* Stubbs, 37 La. Ann.

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authority, nor to any mere assumption of authority by the agent. He must at all times be able to trace the authority home to its source. Keeping within the scope of that authority he is safe and cannot be affected by secret instructions of which he was ignorant.

But if he had knowledge of the instructions, or notice sufficient to put him upon an inquiry by which they might have been discovered, he will be held bound by them.[1]

§ 290. **Persons dealing with Agent must exercise reasonable Prudence.** The person dealing with the agent must also act with ordinary prudence and reasonable diligence. If the character assumed by the agent is of such a suspicious or unreasonable nature, or if the authority which he seeks to exercise is of such an unusual or improbable character, as would suffice to put an ordinarily prudent man upon his guard, the party dealing with him may not shut his eyes to the real state of the case, but should either refuse to deal with the agent at all, or should ascertain from the principal the true condition of affairs.[2]

This is particularly true where the agent is a stranger or one with whom the party has not dealt as agent. Care should be taken in such a case not to rely upon appearances which may be as consistent with other conditions as with the relation of principal and agent. Thus the mere fact that a stranger has in his possession and offers for sale the property of another as his agent, is as consistent with the fact that the pretended agent is a mere bailee or perhaps a thief, as that he actually has the authority which he assumes to possess.

§ 291. **Same Subject—Must ascertain whether necessary Conditions exist.** So where the nature of the authority is such

656. See also Buzard *v.* Jolly, — Tex. —, 6 S. W. Rep. 422.

[1] Rust *v.* Eaton, 24 Fed. Rep. 830.

[2] "The law is well settled," says CHAMPLIN, J., in Hurley *v.* Watson, — Mich. —, 13 West. Rep. 543, "that a person who deals with an agent is bound to inquire into his authority, and ignorance of the agent's authority is no excuse. * * * The principal may be careless in reposing confidence in his agent, yet this does not make him liable to a third party, who, in dealing with such agent fails to exercise the diligence usual with good business men under the circumstances. If there is anything likely to put a reasonable business man upon his guard as to the authority of the agent, it is the duty of the third party to inquire how far the agent's acts are in pursuance of the principal's limitation." See also Dozier *v.* Freeman, 47 Miss. 647.

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that it must have been conferred by written instrument, or must be a matter of public record, the party dealing with the agent must, at his peril, take notice of this fact, and ascertain whether the instrument or record is sufficient for the purpose.[1]

For similar reasons, if the authority is known to be open for exercise only in a certain event, or upon the happening of a certain contingency, or the performance of a certain condition, the occurrence of the event or the happening of the contingency or the performance of the condition, must be ascertained by him who would avail himself of the results ensuing from the exercise of the authority.[2]

§ 292. **Same Subject—Authority of Public Agents must be ascertained.** And this rule is particularly true in the case of public agents. Here the authority is a matter of public record or of public law of which every person interested is bound to take notice, and there is no hardship in confining the scope of such an agent's authority within the limits of the express grant and necessary implication.[3] The fact that the same act might have been within the scope of the authority if created by a private individual is not conclusive.[4]

Thus in a case involving the validity of a contract made by the city commissioner of Baltimore, the court said: "Although a private agent acting in violation of specific instructions yet within the scope of a general authority, may bind the principal, the rule

[1] See *ante*, § 273, *post* § 292.

[2] Craycraft *v.* Selvage, 10 Bush (Ky.) 696; Weise's Appeal, 72 Penn. St. 351; Kirkpatrick *v.* Winans, 1 C. E. Green (N. J. Ch.) 407.

[3] Mayor of Baltimore *v.* Eschbach, 18 Md. 282; Mayor of Baltimore *v.* Reynolds, 20 Md. 1, 83 Am. Dec. 535; State *v.* Bank, 45 Mo. 528; Lee *v.* Munroe, 7 Cranch (U. S.) 366; Curtis *v.* United States, 2 Nott. & Hunt (U. S. Ct. Cl.) 144; Pierce *v.* United States, 1 *Id.* 270; State *v.* Hastings, 10 Wis. 518; Hull *v.* Marshall County, 12 Iowa, 270; Silliman *v.* Fredericksburg, &c. R. R. Co. 27 Gratt. (Va.) 119; The Floyd Acceptances, 7 Wall (U. S.) 680; Clark *v.* DesMoines, 19 Iowa, 199, 87 Am. Dec. 423; State *v.* Hays, 52 Mo. 578; Delafield *v.* State, 26 Wend. (N. Y.) 192; People *v.* Bank, 24 Wend. (N. Y.) 431; Whiteside *v.* United States, 93 U. S. 247.

[4] Mayor *v.* Eschbach, *supra*; Mayor *v.* Reynolds, *supra*.

"By the law of agency at the common law, there is this difference between individuals and the government; the former are liable to the extent of the power they have apparently given to their agents, while the government is liable only to the extent of power it has actually given to its officers." LORING, J. in Pierce *v.* United States, *supra*.

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as to the effect of a like act of a public agent is otherwise. The city commissioner was the public agent of a municipal corporation, clothed with duties and powers specially defined and limited by ordinance bearing the character and force of public laws, ignorance of which can be presumed in favor of no one dealing with him on matters thus conditionally within his official discretion. For this reason the law makes a distinction between the effect of the acts of an officer of a corporation and those of an agent of a principal in common cases. In the latter the extent of the authority is known only to the principal and agent, while in the former, it is a matter of record in the books of the corporation or of public law." [1]

[1] Mayor of Baltimore *v.* Eschbach, *supra*.

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CHAPTER II.

OF THE CONSTRUCTION OF THE AUTHORITY.

§ 293. Purpose of this Chapter.

I. When Authority is conferred by Writing.

294. Construction of Writing for Court.
295. Intention to govern.
296. How Intention discovered — Language Used.
297. Entire Writing — Other Writings.
298. Surroundings of the Parties.
299. Parol Evidence — Latent and patent Ambiguities.
300. Same Subject — Identifying Subject-matter.
301. Same Subject — Parol Evidence cannot enlarge Authority.
302. Same Subject — Parol Evidence cannot contradict Writing.
303. Effect must be given to every Word and Clause.
304. Transaction to be upheld rather than defeated.
305. Authority to be interpreted in Light of *Lex Loci*.
306. General Powers limited by specific Object or Recital.
307. Construed to apply only to Principal's private Business.
308. Only those Powers expressly given or necessarily implied.

II. Where Authority is unwritten or implied.

309. Where Authority is unwritten but express.
310. Where Authority is unwritten but implied.
311. Authority carries with it every Power necessary to accomplish Object.
312. Implied Authority not to be extended beyond its legitimate Scope.
313. Implied Power limited to Principal's Business.

III. Where Authority is ambiguous.

314. Duty of Principal to make his Instructions clear.
315. Where ambiguous, Construction adopted in good Faith sufficient.

§ 293. **Purpose of this Chapter.** An authority having been conferred and an attempt made to exercise it, it becomes important to determine whether the act assumed to be done by virtue of the given power is, in reality, embraced within it. This leads to the necessity of construction or interpretation of the authority.

In the main, the principles governing the construction of a power do not differ from those which prevail in regard to the interpretation of contracts generally. It is proposed in this

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chapter, to refer briefly to some of these and also to consider in full some of the more important rules that apply to it. And in pursuance of this purpose the subject will for convenience sake, be divided thus: 1. When authority is conferred by written instrument. 2. When authority is unwritten or arises from implication, and 3. When authority is ambiguous.

I.

WHEN AUTHORITY IS CONFERRED BY WRITING.

§ 294. **Construction of Writing for Court.** The construction or interpretation of writings is for the court. Hence where the authority is created by a written instrument, the writing must, in general, be produced, and the nature and extent of the authority thereby conferred must be determined by the court.[1]

§ 295. **Intention to govern.** As has been seen, agency is, in general, the creature of intention. Courts sit, not to make contracts between parties, but to construe and enforce the contracts which the parties have themselves made. Hence the first and most important rule, in the construction of writings creating an authority, is to ascertain what authority the parties intended to create.[2]

§ 296. **How Intention discovered—Language used.** The intention of the parties is primarily to be determined from the language used by them. And as a mistake of law does not constitute a valid objection, parties cannot be heard to complain that they did not contemplate the legal effect of the language which they have deliberately chosen.[3]

§ 297. **Entire Writing—Other Writings.** In this, as in other cases, the intention is to be gathered from the whole instrument, whether it be made up of one piece of paper or of many.[4]

§ 298. **Surroundings of the Parties.** And so, in doubtful cases, resort must be had to the situation, surroundings, and rela-

[1] Savings Fund Society v. Savings Bank, 36 Penn. St. 498, 78 Am. Dec. 390.

[2] Marr v. Given, 23 Me. 55, 39 Am. Dec. 600; Vanada v. Hopkins, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92. See Bishop on Contracts, § 380.

[3] Bishop on Contracts, § 381; Hunt v. Rousmaniere, 1 Pet. (U. S.) 1; Holmes v. Hall, 8 Mich. 66.

[4] Bishop on Contracts, § 382.

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tions of the parties; for though the writing cannot, in general, be contradicted by oral evidence, yet the circumstances may properly be used as aids and, by putting the court more or less fully into the exact situation of the parties, to enable it to see the subject-matter as they saw it.[1]

§ 299. **Parol Evidence—Latent and patent Ambiguities.** In the same manner an ambiguity or uncertainty not arising upon the face of the instrument, may be explained by parol.[2] Where, however, the ambiguity is in the writing itself, resort cannot thus be had to the aid of parol explanation.[3]

§ 300. **Same Subject—Identifying Subject-matter.** If the subject-matter be not described with sufficient certainty, parol evidence may be allowed to complete the description and identify the thing intended.[4]

§ 301. **Same Subject—Parol Evidence cannot enlarge Authority.** In general, parol evidence is not admissible for the purpose of enlarging or extending the powers conferred by the written instrument, and the nature and extent of the authority must be ascertained from the instrument itself.[5] But, except where writing is indispensable, the principal may, notwithstanding this general rule, expressly extend or change the agent's powers by parol; or he may hold the agent out as possessing greater powers than those conferred by the writing; or he may so conduct himself as to be estopped from asserting that they were not greater.[6]

§ 302. **Same Subject—Parol Evidence cannot contradict Writing.** It is also a familiar rule that, in the absence of fraud or mistake, parol evidence cannot be admitted for the purpose of varying or contradicting the written instrument.[7] This rule however, in its application to the law of agency, is substantially the same as the preceding, and is subject to the same exceptions

§ 303. **Effect must be given to every Word and Clause.** Wher-

[1] Bishop on Contracts, §§ 372, 378.
[2] Bishop on Contracts, § 374.
[3] *Idem*, § 375.
[4] Pope v. Machias, &c., Co., 52 Me. 535; Norris v. Spofford, 127 Mass. 85; Bishop on Contracts, § 376.
[5] Ashley v. Bird, 1 Mo. 640, 14 Am. Dec. 313; State v. Bank, 45 Mo. 528; Mechanics' Bank v. Schaumburg, 38 Mo. 228.
[6] Hartford Ins. Co. v. Wilcox, 57 Ill. 182; Williams v. Cochran, 7 Rich. (S. C.) 45; Coleman v. National Bank, 53 N. Y. 388.
[7] Bishop on Contracts, § 169.

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ever it is possible, effect is to be given to every word and clause used by the parties. It is to be presumed that the parties used the word or clause with some purpose, and that purpose is, if possible, to be ascertained and enforced.[1]

§ 304. **Transaction to be upheld rather than defeated.** So the intention of the parties is to be sustained rather than defeated.[2] If the writing be open to two constructions, one of which would uphold while the other would overthrow the contract, the former is, where possible, to be chosen. So if by one construction the contract would be illegal, and by another equally permissible construction it would be lawful, the latter is always to be chosen, as it will not be presumed that the parties intended to violate the law.[3]

§ 305. **Authority to be interpreted in Light of Lex Loci.** Every authority given to an agent to transact business for his principal, must, in the absence of anything to show a contrary intent, be construed to empower him to transact it according to the laws of the place where it is to be done, of which laws the principal is presumed to have knowledge.[4]

§ 306. **General Powers limited by specific Object or Recital.** The meaning of general words used in the instrument must be construed with reference to the specific object to be accomplished and limited by the recitals made in reference to such object.[5] Thus in a case already referred to, the recital by the principal in the preamble of the power of attorney, that he designed appointing an agent to act for him during his absence from England, was held to limit the general words used in the appointing part of the instrument to the period of his absence.[6] So where an agent was appointed to accomplish the adjustment of his principal's affairs in the State of New York, and the instrument concluded with a general authority "to do any and every act

[1] Bishop on Contracts, § 384.

[2] Holladay v. Daily, 19 Wall. (U. S.) 606, 1 Myer's Fed. Dec. § 455.

[3] Bishop on Contracts, §§ 391, 392.

[4] Owings v. Hull, 9 Peters (U. S.) 600.

[5] Rountree v. Denson, 59 Wis. 522; Perry v. Holl, 2 DeGex, F. & J. 48; Esdaile v. La Nauze, 1 Y. & C. 394; Attwood v. Munnings, 7 B. & C. 278; Geiger v. Bolles, 1 Thomp. & C. (N. Y.) 129; Berry v. Harnage, 39 Tex. 638; Coquillard v. French, 19 Ind. 274; Hodge v. Combs, 1 Black, (U. S.) 192.

[6] Danby v. Coutts, L. R. 29 Ch. Div. 500.

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in his name which he could do in person," it was held that this broad general power must be limited to the doing of those acts only which were contemplated by the specific object of the appointment.[1] And a power of attorney granting authority to the agent to ask, demand and receive of a debtor all money due from him to the principal, will be limited to this specific object, although it also confers in general terms power "to transact all business;" the words "all business" must be confined to business necessary for the receipt of the money.[2]

§ 307. **Construed to apply only to Principal's private Business.** A power of attorney given to an agent to act in the name and on behalf of his principal, though couched in general language, must, in the absence of anything showing a contrary intent, be construed as giving authority to act only in the separate, individual business of the principal and for his benefit. It cannot be construed as permitting the agent to engage in transactions foreign or repugnant to that business, or to bind the principal by acts done not for his benefit and in his behalf, but for the private benefit of the agent himself or of third persons.[3]

§ 308. **Only those Powers expressly given or necessarily implied.** So a formal instrument conferring authority will be strictly construed and can be held to include only those powers which are expressly given and those which are necessary, essential and proper to carry out those expressly given.[4] It will be presumed that the principal in conferring a power, intended to confer with it the right to do those things without which the object

[1] Rossiter v. Rossiter, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62.

[2] Hay v. Goldsmidt, cited in Hogg v. Snaith, 1 Taunt. 349.

[3] Stainback v. Read, 11 Gratt. (Va.) 281, 62 Am. Dec. 618; Attwood v. Munnings, 7 Barn. & Cress. 278; North River Bank v. Aymar, 3 Hill (N. Y.) 262; Wood v. McCain, 7 Ala. 800, 42 Am. Dec. 612; Camden Safe Dep. Co. v. Abbott, 44 N. J. L. 257; Wallace v. Branch Bank, 1 Ala. 565; Adams Express Co. v. Trego, 35 Md. 47; Gulick v. Grover, 33 N. J. L. 463, 97 Am. Dec. 728; Sewanee Mining Co. v. McCall, 3 Head (Tenn.) 619; Hazeltine v. Miller, 44 Me. 177; Robertson v. Levy, 19 La. Ann. 327; Bank of Hamburg v. Johnson, 8 Rich. (S. C.) L. 42.

[4] Vanada v. Hopkins, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92; Wood v. Goodridge, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611; Craighead v. Peterson, 72 N. Y. 279, 28 Am. Rep. 150; Franklin v. Ezell, 1 Sneed, (Tenn.) 497; Strong v. Stewart, 9 Heisk. (Tenn.) 137; Farrar v. Duncan, 29 La. Ann. 126; McAlpin v. Cassidy, 17 Tex. 449; Mechanics' Bank v. Schaumburg, 88 Mo. 228.

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contemplated could not be accomplished, but beyond this the authority will not be extended by construction. The principle is analogous to the one which applies to the powers of corporations, *i. e.* those powers only which are expressly given or which arise from necessary implication. The rule has been thus stated by a learned judge:—"A formal instrument delegating powers is ordinarily subjected to strict interpretation, and the authority is not extended beyond that which is given in terms, or which is necessary to carry into effect that which is expressly given. They are not subject to that liberal interpretation which is given to less formal instruments, as letters of instruction, etc. in commercial transactions which are interpreted most strongly against the writer, especially when they are susceptible of two interpretations, and the agent has acted in good faith upon one of such interpretations." [1]

II.

WHERE AUTHORITY IS UNWRITTEN OR IMPLIED.

§ 309. **Where Authority is unwritten but express.** Where the authority, though not conferred by written instrument, is express and limited, it is subject to the same general rules of construction that apply to a written power. But when not so expressly limited, a more liberal rule of construction applies than in those cases where the authority is conferred by a formal instrument in writing.

§ 310. **Where Authority is unwritten but implied.** As has been seen, a large proportion of the agencies of the modern business world are not expressly conferred, but whether an agency exists or not, and, if so, of what nature and extent, are questions to be determined from the conduct and relations of the parties. Some of the rules which govern in determining whether an agency has been created or not, have heretofore been referred to. But it having been found that an agency has been so created, it then becomes as necessary to rightly interpret the authority so conferred, as in those cases where it is evidenced by a written instrument. And in general the same rules apply. But it is obvious from the very nature of the case that greater liberality of con-

[1] Craighead *v.* Peterson, *supra*.

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struction must be indulged in. If the principal desires to set exact and definite limits to the authority he may do so by conferring it only by express and definite action; but where he leaves it to be inferred from his conduct, he cannot complain if the rules of interpretation applied are more flexible and expansive than would otherwise have governed.

If from his neglect to make the limits certain, it is difficult to determine exactly along what lines they lie, it is but just to innocent persons who may be misled thereby to give them the benefit of the doubt and construe the authority most strictly against him.

§ 311. **Authority carries with it every Power necessary to accomplish Object.** Every delegation of authority, whether it be general or special, express or implied, unless its extent be otherwise expressly limited by some instrument conferring it, carries with it, as an incident, the power to do all those things which are necessary, proper, usual and reasonable to be done in order to effectuate the purpose for which it was created. It embraces all the appropriate means to accomplish the desired end. This principle is founded on the manifest intention of the party creating such authority and is in furtherance of such intention.[1]

§ 312. **Implied Authority not to be extended beyond its legitimate Scope.** But while, as has been seen, authority is often to be implied from the conduct of the parties, yet it is a necessary and logical limitation upon the construction of such an authority, that the power implied shall not be greater than that fairly and legitimately warranted by the facts. The reason of this rule is so apparent and so just that it needs no argument to support it.

If the agency arises by implication from acts done by the agent with the tacit consent or acquiescence of the principal, it is to be limited in its scope to acts of a like nature; if it arises

[1] Benjamin *v.* Benjamin, 15 Conn. 347, 39 Am. Dec. 384; Huntley *v.* Mathias, 90 N. C. 101, 47 Am. Rep. 516; LeRoy *v.* Beard, 8 How. (U. S.) 451; 1 Myers' Fed. Dec. § 477; Joyce *v.* Duplessis, 15 La. Ann. 242, 77 Am. Dec. 185; McAplin *v.* Cassidy, 17 Tex. 449; Star Line *v.* Van Vliet, 43 Mich. 364; Farrar *v.* Duncan, 29 La. Ann. 126; Craighead *v.* Peterson, 72 N. Y. 279, 28 Am. Rep. 150; Hardee *v.* Hall, 12 Bush. (Ky.) 327; Boyd *v.* Satterwhite, 10 S. C. 45; Shackman *v.* Little, 87 Ind. 187; Benninghoff *v.* Agricultural Ins. Co., 93 N. Y. 495.

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from the general habits of dealing between the parties it must be confined in its operation to dealings of the same kind; if it arises from the previous employment of the agent in a particular business, it is, in like manner, to be limited to that particular business. In other words, an implied agency is not to be extended by construction beyond the obvious purpose for which it is apparently created.[1]

§ 313. **Implied Power limited to Principal's Business.** So, too, where authority is implied, as well as where it is express, it is to be construed as conferring authority to act only in the separate, individual business of the principal and for his benefit, as stated in a previous section.[2]

III.

WHERE AUTHORITY IS AMBIGUOUS.

§ 314. **Duty of Principal to make his Instructions clear.** It is the duty of the principal, if he desires an authority to be executed in a particular manner, to make his terms so clear and unambiguous that they cannot reasonably be misconstrued. If he does so, it is the agent's duty to the principal to execute them strictly and faithfully; and third persons who know of them or who from the circumstances of the case ought to have known of them, can claim no rights against the principal based upon their violation.[3]

§ 315. **When ambiguous, Construction adopted in good Faith, sufficient.** But if, on the other hand, the authority be couched in such uncertain terms as to be reasonably susceptible of two different meanings, and the agent in good faith and without negligence adopts one of them, the principal cannot be heard to assert, either as against the agent or against third persons who have, in like good faith and without negligence, relied upon the same construction, that he intended the authority to be executed in accordance with the other interpretation.[4] If in such a case, the agent exercises his best judgment and an honest discretion,

[1] McAlpin v. Cassidy, 17 Tex. 449; Graves v. Horton, — Minn. —, 35 N. W. Rep. 568; see *ante*, §§ 85, 274.

[2] *Ante*, § 307.

[3] See *ante*, §§ 289, 290.

[4] Ireland v. Livingstone, L. R. 5 H. L. 395.

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he fulfills his duty, and though a loss ensues, it cannot be cast upon the agent.[1]

An instrument conferring authority is generally to be construed by those having occasion to act in reference to it, "as a plain man, acquainted with the object in view, and attending reasonably to the language used, has in fact construed it. He is not bound to take the opinion of a lawyer concerning the meaning of a word not technical and apparently employed in a popular sense."[2]

[2] Bessent v. Harris, 63 N. C. 542; National Bank v. Merchants' Bank, 91 U. S. 92, 104; Shelton v. Merchants Despatch Transp. Co., 59 N. Y. 258; LeRoy v. Beard, 8 How. (U. S.) 451, 1 Myer's Fed. Dec., § 478; Very v. Levy, 13 How. (U. S.) 345, 1 Myer's Fed. Dec., § 458; Loraine v. Cartwright, 3 Wash. (U. S. C. C.) 151; DeTastett v. Crousillat, 2 Wash. (U. S. C. C.) 132; Mechanics' Bank v. Merchants' Bank, 6 Metc. (Mass.) 13; Foster v. Rockwell, 104 Mass. 167; Long v. Pool, 68 N. C. 479; Marsh v. Whitmore, 21 Wall. (U. S.) 178.

[1] CURTIS, J., in Very v. Levy, *supra*, citing Withington v. Herring, 5 Bing. 456.

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CHAPTER III.

OF THE CONSTRUCTION OF AUTHORITIES OF CERTAIN KINDS

§ 316. Purpose of this Chapter.
317. In general.

I. Of Agent authorized to sell Land.

318. What Authority is sufficient.
319. When Authority to be exercised.
320. What Execution authorized.
321. Authority to sell implies Right to convey.
322. To insert usual Covenants of Warranty.
323. But not to mortgage.
324. Authority to receive Payment.
325. Authority to give Credit.
326. Authority to sell does not authorize Exchange or Gift.
327. Does not authorize Waste, or Sale of Timber separate from the Land.
328. Does not authorize changing Boundaries of Land.
329. Does not authorize Partition.
330. Does not authorize Dedication to Public Use.
331. Nor Conveyance in Payment of Agent's Debts.
332. No implied Power to revoke Contract.
333. No implied Power to discharge Mortgage.
334. No implied Power to invest Proceeds.

II. Of Agent authorized to sell Personal Property.

335. When Authority exists.
336. Authority to receive Payment —In general.
337. Authority to receive Payment not implied from Possession of Bill.
338. Agent having Possession or other Indicia of Ownership may receive Payment.
339. Agent to sell merely or to solicit Orders without Possession of Goods not authorized to receive Payment.
340. When travelling Salesman may receive Payment.
341. Same Subject — When Payment to Agent Part of Terms of Sale.
342. Same Subject — Notice of Want of Authority.
343. Same Subject — No implied authority to sell his Samples.
344. Same Subject—Purchaser cannot set off Debt due from Agent.
345. Same Subject—Implied Authority to hire Horses.
346. Same Subject — Authority to procure other Supplies.
347. Implied Authority to warrant Quality.
348. Same Subject — The general Rule.
349. Illustrations of the Rule.
350. Limits of this Rule.
351. Authority to warrant Title.
352. No implied Power to exchange or barter.
353. No implied Power to give Credit.
354. No Authority to Appropriate to his own Use.

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§ 355. No implied Authority to release Principal's Rights or to pay Principal's Debts.
356. No Authority to pledge Goods.
357. No Authority to promise Commissions for Subsales.
358. No Authority to sell at Auction.
359. Authority—When to be exercised.
360. No Authority to rescind the Sale.
361. No Authority to mortgage.
362. Authority to fix Price and Terms of Sale.

III. Of Agent authorized to Purchase.

363. May not buy on Credit when furnished with Funds.
364. May buy on Credit when not supplied with Funds.
365. Has Power to agree upon Price and Terms of Purchase.
366. May not exceed Limits as to Quantity.
367. Must observe Limits as to Quality or Species.
368. May be restricted as to Persons with whom to deal.
369. May make Representations as to Principal's Credit.
370. May not execute negotiable Paper.

IV. Of Agent authorized to receive Payment.

371. What constitutes such Authority.
372. When implied from negotiating the Contract.
373. When implied from Possession of the Securities.
374. When implied from having sold the Goods.
375. Can receive nothing but Money.
376. No Authority to release or compromise the Debt.
377. May receive Part Payment.
§ 378. But may not extend Time.
379. Authority to collect Interest does not authorize Collection of Principal.
380. Not authorized to receive before due.
381. No Authority to take Checks.
382. If authorized to take Check or Note, has no Authority to indorse or collect it.
383. Authority to collect does not authorize Sale.
384. No Authority to deal with Funds collected.
385. May give Receipt or Discharge.
386. Implies Authority to sue—when.
387. May sue in his own Name—when.
388. May employ Counsel.

V. Of Agent authorized to Make and Indorse Negotiable Paper.

389. What constitutes such Authority.
390. Same Subject — Authority strictly construed.
391. When Authority implied.
392. Must be confined to Principal's Business.
393. Execution to be confined to Limits specified.
394. Negotiable Paper or Deeds delivered to Agent in Blank.

VI. Of Agent authorized to Manage Business.

395. Extent of Authority depends on Nature of Business.
396. When Power implied to pledge Principal's Credit.
397. Implied Power to sell Product of Business.
398. None to bind by Negotiable Instrument.
399. When may borrow Money.
400. May not make Accommodation Paper.

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§ 401. May not pledge or mortgage the Property of the Principal.
402. May not sell Principal's Land.
403. May not embark in new and different Business.
404. May not sell the Business.

VII. OF AGENT AUTHORIZED TO SETTLE.

§ 405. May not submit to Arbitration.
406. May not assign Demand.

§ 316. **Purpose of this Chapter.** Having in the preceding chapters considered the question of what constitutes authority, as well as some of the rules which govern its construction and interpretation, it is now proposed to see how these principles are applied.

§ 317. **In general.** In considering the questions discussed in this chapter, the rules already referred to must be kept in mind. Prominent among these, as has been seen, are, that express and formal grants of power are strictly construed;[1] that every grant of power is to be interpreted, in the absence of anything to show a contrary intent, as conferring authority to act only in the private, individual business of the principal, and for his benefit;[2] that grants of power, though couched in general language, are to be limited to the particular object contemplated by the power;[3] that every power carries with it, as an incident, where no limitations appear, the implied authority to do those things which are necessary and proper to be done in order to accomplish the object sought and which are usually done in the execution of a like authority;[4] and that a well-defined and publicly known usage may confer incidental powers unless the parties have excluded it.[5]

I.

OF AGENT AUTHORIZED TO SELL LAND.

§ 318. **What Authority is sufficient.** A power of attorney "to act in all my business, in all concerns, as if I were present, and to stand good in law, in all my land and other business," gives no power to sell land;[6] nor does a power "to ask, demand, recover or receive the maker's lawful share of a decedent's estate,

[1] See *ante*, § 308.
[2] See *ante*, § 307.
[3] See *ante*, § 306.
[4] See *ante*, § 311.
[5] See *ante*, § 281.
[6] Ashley v. Bird, 1 Mo. 640, 14 Am. Dec. 313.

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giving and granting to his said attorney his sole and full power and authority to take, pursue and follow such legal course for the recovery, receiving and obtaining the same as he himself might or could do were he personally present; and upon the receipt thereof, acquittances and other sufficient discharges for him and in his name to sign, seal and deliver;"[1] nor does a power "to make contracts, to settle outstanding debts and generally to do all things that concern my interest in any way real or personal, whatsoever, giving my said attorney full power to use my name to release others or bind myself, as he may deem proper and expedient;"[2] nor does a power "to attend to the business of the principal generally," or "to act for him with reference to all his business;"[3] nor does authority to locate and survey land;[4] nor does a power to sell "claims" and "effects."[5]

[1] Hay v. Mayer, 8 Watts (Penn.) 203, 34 Am. Dec. 453.

[2] Billings v. Morrow, 7 Cal. 171, 68 Am. Dec. 235. Same power also construed to the same effect in Hunter v. Sacramento Valley Beet Sugar Co. 14 Cent. L. Jour. 352, 11 Fed. Rep. 17.

[3] Coquillard v. French, 19 Ind. 274. Nor does a power of attorney appointing one "general and special agent to do and transact all manner of business" necessarily confer power upon the agent to sell bonds belonging to his principal. Hodge v. Combs, 1 Black (U. S.) 192; 1 Myers Fed. Dec. § 484. Such a power, said the court, "may be construed to confer almost any or no power."

[4] Moore v. Lockett, 2 Bibb (Ky.) 67, 4 Am. Dec. 683.

[5] DeCordova v. Knowles, 37 Tex. 19. See also Berry v. Harnage, 39 Tex. 638, where a power of attorney in the following terms was held sufficient to authorize a sale of real estate: "to ask, demand, sue for, recover and receive all such sum and sums of money, debts, goods, wares, dues, accounts and other demands whatever, which are or may be due, owing, payable and belonging to me or detained from me by any manner of ways and means whatever, in whose hands soever the same may be found; giving and granting unto my said attorney, by these presents, my whole and full power, strength and authority, in and about the premises, to have, use, and take all lawful ways and means, in my name and for the purposes aforesaid, upon the receipt of any such debts, dues or issues of money, acquittances or other sufficient discharge, for me, and in my name, to make, seal, execute, deeds of conveyance, and delivered and generally all and every act or acts, thing or things, device or devices, in the law whatsoever needful and necessary to be done in and about the premises, for me and in my name to do, execute and perform." See also Stewart v. Pickering, — Iowa, —, 35 N. W. Rep. 690. In this case the defendants, real estate brokers, wrote to the plaintiff's attorney in fact: "Do you have charge of the lands * * * belonging to the estate of S? If so, are they for sale? * * * If the title is all right, we can possibly find

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So authority to sell real estate in "lots as surveyed by" a person named, does not empower the agent to sell the whole tract for a gross sum or at so much per acre.[1]

But where A wrote to C "I wish you to manage (my property) as you would with your own. If a good opportunity offers to sell everything I have, I would be glad to sell. It may be parties will come into San Antonio, who will be glad to purchase my gas stock and real estate," it was held that C was thereby authorized to contract for the sale of the real estate, but not to convey it.[2]

A power of attorney authorizing the agent "to bargain, sell, grant, release and convey, and upon such sales, convenient and proper deeds with such covenants as to my said attorney shall seem expedient, in due form of law, as deed or deeds, to make, seal, deliver and acknowledge," although it is silent as to what the agent is to sell and convey, is sufficiently broad to authorize the agent to sell and convey whatever estate the principal then had.[3]

So a power of attorney in due form, authorizing the agent "to sell, bargain and convey three certain lots of land in the village of Pentwater belonging to me," but containing no other or further description, is sufficient where the principal had three

a customer for the list this year. Let us hear from you as to prices &c." The answer was: "I herewith inclose you a price-list of our lands. * * * My mother is the widow of S, and is the sole devisee. * * * I am executor of my father, and attorney in fact of my mother. The titles are all strictly clear and good." Attached to this letter was: "Western land for sale, Winnebago county, Iowa," and a list of land, terms, and prices, and, "Apply to D. S. * * *" It was held that this correspondence, on its face, did not contain authority to sell the lands, binding on plaintiff, if the sale was made on the terms given.

See also Stillman v. Fitzgerald, — Minn. — 33 N. W. Rep. 564, where a firm of real estate brokers wrote to the defendant saying; "We have a customer (meaning the plaintiff) who would buy your lot if offered at a fair price," and asked him to state best price and the terms, for which he would sell, and pay their commission, which was stated. The defendant answered by letter stating price, and, in part only, the terms, for which he would sell, and that he would pay their commission. It was held that the brokers were not thereby constituted the defendant's agents, with a power to bind him by a contract of sale.

[1] Rice v. Tavernier, 8 Minn. 248, 83 Am. Dec. 778.

[2] Lyon v. Pollock, 99 U. S. 668.

[3] Marr v. Given, 28 Me. 55, 39 Am. Dec. 600.

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such lots and only three in that village;[1] but an authority "to convey a piece of land in Colebrook belonging to the Bank," there being more than one such piece is too indefinite.[2]

§ 319. **When Authority to be exercised.** An authority to sell lands at a given sum, if they can be sold "immediately," will not authorize a sale at that price a month afterwards, without any further authority;[3] nor can an agent empowered to sell real estate at a given price, without further instructions, sell it three years later at the same price when the land has greatly increased in value.[4] An authority to an agent to sell real estate within "a short time" will authorize a sale made within two weeks, even though in the meantime the property has enhanced in value.[5]

§ 320. **What Execution authorized.** An agent authorized to make the purchase price payable "in three years," has no implied authority to make it payable "on or before three years,"[6] but where he is authorized to make "one-half payable on or before one year" a contract to sell for "one-half payable in one year" is within the terms of the authorization.[7]

A power of attorney authorizing an agent to sell "the one-half" of a lot of land, without specifying which half, or whether in common or in severalty, empowers him to sell one-half in severalty and to exercise his own discretion as to which half.[8]

Where an agent is authorized to sell all the land of his principal which the latter had not previously conveyed, he may convey what the principal had previously sold but not conveyed;[9] and under an authority to sell any of his principal's real estate he may sell that which the principal subsequently acquires.[10]

§ 321. **Authority to sell implies Right to convey.** Unless

[1] Vaughn v. Sheridan, 50 Mich. 155.

[2] Lumbard v. Aldrich, 8 N. H. 31, 28 Am. Dec. 381.

[3] Matthews v. Sowle, 12 Neb. 398.

[4] Proudfoot v. Wightman, 78 Ill. 553.

[5] Smith v. Fairchild, 7 Colo. 510.

[6] Jackson v. Badger, 35 Minn. 52, 26 N. W. Rep. 908; to the same effect see, Dana v. Turlay, — Minn. —, 35 N. W. Rep. 860.

[7] Deakin v. Underwood, 37 Minn. 98. 5 Am. St. Rep. 827.

[8] Alemany v. Daly, 36 Cal. 90.

[9] Mitchell v. Maupin, 3 T. B. Mon. (Ky.) 185.

[10] Fay v. Winchester, 4 Metc. (Mass.) 513. See also Benschoter v. Lalk, — Neb. —, 38 N. W. Rep. 746. In Greve v. Coffin, 14 Minn. 345, 100 Am. Dec. 229, a power of attorney to sell land was construed as authorizing a sale of that only which was acquired subsequently to the date of the power.

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there be something in the instrument by which its scope is limited, as to the mere finding of a purchaser or the negotiation of the sale, a general power to sell real estate carries with it the power to execute all the instruments necessary to complete the sale and carry it into effect.[1] Said Chief Justice SHAW, "where the term 'sale' is used in its ordinary sense, and the general tenor and effect of the instrument is to confer on the attorney a power to dispose of real estate, the authority to execute the proper instruments required by law to carry such sale into effect is necessarily incident." [2]

§ 322. **To insert usual Covenants of Warranty.** Although the decisions are not entirely harmonious, the better rule seems to be that a general power to sell land carries with it authority to insert in the conveyance the usual covenants of general warranty,[3] but not to make any unusual or special warranty, as of the quantity or quality of the land sold.[4] *A fortiori* may the agent warrant where he is expressly authorized to sell on such terms as he shall deem most eligible.[5]

§ 323. **But not to mortgage.** A power to sell, however, conveys no implied authority to mortgage.[6] Said Judge COOLEY, "The principal determines for himself what authority he will confer upon his agent, and there can be no implication from his authorizing a sale of his lands that he intends that his agent may at discretion charge him with the responsibilities and duties of a mortgagor." [7]

[1] Valentine v. Piper, 22 Pick. (Mass.) 85, 33 Am. Dec. 715; People v. Boring, 8 Cal. 406; Fogarty v. Sawyer, 17 Cal. 589; Hemstreet v. Burdick, 90 Ill. 444; Yale v. Eames, 1 Metc. (Mass.) 486; Marr v. Given, 23 Me. 55, 39 Am. Dec. 600; Macgruder v. Peter, 4 Gill & J. (Md.) 323; Alexander v. Walter, 8 Gill (Md.) 239, 50 Am. Dec. 688; Farnham v. Thompson, 34 Minn. 330, 26 N. W. Rep. 9.

[2] In Valentine v. Piper, *supra*.

[3] Vanada v. Hopkins, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92; Peters v. Farnsworth, 15 Vt. 155, 40 Am. Dec. 671; Le Roy v. Beard, 8 How. (U. S.) 451; Backman v. Charlestown, 42 N. H. 125; Farnham v. Thompson, 34 Minn. 330. See also Bronson v. Coffin, 118 Mass. 156; Yazel v. Palmer, 88 Ill. 597.

[4] National Iron Armor Co. v. Bruner, 19 N. J. Eq. 331.

[5] LeRoy v. Beard, *supra*.

[6] Jeffrey v. Hursh, 49 Mich. 31; Wood v. Goodridge, 6 Cush. (Mass.) 117; 52 Am. Dec. 771; Albany Fire Ins. Co. v. Bay, 4 N. Y. 9; Ferry v. Laible, 31 N. J. Eq. 566; Kinney v. Mathews, 69 Mo. 520; Patapsco, &c. Co. v. Morrison, 2 Woods (U. S. C. C.) 395; Devaynes v. Robinson, 24 Beav. 86; Morris v. Watson, 15 Minn. 212.

[7] In Jeffrey v. Hursh, *supra*.

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§ 324. **Authority to receive Payment.** The receipt of so much of the purchase money as is to be paid down, is within the general scope of an authority to sell and convey,[1] but is not within the power of an agent authorized merely to contract for the sale.[2] Such an authority will not, however, warrant the receipt of subsequent payments.[3]

§ 325. **Authority to give Credit.** The power to sell land does not of itself imply an authority to sell on credit. The presumption is that the sale is to be for cash.[4] But where the agent is authorized to sell "on such terms as to him shall seem meet" he may grant a reasonable credit.[5] An authority to sell on credit, but not fixing the time to be given, implies a power to grant a reasonable time.[6]

§ 326. **Authority to sell does not authorize Exchange or Gift.** Neither will a power to sell and convey land, imply an authority to barter or exchange it for other property or to give it away, or to take the pay in merchandise. It is presumed, in the absence of anything showing a contrary intent, that the land is to be sold only, and sold for cash.[7] So where the agent is authorized to sell only for a certain sum, he cannot sell for a less sum.[8]

§ 327. **Does not authorize Waste or Sale of Timber separate from Land.** An agent or attorney who has power only to bargain and sell land subject to confirmation, has no authority to license anyone to enter thereon and commit waste or cut timber, nor has he power to sell the timber distinct from the land.[9]

[1] Peck v. Harriott, 6 Serg & R. (Penn.) 146, 9 Am. Dec. 415; Carson v. Smith, 5 Minn. 78, 77 Am. Dec. 539; Mann v. Robinson, 19 W. Va. 49, 42 Am. Rep. 771; Alexander v. Jones, 64 Iowa, 207; Yerbey v. Grigsby, 9 Leigh (Va.) 387; Johnson v. McGruder, 15 Mo. 365; Goodale v. Wheeler, 11 N. H. 424.

[2] Mann v. Robinson, *supra*.

[3] Johnson v. Craig, 21 Ark. 533.

[4] Lumpkin v. Wilson, 5 Heisk. (Tenn.) 555.

[5] Carson v. Smith, 5 Minn. 78, 77 Am. Dec. 539.

[6] Brown v. Central Land Co. 42 Cal. 257.

[7] Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611; Trudo v. Anderson, 10 Mich. 357, 81 Am. Dec. 795; Mann v. Robinson, 19 W. Va. 49, 42 Am. Rep. 771; Lumpkin v. Wilson, 5 Heisk. (Tenn.) 555; Rhine v. Blake, 59 Tex. 240; Morrill v. Cone, 22 How. (U. S.) 75, 1 Myers' Fed. Dec. § 467; Hampton v. Moorhead, 62 Iowa, 91; Dupont v. Wertheman, 10 Cal. 354; Mott v. Smith, 16 Cal. 533.

[8] Holbrook v. McCarthy, 61 Cal. 216; Bush v. Cole, 28 N. Y. 261, 84 Am. Dec. 343.

[9] Hubbard v. Elmer, 7 Wend. (N. Y.) 446, 22 Am. Dec. 590.

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§ 328. **Does not authorize changing Boundaries of Land.** Nor has an agent authorized to sell or rent real estate any implied power to agree with an adjoining land owner upon a change of the boundaries of the principal's land.[1]

§ 329. **Does not authorize Partition.** Authority to sell and convey land does not authorize a partition of the land in which the principal has an interest as tenant in common.[2]

§ 330. **Does not authorize Dedication to Public Use.** Mere authority to sell and convey land does not imply power to dedicate any part of it to the public use;[3] but a power "to sell, convey, plat and subdivide in such manner as to make the property marketable and to acknowledge and record such plat" implies a power to dedicate such portion as may be necessary to the public use.[4] So a power to lay out land in order to dispose of it, implies authority to dedicate the necessary highways,[5] and authority to purchase a town site and lay it out, implies power to dedicate proper and appropriate streets.[6]

§ 331. **Nor Conveyance in Payment of Agent's Debts.** An agent authorized to sell and convey real estate can do so only for and in behalf of his principal. He may not convey it in trust for the payment of his own debts.[7]

§ 332. **No implied Power to revoke Contract.** An agent authorized to make a contract for the sale of land exhausts his power with the completion of that contract; and has thereafter no implied power to revoke or rescind it, or to release the purchaser from its obligations.[8]

§ 333. **No implied Power to discharge Mortgage.** An agent authorized merely to sell land has therefrom no implied power to release or discharge mortgages belonging to his principal;[9] but an agent having general authority to deal in land, may bind his principal by the assumption of a mortgage as part of the purchase price.[10]

[1] Fore *v.* Campbell, — Va. —, 1 South East. Rep. 180.
[2] Borel *v.* Rollins, 30 Cal. 408; Wirt *v.* McEnery, 21 Fed. Rep. 233.
[3] Wirt *v.* McEnery, 21 Fed. Rep. 233; Gosselin *v.* Chicago, 103 Ill. 623.
[4] Wirt *v.* McEnery, *supra.*
[5] State *v.* Atherton, 16 N. H. 203.
[6] Barteau *v.* West, 23 Wis. 416.
[7] Frink *v.* Roe, 70 Cal. 296, 11 Pac. Rep. 820.
[8] Luke *v.* Grigg, — (Dak.) —, 30 N. W. Rep. 170.
[9] Barger *v.* Miller, 4 Wash. (U. S. C. C.) 284.
[10] Schley *v.* Fryer, 100 N. Y. 71.

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§ 334. **No implied Power to invest Proceeds.** A power of attorney authorizing the agent to take possession of and sell all the property of his principal, and collect his debts, does not authorize the agent to re-invest the funds of his principal or to engage therewith in any schemes of speculation, however tempting.[1]

II.

OF AGENT AUTHORIZED TO SELL PERSONAL PROPERTY.

§ 335. **When Authority exists.** Authority to an agent to sell personal property may, of course, be expressly conferred, but it may also be implied from circumstances. Such authority, however, cannot be inferred from mere possession of the property, even though the alleged agent be a dealer in property of that kind,[2] but the principal must have done something more; he must have so acted as to clothe the agent with apparent authority to sell, or must have conferred upon him, or permitted him to assume, all of the apparent *indicia* of ownership.[3]

§ 336. **Authority to receive Payment—In general.** Whether an agent authorized to sell personal property has implied authority to receive payment, is a question upon which there has been much difference of opinion. It will be obvious that its solution must depend largely upon the nature of the particular transaction and the usages if any in relation thereto.

If a merchant places behind his counters a clerk to sell goods, it could not be doubted that, in the absence of a known custom to pay a cashier or other person, the clerk would have implied power to receive, *at the time of the sale*, payment for the goods sold by him.[4] Whether he would have authority at some sub

[1] Stoddard *v.* United States, 4 Ct. Cl, 516.

[2] Levi *v.* Booth, 38 Md. 305, 42 Am. Rep. 332.

[3] Smith *v.* Clews, 105 N. Y. 283, 59 Am. Rep. 502; and see generally, *post*, §§ 785–788.

[4] See Hirshfield *v.* Waldron, 54 Mich. 649, where CHAMPLIN J. says: "The usual employment of a clerk in a retail store is to sell goods to customers or purchasers, and it is implied from such employment that he has authority to receive pay for them on such sale. But there is no implication from such employment that he has authority, after the goods are delivered and taken from the store, to present bills and collect money due to his employers, because it is not in the scope of the usual employment of such clerks."

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sequent time to receive payment for the goods sold, after the account had gone upon the books, and the matter had passed into other hands, is evidently not so clear. If payment were made to him at his usual place in the store, the case would present a different aspect than if it had been made to him at his own home or upon the street. So, too, if he were one of many salesmen in a large establishment in the metropolis, a different case would be presented than if he were the only clerk in a country store combining in himself salesman, bookkeeper, porter and collector.[1]

Again if he were sent about the country with authority to sell goods entrusted to his possession for that purpose, authority to receive payment therefor would be implied, as it would not be presumed that the principal intended that they should be parted with without payment.[2] But if his authority was simply to solicit orders for goods, a sample of which he had in his possession, it being left for the principal to deliver the goods in pursuance of the orders taken, the question whether the agent might subsequently collect payment merely as an incident of the authority to take orders, would present other considerations.[3]

§ 337. **Authority to receive Payment not implied from Possession of Bill.** The mere fact that one claims to be authorized to receive payment is no evidence of his authority, nor can such authority be implied from the mere possession by the assumed agent of the bill or account, though made out upon the principal's bill-head and in his own handwriting.[4]

§ 338. **Agent having Possession or other Indicia of Ownership may receive Payment.** Where the principal entrusts the agent with the possession of the goods to be sold and authorizes him to sell and deliver them, authority to receive payment therefor will be implied, and a payment made to the agent at the time of the

[1] See Davis *v.* Waterman, 10 Vt. 526, 33 Am. Dec. 216, where it is held that a clerk in a country store with whom are left the goods and demands of his employer, has charge of both, and in the absence of his principal, has power to receive pay on the demands and to institute suits for their security when an emergency arises.

[2] See following section.

[3] See *post*, § 337.

[4] Hirshfield *v.* Waldron, 54 Mich. 649; Dutcher *v.* Beckwith, 45 Ill. 460, 92 Am. Dec. 232; Kornemann *v.* Monaghan, 24 Mich. 36; Grover & Baker Sew. Machine Co. *v.* Polhemus, 34 Mich. 247; Reynolds *v.* Continental Ins. Co. 36 Mich. 131; McDonough *v.* Heyman, 38 Mich. 334.

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sale and delivery, or as part of the same transaction, will be binding upon the principal;[1] of course, in the absence of any knowledge on the part of the purchaser that the agent was not authorized to receive payment.

Having put the agent into such a position that he may appear to the world as the owner of the property, or having held him out as authorized generally to sell, it would be a fraud upon those who had paid the agent in good faith, for the principal to be permitted to assert that he was not authorized to receive payment.

§ 339. **Agent to sell merely or to solicit Orders, without Possession of Goods, not authorized to receive Payment.** Where however, he is not entrusted with possession, the sale of goods by an agent, or the fact that he is, or acts as, agent to solicit orders for goods, will not, in the absence of a controlling usage to the contrary, authorize him to receive payment therefor.[2]

§ 340. **When travelling Salesmen may receive Payment.** The practice of selling goods through the agency of travelling salesmen who go from place to place exhibiting samples and soliciting orders, has become so universal, that the question of the authority of such an agent to subsequently receive payment for the goods, has become very important and has been much discussed, but the decisions have not been entirely uniform. The preponderance of the authority, however, is undoubtedly in harmony with the principles stated in the preceding section, that mere authority to

[1] Butler v. Dorman, 68 Mo. 298, 30 Am Rep. 795; Sumner v. Saunders, 51 Mo. 89; Rice v. Groffmann, 56 Mo. 434; Higgins v. Moore, 34 N. Y. 417; Seiple v. Irwin, 30 Penn. St. 513; Capel v. Thornton, 3 Car. & P. 352; Pickering v. Busk, 15 East, 38; Greely v. Bartlett, 1 Greenl. (Me.) 173, 10 Am. Dec. 54; Goodenow v. Tyler, 7 Mass. 37, 5 Am. Dec. 22; Brooks v. Jameson, 55 Mo. 505; Lumley v. Corbett, 18 Cal. 494. See also Howe Machine Co. v. Ballweg, 89 Ill. 318.

[2] Janney v. Boyd, 30 Minn. 319; Butler v. Dorman, 68 Mo. 298, 30 Am. Rep. 795; Chambers v. Short, 79 Mo. 204; Clark v. Smith, 88 Ill. 298; McKindly v. Dunham, 55 Wis. 515, 42 Am. Rep. 740; Seiple v. Irwin 30 Penn. St. 513; Law v. Stokes, 3 Vroom (N. J. L.) 249, 90 Am. Dec. 655; Higgins v. Moore, 34 N. Y 417; Wright v. Cabot, 89 N. Y. 570; Crosby v. Hill, 39 Ohio St. 100; Graham v. Duckwall, 8 Bush. (Ky.) 12; Abrahams v. Weiller, 87 Ill. 179; Kohn v. Washer, 64 Tex. 131, 53 Am. Rep. 745; Greenhood v. Keator, 9 Ill. App. 181; Kornemann v. Monaghan, 24 Mich. 36; Bernshouse v. Abbott, 16 Vroom (N. J.) 531, 46 Am. Rep 789.

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solicit orders for goods, or subscriptions for books and other articles sold by subscription, the orders or subscriptions to be filled by the principal, implies no authority in the agent to subsequently receive payment, and payment made to such an agent will not be payment to the principal, unless the agent be in fact authorized or the principal has held him out as so authorized.[1] If however, payment in whole or in part is to be made at the time the order or subscription is taken, authority to receive such payment will be implied.[2]

§ 341. **Same Subject—When Payment to Agent Part of Terms of Sale.** But it has been held that an agent authorized to take the order has the implied power to make terms of payment as to time and place, to the extent at least of what was customary and not extraordinary; and that where it is made one of the terms of sale that payment may be made to the agent at the purchaser's place of business, to save the expense and trouble of remittance, payment to the agent was payment to the principal.[3]

So where a travelling salesman agreed, though without authority, to receive certain goods in part payment for those sold by him, the purchaser being ignorant of his want of authority, it was held that the agreement was binding upon the principal who had shipped the goods to the purchaser.[4]

§ 342. **Same Subject—Notice of Want of Authority.** It is frequently attempted to give notice to the purchaser that the agent is not authorized to receive payment, by printing or writing upon the bill or invoice, a warning to that effect. Actual notice of such limitation is, of course, binding upon the purchaser, but whether such a warning can be held to be constructive notice seems to depend largely upon the degree of prominence given it.

[1] Kornemann *v.* Monaghan, 24 Mich. 36; McKindly *v.* Dunham, 55 Wis. 515, 42 Am. Rep. 740; Seiple *v.* Irwin, 30 Penn. St. 513; Clark *v.* Smith, 88 Ill. 298; Chambers *v.* Short, 79 Mo. 204; Greenhood *v.* Keator, 9 Ill. App. 183; Law *v.* Stokes, 32 N. J. L. 249, 90 Am. Dec. 655; Butler *v.* Dorman, 68 Mo. 298, 30 Am. Rep. 795.

[2] See *ante* § 337.

[3] Putnam *v.* French, 53 Vt. 402, 38 Am. Rep. 682; Trainor *v.* Morison, 78 Me. 160, 57 Am. Rep. 790; Hoskins *v.* Johnson, 5 Sneed (Tenn.) 469.

[4] Billings *v.* Mason, — Me. —, 6 New Eng. Rep. 791, 15 Atl. Rep. 59, distinguishing Clough *v.* Whitcomb, 105 Mass. 482, and Finch *v.* Mansfield, 97 Mass. 89, and likening the case to Wilson *v.* Stratton, 47 Me. 120.

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Thus, it is said by a Wisconsin judge, "On the face of the bill sent to the defendant, and directly under his address, there appears in large, legible print in red ink, as if stamped upon it, the words 'Agents not authorized to collect.' * * * If these words so legible and prominent on the face of the bill, would not be notice, it would seem to be impossible to give a purchaser such a notice. By all authorities he must be presumed to have observed these words, and to have had such notice when they were so prominent on the face of the bill of goods in his possession, and in which he alone was interested as purchaser. It might as well be said that the contents of any written or printed notice of any kind, or for any purpose, were not presumed to have been brought home to, and to be known by, a party on his receipt of the notice."[1]

In a Vermont case above referred to it is said: "It is further insisted by the plaintiffs' counsel that the defendants were charged with notice that they must pay the plaintiffs and not Allen (the agent) by reason of the words 'payable at office' written on their bill rendered, when the last invoice was sent. The defendants did not see those words. Therefore they had no notice in fact. Should they be held chargeable with notice? The plaintiffs sent that bill without any letter, when the goods were sent, which was three months before the time of payment agreed upon. The defendants examined it as to items charged and amount of same, and filed it away,—never noticing those words; and when Allen came around at about the time he was to come for the pay by the terms of the sale, they paid him the balance due,—supposing all the while that he was, as he claimed to be, a member of the firm.

In view of the obscure manner in which those words were written on the bill-head; and of the circumstances under which, and the purposes for which in other respects that bill was sent, and of the terms of the contract as to whom and when and where payment was to be made, we do not think the defendants were guilty of such negligence, in not seeing those words, as to be chargeable with notice which they did not in fact have. It was a matter which the plaintiffs might easily have made plain. They saw fit to undertake to give the notice in an obscure way

[1] ORTON, J. in McKindly v. Dunham, 55 Wis. 515, 42 Am. Rep. 740.

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which was likely to be ineffectual. It turned out so and they should bear the consequences." [1]

So goods ordered of an agent were delivered as agreed, accompanied by a bill with the words, "All bills must be paid by check to our order or in current funds at our office," printed in red at the top. About two weeks afterward, the agent called for and received payment, giving to the purchasers a receipted bill bearing the same notice in red letters that appeared upon the bill sent with the goods. The agent embezzled the money. The court said: "The plaintiff seeks to charge the defendants with knowledge that payment was required to be made according to the terms of the notice in red letters upon the bill sent with the goods. The defendants did not see the notice, nor taking into consideration the care ordinarily exercised by prudent men, are they at fault for not observing it. It is not so prominent upon the bill as to become a distinctive feature of it, one that would be likely to attract attention in the hurry of business and that ought to have been seen by the defendants. It would have been an easy matter for the plaintiff to have inclosed the bill in a letter of advice, calling the attention of the defendants to the fact that he was unwilling to intrust collections to his agent." [2]

§ 343. **Same Subject—No implied Authority to sell his Samples.** A travelling salesman has no implied authority to sell the samples furnished him by his principal for use in soliciting orders. His sale of them, therefore, and receipt of payment therefor, will be no bar to the recovery of their value by his principal from the purchaser.[3]

§ 344. **Same Subject—Purchaser cannot set off Debt due from Agent.** For reasons similar to those preventing payment to an agent authorized merely to sell, the purchaser cannot set off against the principal a debt due him from the agent.[4]

§ 345. **Same Subject—Implied Authority to hire Horses.** So an agent authorized to travel from place to place to sell his prin-

[1] VEAZEY, J. in Putnam v. French, 58 Vt. 402, 38 Am. Rep. 682.

[2] Trainor v. Morison, 78 Me. 160, 57 Am. Rep. 790; see also Kinsman v. Kershaw, 119 Mass. 140; Wass v. M. M. Ins. Co., 61 Me. 537; Law v. Stokes, 32 N. J. L. 249, 90 Am. Dec. 655.

[3] Kohn v. Washer, 64 Tex. 131, 53 Am. Rep. 745.

[4] Bernshouse v. Abbott, 16 Vroom (N. J.) 531, 46 Am. Rep. 789.

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cipal's goods, has implied authority to hire horses and carriages, when necessary for use in the course of his employment, to transport himself and his samples;[1] and for that purpose he may use his principal's funds in his hands, or pledge his principal's credit. And even though the agent may have been supplied by the principal with money for that purpose, and forbidden to pledge the credit of the principal therefor, the principal will be liable to one who in good faith has supplied the agent with horses, without knowledge of those instructions.[2]

§ 346. **Same Subject—Authority to procure other Supplies.** But from the mere fact that an agent employed to sell goods, has intrusted to his possession a horse and wagon of the principal as well as the goods for sale, the law will not imply a contract on the part of the principal to pay for the board of the agent or the keeping of the horse.[3] Nor is the principal responsible for a hotel bill covering a period of several months and contracted by his commercial travelling agent without notice to or authority from the principal, it being the custom to pay cash.[4]

§ 347. **Implied Authority to warrant Quality.** The question of the implied power of an agent authorized to sell, to warrant the quality of the goods sold, is a very important one, and one that has often arisen, but upon which the authorities are not harmonious. It has been attempted in many cases to settle the question by reference to the arbitrary distinction made between general and special agencies; but while these rules may suffice to determine many of the questions arising between the principal and his agent, they are not satisfactory in considering the liability of the principal to third persons. This question must be determined by the same principles which govern the liability of the principal for the acts of the agent in other cases.

Every person dealing with an assumed agent is bound at his peril to ascertain the nature and extent of the agent's authority; but authority, as has been seen, is not dependent entirely upon the instructions given, but is an attribute of the character in which the principal holds the agent out to the public. Whatever

[1] Huntley *v.* Mathias, 90 N. C. 101, 47 Am. Rep. 516; Bentley *v.* Doggett, 51 Wis. 244, 37 Am. Rep. 827.

[2] Bentley *v.* Doggett, *supra.*

[3] Sampson *v.* Singer Mn'f'g Co., 5 S. C. 465; Grover & Baker S. Mach. Co. *v.* Polhemus, 34 Mich. 247.

[4] Covington *v.* Newberger, — N.C. (1888), 27 Cent. L. Jour. 263, 6 S.W. Rep. 205.

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attributes properly belong to that character will be presumed to exist, and they cannot be cut off by private instructions of which those who deal with the agent are ignorant. Among these attributes is the power to do all that is usual and necessary to accomplish the object for which the agency was created.

§ 348. **Same Subject—The general Rule.** Authority conferred upon an agent, whether general or special, to sell personal property carries with it, in the absence of countervailing circumstances known to the party with whom he deals, implied power to make in the name of the principal such a warranty of the quality and condition of the property sold as is usually and ordinarily made in like sales of similar property at that time and place.[1]

The question of what is usual in such a case is ordinarily a question of fact to be determined by the jury,[2] but in certain cases the court will take judicial notice of it.[3] The usage must be so well settled, notorious and continuous, as to raise the legal presumption that it was known to buyer and seller and that the sale was made in reference to it.[4] If it is purely local, the prin-

[1] Pickert v. Marston, 68 Wis. 465, 60 Am. Rep. 876, 32 N. W. Rep. 550; Ahern v. Goodspeed, 72 N. Y. 108; Talmage v. Bierhause, 103 Ind. 270; Herring v. Skaggs, 62 Ala. 180, 34 Am. Rep. 4; McAlpin v. Cassidy, 17 Tex. 449; Schuchardt v. Allens, 1 Wall. (U. S.) 359; Palmer v. Hatch, 46 Mo. 585; Huguley v. Morris, 65 Ga. 666; Deming v. Chase, 48 Vt. 382; Boothby v. Scales, 27 Wis. 626; Murray v. Brooks, 41 Iowa, 45; Tice v. Gallup, 2 Hun (N. Y.) 446; Smith v. Tracy, 36 N. Y. 82; Nelson v. Cowing, 6 Hill (N. Y.) 336; Hunter v. Jameson, 6 Ired. (N. C.) L. 252; Ezell v. Franklin, 2 Sneed (Tenn.) 236; Bradford v. Bush, 10 Ala. 386; Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96; Cooley v. Perrine, 12 Vroom (N. J.) 822, 32 Am. Rep. 210; Decker v. Fredericks, 47 N. J. L. 469; Scott v. McGrath, 7 Barb. (N. Y.) 53; Milburn v. Belloni, 34 Id. 607; Gaines v. McKinley, 1 Ala. 446; Skinner v. Gunn, 9 Port. (Ala.) 305; Cocke v. Campbell, 13 Ala. 286; Davis v. Burnett, 4 Jones, (N. C.) L. 71, 67 Am. Dec. 263; Upton v. Suffolk Mills, 11 Cush. (Mass.) 586, 59 Am. Dec. 163; Graves v. Legg, 2 Hurl. &. N. 210; Dingle v. Hare, 7 C. B. (N. S.) 145, 97 Eng. Com. L. 145; Alexander v. Gibson, 2 Camp. 555; Fay v. Richmond, 43 Vt. 25; Morris v. Bowen, 52 N. H. 416; Applegate v. Moffitt, 60 Ind. 104; Randall v. Kehlor, 60 Me. 37; Croom v. Shaw, 1 Fla, 211; Williamson v. Canaday, 3 Ired. (N. C.) L. 349; Sandford v. Handy, 23 Wend. (N. Y.) 260; Taggart v. Stanbery, 2 McLean (U. S. C. C.) 543; Woodford v. McClenahan, 4 Gilm. (Ill.) 85.

[2] Herring v. Skaggs, *supra*; Pickert v. Marston, *supra*.

[3] Ahern v. Goodspeed, *supra*; Talmage v. Bierhause, *supra*.

[4] Herring v. Skaggs, *supra*.

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cipal may rebut the presumption of knowledge by showing that, in fact, he did not know of it, in which case he will not be bound.[1] Proof of the usage is admissible in behalf of either party.[2]

§ 349. **Illustrations of this Rule.** Thus in a New York case, the court said it was within their judicial observation from many cases before them, that a warranty of commercial character was the usual accompaniment of a sale, upon the New York stock exchange, of promissory notes having the guise of commercial paper, and it was held that an agent authorized to sell such paper had implied power to make such a warranty.[3]

So the court will take judicial notice that it is usual and customary in ordering goods of a dealer, through his agent, to require a warranty of quality, where the goods are not present and subject to the inspection of the purchaser, and authority to make such a warranty will be implied.[4]

Again, sales of implements and machinery by the manufacturers are so generally accompanied by a warranty of fitness for the purpose for which they are intended, that an agent commissioned to sell them, will be presumed to have authority to make such a warranty;[5] and evidence is not admissible to prove that it was not the custom of such a manufacturer to warrant, unless it also be shown that the purchaser had notice of that custom;[6] nor that the agent was expressly prohibited to warrant, unless notice of such prohibition be brought home to the purchaser.[7]

So such an agent has implied power to sell upon trial and to give the purchaser the privilege of returning the machine if not satisfactory;[8] and may sell upon condition that the sale shall not be consummated if the machine does not do good work;[9] and, having sold upon condition that if the machine does not prove satisfactory to the purchaser, he shall return it, the agent may waive such return.[10]

[1] Pickert v. Marston, *supra*; see *ante*, § 281.

[2] Pickert v. Marston, *supra*.

[3] Ahern v. Goodspeed, 72 N. Y. 108, 114.

[4] Talmage v. Bierhause, 103 Ind. 270.

[5] McCormick v. Kelly, 28 Minn. 185 (a harvesting machine.)

[6] Murray v. Brooks, 41 Iowa, 45 (a reaping machine.)

[7] Boothby v. Scales, 27 Wis. 626.

[8] Deering v. Thom, 29 Minn. 120.

[9] Oster v. Mickley, 35 Minn. 245.

[10] Pitsinowsky v. Beardsley, 37 Iowa, 9.

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An agent authorized to sell goods by sample will have the implied authority to make the warranty usual in such cases, that the goods sold are equal to the sample.[1]

Evidence that the authority of the agent to warrant was limited to the giving of a printed warranty only, furnished him by his principal, is not admissible, unless it be also shown that the purchaser had knowledge of the limitation;[2] but where the purchaser has knowledge that such a warranty was furnished, he cannot accept an oral warranty from the agent, different in its terms, and require the principal to comply with such oral warranty.[3]

The fact that the vendor of a steam boiler, by his agent, furnishes the vendee at the time of the sale with a pamphlet descriptive of the boilers, in which their durability is advertised as an essential quality, is evidence from which the agent's authority to warrant their durability may be inferred.[4]

§ 350. **Limits of this Rule.** But this rule is not to be extended beyond the limits prescribed by it. It cannot, therefore, apply to sales of property not usually sold with such a warranty, nor to sales made under such circumstances that such a warranty is not usually given, nor can it give countenance to any unusual or extraordinary warranty.

Thus though an agent authorized to sell liquors may warrant their quality and condition, he has no implied power to warrant that they will not be seized for violation of the revenue laws;[5] nor can an agent employed to sell flour, without express authority, warrant that it will keep sweet during a sea voyage from Massachusetts to California.[6]

So an agent authorized to take orders for his principal's goods

[1] Andrews v. Kneeland, 6 Cow. (N. Y.) 354; Dayton v. Hooglund, 39 Ohio St. 671; Schuchardt v. Allens, 1 Wall. (U. S.) 359; Murray v. Smith, 4 Daly (N. Y.) 277.

[2] Murray v. Brooks, 41 Iowa, 45.

[3] Wood Mow. & Reap. Machine Co. v. Crow, 70 Iowa, 340; limiting Eadie v. Ashbaugh, 44 Iowa, 519, and Farrar v. Peterson, 52 Iowa, 420. Where the purchaser is furnished with a printed warranty which expressly provides that the agent has no authority to change or vary its terms, such provision is a sufficient notice to the purchaser of the limitations upon the agent's authority. Furneaux v. Easterly, 36 Kans. 539.

[4] Smilie v. Hobbs, — N. H. —, 5 Atl. Rep. 711.

[5] Palmer v. Hatch, 46 Mo. 585.

[6] Upton v. Suffolk County Mills, 11 Cush. (Mass.) 586, 59 Am. Dec. 163.

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may warrant that the principal will not sell similar goods to any other dealer in the same town;[1] but he cannot warrant that his principal will not afterward sell to others similar goods for a less price.[2] And though an agent employed to sell negotiable notes would have implied authority, when necessary, to endorse them, he would have no implied authority to make an additional guarantee of payment.[3]

Nor has an agent authorized to sell safes, implied authority to warrant that they are burglar proof.[4]

Whether an agent employed to sell a horse has implied power to warrant his soundness, has been much discussed and the authorities are not harmonious. Thus it has been held that an agent of a horse dealer has such implied power, and that it cannot be affected by private instructions from the principal not to warrant;[5] but that the agent of a private individual or a special agent has no such implied power, even in the absence of any restrictions.[6] On the other hand, it has been decided that unless expressly forbidden, the agent would have such an implied power;[7] and in still other cases, the authority has been declared in general terms.[8]

But no satisfactory reason is perceived why the question of the warranty of a horse should stand upon any different basis than the warranty of any other chattel.

§ 351. **Authority to warrant Title.** An agent authorized to sell goods, as the goods of his principal, would have implied authority to warrant his principal's title. Warranties of this sort are usual, and would be implied if the principal himself were to offer for sale goods in his own possession.[9]

[1] Keith v. Hirschberg Optical Co., — Ark. —, 2 S. W. Rep. 777.

[2] Anderson v. Bruner, 112 Mass. 14.

[3] Graul v. Strutzel, 53 Iowa, 712.

[4] Herring v. Skaggs, 62 Ala. 180, 34 Am. Rep. 4, Same Case, 73 Ala. 446.

[5] Howard v. Sheward, L. R. —, 2 C. P. 148.

[6] Brady v. Todd, 9 C. B. (N. S.) 592; Cooley v. Perrine, 12 Vroom (N. J.) 322, 32 Am. Rep. 210. The decision in this case was based solely on the distinction between a general and a special agency.

[7] Deming v. Chase, 58 Vt. 382; Tice v. Gallup, 2 Hun (N. Y.) 446.

[8] Ezell v. Franklin, 2 Sneed (Tenn.) 236; Skinner v. Gunn, 9 Port. (Ala.) 305; Lane v. Dudley, 2 Murph. (N. C.) 119, 5 Am. Dec. 523; Gaines v. McKinley, 1 Ala. 446; Helyear v. Hawke, 5 Esp. 72; Alexander v. Gibson, 2 Camp. 555; Bradford v. Bush, 10 Ala. 386.

[9] See Benjamin on Sales, Bennett's Ed. § 641, and cases cited.

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§ 352. **No implied Power to exchange or barter.** Mere authority to sell gives an agent no power to exchange the chattels for other property, or to take anything else than money in payment for them.[1] He cannot therefore, take payment in notes, checks or other paper.[2] And having received payment in money, he has no authority to exchange the money with a third person for other money, and if he does so and receives a counterfeit bill, his principal may recover the money given for it.[3]

§ 353. **No implied Power to give Credit.** In the absence of anything to the contrary, it will be presumed that the sale is to be for cash in hand. An agent authorized to sell chattels has, therefore, no implied power to give credit, unless there is a valid usage to that effect at that time and place.[4]

§ 354. **No Authority to appropriate to his own Use.** An agent entrusted with goods to sell for his principal, has no right to sell or deliver them in payment of his own debt, or to pledge them as security for his own debt, and persons dealing with such an agent are bound to take notice of this limitation of his authority.[5] A creditor therefore who receives the goods under such an

[1] Trudo *v.* Anderson, 10 Mich. 357, 81 Am. Dec. 795; Wheeler & Wilson Mnfg. Co. *v.* Givan, 65 Mo. 89; Taylor *v.* Starkey, 59 N. H. 142; Brown *v.* Smith, 67 N. C. 245; Victor Sewing Mach. Co. *v.* Heller, 44 Wis. 265; Kent *v.* Borstein, 12 Allen (Mass.) 342; City of Cleveland *v.* State Bank, 16 Ohio St. 246, 88 Am. Dec. 445; Guerreiro *v.* Peile, 3 B. & Ald. 616.

[2] Buckwalter *v.* Craig, 55 Mo. 71. A direction to sell for cash does not permit the agent to take a check payable the day after the sale, even though that be the customary way at the place of sale of making what are there called cash sales. Hall *v.* Storrs, 7 Wis. 253. An agent who takes check payable ten days after date is liable if bank fails before payment. Harlan *v.* Ely, 68 Cal. 522.

[3] Kent *v.* Borstein, *supra*.

[4] Payne *v.* Potter, 9 Iowa, 549; May *v.* Mitchell, 5 Humph. (Tenn.) 365; Burks *v.* Hubbard, 69 Ala. 379; School District *v.* Ætna Ins. Co., 62 Me. 330; State *v.* Delafield, 8 Paige (N. Y.) 527. That a factor may sell on credit, see *post*, Chapter on Factors.

[5] Wheeler & Wilson Mnfg. Co. *v.* Givan, 65 Mo. 89; Holton *v.* Smith, 7 N. H. 446; Whitney *v.* State Bank, 7 Wis. 620; Burks *v.* Hubbard, 69 Ala. 379; Stewart *v.* Woodward, 50 Vt. 78, 28 Am. Rep. 488; Levi *v.* Booth, 58 Md. 305, 42 Am. Rep. 332; Williams *v.* Johnston, 92 N. C. 532, 53 Am. Rep. 428; Parsons *v.* Webb, 8 Greenl. (Me.) 38, 22 Am. Dec. 220; Greenwood *v.* Burns, 50 Mo. 52; Butts *v.* Newton, 29 Wis. 632; Rodick *v* Coburn, 68 Me. 170; McCormick *v.* Keith, 8 Neb. 143; Hart *v.* Hudson, 6 Duer (N. Y.) 294; Hurley *v.* Watson, — Mich. —, 13 West. Rep. 543; Sykes *v.* Giles, 5 M. & W. 645; Scott *v.* Irving, 1 B. & Ad. 605; Catterall *v.* Hindle, L. R. 1 C. P. 187.

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arrangement, as well as his vendee, though acting in good faith and in ignorance that the goods did not belong to the agent, acquires no title thereto as against the principal.[1]

§ 355. **No implied Authority to release Principal's Rights or pay his Debts.** Neither has such an agent any implied power to release a debt due to his principal;[2] nor has a mere clerk employed in his principal's store, any implied authority to compound or compromise debts due to his employer;[3] or to sell goods at wholesale prices for a debt due from his principal;[4] or to deliver goods in payment of, or as security for, a note signed by his employer.[5]

§ 356. **No Authority to pledge Goods.** An authority to sell goods implies no power to pledge them.[6]

§ 357. **No Authority to promise Commissions for Sub-Sales.** An agent authorized to sell his principal's goods has no implied authority to bind his principal by a promise to pay commissions to third persons for sales made by them for the principal;[7] nor having property to be sold for cash, like railroad tickets, has he implied power to deliver it to a third person to sell, to be paid for when sold, and to bind the principal by promising such third person a commission upon sales made by him.[8]

§ 358. **No Authority to sell at Auction—When.** An agent authorized to sell property cannot, without express authority, sell it at auction; and a purchaser at such a sale, with notice of the agent's powers, or where the circumstances were sufficient to put him upon inquiry, who fails to make inquiry, acquires no title.[9] So under a power of attorney authorizing a sale only at

[1] Warner *v.* Martin, 11 How. (U. S.) 209; Belton Compress Co. *v.* Belton Brick Mfg. Co., 64 Tex. 337; De Bouchout *v.* Goldsmid, 5 Ves. Jun. 211, and cases above cited. An agent cannot bind his principal by an agreement to pay his own private debts out of his principal's property. Rice *v.* Lyndborough Glass Co., 60 N. H. 195.

[2] Smith *v.* Perry, 29 N. J. L. 74.

[3] Powell's Admr. *v.* Henry, 27 Ala. 612.

[4] Lee *v.* Tinges, 7 Md. 215; Hampton *v.* Matthews, 14 Penn. St. 105.

[5] Nash *v.* Drew, 5 Cush. (Mass.) 422.

[6] Voss *v.* Robertson, 46 Ala. 483; Wheeler & Wilson Mnfg. Co. *v.* Givan, 65 Mo. 89.

[7] Atlee *v.* Fink, 75 Mo. 100, 42 Am. Rep. 385.

[8] Frank *v.* Ingalls, 41 Ohio St. 560.

[9] Towle *v.* Leavitt, 23 N. H. 360, 55 Am. Dec. 195.

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auction, a private sale is void and confers no title on the purchaser.[1]

§ 359. **Authority when to be executed.** An authority to sell the property upon a particular day specified confers no power to sell it upon a subsequent or different day;[2] neither is there any presumption that an authority to sell goods in a single instance continues for several years afterward.[3]

§ 360. **No Authority to rescind the Sale.** After the contract of sale made by the agent has become complete, the agent has no implied authority to rescind or discharge it, or to receive back the goods,[4] particularly where the sale has been fully executed.[5]

§ 361. **No Authority to mortgage.** Authority to an agent to sell personal property, implies no authority to mortgage it.[6]

§ 362. **Authority to fix Price and Terms of Sale.** An agent clothed with general power to sell personal property without restrictions, has implied authority to fix the price and to agree upon the terms of the sale.[7] The price so fixed, however, should not be less than the market price, if there be a market price, and in any event should not be less than a reasonable price.[8] And so as to the terms of the sale; they should be the usual terms, if there be any usage, and in any case the terms should be reasonable.[9]

The principal may lawfully prescribe the price and terms upon which the sale is to be made, and these regulations will be binding upon the agent,[10] and, if they have notice of them, upon third

[1] The G. H. Montague, 4 Blatch. (U. S. C. C.) 464.

[2] Bliss *v.* Clark, 16 Gray (Mass.) 60.

[3] Reed *v.* Baggott, 5 Ill. App. 257.

[4] Diversy *v.* Kellogg, 44 Ill. 114, 92 Am. Dec. 154; Stilwell *v.* Mutual Life Ins. Co., 72 N. Y. 385.

[5] Adrian *v.* Lane, 13 S. C. 183.

[6] Switzer *v.* Wilvers, 24 Kans. 384, 36 Am. Rep. 259.

[7] Daylight Burner Co. *v.* Odlin, 51 N. H. 56, 12 Am. Rep. 45; Putnam *v.* French, 53 Vt. 402, 38 Am. Rep. 682. As incident to the general authority to sell, the agent has "power to fix the terms of sale, including the time, place, and mode of delivery and the price of the goods, and the time and mode of payment, and to receive payment of the price, subject of course, to be controlled by proof of the mercantile usage in such trade or business." Daylight Burner Co. *v.* Odlin, *supra*.

[8] Bigelow *v.* Walker, 24 Vt. 149, 58 Am. Dec. 156.

[9] Putnam *v.* French, *supra*. Such an agent, it is there held, has apparent authority "to make terms of payment as to time and place, to the extent at least of what was customary and not extraordinary."

[10] See Wolf *v.* Lyster, 1 Hall (N.

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persons. Private instructions as to price and terms cannot, however, affect those who, with no notice of them, have dealt with the agent in good faith, relying upon an apparent general authority.[1] But such third persons must have exercised reasonable prudence, and if the price or terms fixed by the agent were so unusual or so unreasonable as to fairly put a prudent man upon his guard, they will not be protected.[2]

III.

OF AGENT AUTHORIZED TO PURCHASE.

§ 363. **May not buy on Credit, when furnished with Funds.** An agent authorized to purchase goods for his principal, and who is supplied with funds for that purpose, has no implied authority to bind his principal by a purchase on credit; and in such a case the principal will not be bound by a purchase on credit, although the goods come in fact to his use, unless he has knowledge of the fact and does something in ratification of it, or unless it be shown that it is the custom of the trade to buy on credit.[3] A mere authority to buy does not imply power to buy on credit.[4]

So authority to buy goods and pay for the same with funds furnished by the principal, does not authorize the agent to make advances of the money of his principal, nor to sell and guarantee the payment by the principal of unsettled accounts that have been received in satisfaction of such unauthorized advances.[5]

§ 364. **May buy on Credit when not supplied with Funds.** An agent, however, who is directed to purchase goods, but is not supplied with the necessary funds, has implied power to purchase such goods on the credit of his principal.[6] And it has been held that an agent who has general authority to buy and sell goods

Y.) 146; Steele v. Ellmaker, 11 Serg. & R. (Penn.) 86.

[1] Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195.

[2] See *ante*, § 239.

[3] Komorowski v. Krumdick, 56 Wis. 23; Jaques v. Todd, 3 Wend. (N. Y.) 83; Adams v. Boies, 24 Iowa, 96; Taber v. Cannon, 8 Metc. (Mass.) 456; Temple v. Pomroy, 4 Gray, (Mass.) 128; Sprague v. Gillett, 9 Metc. (Mass.) 91; Fraser v. McPherson, 3 Desau. (S. C.) 393; Parsons v. Armor, 3 Pet. (U. S.) 413, 1 Myers Fed. Dec. § 49.

[4] Berry v. Barnes, 23 Ark. 411.

[5] Bohart v. Oberne, 36 Kans 284.

[6] Sprague v. Gillett, 9 Metc. (Mass.) 91.

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for his principal, may buy on credit or for cash at his discretion.[1]

§ 365. **Has Power to agree upon Price and Terms of Purchase.** An agent invested with general authority to purchase goods for his principal has, in the absence of contrary limitations upon his authority, implied power to settle upon the usual incidents of the purchase. Thus he may agree upon the price and terms of payment; he may determine upon the time and method of delivery;[2] he may acknowledge the receipt of the goods and the amount of indebtedness therefor;[3] and may in general do those things, not inconsistent with his authority, which are proper and usual to do in such cases.

In this case, however, as in others, limitations may lawfully be imposed upon the agent's authority, which will be binding upon the agent, and upon third persons having knowledge or charged with notice of them.[4]

§ 366. **May not exceed Limits as to Quantity.** An agent commissioned to buy goods to a certain quantity, must confine his purchase within the limits given. And he has no more implied power to purchase a smaller than a greater quantity.[5] If no limits are fixed, a reasonable discretion may be exercised.

§ 367. **Must observe Limits as to Quality or Species.** An agent authorized generally to buy chattels without limitation as to kind or quality, may undoubtedly exercise a fair and reasonable discretion. But where he is expressly limited to the purchase of a specific thing, he cannot purchase another. And where he is instructed to buy goods only of a given quality or of a certain kind, he must observe the limits fixed.[6]

§ 368. **May be restricted as to Persons with whom to deal.** The principal may lawfully restrict the agent as to the persons with whom he shall deal in the execution of his authority, and where such restrictions are known, the principal cannot be bound by a purchase of other persons than those designated.[7]

[1] Ruffin v. Mebane, 6 Ired. (N. C.) Eq. 507.

[2] Owen v. Brockschmidt, 54 Mo. 285.

[3] Stothard v. Aull, 7 Mo. 318.

[4] Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96.

[5] Olyphant v. McNair, 41 Barb. (N. Y.) 446.

[6] See *ante*, § 288. Davies v. Lyon, 36 Minn. 427, 31 N. W. Rep. 688.

[7] Peckham v. Lyon, 4 McLean, (U. S. C. C.) 45, 1 Myers Fed. Dec. § 451.

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§ 369. **May make Representations as to Principal's Credit.** An agent expressly authorized to purchase goods upon his principal's credit, has implied authority to make the necessary representations as to the solvency and credit of his principal, without which the seller would not sell the goods.[1] This rule is based upon the principle that the agent has implied power to do those things which are necessary and usual to accomplish the object sought to be attained, and must, in reason, be limited by that necessity. Thus if the principal's credit is already established, or if the seller does not require a representation, the principal ought not to be bound by the mere voluntary and gratuitous representations of his agent, nor in any event, for excessive or unusual pledges of responsibility. He cannot pledge his principal's credit for his own personal benefit.[2]

§ 370. **May not execute negotiable Paper.** Authority to bind his principal by a note or bill for the price of the goods bought is not implied from mere authority to purchase. Such an agent, therefore, has no authority to bind his principal by a promissory note or bill of exchange, unless that authority be expressly given,[3] or unless the giving of such note or bill is indispensable to the discharge of the duties to be performed.[4]

IV.

OF AGENT AUTHORIZED TO RECEIVE PAYMENT.

§ 371. **What constitutes such Authority.** Authority to collect or receive payment of a demand may, of course, be conferred in express terms and with more or less of discretionary and incidental power. When such is the case, the rules heretofore laid down are sufficient to determine its construction.

But such power may also be implied from circumstances, and some instances of this nature will illustrate the extent of such implication.

§ 372. **When implied from negotiating the Contract.** And in the first place it may be noticed that the mere fact that the agent

[1] Hunter *v.* Hudson River Co. 20 Barb. (N. Y.) 493.

[2] Stephenson *v.* Grim, 100 Penn. St. 70.

[3] Taber *v.* Cannon, 8 Metc. (Mass.) 456; Webber *v.* Williams College, 23 Pick. (Mass.) 302.

[4] Temple *v.* Pomroy, 4 Gray (Mass.) 128; Bickford *v.* Menier, 107 N. Y. 490.

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was employed to make or negotiate the contract will not, as of course, confer upon him the incidental authority to receive a payment which may become due upon such contract.[1]

§ 373. **When implied from Possession of the Securities.** Authority to receive payment on securities may often be implied from their possession by the agent. Thus where a loan upon a note, or bond and mortgage has been negotiated for the principal through an agent, and the security is left in the agent's possession and control, authority to make payments thereon to the agent, may, in the absence of directions to pay it elsewhere, be implied.[2] But the presumption in these cases is founded upon the agent's possession of the securities, and it ceases when the securities are withdrawn by the creditor; [3] and it is incumbent upon the debtor to assure himself on each occasion when a payment is made that they still continue in the agent's possession, or the payment will not bind the principal, unless his conduct has been such as to estop him to deny the agency.[4]

But authority to receive payment of a note payable to the order of the principal and not endorsed by him, cannot be presumed from the mere possession by the assumed agent.[5]

This rule does not conflict with that already noticed [6] that the mere possession of the bill or statement of an account, though made upon the principal's bill-head and in his handwriting, does not imply authority to receive payment of it. Securities for the payment of money stand obviously upon other ground.

§ 374. **When implied from having sold the Goods.** The presumption as to the authority to receive payment arising from the fact that the agent sold the goods for which the demand is due,

[1] Thompson v. Elliott, 73 Ill. 221; Smith v. Hall, 19 Ill. App. 17; Cooley v. Willard, 34 Ill. 68, 85 Am. Dec. 296.

[2] Haines v. Pohlmann, 25 N. J. Eq. 179; Williams v. Walker, 2 Sandf. (N. Y.) Ch. 325; Hatfield v. Reynolds, 34 Barb. (N. Y.) 612; Van Keuren v. Corkins, 4 Hun (N. Y.) 129.

[3] Guilford v. Stacer, 53 Ga. 618; Megary v. Funtis, 5 Sandf. Sup. Ct. (N. Y.) 376; Brown v. Blydenburgh, 7 N. Y. 141; Cooley v. Willard, 34 Ill. 68, 85 Am. Dec. 296.

[4] Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157; Brown v. Blydenburgh, 7 N. Y. 141; Kellogg v. Smith, 26 N. Y. 18; Purdy v. Huntington, 42 N. Y. 339; Williams v. Walker, *supra;* Hatfield v. Reynolds, *supra;* VanKeuren v. Corkins, *supra;* Megary v. Funtis, *supra;* Haines v. Pohlmann, *supra;* Cooley v. Willard, *supra;* Brewster v. Carnes, 103 N. Y. 556, 9 North E. Rep. 323.

[5] Doubleday v. Kress, 50 N. Y. 410, 10 Am. Rep. 502.

[6] See *ante*, § 337.

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has been considered in treating of the implied powers of an agent authorized to sell goods.[1]

§ 375. **Can receive nothing but Money.** An agent authorized merely to collect a demand or to receive payment of a debt, cannot bind his principal by any arrangement short of an actual collection and receipt of the money.[2] He cannot, therefore, take in payment the note of the debtor payable either to himself [3] or to his principal;[4] or the note or bond of himself,[5] or of a third person;[6] or a draft or order on a stranger,[7] or horses, wheat, merchandise or other property of any kind;[8] nor can he set off a claim due from himself;[9] or take property for his own use in payment.[10]

[1] See *ante*, §§ 338, et seq.

[2] Robinson v. Anderson, 106 Ind. 152; McCormick v. Wood, &c., Co., 72 Ind. 518; O'Conner v. Arnold, 53 Ind. 203; Ward v. Smith, 7 Wall. (U. S.) 451; Waterhouse v. Citizens' Bank, 25 La. Ann. 77; Rodgers v. Bass, 46 Tex. 505; Padfield v. Green, 85 Ill. 529; Woodbury v. Larned, 5 Minn. 339; McCulloch v. McKee, 16 Penn. St. 289; Aultman v. Lee, 43 Iowa, 404; Graydon v. Patterson, 13 Iowa, 256; McCarver v. Nealey, 1 G. Greene (Iowa) 360; Kirk v. Hiatt, 2 Ind. 322; Corning v. Strong, 1 Ind. 329; Bridges v. Garrett, L. R. 5 C. P. 454; Ward v. Evans, 2 Ld. Raym. 928; Powell v. Henry, 27 Ala. 612; Taylor v. Robinson, 14 Cal. 396; Mathews v. Hamilton, 23 Ill. 470; Robson v. Watts, 11 Tex. 764; British & Amer. Mtg. Co. v. Tibballs, 63 Iowa, 468; Pitkin v. Harris, — Mich. —, 13 West. Rep. 719.

[3] Corning v. Strong, 1 Ind. 329; McCulloch v. McKee, 16 Penn. St. 289; Robinson v. Anderson, 106 Ind. 152.

[4] Miller v. Edmonston, 8 Blackf. (Ind.) 291.

[5] McCarver v. Nealey, *supra*.

[6] Langdon v. Potter, 13 Mass. 319; Wilkinson v. Holloway, 7 Leigh (Va.) 277; Smock v. Dade, 5 Rand. (Va.) 639; Smith v. Lamberts, 7 Gratt. (Va.) 138; Wiley v. Mahood, 10 W. Va. 206.

[7] McCarver v. Nealey, 1 G. Greene, (Iowa) 360; Drain v. Doggett, 41 Iowa, 682; Goldsborough v. Turner, 67 N. C. 403.

[8] Rhine v. Blake, 59 Tex. 240; Wright v. Daily, 26 Tex. 730; Kent v. Ricards, 3 Md. Ch. 392; Harper v. Harvey, 4 W. Va. 539; Kirk v. Hiatt, 2 Ind. 322; Aultman v. Lee, 43 Iowa, 404; Martin v. United States, 2 T. B. Monr. (Ky.) 89, 15 Am. Dec. 129; Reynolds v. Ferree, 86 Ill. 570; Williams v. Johnston, 92 N. C. 532, 53 Am. Rep. 428; Pitkin v. Harris, — Mich. —, 13 West Rep. 719.

[9] Whitney v. State Bank, 7 Wis. 620; Butts v. Newton, 29 Wis. 632; Stewart v. Woodward, 50 Vt. 78, 28 Am. Rep. 488; Rodick v. Coburn, 68 Me. 170; Greenwood v. Burns, 50 Mo. 52; McCormick v. Keith, 8 Neb. 143; Irwin v. Workman, 3 Watts, (Penn.) 357; Coffman v. Hampton, 2 Watts & Serg. (Penn.) 377; Bridges v. Garrett, L. R., 5 C. P. 454; Sykes v. Giles, 5 M. &. W. 645; Scott v. Irving, 1 B. & Ad. 605; Catterall v. Hindle, L. P. 1 C. P. 187; Hurley v. Watson, — Mich. —, 13 West. Rep. 543.

[10] Williams v. Johnston, 92 N. C. 532, 53 Am. Rep. 428.

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Where, however, the agent was a bank of deposit, it was held, while recognizing the general rule, that it might receive in payment one of its own certificates of deposit.[1]

And so, it has been held, that an agent authorized to negotiate a note might accept in place of money a certificate of deposit payable on demand, issued by a solvent bank.[2]

§ 376. **No Authority to release or compromise the Debt.** It follows, as a corollary of the rule above referred to, that an agent authorized merely to collect or receive payment, has no implied power to release the debt, in whole or in part, or to compromise the claim, without payment;[3] nor can he discharge the debtor and assume the debt himself.[4]

§ 377. **May receive part Payment.** But authority to collect or receive payment of the whole of a demand implies power to collect or receive a part payment to apply upon it.[5]

§ 378. **But may not extend Time.** But although he is thus authorized to receive payment in part, he cannot upon such payment, or in consideration of it, extend the time of payment of the balance.[6] Nor can he extend the time without express authority in any case.[7]

§ 379. **Authority to receive Interest does not authorize Receipt of Principal.** The payee of a promissory note, payable to her order, delivered it, unindorsed, to an agent with authority to receive the interest thereon, and to take a new note in renewal with an indorser. The maker paid the principal and interest to the agent who embezzled the principal. It was held that the payment of the principal was unauthorized and did not discharge the liability of the maker to the payee.[8]

[1] British, &c., Mortgage Co. v. Tibbals, 63 Iowa, 468.

[2] Poorman v. Woodward, 21 How. (U. S.) 266, 1 Myers Fed. Dec. § 61.

[3] Herring v. Hottendorf, 74 N. C. 588; McHany v. Schenck, 88 Ill. 357; Melvin v. Lamar Ins. Co. 80 Ill. 446; Baird v. Randall, 58 Mich. 175; Nolan v. Jackson, 16 Ill. 272; Whittington v. Ross, 8 Ill. App. 289.

[4] Miles v. Richwine, 2 Rawle (Penn.) 199, 19 Am. Dec. 638; Chambers v. Miller, 7 Watts (Penn.) 63; Cooney v. Wade, 4 Humph. (Tenn.) 444, 40 Am. Dec. 657.

[5] Whelan v. Reilly, 61 Mo. 565.

[6] Hutchings v. Munger, 41 N. Y. 155; Ritch v. Smith, 82 N. Y. 627; Gerrish v. Maher, 70 Ill. 470.

[7] Chappell v. Raymond, 20 La. Ann. 277; Lockhart v. Wyatt, 10 Ala. 231, 44 Am. Dec. 481.

[8] Doubleday v. Kress, 50 N. Y. 410, 10 Am. Rep. 502; to same effect

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§ 380. **Not authorized to receive before due.** And even though an agent have authority to receive payment of an obligation, this does not authorize him to receive it before it is due,[1] in the absence of a known usage of trade or course of business in a particular employment, or habit of dealing between the parties, extending the ordinary reach of the authority.[2]

§ 381. **No Authority to take Checks.** Being authorized to receive nothing but money, the agent had no implied power to accept checks.[3] Of course if the check is paid it is a good payment,[4] but if the drawee fails to pay, the agent is liable for a loss resulting.[5]

§ 382. **If authorized to take Check or Note, has no Authority to indorse and collect it.** But even if authorized to accept checks in payment of the demand, the agent has no implied authority to indorse them and collect the money thereon, and the bank paying the check so indorsed is still liable to the principal for the amount thereof.[6]

So an agent authorized to accept a note in settlement of a debt has no implied power, after delivering it to his principal, to receive payment of the note.[7]

§ 383. **Authority to collect does not authorize Sale.** Authority to an agent to collect or receive payment of a note or other demand, does not imply power to sell, transfer, or otherwise dispose of it.[8] Nor will authority to an agent to accept a note in

Smith *v.* Kidd, 68 N. Y. 130, 23 Am. Rep. 157; Brewster *v.* Carnes, 103 N. Y. 556, 9 North E. Rep. 323.

[1] Smith *v.* Kidd, 68 N. Y. 130, 23 Am. Rep. 157; Doubleday *v.* Kress, 50 N. Y. 410, 10 Am. Rep. 502; Fellows *v.* Northrup, 39 N. Y. 121; Campbell *v.* Hassel, 1 Stark, 233; Parnther *v.* Gaitskell, 13 East, 437. But see Bliss *v.* Cutter, 19 Barb. (N. Y.) 9.

[2] Thompson *v.* Elliott, 73 Ill. 221; Smith *v.* Hall, 19 Ill. App. 17.

[3] Hall *v.* Storrs, 7 Wis. 253.

[4] Bridges *v.* Garrett, L. R., 5 C. P. 454.

[5] Harlan *v.* Ely, 68 Cal. 522.

[6] Graham *v.* United States Saving Inst. 46 Mo. 186; Thompson *v.* Bank, 82 N. Y. 1; Robinson *v.* Chemical Bank, 86 N. Y. 404; Millard *v.* Republic Bank, 3 McArthur (D. C.) 54; McClure *v.* Evartson, 14 Lea (Tenn.) 495; Holtsinger *v.* National, &c. Bank, 6 Abb. (N. Y.) Pr. (N. S.) 292; Hogg *v.* Smith, 1 Taunt. 347.

[7] Draper *v.* Rice, 56 Iowa, 114, 41 Am. Rep. 88.

[8] Smith *v.* Johnson, 71 Mo. 382; Texada *v.* Beaman, 6 La. 84, 25 Am. Dec. 204; Hardesty *v.* Newby, 28 Mo. 567, 75 Am. Dec. 137; Quigley *v.* Mexico Southern Bank, 80 Mo. 289, 50 Am. Rep. 503.

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settlement of a demand, imply power in the agent to afterward sell the note so taken.[1]

§ 384. **No Authority to deal with Funds collected.** An agent authorized to collect and transmit funds to his principal, has no implied authority to enter into any contract concerning the money in his hands or to exchange it for other money with third persons. Such conduct may be treated by the principal as a conversion of the funds.[2]

§ 385. **May give Receipt or Discharge.** An agent authorized to collect has implied authority to give to the debtor upon payment such a receipt or discharge as the payment entitles him to receive. Thus if the debt be evidenced by a note or other security the agent, upon payment, may deliver the security to the debtor.[3]

§ 386. **Implies Authority to sue—When.** While mere authority to demand or receive payment of a debt would not imply authority to sue for it, yet as every endowment of power carries with it implied authority to do those things which are usual and necessary to accomplish the object sought to be attained, an agent having general instructions to collect may, if it becomes necessary, sue upon the claim, cause execution to issue and direct the seizure of property.[4] He has however no implied authority to instruct the sheriff to levy upon any particular property.[5]

Where the principal is a non-resident, an attorney instructed to sue upon a claim, has implied power, when necessary, to indemnify the sheriff against the results of the seizure,[6] as otherwise the attorney would not be able to accomplish his undertaking.

For the same reason, if the exigencies of the case demand

[1] Ames *v.* Drew, 31 N. H. 475.

[2] Darling *v.* Younker, 37 Ohio St. 487, 41 Am. Rep. 532; Kent *v.* Bornstein, 12 Allen (Mass.) 342; Greenwald *v.* Metcalf, 28 Iowa, 363.

[3] Padfield *v.* Green, 85 Ill 529.

[4] Joyce *v.* Duplessis, 15 La. Ann. 242, 77 Am. Dec. 185; McMinn *v.* Richtmyer, 3 Hill (N. Y.) 236; Bush *v.* Miller, 13 Barb. (N. Y.) 481; Scott *v.* Elmendorf, 12 Johns. (N. Y.) 317; Hirshfield *v.* Landman, 8 E. D. Smith (N. Y.) 208.

[5] Averill *v.* Williams, 4 Den. (N. Y.) 295, 47 Am. Dec. 252; Welsh *v.* Cochran, 63 N. Y. 185; Oestrich *v.* Gilbert, 9 Hun (N. Y.) 244.

[6] Clark *v.* Randall, 9 Wis. 135, 76 Am. Dec. 252; Schoregge *v.* Gordon, 29 Minn. 367; but he has no authority to indemnify after the levy and sale have been made. Snow *v.* Hix, 54 Vt. 478.

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immediate action, he may make the necessary affidavit, cause the issue of a writ of attachment, and execute in his principal's name the statutory bond therefor.[1] But an attorney has not necessarily the authority to indemnify the surety upon an injunction bond,[2] nor, it has been held, to execute a replevin bond in the name of his principal.[3]

§ 387. **May sue in his own Name—When.** An agent authorized to collect a negotiable note or bill payable to bearer,[4] or indorsed in blank[5] for the purpose of collection, may sue thereon in his own name. Not so, however, if the note be payable to order and is not indorsed.[6]

Such an endorsement and delivery for the purpose of collection passes the legal title in trust; and the trust is not terminated by the principal's death.[7]

§ 388. **May employ Counsel.** Authority to collect not only implies authority to bring suit, but where suit is necessary, the agent may employ appropriate counsel to conduct it.[8]

V.

OF AGENT AUTHORIZED TO MAKE AND INDORSE NEGOTIABLE PAPER.

§ 389. **What constitutes such Authority.** The power to bind the principal by the making or indorsing of negotiable paper is an important one, not lightly to be inferred. Said a learned judge: "The power of binding by promissory negotiable notes, can be conferred only by the direct authority of the party to be bound, with the single exception where, by necessary implication, the duties to be performed cannot be discharged without the exercise of such a power. To facilitate the business of note

[1] DePoret *v.* Gusman, 30 La. Ann. Part II, 930; Fulton *v.* Brown, 10 La. Ann. 350; Trowbridge *v.* Weir, 6 *Id.* 706; Alexander *v.* Burns, *Id.* 704.

[2] White *v.* Davidson, 8 Md. 169, 63 Am. Dec. 699.

[3] Narraguagus Land Proprietors *v.* Wentworth, 36 Me. 339. See generally the Chapter on Attorneys at Law.

[4] Hotchkiss *v.* Thompson, 1 Morris (Iowa) 156.

[5] Orr *v.* Lacey, 4 McLean (U. S. C. C.) 243; Brigham *v.* Gurney, 1 Mich. 348; Boyd *v.* Corbitt, 37 Mich. 52; Hazewell *v.* Coursen, 45 N. Y. Super. Ct. 22; Moore *v.* Hall, 48 Mich, 143.

[6] Padfield *v.* Green, 85 Ill. 529.

[7] Moore *v.* Hall, *supra.*

[8] Ryan *v.* Tudor, 31 Kans. 366; Davis *v.* Waterman, 10 Vt. 526, 33 Am. Dec. 216.

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making and thus affect the interest and estates of third persons to an indefinite amount, is not within the object and intent of the law regulating the common duties of principal and agent; neither is the power to be implied because occasionally an instance occurs in which a note so made should in equity be paid." [1]

§ 390. **Same Subject—Authority strictly construed.** Such a power will be strictly construed, and the authority will be held to be conferred only in those cases where it is clearly given, or where it is a manifestly necessary and customary incident of the character bestowed upon the agent.[2]

§ 391. **When Authority implied.** As has been seen, general words made use of in conferring authority must be limited to the legitimate scope of the business in the transaction of which it is to be exercised, and authority to bind the principal by negotiable paper will only be implied where it is practically indispensable to accomplish the object.[3]

Thus an authority to an agent "to accomplish a complete adjustment" of all the principal's concerns in a certain State does not authorize him to bind the principal by a promissory note;[4] nor will authority given by a farmer to his agent to sign his name in the general transaction of his business, confer power upon the agent to sign the principal's name to a note;[5] nor will authority to settle a controversy of itself imply power to bind the principal by a note given in settlement.[6]

So an agent authorized to attend to and manage a grocery and provision store;[7] an agent employed in the manufacture of carriages;[8] a mere clerk employed in a merchant's store;[9] an agent

[1] HUBBARD, J. in Paige *v.* Stone, 10 Metc. (Mass.) 160, 43 Am. Dec. 420.

[2] Turner *v.* Keller, 66 N. Y. 66; Craighead *v.* Paterson, 72 N. Y. 279; 28 Am. Rep. 150; Brantley *v.* Southern Life Ins. Co. 53 Ala. 554; Hills *v.* Upton, 24 La. Ann. 427; Webber *v.* Williams College, 23 Pick. (Mass.) 302; Stainback *v.* Read, 11 Gratt. (Va.) 281, 62 Am. Dec. 648; Rossiter *v.* Rossiter, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; Avery *v.* Lauve, 1 La. Ann. 457; Nugent *v.* Hickey, 2 *Id.* 358; Duconge *v.* Forgay, 15 *Id.* 37.

[3] Bickford *v.* Menier, 107 N. Y. 390.

[4] Rossiter *v.* Rossiter, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62.

[5] Brantley *v.* Southern Life Ins. Co. 53 Ala. 554.

[6] Hills *v.* Upton, 24 La. Ann. 427.

[7] Smith *v.* Gibson, 6 Blackf. (Ind.) 369; Terry *v.* Fargo, 10 Johns. (N. Y.) 114; Perkins *v.* Boothby, 71 Me. 91.

[8] Paige *v.* Stone, 10 Metc. (Mass.) 160, 43 Am. Dec. 420.

[9] Kerns *v.* Piper, 4 Watts (Penn.) 222; Terry *v.* Fargo, *supra*.

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authorized to manage his principal's farm;[1] an agent authorized to superintend his principal's mine;[2] and an agent employed generally to manage his principal's business;[3] has no implied power to bind his principal by the execution of negotiable paper.

An agent authorized to buy goods and pay for them, is not thereby authorized to give his principal's note, or to accept a bill of exchange drawn for the amount.[4]

But authority to discount bills confers power to indorse the same when necessary to accomplish the purpose.[5]

§ 392. **Must be confined to Principal's Business.** Authority to make or indorse negotiable paper will be confined to the making or indorsing of such paper in the legitimate business of the principal or for his benefit. Such an agent cannot, therefore, bind his principal by making or indorsing notes for his own benefit or the benefit of third persons.[6]

§ 393. **Execution must be confined to Limits specified.** Parties dealing with an agent assuming to be authorized to draw, accept, or indorse negotiable paper, must see to it that his authority is adequate, and both they and the agent must keep

[1] Davidson *v.* Stanley, 2 M. & G. 721.

[2] New York Iron Mine *v.* Negaunee Bank, 39 Mich. 644; McCullough *v.* Moss, 5 Den. (N. Y.) 567; Sewanee Mining Co. *v.* McCall, 3 Head (Tenn.) 619.

[3] Perkins *v.* Boothby, *supra;* New York Iron Mine *v.* Negaunee Bank, *supra.*

[4] Brown *v.* Parker, 7 Allen (Mass.) 339; Taber *v.* Cannon, 8 Metc. (Mass.) 456; Webber *v.* Williams College, 23 Pick. (Mass.) 302; Gould *v.* Norfolk Lead Co. 9 Cush. (Mass.) 338; Emerson *v.* Providence Mnfg. Co. 12 Mass. 237, 7 Am. Dec. 66.

[5] Merchants' Bank *v.* Central Bank, 1 Ga. 418, 44 Am. Dec. 665.

[6] North River Bank *v.* Aymer, 3 Hill (N. Y.) 262; Stainer *v.* Tysen, *Id.* 279; Stainback *v.* Read, 11 Gratt. (Va.) 281, 62 Am. Dec. 648; Camden Safe Dep. Co. *v.* Abbott, 44 N. J. L. 257; Duncan *v.* Gilbert, 29 *Id.* 521; Hamilton *v.* Vought, 34 *Id.* 187; Gulick *v.* Grover, 33 *Id.* 463; Bird *v.* Daggett, 97 Mass. 494; Wallace *v.* Branch Bank, 1 Ala. 565; Brantley *v.* Southern Life Ins. Co., 53 Ala. 554; Citizens' Savings Bank *v.* Hart, 32 La. Ann. 22; Odiorne *v.* Maxcy, 13 Mass. 178. Even if authorized to indorse, he cannot indorse to himself. Englehart *v.* Peoria Plow Co. 21 Neb. 41, 31 N. W. Rep. 391. A power of attorney to execute, sign, draw and endorse in the name of the principal, will not imply authority to use the principal's name in joint transactions with other persons and for their benefit. Mechanics' Bank *v.* Shaumburg, 38 Mo. 228. An agent authorized to sign his principal's name to "any paper" is not justified in signing paper outside of the principal's business. Camden Safe Deposit Co. *v.* Abbott, *supra.*

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strictly within the limits fixed to the agent's authority or the principal will not be bound. Thus authority to draw and discount a note for a given purpose, implies no power to draw and discount one for another and different purpose;[1] authority to bind the principal for a given sum will not authorize the binding for a greater sum;[2] authority to make deposits, draw, sign and indorse notes, checks and bills of exchange, in the course of business with a particular bank, will not imply power to bind the principal by giving notes for borrowed money executed in a business in which the principal never engaged, and with other persons than the bank;[3] authority to do all things at a particular bank, which the principal could do if present, will not authorize the agent to draw money of his principal from another bank where the principal has an account;[4] authority to draw checks and notes payable at any bank where the principal has an account, will not justify making a note payable at a bank where the principal has no account;[5] authority to draw on a principal's funds will not empower the agent to draw upon the principal's credit;[6] authority to draw checks on a bank for property purchased by the agent, implies no power to borrow money;[7] authority to execute notes gives no power to renew them;[8] authority to make a note for a given time will not authorize the making of a note payable in a different time,[9] unless from the circumstances it is evident that the principal did not intend to fix an exact limit and the variance be not great;[10] authority to issue bonds does not authorize the issuing of notes;[11] authority to draw a bill does not of itself imply power to indorse,[12] or to accept one;[13] nor does authority

[1] Callender v. Golsan, 27 La. Ann. 311; Nixon v. Palmer, 8 N. Y. 398; Hortons v. Townes, 6 Leigh (Va.) 59.

[2] Blackwell v. Ketcham, 53 Ind. 184; King v. Sparks, 77 Ga. 285, 4 Am. St. Rep. 85; Batty v. Carswell, 2 Johns. (N. Y.) 48.

[3] Citizens' Savings Bank v. Hart, 32 La. Ann. 22.

[4] Sims v. United States Trust Co. —N. Y.—, 9 N. E. Rep. 605.

[5] Craighead v. Peterson, 72 N. Y. 279, 28 Am. Rep. 150.

[6] Breed v. First Nat. Bank, 4 Colo. 481.

[7] Mordhurst v. Boies, 24 Iowa, 99.

[8] Ward v. Bank of Kentucky, 7 T. B. Mon. (Ky.) 93.

[9] Batty v. Carswell, 2 Johns. (N. Y.) 48; Tate v. Evans, 7 Mo. 419.

[10] Adams v. Flanagan, 36 Vt. 400; Bank v. McWillie, 4 McCord, (S. C.) 438.

[11] School Directors v. Sippy, 54 Ill. 287; Bank of Deer Lodge v. Hope Mining Co., 3 Montana, 146, 35 Am. Rep. 458.

[12] Robinson v. Yarrow, 7 Taunt, 455; Murray v. East India Co., 5 B. & Ald. 204.

[13] Atwood v. Munnings, 7 B. & C.

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to indorse empower the agent to accept a bill, or make a joint and several note;[1] authority to draw bills of exchange payable on time or at sight does not imply authority to draw post-dated bills;[2] authority to execute a note does not of itself imply authority to pay it when due, or to receive demand of payment;[3] or to receive notice of dishonor;[4] and authority to draw on A at Portland, or B at New York, does not authorize the agent to draw on A payable at New York.[5]

Authority to sign the principal's name to promissory notes will be limited to notes drawn in the usual form, and will not authorize the execution of a note containing a provision that if not paid at maturity, an additional sum of ten per cent. would be paid.[6] Authority to an agent to draw a bill in the principal's name will not authorize a bill drawn in the joint names of the principal and the agent; nor will authority to draw a bill, authorize an agent to contract to indemnify the acceptor against the consequences of his acceptance;[7] nor will joint authority from several persons to indorse a bill in their names jointly, authorize several and successive indorsements.[8] Nor will authority to sign as surety authorize the signing as principal.[9] Authority to draw checks upon a certain bank will not justify the agent in overdrawing his principal's account.[10]

§ 394. **Negotiable Paper or Deeds delivered to Agent in Blank.** A principal who delivers to his agent negotiable paper executed in blank, to be filled out by the agent according to certain instructions, will be liable upon the paper as the agent may fill it out, to one who takes it in good faith, for value and without notice, although the agent may have violated his instructions.[11]

278: Sewanee Mining Co. *v.* McCall, 8 Head (Tenn.) 621; Bank *v.* Hope Min. Co. *supra*.

[1] Cuyler *v.* Merrifield, 5 Hun (N. Y.) 559.

[2] New York Iron Mine *v.* Citizens' Bank, 44 Mich. 344; Forster *v.* Macreth, L. R., 2 Exch. 163.

[3] Luning *v.* Wise, 64 Cal. 410.

[4] Bank of Mobile *v.* King, 9 Ala. 279.

[5] Lanusse *v.* Barker, 3 Wheat (U. S.) 101.

[6] First National Bank *v.* Gay, 63 Mo. 33, 21 Am. Rep. 430.

[7] Stainback *v.* Read, 11 Gratt. (Va.) 281, 62 Am. Dec. 648.

[8] Bank of United States *v.* Beirne, 1 Gratt. (Va.) 234. 42 Am. Dec. 551.

[9] Farmington Savings Bank *v.* Buzzell, 61 N. H. 612.

[10] Union Bank *v.* Mott, 39 Barb. (N. Y.) 180.

[11] Davis *v.* Lee, 26 Miss. 505, 59 Am. Dec. 267; Johnson *v.* Blasdale, 1 Smedes & M. (Miss.) 20, 40 Am. Dec.

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But if the third person had notice of the instructions or if he does not take the paper for value, he will not be protected.[1] Whether mere knowledge that the paper was delivered to the agent in blank is enough to put third persons upon inquiry as to his instructions, is a question upon which the authorities differ, but the better opinion seems to be that it is not.[2]

And the same general principle applies to deeds which have been delivered in blank to an agent with authority to fill the blanks. "Although there is some conflict in the decisions" says LAKE, C. J. in a recent case, "the current of the more modern of them plainly is to the effect that if the owner of land delivers to his agent a deed thereof executed in blank as to the grantee, with authority, either express or implied, to insert the name of a purchaser and perfect the conveyance, and he does so in good faith, the title will be conveyed.[3] And it follows from this that if the agent with such authority makes a fraudulent use of the deed entrusted to him, as by inserting the name of a grantee and delivering it to him without consideration, and for his own benefit, such grantee can convey a good title to an innocent purchaser."[4]

85; Putnam v. Sullivan, 4 Mass. 45, 3 Am. Dec. 206; Roberts v. Adams, 8 Port. (Ala.) 297, 33 Am. Dec. 291; Hall v. Bank of Commonwealth, 5 Dana (Ky.) 258, 30 Am. Dec. 685; Holland v. Hatch, 11 Ind. 497, 71 Am. Dec. 363; Gillaspie v. Kelley, 41 Ind. 161; Blackwell v. Ketcham, 53 Ind. 186; Snyder v. Van Doren, 46 Wis. 610; Bank of Pittsburgh v. Neal, 22 How. (U. S.) 107.

[1] Davidson v. Lanier, 4 Wall. (U. S.) 456; Johnson v. Blasdale, *supra*. Where the note bears evidence on its face that it is being delivered contrary to directions, it cannot be enforced by person to whom it is so delivered. Mills v. Williams, 16 S. C. 593.

[2] See Daniel Neg. Inst. § 147.

[3] Citing Drury v. Foster, 2 Wall. (U. S.) 24; Van Etta v. Evenson, 28 Wis. 33, 9 Am. Rep. 486; Schintz v. McManamy, 33 Wis. 299; Field v. Stagg, 52 Mo. 534, 14 Am. Rep. 435; Swartz v. Ballou, 47 Iowa, 188, 29 Am. Rep. 470. To same effect see also Phelps v. Sullivan, 140 Mass. 36, 54 Am. Rep. 442; Campbell v. Smith, 71 N. Y. 26, 27 Am. Rep. 5; Vose v. Dolan, 108 Mass. 155, 11 Am. Rep. 331.

Contra, Upton v. Archer, 41 Cal. 85, 10 Am. Rep. 266; Preston v. Hull, 23 Gratt. (Va.) 600, 14 Am. Rep. 153; Williams v. Crutcher, 5 How. (Miss.) 71, 35 Am. Dec. 422; Davenport v. Sleight, 2 Dev. & Bat. L. (N. C.) 381, 31 Am. Dec. 420; Bland v. O'Hagan, 64 N. C. 472.

[4] In Garland v. Wells, 15 Neb. 298.

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VI.

OF AGENT AUTHORIZED TO MANAGE BUSINESS.

§ 395. **Extent of Authority depends on Nature of Business.** The extent of the implied or incidental power of an agent who has general authority to manage his principal's business, must be dependent largely upon the nature of the business and the degree to which it is placed under the agent's control. Thus it is obvious that the implied powers of the general manager of a great continental insurance company, while they might be of the same kind, would differ greatly in degree from those of a clerk in an inland store who is given general control of the business during his principal's absence.

In general terms it may be said that such an agent has implied power to do those things which are necessary and proper to be done in carrying out the business in its usual and accustomed way, and which the principal could and would usually do in like cases if present.[1]

§ 396. **When Power implied to pledge Principal's Credit.** An agent employed to manage his principal's store has implied authority, for the keeping up of the stock, to make reasonable and proper purchases of goods upon his principal's account on such terms as to credit and time of payment as are customary in the sale of such goods in like cases.[2] So an agent authorized to take charge of and manage his principal's hotel and to purchase the necessary supplies, may buy suitable and appropriate goods for use in the hotel upon his principal's credit;[3] but he has no implied power to bind his principal for the safe keeping and return of carriages furnished by a livery-stable keeper for use by guests of the hotel.[4] So though an agent authorized to manage a plantation would have implied power to purchase, on his principal's account, the necessary supplies therefor,[5] he would have no such authority to pledge the credit of his principal for supplies furnished to the "hands" engaged upon the

[1] German Fire Ins. Co. v. Grunert, 112 Ill. 68.

[2] Banner Tobacco Co. v. Jenison, 48 Mich. 459; Schmidt v. Sandel, 30 La. Ann. 353.

[3] Beecher v. Venn, 35 Mich. 466; Cummings v. Sargent, 9 Metc. (Mass.) 172.

[4] Brockway v. Mullin, 46 N. J. L. 448, 50 Am. Rep. 442.

[5] But see Meyer v. Baldwin, 52 Miss. 263.

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plantation.[1] Where it is customary in the business for the employer to board the workmen employed, such an agent may lawfully contract in his principal's name for the board of the men employed by him.[2]

The general manager of a mining company has implied power to buy and sell personal property for use about the premises,[3] but such an agent has no implied power to bind his principal for debts of a third person;[4] nor has an agent authorized to carry on his principal's farm any implied power to permit a creditor to cut, remove and sell on execution, grass growing on the farm.[5]

A railway station agent authorized to receive and forward freight has implied authority to contract to furnish a certain number of cattle cars at his station on a specified day, the shipper being ignorant of any limitation upon his powers;[6] but such an agent[7] or a yardmaster[8] or a conductor[9] has no implied authority to bind the company by the employment of a physician or surgeon to attend one of the men, employed under him in the service of the company, who had been injured.

Upon the question of the authority of a general superintendent of a railroad company to employ such a physician, the Supreme Court of Michigan was evenly divided.[10] As to the authority of the president in such cases, see cases cited in the note.[11]

A surgeon employed by a railroad company to attend upon persons injured by an accident, has no implied authority to bind the company by a promise to pay for meals and services

[1] Carter v. Burnham, 31 Ark. 212.

[2] Burley v. Kitchell, 20 N. J. L. 305.

[3] Scudder v. Anderson, 54 Mich. 122.

[4] Ruppe v. Edwards, 52 Mich. 411; New York Iron Mine v. Negaunee Bank, 39 Mich. 644; Clayton v. Martin, 31 Ark. 217; Meyer v. Baldwin, *supra*.

[5] Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384.

[6] Harrison v. Missouri Pacific Ry Co. 74 Mo. 364, 41 Am. Rep. 318.

[7] Tucker v. St. Louis, &c. Ry Co., 54 Mo. 177. But such an employment will be deemed to be ratified where the superintendent knows of the employment and does not object, but promises to pay the physician. Cairo, &c. Ry Co. v. Mahoney, 82 Ill. 73, 25 Am. Rep. 299.

[8] Marquette & Ontonagon R. R. Co. v. Taft, 28 Mich. 289.

[9] Tucker v. St. Louis, &c. Ry Co., *supra*. The conductor of a freight train may employ a person to take the place of a sick brakeman. Georgia Pac. R. Co. v. Probst, — Ala. —, 4 South Rep. 711.

[10] Marquette & Ontonagon R. R. Co. v. Taft, *supra*.

[11] Canney v. Railroad Co. 63 Cal. 501; Trenor v. Railroad Co. 50 Cal. 222.

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furnished to those who were in attendance upon a party injured.[1]

§ 397. **Implied Power to sell Product of Business.** An agent authorized to manage his principal's plantation may sell the product of it and collect the money therefor;[2] but he has no implied power to agree to exchange such product for that of another plantation.[3] An agent having general authority to manage the business of a lumber company may not only employ the necessary workmen, but he may, if it become necessary, make a sale of lumber to pay them.[4]

§ 398. **None to bind by negotiable Instrument.** An agent having general authority to manage his principal's business, has, by virtue of his employment, no implied authority to bind his principal by making, accepting or indorsing negotiable paper. Such an authority must be expressly conferred or be necessarily implied from the peculiar circumstances of each particular case. It may undoubtedly be conferred and by implication, but it will not be presumed from the mere appointment as general agent.[5]

§ 399. **When may borrow Money.** In a recent case in the Court of Appeals of New York, it is said, "If the transaction of business absolutely required the exercise of the power to borrow money in order to carry it on, then that power was impliedly conferred as an incident to the employment; but it does not afford a sufficient ground for the inference of such a power, to say the act proposed was convenient or advantageous or more effectual in the transaction of the business provided for, but it must be practically indispensable to the execution of the duties really delegated in order to justify its inference from the original employment."[6]

[1] Bushnell v. Chicago, &c. Ry Co., 69 Iowa, 620.

[2] Sentell v. Kennedy, 29 La. Ann. 679.

[3] Ball v. Bender, 23 La. Ann. 493.

[4] Taylor v. Labeaume, 17 Mo. 338.

[5] New York Iron Mine v. Negaunee Bank, 39 Mich. 644; Perkins v. Boothby, 71 Me. 91; Rossiter v. Rossiter, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62. Thus the general managing agent of a mining company may not bind it by making promissory notes in its name. New York Iron Mine v. Negaunee Bank, *supra;* McCullough v. Moss, 5 Denio (N. Y.) 567; nor may he bind it by acceptance of a bill of exchange even to avoid the suspension of work of great importance. Sewanee Mining Co. v. McCall, 3 Head (Tenn.) 619.

[6] Bickford v. Menier, 107 N. Y. 490, 26 Cent. L. Jour. 236. Authority to wind up a business does not author-

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§ 400. **May not make Accommodation Paper.** *A fortiori* has he no power to bind his principal by making, accepting or indorsing negotiable paper for the benefit of himself or third persons.[1] Nor can he pledge his principal's credit for the debt of third persons.[2]

§ 401. **May not pledge or mortgage the Property of his Principal.** An agent authorized to manage and carry on his principal's business has thereby no implied authority to pledge or mortgage the property in his possession. As is tersely said by a learned judge: "It is not carrying on the business of the company to pledge or mortgage the machinery used by the company and thereby suspend its operations; or place them at the will and pleasure of a mortgagee."[3]

§ 402. **May not sell Principal's Land.** Neither has such an agent implied power to sell his principal's land, even though it may have been acquired by him in the execution of the agency.[4]

§ 403. **May not embark in new and different Business.** Authority to carry on the principal's business already established, implies no authority in the agent to embark in a new and different business, or to attempt to use his principal's funds or credit in such a business.[5]

§ 404. **May not sell the Business.** So general authority to manage a business implies no power to sell it.[6]

VII.

OF AGENT AUTHORIZED TO SETTLE.

§ 405. **May not submit to Arbitration.** Authority conferred upon an agent to settle a dispute or demand, will be presumed to be so conferred in reliance upon the judgment and discretion of

ize the agent to borrow money. Smith v. McGregor, 96 N. C. 101.

[1] Gulick v. Grover, 33 N. J. L. 463, 97 Am. Dec. 728; Bank v. Johnson, 3 Rich. (S. C.) 42.

[2] Ruppe v. Edwards, 52 Mich. 411.

[3] Despatch Line v. Bellamy Mnfg Co. 12 N. H. 205, 37 Am. Dec. 203.

[4] Smith v. Stephenson, 45 Iowa, 645; Watson v. Hopkins, 27 Tex. 637.

[5] Campbell v. Hastings, 29 Ark. 512.

[6] Holbrook v. Oberne, 56 Iowa, 324; Vescelius v. Martin, — Colo. —, 18 Pac. Rep. 338.

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the agent, and unless there be clear evidence of a contrary intention, the agent will not be permitted to delegate the trust to another. He cannot therefore submit the dispute or demand to the judgment of arbitrators, and if he does so, the award will not be binding upon the principal.[1] Like other unauthorized acts, the submission may of course be ratified by the principal, and such a ratification will be presumed where, for example, with full knowledge of the facts, the principal accepts the award.

§ 406. **May not assign the Demand.** For the same reasons an agent employed to collect and settle his principal's demands has no implied authority to assign them to another for that purpose; nor can he pledge them to indemnify a surety for his principal.[2]

[1] Huber v. Zimmerman, 21 Ala. 488, 56 Am. Dec. 255; Scarborough v. Reynolds, 12 Ala. 252; Michigan Central R. R. Co. v. Gougar, 55 Ill. 503.

[2] Wood v. McCain, 7 Ala. 800, 42 Am. Dec. 612.

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BOOK III.

OF THE EXECUTION OF THE AUTHORITY.

CHAPTER I.

IN GENERAL.

§ 407. Purpose of Book III.
408. Primary Purpose to bind Principal and not Agent.
409. Must act within Scope of Authority.
410. Necessity of proper Execution.
411. How Question determined.
412. Execution within, and exceeding Authority.
413. Slight Deviation does not invalidate.
414. When separable, authorized Part may stand.
415. When Execution lacks essential Elements.
416. Summary of the Rules.
417. Should act in Name of the Principal.

§ 407. **Purpose of Book III.** In the preceding chapters it has been seen how authority may be conferred upon an agent, and by what standards the nature and extent of the authority so conferred are to be determined.

It is the purpose of Book III to ascertain in what manner the authority so conferred and so construed is to be executed. In what is said upon this subject, it is to be borne in mind that the authority of the agent to perform the given act is assumed to be established, and the only question is as to the mode and sufficiency of the performance.

§ 408. **Primary Purpose to bind Principal and not Agent.** It is the primary purpose of the creation of an agency to authorize the agent to act for and in behalf of the principal. It is, therefore, the primary duty of the agent in executing the authority to so act as to secure to the principal the benefits to be derived from the performance, and to impose upon him the responsibili-

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ties arising therefrom. In other words, it is the primary function of the agent to bind the principal and not himself, to third persons, and likewise to bind such third persons to the principal and not to himself.

§ 409. **Agent must act within the Scope of his Authority.** The act of the agent, whether he be general or special, within the limits of his authority is binding upon the principal; his act beyond those limits, binds himself only, or no one. Hence arises the fundamental necessity that not only the extent, but the manner, of the execution be such as the authority conferred will warrant, and no other. Where precise and exact limits have been fixed, the performance of the agent should be kept scrupulously within them. When those limits have not so been fixed, it is still imperative that the reasonable and usual limits in such cases be determined, and that the manner and extent of the execution be made to conform to them.

§ 410. **Necessity of proper Execution.** It is obvious, therefore, that attention to the proper execution of the authority is highly important, not only as respects the principal himself, but the agent also. Thus the agent in the attempted execution of the authority, may do, (*a*) exactly what he was authorized to do, or (*b*) more than he was authorized to do, or (*c*) less than he was directed to do, and the result of his performance may be that—

1. He will bind his principal only, or
2. He will bind himself only, or
3. His attempted execution will be wholly void;

whereas the first result was the only one contemplated by the parties at the time of the creation of the agency.

§ 411. **How Question determined.** In determining the results of an attempted performance, four questions arise:

1. What authority did the agent possess?
2. Is the act assumed to be done by virtue of it, in reality within its scope?
3. Who was intended to be bound? and
4. Who as a matter of fact is bound?

The first two of these questions must be largely determined by the principles laid down in the preceding chapters. The last two are yet to be considered.

§ 412. **Execution within, and exceeding Authority.** Where

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the agent keeps strictly within the limits of his authority, the only question that will arise will be as to the mode of performance,—whether it is such as to bind the principal, or the agent, or neither.

Where, however, the agent exceeds those limits, the question will depend somewhat upon the degree of excess. "It is evident," as is observed by a learned writer, "to anyone who considers the matter, that the variance between the act done by the agent and the act authorized by the principal, may range through every degree of difference. The variance may be infinitesimal, or it may be so great as to make an absolute departure from the authority conferred. To determine the exact point between those two extremes at which a variance becomes substantial and material often gives rise to difficult questions. The result in each case must depend upon the circumstances of the particular case." [1]

§ 413. **Slight Deviation does not invalidate.** No inflexible rule can be laid down by which to determine when the act as performed exceeds the limits of the act as authorized. But keeping in mind the fundamental principle to which reference has so frequently been made, that the authority conferred includes incidental power to employ all the usual modes and means of accomplishing the ends and purposes of the agency, it may be said that a slight deviation from the course of his duty will not vitiate his act, if the variation be immaterial and circumstantial only, and does not in substance exceed the limits fixed.[2]

§ 414. **When separable, authorized Part may stand.** Although the agent may have exceeded his authority, yet if the act be separable, it may stand so far as it is authorized.[3] "When

[1] Evans' Agency, 168.

[2] Huntley *v.* Mathias, 90 N. C. 101, 47 Am. Rep. 516; Parker *v.* Kett, 1 Salk. 95. "Authorities by letter of attorney," says HOLT, Ch. J., in this case, "are either general or special; thus a letter of attorney may be to sue *in omnibus causis motis et movendis*, or to defend a particular suit. Sir Philip Sidney, when he went to travel, gave a letter of attorney to Sir Thomas Walsingham to act and sell all his lands, and all his goods and chattels; and this was held good. Where the authority is particular the party must pursue it: if the act varies from it, he departs from his authority, and what he does is void; but that must be intended of a variance not in circumstance, but of a variance material and substantial, as where the person, the thing, or the date is mistaken."

[3] Drumright *v.* Philpot, 16 Ga. 424,

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a man," says Lord Coke, "doth that which he is authorized to do and more, there it is good for that which is warranted, and void for the rest." [1] So if the excess be merely superfluous it may be disregarded. Thus if an agent authorized to enter into a contract not under seal, executes it under seal, yet if the contract would be good without the seal, the seal may be disregarded and the contract be allowed to stand as written evidence of a simple contract.[2]

So if an agent in making an authorized sale, adds unauthorized covenants, the purchaser may enforce so much of the contract as conforms to the authority, or, at his option, may refuse to abide by the contract at all, if the principal repudiates the unauthorized covenants.[3]

§ 415. **When Execution lacks essential Elements.** Where, however, the execution is defective by reason of the absence of some element essential to a complete performance, the principal is not bound. "Regularly," says Lord Coke, "it is true, that where a man doth less than the commandment or authority committed unto him, there (the commandment or authority being not pursued) the act is void." [4]

§ 416. **Summary of the Rules.** Where there is a complete execution of the power and something *ex abundanti* is added which was not authorized, there the execution is good and the excess only is void; but where there is not a complete execution of the power, or where the boundaries between the execution and the excess are not distinguishable, the whole must be held bad.[5]

§ 417. **Should act in Name of Principal.** It is also a general

60 Am. Dec. 738; Vanada *v.* Hopkins, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92; Dickerman *v.* Ashton, 21 Minn. 538; Stowell *v.* Eldred, 39 Wis. 614; Evans *v.* Wells, 22 Wend. (N. Y.) 341; Crozier *v.* Carr, 11 Tex. 376; Moore *v.* Thompson, 32 Me. 497; Jesup *v.* City Bank, 14 Wis. 331.

[1] Coke, Lit. 258, *a*.

[2] Morrow *v.* Higgins, 29 Ala. 448; Baum *v.* Dubois, 43 Penn. St. 260; Long *v.* Hartwell, 34 N. J. L. 116; Dutton *v.* Warschauer, 21 Cal. 609; Worrall *v.* Munn, 5 N. Y. 229, 55 Am. Dec. 330; Wood *v.* Auburn, &c., R. R. Co. 8 N. Y. 160; Thomas *v.* Joslin, 30 Minn. 388.

[3] Vanada *v.* Hopkins, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92; Smith *v.* Tracy, 36 N. Y. 79.

[4] Coke, Lit. 258. *a*. Olyphant *v.* McNair, 41 Barb. (N. Y.) 446; Marland *v.* Stanwood, 101 Mass. 470.

[5] Alexander *v.* Alexander, 2 Ves. Sr. 640; Thomas *v.* Joslin, 30 Minn. 388.

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rule, subject to certain exceptions to be hereafter noticed, that the act of the agent should purport to be what it is intended to be,—the act of the principal,—and should be performed in his name by the agent as such.[1] Where the character in which, and the person for whom, the act is done are clearly expressed and understood at the time, many of the difficult questions, hereafter to be noted, which arise where these matters are left uncertain or ambiguous, would be avoided.

[1] White *v.* Cuyler, 6 T. R. 176; Brinley *v.* Mann, 2 Cush. (Mass.) 337, 48 Am. Dec. 669; Hale *v.* Woods, 10 N. H. 470, 34 Am. Dec. 176; Merchants' Bank *v.* Central Bank, 1 Ga. 418, 44 Am. Dec. 665; Clealand *v.* Walker, 11 Ala. 1058, 46 Am. Dec. 238; Wood *v.* Goodridge, 6 Cush. (Mass.) 117, 52 Am. Dec. 771.

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CHAPTER II.

OF THE EXECUTION OF SEALED INSTRUMENTS.

§ 418. Purpose of Chapter.
419. Must purport to be made and sealed in the Name of the Principal.
420. How Question determined.
421. Same Subject — Not enough that the Agent is described as such.
422. Same Subject—Illustrations.
423. Same Subject—Further Illustrations.
424. Same Subject — Further Illustrations — Descriptio Personæ.
§ 425. Same Subject — What Form sufficient.
426. Distinction in Case of Public Agent.
427. Whether necessary that Deed should purport to be executed by Agent — Rule of Wood v. Goodridge.
428. Same Subject—Further of this Rule.
429. Same Subject—How in Reason.
430. Parol Evidence not admissible to discharge Agent.

§ 418. **Purpose of Chapter.** The manner of the execution of instruments under seal, such as deeds, bonds and other solemn writings, is of so much importance and has been so frequently discussed, as to merit the more extended treatment, which it is the purpose of this chapter to devote to it. The word "deed" herein is used to describe instruments under seal, and not merely conveyances of land.

§ 419. **Must purport to be made and sealed in the Name of the Principal.** It is a fundamental rule in the law of agency that in order to bind the principal by a deed executed by an agent, the deed must upon its face purport to be made, signed and sealed in the name of the principal. If, on the contrary, though the agent describes himself an agent, or though he add the word agent to his name, the words of grant, covenant and the like, purport upon the face of the instrument to be his, and the seal purports to be his seal, the deed will bind the agent and not the principal.[1]

[1] Stinchfield v. Little, 1 Greenl. (Me.) 231, 10 Am. Dec. 65; Stone v. Wood, 7 Cow. (N. Y.) 452, 17 Am. Dec. 529; Lutz v. Linthicum, 8 Pet. (U. S.) 165; Fullam v. West Brookfield, 9 Allen (Mass.) 1; Townsend v.

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This rule, however, while well settled, is highly technical in its nature, being founded upon the common law theories of the effect of a seal, and like other rules based purely upon these theories, has encountered a strong tendency in recent cases to make the mere presence of a seal subordinate to the evident intention of the parties.[1]

§ 420. **How Question determined.** In determining whether the deed is the deed of the principal, regard may be had, *First*, to the party named as grantor. Is the deed stated to be made by the principal or by some other person? *Secondly*, to the granting clause. Is the principal or the agent the person who purports to make the grant? *Thirdly*, to the covenants, if any. Are these the covenants of the principal? *Fourthly*, to the testimonium clause. Who is it who is to set his name and seal in testimony of the grant? Is it the principal or the agent? And *Fifthly*, to the signature and seal. Whose signature and seal are these? Are they those of the principal or of the agent?

If upon such an analysis the deed does not upon its face purport to be the deed of the principal, made, signed, sealed and delivered in his name and as his deed, it cannot take effect as such.

§ 421. **Same Subject—Not enough that the Agent is described as such.** It is not enough that the agent was in fact authorized to make the deed, if he has not acted in the name of the principal. Nor is it sufficient that he describes himself in the deed as acting by virtue of a power of attorney or otherwise, for, or in behalf, or as attorney, of the principal, or as a committee, or as trustees of a corporation, etc.; for these expressions are but *descriptio personæ*, and if in fact, he has acted in his own name and set his own hand and seal, he is bound personally and not the principal, despite these recitals.[2]

Corning, 23 Wend. (N. Y.) 435; Briggs *v.* Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Grubbs *v.* Wiley, 17 Miss. 29; Hopkins *v.* Mehaffy, 11 S. & R. (Penn.) 126; Webster *v.* Brown, 2 Rich. (S. C.) N. S. 428; Echols *v.* Cheney, 28 Cal, 157; Morrison *v.* Bowman, 29 Cal. 337; Hancock *v.* Yunker, 83 Ill., 208; City of Providence *v.* Miller, 11 R. I. 272; Elwell *v.* Shaw, 16 Mass. 42, 8 Am. Dec. 126; Brinley *v.* Mann, 2 Cush. (Mass.) 337, 48 Am. Dec. 669; Combe's Case, 9 Co. 76; Fowler *v.* Shearer, 7 Mass. 14; Carter *v.* Chaudron, 21 Ala. 72; Bogart *v.* De Bussy, 6 Johns. (N. Y.) 94; Martin *v.* Flowers, 8 Leigh (Va.) 158, and see cases cited in following sections.

[1] See remarks of HENRY, J., in McClure *v.* Herring, 70 Mo. 18, 35 Am. Rep. 404.

[2] Stinchfield *v.* Little, 1 Greenl. (Me.) 231, 10 Am. Dec. 65; Fowler *v.*

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But at the same time, no set form of words is necessary. The deed must be in the name, and purport to be the act and deed, of the principal; but whether such is the purport of the instrument, must be determined from its general tenor, and not from any particular clause. Such construction must be given, in this as well as in other questions arising on conveyances, as shall make every part of the instrument operative as far as possible; and when the intention of the parties can be discovered, such intention should be carried into effect, if it can be done consistently with the rules of law.[1]

Thus in a leading English case, the court says: "There is no particular form of words required to be used, provided the act be in the name of the principal, for where is the difference between signing J B by M W, his attorney, which must be admitted to be good, and M W for J B? In either case, the act of sealing and delivering is done in the name of the principal and by his authority. Whether the attorney put his name first or last cannot affect the validity of the act done."[2]

§ 422. **Same Subject—Illustrations.** Thus where a deed was executed by an agent in the following form, "Know all men, etc., that I, Josiah Little, of, etc., by virtue of a vote of the Pejebscot Proprietors, passed, etc., authorizing and appointing me to give and execute deeds for and in behalf of said proprietors, for and

Shearer, 7 Mass. 14; Tippets v. Walker, 4 Mass. 595; Tucker v. Bass, 5 Mass. 164; Taft v. Brewster, 9 Johns. (N. Y.) 334, 6 Am. Dec. 280; Lutz v. Linthicum, 8 Pet. (U. S.) 165; Fullam v. West Brookfield, 9 Allen (Mass.) 1; Duval v. Craig, 2 Wheat. (U. S.) 45; Deming v. Bullitt, 1 Blackf. (Ind.) 241; White v. Skinner, 13 Johns. (N. Y.) 307, 7 Am. Dec. 381; Quigley v. DeHaas, 82 Penn. St. 267, Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Kiersted v. Orange, &c. R. R. Co. 69 N. Y. 343, 25 Am. Rep. 199; Sargent v. Webster, 13 Metc. (Mass.) 497; 46 Am. Dec. 748; Endsley v. Strock, 50 Mo. 508; Jones v. Morris, 61 Ala. 518; Banks v. Sharp, 6 J. J. Marsh. (Ky.) 180; Locke v. Alexander, 2 Hawk. (N. C.) 155; 11 Am. Dec. 750; Scott v. McAlpin, N. C. Term Rep. 155, 7 Am. Dec. 703; Bellas v. Hays, 5 Serg. & R. (Penn.) 427, 9 Am. Dec. 385; Fisher v. Salmon, 1 Cal. 413, 54 Am. Dec. 297; Welsh v. Usher, 2 Hill Ch. (S. C.) 167, 29 Am. Dec. 63; Buffalo Catholic Institute v. Bitter, 87 N. Y. 250; Willis v. Bellamy, 52 N. Y. Super. Ct. 373.

[1] Hale v. Woods, 10 N. H. 470, 34 Am. Dec. 176; Jackson v. Blodget, 16 Johns. (N. Y.) 172; Bridge v. Wellington, 1 Mass. 219; Davis v. Hayden, 9. Mass. 514; Hatch v. Dwight, 17 Mass. 289, 9 Am. Dec. 147; Magill v. Hinsdale, 6 Conn. 464 *a*, 16 Am. Dec. 70; Hovey v. Magill, 2 Conn. 680.

[2] Wilks v. Back, 2 East 142.

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in consideration of the sum of thirty-seven pounds to me in hand paid by Thomas Stinchfield, of, etc., the receipt whereof I do hereby acknowledge, have given, granted, released, conveyed and confirmed unto him, the said Thomas Stinchfield, his heirs and assigns, two hundred acres, etc. To have and to hold, etc., hereby covenanting in behalf of said proprietors, their respective heirs, executors and administrators, to and with the said T. S., his heirs and assigns, to warrant, confirm and defend him and them in the possession of the said granted premises, against the lawful claims of all persons whatsoever. In testimony that this instrument shall be forever hereafter acknowledged by the said proprietors as their act and deed and be held good and valid by them, I, the said Josiah Little, by virtue of the aforesaid vote, do hereby set my hand and seal this day, etc." Signed "Josiah Little, Seal," it was held to be the deed of Josiah Little and that he, and not the Pejebscot Proprietors, was liable upon the covenants.[1]

So where Jonathan Elwell executed to Joshua Elwell a power of attorney to convey the lands in question, and the latter, purporting to act in pursuance of it, executed a deed of the land, in which, after reciting the power, he proceeded: "Now know ye that I, the said Joshua, by virtue of the power aforesaid, in consideration, etc., do hereby bargain, grant, sell and convey unto the said (grantees) to have and to hold, etc., and I do covenant with the said (grantees) that I am duly empowered to make the grant and conveyance aforesaid; that the said Jonathan at the time of executing said power was, and now is, lawfully seized of the premises, and that he will warrant and defend the same, etc. In testimony whereof, I have hereunto set the name and seal of the said Jonathan this day, etc.," and signed "Joshua Elwell" and seal, the deed was held not be the deed of Jonathan.[2]

And again where one of two deeds which purported to be made by "New England Silk Company, a corporation, by Christopher Colt, Jun., their treasurer," was attested: "In witness whereof, I, the said Christopher Colt, Jun., in behalf of said company, and as their treasurer, have hereunto set my hand and seal," was signed and sealed "Christopher Colt, Jun., treasurer, New England Silk Company," and the acknowledgment was to the effect

[1] Stinchfield v. Little, (1821), 1 Greenl. (Me.) 231, 10 Am. Dec. 65.

[2] Elwell v. Shaw, (1819), 16 Mass. 42, 8 Am. Dec. 126.

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that "Christopher Colt, Jun., treasurer, etc., acknowledged the above instrument to be his free act and deed," and the other deed was like the first except that Colt was therein described as "treasurer of New England Silk Company, and duly authorized for that purpose," the court held each of them to be inoperative to convey the title of the Silk Company. In both of these deeds, as will be noticed, the principal was properly named as grantor but they were signed and sealed by the agent in his own name. "Both of these deeds," said Judge Metcalf, "were executed by C. Colt, Jun., in his own name, were sealed with his seal, and were acknowledged by him as his acts and deeds. In one of them, it is true, he declared that he acted in behalf of the company, and as their treasurer; and in the other he declared himself to be their treasurer, and to be duly authorized for the purpose of executing it. But this was not enough. He should have executed the deeds in the name of the company. He should also have affixed to them the seal of the company, and have acknowledged them to be the deeds of the company."[1]

Where, however, although the agent was named in the instrument as the party, the deed was properly signed in the name of the principal, it was given effect as the deed of the principal, and not of the agent.[2] In this case a lease was made commencing as follows: "This indenture, made this 17th day of April, A. D. 1869, between Daniel R. Brant, of the city of Chicago, party of the first part, and Edward F. Lawrence, president of the Northwestern Distilling Company, of the same place, party of the second part." Throughout the lease the parties were spoken of as persons and the covenants were personal covenants, and the instrument concluded as follows: "In testimony whereof, the said parties have hereunto set their hands and seals the day and year first above written. D. R. Brant. [Seal.] Northwestern Distilling Co. [Seal.] By Edward Lawrence, President."

So where a deed reading, "Know all men by these presents that the West Kansas Land Company, by Solomon Houck, President, and Theodore S. Case, Secretary, * * * has granted," etc., was signed "Solomon Houck, President [Seal], Theodore S.

[1] Brinley v. Mann, (1848), 2 Cush. (Mass.) 337, 48 Am. Dec. 669.

[2] Northwestern Distilling Co. v. Brant, (1873), 69 Ill. 658, 18 Am. Rep. 631. See also to the same effect, Shanks v. Lancaster, (1848), 5 Gratt. (Va.) 110, 50 Am. Dec. 108; Butterfield v. Beall (1851), 3 Ind. 203.

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Case, Sect'y [Seal], W. K. Land Co. [Seal]," it was held to be the deed of the company.[1]

§ 423. **Same Subject—Further Illustrations.** So where a manufacturing company by vote had authorized one Arthur W. Magill to make a deed of the real estate of the company, and he, in pursuance of the authority, executed a deed, of which the granting part was as follows: "Arthur W. Magill, agent for the Middletown Manufacturing Company, being empowered by vote," etc., "for and in behalf of said company," etc., "do give, grant," etc., the covenant being: "I do hereby covenant for and in behalf of the said company," etc., "that said Middletown Manufacturing Company is well seized," etc., "and I do also bind the said Middletown Manufacturing Company to warrant and defend," etc., and the conclusion being as follows: "In witness whereof, I have hereto, for and in behalf of said Middletown Manufacturing Company, set my hand and seal at Middletown, this 29th day of March, A. D. 1817. Arthur W. Magill [L. S.], agent for the Middletown Manufacturing Company," it was held that this was the deed of the company and not of the agent.[2]

And again, where the terms of the conveyance were: "I, Daniel King, as well for myself as attorney for Zachariah King, do for myself and the said Zachariah, remise, release and forever quit-claim" the premises, "together with all the estate, right, title, interest, use, property, claim and demand whatsoever, of me, the said Daniel, and said Zachariah, which we now have, or heretofore had at any time, in said premises. And we, the said Daniel and Zachariah, do hereby, for ourselves, our heirs and executors, covenant that the premises are free of all incumbrance and that the grantee may quietly enjoy the same without any claim or hindrance from us or any one claiming under us, or either of us. In witness whereof, we the said Daniel for himself and as attorney aforesaid, have hereunto set our hands and seals," etc., and signed "Daniel King" and "Daniel King, attorney for Zachariah King, being duly authorized as appears of record,"

[1] City of Kansas v. Hannibal, &c. R. R. Co. (1882), 77 Mo. 180.

[2] Magill v. Hinsdale (1827), 6 Conn. 464 *a*, 16 Am. Dec. 70.

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with seals affixed to each signature, it was held that the grant conveyed the title of both.[1]

So where the deed of the land of T and S, his wife, was drawn as follows: "I, H, for myself, and as attorney for T and S, by their letters of attorney under their hands and seals, in consideration, etc., to us paid by L, do sell and convey to L, etc. And we the said T and S do covenant, etc. In witness whereof, I, H, in my own right have hereunto set my hand and seal, and as attorney for said T and S have hereunto set their hands and seals," and was signed "H. [L. S.] T. [L. S.] S. [L. S.] By H, their attorney in fact," it was held that the deed was that of T and his wife S, and not of the agent H.[2]

But where A gave to his wife B a power of attorney to execute a deed of land and she made the deed in the following form: "Know ye that I, B, of, etc., as attorney to A, of, etc., in consideration, etc., have granted, etc. In witness whereof I have hereunto set my hand and seal. B. [Seal]," the court held that it was not the deed of A.[3]

§ 424. **Same Subject—Further Illustrations—Descriptio Personæ.** Where the covenants are clearly personal, the mere addition of the word "agent," "trustee," etc., will not, as has been stated, change their character.

Thus where a bond was executed by certain persons, who signed and sealed the same as individuals, but added "Trustees of the Baptist Society of the Town of Richfield," the court said: "The bond must be considered as given by the defendants in their individual capacities. It is not the bond of the Baptist church; and if the defendants are not bound the church certainly is not, for the church has not contracted either in its corporate name or by its seal. The addition of 'Trustees' to the names of the defendants is, in this case, a mere *descriptio personarum*."[4]

[1] Hale v. Woods (1839), 10 N. H. 470, 34 Am. Dec. 176; citing Wilks v. Back (1802), 2 East, 142, and Montgomery v. Dorion (1835), 7 N.H. 484.

[2] McClure v. Herring (1879), 70 Mo. 18, 35 Am. Rep. 404. To like effect see Shanks v. Lancaster (1848), 5 Gratt. (Va.) 110, 50 Am. Dec. 108.

[3] Fowler v. Shearer (1810), 7 Mass. 15.

[4] Taft v. Brewster (1812), 9 Johns. (N. Y.) 334, 6 Am. Dec. 280. See Fullam v. West Brookfield, (1864), 9 Allen, (Mass.) 1.

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And for the same reason, where A, B, C and others, "trustees of the Methodist Episcopal Church of Jacksonville, their successors and assigns," executed a bond, binding themselves, their heirs, executors and administrators, and signed it in their individual names, they were held personally liable.[1]

§ 425. **Same Subject—What Form sufficient.** Where a lease purporting to be made by Mussey, was signed "John Hammond for B. B. Mussey, (Seal)" it was held that it was well executed as the lease of Mussey. Said the court: "The defendant does not deny Hammond's authority, but takes the ground that the lease is not the deed of Mussey but of Hammond. And the common learning is relied on, to wit, that when a deed is executed by attorney, it must be the act of the principal, done and executed in the principal's name. The only question is, What is an execution of a deed, by an attorney, in the name of the principal? We understand the execution of a deed to be the signing, sealing and delivery of it. These must be done in the name of the principal by the hand of the attorney. When the signing and sealing are in the name of the principal, the delivery will be presumed to have been so, unless the contrary is proved. But however clearly the body of the deed may show an intent that it shall be the act of the principal, yet unless it is executed by his attorney for him, it is not his deed, but the deed of the attorney or of no one.[2] The most usual and approved form of executing a deed by attorney is by his writing the name of the principal and adding 'by A B his attorney' or 'by his attorney A B.' But this is not the only form of execution which will make the deed the act of the principal. In Wilks *v.* Back,[3] M. Wilks, attorney for J. Browne, executed a deed for himself and Browne in this form: 'Mathias Wilks' (Seal); 'For James Browne, Mathias Wilks' (Seal). The court of King's bench decided that the deed was well executed in the name of Browne. This decision has never been overruled, but has always been regarded as rightly made."[4]

[1] Dayton *v.* Warne (1881), 43 N. J. L. 659.

[2] Lessee of Clarke *v.* Courtney, (1831) 5 Pet. (U. S.) 350.

[3] 2 East, 142.

[4] Mussey *v.* Scott (1851), 7 Cush. (Mass.) 215, 54 Am. Dec. 719, citing Wilburn *v.* Larkin (1832), 3 Blackf. (Ind.) 55; Hunter *v.* Miller (1846), 6 B. Mon. (Ky.) 612. And to the same effect are, Shanks *v.* Lancaster (1848), 5 Gratt. (Va.) 110, 50 Am. Dec. 108;

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So where the operative clauses of a deed were in the name of the corporation "by William Wallace, their agent," and the covenants were in the name of the corporation, but the signature was "William Wallace, Agent for the Flower Brook Manufacturing Company," the court held that the deed must be considered the deed of the corporation.[1]

And where a contract under seal was made "between the C. I. Co. party of the first part by J. S. B. agent, and J. K. B. and E. C. B. parties of the second part;" the stipulations in the contract purporting to be between "the said party of the first part" and "the said parties of the second part," no names being given, and concluded, "In witness whereof the parties have hereunto affixed their hands and seals," and was signed "J. S. B. Agent (L. S.), J. K. B. (L. S.), E. C. B. (L. S.)," it was held to be the deed of the company.[2]

In the preceding cases cited in this section it will be noticed that the respective instruments purported to be made by and in the name of the principal. But where a bond beginning "I promise to pay," etc., and not mentioning any obligor's name, was signed, "Witness my hand and seal, H. S. Lucas, (Seal) for Charles Callender," the Supreme Court of North Carolina held Lucas personally responsible.[3] And so where a bond was signed "Thomas Dix, acting for James Dix," Chief Justice RUFFIN said it was "unquestionably the bond of Thomas and not of James. The former seals it and he speaks in it throughout, and the latter not at all."[4] But the same judge in passing upon the liability of a party to a deed says: "It is not material in what form the deed be signed, whether A B by C D or C D for A B *provided it appears in the deed*, and by the execution that it is the deed of the principal."[5]

§ 426. **Distinction in Case of Public Agents.** But a distinction has been made in the case of public agents, who have entered into agreements, not negotiable, for the performance of

Tucker Mnfg. Co. v. Fairbanks (1867), 98 Mass. 105.

[1] McDaniels v. Flower Brook Mnfg. Co. (1850), 22 Vt. 274; see also Martin v. Almond (1857), 25 Mo. 313.

[2] Bradstreet v. Baker (1884), 14 R. I. 546.

[3] Bryson v. Lucas (1881), 84 N. C. 680, 37 Am. Rep. 634.

[4] Oliver v. Dix (1835), 1 Dev. & Bat. Eq. (N. C.) 158.

[5] Redmond v. Coffin (1833), 2 Dev. Eq. (N. C.) 437.

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public duties. In such a case it is to be presumed that they did not undertake personally to assume the public burdens, and although they may have entered into covenants under seal, partaking of a personal nature, yet where the obligation is known to be a public one, they can only be held personally bound, if at all, where the intent is clearly apparent so to bind them.[1] Said Chief Justice MARSHALL: "The intent of the officer to bind himself personally, must be very apparent indeed to induce such a construction of the contract;"[2] and it is said by another learned judge that: "It is much against public policy to cast the obligations that justly belong to the body politic upon this class of officials."[3]

These cases, however, are not to be confounded with the cases where the agents, like the trustees and officers of private corporations and religious bodies, are not public in their nature, nor with cases of negotiable instruments, which stand upon different ground.

§ 427. **Whether necessary that Deed should purport to be executed by an Agent.** Whether it is necessary to the validity of the deed that it should on its face purport to be executed by an agent, or whether the agent may act in the principal's name throughout with nothing to disclose the fact of the agency, are questions which have been much discussed.

[1] Hodgson v. Dexter, 1 Cranch (U. S.) 345 (Secretary of War); Knight v. Clark, 48 N. J. L. 22, 57 Am. Rep. 584 (Township Trustees); Jones v. LeTombe, 3 Dallas (U. S.) 384 (Consul General of France); Fox v. Drake, 8 Cow. (N. Y.) 191 (Court House Commissioners); Tutt v. Hobbs, 17 Mo. 486 (School Trustees); Miller v. Ford, 4 Rich. (S. C.) L. 376, 55 Am. Dec. 687 (Commissioners of Roads); Simonds v. Heard, 23 Pick. (Mass.) 120, 34 Am. Dec. 41 (Committee of town held to be personally liable on the ground that the intent was clear to make them so); Brown v. Austin, 1 Mass. 208, 2 Am. Dec. 11 (Agent appointed to take depositions by committee of Congress); McClenticks v. Bryant, 1 Mo. 598; 14 Am. Dec. 310 (Town Commissioners held personally liable because they exceeded their authority); Belknap v. Reinhart, 2 Wend. (N. Y.) 375, 20 Am. Dec. 621 (Captain U. S. Army); Stinchfield v. Little, 1 Greenl. (Me.) 231, 10 Am. Dec. 65; Dawes v. Jackson, 9 Mass. 490 (Superintendent of States Prison); Freeman v. Otis, 9 Mass. 272, 6 Am. Dec. 66 (U. S. Collector of Customs); Walker v. Swartwout, 12 Johns. (N. Y.) 444, 7 Am. Dec. 334 (Quartermaster general U. S. Army); Wallis v. Johnson School Township, 75 Ind. 368 (Trustee of schools).

[2] In Hodgson v. Dexter, 1 Cranch (U. S.) 345.

[3] BEASLEY, C. J. in Knight v. Clark, 48 N. J. L. 22, 57 Am. Rep. 584.

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Thus in Wood *v.* Goodridge the agent had executed a mortgage by simply signing the name of his principal with nothing to show that it was signed by an agent and not by the principal in person. FLETCHER, J., was of the opinion that such a form of execution was not authorized, and said:—

Rule of Wood v. Goodridge.—"It should appear upon the face of the instruments that they were executed by the attorney, and in virtue of the authority delegated to him for this purpose. It is not enough that an attorney in fact has authority, but it must appear by the instruments themselves which he executes, that he intends to execute this authority. The instruments should be made by the attorney expressly as such attorney; and the exercise of his delegated authority should be distinctly avowed upon the instruments themselves. Whatever may be the secret intent and purpose of the attorney, or whatever may be his oral declaration or profession at the time, he does not in fact execute the instruments as attorney, and in the exercise of his power as attorney, unless it is so expressed in the instruments. The instruments must speak for themselves. Though the attorney should intend a deed to be the deed of his principal, yet it will not be the deed of the principal, unless the instrument purports on its face to be his deed. The authority given clearly is, that the attorney shall execute the deed as attorney but in the name of the principal."[1] The decision in the case, however, was placed upon other grounds.

How of this Rule.—This rule, certainly, has much to commend it, as tending to the due and orderly execution of important instruments, and as facilitating greatly the proper preservation in the public records of the evidence of the authority and of its exercise. But at most, it was a mere *dictum* in the case, and its authority has not generally been conceded, even in its own State.[2]

§ 428. **Same Subject—Further of this Rule.** In Forsyth *v.* Day,[3] speaking of this case, RICE, J, said: "No case, I apprehend, can be found in the books which will sustain the rule so broadly laid down by the learned judge in the case of Wood *v.* Goodridge. Nor can the doctrine be sustained on principle. It

[1] (1850) 6 Cush. (Mass.) 117, 52 Am. Dec. 771.

[2] Hunter *v.* Giddings, 96 Mass. 41, 93 Am. Dec. 54.

[3] (1856) 41 Me. 382.

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is difficult to perceive any sound reason why, if one man may authorize another to act for him and bind him, he may not authorize him thus to act for and bind him in one name as well as in another. As matter of convenience in preserving testimony, it may be well that the names of all the parties who are in any way connected with a written instrument should appear upon the instruments themselves. But the fact that the name of the agent by whom the signature of the principal is affixed to an instrument, appears upon the instrument itself, neither proves nor has any tendency to prove, the authority of such agent. *That* must be established *aliunde*, whether his name appears as agent, or whether he simply places the name of his principal to the instrument to be executed." This, however, was the case of a promissory note and not of a deed.

Again in Devinney *v.* Reynolds,[1] a deed commencing: "To all to whom these presents shall come, Know ye that Michael Hollman by William McAllister, his lawful and regularly deputed attorney in fact, etc., grants," etc., concluded, "In witness whereof, the said Michael Hollman, by his attorney aforesaid, hath hereunto set his hand and seal," etc. To this were appended the name and seal of Michael Hollman. Said the court: "The execution of the deed is in proper form, and, indeed, we seldom see such instruments executed so much in accordance with approved precedents. It would be useless to add the name and seal of the attorney, for it is what it purports to be, the deed of the principal and not the attorney, and therefore does not require his name and seal, but the name and seal of the principal only."

So in Berkey *v.* Judd,[2] a deed reciting that it was made by the principals by their attorney in fact, was signed and sealed in the names of the principals, followed by the words, "By their attorney in fact." The court said: "As respects the execution of a deed by an attorney in fact, although it is usual and better for him to sign the name of his principal, and to add thereto his own signature, with proper words indicating that the act is done by him as such attorney, yet it is not in all cases necessary that he should so append his own name. When the deed on its face purports to be the indenture of the principal, made by his attor-

[1] (1841) 1 Watts & Serg. (Penn.) 328. [2] (1875) 22 Minn. 287.

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ney in fact, therein designated by name, it may be properly executed by such attorney by his subscribing and affixing thereto the name and seal of his principal alone.[1] In this case the deed purports on its face to be the indenture of the principals, and not that of the agent. It fully discloses that it was made for them and in their name by their attorney in fact who had full authority so to do. Its execution was properly acknowledged by him as such attorney in fact, and for and on behalf of his said principals. The neglect to sign his own name to the words 'by their attorney in fact' was a purely technical omission devoid of any legal effect whatever."

In both of these cases, however, it will be noticed that the fact that the deed was executed by an agent appeared from the face of the instruments.

In Wilks *v.* Back,[2] heretofore referred to, where the signature to the instrument, which was an arbitration bond, was: "For James Browne, Mathias Wilks," (Seal). LAWRENCE, J. said: "Here the bond was executed by Wilks for and in the name of his principal; and this is distinctly shown by the manner of making the signature. Not even this was necessary to be shown; for if Wilks had sealed and delivered it in the name of Browne, that would have been enough without stating that he had so done."

Where the deed is to be signed in the presence and by the direction of the principal, mere parol authority is, as has been seen,[3] sufficient; and in such case there need be nothing in the deed to indicate that the signature was set by an agent and not by the principal.

§ 429. **Same Subject—How in Reason.** While the rule of Wood *v.* Goodridge is undoubtedly well founded in convenience and propriety, yet it is difficult in reason to perceive why even in those cases where nothing whatever appears upon the face of the instrument to indicate it, it may not be shown by evidence *aliunde* that it was in fact executed by an agent. It cannot be said that this is to contradict, add to or vary the deed by parol evidence, for its legal effect remains the same, and it is none the

[1] Citing Devinney *v.* Reynolds, 1 Watts & Serg. (Penn.) 328; and Forsyth *v.* Day, 41 Me. 382.

[2] 2 East, 142.

[3] See *ante*, § 96.

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less afterward what it purported to be before,—the deed of the principal. Neither can it be said that in one case there is, while in the other there is not, evidence of the agency. In either event the agency must be proved as a fact. It cannot be established by mere recitals of authority or by any pretence of acting in that capacity.

§ 430. **Parol Evidence not admissible to discharge Agent.** Where the deed upon its face is the deed of the agent, parol evidence is not admissible to discharge the agent by showing that it was intended or understood to be the deed of the principal,[1] but where the deed is ambiguous, parol evidence may be resorted to, to show who was in fact the party intended to be charged.[2]

[1] Willis v. Bellamy, 52 N. Y. Super. Ct. 378; Higgins v. Senior, 8 M. & W. 834; Beckam v. Drake, 9 M. & W. 79; Leadbitter v. Farrow, 5 M. & S. 345; Spencer v. Field, 10 Wend. (N. Y.) 88; Townsend v. Hubbard, 4 Hill (N. Y.) 351; Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617. See this subject fully discussed in following chapter.

[2] Shuetze v. Bailey, 40 Mo. 69; Smith v. Alexander, 31 Mo. 193.

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CHAPTER III.

OF THE EXECUTION OF SIMPLE CONTRACTS.

§ 431. Purpose of this Chapter.

I. Of the Execution of Negotiable Paper.

432. In general—The proper Manner.
433. Same Subject—General Rule.
434. Same Subject—Not necessary that Agent's Name appear.
435. Not enough that Principal be named only in Body of Instrument.
436. Same Subject—Where Intent to charge Principal is manifest.
437. Same Subject—Other Cases.
438. Where no Principal is disclosed, Agent is bound notwithstanding he signs as "Agent."
439. Negotiable Paper drawn payable to an Agent and indorsed by him.
440. How when made by Public Agents.
441. Admissibility of parol Evidence to show Intent.
442. Same Subject — What Rules applied.
443. Same Subject—The true Rule.
444. Further of this Rule.

II. Of the Execution of other simple Contracts.

445. The proper Manner.
446. Intention of the Parties the true Test.
447. Agent may bind himself by express Words.
448. Same Subject — Contrary Intention manifest.
449. The Admissibility of parol Evidence to show Intent.

§ 431. **Purpose of this Chapter.** It is intended in this chapter to discuss the manner of executing contracts not under seal, including therein such contracts whether written or unwritten. And as there are some special rules applicable to the execution of negotiable instruments, that subject will first be separately considered.

I.

OF THE EXECUTION OF NEGOTIABLE PAPER.

§ 432. **In general—The proper Manner.** Negotiable paper being intended to circulate in the commercial world as the representative of money, it is highly important that the character and liability of the parties to it, shall be disclosed with reasonable certainty upon the face of the paper itself. In no class of instru-

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ments is uncertainty, or ambiguity, or the necessity of making outside inquiry, so destructive to its mission, as in this.

The method approved in the execution of instruments under seal can with great propriety be adopted here. Thus if the bill, or note be drawn, accepted or indorsed, "A B, by C D, his attorney or agent," or "A B, by his attorney or agent C D," there can be no question as to who is the party to be charged. "A B by C D" is also unequivocal, though not so full.[1]

These forms, however, are not imperative. Thus, "C D agent for A B," "C D for A B," and "For A B, C D" are now quite generally regarded as sufficiently indicative of the intent, for although "agent for" a particular person or corporation may either designate the general relation which the person signing holds to another party, or show that the particular act in question is done in behalf of and as the very contract of that other, yet the court, if such is manifestly the intention of the parties will construe the words in the latter sense.[2]

"Pro A B, C D" is to the same effect and is also sufficient.[3] "Agent of" however is not the equivalent of "agent for," but is mere *descriptio personæ*;[4] and even the words "agent for" must under some circumstances also be held to be merely a description of the person, as where they are not followed by the proper name of the principal. Thus a note signed "D. H., agent for the Churchman" (the name of the newspaper which the agent carried on in the behalf of his principal), was held to be the note of D. H., and not of his principal.[5]

[1] Tucker Mnf'g Co. *v.* Fairbanks, 98 Mass. 101; Bradlee *v.* Boston Glass Co., 16 Pick. (Mass.) 347; Weaver *v.* Carnall, 35 Ark. 198; Ballou *v.* Talbot, 16 Mass. 461; Jefts *v.* York, 4 Cush. (Mass.) 372; Page *v.* Wight, 14 Allen (Mass.) 182; Barlow *v.* Congregational Society, 8 Allen (Mass.) 460; Emerson *v.* Providence Mnf'g Co., 12 Mass. 237, 7 Am. Dec. 66.

[2] Ballou *v.* Talbot, 16 Mass. 461; Tucker *v.* Fairbanks, 98 Mass. 101; Rawlings *v.* Robson, 70 Ga. 595; Jefts *v.* York, 4 Cush. (Mass.) 372; Bartlett *v.* Tucker, 104 Mass. 336, 6 Am. Rep. 240; Tiller *v.* Spradley, 39 Ga. 36. *Contra*: Offutt *v.* Ayers, 7 T. B. Monr. (Ky.) 356; Dawson *v.* Cotton, 26 Ala. 591. But see: Webb *v.* Burke, 5 B. Monr. (Ky.) 51; Cook *v.* Sanford, 8 Dana (Ky.) 237; Shuetze *v.* Bailey, 40 Mo. 69; Garrison *v.* Combs, 7 J. J. Marsh. (Ky.) 84, 22 Am. Dec. 120.

[3] Long *v.* Colburn, 11 Mass. 97, 6 Am. Dec. 160.

[4] Tucker Mnf'g Co. *v.* Fairbanks, *supra*; Haverhill Ins. Co. *v.* Newhall, 1 Allen (Mass.) 130.

[5] De Witt *v.* Walton, 9 N. Y. 571; see also Shattuck *v.* Eastman, 12 Allen (Mass.) 369.

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In Colorado, after an exhaustive examination, the sufficiency of the form "C D, agent for A B," was denied altogether.[1]

So "A B, C D, agent," has been held to be sufficient. Thus where a note reading "we promise to pay," was signed "Massachusetts Steam Heating Company, L. S. Fuller, treasurer," the court said: "The name of the company is signed to the note. This signature could not be made by the corporation itself and must have been written by some officer or agent. It was manifestly proper that some indication should be given by whom the signature was made, as evidence of its genuineness; and Fuller added his own name, with the designation of his official character. And the whole taken together shows it to be the signature of the Massachusetts Steam Heating Company and not of Fuller."[2]

§ 433. **Same Subject—General Rule.** It has been said by a learned judge, in dealing with this question, that "In order to exempt an agent from liability upon an instrument executed by him within the scope of his agency, he must not only name his principal, but he must express by some form of words that the writing is the act of the principal though done by the hand of the agent. If he expresses this, the principal is bound, and the agent is not. But a mere description of the general relation or office which the person signing the paper holds to another person or corporation, without indicating that the particular signature is

[1] Tannatt v. Rocky Mountain National Bank, 1 Colo. 278, 9 Am. Rep. 156.

[2] Draper v. Massachusetts Steam Heating Co., 5 Allen (Mass.) 333. So a note reading "we promise to pay * * * at office Belfast Foundry Co." and signed, "Belfast Foundry Company, W. W. Castle, President," binds the company. Castle v. Belfast Foundry Co. 72 Me. 167; so a note reading "we promise to pay," and signed "Pioneer Mining Company, John E. Mason, Supt." may be shown by parol to have been intended to bind the Company. Bean v. Pioneer Min. Co., 66 Cal. 451, 56 Am. Rep. 106. See also the same effect as the Draper case; Abbott v. Sawmut Ins. Co., 3 Allen (Mass.) 215; Atkins v. Brown, 59 Me. 90.

But in a recent Iowa case where a note read "we promise to pay" and was signed "Independence M'f'g Co., B. J. Brownell, Pres. D. B. Sanford, Sec'y," it was held that Brownell was *prima facie* liable individually, but it was intimated that this result could have been controlled by parol evidence showing a contrary intent. Heffner v. Brownell, 70 Iowa, 591, 31. N. W. Rep. 947. So a note reading "we promise to pay," and signed, "English S. M. Co., H. Pattberg, Manager," was held not to be the note of the company. Chase v. Pattberg, 12 Daly (N. Y.) 171.

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made in the execution of the office and agency, is not sufficient to charge the principal, or to exempt the agent from personal liability." [1]

§ 434. **Same Subject—Not necessary that Agent's Name appear.** Although reasons of convenience and propriety render it highly desirable that the fact that the note or bill is executed in the name of the principal by the agent, should appear on the face of the instrument, it cannot be regarded as indispensable, and the agent may sign the principal's name alone without adding anything to disclose the agency.[2]

§ 435. **Not enough that Principal be named only in Body of Instrument.** It is not enough to relieve the agent that the person, for whom the promise is made or the bill drawn, be named in the body of the instrument alone. In such a case, as a rule, it will be presumed that only the person who signed intended to be charged, unless there is a clear indication to the contrary.

Thus where the form of the bill was, "Forty days after date, pay to the order of T. L. fifty pounds, value received, which place to the account of the Durham bank, as advised," signed "C. F.," it was held to be the bill of C. F., though he was known at the time to be the agent of the Durham bank. Said Lord ELLENBOROUGH: "Is it not an universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it *for* another, or by procuration of another, which are words of exclusion? Unless he says plainly 'I am the mere scribe,' he becomes liable. Now in the present case, although the plaintiff knew the defendant to be the agent of the Durham bank, he might not know but that he meant to offer his own responsibility. Every person, it is to be presumed, who takes a bill of the drawer, expects that his responsibility is to be pledged to its being accepted. Giving full effect to the circumstance that the plaintiff knew the defendant to be agent, still the defendant is liable, like any other drawer who puts his name to a bill without denoting that he does it in the character of a procurator." [3]

[1] GRAY, J., in Tucker Mn'fg Co. v. Fairbanks, 98 Mass. 101.

[2] First National Bank v. Gay, 63 Mo. 33, 21 Am. Rep. 430; Forsyth v. Day, 41 Me. 382.

[3] Leadbitter v. Farrow, 5 Maule & Sel. 345. To the same effect see: Penkivil v. Connell, 5 Exch. 381; Mayhew v. Prince, 11 Mass. 54.

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And again where a note was executed in these words: "For value received, we, the subscribers, jointly and severally promise to pay Messrs. J. and T. B. or order, for the Boston Glass Manufactory, thirty-five hundred dollars, on demand, with interest," and was signed, "J. H., S. G., C. F. K.," it was held to be the note of the signers and not of the manufactory. Chief Justice SHAW, in delivering the opinion of the court, said: "The main question in the present case, arises from the form of the contract; and the question is, whether in this form it binds the persons who signed it, or the company for whose use the money was borrowed. As the form of words in which contracts may be made and executed, are almost infinitely various, the test question is, whether the person signing professes and intends to bind himself, and adds the name of another to indicate the capacity or trust in which he acts, or the person for whose account his promise is made; or whether the words referring to a principal are intended to indicate that he does a mere ministerial act in giving effect and authenticity to the act, promise and contract of another. Does the person signing apply the executing hand as the instrument of another, or the promising and engaging mind of a contracting party?"[1]

And in a subsequent case in the same court, it is said: "It seems to be well settled in this court, and supported by English authority, that the mere insertion of 'for' or 'for and in behalf of' the principal, in the body of the note does not make it the contract of the principal if signed by the mere name of the agent without addition."[2]

In accordance with the same rules, it was held that a note running "we, the trustees of the Methodist Episcopal Church," promise, etc., and signed by the trustees as individuals, with nothing to indicate that they signed as trustees, was their individual promise;[3] and the same ruling was made where a note running "we, the directors of the Big Eagle and Harrison Turn-

[1] Bradlee v. Boston Glass Manufactory, 16 Pick. (Mass.) 347; See also Morell v. Codding, 4 Allen (Mass.) 403.

[2] Barlow v. Congregational Society, 8 Allen (Mass.) 460.

[3] Hypes v. Griffin, 89 Ill, 134, 31 Am. Rep. 71; but see the decision of the same court where the trustees added that word to their signatures, Powers v. Briggs, 79 Ill. 493, 22 Am. Rep. 175. See also Burlingame v. Brewster, 79 Ill. 515, 22 Am. Rep. 177.

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pike Company promise," was signed by those officers in their individual names.[1]

But a contrary conclusion was reached in Maine, where a note, beginning "We, the subscribers, for the Carmel Cheese Manufacturing Company, promise to pay," etc., was signed by the makers in their individual name.[2] But this conclusion was based largely upon the provisions of a statute of that State, which as the court say in an earlier case:[3] "was passed soon after the decision of Stinchfield *v.* Little (to which reference has been made before), and was undoubtedly intended to modify the technical rule of the common law as declared by the court in that case." That statute provides that "deeds and contracts, executed by an authorized agent of an individual or corporation in the name of the principal, or in his own name for his principal, are to be regarded as the deeds and contracts of such principal," "'For his principal,'" says the court, "are the words used in our statute above cited, in regard to the proper execution of a contract by an agent; and 'for' when so used, means 'in behalf of.' * * The words used in the body of the note, tending to show the meaning of the parties, should have the same force and effect as if following, or written against the defendants' signatures."

§ 436. **Same Subject—Where Intent to charge Principal is manifest.** But where the body of the instrument discloses that it is evidently executed for or in behalf of a principal therein named, and the person signing adds to his signature such words as indicate that he was acting in a representative and not in a personal capacity, the instrument will be deemed to be the obligation of the principal. Thus where the contract ran "We, the undersigned committee for the first school district, promise in behalf of said district," etc., and was signed with the individual names of the committee with the addition of the word "committee," it was held that the intention to bind the district was apparent upon the face of the contract and that the members of the committee were not personally bound.[4] For the same reason, where a check with the words "Ætna Mills" printed on the margin was given in payment of a debt due from the mills and was

[1] Pack *v.* White, 78 Ky. 243.

[2] Simpson *v.* Garland, 72 Me. 40, 39 Am. Rep. 297.

[3] Nobleboro *v.* Clark, 68 Me. 87, 28 Am. Rep. 22. See also Purinton *v.* Insurance Co. 72 Me. 22.

[4] Andrews *v.* Estes, 11 Me. 267, 26 Am. Dec. 521.

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signed "I. D. F., Treasurer," the court held it to be manifestly the check of the mills and not the personal check of F.[1] And so where a note beginning "We promise" and signed W. B. S., "Sec'y," had impressed upon it the seal of the company containing the words "Neal Manufacturing Co., Madison, Ind.," of which company S. was the secretary, it was held to be the note of the company and not of S.[2] And the same effect was given to the seal of the company in Oregon and Illinois. Thus a note stating, "We promise to pay" etc., signed "J. I., Pres., J. J. I., Sec. G. M. Co.," which had impressed upon it the seal of the company containing the words, "Granger Market Co.," is the note of the company and not of the officers;[3] and so is a note reading "We promise to pay," etc., signed "S. L. K., Pres., Chicago Ready Roofing Co., W. H. K., Sec'y," impressed with the seal of the "Chicago Ready Roofing Company."[4] But a different conclusion was reached in England.[5]

Again, a note reading, "We promise to pay," etc., "on account of the London and Bermingham Iron Hardware Company," and signed "J. M., H. W., J. W., Directors," and countersigned "E. G., Secretary," was held to be the note of the company;[6] a note beginning "I, the subscriber, treasurer of the Dorchester Turnpike Corporation promise," etc., signed "A. B., treasurer of the Dorchester Turnpike Corporation," was held to be the note of the corporation and not of the treasurer;[7] a note reading, "the president and directors of the Woodstock Glass Company promise," etc., and signed "W. H., President," binds the company and not the president individually;[8] a note beginning "we as Trustees of the Amador and Nevada Wagon Road Company promise," etc., and signed, "J. M. K., L. N., J. T., Trustees, of the Amador and Nevada Wagon Road Company," is the note of the company and not of the trustees;[9] and a note beginning "we, as the trustees of the Methodist church, promise to pay," etc.,

[1] Carpenter v. Farnsworth, 106 Mass 561, 8 Am. Rep. 360.

[2] Means v. Swormstedt, 32 Ind. 87, 2 Am. Rep. 330.

[3] Guthrie v. Imbrie, 12 Oregon, 182, 53 Am. Rep. 331, 6 Pac. Rep. 664.

[4] Scanlan v. Keith, 102 Ill. 634, 39 Am. Rep. 302.

[5] Dutton v. Marsh, L. R. 6 Q. B. 361.

[6] Lindus v. Melrose, 2 Hurl. & Nor. 293.

[7] Mann v. Chandler, 9 Mass. 335.

[8] Mott v. Hicks, 1 Cow. (N.Y.) 513; 13 Am. Dec. 550.

[9] Blanchard v. Kaull, 44 Cal. 440.

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and signed, "J. W. K., J. A. P., R. G. C., Trustees," is the note of the church and not of the trustees.[1]

A note reading, "we, the trustees of the First Free Will Baptist Society of Chicago, promise," etc., and signed "Trustees of the First Free Will Baptist Society, of Chicago, Illinois, A. P. D., P. W. G.," and seven others, was held to be the note of the society;[2] while a note reading "we, the trustees of the Seventh Presbyterian Church, promise," etc., and signed "A. H. B., L. B. K., J. C. and F. D. M., Trustees," was held by the same court to be the individual note of the trustees, and not of the society;[3] the distinction being based upon the fact that in the first case the exact corporate name of the society, *i. e.* "The Trustees of the First Free Will Baptist Society, of Chicago," had been used both in the body of the note and in the signature, while in the second case it had not been, the corporate name there being "Trustees of the Society of the Seventh Presbyterian Church, of Chicago." The distinction here made cannot be reconciled with many of the cases cited above.

§ 437. **Same Subject—Other Cases.** A bill or note drawn by an agent with such directions or expressions upon its face as indicate that it is drawn upon, or is to be charged to, the account of his principal, and which is signed by the agent with such additions as to disclose that he is acting in his character as agent, will be deemed to be a charge upon the principal and not upon the agent.

And it has been held that it is not necessary that the bill or note itself should unequivocally disclose the name of the principal in order to exonerate the agent; but that it will be sufficient if enough appears upon the face of the transaction to put a prudent man, before taking the bill or note, upon inquiry.[4]

Thus a bill drawn by an agent upon his principal concluding "and charge the same to the account of your agency at Natchez," and signed "J. D. H., Agent" sufficiently indicates that the agent was acting in a representative character;[5] so a bill headed

[1] Leach v. Blow, 8 Smedes & M. (Miss.) 231.

[2] New Market Savings Bank v. Gillett, 100 Ill. 254, 39 Am. Rep. 39.

[3] Powers v. Briggs, 79 Ill. 493, 22 Am. Rep. 175.

[4] Davis v. Henderson, 25 Miss. 549, 59 Am. Dec. 229; Mott v. Hicks, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550.

[5] Davis v. Henderson, *supra*.

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"Office of Tioga Navigation Company," concluding, "charge to motive power and account," and signed, J. R. W., "Pres. T. N. Co.," purports upon its face to be the bill of the corporation and not the individual bill of the signer;[1] and a draft headed "New England Agency of the Pennsylvania Fire Insurance Company," having the words "Foster & Cole, General Agents for the New England States" printed in the margin, and appearing on its face to be drawn upon said insurance company in payment of a claim against it, is the draft of the company and not of Foster & Cole, although it is signed by them in their own names;[2] and a bill headed "Office of Belleville Nail Mill Co.," and concluding, "charge same to account of Belleville Nail Mill Co., W. C. B., Pres., J. C. W., Sec'y," is the bill of the company.[3]

So where a draft was headed "Pompton Iron Works" and directed that the amount should be placed "to the account of Pompton Iron Works," it was held to be clearly the draft of the Iron Works and not of Burtt, though it was signed "W. Burtt, Agt,"[4] and a bill headed "Adams & Co.'s Express and Banking House," drawn on Adams & Co., concluding, "and charge same to account of this office," and signed "C. P. N. per G. W. C., Ag'ts," is the bill of the company.[5]

So where a bill headed "Office of Portage Lake Manufacturing Company" and concluding, "charge the same to account of the company, I. R. Jackson, Agt.," was drawn upon "E. T. Loring, Agent," and was accepted by him in the same manner, it was held in Massachusetts that so far as the drawer, Jackson, was concerned, there was enough upon the face of the instrument to show that the bill was drawn as agent of the company, but it was further held that this conclusion exhausted the operation of the words showing that intent, and that they could not be used again to indicate that the acceptance of Loring was made in the same capacity.[6]

But on the other hand, in accordance with cases cited in a pre-

[1] Olcott v. Tioga R. R. Co., 27 N. Y. 546, 84 Am. Dec. 298.

[2] Chipman v. Foster, 119 Mass. 189; to same effect, Tripp v. Swanzey Paper Co., 18 Pick. (Mass.) 291.

[3] Hitchcock v. Buchanan, 105 U. S. 416.

[4] Fuller v. Hooper, 3 Gray (Mass.) 334.

[5] Sayre v. Nichols, 7 Cal. 535, 68 Am. Dec. 280.

[6] Slawson v. Loring, 5 Allen (Mass.) 340, 81 Am. Dec. 750.

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ceding section, a draft concluding, "and charge the same to the account of Proprietors Pembroke Iron Works. Joseph Barrell," was held to be the draft of Barrell because he had not added anything to his signature to indicate that he was acting in a representative character.[1]

§ 438. **When no Principal is disclosed, Agent is bound notwithstanding he signs as "Agent."** Where, however, no principal is disclosed upon the face of the instrument, for whom or in whose behalf it appears to have been made, the agent will be held personally bound notwithstanding the fact that he adds the word "agent," "trustee," "president," etc., to his name. It is to be presumed that he intended to bind some one by the instrument, and as he has used no apt words to bind the principal, and no other contracting party appears, he must be held to have intended to charge himself, and the words "agent," "trustee," etc., will be regarded as mere *descriptio personæ*.

Thus a note in the usual form, "I promise to pay," etc., signed "A. B., Treas. St. Paul's Parish,"[2] C. H., President of the Dorchester Avenue Railroad Company;"[3] "J. S. E., Trustee of Sullivan Railroad;"[4] "A. B., Treasurer of Eagle Lodge;"[5] "W. H. E., Pres. and Treas. Chelsea Iron Foundry Company;"[6] "J. B., Agent for Lewis County;"[7] or a draft signed "W. P. C., Treas.,"[8] etc., with nothing in the body of the note to indicate that the promise is not the promise of the signer, will be held to be the personal obligation of him whose name is subscribed, notwithstanding the addition.

[1] Bank of North America v. Hooper, 5 Gray (Mass.) 567, 66 Am. Dec. 390; and to the same effect, is Newhall v. Dunlap, 14 Me. 180, 31 Am. Dec. 45.

[2] Sturdivant v. Hull, 59 Me. 172, 8 Am. Rep. 409; Mellen v. Moore, 68 Me. 390, 28 Am. Rep. 77.

[3] Haverhill M. F. Ins. Co. v. Newhall, 1 Allen (Mass.) 130.

[4] Fiske v. Eldridge, 12 Gray (Mass.) 474.

[5] Seaver v. Coburn, 10 Cush. (Mass.) 324.

[6] Davis v. England, 141 Mass. 587.

[7] Exchange Bank v. Lewis County, 28 W. Va. 273; to like effect, see, Robinson v. Kanawha Valley Bank, 44 Ohio St. 441; Barker v. Mechanics' Fire Ins. Co., 3. Wend. (N. Y.) 94; Hills v. Bannister, 8 Cow. (N. Y.) 31; Pentz v. Stanton, 10 Wend. (N. Y.) 271; Savage v. Rix, 9 N. H. 263; Chadsey v. McCreery, 27 Ill. 253; Drake v. Flewellen, 33 Ala. 106; Fowler v. Atkinson, 6 Minn. 578; Rand v. Hale, 3 W. Va. 495, 100 Am. Dec. 761; Collins v. Ins. Co., 17 Ohio St. 215, 93 Am. Dec. 612; Bickford v. First Nat. Bank, 42 Ill. 238, 89 Am. Dec. 436.

[8] Bank v. Cook, 38 Ohio St. 442.

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And, as is said by a learned judge, "Why should it not be so? That is the plain and direct import of the language he uses. 'I' is not the language of a corporation or association. It is that of an individual signer. If a signer appends to his signature a description of himself as agent, president, trustee, or treasurer of a corporation, it may import a declaration on his part that, having funds of such corporation in his possession, he is willing to be responsible, and accordingly makes himself responsible for a debt of theirs. And this *descriptio personæ* may aid him in the keeping and adjustment of his accounts with his different principals. But without some words in the contract importing that he promises for or on behalf of his principal, he cannot avoid the personal liability he has assumed."[1]

What is true of one individual signer is also true of several, whether the form adopted be "I" or "we" promise. Thus a note in the usual form signed by several with the addition "vestryman, Grace church"[2] or "President and Directors of the P. and S. Cheese Co.,"[3] or "Trustees of First Universalist Society,"[4] or "Trustees of the A. Lodge,"[5] is the note of the individual signers.

§ 439. **Negotiable Paper drawn payable to an Agent and indorsed by him.** Where a bill or note is drawn payable to the agent of a private individual, and is indorsed by the agent, the same general rules apply to his liability upon the indorsement, as where he signs the bill or note in the same form as maker.

But where a bill or note is drawn payable to an individual as an officer of a corporation, a different rule has generally been applied. In such a case, the note or bill is considered to be in reality payable to the corporation of which he is such officer, and

[1] BARROWS, J., in Sturdivant v. Hull, *supra*.

[2] Tilden v. Barnard, 43 Mich. 376, 38 Am. Rep. 197.

[3] Rendell v. Harriman, 75 Me. 497, 46 Am. Rep. 421. But *contra*, see Farmers' & Mechanics' Bank v. Colby, 64 Cal. 352, where a note reading "we promise," and signed "G. A. C., Pres. Pac. Peat Coal Co., D. K. T., Sec. *pro tem.*" was held to be the note of the company,

[4] Burlingame v. Brewster, 79 Ill. 515, 22 Am. Rep. 177; to like effect, Powers v. Briggs, 79 Ill. 493, 22 Am. Rep. 175; Hypes v. Griffin, 89 Ill. 134, 31 Am. Rep. 71; Barlow v. Congregational Society, 8 Allen (Mass.) 460; Coburn v. Omega Lodge, 71 Iowa, 581; Hayes v. Brubaker, 65 Ind. 27.

[5] McClellan v. Robe, 93 Ind. 298; Williams v. Second National Bank, 83 Ind. 237.

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his indorsement of it in the same way is generally regarded as the indorsement of the corporation, and not of the officer. Thus where the paper is drawn payable to the "cashier" of a bank, or to "A. B., Cashier" or to "A. B., Cas." or to the order of an officer of the corporation, as to "L. M., Pres. M. F. & M. Ins. Co.," the bank or other corporation is, in the judgment of the law, the payee,[1] and the indorsement of the cashier or officer is regarded as the indorsement of the corporation and not the individual undertaking of the agent.[2]

And the same rule is reached where paper is drawn upon an officer of a corporation as such, as upon "A. B., Treasurer" or "A. B., Agent," and is accepted by him in the same form.[3]

So where a note or bill payable to a corporation by its corporate name has been indorsed by an authorized agent or official, with the title of his office appended, it is regarded as the indorsement of the corporation; as where a note was payable to the "Globe Mutual Insurance Co. or order," and was indorsed "L. G., President."[4]

§ 440. **How when made by Public Agents.** As has been seen, in the preceding chapter,[5] contracts made by public agents while acting in the exercise of their public functions are presumed to be made in behalf of the public, and are not binding upon them personally unless the intent to be so charged is very clear. Whether the same rule applies to the execution of negotiable instruments by public agents is not so clear, although

[1] First National Bank of Angelica v. Hall, 44 N. Y. 395, 4 Am. Rep. 698; Bank of New York v. Bank of Ohio, 29 N. Y. 619; Nichols v. Frothingham, 45 Me. 220, 71 Am. Dec. 539.

[2] Bank of Genesee v. Patchin Bank, 19 N. Y. 312; Burnham v. Webster, 19 Me. 232; Robb v. Bank, 41 Barb. (N. Y.) 586; Mechanics' Bank v. White Lead Co., 35 N. Y. 505; Bank v. Wheeler, 21 Ind. 90; Baldwin v. Bank, 1 Wall. (U. S.) 234; Houghton v. First Nat. Bank of Elkhorn, 26 Wis. 663, 7 Am. Rep. 107; Nave v. Lebanon Bank, 87 Ind. 204; Russell v. Folsom, 72 Me. 436; Farrar v. Gilman, 19 Me. 440; Vater v. Lewis, 36 Ind. 288, 10 Am. Rep. 29.

[3] Hager v. Rice, 4 Colo. 90, 34 Am. Rep. 68; Laflin & Rand Powder Co. v. Sinsheimer, 48 Md. 411, 30 Am. Rep. 472; Shelton v. Darling, 2 Conn. 435; Amison v. Ewing, 2 Cold. (Tenn.) 366. But to the contrary are, Slawson v. Loring, 5 Allen (Mass.) 340, 81 Am. Dec. 750; Moss v. Livingston, 4 N. Y. 208.

[4] Elwell v. Dodge, 33 Barb. (N. Y.) 336; same point, Northampton Bank v. Pepoon, 11 Mass. 288; Nicholas v. Oliver, 36 N. H. 219; McIntyre v. Preston, 5 Gil. (Ill.) 48.

[5] *Ante*, § 426.

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in reason, it would seem that it should, as between the immediate parties where the principal is known or disclosed, and as against third persons where enough is shown to fairly put a prudent man upon his guard.

The cases upon this subject are not harmonious and in many of them the distinction between public and private agents does not seem to have received attention. Thus where a note reading, "I promise to pay" etc. was signed by G. H. and A. P., "School trustees," it was held that the note was the individual obligation of the signers, and that the words "School trustees" were but descriptive of the persons;[1] and a similar ruling was made where the paper was headed "State of Iowa, County of Jones, Township of Hale," and was signed, W. H. G., "Pres. School Board" and I. B. S., "Sec'y School Board."[2] So where notes were signed J. B., "Agent for Lewis County" it was held that J. B. was personally bound.[3] So a note reading "For value received as treasurer of the town of Monmouth, I promise to pay" etc., and signed "Wm. G. Brown, Treasurer," was held to be the individual note of Brown.[4]

But upon the ground that they were public agents, it was held, where two notes headed "Monticello, Ind." and reading "we promise to pay" etc. were signed, one, H. P. A., W. S. H., C. W. K., "Trustees of Monticello School," and the other H. P. A., C. W. K., "School trustees," that the words "Trustees of Monticello School," and "School trustees," were not mere *descriptio personæ*, but indicated an intent to charge the school town,[5] and this doctrine is reaffirmed in later cases in the same court.[6] *A fortiori* would the rule of this case apply where a note read-

[1] Village of Cahokia v. Rautenberg, 88 Ill. 219. To same effect, see Fowler v. Atkinson, 6 Minn. 579.

[2] Wing v. Glick, 56 Iowa, 473, also reported in note to 37 Am. Rep. 142. See also Bayliss v. Peterson, 15 Iowa, 279, where persons who signed as "Committeemen for the erection of a school-house in District No. 1." were held liable. But see Baker v. Chambles, 4 Greene (Iowa) 428. And in the same state a note signed "E. G., President, J. A. C., Secretary, E. S., Director," was held to be the individual note of the signers. American Insurance Co. v. Stratton, 59 Iowa, 696.

[3] Exchange Bank of Virginia v. Lewis County, 28 W. Va. 273.

[4] Ross v. Brown, 74 Me. 352.

[5] School Town of Monticello v. Kendall, 72 Ind. 91, 37 Am. Rep. 139.

[6] Moral School Tp. v. Harrison, 74 Ind. 93.

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ing "I promise to pay" etc. "to be paid out of the township funds" is signed F. K. M., "Trustee of Johnson Tp." [1]

And where a sealed note reading "we, A. S. C., W. M. C., and J. H. K., members of the township committee of the township of Harrison, * * * and our successors in office promise to pay" was signed by the parties in their individual names, the court applied the doctrine in regard to public agents and held the signers not personally liable.[2]

§ 441. **Admissibility of parol Evidence to show Intent.** The question of the admissibility of parol evidence to show who was intended to be bound by an instrument executed by an agent is one not free from difficulty, and the decisions are in conflict.

Thus where an agent drew a bill upon his principal, signing it "T. R. T., agent for S. T.," and there was nothing in the body of the bill to show that it was drawn as the act of the principal, the Supreme Court of Colorado held, 1. That, contrary to the preponderance of authority that the form "C D, agent for A B," is sufficient to bind the principal, it was the individual obligation of T. R. T.; and, 2. That even as between the original parties, parol evidence was not admissible to prove that the bill was drawn in a representative capacity, and not individually, and that the payee had full knowledge of this fact.[3]

But this case was practically overruled by a subsequent case in the same court, where it was held that in the case of a bill drawn upon "T. D. H., Treas." and accepted by him in the same form, parol evidence was admissible to show that the acceptance was in an official capacity and was known by the payee to be so.[4] And the same ruling was made in a similar case in Maryland.[5]

And in accordance with these cases, the Supreme Court of Mississippi held that where a bill was drawn upon an agent and accepted by him, "Accepted, W. S. B., agent of H. W. H.," parol evidence was admissible, as between the original parties, to

[1] Wallis v. Johnson School Tp., 75 Ind. 368.

[2] Knight v. Clark, 48 N. J. L. 22, 57 Am. Rep. 534.

[3] Tannatt v. Rocky Mt. Nat. Bank (1871), 1 Colo. 278, 9 Am. Rep. 156.

[4] Hager v. Rice (1877), 4 Colo. 90, 34 Am. Rep. 68.

[5] Laflin & Rand Powder Co. v. Sinsheimer (1877), 48 Md. 411, 30 Am. Rep. 472.

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show that it was the intent at the time to bind H., the principal, only.[1]

Again, where a note was drawn "we promise to pay," etc., and was signed by four individuals, adding "President and Directors of the Prospect and Stockton Cheese Company," the Supreme Court of Maine held that evidence was not admissible to show that it was intended to be the obligation of the company;[2] but where the note read "we, the president and directors" of a turnpike company "promise to pay" etc., and was signed by C. T. H., "President," J. H. H. and J. G. D., "directors" and E. R. S., "secretary," the Court of Appeals of Maryland held that parol evidence was admissible to show that the signers of the note did so as the agents of the company and not as individuals and that the note was accepted as the note of the company.[3]

So, again, where the note ran, "we, the trustees of the Methodist Episcopal Church in Lebanon, promise to pay," etc., and was signed with the individual names of the makers, the Supreme Court of Illinois decided that it was the individual note of the signers and that parol evidence could not be admitted to show "that it was well understood by the payee when the makers executed the note, they were acting in their capacity as trustees of the church; that they intended to obligate the church corporation, having full authority in that regard, and did not intend to bind themselves personally or individually by their writing."[4]

But in New York, where the makers of a note designated themselves "Trustees of the First Baptist Society of the Village of Brockport," it was held that while *prima facie* they were personally liable, yet that the presumption might be rebutted by parol evidence that the note was, to the knowledge of the payees, given as the obligation of the Society,[5] and this principle was reaffirmed in later cases.[6]

[1] Hardy *v.* Pilcher (1879), 57 Miss. 18, 34 Am. Rep. 432. To same effect see Martin *v.* Smith, — Miss. —, 3 South. Rep. 33.

[2] Rendell *v.* Harriman (1883), 75 Me. 497, 46 Am. Rep. 421.

[3] Haile *v.* Peirce (1869), 32 Md. 327, 3 Am. Rep. 139; and see Laflin & Rand Powder Co. *v.* Sinsheimer, *supra*.

[4] Hypes *v.* Griffin (1878), 89 Ill. 134, 31 Am. Rep. 71.

[5] Brockway *v.* Allen, 17 Wend. (N. Y.) 40.

[6] See White *v.* Skinner, 13 Johns. (N. Y.) 307; Barker *v.* Mechanic Ins. Co. 3 Wend. (N. Y.) 94; Babcock *v.* Beman, 11 N. Y. 200; Bank of Utica *v.* Magher, 18 Johns. (N. Y.) 342;

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So where a note reading "We promise to pay," etc., was signed "Pioneer Mining Company, John E. Mason, Supt.," parol evidence was held, by the Supreme Court of California, to be admissible to show that it was understood by the payee to have been the note of the company alone and to have been given for a consideration passing to the company.[1]

So where a bill was signed "John Kean, President Elizabethtown & Somerville R. R. Co.," the Court of Errors and Appeals New Jersey held that parol proof was admissible, as against a party who was apprised of that fact when he took it, to show that the bill was the bill of the company, and not of Kean, individually.[2]

And the same ruling has been made in Alabama[3] and Virginia,[4] but a directly opposite conclusion has been reached in Ohio. Thus where a bill was accepted by J. A. R., "Agent K. & O. C. Co.," parol evidence was rejected to show that he was the duly authorized agent of Kanawha & Ohio Coal Company; that he accepted the bill for and on account of the company and that the payee knew these facts.[5]

In Kentucky, where a due bill was signed "for Thomas D. Owings, James Grubbs," parol evidence was held to be admissible as against the payee, to show that Grubbs was the manager of Owings' works, and that he executed and delivered the due bill as the obligation of Owings;[6] and the same ruling was made in Connecticut, where a note was signed A. W. M., "agent for the Middletown Manufacturing Company."[7]

In Missouri, where a note reading "I promise to pay," etc., "for building a school-house in Dist. No. 3," was signed by P. T. R., "Local Director," it was held in an action against the

Bank of Genesee v. Patchin Bank, 19 N. Y. 312; Randall v. Van Vetchen, 19 Johns. (N. Y.) 60; Newman v. Greeff, 101 N. Y. 663, 5 North. E. Rep. 335.

[1] Bean v. Pioneer Mining Co. (1885), 66 Cal. 451, 56 Am. Rep. 106.

[2] Kean v. Davis (1847), 21 N. J. L. 683, 47 Am. Dec. 182.

[3] Lazarus v. Shearer, 2 Ala. (N. S.) 718.

[4] Richmond, &c. R. R. Co. v. Snead, 19 Gratt. (Va.) 354.

[5] Robinson v. Kanawha Valley Bank, 44 Ohio St. 441, 8 N. E. Rep. 583; see also to same effect: Collins v. Insurance Co. 17 Ohio St. 215; Titus v. Kyle, 10 Ohio St. 445.

[6] Owings v. Grubbs, 6 J. J. Marsh. (Ky.) 31; Webb v. Burke, 5 B. Mon. (Ky.) 51.

[7] Hovey v. Magill, 2 Conn. 680.

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director that he might show by parol evidence that it was not intended to be his note but that of the district.[1]

In Illinois, where a bill headed "Office of De Steiger Glass Company" was signed "Phil. R. De Steiger, Pres.," it was held by the Appellate Court, after an exhaustive review of the authorities, that parol evidence was admissible to show that it was the draft of the glass company and not of the president individually."[2]

Such evidence has also been freely admitted by the Supreme Court of the United States. Thus where a check headed "Mechanics' Bank of Alexandria," drawn on the cashier of the Bank of Columbia, was signed "Wm. Paton, Jr.," parol evidence was held to be admissible to show that Paton was the cashier of the Mechanics' Bank; that he drew the check as such cashier and that the Bank of Columbia knew it;[3] but where a note drawn payable to the order of "Geo. Moebs, Sec. and Treas.," by the "Peninsular Cigar Co., Geo. Moebs, Sec. and Treas.," was indorsed "Geo. Moebs, Sec. and Treas.," it was held that the indorsement was clearly that of the cigar company and that parol evidence was not admissible to show that the indorsement was intended to be that of Moebs personally.[4]

[1] McClellan *v.* Reynolds, 49 Mo. 312; and the same ruling was made in other cases, Shuetze *v.* Bailey, 40 Mo. 69; Musser *v.* Johnson, 42 Mo. 74, 97 Am. Dec. 316; Turner *v.* Thomas, 10 Mo. App. 342.

[2] La Salle National Bank *v.* Tolu Rock & Rye Co., 14 Ill. App. 141.

[3] Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. (U. S.) 326; see also, Baldwin *v.* Bank of Newbury, 1 Wall. (U. S.) 234, where it is held that where negotiable paper is drawn to a person by name, with addition of "Cashier" to his name, but with no particular designation of the particular bank of which he is cashier, parol evidence is allowable to show that he was the cashier of a bank which is plaintiff in the suit, and that in taking the paper he was acting as cashier and agent of that corporation; and Metcalf *v.* Williams, 104 U. S. 93, where it is held that where a check was signed "W. G. Williams, V. Pres't," parol evidence was admissible to show that the person taking it, took it as the check of the corporation of which Williams was vice-president.

[4] Falk *v.* Moebs, 127 U. S. 597. "We conclude, therefore," says Mr. Justice LAMAR, in this case, "that the notes involved in this controversy, upon their face, are the notes of the corporation. In the language of the court below, they were 'drawn by, payable to and indorsed by, the corporation.' There is no ambiguity in the indorsement, but, on the contrary, such indorsement is, *in terms*, that of the Peninsular Cigar Company. This being true, it follows that the court below was right in excluding from the jury the evidence offered to explain away and modify the terms of such indorsement."

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But in Massachusetts, where a draft headed "Office of Portage Lake Manufacturing Company," drawn upon "E. T. Loring, Agent," and concluding "and charge the same to the account of the company," was signed by "J. R. Jackson, Agt.," and was accepted as follows, "Accepted June 15, E. T. Loring, Agent," it was held in an action against the acceptor, that parol evidence was not admissible to show that the defendant was in fact the agent of the company named on the face of the draft, that the plaintiff knew that he was so, and that the defendant had no personal interest in the company. In this case, as has been seen, the court construed the words disclosing the name of the company and upon whose account the bill was drawn, as showing that the bill was *drawn* as the bill of the company, and that they could not be again used to show that it was also *accepted* in that character;[1] and where a note reading "I promise to pay," etc., was signed by W. H. E., "Pres. and Treas. Chelsea Iron Foundry Company," the same court held that it was the individual promise of W. H. E., and that it was erroneous to admit oral testimony to show that at the time the note was given and afterwards, it was understood and agreed by the parties that it was the note of the foundry company.[2]

So in Iowa, where a note containing an individual promise was signed "E. G., President, J. A. C., Secretary, E. S., Director," it was held that it was the individual promise of the signers and that parol evidence was not admissible to show that it was intended to be the promise of the school district of which the signers were the respective officers indicated.[3]

Where, however, the note or bill is signed in the individual name of the maker, with nothing in the body of the instrument or in the signature to show that he acted in a representative capacity, parol evidence is inadmissible to exonerate him and to charge another.[4]

§ 442. **Same Subject—What Rules applied.** The trouble that

Citing White *v.* Bank, 102 U. S. 658; Martin *v.* Cole, 104 U. S. 30; Metcalf *v.* Williams, *Id.* 93.

[1] Slawson *v.* Loring, 5 Allen (Mass.) 340, 81 Am. Dec. 750.

[2] Davis *v.* England, 141 Mass. 587; 6 N. East, Rep. 73.

[3] American Ins. Co. *v.* Stratton, 59 Iowa, 696.

[4] Phelps *v.* Borland, 30 Hun (N. Y.) 362; Auburn Bank *v.* Leonard, 40 Barb. (N. Y.) 119; Babbett *v.* Young, 51 N. Y. 238.

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has been experienced in dealing with this question does not arise so much from a lack of appreciation of the proper principle involved, as from the difficulty of applying it, although the courts have not always agreed even upon the principle.

Thus the rule has been stated by a learned judge in this way: "Ordinarily, no extrinsic testimony of any kind is admissible to vary or explain negotiable instruments. Such paper speaks its own language, and the meaning which the law affixes to it cannot be changed by any evidence *aliunde*. One of the few exceptions to this rule is where anything on the face of the paper suggests a doubt as to the party bound, or the character in which any of the signers has acted in affixing his name; in which case, testimony may be admitted between the original parties to show the true intent. Thus, where one has signed as agent of another, while the *prima facie* presumption is that the words are merely *descriptio personæ*, and that the signer is individually bound, yet it may be shown in a suit between the parties that it was not so intended, but that, on the contrary, the true intention was that the payee should look to the principal whose name was disclosed in the signature of his agent, or who was well known to be the true party to be bound. The principle, though not recognized in all the cases, is, we think, a sound one, and supported by the weight of authority."[1]

And the principle has been asserted in another case as follows: "The established rule seems to be, that an agent, in making a promise for his principal, is liable on the promise unless it be expressed in terms which show that it was made for and on behalf of the principal; and where an agent makes a promissory note to a third person, in terms sufficient to bind himself as principal, the mere addition of the word 'agent' or other description of his office or capacity, to his signature, does not change or vary the legal effect of the promise itself."[2] * * *

But sometimes the agent may attach to his signature the character in which he signs the instrument without any correspond-

[1] CHALMERS, J., in Hardy *v.* Pilcher, 57 Miss. 18, 34 Am. Rep. 433, citing 1 Dan. on Neg. Inst. § 418; Haile *v.* Peirce, 32 Md. 327, 3 Am. Rep. 139; McClellan *v.* Reynolds, 49 Mo. 312; Baldwin *v.* Bank, 1 Wall. (U. S.) 234; Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. (U. S.) 326, 1 Am. Lead. Cas. 633.

[2] Citing Sumwalt *v.* Ridgely, 20 Md. 114.

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ent or other description in the body of the note—or he may, in the body of the instrument, disclose the name of his principal and sign his own individual name without any additional description whatever,—or he may sign his own name, without apt terms to charge himself, and in the body of the note use doubtful expressions to describe the principal, leaving the precise meaning of the instrument to be gathered from the terms on its face, so ambiguous or obscure as to render its interpretation, *per se*, too difficult and uncertain for just and sound construction. When the note is of this last description, that is where its language or terms are so unintelligible as to admit of no rational interpretation of the meaning, or are not sufficiently decisive of the intention of the parties, but, on the contrary, are equivocal and uncertain, extraneous proof, as between the original parties, may be admitted to show the true character of the instrument, and what party,—the principal or the agent, or both,—is liable.

Where individuals subscribe their proper names to a promissory note, *prima facie* they are personally liable, though they add a description of the character in which the note is given; but such presumption of liability may be rebutted, as between the original parties, by proof that the note was in fact given by the makers, as agents, with the payee's knowledge."[1]

And still again it has been said that "The rule is that when words which may be either descriptive of the person, or indicative of the character in which he contracts, are affixed to the name of the contracting party, *prima facie* they are descriptive of the person only, but the fact that they were not intended by the parties as descriptive of the person, but were understood as determining the character in which the party contracted, may be shown by extrinsic evidence; but the burden of proof rests upon the party seeking to change the *prima facie* character of the contract."[2]

In Kean *v.* Davis,[3] where the form of signature was "John Kean, President Elizabethtown and Somerville R. R. Co.," Chief Justice Green said: "It is at best, upon the face of the instruments, doubtful by whom they were executed. It is not clear who was the contracting party, whether the obligation was assumed by the agent, or whether he contracted on behalf of his

[1] Haile *v.* Peirce, 32 Md. 327, 3 Am. Rep. 139.

[2] Pratt *v.* Beaupre, 13 Minn. 187.

[3] 21 N. J. L. 683, 47 Am. Dec. 182.

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principal. May extrinsic evidence be resorted to, to remove this doubt? Is parol evidence admissible to show by whom this contract was in fact made,—whether it is the contract of the agent or the contract of the principal?

If this were a verbal and not a written contract, it is not questioned that the evidence offered is both pertinent and competent to discharge the agent, and fix the liability upon the principal. The objection urged to the evidence is, that the contract is in writing; that the construction of a written agreement is matter of law, to be settled by the court upon the terms of the instrument itself; and that evidence *aliunde* cannot be received to contradict or to vary the terms of a valid written instrument.

It is material to observe that the *body* of this instrument contains not a word indicating by whom the contract was made. The language of the instrument is equally applicable to a contract made by the individual or by the corporation. It cannot be said that this evidence will either contradict or vary the terms of the instrument. The whole difficulty lies, not in the construction of the instrument, but in the import of the signature. That signature, as we have seen, may import either the act of the company or of the individual. The terms of the instrument are neither varied nor contradicted by proof that it was the contract of the one or of the other.

The question is not what is the true construction of the language of the contracting party, but who is the contracting party? Whose language is it? And the evidence is not adduced to discharge the agent from a personal liability which he has assumed, but to prove that in fact he never incurred that liability. Not to aid in the construction of the instrument, but to prove whose instrument it is.

Now it is true that the construction of a written contract is a question of law, to be settled by the court upon the terms of the instrument. But whether the contract was in point of fact executed, when it was made, where it was made, upon what consideration it was made, and by whom it was made, are questions of fact to be settled by a jury, and are provable in many instances by parol even though the proof conflicts with the language of the instrument itself."

So in the United States Supreme Court, Mr. Justice BRADLEY said: "The ordinary rule undoubtedly is that if a person merely

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adds to the signature of his name the word 'agent,' 'trustee,' 'treasurer,' etc., without disclosing his principal, he is personally bound. The appendix is regarded as a mere *descriptio personæ*. It does not of itself make third persons chargeable with notice of any representative relation of the signer. But if he be in fact a mere agent, trustee or officer of some principal, and is in the habit of expressing in that way his representative character in his dealings with a particular party, who recognizes him in that character, it would be contrary to justice and truth to construe the documents, thus made and used, as his personal obligations contrary to the intent of the parties."[1]

The reasons given for the contrary ruling are numerous. Thus in the Colorado case above cited,[2] the court said: "If the defendant is liable as drawer of this negotiable instrument, that liability must be determined by the instrument itself. Parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he disclosed his agency and mentioned the name of his principal at the time the contract was executed. When a simple contract, other than a bill or note, is made by an agent, the principal whom he represents may, in general, maintain an action upon it in his own name, and parol evidence is admissible, although the contract is in writing, to show that the person named in the contract was an agent, and that he was acting for his principal. Such evidence does not deny that the contract binds those whom on its face it purports to bind, but shows that it also binds another."

In Massachusetts, the court says: "The rule excluding all parol evidence to charge any person as principal, not disclosed on the face of a note or draft, rests on the principle that each person who takes negotiable paper makes a contract with the parties on the face of the instrument, and with no other person."

[1] Metcalf *v.* Williams, 104 U. S. 93.

[2] Tannatt *v.* Rocky Mountain National Bank, 1 Colo. 279, 9 Am. Rep. 156; see *contra:* Hager *v.* Rice, 4 Colo. 90, 34 Am. Rep. 68.

[3] Slawson *v.* Loring, 5 Allen (Mass.) 340, 81 Am. Dec. 750; Williams *v.* Robbins, 16 Gray (Mass.) 77; Forster *v.* Fuller, 6 Mass. 58; Thacher *v.* Dinsmore, 5 Mass. 299; Fuller *v.* Hooper, 3 Gray, (Mass.) 334; Bank of British N. A. *v.* Hooper, 5 Gray, (Mass.) 567, 66 Am. Dec. 390; Draper *v.* Mass. Steam Heat. Co., 5 Allen,

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In Maine, the court recognize the rule that an ambiguity may be made plain by the use of parol evidence, but deny that where a note beginning "We promise to pay," etc., is signed by several individuals, adding the words "President and Directors of the Prospect and Stockton Cheese Company," any such ambiguity exists.[1] And the general doctrine in this State as expressed by the court is, "that the liability or non-liability of the parties must be determined by an inspection of the note itself; that resort cannot be had to parol evidence to show an intention other than that expressed by the instrument itself."[2]

In Illinois it is said "Whatever may be the decisions elsewhere on analogous questions, the authorities in this State are full to the point that a party will not be permitted to show by oral testimony that his written agreement, understandingly entered into, was not in fact to be binding upon him. Accordingly it was held in Hypes *v.* Griffin,[3] mainly on the authority of Powers *v.* Briggs,[4] that where trustees of a church corporation made a note in their individual names, although they described themselves as trustees of the church, parol evidence was inadmissible to show it was the intention of the parties that it was to be the note of the church corporation and not the note of the trustees executing it. The principle running through that and other cases is that such instruments will be construed as the parties made them without the aid of extrinsic evidence. That rule of interpretation would seem to be as well settled in this State as any rule can be."[5]

§ 443. **Same Subject—The true Rule.** To extract general principles from these cases whose conflict is so great as to amount, in the language of a recent case, almost to anarchy, is manifestly difficult. It will be obvious that the question is of importance in two classes of cases:

1. Those involving the rights of the immediate parties to the instrument only.

2. Those involving the rights of third persons.

(Mass.) 338; Davis *v.* England, 141 Mass. 587, 6 N. E. Rep. 731; Bartlett *v.* Hawley, 120 Mass. 92.

[1] Rendell *v.* Harriman, 75 Me. 497, 46 Am. Rep. 421.

[2] Sturdivant *v.* Hall, 59 Me. 172, 8 Am. Rep. 409; Mellen *v.* Moore, 68 Me. 390, 28 Am. Rep. 77.

[3] 89 Ill. 134, 31 Am. Rep. 71.

[4] 79 Ill. 493, 22 Am. Rep. 175.

[5] Scanlan *v.* Keith, 102 Ill. 634, 40 Am. Rep. 624.

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Respecting this question, however, these general rules may be evolved:

I. Where the paper on its face is the undertaking of the agent only, no reference being made on its face to representative capacity,[1] and where the paper on its face is unmistakably the principal's,[2] parol evidence will not be received, in the one case to exonerate, and in the other to charge the agent.

II. But where the paper bears on its face some reference to a principal, or some appellation indicating representative character, while it is undoubtedly true that the mere addition of the word "agent," "trustee," "treasurer" and the like, or the mere recital in the body of the instrument that the person signing is such agent, treasurer, or trustee of a principal named or unnamed, is, as has been seen, to be regarded *prima facie*, as *descriptio personæ* merely and not as characterizing the act as one done in a representative capacity; and while it is also true, as a general rule, that parol evidence is not admissible to exonerate an agent from a contract into which he has personally entered, yet it is believed that the preponderance of authority will warrant the statement of the rule that:

1. Between the immediate parties to a bill or note, parol evidence is admissible to show:

a. That, by a course of dealing between the parties, that form of execution has become to be the recognized and adopted form by which the obligation of the principal is entered into;[3] or

[1] Phelps *v.* Borland, 30 Hun (N. Y.) 362; Auburn Bank *v.* Leonard, 40 Barb (N. Y.) 119; Babbett *v.* Young, 51 N. Y. 238; Hancock *v.* Fairfield, 30 Me. 299; Collins *v.* Buckeye State Ins. Co., 17 Ohio St. 215; Brown *v.* Parker, 7 Allen (Mass.) 339.

[2] Falk *v.* Moebs, 127 U. S. 597.

[3] Says Mr. Justice BRADLEY, "But if he be in fact a mere agent, trustee or officer of some principal, and is in the habit of expressing, in that way, his representative character in his dealings with a particular party, who recognizes him in that character, it would be contrary to justice and truth to construe the documents, thus made and used as his personal obligations, contrary to the intent of the parties." Metcalf *v.* Williams, 104 U. S. 93, 99; Hovey *v.* Magill, 2 Conn. 680; La Salle Nat. Bank *v.* Tolu, &c. Co., 14 Ill. App. 141; Milligan *v.* Lyle, 24 La. Ann. 144; Gerber *v.* Stuart, 1 Montana, 172.

So it may be shown that the principal was doing business in the agent's name; Bank of Rochester *v.* Monteath, 1 Denio (N. Y.) 402, 43 Am. Dec. 681. See also Devendorf *v.* West Virginia, &c. Co., 17 W. Va. 135; Pease *v.* Pease, 35 Conn. 131; Stevenson *v.* Polk, — Iowa, —, 32 N. W. Rep. 340.

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b. That the instrument was, to the knowledge of the parties, intended to be the obligation of the principal and not of the agent, and that it was given and accepted as such;[1]

c. That an instrument which is so ambiguous upon its face as to render it uncertain who was intended to be bound, was known to be intended to be the obligation of the principal.[2]

2. Between one of the original parties and a third party, such evidence is admissible to make either of the lines of proof mentioned above:

a. Where the third person is not a *bona fide* holder;[3] or

b. Where the instrument bears sufficient evidence upon its face, or is so ambiguous, as to fairly put a reasonably prudent man upon inquiry.[4]

As to this last subdivision it may be said that the mere addition of the word "agent," "trustee," etc., without disclosing the principal is not sufficient to make third persons chargeable with notice of any representative relation of the signer;[5] but the form of executing may be such as to well awaken the suspicion of third persons.[6] Thus where a check was signed "W. G. Wil-

[1] Says GRAY, J.: "As a general proposition, it is undoubtedly true, that one who signs a writing as agent, trustee or president is to be regarded as merely describing himself, and hence is to be held personally liable. But where a writing is thus executed, with full authority from the principal, the party upon whose account it is executed is alone liable." Bank of Genesee *v.* Patchen Bank, 19 N. Y. 312; Brockway *v.* Allen, 17 Wend. (N. Y.) 40; Owings *v.* Grubbs, 6 J. J. Marsh. (Ky.) 31; McClellan *v.* Reynolds, 49 Mo. 312; La Salle Nat. Bank *v.* Tolu, &c. Co., 14 Ill. App. 141; Markley *v.* Quay, 14 Phila. 164.

See also the cases cited in detail in the preceding section.

See also Whitney *v.* Wyman, 101 U. S. 392.

[2] This principle does not seem to be strongly controverted, but, as has been seen, the courts have not always agreed as to what constitutes such an ambiguity. It is certainly sustained by the great weight of authority. Kean *v.* Davis, 21 N. J. L. 683, 47 Am. Dec. 182; Haile *v.* Peirce, 32 Md. 327, 3 Am. Rep. 139; Richmond, &c. R. R. Co. *v.* Snead, 19 Gratt. (Va.) 354; Early *v.* Wilkinson, 9 Gratt. (Va.) 68; Lazarus *v.* Shearer, 2 Ala. 718; Hardy *v.* Pilcher, 57 Miss. 17, 34 Am. Rep. 433; Martin *v.* Smith, — Miss. —, 3 South. Rep. 33; Hager *v.* Rice, 4 Colo. 90, 34 Am. Rep. 68; Lacy *v.* Dubuque Lumber Co., 43 Iowa, 510; Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. (U. S.) 326; Baldwin *v.* Bank of Newbury, 1 Wall. (U. S.) 234; Newman *v.* Greeff, 101 N. Y. 663, 5 N. E. Rep. 335.

[3] Metcalf *v.* Williams, 104 U. S. 93; Condon *v.* Pearce, 43 Md. 83.

[4] Metcalf *v.* Williams, *supra.*

[5] Metcalf *v.* Williams, *supra;* Slawson *v.* Loring, 5 Allen (Mass.) 340, 81 Am. Dec. 750.

[6] Metcalf *v.* Williams, *supra*; Davis

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liams, V-Pres." and "E. P. Aistrop, Sec'y," the Supreme Court of the United States said: "The fact that it bore two official signatures, that of the complainant as vice-president, and of Aistrop as secretary, is so unusual on the hypothesis of its being an individual transaction and points so distinctly to an official origin, that it may very well be doubted whether any holder could claim to be innocently ignorant of its true character." [1]

III. As between the principal and the agent, the more modern cases hold that it is competent for the agent to show that what appears to be the agent's obligation is in fact the principal's.[2]

§ 444. **Further of this Rule.** Consideration of these rules will show that they are not in conflict with established principles. They are not for the purpose, nor have they the effect, to exonerate the agent from a liability assumed by him. They go deeper than that. They permit the agent to show that what appears upon its face to be his contract never was his contract, but is in reality the contract of another; and the rule is limited in its operation to those who either had actual knowledge of the true state of the case at the time of its inception, or who have taken the paper under such circumstances as would put a reasonably prudent man upon inquiry.

II.

OF THE EXECUTION OF OTHER SIMPLE CONTRACTS.

§ 445. **The proper Manner.** Much that has been said in preceding sections in reference to the proper method of executing contracts applies here.

All considerations of propriety and convenience suggest such a clear and unequivocal statement of the character and purpose of the act that there can be no misunderstanding. Hence a proper and formal execution would require that the relations of the

v. Henderson, 25 Miss. 549, 59 Am. Dec. 229; Mott v. Hicks, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550.

[1] Metcalf v. Williams, *supra*.

[2] Castrique v. Buttigieg, 10 Moore, P. C. 94; Sharp v. Emmet, 5 Whart. (Penn.) 288; Lewis v. Brehme, 33 Md. 412. 3 Am. Rep. 190; Miles v. O'Hara, 1 Serg. & R. (Penn.) 32; Whitlock v. Hicks, 75 Ill. 460.

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parties be set forth, and that the instrument be declared to be the contract of the principal executed by his agent. As to the method of signing, the forms found to be sufficient for the execution of negotiable instruments may appropriately be followed.

Notwithstanding this, however, it is a matter of every-day experience that in the haste and press of business, contracts are drawn not only in inartificial, but frequently in equivocal and ambiguous language, and by persons ignorant not only of the technical meaning of legal phrases, but often of the accepted construction of the vernacular. From the very necessities of the case, therefore, as well as from a desire to give effect to the intention of the parties, courts look with indulgent eyes upon such contracts. The strict rules of the common law which govern the execution of solemn instruments under seal, do not apply here; neither is there the same necessity that they should tell their own story in that direct and positive manner that has been seen to be required of negotiable paper.[1]

§ 446. **Intention of the Parties the true Test.** In determining whether a given form of execution is sufficient to bind the principal, the primary consideration is, What is the true intention of the parties as expressed in this contract? In settling this question it must be borne in mind that no particular form of words is required, and that the intention is to be gathered from the whole instrument and not from any isolated portion of it.[2] The situation of the parties and the circumstances of the case are to be taken into consideration. So, too, a valid usage or custom may be resorted to in the proper cases to aid in arriving at the intention, but not to contradict or vary the terms expressly employed.[3]

If upon a survey of the whole instrument, it can be collected

[1] See Merchants' Bank v. Central Bank, 1 Ga. 418, 44 Am. Dec. 665; Andrews v. Estes, 11 Me. 267, 26 Am. Dec. 521; New England Insurance Co. v. De Wolf, 8 Pick. (Mass.) 56; Rice v. Gove, 22 Pick. (Mass.) 158, 33 Am. Dec. 724.

[2] Rogers v. March, 33 Me. 106; Whitney v. Wyman, 101 U. S. 392; Pentz v. Stanton, 10 Wend. (N. Y.) 275; Magill v. Hinsdale, 6 Conn. 464, 16 Am. Dec. 70; Hovey v. Magill, 2 Conn. 682; Spencer v. Field, 10 Wend. (N. Y.) 87; New England Ins. Co. v. De Wolf, 8 Pick. (Mass.) 56; City of Detroit v. Jackson, 1 Doug. (Mich.) 106; Fowle v. Kerchner, 87 N. C. 49.

[3] Oelricks v. Ford, 23 How. (U. S.) 49.

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that the true object and intent of it are to bind the principal and not the agent, courts of justice will adopt that construction of it, however informally it may be expressed.[1]

§ 447. **Agent may bind himself by express Words.** But although where an agent acts within the scope of his authority and professes to act in the name and behalf of his principal, he is not personally liable; still if by the terms of the contract he binds himself personally, and engages expressly in his own name to pay money or to perform other obligations, he will be personally responsible even though he describes himself as "agent," etc.[2] As in the case of negotiable paper, the mere recital of the fact of agency, and the mere addition to his signature of the title of his respresentative character, are *prima facie* to be construed as descriptive of the person only, and not as indicating an intention to charge a principal.

Thus where the committee of a town entered into a contract stated to be made "between Horace Heard, Eli Sherman and Newell Heard, committee of the town of Wayland, on the one part, and William Simonds and John Chapin on the other part,"

[1] Merchants' Bank *v.* Central Bank, 1 Ga. 418, 44 Am. Dec. 665; Abbey *v.* Chase, 6 Cush. (Mass.) 56, and cases cited in note 2, above.

In Whitney *v.* Wyman, *supra*, Mr. Justice SWAYNE says: "Where the question of agency in making a contract arises, there is a broad line of distinction between instruments under seal and stipulations in writing not under seal, or by parol. In the former case the contract must be in the name of the principal, must be under seal, and must purport to be his deed and not the deed of the agent covenanting for him. Stanton *v.* Camp, 4 Barb. (N. Y.) 274.

In the latter cases the question is always one of intent; and the court, being untrammeled by any other consideration, is bound to give it effect. As the meaning of the law-maker is the law, so the meaning of the contracting parties is the agreement. Words are merely the symbols they employ to manifest their purpose that it may be carried into execution. If the contract be unsealed and the meaning clear, it matters not how it is phrased, nor how it is signed, whether by the agent for the principal or with the name of the principal by the agent or otherwise.

The intent developed is alone material, and when that is ascertained it is conclusive. Where the principal is disclosed and the agent is known to be acting as such, the latter cannot be made personally liable unless he agreed to be so."

[2] Simonds *v.* Heard, 23 Pick. (Mass.) 120, 34 Am. Dec. 41; Andrews *v.* Estes, 11 Me. 267, 26 Am. Dec. 521; Burrell *v.* Jones, 3 Barn. & Ald. 47; Fiske *v.* Eldridge, 12 Gray (Mass.) 474; Morell *v.* Codding, 4 Allen (Mass.) 403; Guernsey *v.* Cook, 117 Mass. 548.

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and in and by which, after a specific description of the work to be done, the committee promised as follows: "Said committee are to pay said Simonds & Chapin the sum of three hundred and seventy-five dollars when said work is completed," etc., and signed it as individuals, it was held that the members of the committee had made themselves personally liable. Said the court, by SHAW, Chief Justice: "Two things are here observable, the first is that they do not profess to act in the name or behalf of the town, otherwise than as such an intention may be implied from describing themselves as a committee. But such description, although it may have some weight, is far from being conclusive; and in many of the cases a similar designation was used, which was held to be a mere *descriptio personarum*, and designed to show for whose account the contract was made, and to whose account the amount paid under such contract should be charged.

The second and more decisive circumstance respecting this contract is, that here is an express undertaking on the part of the committee to pay, "Said committee are to pay said Simonds & Chapin," etc. Having described themselves as a committee, this undertaking is as strong and direct as if the names had been repeated, and Heard, Sherman and Heard had promised to pay. The court are therefore of the opinion that by the terms of this contract, the committee intended to bind themselves and did become personally responsible, and that the action is well brought against them."[1]

So where a contract was made "between T. W. Matthews, Secretary of the Mutual Endowment Association of Baltimore, Md., and S. T. Jenkins, of Atlanta, Ga.," and all the agreements were in the form "The said Matthews agrees," etc., and the contract was signed "T. W. Matthews, S. T. Jenkins," it was held to be the personal contract of Matthews.[2]

§ 448. **Same Subject—Contrary Intention manifest.** But where, notwithstanding the failure to use precise and appropriate language, it still can be gathered from the whole instrument that the agent acted in a representative character, the words used will

[1] Simonds v. Heard (1839), *supra*. See also Grau v. McVicker, 8 Biss. (U. S. C. C.) 13.
[2] Matthews v. Jenkins, 80 Va. 463.

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be regarded as employed with that intention, and not merely as descriptive of the person.[1]

Thus where a lease began "This agreement, made this 25th day of December, 1880, between Randolph Marshall, agent of Oliver Dougherty," etc., and was signed "Randolph V. Marshall, agent of O. R. Dougherty," the Supreme Court of Indiana, while recognizing the general rule that such expressions are ordinarily regarded as descriptive of the person, said: "While accepting the general rule to be that stated, the American authorities agree that if the contract itself shows that the words were not used as merely descriptive of the person they will not be so regarded, but will be assigned their real meaning. In the instrument before us it clearly appears that Marshall was the agent of the lessor, and acted as such, for we find this recited, 'That the said Marshall, agent as aforesaid, has rented, etc.' There are other provisions in the instrument clearly showing that Marshall executed the lease as the agent of Dougherty, and we have no doubt that it should be treated as having been executed by him."[2]

And where an order for goods, beginning "our company being so far organized, by direction of the officers, we now order from you," etc., was signed "Charles Wyman, Edward P. Ferry, Carlton L. Storrs, Prudential Committee, Grand Haven Fruit Basket Co.," and was accepted by a letter addressed to the "Grand Haven Fruit Basket Company," the Supreme Court of the United States held, in an action brought to charge the members of the committee personally, that it was entirely clear that both parties understood and meant that the contract was to be, and in fact was, with the corporation, and not with the committee.[3]

§ 449. **The Admissibility of parol Evidence to show Intent.** Where an agent has entered into a contract which in terms charges himself, parol evidence is not admissible to discharge

[1] Rogers *v.* March, 33 Me. 106; Goodenough *v.* Thayer, 132 Mass. 152; Green *v.* Kopke, 18 C. B. 549 (9 J. Scott); Cook *v.* Gray, 133 Mass. 106; Lyon *v.* Williams, 5 Gray (Mass.) 557; McGee *v.* Larramore, 50 Mo. 425; Smith *v.* Alexander, 31 Mo. 193; Ogden *v.* Raymond, 22 Conn. 379, 58 Am. Dec. 429; Hall *v.* Huntoon, 17 Vt. 244; Traynham *v.* Jackson, 15 Tex. 170; Texas Land & Cattle Co. *v.* Carroll, 63 Tex. 48.

[2] Avery *v.* Dougherty (1885), 102 Ind. 443, 52 Am. Rep. 680.

[3] Whitney *v.* Wyman, 101 U. S. 392: Post *v.* Pearson, 108 *Id.* 418.

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him by showing that he intended to charge the principal,[1] although it is admissible to show that it was the intention to charge himself personally,[2] but where the contract bears upon its face evidence that the person signing was in fact an agent,[3] and where the contract is so framed as to render it uncertain whether the agent or the principal was intended to be bound,[4] parol evidence may be received to show that it was the intention to bind the principal and not the agent.

But although parol evidence may not be admissible to release the agent, it may be made use of to charge the principal. Thus the principal, as will be seen hereafter, may be charged as such by parol evidence upon a simple contract made by his agent, even though the contract gives no indication on its face of an intention to charge any other person than the signer. And this doctrine applies as well to those contracts which are required to be in writing as to those to whose validity a writing is not essential.[5] This rule is not obnoxious to the principle which forbids the contradiction of written instruments by parol testimony, for the effect is not to show that the person appearing to be bound is not bound, but to show that some other person is bound also.[6]

[1] Bryan *v.* Brazil, 52 Iowa, 350.

[2] Black River Lumber Co. *v.* Warner, 98 Mo. 374; Ferris *v.* Thaw, 72 Mo. 446.

[3] Deering *v.* Thom, 29 Minn. 120; Pratt *v.* Beaupre, 13 Minn. 187; Haile *v.* Peirce, 32 Md, 327, 3 Am. Rep. 139. In Deering *v.* Thom the agent gave the purchaser of a machine an instrument as follows: "If the Marsh harvester don't work to his satisfaction, he, W. Thom, can return the machine to me, and I will return his note for the same. A. M Schnell, agent." GILFILLAN, C. J. said: "The memorandum signed by Schnell is standing alone and without anything to explain it *prima facie* his contract, and not that of his principal, and the word 'agent' affixed to his signature is *prima facie, descriptio personæ* and not as determining the character in which he contracted. But it was open to proof that it was the intention to bind his principal and not himself. Bingham *v.* Stewart, 13 Minn. 106, s.c. 14 Minn. 214; Pratt *v.* Beaupre, 13 Minn. 187."

[4] Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. (U. S.) 326; Deering *v.* Thom. *supra.*

[5] Byington *v.* Simpson, 134 Mass. 169, 45 Am. Rep. 314; Briggs *v.* Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Huntington *v.* Knox, 7 Cush. (Mass.) 371; Eastern Railroad *v.* Benedict, 5 Gray (Mass.) 561; Lerned *v.* Johns, 9 Allen (Mass.) 419; Hunter *v.* Giddings, 97 Mass. 41; Exchange Bank *v.* Rice, 107 Mass. 37, 9 Am. Rep. 1; National Ins. Co. *v.* Allen, 116 Mass. 398; Texas Land & Cattle Co. *v.* Carroll, 63 Tex. 48; Higgins *v.* Senior, 8 M. & W. 834.

[6] See Higgins *v.* Senior, *supra.*

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The fact that the contract was one which the Statute of Frauds requires to be in writing, makes no difference. Such a contract may be signed for the principal by a person thereunto lawfully authorized, and though the agent sign in his own name alone, the principal may still be charged by parol evidence.[1] The rule is otherwise, however, where the agent has entered into a contract in his own name and under seal.[2]

[1] Neaves v. North State Mining Co., 90 N. C. 412, 47 Am. Rep. 529. In this case it was held that a draft for the purchase money of land, drawn by an agent without disclosing his principal's name, is a sufficient memorandum to charge the principal under the Statute of Frauds.

[2] Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617.

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BOOK IV.

OF THE RIGHTS, DUTIES AND LIABILITIES ARISING OUT OF THE RELATION.

CHAPTER I.

IN GENERAL.

450. Purpose of Book IV.
451. What Parties interested.
452. How Subject divided.

§ 450. **Purpose of Book IV.** Having heretofore considered how the relation of principal and agent may be created; by what rules the nature and extent of the authority conferred shall be determined; and in what manner the authority so conferred and construed shall be executed, it remains to consider in this Book, what are the rights, duties and liabilities of all of the parties concerned, growing out of, or based upon, the actual or attempted execution of the agency.

§ 451. **What Parties interested.** It will be obvious that the persons who are interested in this inquiry are numerous, involving all of the possible parties to the transaction, and that their several rights, duties and liabilities *inter sese* will not always be identical or reciprocal, or determined by the same standards. Thus, as has already been seen, the circumstances may be such that a given act of the agent must, in questions arising between the principal and third persons, be deemed to be fully authorized; while the same act in questions arising between the principal and the agent, will be deemed to be wholly unauthorized. So, as has been seen, the acts of one who was before a mere stranger to an assumed principal may become, by the latter's words or conduct, binding upon him as an actual principal; while

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the acts of an agent fully authorized, may from defective or excessive execution fail to bind the principal at all, and be binding only upon the agent himself in some cases, and in others, upon no one.

When the agent has fully and properly executed his authority in the name and for the benefit of his ostensible principal, his mission is performed and his rights and liabilities are determined. Henceforth his principal is entitled to the benefits and is subject to the liabilities arising from the transaction.

Where, however, he has executed his authority in his own name, or so ambiguously as to render it uncertain upon the face of the transaction in what character and capacity he acted, it will be found in many cases that dual rights and liabilities have been created, and that one or other of the parties is entitled to elect upon whom to fasten the liability.

§ 452. **How Subject divided.** Such being the general nature of the subject, it will be found convenient to treat it under the following heads:

1. The duties and liabilities of the agent to his principal.
2. The duties and liabilities of the agent to third persons.
3. The duties and liabilities of the principal to the agent.
4. The duties and liabilities of the principal to third persons.
5. The duties and liabilities of third persons to the agent.
6. The duties and liabilities of third persons to the principal.

No separate consideration of the rights of the parties is intended, because, as will be seen, the duties and liabilities of one party are generally reciprocally the rights of the other.

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CHAPTER II.

OF THE DUTIES AND LIABILITIES OF THE AGENT TO HIS PRINCIPAL.

§ 453. In general—Duty the Measure of Liability.

I. AGENT MUST BE LOYAL TO HIS TRUST.

454. Loyalty to his Trust the first Duty of the Agent.
455. May not put himself in Relations antagonistic to his Principal.
456. May not deal in Business of his Agency for his own Benefit.
457. Agent authorized to purchase for his Principal may not purchase for himself.
458. Same Subject—Same Principle applies to Leases.
459. Same Subject—What Evidence of Trust sufficient.
460. Same Subject—When Rule does not apply.
461. Agent authorized to sell may not become the Purchaser.
462. Agent authorized to purchase may not purchase of himself.
463. To what Agents this Rule applies.
464. Further of this Rule—Indirect attempts—Ratification.
465. This Rule cannot be defeated by Usage.
466. Agent may purchase with Principal's Consent.
467. Agent employed to settle Claim, may not buy and enforce it against his Principal.
§ 468. Agent may not acquire Rights against his Principal based on his own Neglect or Default.
469. Profits made in the Course of the Agency belong to the Principal.
470. Same Subject—Illustrations.
471. When Principal entitled to Agent's Earnings.
472. Same Subject—Rule does not extend to mere Gratuities received by the Agent.

II. TO OBEY INSTRUCTIONS.

473. Agent's Duty to obey Instructions.
474. Results of Disobedience—Agent liable for Losses caused by it.
475. Same Subject—Illustrations.
476. Form of Action—When Agent liable in Trover.
477. Same Subject—The Rule stated—Intent immaterial.
478. How when Agency is gratuitous.
479. Exceptions to this Rule.
480. Agent not bound to perform illegal or immoral Act.
481. Departure from Instructions may be justified by sudden Emergency.
482. Same Subject—Limitations.
483. Where the Authority has been substantially pursued, Agent not liable for immaterial Departure.

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§ 484. Where Instructions are ambiguous, and Agent acts in good Faith.
485. How affected by Custom.
486. Same Subject — When Presumption conclusive.
487. No Presumption of Disobedience.

III. NOT TO BE NEGLIGENT

488. In general.
489. Difficulty of defining Negligence.
490. The general Rule.
491. Consideration of this Rule.
492. Same Subject.
493. Same Subject—Agent bound to exercise usual Precautions.
494. Same Subject—Not bound to exercise highest Care.
495. Same Subject—Good Faith—Reasonable Diligence.
496. Same Subject — When Agent warrants Possession of Skill.
497. How when Agency is gratuitous.
498. Same Subject—When employed in a Capacity which implies Skill.
499. Same Subject—Bound to exercise the Skill he possesses.
500. Reasonable Skill — How determined.
501. Agent not liable for unforeseen Dangers.
502. Agent presumed to have done his Duty.
503. Agent not liable if Principal also negligent.
504. When Agent liable for Neglect of Subagents.
505. Effect of Ratification upon the Agent's Liability.
506. The Measure of Damages.
507. Same Subject — Judgments, Costs, Counsel Fees.
508. Illustrations of this Rule.

1. Neglect of Agent in making Loans.

509. Liable for resulting Loss.

2. Neglect of Agent to Effect Insurance.

§ 510. When liable for Loss.

3. Neglect of Agent in making Collections.

511. Liable for Loss from Negligence.
512. Same Subject — Neglect in making Remittances.
513. Same Subject—Liability for Neglect of Correspondents and Subagents.
514. Same Subject — Liability of Banks.
515. Same Subject — Liability of Attorneys.
516. Same Subject — Liability of Mercantile or Collection Agencies.
517. Same Subject — Liability of Express Companies.
518. Same Subject—The Measure of Damages.
519. Principal's Right of Action against Subagents.
520. Del Credere Agents—How liable to Principal.
521. When Agent liable for selling to irresponsible Parties.

IV. TO ACCOUNT FOR MONEY AND PROPERTY.

522. In general.
523. Account only to Principal—Joint Principal.
524. Subagents — Account to whom.
525. Agent may not dispute his Principal's Title.
526. May not allege Illegality of Transaction to defeat Principal's Claim.
527. When may maintain Interpleader.
528. Agent's Duty to keep correct Accounts.
529. Duty to keep Principal's Property and Funds separate from his own—Liability for commingling.

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§ 530. When Agent should account.
531. Necessity for Demand before Action.
532. When Agent liable for Interest.
533. When Liability barred by Statute of Limitations.
534. Form of Action—When equitable.
§ 535. Of the Right of Set-off.
536. How far Principal may follow trust Funds.
537. Same Subject—Illustrations.
V. To give Notice.
538. Duty to give Notice of Facts material to his Agency.

§ 453. **In general—Duty the Measure of Liability.** It is evident that the extent of the liability of the agent to his principal is to be determined by ascertaining the nature and scope of the duty owed to him. Liability follows from the non-performance of a legal duty; and if, in what shall be hereafter said, that fact may not in each instance be mentioned, it must be constantly understood.

The duties which the agent owes his principal are numerous, and many of them are peculiar. It is scarcely within the limits of an ordinary treatise to enter minutely into all the questions that may arise, but it is possible to so group them under the respective principles that govern them as to furnish a rule, not only for the same states of fact, but also for similar ones.

I.

AGENT MUST BE LOYAL TO HIS TRUST.

§ 454. **Loyalty to his Trust, the first Duty of the Agent.** Loyalty to his trust is the first duty which the agent owes to his principal. Without it, the perfect relation cannot exist. Reliance upon the agent's integrity, fidelity and capacity is the moving consideration in the creation of all agencies; in some it is so much the inspiring spirit, that the law looks with jealous eyes upon the manner of their execution, and condemns, not only as invalid as to the principal, but as repugnant to the public policy, everything which tends to destroy that reliance.[1]

§ 455. **May not put himself in Relations antagonistic to his Principal.** It follows as a necessary conclusion from the principle last stated, that the agent must not put himself into such relations that his interests become antagonistic to those of his prin-

[1] Keighler *v.* Savage Mnf'g Co. 12 Md. 383, 71 Am. Dec. 600.

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cipal. Indeed, this rule is but a restatement of the previous one, and is based upon the same fundamental principles. The agent will not be permitted to serve two masters, without the intelligent consent of both.[1] As is said by a learned judge: "So careful is the law in guarding against the abuse of fiduciary relations, that it will not permit an agent to act for himself and his principal in the same transaction, as to buy of himself, as agent, the property of his principal, or the like. All such transactions are void, as it respects the principal, unless ratified by him with a full knowledge of all the circumstances. To repudiate them, he need not show himself damnified. Whether he has been or not is immaterial. Actual injury is not the principle the law proceeds on in holding such transactions void. *Fidelity in the agent* is what is aimed at, and as a means of securing it, the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal."[2] "This doctrine," to speak again in the beautiful language of another, "has its foundation, not so much in the commission of actual fraud, as in that profound knowledge of the human heart which dictated that hallowed petition 'Lead us not into temptation but deliver us from evil,' and that caused the announcement of the infallible truth that 'a man cannot serve two masters.'"[3]

§ 456. **May not deal in Business of his Agency for his own Benefit.** Akin to these rules and founded upon the same principles, is the other rule that the agent may not deal in the business of his agency for his own benefit. His duty to his principal requires that his efforts shall be in the behalf and for the benefit of his principal. He cannot perform this duty if he is constantly attempting to use his agency for his own purposes.[4]

Following these principles into details, we have:—

§ 457. **Agent authorized to purchase for his Principal may not purchase for himself.** An agent instructed to purchase property

[1] Bentley *v.* Craven, 18 Beav. 76; European, &c. Ry Co. *v.* Poor, 59 Me. 277, re-reported in note to 59 Am. Rep. 468.

[2] MANNING, J. in People *v.* Township Board, 11 Mich. 222.

[3] CARUTHERS, J. in Tisdale *v.* Tisdale, 2 Sneed. (Tenn.) 596, 64 Am. Dec. 775.

[4] Switzer *v.* Skiles, 3 Gilman (Ill.) 529; 44 Am. Dec. 723; Bunker *v.* Miles, 30 Me. 431, 50 Am. Dec. 632; Miller *v.* Davidson, 3 Gilman (Ill.) 518, 44 Am. Dec. 715.

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for his principal will not be permitted, without his principal's knowledge and consent, to become the purchaser of the same property for himself; and if he makes such purchase, he will, although he purchased with his own money, be considered as holding the property in trust for his principal, and the latter upon repaying or tendering him the amount of the purchase price and his reasonable compensation, may by proper proceeding in equity compel a conveyance to himself,[1] or where ejectment is an equitable remedy, he may maintain that action.[2]

And what the agent cannot do directly he will not be permitted to do indirectly, as by causing the property to be purchased ostensibly by another, but in reality for his own benefit. The court will look behind the appearance sought to be put upon the transaction, and determine the case according to its true inwardness.[3]

§ 458. **Same Subject. — Same Principle applies to Leases.**

[1] Rose *v.* Hayden, 35 Kan. 106, 57 Am. Rep. 145; Van Horne *v.* Fonda, 5 Johns. (N. Y.) Ch. 388; Sweet *v.* Jacocks, 6 Paige (N. Y.) 355, 31 Am. Dec. 252; Pinnock *v.* Clough, 16 Vt. 500, 42 Am. Dec. 521; Dennis *v.* McCagg, 32 Ill. 444; Hitchcock *v.* Watson, 18 Ill. 289; McMurry *v.* Mobley, 39 Ark. 309; Ringo *v.* Binns, 10 Pet. (U. S.) 269; Wolford *v.* Herrington, 74 Penn. St. 311, 15 Am. Rep. 548; Von Hurter *v.* Spengeman, 17 N. J. Eq. 185; Van Epps *v.* Van Epps, 9 Paige (N. Y.) 237; Torrey *v.* Bank of Orleans, *Id.* 649; Eshleman *v.* Lewis, 49 Penn. St. 410; Smith *v.* Brotherline, 62 Penn. St. 461; Krutz *v.* Fisher, 8 Kans. 90; Fisher *v.* Krutz, 9 *Id.* 501; Winn *v.* Dillon, 27 Miss. 494; Wellford *v.* Chancellor, 5 Gratt. (Va.) 39; Church *v.* Sterling, 16 Conn. 383; Rhea *v.* Puryear, 26 Ark. 344; Matthews *v.* Light, 32 Me. 305; McMahon *v.* McGraw, 26 Wis. 615; Barziza *v.* Story, 39 Tex. 354; Chastain *v.* Smith, 30 Ga. 96; Cameron *v.* Lewis, 56 Miss. 76; Gillenwaters *v.* Miller, 49 Miss. 150; Sanford *v.* Norris, 4 Abb. App. Dec. (N. Y.) 144; Parkist *v.* Alexander, 1 Johns. (N. Y.) Ch. 394; Wood *v.* Rabe, 96 N. Y. 414, 48 Am. Rep. 640; Burrell *v.* Bull, 3 Sanford (N. Y.) Ch. 15; Bennett *v.* Austin, 81 N. Y. 308; Hargrave *v.* King, 5 Ired. (N. C.) Eq. 430; Kendall *v.* Mann. 11 Allen (93 Mass.) 15; Jackson *v.* Stevens, 108 Mass. 94; McDonough *v.* O'Neil, 113 Mass. 92; Sandfoss *v.* Jones, 35 Cal. 481; Snyder *v.* Walford, 33 Minn. 175; Soggins *v.* Heard, 31 Miss. 426; Seichrist's Appeal, 66 Penn. St. 237; Peebles *v.* Reading, 8 Serg. & R. (Penn.) 484; Onson *v.* Cown, 22 Wis. 329; Bryant *v.* Hendricks, 5 Iowa, 256; Judd *v.* Mosely, 30 Iowa, 424; Jenkins *v.* Eldredge, 3 Story, 183; Baker *v.* Whiting, 3 Sumner, 476; Rothwell *v.* Dewees, 2 Black, 613.

[2] Rose *v.* Hayden, *supra;* McKay *v* Williams (Mich.), 35 N. W. Rep. 159.

[3] Cameron *v.* Lewis, 56 Miss. 76; Eldridge *v.* Walker, 60 Ill. 230; Hughes *v.* Washington, 72 Ill. 84; Rogers *v.* Rogers, 1 Hopk. (N. Y.) 524; Kruse *v.* Steffens, 47 Ill. 112; Forbes *v.* Halsey, 26 N. Y. 53; Davoue *v.* Fanning, 2 Johns. (N. Y.) Ch. 257; Beaubien *v.* Poupard, Harr. (Mich.) Ch. 206.

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This principle is of course not confined to transactions involving an absolute purchase; it includes leasings and other similar arrangements as well. And it is immaterial that the agent was not directly authorized to purchase or lease; he will not be permitted to avail himself of the knowledge that his principal desires or is attempting to negotiate such a transaction in order to forestall him or to make a profit to himself.

An illustration of this principle is found in a recent case in California. There a warehouseman, occupying premises under a lease about to expire, was negotiating for a renewal. His clerk, who from his access to his principal's books and papers and his knowledge of the business, knew of these facts, secretly obtained a lease of the premises to himself and another person, who was a party to the scheme, by telling the landlord that his principal would probably give up the premises at the expiration of his term. But the court directed a conveyance to the principal, saying that an agent should not, any more than a trustee, adopt a course that will operate as an inducement to postpone the principal's interest to his own; and that an agent or subagent who uses the information he has obtained in the course of his agency as a means of buying or leasing for himself will be compelled to convey to the principal.[1]

And the same result was reached in a similar case in Illinois, where a confidential agent of the lessee of a theater, shortly before his principal's lease would expire, secretly procured a lease of the theater for a new term to himself though at a larger rent, denying to his principal that he was trying to secure the lease. The court held that the lease was acquired in violation of the agent's duty and presumably because of his peculiar means of knowledge of the profits of the business, and that a personal benefit thus obtained by an agent would, in equity, inure to the benefit of the principal.[2]

§ 459. **Same Subject — What Evidence of Trust sufficient.** In order to establish such a trust in real estate, if it be denied, it has been regarded as the settled rule that the evidence of it must, to satisfy the statute of frauds, be in writing, or the principal

[1] Gower v. Andrews (1881), 59 Cal. 119, 43 Am. Rep. 242.

[2] Davis v. Hamlin (1883), 108 Ill. 39, 48 Am. Rep. 541. See also Grumley v. Webb, 44 Mo. 444, 100 Am. Dec. 304; Vallette v. Tedens, 122 Ill. 607, 3 Am. St. Rep. 502.

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must have paid or furnished the purchase money.[1] But in a recent case in Kansas, it is held after an elaborate resumé of the authorities that, though the agent was orally employed, and though he purchased with his own money, the trust arose, and that the principal on tendering the amount so paid, and a reasonable compensation for his services, could, if the agent refused to convey to

[1] "Where a man merely employs another person by parol, as an agent to buy an estate, who buys it for himself and denies the trust, and no part of the purchase money is paid by the principal, and there is no written agreement, he cannot compel the agent to convey the estate to him, as that would be directly in the teeth of the statute of frauds." 2 Sugden on Vendors (14th ed.) 703. Same rule: Burden *v.* Sheridan, 36 Iowa, 125, 14 Am. Rep. 505; Bartlett *v.* Pickersgill, 1 Eden, 515, cited in 1 Cox, 15, 4 East, 577, note, 4 Burr, 2255; Botsford *v.* Burr, 2 Johns. (N. Y.) Ch. 405; Perry *v.* McHenry, 13 Ill. 227; Collins *v.* Sullivan, 135 Mass. 461; Kendall *v.* Mann, 11 Allen (Mass.) 15; Davis *v.* Wetherell, 11 Allen (Mass.) 19; Parsons *v.* Phelan, 134 Mass. 419; Barnard *v.* Jewett, 97 Mass. 87; Dodd *v.* Wakeman, 26 N. J. Eq. 484; Fickett *v.* Durham, 109 Mass. 419; Firestone *v.* Firestone, 49 Ala. 128; Allen *v.* Richard, 83 Mo. 55; Nixon's Appeal, 63 Penn. St. 279; Steere *v.* Steere, 5 Johns. (N. Y.) Ch. 1, 9 Am Dec. 256; Walter *v.* Klock, 55 Ill. 362; Watson *v.* Erb, 33 Ohio St. 35; Pinnock *v.* Clough, 16 Vt. 500, 42 Am. Dec. 521; Hidden *v.* Jordan, 21 Cal. 92. In Fickett *v.* Durham, *supra*, AMES, J., says:—

"There is no doubt of the correctness of the doctrine, that, where the purchase money is paid by one person and the conveyance taken by another, there is a resulting trust created by implication of law in favor of the former. And where a part of the purchase money is paid by one, and the whole title is taken by the other, a resulting trust *pro tanto* may in like manner, under some circumstances, be created." McGowan *v.* McGowan, 14 Gray (Mass.) 119; Livermore *v.* Aldrich, 5 Cush. (Mass.) 431. The ordinary case of trusts of this character is, where the purchase money is paid by one party and the conveyance is made to another. "The whole foundation of the trust is the payment of the money, and that must be clearly proved. If, therefore, the party who sets up a resulting trust made no payment, he cannot be permitted to show by parol proof that the purchase was made for his benefit or on his account." Botsford *v.* Burr, 2 Johns. (N. Y.) Ch. 405, 409. He may show that although not paid by his own hand it was substantially his money, by proof that the defendant who made the payment had agreed to lend him the money, to be repaid at an agreed time with interest, and to hold the title in the meantime as security. Page *v.* Page, 8 N. H. 187. But this has been said to be a dangerous species of evidence, and the payment by the party setting up such a trust is required to be clearly proved. Getman *v.* Getman, 1 Barb. Ch. (N. Y.) 499. Kendall *v.* Mann, 11 Allen, (Mass.) 15. It must clearly appear that it was the plaintiff's money when paid. Davis *v.* Wetherell, 11 Allen (Mass.) 19.

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him, recover the land in ejectment, ejectment being in that State an equitable as well as a legal remedy.[1]

[1] Rose *v.* Hayden, 35 Kans. 106, 57 Am. Rep. 145. In this case VALENTINE, J., says: "In this State, the action of ejectment is an equitable remedy as well as a legal remedy, and in such action the party holding the paramount title, whether legal or equitable, or both, or partly one and partly the other, may recover. The only question then for us to consider in this case is, which has the paramount title to the property in controversy — the plaintiff or the defendant? That the defendant with his partner was the agent of the plaintiff to carry on negotiations for the purchase of the lots in controversy for the plaintiff, there can be no question, and but little question as to the nature and character of the agency. The defendant, with his partner, was simply to carry on negotiations for the purchase of the lots, under the directions and instructions of the plaintiff and for the plaintiff. Under such circumstances could the defendant purchase the property for himself, in his own name and with his own money, and take the title to himself without becoming a trustee, for the plaintiff, at the option of the plaintiff, and holding the legal title to the property merely in trust for the plaintiff, and until the plaintiff should repay him the amount which he had expended in the purchase of the property and reasonable compensation for his services? Except for the statute of frauds, which we shall hereafter consider, we think he could not. Krutz *v.* Fisher, 8 Kans. 90; Fisher *v.* Krutz, 9 Kans. 501; Lees *v.* Nutall, 1 Russ. & M. Ch. 53; same case, on appeal, 2 Myl. & K. 819; Taylor *v.* Salmon, 4 Myl. & Cr. 134; Heard *v.* Pilley, L. R., 4 Ch. App. 548; Massie *v.* Watts, 10 U. S. (6 Cranch.) 148; Winn *v.* Dillon, 27 Miss. 494; Wellford *v.* Chancellor, 5 Gratt. (Va.) 39; Church *v.* Sterling, 16 Conn. 383; Rhea *v.* Puryear, 26 Ark. 344; Sweet *v.* Jacocks, 6 Paige (N. Y. Ch.) 355, 461; s. c., 31 Am. Dec. 252; Matthews *v.* Light, 32 Me. 305; McMahon *v.* McGraw, 26 Wis. 615; Barziza *v.* Story, 39 Tex. 354. See also the various cases hereafter cited.

"But can the statute of frauds make any difference? Under the authorities cited by the defendant, plaintiff in error, he claims that it not only can but does. Under such authorities he claims that plaintiff has no remedy and is not entitled to any relief. The following are the principal authorities cited by the defendant:" Citing, 2 Sugd. Vendors, 2 Story Eq. Jur.; Bartlett *v.* Pickersgill; Burden *v.* Sheridan; Allen *v.* Richard; Botsford *v.* Burr; Nixon's Appeal; Steere *v.* Steere; Perry *v.* McHenry; Walter *v.* Klock; Watson *v.* Erb; Pinnock *v.* Clough, Hidden *v.* Jordan, all *supra*, note 1.

"Under the authorities cited by the plaintiff, it is claimed that the statute of frauds makes no difference. It is claimed that with or without the statute of frauds, a trust resulted by operation of law in favor of the plaintiff, and that the defendant simply holds the legal title to the property in trust for the plaintiff. The principal authorities cited by the plaintiff, in addition to those which we have already cited for him are the following: Chastain *v.* Smith, 30 Ga. 96; Cameron *v.* Lewis, 56 Miss. 76; Gillenwaters *v.* Miller, 49 Miss. 150; Sanford *v.* Norris, 4 Abb. App. Dec. 144; Parkist *v.* Alexander, 1

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§ 460. **Same Subject—When Rule does not apply.** But if the agent be not employed to obtain the conveyance, but for an entirely collateral matter,—as to bring his principal into communication with some one who would lend him the money with which to make the purchase, although the agent, with secret intention to buy the land himself, dissuades the principal from seeking other assistance in finding the money,—no trust is created which would be violated if the agent purchases the land

Johns. Ch. 394; Wood *v.* Rabe, 96 N. Y. 414; s. c., 48 Am Rep. 640; Burrell *v.* Bull, 3 Sandf. Ch. 15; Bennett *v.* Austin, 81 N. Y. 308; Hargrave *v.* King, 5 Ired. (N. C.) Eq. 430; Kendall *v.* Mann, 11 Allen (93 Mass.) 15; Jackson *v.* Stevens, 108 Mass. 94; McDonough *v.* O'Neil, 113 Mass. 92; Sandfoss *v.* Jones, 35 Cal. 481; Snyder *v.* Wolford, 33 Minn. 175; Soggins *v.* Heard, 31 Miss. 426; Seichrist's Appeal, 66 Penn. St. 237; Peebles *v.* Reading, 8 Serg. & R. 484; Onson *v.* Cown, 23 Wis. 329; Bryant *v.* Hendricks, 5 Iowa, 256; Bannon *v.* Bean, 9 Iowa, 395; Judd *v.* Mosely, 30 Iowa, 424; Jenkins *v.* Eldredge, 3 Story (U. S. C. C.) 183, 288 to 290; Baker *v.* Whiting, 3 Sumner (U. S. C. C.) 476, 482 *et seq.*; Rothwell *v.* Dewees, 67 U. S. (2 Black,) 613; Cave *v.* McKenzie, 46 L. J. Ch. Div. 564; 37 L. T., N. S 218; Fisher Dig. 1877, 400; McCormick *v.* Grogan, 4 Eng. & Irish. Appeals, L. R. 97; Bond *v.* Hopkins, 1 Sch. & Lef. 433; Dale *v.* Hamilton, 5 Hare Ch. 369.

The statute of frauds upon which the defendant relies will be found in sections 5 and 6 of the act of the legislature of Kansas relating to frauds and perjuries. The statute, so far as it is necessary to quote it, reads as follows:

'Section 5. No leases, estates or interests of, in or out of lands, exceeding one year in duration, shall at any time hereafter be assigned or granted, unless it be by deed or note, in writing signed by the party so assigning or granting the same, or their agents thereunto lawfully authorized, by writing or by act and operation of law.'

'Section 6. No action shall be brought whereby to charge a party, * * * upon any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them, * * * unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized.'

The statute relating to trusts and powers, so far as it is necessary to quote it, reads as follows:

'Section 1. No trust concerning lands, except such as may arise by implication of law, shall be created, unless in writing, signed by the party creating the same, or by his attorney thereto lawfully authorized in writing.'

The statute relating to conveyances, so far as it is necessary to quote it, reads as follows;

'Section 8. Declarations or creations of trusts or powers, in relation of real estate, must be executed in the same manner as deeds of conveyance; but this provision does not apply to trusts resulting from the operation or construction of law.'

* * * The controlling question

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himself with his own money;[1] and if the agent first expressly relinquishes his agency and afterwards buys with his own funds no trust can arise.[2]

So where three parties agreed to make a purchase for their joint benefit; but one of them when called upon to furnish his share of the necessary funds declined to do so, and the two others went on and made the purchase, it was held that no trust could arise in favor of the one who had not joined.[3]

§ 461. **Agent authorized to sell may not become the Purchaser.** For the same reasons, an agent authorized to sell or let his principal's property, cannot without the latter's consent, become the purchaser or lessee.[4] If he does so, the principal may

in this case is not whether the principal advanced the purchase money or not, but it is whether in equity and good conscience the agent who in fact purchased the property with his own money in his own name, in violation of his agreement with his principal and in abuse of the confidence reposed in him by his principal, can be allowed to retain the fruits of his perfidy. The weight of authority is, we think, that he cannot. Sandford *v.* Norris, 4 Abb. N. Y. Ct. App. 144; Wellford *v.* Chancellor, 5 Gratt. (Va.) 39; Onson *v.* Cown, 32 Wis. 329; Winn *v.* Dillon, 27 Miss. 494; Cameron *v.* Lewis, 56 Miss. 76; Gillenwaters *v.* Miller, 49 Miss. 150; Chastain *v.* Smith, 30 Ga. 96; Heard *v.* Pilley, L. R., 4 Ch. App. 548; Lees *v.* Nuttall, 1 Russ. & M. Ch. 53; same cases affirmed on appeal, 2 Myl. & K. Ch. 819; Taylor *v.* Salmon, 4 Myl. & C. Ch. 134; Cave *v.* Mackenzie, Fisher Ann. Dig. (1877), 400, Baker *v.* Whiting, 3 Sumner (U. S. C. C.) 476; Snyder *v.* Wolford, 33 Minn. 175; Peebles *v.* Reading, 8 Serg. & R. (Penn.) 484, Burrell *v.* Bull, 3 Sandf. Ch. (N. Y.) 15; and other cases heretofore cited."

[1] Collins *v.* Sullivan, 135 Mass. 461, distinguishing Lees *v.* Nuttall, 1 Russ. & Myl. 53, s. c., 2 Myl. & K. 819, and Parkist *v.* Alexander, 1 Johns. (N. Y.) Ch. 394, on the ground that there the principal had a previous interest in the land, at least honorary, as by oral agreement with the owner, and the agent was employed for the very purpose of procuring or completing the title.

[2] First Nat. Bank *v.* Bissell, 2 McCrary (U. S. C. C.) 73.

[3] Yeager's Appeal, 100 Penn. St. 88.

[4] People *v.* Township Board, 11 Mich. 222; Clute *v.* Barron, 2 Mich. 194; Dwight *v.* Blackmar, 2 Mich. 330, 57 Am. Dec. 130; Moore *v.* Mandlebaum, 8 Mich. 433; Powell *v.* Conant, 33 Mich. 396; Merryman *v.* David, 31 Ill. 404; Kerfoot *v.* Hyman, 52 Ill. 512; Cottom *v.* Holliday, 59 Ill. 176; Mason *v.* Bauman, 62 Ill. 76; Stone *v.* Daggett, 73 Ill. 367; Tewksbury *v.* Spruance, 75 Ill. 187; Hughes *v.* Washington, 72 Ill. 84; Ruckman *v.* Bergholz, 37 N. J. L. 437; Bain *v.* Brown, 56 N. Y. 285; Tynes *v.* Grimstead, 1 Tenn. Ch. 508; Cumberland Coal Co. *v.* Sherman, 30 Barb. (N. Y.) 553; Copeland *v.* Mercantile Ins. Co. 6 Pick. (Mass.) 198; Parker *v.* Vose, 45 Me. 54; White *v.* Ward, 26 Ark. 445; Stewart *v.* Mather, 32 Wis. 344; Marsh *v.* Whitmore, 21 Wall. (U. S.) 178; Scott *v.* Mann, 36 Tex. 157;

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repudiate it and recover back his property.[1] Here, too, as in the preceding cases, the law looks at the natural and legitimate tendency of such transactions, and not at the motive of the agent in any given case. This tendency is demoralizing, and the fact that in a certain case the agent's motive was honorable, or that the result is more beneficial to the principal, will make no difference if the latter chooses to repudiate it.[2] Said a learned judge: "If such contracts were to be held valid, until shown to be fraudulent or corrupt, the result, as a general rule, would be that they must be enforced *in spite of fraud or corruption.* Hence the only safe rule in such cases is to treat the contract as void, without reference to the question of fraud in fact, unless affirmed by the opposite party. This rule appears to me so manifestly in accordance with sound public policy as to require no authority for its support."[3]

§ 462. **Agent authorized to purchase may not purchase of himself.** An agent authorized to purchase or hire property for his principal, will not, without the intelligent consent of his principal, be permitted to purchase or hire of himself; and if he does so, the principal is not bound, but may repudiate the transaction. This rule is founded upon the same principles as the preceding ones. The law will not permit the agent to put himself in a position where there is such abundant opportunity, if not temptation, to take advantage of his relations for his own benefit.[4]

And it makes no difference that the intention of the agent was honest and the result of his action might be to the advantage of

Francis *v.* Kerker, 85 Ill. 190; Grumley *v.* Webb, 44 Mo. 444; Robertson *v.* Western F. & M. Ins. Co., 19 La. 227, 36 Am. Dec. 673; Florance *v.* Adams, 2 Rob. (La.) 556, 38 Am. Dec. 226; Butcher *v.* Krauth, 14 Bush (Ky.) 713; Mosley *v.* Buck, 3 Munf. (Va.) 232, 5 Am. Dec. 508; McKinley *v.* Irvine, 13 Ala. 681; Banks *v.* Judah, 8 Conn. 145; Church *v.* Sterling, 16 Conn. 388; Sturdevant *v.* Pike, 1 Ind. 277; Matthews *v.* Light, 32 Me. 305; Moore *v.* Moore, 5 N.Y. 256; Shannon *v.* Marmaduke, 14 Tex. 217; Segar *v.* Edwards, 11 Leigh (Va.) 213.

[1] Louisville Bank *v.* Gray, 84 Ky. 565.

[2] People *v.* Township Board, 11 Mich. 222.

[3] CHRISTIANCY, J. in People *v.* Township Board, *supra.*

[4] Taussig *v.* Hart, 58 N. Y. 425; Tewksbury *v.* Spruance, 75 Ill. 187; Harrison *v.* McHenry, 9 Ga. 164, 52 Am. Dec. 435; Florance *v.* Adams, 2 Rob. (La.) 556, 38 Am. Dec. 226; Ely *v.* Hanford, 65 Ill. 267; Conkey *v.* Bond, 36 N. Y. 427; Beal *v.* McKiernan, 6 La. (O. S.) 407; Keighler *v.* Savage Mnfg. Co. 12 Md. 383, 71 Am. Dec. 600.

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his principal; the latter may still repudiate it. The tendency of such transactions is bad, and a good intention in a particular case will not save it, unless the principal sees fit to affirm it.[1]

And what was said in a preceding section applies here also. The agent may not accomplish by indirect and covert means what he could not do directly and openly.

§ 463. **To what Agents this Rule applies.**—This rule is of frequent application, not only to agencies which are strictly private in their nature, but to those which are public or quasi-public as well.

Thus an administrator,[2] executor,[3] guardian,[4] sheriff,[5] deputy

[1] Taussig v. Hart, 58 N. Y. 425; Harrison v. McHenry, 9 Ga. 164, 52 Am. Dec. 435; People v. Township Board, 11 Mich. 222.

"The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private; but the value of the prohibition is most felt, and its application is most frequent, in the private relations in which the vendor and purchaser may stand toward each other. The disability to purchase is a consequence of that relation between them which imposes on one a duty to protect the interest of the other, from the faithful discharge of which duty his own personal interests may withdraw him. In this conflict of interest the law wisely interposes. It acts not on the possibility that, in some cases, the sense of that duty may prevail over the motives of self-interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty. It therefore prohibits a party from purchasing on his own account that which his duty or trust requires him to sell on account of another; and from purchasing on account of another, that which he sells on his own account. In effect he is not allowed to unite the two opposite characters of buyer and seller, because his interests, when he is the seller or buyer on his own account, are directly conflicting with those of the person on whose account he buys or sells." Mr. Justice WAYNE, in Michoud v. Girod, 4 How. (U. S.) 503.

[2] Dwight v. Blackmar, 2 Mich. 330, 57 Am. Dec. 130; Pearson v. Moreland, 7 Smedes & M. (Miss.) 609, 45 Am. Dec. 319; Scott v. Freeland, 7 Smedes & M. (Miss.) 409, 45 Am. Dec. 310; Planters' Bank v. Neely, 7 How. (Miss.) 80, 40 Am. Dec. 51; McGowan v. McGowan, 48 Miss. 553; Hoffman v. Harrington, 28 Mich. 106; Obert v. Hammel, 3 Har. (N. J. L.) 74; Coat v. Coat, 63 Ill. 73; Kruse v. Steffens, 47 Ill. 112; Smith v. Drake, 23 N. J. Eq. 302.

[3] Rogers v. Rogers, 1 Hopk. (N. Y.) 524; Schenck v. Dart, 22 N. Y. 420; Winter v. Geroe, 5 N. J. Ch. 319; Dunlap v. Mitchell, 10 Ohio, 117; Worthy v. Johnson, 8 Ga. 236; 52 Am. Dec. 399; Scott v. Gorton, 14 La. 115, 33 Am. Dec. 578.

[4] Ward v. Smith, 3 Sandf. (N. Y.) Ch. 592.

[5] Harrison v. McHenry, 9 Ga. 164, 52 Am. Dec. 435; Carr v. Houser, 46

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sheriff,[1] trustee,[2] assignee,[3] or commissioner in bankruptcy,[4] judge of probate,[5] county treasurer,[6] commissioner to sell land,[7] etc., will not be permitted, either directly or indirectly, to purchase of himself the rights or property which he is authorized in that capacity to sell.[8] A public or private agent[9] authorized to let a contract will not be permitted to let it to himself. A railroad agent authorized to furnish an excursion train to third persons, will not be permitted to furnish one ostensibly to a third person but in reality for his own benefit.[10]

These rules also apply to the directors and officers of corporations. The former are regarded in equity as trustees, and the ministerial officers occupy the relation of agents.[11]

And the principle is applied not only to the agent himself, but to subagents, clerks and assistants appointed by him;[12] and it extends also to his partner in business.[13] Whatever disabilities the agent labors under attach equally to those whom he employs under him.

§ 464. **Further of this Rule—Indirect attempts—Ratification.** It seems scarcely necessary to repeat here, what has already been emphasized, that what the agent cannot do directly, he will not be permitted to do indirectly, as by having the property acquired ostensibly by another, but in reality for his own benefit.[14]

Ga. 477; Flury *v.* Grimes, 52 Ga. 343; Mayor of Macon *v.* Huff, 60 Ga. 228.

[1] Perkins *v.* Thompson, 3 N. H. 144.

[2] Robertson *v.* Western F. & M. Ins. Co., 19 La. 227, 36 Am. Dec. 673; Green *v.* Winter, 1 Johns, (N. Y.) Ch. 26; Davoue *v.* Fanning, 2 Johns. (N. Y.) Ch. 257.

[3] *Ex parte* Lacey, 6 Ves. Jr. 626.

[4] *Ex parte* Bennett, 10 Ves. Jr. 384.

[5] Walton *v.* Torrey, Har. (Mich.) Ch. 259.

[6] Clute *v.* Barron, 2 Mich. 192; Pierce *v.* Boughman, 14 Pick. (Mass.) 356.

[7] Ingerson *v.* Starkweather, Walk. (Mich.) Ch. 346.

[8] People *v.* Township Board, 11 Mich. 222.

[9] Flint, &c. R. R. Co. *v.* Dewey, 14 Mich. 477.

[10] Pegram *v.* Charlotte, &c. R. R. Co., 84 N. C. 696, 37 Am. Rep. 639.

[11] Cook *v.* Berlin Woolen Mills Co., 43 Wis. 433; Cumberland Coal Co. *v.* Hoffman Steam Coal Co., 30 Barb. (N. Y.) 159; Hodges *v.* New England Screw Co., 1 R. I. 321; Jackson *v.* Ludeling, 21 Wall (U. S.) 616; Wilbur *v.* Lynde, 49 Cal. 290; City of San Diego *v.* San Diego, &c. R. R. Co., 44 Cal. 106; Commissioners, &c. *v.* Reynolds, 44 Ind. 509; Greenfield Savings Bank *v.* Simons, 133 Mass. 415.

[12] Gardner *v.* Ogden, 22 N. Y. 327, 78 Am. Dec. 192.

[13] New York Cent. Ins. Co. *v.* National Protection Ins. Co. 14 N. Y. 85.

[14] Eldridge *v.* Walker, 60 Ill. 230; or by a third person for the joint benefit of himself and such third per-

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But the law does not in the case of private agencies, regard such transactions as so far absolutely void as to be incapable of ratification by the principal. If he is satisfied with it, after full knowledge, no one else can complain; and here, as in other cases, ratification may be presumed if the principal does not repudiate it within a reasonable time after the facts come to his knowledge.[1] And the same principle has been extended to trustees, administrators, executors and guardians.[2]

§ 465. **This Rule cannot be defeated by Usage.** The law will not permit these important safeguards to be easily defeated. Hence it has been held that the rule that an agent who undertakes to act for his principal cannot, without the latter's consent, in the same matter act for himself, cannot be avoided upon the authority of any local or temporary usage.[3]

§ 466. **Agent may purchase with Principal's Consent.** It is not to be inferred, however, that there is any inherent incapacity in an agent to purchase from his principal or to sell to him. Where the facts are fully disclosed, and the agent acts in good faith, taking no advantage of his situation, the principal may, if he sees fit, deal with the agent as with any other person.[4]

But, as is said in a recent case,[5] "while a transaction of the character disclosed is not necessarily voidable at the election of the principal, a court of equity, upon grounds of public policy, will nevertheless subject it to the severest scrutiny. Its purpose will be to see that the agent, by reason of the confidence reposed in him by the principal, secures to himself no advantage from

son, Hughes *v.* Washington, 72 Ill. 84; mere fact that purchaser is brother-in-law of the agent will not of itself invalidate the sale, Walker *v.* Carrington, 74 Ill. 440.

[1] Marsh *v.* Whitmore, 21 Wall. (U. S.) 178; Eastern Bank *v.* Taylor, 41 Ala. 72; Bassett *v.* Brown, 105 Mass. 551.

[2] Worthy *v.* Johnson, 8 Ga. 236, 52 Am. Dec. 399.

[3] Butcher *v.* Krauth, 14 Bush (Ky.) 713; see a very exhaustive discussion of this question in Robinson *v.* Mollett, L. R., 7 H. of L, 802, 14 Eng. Rep. (Moak) 177; reversing same case, L. R., 5 C. P. 646, and L. R., 7 C. P. 84, 1 Eng. Rep. 335.

[4] Rochester *v.* Levering, 104 Ind. 562, 23 Cent. L. Jour. 130; Fisher's Appeal, 34 Penn. St. 29; Uhlich *v.* Muhlke, 61 Ill. 499.

[5] Rochester *v.* Levering, *supra*, citing: McCormick *v.* Malin, 5 Blackf. (Ind.) 509, 522; Cook *v.* Burlin, &c. Co., 43 Wis. 433; Porter *v.* Woodruff, 36 N. J. Eq. 174; Young *v.* Hughes, 32 N. J. Eq. 372; Farnum *v.* Brooks, 9 Pick. (Mass.) 212; Moore *v.* Mandlebaum, 8 Mich. 433.

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the contract. When the transaction is seasonably challenged, a presumption of its invalidity arises, and the agent then assumes the burden of making it affirmatively appear that he dealt fairly, and in the strictest of faith imparted to his principal all the information concerning the property possessed by him. The confidential relation and the transaction having been shown, the *onus* is upon the agent to show that the bargain was fair and equitable; that he gave all the advice within his knowledge pertaining to the subject of the sale and the value of the property; and that there was no suppression or concealment which might have influenced the conduct of the principal."

§ 467. Agent employed to settle Claim, may not buy and enforce it against his Principal. The principles now being considered find further illustration in the rule that an agent who is employed to settle or compromise a claim against his principal, will not be permitted to avail himself of the benefit of a favorable settlement by purchasing the claim himself at a discount and enforcing it against his principal for the full amount.[1]

Said Lord Cottenham: "Why is the agent precluded from taking the benefit of purchasing a debt which his principal is bound to discharge? Because it is his duty, on behalf of his employer, to settle the debt on the best terms he can obtain; and if he is employed for that purpose, and is enabled to procure a settlement of the debt for anything less than the whole amount, it would be a violation of his duty to his employer, or at least hold out a temptation to violate that duty, if he might take an assignment of the debt and so make himself a creditor of his employer to the full amount of the debt he was employed to settle."[2]

Thus where two partners who were financially embarrassed employed an agent to assist them in settling with their creditors and the agent while so employed, purchased an outstanding claim against the firm, at a large discount, but did not disclose the fact of the discount to his employers, who gave him their note for the full amount of the claim, it was held that the benefit of the discount inured to the principals and that there was a failure of consideration of the notes to that extent.[3]

[1] Davis v. Smith, 43 Vt. 269; Case v. Carroll, 35 N. Y. 385.

[2] In Reed v. Norris, 2 Myl. & C. 361.

[3] Noyes v. Landon, 59 Vt. 569, 10 Atl. Rep. 342.

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§ 468. **Agent may not acquire Rights against his Principal based on his own Neglect or Default.** It is the duty of the agent to protect the interests of his principal confided to his care. He will not therefore, be permitted to build up in himself rights and interests against his principal based upon his own neglect or default in the performance of his duty.

Thus an agent whose duty it is to pay the taxes upon his principal's lands, cannot by neglecting to pay such taxes, acquire a valid title to the lands upon a sale of them for the non-payment thereof, and if such purchase be made, the agent will be deemed to hold it in trust for his principal.[1] This rule applies although the duty of paying the taxes is not directly imposed. It is enough that such a course puts the interests of the agent, in the course of his agency, in conflict with those of the principal,—a result which it is his duty to avoid. Thus an agent authorized to care for, or to manage, or to sell his principal's real estate, will not be permitted to acquire adverse interests by purchasing the same at a tax sale.[2]

The mere fact that the principal has not furnished the agent with money with which to pay the taxes, makes no difference,[3] nor will the neglect of the principal to reimburse the agent for money expended in such a purchase, authorize him to acquire and hold the title, unless he has first made to the principal a full and fair statement of the amount required.[4] So an agent authorized to manage and sell lands will not be permitted to acquire a title to them by bidding them in at a mortgage sale.[5] Nor will an agent whose duty it is to buy up and remove an outstanding claim against his principal's title, be permitted to buy it in his own name and enforce it against his principal.[6] Nor can an agent employed to settle a debt against his principal, be permitted

[1] Curts *v.* Cisna, 7 Biss. (U. S. C. C.) 260; Franks *v.* Morris, 9 W. Va. 664; Barton *v.* Moss, 32 Ill. 50; Oldhams *v.* Jones, 5 B. Mon. (Ky.) 458; Krutz *v.* Fisher, 8 Kans. 90; Matthews *v.* Light, 32 Me. 305; Huzzard *v.* Trego, 36 Penn. St. 9; Bartholemew *v.* Leech, 7 Watts (Penn.) 472.

[2] Ellsworth *v.* Cordrey, 63 Iowa, 675; Collins *v.* Rainey, 42 Ark, 531; Woodman *v.* Davis, 32 Kans. 344.

[3] Bowman *v.* Officer, 53 Iowa, 640; Page *v.* Webb, — Ky., —7 S. W. Rep. 308.

[4] Bowman *v.* Officer, *supra;* McMahon *v.* McGraw, 26 Wis. 614; Krutz *v.* Fisher, 8 Kans. 90.

[5] Adams *v.* Sayre, 70 Ala. 318.

[6] Smith *v.* Brotherline, 62 Penn. St. 461; Case *v.* Carroll, 35 N. Y. 385.

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to take an assignment of it to himself and enforce it against his principal.[1]

So if an agent discovers a defect in his principal's title he cannot use it to acquire a title for himself; and if he does so, he will be held to be a trustee holding for his principal.[2]

If an agent wishes to acquire such a title, he must first make an unambiguous relinquishment of his agency,[3] and if any doubt exists as to whether he had done so, it will be solved in the principal's favor.[4]

§ 469. **Profits made in the Course of the Agency belong to the Principal.** The well settled and salutary principle that a person who undertakes to act for another shall not, in the same matter, act for himself, results also in the other rule, that all profits made and advantage gained by the agent in the execution of the agency belong to the principal. And it matters not whether such profit or advantage be the result of the performance or of the violation of the duty of the agent. If his duty be strictly performed, the resulting profit accrues to the principal as the legitimate consequence of the relation; if profit accrues from his violation of duty, that likewise belongs to the principal, not only because the principal has to assume the responsibility of the transaction, but also because the agent cannot be permitted to derive advantage from his own default.

It is only by rigid adherence to this rule that all temptation can be removed from one acting in a fiduciary capacity, to abuse his trust or seek his own advantage in the position which it affords him.

It matters not how fair the conduct of the agent may have been in the particular case, nor that the principal would have been no better off if the agent had strictly pursued his power, nor that the principal was not in fact injured by the intervention of the agent for his own benefit. The result is still the same. If the agent dealing legitimately with the subject-matter of his agency, acquires a profit; or if by departing from his instructions, he obtains a better result than would have been obtained by following them, the principal may claim the advantage thus obtained,

[1] Reed v. Norris, 2 My. & C. 374.

[2] Ringo v. Binns, 10 Pet. (U. S.) 269.

[3] Continental L. Ins. Co. v. Perry, 65 Iowa, 709.

[4] Fountain Coal Co. v. Phelps, 95 Ind. 271.

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even though the agent may have contributed his own funds or responsibility in producing the result. All profits and every advantage beyond lawful compensation, made by the agent in the business, or by dealing or speculating with the effects of his principal, though in violation of his duty as agent, and though the loss, if one had occurred, would have fallen on the agent, are for the benefit of the principal.[1]

In such a case the principal may at his option compel the agent to account for or convey to him the profits thus acquired.[2] And even though the transaction was outside of the actual purview of the agency, yet if the agent at the time professed to act for the principal and in his behalf, the benefit of the transaction will inure to the principal.[3]

This principle is of universal application in the case of all agencies involving fiduciary relations. Thus it is well settled that where a trustee speculates with the trust funds he may be held liable for profits or interest, at the option of the *cestui que trust*—profits if the investment has been a successful one, and interest if it has been disastrous. In no event will the trustee be allowed to make a profit out of the trust fund. The law holds out no inducement to trustees so to misapply the estate. The trustee may lose, but he cannot make by so doing. It is equally clear that when the trust funds can be traced into the purchase of any particular property the latter will be held to belong to the estate, if the *cestui que trust* so elect.[4]

[1] Dutton *v.* Willner, 52 N. Y. 312; Dodd *v.* Wakeman, 26 N. J. Eq. 484; Lafferty *v.* Jelley, 22 Ind. 471; Ackburg *v.* McCool, 36 Ind. 473; Moore *v.* Moore, 5 N. Y. 256; Gardner *v.* Ogden, 22 N. Y. 327, 78 Am. Dec. 192; York Buildings Co. *v.* McKenzie, 3 Paton, 378; Keech *v.* Sandford, 3 Eq. Cas. Abr. 741; Ringo *v.* Binns, 10 Pet. (U. S.) 269; Bartholemew *v.* Leech, 7 Watts (Penn.) 472; Davoue *v.* Fanning, 2 Johns. (N. Y.) Ch. 252; Hall *v.* Noyes, 2 Bro. Ch. 483; Crowe *v.* Ballard, *Idem*, 117; Coursin's Appeal, 79 Penn. St. 220; Wilson *v.* Wilson, 4 Abb. (N. Y.) App. Dec. 621; Leake *v.* Sutherland, 25 Ark. 219; Price *v.* Keyes, 62 N. Y. 378; Moinett *v.* Days, 1 Baxter (56 Tenn.) 431.

[2] Gardner *v.* Ogden, 22 N. Y. 327, 78 Am. Dec. 192; Holman *v.* Holman, 66 Barb. (N. Y.) 222; Dutton *v.* Willner, 52 N. Y. 312; Greenfield Savings Bank *v.* Simons, 133 Mass. 415.

[3] Watson *v.* Union Iron & Steel Co., 15 Ill. App. 509.

[4] Norris' Appeal, 71 Penn. St. 106; Hall's Appeal, 4 Wright, (40 Penn.) 409; Miller's Appeal, 6 Casey, (30 Penn.) 478; Robinett's Appeal, 12 Casey, (36 Penn.) 191; Oliver *v.* Piatt, 3 How. (U. S.) 333; Callaghan *v.* Hall, 1 Serg. & R. (Penn.) 241; Wiley's Appeal, 8 Watts & S. (Penn.) 244; Docker *v.* Somes, 2 Myl. & K

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§ 470. **Same Subject—Illustrations.** In accordance with this rule, where one who while pretending to act as the agent of the purchaser of certain real estate, was in reality acting as the agent of the seller, and received as his compensation from the seller a note given by the purchaser as part of the purchase price, it was held that he should be restrained from enforcing payment of the note, and that it should be delivered up and cancelled.[1]

And if the agent, while secretly negotiating a sale of his principal's land or other property to third persons for a large sum, by concealment of the facts as to the value and demand of the property, obtains from his principal a conveyance of it to himself for less than it is worth, and then conveys it to third persons, he will be held to account to his principal for the excess so received.[2]

So if an agent who is authorized to sell land or other property at a given price, succeeds in realizing more than that price for it, the excess belongs to his principal;[3] or if, being authorized to purchase at a given price, he makes the purchase for less;[4] or if being employed to settle a claim at a given sum, he obtains a reduction,[5] the amount saved belongs to the principal.

And one who employs another to pursue and capture a horse thief and pays the person so employed for his services and expenses, will be entitled to receive a reward offered for the apprehension of the thief, which the agent earns by such apprehension.[6]

So where the treasurer of a savings bank who was directed to sell certain rights for not less than a certain price and buy shares in a national bank with the proceeds, bought the rights for himself and others at the minimum price, although they could easily have

655; Attorney-General *v.* Alford, 4 DeG. M. & G. 843; Hart *v.* Ten Eyck, 2 Johns. (N. Y.) Ch. 62. Lupton *v.* White, 15 Ves. Jr. 432; Chedworth *v.* Edwards, 8 Ves. Jr. 46.

[1] Moinett *v.* Days, 1 Baxt. (Tenn.) 431.

[2] Stoner *v.* Weiser, 24 Iowa, 434; see also Bain *v.* Brown, 56 N. Y. 285; Savage *v.* Savage, 12 Oregon, 459; Northern Pacific R. R. Co. *v.* Kindred, 14 Fed. Rep. 77; Thompson *v.* Hallet, 26 Me. 141; Moseley *v.* Buck, 3 Munf. (Va.) 232, 5 Am. Dec. 508; Bell *v.* Bell, 3 W. Va. 183.

[3] Merryman *v.* David, 31 Ill. 404; Kerfoot *v.* Hyman, 52 Ill. 512.

[4] Bunker *v.* Miles, 30 Me. 431, 50 Am. Dec. 632; Kanada *v.* North, 14 Mo. 615.

[5] *Ante*, § 466, and cases cited.

[6] Montgomery County *v.* Robinson, 85 Ill. 174.

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been sold for more, it was held that he must account to the bank for the difference between the minimum price and what they might have been sold for.[1]

§ 471. **When Principal entitled to Agent's Earnings.** Where an agent contracts his entire time to his principal for a fixed salary, the principal is entitled to receive money earned by the agent in performing services for third persons.[2]

§ 472. **Same Subject—Rule does not extend to mere Gratuities received by the Agent.** The rule that all profits and advantage made by the agent in the course of his agency belong to the principal, does not apply to mere gratuities or gifts from third parties to the agent, which neither he nor the principal had any right to expect, although they were made in consideration of benefits incidentally derived from the performance of the agent.

This principle was applied where the agent of an insurance company had been presented with a sum of money by another company in recognition of the benefit the latter company had derived from an adjustment of a loss by the agent for his own company.[3]

II.

TO OBEY INSTRUCTIONS.

§ 473. **Agent's Duty to obey Instructions.** It is also a fundamental duty of the agent to obey all of the reasonable and lawful instructions given him by his principal. That the agent shall, for the time being put his own will under the direction of another, is one of the primary elements in the relation. It is the idea, the desire, the purpose, perhaps the mere whim or caprice of the principal, and not of the agent, that is to be executed; and it is ordinarily to be executed in the manner, although perhaps capricious, which the principal directs.

§ 474. **Results of Disobedience — Agent liable for Losses caused by it.** It is obvious that the results of disobedience may be dependent largely upon the nature of it. As has been seen,

[1] Greenfield Savings Bank v. Simons, 133 Mass. 415.

[2] Stansbury v. United States, 1 Ct. of Cl. 123; Leach v. Hannibal &c. R. R. Co., 86 Mo, 27, 56 Am. Rep. 408.

[3] Ætna Ins. Co. v. Church, 21 Ohio St. 492.

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the principal has, in general, an undoubted legal right to have the agency executed in his own way, if it be not an unlawful way, and it is the duty of the agent to pursue that mode even though he may think or know that a very much better way is open to him.[1]

If the agent refuses or neglects to follow the instructions given, one, or either, or both of two remedies may be open to the principal, as the peculiar circumstances of the case may determine. Thus if the disobedience be such as affects merely the *manner* of the execution but does not affect the *result*, and causes the principal no loss or injury, no substantial damages could be recovered from the agent, though he might be liable to nominal damages as in the case of any other breach of duty, unless the departure from the line marked out were so insignificant as to fall within the domain of the maxim *de minimis non curat lex*. The principal might, however, very properly refuse to longer continue the relation with an agent who habitually disregarded his instructions even though no actual loss or injury had ensued.[2]

But if the disobedience be not such as affects the *manner* only, but results in actual loss or injury to the principal, the latter may, subject to the exceptions to be hereafter named, recover from the agent such substantial damages as he can show he has sustained by reason of such disobedience.[3] He may also remove the agent from his trust.[4] The general rules applicable to the recovery of damages in other cases obtain here. Thus the damages must not be too remote nor of a purely speculative or problematical character. They must, in other words, be the natural, proximate and legitimate result of the act complained of.[5] As is said by a learned judge: "It is the first duty of an agent

[1] *See ante*, Chapter VII., Book I.

[2] See *idem*.

[3] Whitney *v.* Merchants Union Express Co., 104 Mass. 152; 6 Am. Rep. 207; Scott *v.* Rogers, 31 N. Y. 676; Wilts *v.* Morrell, 66 Barb. (N. Y.) 511; Adams *v.* Robinson, 65 Ala. 58 Dodge *v.* Tileston, 12 Pick. (Mass.) 333; Dickson *v.* Screven, 23 S. C. 212; Magnin *v.* Dinsmore, 62 N. Y. 35; Frothingham *v.* Everton, 12 N. H. 239; Amory *v.* Hamilton, 17 Mass. 103; Harvey *v.* Turner, 4 Rawle (Penn.) 223; Brown *v.* Arrott, 6 Watts & S. (Penn.) 402; Blot *v.* Boiceau, 3 N. Y. 78; 51 Am. Dec. 345; see also *post*, Chapters on Attorneys, Auctioneers, Brokers and Factors; and see cases cited in notes to following section.

[4] See *ante*, Chapter on Termination of the Relation.

[5] 3 Sutherland on Damages, 6.

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whose authority is limited, to adhere faithfully to his instructions, in all cases to which they can be properly applied, If he exceeds, or violates, or neglects them, he is responsible for all losses which are the natural consequence of his act." [1] That he acted in good faith or with the intention of benefiting the principal does not relieve him from the responsibility.[2]

§ 475. **Same Subject—Illustrations.** Thus if an agent who was instructed to collect a claim by the employment of certain methods, elects to pursue other methods and the claim is lost thereby, he will be liable for the loss, and it will be no defense that he used reasonable diligence in the prosecution of the claim according to the method of his own selection.[3]

So if, being instructed to ship goods at a certain time, or by a designated carrier, the agent ships at another time or by a different carrier, and loss thereby results, the agent will be liable. By pursuing his own notions in opposition to the express instructions of his principal, the agent will be held to have assumed the risks incident thereto and will be treated as an insurer of the goods.[4]

And the same result follows where an agent being instructed to insure his principal's goods, fails to do so. The risk is his own.[5]

So if being expressly instructed to sell only to persons of undoubted responsibility, the agent sells to persons notoriously insolvent, the principal may recover of the agent for the loss thereby occasioned. And in such a case it will be no defense to the agent that he acted in pursuance of an alleged custom among similar agents to rely upon the purchaser's statements as to his own responsibility, without making further inquiry.[6] But where the principal with knowledge of the facts has retained the notes taken by the agent for an unreasonable period, as for instance for two years, without complaint, he will not then be permitted to

[1] COLT, J., in Whitney *v.* Merchants Union Exp. Co. *supra.*

[2] Rechtsherd *v.* Bank, 47 Mo. 181; Dickson *v.* Screven, 23 S. C. 212.

[3] Butts *v.* Phelps, 70 Mo. 302.

[4] Johnson *v.* New York Cent. Transp. Co. 33 N. Y. 610, 88 Am. Dec. 416; Ackley *v.* Kellogg, 8 Cow. (N. Y.) 223.

[5] Sawyer *v.* Mayhew, 51 Me. 398.

[6] Robinson Machine Works *v.* Vorse, 52 Iowa, 207; Osborne *v.* Rider, 62 Wis. 235; Clark *v.* Roberts, 26 Mich. 506; See also *post* § 519.

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allege that the agent violated his instructions by selling to irresponsible parties.[1]

So where an agent authorized to collect at a distant place, was instructed to remit the proceeds to his principal by express, but made the remittance by check of a third person who failed before payment, it was held that the loss must fall upon the agent;[2] and the same result was reached where such an agent, being instructed to send the money in fifty or one hundred dollar bills sent it in smaller bills, which were lost;[3] and where, being instructed to remit by draft, the agent sent the money in a letter which was lost.[4]

An agent instructed to insure property, who neglects without sufficient reason to do so or to give his principal timely information of his inability to effect the insurance, will be liable if a loss occurs, for the full insurable value of the property less the amount of the premiums, unless the amount of insurance was limited to a less sum.[5] And where the agent of an insurance company was instructed by his principal to cancel a certain policy of insurance, but, without sufficient reason, delayed for a number of days to do so, in which time the property was destroyed by fire and the company was compelled to pay the loss, it was held that the company could recover from the agent the amount so paid.[6]

An agent instructed to sell for cash, who accepts a check payable the next,[7] or ten days[8] after the sale, will be liable for the loss, if the drawer fails before the check can be paid. And a local custom to treat such checks as cash will not avail him.[9]

§ 476. **Form of Action—When Agent liable in Trover.** The form of action in which the liability of the agent is determined

[1] Plano Mnfg Co. v. Buxton, 36 Minn. 203, 30 N. W. Rep. 668.

[2] Walker v. Walker, 5 Heisk. (Tenn.) 425.

[3] Wilson v. Wilson, 26 Penn. St. 393.

[4] Foster v. Preston, 8 Cow. (N. Y.) 198; Kerr v. Cotton, 23 Tex 411; see Buell v. Chapin, 99 Mass. 594, 97 Am. Dec. 58.

[5] Park v. Hamond, 4 Camp. 344; Perkins v. Washington Ins. Co., 4 Cow. (N. Y.) 645; De Tastett v. Crousillat, 2 Wash. (U. S. C. C.) 132; Thorne v. Deas, 4 Johns. (N. Y.) 84; Shoenfeld v. Fleischer, 73 Ill. 404.

[6] Phœnix Ins. Co. v. Frissell, — Mass. —, 8 North E. Rep. 348. See also to same effect, Franklin Ins. Co. v. Sears, 21 Fed. Rep. 290.

[7] Hall v. Storrs, 7 Wis. 253.

[8] Harlan v. Ely, 68 Cal. 522.

[9] Hall v. Storrs, *supra*.

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is usually assumpsit or a special action on the case, but there are cases in which trover is the proper remedy, as where the conduct of the agent amounts to a conversion.

Conversion is defined to be an unauthorized assumption and exercise of the right of ownership over goods belonging to another, to the exclusion of the owner's rights.[1] A constructive conversion takes place when a person does such acts in reference to the goods of another as to amount in law to an appropriation of the property to himself. Every unauthorized taking of personal property, and all intermeddling with it beyond the extent of the authority conferred, in case a limited authority has been given, with intent so to apply and dispose of it as to alter its condition or to interfere with the owner's dominion, is a conversion.[2]

In many cases it becomes difficult to determine whether the misconduct of the agent consists in a mere breach of instructions or amounts in law to a conversion; and the distinctions made in many cases seem to be exceedingly technical. A distinction is, nevertheless, to be made. Thus it has been held that if property be delivered to an agent with instructions to sell it at a certain price, and he sells it for less than that price, he is not liable in trover as for conversion. In such a case the agent had a right to sell and deliver, and in that respect did no more than he was authorized to do. He disobeyed instructions as to price only, and was liable for misconduct but not for conversion of the property.[3] So where an agent was authorized to deliver goods on receiving sufficient security, but delivered them on inadequate security, it was held that trover would not lie.[4]

On the other hand, where a factor in Buffalo was directed to sell wheat at a certain specified price on a particular day, or if not so sold to ship to New York, and did not sell or ship it on that day, but sold it the next day at the price named, it was held to be a conversion.[5] So where the plaintiff delivered to the defendant a promissory note to get it discounted, but with instructions

[1] Adams v. Robinson, 65 Ala. 586; Myers v. Gilbert, 18 Ala. 467.

[2] Bouv. Law Dict. "Conversion;" Laverty v. Snethen, 68 N. Y. 522, 23 Am. Rep. 184.

[3] Sarjeant v. Blunt, 16 Johns. (N. Y.) 74; Dufresne v. Hutchinson, 3 Taunt. 117; Palmer v. Jarmain, 2 M. & W. 282.

[4] Cairnes v. Bleecker, 12 Johns. (N. Y.) 300.

[5] Scott v. Rogers, 31 N. Y. 676.

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not to let it go out of his hands without receiving the money; and the defendant, without wrongful intent, delivered it to F, who promised to get and return the money on it, but who, having obtained the money, appropriated it to his own use, it was held that the defendant was liable for the conversion of the note. The court said that the defendant had a right to sell the note, and if he had sold it for less than the price stipulated, he would not have been liable in trover, but he had no right to deliver it to F, to take away, any more than he had to pay his own debt with it.[1]

§ 477. **Same Subject—The Rule stated—Intent immaterial.** The result of the authorities may be said to be, that if the agent parts with the property in any way or for any purpose not authorized, he is liable for a conversion; but if he parts with it in accordance with his authority, but sells it at a less price, or misapplies the proceeds, or takes inadequate security, he is not liable for a conversion of the property, but only in an action for damages on account of the misconduct.[2]

In such cases the question of good faith is not involved. A wrongful intent is not an essential element of the conversion. It is enough if the owner has been deprived of his property by the act of another assuming an unauthorized dominion and control over it.[3]

§ 478. **How when Agency is gratuitous.** The rules heretofore laid down are those which apply to cases where the service is to be performed for a reward. Where, however, the service

[1] Laverty *v.* Snethen, *supra*. "If one man who is intrusted with the goods of another, put them into the hands of a third person contrary to orders, it is a conversion." Syeds *v.* Hay, 4 T. R. 260. Same point, Spencer *v.* Blackman, 9 Wend. (N. Y.) 167.

[2] Laverty *v.* Snethen, 68 N. Y. 522, 23 Am. Rep. 184. "Trover," says BRONSON, J., "may be maintained when the agent has wrongfully converted the property of his principal to his own use, and the fact of the conversion may be made out by showing either a demand and refusal, or that the agent has without necessity sold or otherwise disposed of the property contrary to his instructions. Where an agent wrongfully refuses to surrender the goods of his principal, or wholly departs from his authority in disposing of them, he makes the property his own and may be treated as a tort feasor." McMorris *v.* Simpson, 21 Wend. (N. Y.) 610; Galbreath *v.* Epperson, — Tenn. —, 1 S. W. Rep. 157.

[3] Laverty *v.* Snethen, 68 N. Y. 522; 23 Am. Rep. 184; Scott *v.* Rogers, 31 N. Y. 676.

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is to be gratuitous, certain other considerations become important.

If in such a case the agent refuses to enter upon and perform the service at all; if his default consists in the mere not doing of a thing which he had promised to perform, and it be not a case where the *law* imposes upon him the duty to perform it, the fact that the performance was to be gratuitous, that the promise to perform was entirely without consideration, will furnish a complete defense to a claim for damages on account of such default.[1]

[1] Balfe *v.* West, 13 C. B. 466, 22 Eng. L. & Eq. 506; Elsee *v.* Gatward, 5 T. R. (Eng.) 143; Thorne *v.* Deas, 4 Johns. (N. Y.) 84; Spencer *v.* Towles, 18 Mich. 9.

See Nixon *v.* Bogin, 26 S. C. 611, 2 S. E. Rep. 302.

Thorne *v.* Deas, *supra*, was an action on the case for a non-feasance in not effecting insurance as the defendant had gratuitously undertaken to do. Chief Justice KENT, in delivering the opinion of the court, said: "The chief objection raised to the right of recovery in this case is the want of consideration for the promise. The offer on the part of the defendant to cause insurance to be effected was perfectly voluntary. Will, then, an action lie, when one party intrusts the performance of a business to another who undertakes to do it gratuitously and wholly omits to do it? If the party who makes this engagement, enters upon the execution of the business, and does it amiss through the want of due care, by which damage ensues to the other party, an action will lie for this misfeasance. But the defendant never entered upon the execution of his undertaking, and the action is brought for the non-feasance. Sir William Jones, in his 'Essay on the Law of Bailments,' considers this species of undertaking to be as extensively binding in the English law as the contract of *mandatum* in the Roman law; and that an action will lie for damage occasioned by the non-performance of a promise to become a *mandatary*, though the promise be purely gratuitous. This treatise stands high with the profession as a learned and classical performance, and I regret that on this point I find so much reason to question its accuracy. I have carefully examined all the authorities to which he refers. He has not produced a single adjudged case; but only some *dicta* (and those equivocal) from the Year Books, in support of his opinion; and were it not for the weight which the authority of so respectable a name imposes, I should have supposed the question too well settled to admit of an argument. A short review of the leading cases will show that, by the common law, a *mandatary*, or one who undertakes to do an act for another without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do it, and does it amiss. In other words he is responsible for a *misfeasance*, but not for a non-feasance even though special damages are averred. Those who are conversant with the doctrine of mandatum in the civil law, and have perceived the equity which supports it and the good faith which it enforces may, perhaps, feel a portion of regret that Sir William Jones was not successful in his

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This is upon the familiar ground that the non-performance of a gratuitous executory contract constitutes no cause of action.

But where, on the other hand, the agent has undertaken or entered upon the performance of the service, although it be gratuitous, it then becomes his duty to conform to the instructions given. If he were not willing to do so, he should have declined to serve; but having assumed the performance of the service, the trust and confidence reposed furnish a sufficient consideration for the undertaking to obey instructions, and a failure to do so, will subject him to liability for the loss or damage occasioned thereby.[1]

§ 479. **Exceptions to this Rule.** This rule which requires adherence to the instructions of the principal is subject to certain exceptions, growing out of the nature of the duty to be performed, or the necessities or circumstances of the case. Thus—

§ 480. **Agent not bound to perform illegal or immoral Act.** The law will not lend its sanction to the commission of an illegal or immoral act. An agent therefore cannot be held responsible for the disobedience of instructions which required the performance of an act illegal or immoral in itself, or whose natural and legitimate result would be of that nature.[2]

attempt to ingraft this doctrine, in all its extent, into the English law. I have no doubt of the perfect justice of the Roman rule, on the ground that good faith ought to be observed, because the employer placing reliance upon that good faith in the mandatary was thereby prevented from doing the act himself or employing another to do it. * * * But there are many rights of moral obligation which civil laws do not enforce, and are therefore left to the conscience of the individual as rights of imperfect obligation; and the promise before us seems to have been so left by the common law which we cannot alter and which we are bound to pronounce." See also Benden v. Manning, 2 N. H. 289.

[1] Passano v. Acosta, 4 La. 26, 23 Am. Dec. 470; Williams v. Higgins, 30 Md. 404; Short v. Skipwith, 1 Brock. (U. S. C. C.) 104; Walker v. Smith, 1 Wash. (U. S. C. C.) 152; Spencer v. Towles, 18 Mich. 9.

Thus if a person undertakes, even voluntarily and gratuitously, to invest money for another, and disregards positive instructions given as to the specific character of the security to be taken, he is liable if the investment should fail on that account.

Williams v. Higgins, 30 Md. 404. But where agency is gratuitous, an agent is not liable for not collecting without proof of negligence. Nixon v. Bogin, 26 S. C. 611, 2 S. E. Rep. 802.

[2] Brown v. Howard, 14 Johns (N. Y.) 119; Davis v. Barger, 57 Ind. 54; Elmore v. Brooks, 6 Heisk. (Tenn.) 45.

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§ 481. **Departure from Instructions may be justified by sudden Emergency.** Another exception to this rule is based upon the necessities of the case, as where, without the agent's fault or neglect, some sudden emergency or supervening necessity arises, or some unexpected event happens, which will not admit of delay for communication or consultation with the principal, and a literal adherence to instructions becomes impossible or would defeat the very object sought to be attained. In such a case if the agent, exercising prudence and sound discretion, in good faith adopts the course which seems best under the circumstances as then existing, he will be justified although subsequent events may demonstrate that some other course would have been better.[1]

§ 482. **Same Subject—Limitations.** But while extraordinary circumstances may thus justify the assumption of extraordinary powers, it does not necessarily follow that an agent may assume *any* or *all* extraordinary powers, and bind his principal by acts done under such assumed powers. The same general principles apply here that govern the implication of authority from circumstances in other cases. The powers assumed must not exceed the exigencies of the occasion. They must be limited both in nature and extent by the necessities of the case, and must bear as close relationship as possible to the authority actually conferred.[2]

§ 483. **Where the Authority has been substantially pursued, Agent not liable for immaterial Departure.** As has been already stated, no substantial damages can be recovered from the agent for a purely circumstantial departure from instructions, not affecting the result.[3] Where it is shown that the instructions have not been followed and that a loss has ensued, the burden of proving that the departure from the course prescribed was immaterial and did not cause the loss, is upon the agent.[4] The very fact that

[1] Greenleaf *v.* Moody, 13 Allen (Mass.) 363; Forrestier *v.* Bordman, 1 Story (U. S. C. C.) 43; Judson *v.* Sturges, 5 Day (Conn.) 556; Milbank *v.* Dennistoun, 21 N. Y. 386; Goodwillie *v.* McCarthy, 45 Ill. 186; Catlin *v.* Bell, 4 Camp. 183; Jervis *v.* Hoyt, 2 Hun (N. Y.) 637; Foster *v.* Smith, 2 Cold. (Tenn.) 474, 88 Am. Dec. 604; Dusar *v.* Perit, 4 Binn (Penn.) 361; Drummond *v.* Wood, 2 Cai. (N. Y. 310; Liotard *v.* Graves, 3 Cai. (N. Y.) 226; Bartlett *v.* Sparkman, 95 Mo. 136, 6 Am. St. Rep. 35.

[2] Foster *v.* Smith, 2 Cold. (Tenn.) 474, 88 Am. Dec. 604.

[3] See *ante*, § 413.

[4] Wilson *v.* Wilson, 26 Penn. St. 393; Walker *v.* Walker, 5 Heisk. (Tenn.) 425.

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the principal gave directions is evidence that he regarded them as material, and if the agent, except in the case of sudden emergency before referred to, voluntarily elects to disregard them and pursue a course of his own election, he must be prepared to show that the instructions were not in fact material. And it is evident from the very nature of the case that such proof is often difficult to make.

Thus in a case above referred to, if the agent had made his remittance in large bills as directed, the letter containing them *might* have been lost in the same manner that the more bulky package containing the larger number of small bills was lost; but it was obviously impossible to prove that as a matter of fact it *would* have been lost; and the court properly held that the agent was the insurer of the safety of the method which he adopted.[1] In such cases, it has been said, that every doubtful circumstance will be construed against the agent.[2] In short, instructions are followed at the principal's risk; they are violated at the risk of the agent.

§ 484. **Where Instructions are ambiguous, and Agent acts in good Faith.** If the principal desires his instructions to be pursued, it is obviously necessary that he should make them intelligible and clear. If however they are so ambiguous as to be capable of two interpretations, and the agent in good faith and with due diligence adopts one of them, he cannot be held liable to the principal for a loss that may result, upon the latter's claim that he meant the other.[3]

This subject has been discussed in a preceding section, and what is there said is applicable here.[4]

§ 485. **How affected by Custom.** As has been already seen, it is not only within the agent's power, but it is also his duty, in the absence of countervailing circumstances, to conform to such valid and established usages and customs as apply to the subject-

[1] Wilson *v.* Wilson, *supra.*

[2] Adams *v.* Robinson, 65 Ala. 586; Dodge *v.* Tileston, 12 Pick. (Mass.) 333.

[3] Bessent *v.* Harris, 63 N. C. 542; National Bank *v.* Merchants Bank, 91 U. S. 92; Shelton *v.* Merchants Dispatch Transp. Co. 59 N. Y. 258; Le Roy *v.* Beard, 8 How. (U. S.) 451, 1 Myers Fed. Dec. § 458; Loraine *v.* Cartwright, 3 Wash. (U. S. C. C.) 151; De Tastett *v.* Crousillat, 2 Wash. (U. S. C. C.) 132; Pickett *v.* Pearsons, 17 Vt. 470; Minnesota Linseed Oil Co. *v.* Montague, 65 Iowa, 67.

[4] *Ante*, §§ 314, 315.

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matter or the performance of his agency. One who makes a contract in the face of an established custom relating to the matter, will, in the absence of anything to the contrary, be presumed to have made it subject to the custom. So a person who employs another to act for him in a particular place or market, will be presumed, when nothing appears to indicate a different intent, as intending that the business to be done, will be done according to the usage or custom of that place or market.[1]

Custom cannot however, as between the principal and his agent, override positive instructions to the contrary.[2] If, in such a case, the agent is not able, or does not wish, to conform to the instructions, he should refuse to accept, or should renounce the trust.

So, as has been seen, a custom, unless shown to have been known and assented to, will not justify the changing of the essential character of the relation between the principal and his agent,[3] nor can it operate to authorize the making of an invalid instead of a valid contract, or to bind the principal to take one thing when he has ordered another.[4]

But, as has already been stated, where no contrary instructions are given, it is the duty of the agent to conform to the custom, and failure to do so will subject him to liability for such losses as may result therefrom.[5]

§ 486. **Same Subject—When Presumption conclusive.** How far the presumption, that the parties had the custom in contemplation, is conclusive, is a question not always easy of determination. Some customs are so well established and so universally

[1] Bailey *v.* Bensley, 87 Ill. 556; Lyon *v.* Culbertson, 83 Ill. 33; United States L. Ins. Co. *v.* Advance Co., 80 Ill. 549; Byrne *v.* Schwing, 6 B. Mon. (Ky.) 199; De Lazardi *v.* Hewitt, 7 B. Mon. (Ky.) 697; White *v.* Fuller, 67 Barb. (N. Y.) 267; Smythe *v.* Parsons, — Kan. —, 14 Pac. Rep. 444.

[2] Wanless *v.* McCandless, 38 Iowa, 20; Robinson Machine Works *v.* Vorse, 52 Iowa, 207; Osborne *v.* Rider, 62 Wis. 235; Greenstine *v.* Borchard, 50 Mich. 434, 45 Am. Rep. 51; Barksdale *v.* Brown, 1 Nott. & M. (S. C.) 517, 9 Am. Dec. 720; Hall *v.* Storrs, 7 Wis. 253; Bliss *v.* Arnold, 8 Vt. 252, 30 Am. Dec. 467; Hutchings *v.* Ladd, 16 Mich. 493; Leland *v.* Douglass, 1 Wend. (N. Y.) 490; Clark *v.* Van Northwick, 1 Pick. (Mass.) 343; Catlin *v.* Smith, 24 Vt. 85; Day *v.* Holmes, 103 Mass. 306; Parsons *v.* Martin, 11 Gray (Mass.) 112; Ledyard *v.* Hibbard, 48 Mich. 421.

[3] Robinson *v.* Mollett, L. R. 7 H. L. 802, 14 Eng. Rep 177.

[4] Perry *v.* Barnett, 15 Q. B. Div. 388.

[5] Greely *v.* Bartlett, 1 Greenl. (Me.) 172, 10 Am. Dec. 54.

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recognized as to have become a part of the law of the land and a party will not be heard to allege his ignorance of them. Others, however, are so restricted as to locality or trade or business, that ignorance of them is a valid reason why a party may not be held to have contracted in reference to them.

Not only the existence of such a custom, but whether knowledge of it exists in any particular case, are questions of fact for the jury. It is for them to determine, under proper instructions from the court, whether from the evidence as to the existence, duration and other characteristics of the custom, and as to the knowledge thereof by the parties, there is shown a custom of such age and character that the law will presume that the parties knew of, and contracted in reference to, it; or whether the custom is so local and particular that knowledge in the party to be charged must be affirmatively shown and may be negatived.[1]

§ 487. **No Presumption of Disobedience.** The law does not presume that the agent has not obeyed his instructions or that he does not intend to obey them. It matters not what the intent or supposition of the principal may be, the law will presume that the agent obeyed the instructions that were given and as they were given, and if the contrary is alleged, it must be proved.[2]

III.

NOT TO BE NEGLIGENT.

§ 488. **In general.** Many of the questions that might fall under this head would also properly be classed under the preceding. That is, the negligence complained of may be the result of a failure to observe positive instructions, as well as of a failure

[1] Walls *v.* Bailey, 49 N. Y. 464, 10 Am. Rep. 407; Williams *v.* Gilman, 3 Greenl. (Me.) 276; Bradley *v.* Wheeler, 44 N. Y. 500; Higgins *v.* Moore, 34 N. Y. 425; Dawson *v.* Kittle, 4 Hill (N. Y.) 107; Caldwell *v.* Dawson, 4 Metc. (Ky.) 121; Barnard *v.* Kellogg, 10 Wall. (U. S.) 383; Martin *v.* Maynard, 16 N. H. 166; Dodge *v.* Favor, 15 Gray (Mass.) 82; Fisher *v.* Sargent, 10 Cush. (Mass.) 250; Stevens *v.* Reeves, 9 Pick. (Mass.) 200; Citizens Bank *v.* Grafflin, 31 Md. 507; 1 Am. Rep. 66; McMasters *v.* Pennsylvania R. R. Co., 69 Penn. St. 374, 8 Am. Rep. 264; Farnsworth *v.* Chase, 19 N. H. 534, 51 Am. Dec. 206; Randall *v.* Smith, 63 Me. 105, 18 Am. Rep. 200.

[2] Bangs *v.* Hornick, 30 Fed. Rep. 97; Bartlett *v.* Smith, 13 Fed. Rep. 263; Kirkpatrick *v.* Adams, 20 Fed. Rep. 287.

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to perform the general duties, which pertain to the undertaking, but which were not the object of express directions. No harm can come, however, if strict lines of demarkation be not always drawn.

§ 489. **Difficulty of defining Negligence.** No general definition of negligence can be given which shall be at once so expansive as to cover all of the questions that may arise, and so close-fitting as to meet the infinite variety of individual cases. None therefore will be attempted. Neither is it believed that there is any advantage to be derived from an attempt to adhere to the former arbitrary divisions into *slight*, *ordinary* and *gross* negligence, sufficient to compensate for the misleading and unsatisfactory results that are often experienced where these distinctions are made the conclusive tests.[1]

§ 490. **The general Rule.** It is the duty of every agent to bring to the performance of his undertaking, and to exercise in such performance, that degree of skill, care and diligence which the nature of the undertaking and the time, place and circumstances of the performance justly and reasonably demand. A failure to do this, whereby the principal suffers loss or injury, constitutes negligence for which the agent is responsible.[2]

§ 491. **Consideration of this Rule.** It is obvious that the degree of skill, care and diligence required in any given case is not a fixed quantity, but depends upon time, place and circumstances. That degree which would meet the requirements of the case of an agent sent to sell a horse at a country fair might be entirely insufficient in the case of a broker authorized to sell valuable securities upon the stock exchange. So a different degree might be expected in the case of one casually employed in a single instance and professing no peculiar skill, from that which might reasonably be demanded in the case of one employed in the line of his business or profession in which he held himself out as possessing peculiar skill. And again, even in the same general line, it might be reasonable to expect a higher degree in the case

[1] See Gill *v.* Middleton, 105 Mass. 477, 7 Am. Rep. 548.

[2] Leighton *v.* Sargent, 27 N. H. 460, 59 Am. Dec. 388; Gill *v.* Middleton, 105 Mass. 477, 7 Am. Rep. 548; Holly *v.* Boston Gaslight Co., 8 Gray (Mass.) 123, 69 Am. Dec. 233; Gaither *v.* Myrick, 9 Md. 118, 66 Am. Dec. 316; Whitney *v.* Martine, 88 N. Y. 535; Heinemann *v.* Heard, 50 N. Y. 35.

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of one who pursued his calling in a great city than in the case of him whose field of action was in a country village.[1]

But the difference is a difference of degree only and not in kind. The test still remains: Given an employment of *this* nature, to be performed at *this* time and place and under *these* circumstances, what degree of skill, care and diligence may justly and reasonably be demanded?

§ 492. **Same Subject.** These considerations lead to still others. Is it the case of one employed in a learned profession? If so, what rules of procedure in such cases have been established by authority or custom? What standards of performance have been agreed upon? What means of accomplishing the given purpose have been provided and how have they been used?

Or is it the case of one employed in some particular department of business? If so, have any local rules or customs been established in such cases? Are there particular places or peculiar times at which such duties are to be performed? Has common experience taught that any special method should be pursued or any peculiar precaution observed in such transactions?

And so, in every case. The *how* depends in large degree upon the *what*, the *where* and the *when*.

§ 493. **Same Subject—Agent bound to exercise usual Precautions.** These considerations lead still further to the restatement of one aspect of the general rule above given. The agent is bound to exercise and observe all the precautions ordinarily pursued in relation to the particular business in which he is employed, and according to the usages of the place and the circumstances of the times within which the business is to be transacted.[2]

§ 494. **Same Subject—Not bound to exercise highest Care.** Except in those cases in which he voluntarily and without sufficient reason, violates express instructions, the agent is not ordinarily an insurer. Unless he expressly agrees to do so, he is not bound to exercise the highest possible degree of care. Unless he professes to be an expert, he is not ordinarily bound to bring his performance up to the standard of an expert. If he be, for example, a general practitioner in the country, he cannot be

[1] Small v. Howard, 128 Mass. 131, 35 Am. Rep. 363.

[2] Wright v. Central R. R. Co. 16 Ga. 38.

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required to have and exercise that high degree of skill to which the specialist of the metropolis attains.[1]

§ 495. **Same Subject—Good Faith—Reasonable Diligence.** But the agent is, in all cases, bound to act in good faith, and to exercise reasonable diligence, and such care and skill as are ordinarily possessed by persons of common capacity engaged in the same business.[2] As is said by Judge Cooley: "Whoever bargains to render services for another undertakes for good faith and integrity, but he does not agree that he will commit no errors. For negligence, bad faith or dishonesty, he would be liable to his employer; but if he is guilty of neither of these, the master or employer must submit to such incidental losses as may occur in the course of the employment, because these are incident to all avocations, and no one, by any implication of law, ever undertakes to protect another against them."[3]

Further than this, general statements of the principle cannot usefully go. The principle is not an uncertain one, though the question of what is reasonable in any given case is not one which can ordinarily be measured by any pre-established inflexible standard. There are cases, it is true, where a limit must be fixed, and one so fixed, though purely arbitrary, is to be observed. But there is a growing tendency on the part of courts, and it is in furtherance of justice, to measure each case by the more flexible standard of its own facts and circumstances. "Care and diligence should vary according to the exigencies which require vigilance and

[1] Small *v.* Howard, 128 Mass. 131, 35 Am. Rep. 363; Leighton *v.* Sargent, 27 N. H. 460, 59 Am. Dec. 388.

[2] Leighton *v.* Sargent, 27 N. H. 460, 59 Am. Dec. 388; Whitney *v.* Martine, 88 N. Y. 535; Heinemann *v.* Heard, 50 N. Y. 35; Gaither *v.* Myrick, 9 Md. 118, 66 Am. Dec. 316; Fletcher *v.* Boston & Maine R. R. 1 Allen (Mass.) 9, 79 Am. Dec. 695; Varnum *v.* Martin, 15 Pick. (Mass.) 440; Stimpson *v.* Sprague, 6 Greenl. (Me.) 470; Crooker *v.* Hutchinson, 1 Vt. 73; Holmes *v.* Peck. 1 R. I. 242; Wilson *v.* Russ, 20 Me. 421; Grannis *v.* Branden, 5 Day (Conn.) 260, 5 Am. Dec. 143; Landon *v.* Humphrey, 9 Conn. 209, 23 Am. Dec. 333; Howard *v.* Grover, 28 Me. 97; 48 Am. Dec. 478; Myles *v.* Myles, 6 Bush. (Ky.) 237; Kempker *v.* Roblyer, 29 Iowa, 274; Stevens *v.* Walker, 55 Ill. 151; Chandler *v.* Hogle, 58 Ill. 46; Deshler *v.* Beers, 32 Ill. 368; Phillips *v.* Moir, 69 Ill. 155; Babcock *v.* Orbison, 25 Ind. 75; Leverick *v.* Meigs, 1 Cow. (N. Y.) 645; Van Alen *v.* Vanderpool, 6 Johns. (N. Y.) 69, 5 Am. Dec. 192; Howatt *v.* Davis, 5 Munf. (Va.) 34, 7 Am. Dec. 681; Greely *v.* Bartlett, 1 Greenl. (Me.) 172, 10 Am. Dec. 54; Folsom *v.* Mussey, 8 Greenl. (Me.) 400, 23 Am. Dec. 522.

[3] In Page *v.* Wells, 37 Mich. 415.

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attention, conforming in amount and degree to the particular circumstances under which they are to be exerted." [1]

§ 496. **Same Subject—When Agent warrants Possession of Skill.** Wherever the undertaking of the agent is one which in its nature requires the possession and exercise of professional skill, the law will presume, in the absence of anything to the contrary, a warranty on the part of the agent that he possesses and will exercise a reasonable and competent degree of the skill required.[2]

And the same rule applies to any other case requiring special or peculiar skill. If the agent undertakes, for a reward, the performance of such a duty, without possessing a reasonable and competent degree of skill, of which fact the principal is ignorant, he will be liable to the principal for the loss or injury resulting therefrom.[3] If, however, the principal had notice or knowledge of the deficiency at the time of the employment, the agent will not be so liable.[4] No warranty of skill will be implied when the principal knows that no such skill is possessed. If he sees fit to employ an unskilled person, he must be content with unskillful performance. And the same thing is true where the agent is employed out of the line of his employment. If the principal sees fit to employ an auctioneer to conduct his case in court, he cannot complain of his attorney's want of skill, unless the latter expressly warranted that he possessed it.

§ 497. **How when Agency is gratuitous.** Where the duty to be performed by the agent is purely voluntary in its nature, a somewhat different rule applies. Friends and neighbors are every day rendering mutual services for the accommodation and

[1] MERRICK, J. in Holly v. Boston Gaslight Co. 8 Gray (Mass.) 131, 69 Am. Dec. 233.

[2] Wilson v. Brett, 11 M. & W. 113; Stanton v. Bell, 2 Hawks (N. C.) 145, 11 Am. Dec. 744; Leighton v. Sargent, 27 N. H. 460, 59 Am. Dec. 388; Varnum v. Martin, 15 Pick. (Mass.) 440; Stimpson v. Sprague, 6 Greenl. (Me.) 470; Crooker v. Hutchinson, 1 Vt. 78; Holmes v. Peck, 1 R. I. 242; Grannis v. Branden, 5 Day (Conn.) 260, 5 Am. Dec. 143; Howard v. Grover, 28 Me. 97, 48 Am. Dec. 478, and see cases cited in preceding section.

[3] Kirtland v. Montgomery, 1 Swan (Tenn.) 452; McDonald v. Simpson, 4 Ark. 523; Wilson v. Brett, 11 M. & W. 113; Moneypenny v. Hartland, 1 Car. & P. 352, s. c. 2 *Id.* 378; McFarland v. McClees, — Penn. St. —, 5 Atl. Rep. 50, and see generally cases cited in preceding section.

[4] Story on Bailments, § 435; Felt v. School District, 24 Vt. 297.

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convenience of each other, with no thought of exacting or receiving a reward. These services, too, are often of such a nature that professional or skilled agents might well have been employed if they were accessible or within the means of the parties; as where, in rural districts, neighbors render for each other simple medical aid or give each other assistance, counsel or advice, in the transaction of their affairs.

In these cases it is evident that it is not contemplated that the party so acting possesses any peculiar skill or that he undertakes to exercise any. The reasonable degree of skill which such an agent could be held accountable for, is obviously very small, and the negligence which would make him liable must be of that degree which is often, for want of a better term, characterized as gross.[1]

Thus where B, a general merchant, who was about to export a case of leather, being applied to by A to ship a case for him at the same time, voluntarily and without any compensation, and by agreement with A, made one entry of both cases at the custom house, but under an improper designation, by reason of which both cases were seized, it was held that he was not liable for the loss sustained by A.

HEATH, J., said: "The defendant in this case was not guilty either of gross negligence or fraud; he acted *bona fide*. If a man applies to a surgeon to attend him in a disorder, for a reward, and the surgeon treats him improperly, there is gross negligence and the surgeon is liable to an action; the surgeon would also be liable for such negligence, if he undertook *gratis* to attend a sick person, because his situation implies skill in surgery; but if the patient applies to a man of a different employment or occupation, for his gratuitous assistance, who either does not exert all his skill, or administers improper remedies to the best of his ability, such person is not liable. It would be attended with

[1] Hammond v. Hussey, 51 N. H. 40, 12 Am. Rep. 41; Shiells v. Blackburne, 1 H. Bl. 158; Beardslee v. Richardson, 11 Wend. (N. Y.) 25, 25 Am. Dec. 596; Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168; Stanton v. Bell, 2 Hawks (N. C.) 145, 11 Am. Dec. 744; Haynie v. Waring, 29 Ala. 265; Skelley v. Kahn, 17 Ill. 171; Lampley v. Scott, 24 Miss. 533; Eddy v. Livingston, 35 Mo. 493. Bissell v. New York, &c. R. R. Co, 29 Barb. (N. Y.) 615; Needles v. Howard, 1 E. D. Smith (N. Y.) 62; Grant v. Ludlow, 8 Ohio St. 48.

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injurious consequences, if a gratuitous undertaking of this sort should subject the person who made it, and who acted to the best of his knowledge, to an action." And Lord LOUGHBOROUGH said: "If in this case a ship-broker, or a clerk in the custom house, had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries; but when an application, under the circumstances of this case, is made to a general merchant to make an entry at the custom house, such a mistake is not to be imputed to him as gross negligence." [1]

Such an agent would, however, be liable if his negligence was of such a nature and degree that it might justly be characterized as wilful or malicious.[2]

So even though the agent be possessed of professional skill, yet if under the circumstances, there was no express or implied undertaking to exercise it, he cannot be held liable. Thus if an attorney, in reply to a casual inquiry made upon the street or elsewhere, without any intention to mislead, gives erroneous advice to one to whom he sustains no professional relations, he cannot be held liable.[3]

§ 498. **Same Subject—When employed in a Capacity which implies Skill.** But where a person holds himself out to the public as possessing professional, peculiar or competent skill; or offers his services in a profession, occupation or capacity, which from its nature implies the possession of such skill, he will be liable to those who employ or rely upon him in that capacity and upon that supposition, to the same extent as though the services were to be rendered for a reward.[4]

This principle is of constant application to the cases of attorneys and physicians,[5] but it is not confined to the so-called learned professions.

[1] Shiells *v.* Blackburne, *supra.*

[2] Hammond *v.* Hussey, *supra.*

[3] Fish *v.* Kelly, 17 Com. Bench (N. S.) 194.

[4] Shiells *v.* Blackburne, 1 H. Blackstone, 158; Williams *v.* McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775; McNevins *v.* Lowe, 40 Ill. 209; Hord *v.* Grimes, 13 B. Mon. (Ky.) 188; Carpenter *v.* Blake, 60 Barb. (N. Y.) 488; s. c. 50 N. Y. 696; Howard *v.* Grover, 28 Maine, 97; Craig *v.* Chambers, 17 Ohio St. 253; Benden *v.* Manning, 2 N. H. 289; Thorne *v.* Deas, 4 Johns. (N. Y.) 84.

[5] McNevins *v.* Lowe, *supra.*

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Thus if a bank has undertaken the collection of a note or other demand and through its negligence the claim is lost, it is no defense that the collection was to be made gratuitously.[1] Nor can the managers of a bank escape responsibility for their mismanagement on the ground that they received no compensation. In such a case, the court said: "It is true that the defendants were unpaid servants, but the duty of bringing to their office ordinary skill and vigilance was none the less on that account. * * * These defendants held themselves out to the public as the managers of this bank, and by so doing they severally engaged to carry it on in the same way that men of common prudence and skill conduct a similar business for themselves."[2]

And so where a landlord had undertaken gratuitously to make certain repairs upon the premises of his tenant, but so negligently and unskilfully performed the work that the tenant's wife was injured, the court in Massachusetts said: "It is argued that upon a gratuitous undertaking of this nature, the defendant could only be held resposible for bad faith or for gross negligence, and that it was, therefore, an error to instruct the jury that he was liable for want of ordinary care and skill. But in assuming to make the repairs at the request of the tenant, he must be considered as professing to have the requisite skill as a mechanic, and as undertaking to select and furnish the kind and quality of materials appropriate to the accomplishment of the desired object. * * * The true question for the jury was whether the defendant had discharged the duty which he had assumed, with that due regard to the rights of the other party which might reasonably have been expected of him under all the circumstances. His undertaking required at least the skill of an ordinary mechanic, and his failure to furnish it, either because he did not possess, or neglected to use it, would be gross negligence."[3]

§ 499. **Same Subject—Bound to exercise the Skill he possesses.** So where an agent possesses a competent degree of skill and enters upon the performance of an undertaking requiring its exercise, he will be liable if he neglects to use it, although the service is to be gratuitous.

[1] Durnford v. Patterson, 7 Martin (La.) 460, 12 Am. Dec. 514; Smedes v. Bank of Utica, 20 Johns. (N. Y.) 372, s. c. 3 Cow. 662.

[2] Williams v. McKay, *supra*.

[3] Gill v. Middleton, 105 Mass. 477, 7 Am. Rep. 548. See also Steamboat v. King, 16 How. (U. S.) 469.

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Thus in a case which has been often cited[1] it appeared upon the trial before ROLFE, B., that the plaintiff had intrusted his horse to the defendant, requesting him to ride it for the purpose of showing it to a prospective purchaser. The defendant accordingly rode the horse and for the purpose of showing it, took it into a race ground, where in consequence of the slippery nature of the ground, the horse slipped and fell several times, and in falling broke one of its knees. It was proved that the defendant was a person conversant with and skilled in the use of horses. The learned judge left it to the jury to say whether the nature of the ground was such as to render it a matter of culpable negligence in the defendant to ride the horse there; and instructed them, that under the circumstances the defendant, being shown to be a person skilled in the management of horses, was bound to take as much care of the horse as if he had borrowed it, and that if they found that the defendant had been negligent in going upon the ground where the injury was done, or had ridden the horse carelessly while there, they should find for the plaintiff which they accordingly did.

Upon appeal, this direction was approved. Lord ABINGER said that the defendant was bound to use such skill in the management of the horse as he really possessed, and that whether he did so or not, was a proper question for the jury. PARKE B. was of the same opinion. "The defendant," said he, "was shown to be a person conversant with horses, and was therefore bound to use such care and skill as a person conversant with horses might reasonably be expected to use; if he did not, he was guilty of negligence. The whole effect of what was said by the learned judge as to the distinction between this case and that of a borrower was this;—that this particular defendant, being in fact a person of competent skill, was in effect in the same situation as that of a borrower, who in point of law represents to the lender that he is a person of competent skill. In the case of a gratuitous bailee where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it."

ROLFE, B., before whom the case had been tried, said: "The distinction I intended to make was, that a gratuitous bailee is only

[1] Wilson v. Brett, 11 Mees. & Wels. 113.

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bound to exercise such skill as he possesses, whereas a hirer or borrower may reasonably be taken to represent to the party who lets, or from whom he borrows, that he is a person of competent skill. If a person more skilled knows that to be dangerous, which another not so skilled as he does not, surely that makes a difference in the liability. I said I could see no difference between *negligence* and *gross* negligence—that it was the same thing with the addition of a vituperative epithet; and I intended to leave it to the jury to say whether the defendant, being as appeared by the evidence, a person accustomed to the management of horses, was guilty of culpable negligence."

§ 500. **Reasonable Skill—How determined.** How this reasonable degree of skill is to be determined is a question of importance. There are cases where its presence or absence is so palpable and unquestionable that the court may so declare as matter of law. But in cases where the facts are controverted, and the existence or non-existence of certain of them may fairly be presumed to affect the mind in any given exigency, there the whole question of the existence of the facts and the conclusions to be deduced from them, is one of fact to be determined by the jury or other tribunal by reference to all the circumstances of the case, including the subject-matter and objects of the agency, and the known character, qualifications and relations of the parties.[1]

§ 501. **Agent not liable for unforeseen Dangers.** It follows as a corollary from the principles above stated, that while the agent is bound to exercise, for the protection of the principal, a reasonable degree of care and skill, and would be liable for any loss or damage which he might sustain on account of a failure so to do, yet the agent can not be held responsible for unforeseen and unexpected losses or damage out of the ordinary course of business or of natural events and not to be guarded against by reasonable diligence or foresight.[2]

§ 502. **Agent presumed to have done his Duty.** The law does not presume negligence on the part of the agent. On the other hand, it presumes that the agent has done his duty, until the con-

[1] Pennsylvania R. R. Co. v. Ogier, 35 Penn. St. 60, 78 Am. Dec. 322; Gill v. Middleton, 105 Mass. 477, 7 Am. Rep. 548; Eddy v. Livingston, 35 Mo. 493; Grant v. Ludlow, 8 Ohio St. 1.

[2] Johnson v. Martin, 11 La. Ann. 27, 66 Am. Dec. 193.

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trary appears, and the burden of proof is upon him who alleges a misfeasance, to establish it.[1]

§ 503. **Agent not liable if Principal also negligent.** The ordinary rule of contributory negligence applies to the question under consideration. Thus if the principal has by his own negligence, contributed to cause the injury, or if, by use of reasonable diligence on his own part, he could have prevented the injury, the agent can not be held responsible for it.[2]

§ 504. **When Agent liable for Neglect of Subagent.** The question of the liability of the agent for the misconduct of a subagent, has already been considered in an earlier portion of the work to which the reader is referred.[3]

§ 505. **Effect of Ratification upon the Agent's Liability.** This question also has been already discussed, and nothing need be added here in reference to it.[4]

§ 506. **The Measure of Damages.** The question of the measure of the damages to be recovered for the agent's neglect is substantially the same that arises where an injury has been sustained by reason of a violation of instructions. The principal is entitled to full compensation; to be put into that situation in which he would have been if the agent had performed his duty. In other words, he is entitled to recover such damages as naturally, proximately and legitimately result from the wrongful act complained of. Profits which are possible or speculative merely, are not to be recovered, but at the same time, it is not necessary that the loss or damage should be directly or immediately caused by the default, if such loss or damage can fairly be considered as the natural result or just consequence of it.[5]

§ 507. **Same Subject—Judgments, Costs, Counsel Fees.** The principal may often be made liable in actions brought against him by third persons to recover damages for some wrong or injury sustained by them solely by reason of the agent's neglect or default in the performance of his duty to his principal, in which actions the principal may not only be charged in damages, but may be

[1] Gaither v. Myrick, 9 Md. 118, 66 Am. Dec. 316; Lampley v. Scott, 24 Miss. 533.

[2] Sioux City, &c. R. R. Co. v. Walker, 49 Iowa, 273.

[3] *Ante*, § 197; St. Louis, &c. Ry v. Smith, — Ark. —, 3 S. W. Rep. 364.

[4] *Ante*, § 170 *et seq.*

[5] Bell v. Cunningham, 3 Peters (U. S.) 69; Gilson v. Collins, 66 Ill. 136.

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compelled to pay costs and counsel fees incurred in the defense. The question thereupon arises how far such judgment, costs and expenses can be regarded as proper elements of damage in an action by the principal against the agent based upon the same neglect and default.

Of course where the act which caused the injury or damage was done with the express or implied consent or direction of the principal, or has been subsequently ratified by him, or if it was contributed to by some neglect or default on the part of the principal himself, no recovery can be had by him against the agent.

Where, however, the act was purely and wholly the result of a violation by the agent of his duty to his principal, the latter upon being sued therefor, may notify the agent of the pendency of the action and call upon him to defend it, and if he fails to defend, he may be held liable to the principal not only for the amount of damages and costs recovered, but for all reasonable and necessary counsel fees and other expenses incurred in such defense.[1]

§ 508. **Illustrations of this Rule.** It is not within the limits of the present work to exhibit in detail all of the various cases in which these principles have been applied. Enough may, however, be given to sufficiently illustrate their application to the law of agency.

1. *Neglect of Agents in making Loans.*

§ 509. **Liable for resulting Loss.** It is the duty of an agent who undertakes to loan money for his principal to exercise reasonable care and prudence in the selection of the security; in the examination of the title; in the procuring of proper conveyances; in making the necessary records, and in the performance of those other acts which may be necessary under the circumstances to perfect and protect the security. If he fails in the performance of this duty, and loss thereby results to his principal, the agent is responsible for the amount of the loss.[2]

[1] Wilson *v.* Greensboro, 54 Vt. 533; Inhabitants of Westfield *v.* Mayo, 123 Mass. 100, 23 Am. Rep. 292; Chesapeake, &c. Co. *v.* County Commissioners, 57 Md. 201, 40 Am. Rep. 430; Brooklyn *v.* Railway Co. 47 N. Y. 475, 7 Am. Rep. 469.

[2] McFarland *v.* McClees, — Penn. St. —, 5 Atl. Rep. 50; Bank of Owensboro *v.* Western Bank, 13 Bush (Ky.) 526, 26 Am. Rep. 211; Bannon *v.* Warfield, 42 Md. 22.

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2. *Neglect of Agent to effect Insurance.*

§ 510. **When liable for Loss.** The same rule applies to the case of an agent whose duty it is to insure the property of his principal. This duty may arise as has been seen,[1] from express instructions, but while in other cases the duty does not arise from the mere fact of agency, it will arise wherever the agent has in his possession property of his principal of a kind which it is the usage to insure,[2] or which it has been the agent's habit to insure,[3] or which reasonable care and prudence requires shall be protected against loss.[4]

The duty of the agent when not otherwise limited by express instructions, requires the exercise on his part of reasonable care and prudence in the selection of the insurer;[5] in the determination of the duration and amount of the risk; in procuring proper and sufficient policies or contracts and in inserting such special stipulations and provisions as the circumstances of the case reasonably require.[6] But unless expressly instructed so to do, he would not be bound to insure against unusual and unforeseen dangers, but only against such as an ordinarily prudent man would select under the circumstances. If the agent is unable to procure the insurance,[7] or if after having been in the habit of insuring upon his own motion, he determines no longer to do so,[8] he should promptly notify his principal in order to give the latter an opportunity to insure. Failing in the performance of his duty, the agent is liable for the full amount of the insurance which he should have effected, less the premium.[9] His duty is not performed if he selects underwriters

[1] § 474.

[2] Kingston v. Wilson, 4 Wash. (U. S. C. C.) 310; Shirtliff v. Whitfield, 2 Brev. (S. C.) 71, 3 Am. Dec. 701; Berthoud v. Gordon, 6 La. 579, 538; Ralston v. Barclay, 6 Id. 653; Lee v. Adsit, 37 N. Y. 78; Shoenfeld v. Fleisher, 78 Ill. 404; Schaeffer v. Kirk, 49 Ill. 251; Brisban v. Boyd, 4 Paige (N. Y.) Ch. 17.

[3] Shoenfeld v. Fleisher, *supra*; Schaeffer v. Kirk, *supra*; Lee v. Adsit, *supra*; Brisban v. Boyd, *supra*; Ralston v. Barclay, *supra*; Berthoud v. Gordon, *supra*.

[4] *Ante*, §§ 493, 495.

[5] Strong v. High, 2 Rob. (La.) 103, 38 Am. Dec. 195.

[6] Mallough v. Barber, 4 Camp. 150.

[7] Callander v. Oelrichs, 5 Bing. N. C. 58; Smith v. Lascelles, 2 T. R. 187.

[8] Area v. Milliken, 35 La. Ann. 1150.

[9] Storer v. Eaton, 50 Me. 219, 79 Am. Dec. 611; Mallough v. Barber, 4 Camp. 150; Park v. Hamond 4 Camp. 344; Perkins v. Washington Ins. Co., 4 Cow. (N. Y.) 645; DeTastett v. Crousillat, 2 Wash. (U. S. C. C.) 132;

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notoriously in bad credit or insolvent;[1] or if he accepts of manifestly insufficient or invalid policies.[2] If the principal has by express instructions fixed the amount of the insurance and such amount might, by reasonable diligence, have been obtained, the agent who neglects to insure is liable for that amount as on a valued policy.[3] Where no amount is so fixed, the agent should ordinarily procure insurance to the full insurable value.[4]

3. *Neglect of Agent in making Collections.*

§ 511. **Liable for Loss from Negligence.** The liability of an agent employed to collect a demand, depends largely upon the nature of his undertaking. Such an agent may, undoubtedly, by express contract, impose upon himself the absolute duty to collect the demand in any event. In such a case he becomes, practically, a guarantor of the debt and is liable as such.

Where no such express contract is made, however, the agent by assuming the collection of the claim, undertakes that he will exercise reasonable care, skill and diligence in making the money. If he does this, and is unable to collect the demand, he is not liable; but if from his neglect to exercise this degree of care, skill and diligence, the claim or any part of it is lost, the agent is liable for the loss.[5]

This rule imposes upon the agent the duty to take all the precautions and avail himself of all the remedies, which are reasonable and proper under the circumstances,—which a reasonably prudent and careful man would avail himself of under like circumstances.[6]

If certain proceedings are, by law, required to be taken, for

Thorne v. Deas, 4 Johns. (N. Y.) 84; Shoenfeld v. Fleisher, 73 Ill. 404; Callander v. Oelrichs, 5 Bing. (N. C.) 58; Gray v. Murray, 3 Johns. (N. Y.) Ch. 167.

[1] Strong v. High, 2 Rob. (La.) 103, 38 Am. Dec. 195.

[2] Mallough v. Barber, *supra*.

[3] Miner v. Tagert, 3 Binn. (Penn.) 204.

[4] Beardsley v. Davis, 52 Barb. (N. Y.) 159; Betteley v. Stainsby, 12 C. B. (N. S.) 499; Douglass v. Murphy, 16 U. C. Q. B. 118.

[5] Allen v. Suydam, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555; Buell v. Chapin, 99 Mass. 594; Reed v. Northrup, 50 Mich. 442; Fick v. Runnels, 48 Mich. 302. In order to recover against the agent for failure to collect it is sufficient to show that debtor was solvent, and that with proper exertion, claim could have been collected. Wiley v. Logan, 95 N. C. 358.

[6] Allen v. Suydam, *supra*.

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the protection of his principal, the agent must see that these requirements are complied with. Thus it is the duty of an agent who receives negotiable paper to collect, to so act as to secure and preserve the liability thereon of all parties prior to his principal; and if he fails in this duty, and thereby causes loss to his principal, he becomes liable for such loss.[1] Such an agent must therefore present the bill or note for acceptance without delay and present it for payment at maturity. If the bill or note be not duly accepted or paid, he must cause it to be immediately protested, where protest is necessary, and cause notice to be duly given of its dishonor.

Whether the agent shall give notice of the dishonor to prior parties directly, or to his principal only, but in time to enable him to give such notice to prior parties, is a question upon which the authorities are not harmonious. The weight of authority, however, seems to be that the agent is only bound to notify his principal.[2]

For the purposes of notice, a bank or other agent to whom a note or bill has been transmitted for collection is to be considered as though he were the real holder, and his principal a prior endorser. The agent may therefore notify his principal only, and the latter has the same time to notify prior parties.[3]

But this is not the utmost limit of the agent's duty and liability. He may so act as to charge all of the parties to the paper, and yet become liable to his principal for a loss occasioned by his negligence. The rule which will measure the diligence which is exacted of a *holder* of such paper in order to charge the prior parties, will not always measure the diligence which is

[1] First National Bank of Meadville v. Fourth National Bank of N. Y. 77 N. Y. 320, 33 Am. Rep. 618; Allen v. Merchants' Bank, 22 Wend. (N. Y.) 215, 34 Am. Dec. 289; Chapman v. McCrea, 63 Ind. 360.

[2] Colt v. Noble, 5 Mass. 167; Burnham v. Webster, 19 Me. 232; United States Bank v. Goddard, 5 Mason (U. S. C. C.) 366; Farmers' Bank v. Vail, 21 N. Y. 485; Bank of Mobile v. Huggins, 3 Ala. (N. S.) 206; Mead v. Engs, 5 Cow. (N. Y.) 303; Phipps v. Millbury Bank, 8 Metc. (Mass.) 79; Howard v. Ives, 1 Hill (N. Y.) 263. *Contra*, Thompson v. Bank of South Carolina, 3 Hill (S. Car.) Law, 77, 30 Am. Dec. 354; Smedes v. Bank of Utica, 20 Johns. (N. Y.) 372; Merchants' Bank v. Stafford Bank, 44 Conn. 565; McKinster v. Bank of Utica, 9 Wend. (N. Y.) 46; Chapman v. McCrea, 63 Ind. 360.

[3] Seaton v. Scovill, 18 Kan. 433.

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required of a collecting agent in the discharge of his duty to his principal.[1]

Thus it is said by a learned judge: "Suppose an agent receives for collection from the payee, a sight draft. No circumstance can make it his duty, in order to charge the drawer, to present it for payment until the next day. He has entered into no contract with the drawer, is not employed or paid by him to render him any service, and owes him no duty to protect him from loss. What is required to be done to charge the drawer is simply a compliance with the condition attached to the draft, as if written therein; and that condition is in all cases complied with by presentation, demand and notice on the next day after receipt of the draft. But suppose the agent, on the day he receives the draft, obtains reliable information that the drawee must fail the next day, and that the draft will not be paid unless immediately presented; what then is the duty he owes his principal whose interests, for a compensation, he has agreed with proper diligence and skill, to serve, in and about the collection of the draft? Clearly, all would say, to present the draft at once; and if he fails to do this, and loss ensues, he incurs responsibility to his principal; and yet the drawer would be charged if it was not presented until the next day. Where an agent receives a bill for collection, payable some days or months after date, in order to charge the drawer, he need not present it for acceptance until it falls due; and if he then presents it and demands payment, and protests it and gives the notice, the drawer is held; and yet in such a case he owes his principal the duty to present the bill for acceptance at once, and if he fails in such duty and loss ensues to his principal he becomes liable for such loss."[2]

And so it was said by Chancellor WALWORTH: "If the receiving a bill by an agent to collect implies an obligation on his part to take the necessary steps to charge the drawer and indorsers by protest and notices, in case it is not accepted and paid by the drawee, I do not see why due diligence on the part of the agent in procuring the acceptance of the drawee without delay,

[1] First National Bank v. Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618; Smith v. Miller, 43 N. Y. 172, 3 Am. Rep. 690, again reported in 52 N. Y. 545.

[2] First Nat. Bank v. Fourth Nat. Bank, *supra*.

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when it may be necessary or beneficial to the interests of the principal, should not also be implied, as it is the duty of a faithful agent to do for his principal whatever the principal himself would probably have done, if he was a discreet and prudent man. Even where the principal is habitually negligent in attending to his own interests, it forms no excuse for similar negligence on the part of his agent."[1]

In accordance with these principles it was held that an agent intrusted, for collection, with a draft or bill payable on a particular day, is liable for any unnecessary delay in presenting it for acceptance, although it may not be yet due.[2] So the defendant, a bank in New York, received for collection a draft upon a firm in that city upon the morning of a certain day and, upon presentation, received in payment the drawee's check upon another bank in the same city, and delivered up the draft. The check, however, was not presented until the next day, and then through the clearing house. On that day, and before it was presented for payment, the drawers of the check failed and payment was refused. The defendant thereupon returned the check to the drawers, got back the draft, made a formal demand for its payment, caused it to be protested, and, on the next day, gave due notice of its dishonor. It appeared that the bank upon which the check was drawn paid all of the drawer's checks down to the time of the failure, and that the check would have been paid if presented, as it might easily have been, for payment upon the day it was given. Upon this state of facts it was held that, though the action of the defendant bank might have been sufficient to charge prior parties, it was negligent in not securing payment of the check on the day that it was drawn, and hence was liable for the loss.[3] Indeed, as has been seen,[4] there is no implied authority, in an agent to collect, to receive a check in payment at all. It is, undoubtedly, a common practice among business men in their own transactions, to give and receive checks in payment of demands. This is, however, a matter of convenience only, and the check does not constitute payment unless expressly received as such. But this practice falls short of a usage applying to the collection of drafts for absent parties. And it is not

[1] Allen v. Suydam, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555.

[2] Allen v. Suydam, *supra*.

[3] First Nat. Bank v. Fourth Nat. Bank, *supra*.

[4] *Ante*, § 381.

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a reasonable usage that one who undertakes to collect a draft for an absent party should be allowed to give it up to the drawee, and sacrifice the claim which the owner may have on prior parties upon the mere receipt of a check which may turn out to be worthless.[1]

§ 512. **Same Subject — Neglect in making Remittances.** Where, as has been seen, the principal directs his agent to send the money in a certain way or through a particular channel, transmitting it in a different mode is evidence of negligence.[2] But unless so bound by express instructions, the agent is held only for reasonable skill and diligence in sending the money.[3]

Thus where the principal sent a claim of about sixty dollars to his agent by mail, with instructions to the agent to "forward" the proceeds, it was held that the agent was warranted in believing that he was authorized to transmit the proceeds in the same way.[4] Said GRAY, J.: "There is no rule of law that the postoffice established by the government for the purpose of carrying letters is a less safe or appropriate means of forwarding money than a private carrier or banker. Whether it is so in any particular case is a question of fact, depending upon the amount to be sent, the proportionate expense of different modes of transmission, the time and distance intervening, the prevailing usage in similar cases, and other circumstances surrounding the transaction, all of which are proper for the consideration of the jury."[5]

§ 513. **Same Subject—Liability for Neglect of Correspondents and Subagents.** As has been already stated, the principle which runs through the cases, is that if an agent employs a subagent for his principal and by his authority, express or implied, then the subagent is the agent of the principal and is responsible directly to the principal for his conduct. In such a case the agent is not liable for the negligence of the subagent, unless he has failed to exercise due care in the selection of such subagent. But where the agent, having undertaken to do the business for his principal,

[1] Whitney *v.* Eson, 99 Mass. 308, 96 Am. Dec. 762.

[2] *Ante*, § 474.

[3] Buell *v.* Chapin, 99 Mass. 594, 97 Am. Dec. 58; Kingston *v.* Kincaid, 1 Wash. (U. S. C. C.) 457; Mechanics Bank *v.* Merchants' Bank, 6 Metc. (Mass.) 26.

[4] Buell *v.* Chapin, *supra*; Morgan *v.* Richardson, 13 Allen (Mass.) 410.

[5] In Buell *v.* Chapin, *supra*.

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employs a servant or subagent on his own account to assist him in what he has undertaken, then the subagent or servant is the representative of the agent only, and is responsible to him for his conduct, and the agent is responsible to the principal for the manner in which the business has been done, whether by himself or by his servant or agent.[1] In the latter case, the agent stands in the position of an independent contractor, at liberty to perform the undertaking by the agencies of his own selection, and is responsible to his principal for the due execution of the enterprise by the means he has selected. As has been seen, the authority of the agent to employ a subagent on his principal's account, may, in certain cases, be implied.[2] The application of these principles to the case of collecting agents has not been altogether harmonious, yet the preponderance of authority is believed to be in accordance with them.

§ 514. **Same Subject—Liability of Banks.** There can be no question of course, that the bank is liable for the neglect of its own immediate officers and servants; these are the direct executive actors of the bank through whom all of its transactions must necessarily be performed.

But when it becomes necessary to employ an independent agency, such as a notary public to protest the paper, or another bank when the demand is payable in a distant town, other questions arise.

For the Neglect of the Notary. The doctrine was established in New York at an early period and has since been maintained, that a bank receiving negotiable paper for collection, in the absence of an express agreement or recognized custom limiting its liability, stands in the attitude of an independent contractor, and that if, in the course of the performance, it employs a notary to present the paper for payment and give the proper notice to charge the parties, the notary is the agent of the bank and not of the depositor or owner of the paper.[3] The bank is therefore liable for his negligence. The same rule formerly prevailed in Louisiana[4] and South Carolina,[5] but has since been overruled.

[1] See *ante*, § 197.

[2] See *ante*, §§ 192–196.

[3] Ayrault *v.* Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489.

[4] Miranda *v.* City Bank, 6 La. 740, 26 Am. Dec. 493, overruled in Hyde *v.* Planters' Bank, 17 La. 560; Baldwin *v.* Bank of Louisiana, 1 La. Ann. 13.

[5] Thompson *v.* Bank of South Carolina, 3 Hill L. 77, 30 Am. Dec. 354.

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It appears to be approved in Indiana[1] and is unqualifiedly indorsed in New Jersey.[2] It is also approved in Kansas.[3]

But the weight of authority is believed to be that if the bank exercises due care in the selection of a competent notary, it is not liable for his neglect in the performance of the duty entrusted to him.[4] Where, however, the bank employs a notary by the year, and takes from him a bond for the faithful discharge of his duties, he is to be regarded as an officer of the bank, and the bank will be liable for his negligence or default.[5]

For the Neglect of a Correspondent Bank. The same conflict of authority exists as to the liability of a bank which receives, in the ordinary manner, a note or bill payable at a distant place, and sends it to its correspondent there for collection. It is well established in New York[6] that in such a case the correspondent bank is the agent of the bank from which it received the paper, and not of the depositor or owner of the paper. The transmitting bank is, therefore, liable for the neglect or default of the correspondent bank in making the collection and transmitting the proceeds. This rule prevails also in Michigan,[7] Ohio,[8] New

[1] American Express Co. v. Haire, 21 Ind. 4, 83 Am. Dec. 334. The point was not directly involved, but the court seem to approve the doctrine of the New York cases. The question at issue was the liability of an express company, which, having undertaken the collection of a bill of exchange caused it to be protested too soon. It was held to be liable. See Tyson v. State Bank, 6 Blackf. (Ind.) 225.

[2] Davey v. Jones, 13 Vroom. (N. J.) 28, 36 Am. Rep. 505.

[3] Bank of Lindsborg v. Ober, 31 Kans. 599.

[4] Tiernan v. Commercial Bank, 7 How. (Miss.) 648; Agricultural Bank v. Commercial Bank, 7 Smedes & Mo. (Miss.) 592; Bowling v. Arthur, 34 Miss. 41; Third National Bank v. Vicksburg Bank, 61 Miss. 112, 48 Am. Rep. 78; Bellemire v. Bank of U. S., 4 Whart. 105, 33 Am. Dec. 46; Warren Bank v. Suffolk Bank, 10 Cush. (Mass) 582; Stacy v. Dane County Bank, 12 Wis. 629; Britton v. Nichols, 104 U. S. 757; Bank v. Butler, 41 Ohio St. 519, 52 Am. Rep. 94.

[5] Gerhardt v. Boatmen's Savings Inst. 38 Mo. 60, 90 Am. Dec. 407.

[6] Ayrault v. Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489; Bank of Orleans v. Smith, 3 Hill (N. Y.) 560; Montgomery County Bank v. Albany City Bank, 7 N. Y. 459; Commercial Bank v. Union Bank, 11 N. Y. 212; Allen v. Suydam, 22 Wend. (N. Y.) 321, 32 Am. Dec. 553; Allen v. Merchants' Bank, 22 Wend. (N. Y.) 215, 34 Am. Dec. 289.

[7] Simpson v. Waldby, — Mich. —, 30 N. W. Rep. 199.

[8] Reeves v. State Bank, 8 Ohio St. 465. See this case discussed and explained in Bank v. Butler, 41 Ohio St. 519, 52 Am. Rep. 94.

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Jersey,[1] Montana,[2] Indiana,[3] the Supreme Court of the United States[4] and in England.[5] It is based upon the principle that the home bank having undertaken the collection of the paper stands in the attitude of an independent contractor who is left at liberty to select and does select his own agents and correspondents, and is, therefore, liable for their default.[6]

[1] Titus *v.* Mechanics' Nat. Bank, 35 N. J. L. 588.

[2] Power *v.* First Nat. Bank, 6 Mont. 251, 12 Pac. Rep. 597. This case contains a very full resume of the cases.

[3] Abbott *v.* Smith, 4 Ind. 452; Tyson *v.* State Bank, 6 Blackf. (Ind.) 225.

[4] Exchange Nat. Bank *v.* Third Nat. Bank, 112 U. S. 276, limiting Britton *v.* Niccolls, 104 U. S. 757; Hoover *v.* Wise, 91 U. S. 308. At the Circuits see Kent *v.* Dawson Bank, 13 Blatchf. 237; Taber *v.* Perrot, 2 Gall. 565; Bank of Trinidad *v.* First Nat. Bank, 4 Dill. 290; Hyde *v.* Bank, 7 Biss. 156.

[5] Mackersy *v.* Ramsays, 9 Clark & F. 818 (House of Lords); Van Wart *v.* Woolley, 3 B. & C. 439.

[6] In Exchange National Bank *v.* Third National Bank, 112 U. S. at p. 289, Mr. Justice BLATCHFORD says: "The distinction between the liability of one who contracts to do a thing, and that of one who merely receives a delegation of authority to act for another, is a fundamental one, applicable to the present case. If the agency is an undertaking to do the business, the original principal may look to the immediate contractor with himself, and is not obliged to look to inferior or distant under-contractors or subagents, when defaults occur injurious to his interest.

Whether a draft is payable in the place where the bank receiving it for collection is situated, or in another place, the holder is aware that the collection must be made by a competent agent. In either case there is an implied contract of the bank that the proper measures shall be used to collect the draft, and a right, on the part of its owner, to presume that proper agents will be employed, he having no knowledge of the agents. There is, therefore, no reason for liability, or exemption from liability in the one case which does not apply to the other. And, while the rule at law is thus general, the liability of the bank may be varied by consent, or the bank may refuse to undertake the collection. It may agree to receive the paper only for transmission to its correspondent, and thus make a different contract, and become responsible only for good faith and due discretion in the choice of an agent. If this is not done, or there is no implied understanding to that effect, the same responsibility is assumed in the undertaking to collect foreign paper and in that to collect paper payable at home. On any other rule, no principal contractor would be liable for the default of his own agent, where from the nature of the business, it was evident he must employ subagents. The distinction recurs, between the rule of merely personal representative agency, and the responsibility imposed by the law of commercial contracts. This solves the difficulty and reconciles the apparent conflict of decision in many cases. The nature of the contract is the test. If the contract be only for the immediate services of the agent,

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But in the majority of the States, however, a different rule prevails, and it is held that the liability of the home bank, in the absence of instructions or an agreement to the contrary, extends merely to the selection of a suitable and competent agent at the place of payment and the transmission of the paper to such agent with proper instructions. This rule prevails in Massachusetts,[1] Connecticut,[2] Maryland,[3] Illinois,[4] Wisconsin,[5] Iowa,[6] Mississippi,[7] Missouri,[8] Tennessee,[9] Pennsylvania,[10] and Louisiana.[11]

This rule is based upon the theory that from the nature of the case there is implied authority, upon the ground of necessity, for the appointment of a subagent, and that in this, as in other cases, the agent fulfils his duty when he uses due care in the selection of the subagent.[12]

and for his faithful conduct as representing his principal, the responsibility ceases with the limits of the personal services undertaken. But where the contract looks mainly to the thing to be done, and the undertaking is for the due use of all proper means to performance, the responsibility extends to all necessary and proper means to accomplish the object by whomsoever used."

[1] Dorchester, &c. Bank v. New England Bank, 1 Cush. (Mass.) 177; Fabens v. Mercantile Bank, 23 Pick. (Mass.) 330, 34 Am. Dec. 59.

[2] Lawrence v. Stonington Bank, 6 Conn. 521; East Haddam Bank v. Scovil, 12 Conn. 303.

[3] Jackson v. Union Bank, 6 Har. & J. (Md.) 146; Citizens' Bank v. Howell, 8 Md. 530.

[4] Ætna Ins. Co. v. Alton City Bank, 25 Ill. 243.

[5] Stacy v. Dane County Bank, 12 Wis. 629.

[6] Guelich v. National State Bank, 56 Iowa, 434, 41 Am. Rep. 110, 9 N. W. Rep. 328, 12 Rep. 237.

[7] Tiernan v. Commercial Bank, 7 How. (Miss.) 648; Agricultural Bank v. Commercial Bank, 7 Sm. & M. (Miss.) 592; Bowling v. Arthur, 34 Miss. 41; Third National Bank v. Vicksburg Bank, 61 Miss. 112, 48 Am. Rep. 78.

[8] Daly v. Butchers' & Drovers' Bank, 56 Mo. 94, 17 Am. Rep. 663.

[9] Bank of Louisville v. First National Bank, 8 Baxt. (Tenn.) 101, 35 Am. Rep. 691.

[10] Merchants' National Bank v. Goodman, 109 Penn. St. 422, 58 Am. Rep. 728; Bank v. Earp, 4 Rawle (Pa.) 386; Bellemire v. Bank of U. S. 4 Whart. (Penn.) 105, 33 Am. Dec. 46, Wingate v. Mechanics' Bank, 10 Penn. St. 104.

[11] Hyde v. Planters' Bank, 17 La. 560; Baldwin v. Bank of Louisiana, 1 La. Ann. 13.

[12] In Guelich v. National State Bank, 56 Iowa 434, 41 Am. Rep. 110, Beck, J., states the reasons for this view as follows: "The course of business of defendant, and all other banks, is, in such cases, to make collections through correspondents. They do not undertake themselves to collect the bills, but to intrust them to other banks at the place payment is to be made. The holder of the paper, having full notice of the course of business, must be held to assent thereto. He therefore authorizes the

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A bank, however, does not exercise due care in the selection of its correspondent when it sends the paper for collection to the debtor himself, as, for example, to the very bank upon which the check or draft is drawn. In such a case the bank is liable for a loss occasioned by the failure of the drawee.[1]

bank with whom he deals to do the work of collection through another bank.

We will now inquire as to the relations existing between the bank charged with the collection of the paper and the holder depositing it with the first bank. The bank receiving the paper becomes an agent of the depositor with authority to employ another bank to collect it. The second bank becomes the subagent of the customer of the first, for the reason that the customer authorizes the employment of such an agent to make the collection.

The paper remains the property of the customer, and is collected for him; the party employed, with his assent, to make the collection, must therefore be regarded as his agent.

A subagent is accountable ordinarily only to his superior agent when employed without the assent or direction of the principal. But if he be employed with the express or implied assent of the principal, the superior agent will not be responsible for his acts. There is, in such a case, a privity between the subagent and the principal, who must therefore seek a remedy directly against the subagent for his negligence or misconduct. Story on Agency, §§ 217, 313. These familiar rules of the law applied to the case relieve it of all doubt, when considered in the light of legal principles."

[1] Drovers National Bank v. Anglo-American, &c. Co. 117 Ill. 100, 57 Am. Rep. 855, 23 Cent. L. Jour. 182; Merchants' National Bank v. Goodman, 109 Penn. St. 422, 58 Am. Rep. 728, 2 Atl. Rep. 687; Farwell v. Curtis, 7 Biss. C. C. 163. The case of Indig v. National City Bank, 80 N. Y. 100, as interpreted by Judge SCHOLFIELD in Drovers' National Bank v. Anglo-American, &c. Co. *supra* is not in conflict with the statement in the text; nor as interpreted by the judge who wrote the opinion and by the court which pronounced it, in the later case of Briggs v. Central National Bank, 89 N. Y. 182, 42 Am. Rep. 285, does it conflict.

Said the courts in the Pennsylvania and Illinois cases: "We think the principle may be stated as a true one * * * that no firm, bank, corporation or individual can be deemed a suitable agent, in contemplation of law, to enforce in behalf of another, a claim against itself. The only safe rule is to hold that an agent, with whom a check or bill is deposited for collection must transmit it to a suitable subagent, to demand payment, in such manner that no loss can happen to any party, whether he be depositor and indorser, or the indorsee and holder. * * * We interpret the cases to which we have referred as establishing the rule of transmission to a suitable correspondent or agent, to mean that such suitable agent must, from the nature of the case, be some one other than the party who is to make the payment. By no other rule can the rights of indorsers be protected, if it is the interest of the party who is to make payment to hinder, postpone or defeat payment. This imposes no hardship on the in-

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§ 515. Same Subject—Liability of Attorneys. The liability of an attorney for the neglect or default of other attorneys or agents employed by him in the collection of claims, depends upon the nature of his undertaking. He is, of course, liable for the neglect or default of his own immediate clerks or agents, employed by him to assist him in the collection. So where he undertakes the collection of a claim at a place distant from that in which he does business, his liability extends to the neglect or default of another attorney or agent to whom he transmits the claim for collection, and is not limited to the selection of, and transmission to, a suitable and proper agent. In this respect his

stitution undertaking to transmit for collection, which can always protect itself by stipulating that special instructions by the depositor shall be given which will save the collecting bank from all risk or peril."

Said RAPALLO, J., in Briggs *v.* Central National Bank, *supra:* "In the case of Indig *v.* National City Bank, 80 N. Y. 100, it was decided that where a bank receives from one of its customers, for collection, a check or draft drawn upon another bank at a distant place, and for the purpose of collecting the paper, sends it by mail to the bank upon which it is drawn, with a request to remit the amount, the collecting bank by so sending the paper to the drawee directly, for payment, does not constitute the drawee its agent to receive the proceeds, and consequently does not become guarantor of the solvency of the drawee; and that in such a case, though the drawee has funds of the drawer of the paper and charges it to his account as paid, but fails to pay over to the collecting bank, the latter is not responsible to its customers for the amount, unless there has been some negligence. The point of the decision is that the mere act of presenting the paper for payment by mail, instead of employing a messenger to present it, does not constitute the drawee agent of the sender to receive or hold the proceeds." The difficulty, as it seems to the author, is that Judge SCHOLFIELD misapprehended the actual effect of the Indig case. In that case the collecting bank sent to its correspondent bank a note made by one of the latter's depositors and payable at its banking house. A note so payable says RAPALLO, J., in that case, "is equivalent to a check drawn by him upon that bank, except that in the case of a note, the failure to present for payment does not discharge the maker." So interpreted, it will be seen that the Illinois and New York cases are not in conflict upon the question of liablity where the paying bank *is* made the agent to collect. The conflict arises from the fact that the Illinois and Pennsylvania cases hold that the sending of the check to the paying bank makes that bank the agent to receive and transmit the money, while the New York case, as interpreted in Briggs *v.* Central National Bank, holds, as will be seen from the quotation above, that the sending of the check by mail does not constitute the drawee agent of the sender to receive or hold the proceeds. But whatever view is to be taken of the transaction, the result reached in Illinois and Pennsylvania seems, to the author, to be correct.

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liability differs from that which, as has been seen, is, by a majority of the courts, imposed upon banks under like circumstances. He may, of course, in such a case limit his liability by express agreement, but in the absence of such an agreement, an attorney taking a claim "for collection" is looked upon as an independent contractor, and is therefore liable for the default of his correspondent.[1]

[1] Cummins v. Heald, 24 Kan. 600, 36 Am. Rep. 264; Walker v. Stevens, 79 Ill. 193; Abbott v. Smith, 4 Ind. 452; Lewis v. Peck, 10 Ala. 142; Riddle v. Poorman, 3 Penn. 224; Cox v. Livingston, 2 Watts & Serg. (Penn.) 103, 37 Am. Dec. 486; Krause v. Dorrance, 10 Penn. St. 462, 51 Am. Dec, 496; Rhines v. Evans, 66 Penn. St. 192, 5 Am. Rep. 364; Pollard v. Rowland, 2 Blackf (Ind.) 22; Cummins v. McLain, 2 Pike (Ark.) 402; Wilkinson v. Griswold, 12 Smedes & Marsh. (Miss.) 669 See also Bradstreet v. Everson, 72 Penn. St. 124, 13 Am. Rep. 665, and Sanger v. Dun, 47 Wis. 615, 32 Am. Rep. 789, cited in the following section.

In Bradstreet v. Everson, 72 Penn. St. 124, 13 Am. Rep. 665, AGNEW, J. said. "Recurring to the analogy of attorneys at law, the first point to be considered is the interpretation given by the courts to the terms of a receipt for collection." In our own State, we have several decisions in point. In Riddle v. Hoffman's Exr, 3 Penn. 224; Riddle, an attorney in Franklin County, gave a receipt in these words: "Lodged in my hands a judgment bill granted by Henry H. Morwitz to Henry Hoffman for the sum of $1,200, due with interest since the 15th of May, 1811, which is entered up in Bedford county, which I am to have recovered if it can be accomplished." Riddle sent this bill to his brother, a practicing lawyer in Bedford. The money was made by the sheriff, but by the neglect of the Bedford Riddle was not received from the sheriff, who became insolvent, and the money was thus lost. Hoffman sued the Franklin county Riddle on his receipt and recovered. On a writ of error it was contended that the words of the receipt, "which I am to have recovered if it can be accomplished," imported only a limited undertaking to have it collected by another, and not to collect it himself. But this court held that the receipt contained an express and positive undertaking for the collection of the money, if practicable, and not merely for the employment of another to that end; and that the defendant was bound by every principle of moral and legal obligation to make good the collection of the judgment by the application of reasonable diligence, skill and attention.

The next case is Cox v. Livingston, 2 W. & S. 103. This was the receipt: "Received of Mr. Thomas Cox, of Lancaster, Pa., for collection, a note drawn in his favor by Mr. Dubbs, calling for $497.65, payable three months after date." The note was left with an instruction to bring suit. The receipt was dated August 30, 1837, and Livingston died in January following without having brought suit. Dubbs became insolvent. It was held that Livingston was liable for the collection, though only two terms intervened between the receipt and his death.

Krause v. Dorrance, 10 Barr, 462,

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§ 516. **Same Subject—Liability of Mercantile or Collection Agencies.** The same rules which have been applied to attorneys who undertake the collection of claims, apply to the so-called commercial or collection agencies, through which a large portion

was assumpsit against two attorneys for money collected and not paid by another attorney to whom they sent the note for collection. The liability of the original attorneys for the collection was admitted, but the point was made and succeeded, that a demand before suit was necessary. ROGERS, J., says expressly they were liable for the acts of the agent whom they employed, but being without fault themselves, a demand was necessary before a resort to an action.

In Rhines *v.* Evans, 16 P. F. Smith, 192; S. C., 5 Am. Rep. 365, the receipt was: "Received for collection of A. Rhines one note on Lukens & Beeson, of Rochester, dated October 30, 1857, for $365" The liability of Evans, the attorney, was conceded and the question was on the statute of limitations, and it was held the action was barred by the lapse of seven years and five months from the date of the receipt.

These cases show the understanding of the bench and bar of this State upon a receipt of claims for collection. It imports an undertaking by the attorney himself to collect, and not merely that he receives it for transmission to another for collection, for whose negligence he is not to be responsible. He is therefore liable by the very terms of his receipt for the negligence of the distant attorney, who is his agent, and he cannot shift responsibility from himself upon his client. There is no hardship in this, for it is in his power to limit his responsibility by the terms of his receipt, when he knows he must employ another to make the collection. Bullitt *v.* Baird, *supra*.

We find cases in other states holding the same doctrine. In Lewis & Wallace *v.* Peck & Clark, 10 Ala. 142, both firms were attorneys. The defendants gave their receipt to the plaintiffs for certain notes for collection, and after collecting the money, transmitted it to the payees in the notes instead of the attorneys who had employed them, the payees having, however, indorsed the notes.

Held, that Peck & Clark were liable to their immediate principals, the plaintiffs, there being no evidence that the payees had given them notice not to pay over to Lewis & Wallace, the original attorneys. This is a direct recognition of the liability of the collecting attorney to the transmitting attorney. The case of Pollard *v.* Rowland, 2 Blackf. (Ind.) 22, is more directly in point. Rowland received from Pollard claims for collection, and sent them to Stephen, an attorney in another county. Stephen obtained judgment and collected the money. Held, that Rowland was accountable to Pollard for the acts of Stephen to the same extent that Stephen was, and could make no defense that Stephen could not; and that Rowland was liable to Pollard for the money. Cummins *v.* McLain *et al.*, 2 Pike (Ark.) 402, was a case nearly similar to the Pennsylvania case of Krause *v.* Dorrance, *supra*. The attorney sent the claim to another attorney at a distance, and was held liable, but for the omission of the plaintiff to make a demand, he failed to recover. The court say the attorney is liable for the acts of the attorney he employs. In a Mississippi case, two attorneys, Wilkinson and

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of the collection business is now transacted. In a leading case[1] upon this subject the defendants gave the plaintiffs the following receipt:

"J. M. Bradstreet & Son, Improved Mercantile Agency, Pittsburg, June 2d, 1865.—Received from Messrs. Everson, Preston & Co. four duplicate acceptances, for collection, against Watt C. Bradford, Memphis, Tennessee, amounting in all to $1.726.37.

"J. M. BRADSTREET & SON."

Defendants sent the claims to their agent in Memphis, who collected the money but failed to pay over the proceeds. The court held the defendants liable, saying, "It is argued, notwithstanding the express receipt 'for collection,' that the defendants did not undertake for themselves to collect, but only to remit to a proper and responsible attorney, and made themselves liable only for diligence in correspondence, and giving the necessary information to the plaintiffs; or in briefer terms, that the attorney in Memphis was not their agent for the collection, but that of the plaintiffs only. The current of decision, however, is otherwise as to attorneys at law sending claims to correspondents for collection, and the reasons for applying the same rule to collection agencies are even stronger. They have their selected agents in every part of the country. From the nature of such ramified institutions we must conclude that the public impression will be, that the agency invited customers on the very ground of its facilities for making distant collections. It must be presumed, from its business connections at remote points, and its knowledge of the agents chosen, the agency intends to undertake the performance of the service which the individual customer is unable to perform for himself. There is good reason, therefore, to hold that such an agency is liable for collections made by its own agents, when it undertakes the collection by the

Willison, received of plaintiff a claim for collection, and brought suit and obtained judgment. They dissolved partnership, Wilkinson retiring from the practice; and Willison took another partner, Jennings, who received the money from the sheriff. In a suit against Wilkinson as surviving partner of Willison, he was held liable for the receipt of the money by Jennings. Wilkinson v. Griswold, 12 Smedes & Marsh. 669."

[1] Bradstreet v. Everson, 72 Penn. St. 124; 13 Am. Rep. 665. To same effect see Hoover v. Wise, 91 U. S. 308; Weyerhauser v. Dun, 100 N. Y. 150, 2 N. E. Rep. 274.

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express terms of the receipt. If it does not so intend, it has it in its power to limit responsibility by the terms of the receipt."

Limitations of the kind indicated by the court in the passage just cited are valid. Thus in an action [1] brought against a similar agency it appeared that the defendants had given and the plaintiffs had accepted a receipt for the claim, stating that it was to be transmitted to an attorney by mail for collection or adjustment, at the risk and on the account of the plaintiffs. Plaintiffs had also signed a memorandum to the same effect upon the defendants' books. It was contended on behalf of the plaintiffs not only that the receipt was not sufficient in terms to limit the defendant's liability to a mere transmitter of the claim, but that even if it would bear this construction it would permit the defendants to take advantage of their own wrong and was void as opposed to public policy, and that therefore the defendants were liable for the negligence or misconduct of the attorney whom they employed and who had collected the money and appropriated it to his own use. In answer to this contention the court said: "It well may be that such would be the responsibility of the defendants, were it not for the restrictive clause in the receipts. But that clause, if any effect is given to it, clearly limits that liability; for it provides that the account is to be transmitted to an attorney for collection at the risk of the plaintiffs. Such being the case, we think the defendants are not liable for the acts or default of the attorney employed by them, unless in the selection of such attorney they were guilty of gross negligence; for it seems to us it was competent for the parties, by express contract, to limit the liability which the law would otherwise impose upon the defendants for the acts of the attorney employed by them to make the collection. We are not aware of any principle of law or public policy which condemns such a contract."

But where the agency retains the right to control the means and methods of collection, it will be held liable for the faithful performance of the subagencies it employs, in the absence of such a stipulation to the contrary. Thus where the claim was taken "to be forwarded by us for collection by suit or otherwise, at our discretion," the agency was held liable for the default of its subagent.[2]

[1] Sanger v. Dun, 47 Wis. 615; 33 Am. Rep. 789; 3 N. W. Rep. 388.

[2] Morgan v. Tener, 83 Penn. St. 805.

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§ 517. **Same Subject—Liability of Express Companies.** The same general principles are applied to express companies which undertake the collection of demands. Thus where the plaintiff at Brockport, New York, delivered to the American Express Co. a note made by a resident of San Francisco, with instructions to take it to San Francisco, demand payment, and, if not paid, to have suit instituted at once for its collection, (the plaintiff supposing the company's line to extend to San Francisco, although in fact it did not), and the express company carried the note to the termination of its line and there delivered it to another company, whose line extended the remainder of the distance, with the instructions, to be by the latter company carried out, it was held that the first company was responsible for a loss occurring from the negligence of the latter company in making the collection.[1]

So where an express company having undertaken the collection of a bill, delivered it to a notary for protest, it was held that the company was responsible for a loss occasioned by the notary's protesting it too soon.[2]

§ 518. **Same Subject—The Measure of Damages.** The measure of damages in an action against an agent for negligence in collection is the actual loss sustained. The negligence being established, that loss *prima facie* is the amount of the claim,[3] but the agent may show that, notwithstanding his negligence, the principal has suffered no loss, and the recovery can then be for nominal damages only. Thus he may show in reduction of damages that if he had used the greatest diligence, the debt could not have been collected;[4] or that the principal's claim against the debtor is delayed only and not lost,[5] or that he is wholly or partially protected by securities which he holds,[6] or that though the principal's claim against certain of the parties is

[1] Palmer *v.* Holland, 51 N. Y. 416, 10 Am. Rep. 616.

[2] American Express Co. *v.* Haire, 21 Ind. 4, 83 Am. Dec. 334

[3] Allen *v.* Suydam, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555; Durnford *v.* Patterson, 7 Mart. (La.) 460; 12 Am. Dec. 514; Miranda *v.* City Bank, 6 La. 740; 26 Am. Dec. 493; Bank of Washington *v.* Triplett, 1 Pet. (U. S.) 25; First National Bank *v.* Fourth National Bank, 77 N. Y. 320, 33 Am. Rep 618.

[4] First National Bank *v.* Fourth National Bank, *supra.*

[5] Van Wart *v.* Woolley, 3 Barn. & Cress. 439.

[6] Borup *v.* Nininger, 5 Minn. 523.

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lost, there are still others liable who are amply responsible, from whom the debt can be collected.[1]

§ 519. **Same Subject—Principal's Right of Action against Subagent.** Whether the principal may hold the subagent directly responsible is a question upon which there is also much conflict of authority. The question may present itself in two forms: 1. Whether the principal may hold the subagent directly liable for his negligence, and 2. Whether the principal may recover from the subagent the proceeds of the collection then in his hands.

I. The determination of first form must depend largely upon the view which shall be taken of the general relations of the parties as discussed in the preceding sections. If the subagent is to be treated as the agent of the agent only, then there is no privity between them upon which such an action can be based;[2] but if on the other hand the subagent is to be treated as the agent of the principal, the principal may proceed against him directly for his default.[3] This conclusion is in accordance with the general principles governing the appointment of subagents which have been heretofore stated.

II. The determination of the second form must also rest upon the same general principles, but the decisions of the courts have not been harmonious, nor have the decisions of the same court always been in harmony upon both forms of the question. It is therefore difficult to extract uniform principles from them, but the following may be said to be supported by a preponderance of authority:—

1. That where by special arrangement or custom of dealing between the owner of the paper and the bank or the agent undertaking the collection, the latter at once places the amount thereof to the credit of the owner, upon which he thereupon draws or is entitled to draw as cash, this works a transfer of the title to the paper in such a way as to prevent the owner from following the paper or its proceeds into the hands of a third party who has received the paper in good faith and due course of business from the agent for collection.[4]

[1] First National Bank v. Fourth National Bank, *supra*.

[2] See *ante*, § 197.

[3] See *ante*, § 197.

[4] Ayres v. Farmers' and Merchants' Bank, 79 Mo. 421, 49 Am. Rep. 235. In this case the plaintiff deposited with the Mastin Bank for collection

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2. That, except as above, the bank or agent actually making the collection may be held responsible directly to the true owner, unless, before receiving notice of the owner's claim, it has paid over the proceeds to the bank or agent from which it received the paper, or unless it has made advances or given credit to the bank or agent from which it received the paper in such a way as to make it a bona fide holder of the paper for value.[1] Unless it

and credit on his account a check drawn on defendant in favor of a third person. Under an express arrangement the amount of the check was immediately passed to the credit of the plaintiff, who drew upon it the same day. The Mastin Bank sent the check to defendant who charged it to the maker and credited the Mastin Bank. The Mastin Bank in the meantime had failed, but defendant did not know it. Plaintiff then sued defendant to recover the amount of the check, but was held not entitled to recover. The arrangement between the plaintiff and the Mastin Bank was held by the court to amount to a purchase of the paper by the latter.

[1] Thus bank A, the owner of a check drawn on bank D, indorsed and transmitted it for collection and credit on its account to bank B. Bank B did not however give bank A credit for the check, but entered it on its collection register merely, and indorsed and transmitted it for collection to bank C, with directions to credit bank B with the proceeds. Bank B on the same day failed in debt to bank A. Bank C collected the check and credited the proceeds to bank B, which was in debt to bank C. Before the collection the cashier of bank C had heard of bank B's failure, but did not inform bank D, which was ignorant of it. The United States bank examiner having taken charge of the affairs of bank B, without the knowledge of bank A, credited bank A and charged bank B with the amount on the books of bank B. Bank A sued bank C to recover the amount of the check.

Upon this state of facts it was held that bank C was the agent of bank B for the purposes of the collection; that the form of the indorsement from bank A to bank B was sufficient to apprise bank C that bank B was not the owner of the check, but an agent for collection merely; that the insolvency of bank B, of which bank C had notice, was sufficient to revoke the authority conferred by bank A upon bank B, to mingle the proceeds with the general funds of bank B, by entering the amount to the credit of bank A, even if it did not revoke bank B's authority to collect altogether; that bank A was therefore entitled to recover the proceeds from bank C, and that the fact that bank C had credited the amount on its books to bank B did not defeat the recovery. "No objection," said the court, "can be successfully made on the ground of want of privity. There is some discrepancy in the decisions as to whether the collecting agent, or the subagent, should be sued by the holder of paper for the failure of the subagent to perform some duty, or for some negligence whereby the debt is lost. See 1 Dan. Neg. Inst. §344 and notes. But the rule scarcely admits of an exception that where one has in his hands money which rightfully belongs to another, the latter may sue for and recover it."

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be a bona fide purchaser of it for value or for advances made upon it in good faith without notice of any defect in the title, the bank or agent actually making the collection acquires no better title to the paper or its proceeds than was possessed by the bank or agent from whom it was received.[1]

3. That in the last mentioned case, the subagent cannot be

First National Bank of Crown Point v. First National Bank of Richmond, 76 Ind. 561, 40 Am. Rep. 261, citing Hall v. Marston, 17 Mass. 574. In Hyde v. First Nat. Bank, 7 Biss. C. C. 156, the rule laid down in subdivision 2 of the text is thought to be overruled by Hoover v. Wise, 91 U. S. 308, but in First National Bank of Chicago v. Reno County Bank, 3 Fed. Rep. 257, Judge McCRARY reaches the opposite conclusion as to the effect of Hoover v. Wise, and announces the same rule as is laid down in Indiana, saying, "I fully approve the doctrine announced by the Supreme Court of Massachusetts in Hall v. Marston, 17 Mass. 574, as follows: 'Whenever one man has in his hands the money of another which he ought to pay over, he is liable in this action (assumpsit) although he has never seen or heard of the party who has the right. When the fact is proved that he has the money, if he cannot show that he has legal or equitable grounds for retaining it, the law creates the privity and the promise.' This doctrine is not in conflict with the decision of the Supreme Court in Hoover v. Wise." See also Wallis v. Shelly, 30 Fed. Rep. 747; Elliott v. Swartwout, 10 Pet.(U.S.) 137; Gaines v. Miller, 111 U. S. 395.

[1] Dickerson v. Wason, 47 N. Y. 439, 7 Am. Rep. 455; McBride v. Farmers' Bank, 26 N. Y. 450.

In New York an antecedent debt is not a good consideration. "The decisions of our courts have been uniform from the time Coddington v. Bay (20 Johns 637) was determined, that before the holder of a note can acquire a better title to it than the person had from whom he received it, he must pay a present valuable consideration therefor; and that receiving it in payment of, or as security for, an antecedent debt, is not such a consideration. Rosa v. Brotherson, 10 Wend. 86; Stalker v. McDonald, 6 Hill 93; Youngs v. Lee, 2 Kern. 551." BALCOM, J., in McBride v. Farmers' Bank, *supra*.

The contrary doctrine as to consideration prevails in Massachusetts. One who takes a negotiable promissory note before maturity, as security for a pre-existing debt, is by the law of that State, a holder for value. Culver v. Benedict, 13 Gray (Mass.) 7; Wood v. Boylston National Bank, 129 Mass. 358, 37 Am. Rep. 366. Thus the plaintiff who was the owner of a negotiable promissory note endorsed it in blank and delivered it to an attorney for collection. The attorney deposited it in the defendant bank, without his own indorsement, to be collected. The bank collected the money and not knowing that the attorney was not the owner applied it upon a debt which the attorney owed the bank. The attorney became bankrupt and the bank settled with his assignee, crediting the proceeds of the note and receiving but a portion of its claim against the attorney. Afterwards the plaintiff learned that the bank had collected the money, informed it of his claim, and upon the bank's refusal to pay it to him,

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deemed to be such a bona fide holder where the paper bears upon its face evidence that the bank or agent from which it was received was an agent for collection merely.[1]

4. That the bankruptcy of the bank or agent which has taken the paper for collection and credit when collected, before it has received the funds from the subagent, terminates the authority to so receive the proceeds and credit them to the account of the owner.[2]

§ 520. **Del Credere Agents. How liable to Principal.** Whenever an agent, in consideration of additional compensation, guarantees to his principal the payment of the debts that become due through his agency, he is said to act under a *del credere* commission.

Whether the legal effect of such a commission is to make the agent primarily liable in all events for the proceeds of the goods as for goods sold to him, or whether he is a mere surety for the vendee to pay for the goods if the latter does not, is a question upon which there has been great conflict of authority. After much vacillation, the doctrine is settled in the English courts that he is not liable to his principal in the first instance, but is only to answer for the solvency of the vendee and to pay the money if the vendee does not.[3]

But the prevailing doctrine in the United States seems to be in accordance with the more stringent rule, that he is absolutely liable in the first instance for the payment of the price of the goods sold by him, to the same extent and in the same manner as if he were himself the purchaser.[4] His liability is thus

brought suit, but he was held not entitled to recover. Wood *v.* Boylston Nat. Bank, *supra*.

[1] First National Bank of Crown Point *v.* First National Bank of Richmond, 76 Ind. 561, 40 Am. Rep. 261; City Bank *v.* Weiss, 67 Tex. 333, 60 Am. Rep. 29; First National Bank *v.* Bank of Monroe, 33 Fed. Rep. 408; *In re* Armstrong, 33 Fed. Rep. 405.

[2] See cases cited in preceding note.

[3] Hornby *v.* Lacy, 6 Maul & Sel. 166; Morris *v.* Cleasby, 4 Maul. & Sel. 566; Couturier *v.* Hastie, 8 Ex. 40; Peele *v.* Northcote, 7 Taunt. 558. See earlier cases, *contra*, Grove *v.* Dubois, 1 T. R. 112; Mackenzie *v.* Scott, 6 Bro. P. C. 280; Houghton *v.* Matthews, 3 Bos. & Pul. 489.

[4] Lewis *v.* Brehme, 83 Md. 412, 8 Am. Rep. 190; Wolff *v.* Koppel, 2 Denio (N. Y.) 368; 43 Am. Dec. 751; Swan *v.* Nesmith, 7 Pick. (Mass.) 220, 19 Am. Dec. 282; Cartwright *v.* Greene, 47 Barb. (N. Y.) 16; Sherwood *v.* Stone, 14 N. Y. 268; Leverick *v.* Meigs, 1 Cow. (N. Y.) 645; Blakely *v.* Jacobson, 9 Bosw. (N. Y.) 140.

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made an original and not a collateral one, and his undertaking is not, therefore, a promise to answer for the debt of another within the contemplation of the Statute of Frauds and void if not in writing.[1]

§ 521. **When Agents liable for selling to irresponsible Parties.** It is the duty of an agent, intrusted with goods to be sold, to sell them, in the absence of a usage or of authority to the contrary, for cash only;[2] and even when authorized to sell upon credit, he is bound to exercise reasonable care and prudence in selling only to responsible purchasers. For a loss occurring from his failure to observe his duty in this regard, the agent is liable.[3]

So if under the agent's contract it is his duty to sell for cash if possible, but if he gives credit at all, to do so only to those who are good and responsible, and to take no paper but that which is good and collectible, he will be liable if he negligently takes the notes of purchasers who are not responsible.[4]

In such a case, however, if the principal would take advantage of the agent's negligence or disobedience, he must act within a reasonable time, and if he does not, he cannot afterwards complain.[5]

IV.

TO ACCOUNT FOR MONEY AND PROPERTY.

§ 522. **In general.** It may be stated as a general rule that the agent is bound to account to his principal for all money and property which may come into his hands during, and by virtue of, the agency.[6] This rule embraces not only such money and

Contra, Thompson *v.* Perkins, 3 Mason (U. S. C. C.) 232.

[1] Wolff *v.* Koppel, 5 Hill (N. Y.) 458; Swan *v.* Nesmith, *supra*; Sherwood *v.* Stone, *supra*; Bradley *v.* Richardson, 23 Vt. 720.

[2] See *ante*, § 353.

[3] Tate *v.* Marco, — S. C. — 4 S. E. Rep. 71. See *ante*, § 474, note 4.

[4] Clark *v.* Roberts, 26 Mich. 506. See *ante*, § 474, note 4.

[5] Plano Mnfg Co. *v.* Buxton, 36 Minn. 203, 30 N. W. Rep. 668. In this case it was held that the principal who had for two years retained notes taken by the agent could not complain that he had sold to irresponsible parties.

[6] Baldwin *v.* Potter, 46 Vt. 403; Taul *v.* Edmondson, 37 Tex. 556; Bedell *v.* Janney, 4 Gilm. (Ill.) 193; Armstrong *v.* Smith, 3 Blackf. (Ind.) 251; Heddens *v.* Younglove, 46 Ind. 212; Jett *v.* Hempstead, 25 Ark. 462; Whitehead *v.* Wells, 20 Ark. 99; Haas *v.* Damon, 9 Iowa 589; Robson *v.* Sanders, 25 S. C. 116.

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property as may be received directly from the principal, but also that which comes into the agent's hands as the results of his agency. As has been seen in a previous section,[1] to the principal belong all profits and advantages made by the agent, beyond lawful compensation, whether such profit or advantage be the fruit of the performance or the violation of the agent's duty, or whether they are the result of transactions within or beyond the scope of his authority, provided the acts from which they accrue were assumed to be done in the behalf and for the benefit of the principal.

§ 523. **Account only to Principal—Joint Principal.** As a rule, the agent is bound to account to his principal only,[2] and where there are several common principals he will not be held to account to each separately.[3]

§ 524. **Subagents—Account to whom.** The principles governing in this case have already been referred to in preceding sections. Wherever the appointment of the subagent is by the express or implied consent of the principal, such a privity exists between them as makes the subagent liable directly to the principal.[4] Where, however, the subagent is to be regarded as the agent only of one who stood in the relation of independent contractor to the principal, there, as has been said, there is ordinarily no privity by virtue of which the subagent can be held accountable to the principal.[5] Yet even in this case, as has also been seen, where funds of the principal come into the hands of a subagent or other third person who has no duty in respect to them but to pay them over to the person to whom they belong, the principal, by timely information as to his claim, may recover them directly from such subagent or other third party.[6]

§ 525. **Agent may not dispute his Principal's Title.** It is a general principle in the law of agency that the agent may not dispute his principal's title.[7] Having assumed the performance

[1] *Ante*, §§ 469–472.

[2] Attorney-General *v.* Chesterfield, 18 Beav. 596.

[3] Trustees, &c. *v.* Dupuy, 31 La. Ann. 305.

[4] *Ante*, § 197. Guelich *v.* National State Bank, 56 Iowa 434, 41 Am. Rep. 110.

[5] *Ante*, § 197. Guelich *v.* National State Bank, *supra*.

[6] *Ante*, § 519.

[7] Collins *v.* Tillou, 26 Conn. 368, 68 Am. Dec. 398; Holbrook *v.* Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607; Marvin *v.* Ellwood, 11 Paige (N. Y.) 365; Roberts *v.* Ogilby, 9 Price

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of the agency by virtue of which he has received the property or money of his principal, he will not be permitted, when called upon by his principal to account for the property or money so received, to deny his principal's title to it. This general principle, however, is subject to certain exceptions as well settled as the principle itself. It is always competent for the agent to show in his own defense that he has been divested of the property by a title paramount to that of his principal.[1] He may also show that since the delivery to him the title of his principal has been terminated[2] or that the principal has transferred his interest or title to another under whom the agent claims.[3]

§ 526. **May not allege Illegality of Transaction to defeat Principal's Claim.** An agent who has received money from, or in behalf of, his principal, can not defeat an action brought by the principal to recover it, upon the ground that the contract under which the money was paid, or the transaction from which it was realized, or the purpose to which it was to be devoted, was illegal.[4]

Thus a collector of taxes cannot deny the right of his principal to receive them on the ground that they were illegally levied;[5] an agent who in unlawful speculations has received money belonging to his principal can not refuse, on that ground, to pay it to him;[6] nor can an agent who has received money from his principal to be employed for an unlawful purpose, but who has not

269; Kieran v. Sandars, 6 Ad. & El. 515.

[1] Western Transportation Co. v. Barber, 56 N. Y. 552; Biddle v. Bond, 6 Best & Smith 224; Bliven v. Hudson River R. R. Co., 36 N. Y. 406; Doty v. Hawkins, 6 N. H. 247, 25 Am. Dec. 459; Burton v. Wilkinson, 18 Vt. 186.

[2] Marvin v. Ellwood, 11 Paige (N. Y.) 365.

[3] Duncan v. Spear, 11 Wend. (N. Y.) 56; Harker v. Dement, 9 Gill (Md.) 7, 52 Am. Dec. 670; Snodgrass v. Butler, 54 Miss. 45.

[4] Snell v. Pells, 118 Ill. 145; Chinn v. Chinn, 22 La. Ann. 599; Murray v. Vanderbilt, 39 Barb. (N. Y.) 140; Daniels v. Barney, 22 Ind. 207; Kiewert v. Rindskopf, 46 Wis. 481, 32 Am. Rep. 731; Brooks v. Martin, 2 Wall. (U. S.) 70; Gilliam v. Brown, 43 Miss. 641; Reed v. Dougan, 54 Ind. 307; Baldwin v. Potter, 46 Vt. 402; First National Bank v. Leppel, 9 Col. 594; Souhegan Bank v. Wallace, 61 N. H. 24.

See also DeLeon v. Trevino, 49 Tex. 88, 30 Am. Rep. 101, with criticisms in the note.

See also the cases next cited.

[5] Placer County v. Astin, 8 Cal. 303; Clark v. Moody, 17 Mass. 145; Hammond v. Christie, 5 Robt. (N. Y.) 160; Galbaith v. Gaines, 10 Lea. (Tenn.) 568.

[6] Norton v. Blinn, 39 Ohio St. 145.

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so employed it, refuse to return the money to his principal because of the illegality of the purpose contemplated.[1]

§ 527. **When may maintain Interpleader.** An agent being bound to recognize and respect his principal's title can not, in general, compel his principal to interplead with a stranger who claims, by a paramount and adverse title, the property or funds intrusted to the agent by the principal.[2] Where, however, the third person claims under a title derived from the principal and created by the latter's own act subsequently to the time the agent was intrusted with the possession—as through an assignment, sale, mortgage or lien made or given by the principal—the agent may compel the parties to interplead.[3]

§ 528. **Agent's Duty to keep correct Accounts.** As a necessary consequence of the agent's duty to account, it is his duty to keep and preserve true and correct accounts and statements of the business with which he is intrusted, together with all such receipts, vouchers and evidences of dealing as may be necessary to fully and fairly disclose the details of the transaction and protect the principal from future liability.[4]

Technical nicety of bookkeeping is not, of course, in general to be expected. What is a reasonable fulfillment of the agent's duty in this case as in others, depends upon the particular circumstances requiring care and diligence.[5]

So while it is thus the agent's duty to keep correct accounts yet if the principal himself has by his own interference created, or so contributed to, such confusion as to render an absolutely

[1] Kiewert *v.* Rindskopf, *supra.*

[2] Crawshay *v.* Thornton, 2 My. & Cr. 1; Smith *v.* Hammond, 6 Sim. 10; Atkinson *v.* Manks, 1 Cow. (N. Y.) 691; United States Trust Co. *v.* Wiley, 41 Barb. (N. Y.) 477; Lund *v.* Seaman's Bank, 87 Id. 129; Vosburgh *v.* Huntington, 15 Abb. (N. Y.) Pr. 254; Bank *v.* Bininger, 26 N. J. Eq. 345; Tyus *v.* Rust, 37 Ga. 574, 95 Am. Dec. 365; Hatfield *v.* McWhorter, 40 Ga. 269; Crane *v.* Burntrager, 1 Ind. 165.

[3] Gibson *v.* Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592; Smith *v.* Hammond, 6 Sim. 10; Wright *v.* Ward, 4 Russ. 215; Crawford *v.* Fisher, 1 Hare, 436; Tanner *v.* European Bank, L. R. 1 Exch. 261.

[4] Haas *v.* Damon, 9 Iowa 589; Clark *v.* Moody, 17 Mass. 145; Kerfoot *v.* Hyman, 52 Ill. 512; Matthews *v.* Wilson, 27 Mo. 155; Dunwidie *v.* Kerley, 6 J. J. Marsh. (Ky.) 501; Schedda *v.* Sawyer, 4 McLean (U. S. C. C.) 181; Ridder *v.* Whitlock, 12 How. (N. Y.) Pr. 208; Chinn *v.* Chinn, 22 La. Ann. 599.

[5] Makepeace *v.* Rogers, 34 L. J. Ch. 367.

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satisfactory accounting impossible, the agent ought not to be held to the most rigid rule.[1]

§ 529. **Duty to keep Principal's Property and Funds separate from his own—Liability for Commingling.** It is the duty of the agent to keep the property and funds of his principal separate from his own. If, without necessity, he has so commingled the goods of his principal with his own that he cannot discriminate between the two, the whole mass so undistinguishable must be held to belong to the principal.[2] So if he mingles the funds of his principal with his own and the whole is lost, the loss must fall upon the agent.[3]

This rule is of frequent application in cases where the agent has deposited money of his principal in a bank. In case it becomes necessary to make such a deposit, the agent will escape personal liability if he deposits it in the name of his principal in a bank of good credit, or if he so distinguishes it on the books of the bank as to indicate in some way that it is the money of his principal.[4] If on the contrary he deposits it in his own name, or with his own funds, he will, in case of a failure of the bank, be liable to the principal for his money.[5]

This rule was carried to the extent in a recent case to hold that an attorney who deposits his client's money in a solvent bank in his own name, though in a separate account, but with no indication of the trust, is liable for a loss occasioned by the subsequent failure of the bank, notwithstanding he was prevented from transmitting the money by garnishment proceedings against him.[6]

§ 530. **When Agent should account.** Where at the creation of the agency the time of accounting is expressly agreed upon,

[1] Robbins v. Robbins, — N. J. Eq. — 3 Atl. Rep. 264.

[2] Hart v. Ten Eyck, 2 Johns. (N. Y.) Ch. 62; Edwards v. Bailments, § 271.

[3] Bartlett v. Hamilton, 46 Me. 435; Cartmell v. Allard, 7 Bush. (Ky.) 482; Graver's Appeal, 50 Penn. St. 189, and cases cited in following notes.

[4] Norwood v. Harness, 98 Ind. 134, 49 Am. Rep. 739; State v. Greensdale, 106 Ind. 364, 55 Am. Rep. 753.

[5] Williams v. Williams, 55 Wis. 300. 42 Am. Rep. 708; Norris v. Hero, 22 La. Ann. 605; Mason v. Whitthorne, 2 Cold. (Tenn.) 242; Jenkins v. Walter, 8 Gill & J. (Md.) 218, 29 Am. Dec. 539; State v. Greensdale, 106 Ind. 364, 55 Am. Rep. 753; Naltner v. Dolan, 108 Ind. 500, 58 Am. Rep. 61; Cartmell v. Allard, 7 Bush (Ky.) 482.

[6] Naltner v. Dolan, 108 Ind. 500, 58 Am. Rep. 61.

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or where, from the circumstances of the case, an agreement to account at a particular time is to be implied, such agreement will of course govern. In the absence of such an express or implied agreement, the time when an accounting should be made will depend largely upon the facts of each case. In general terms, however, it may be said that an agent is ordinarily bound to account upon demand, and in all events within a reasonable time.[1]

It is the duty of an agent who has received goods to sell for his principal, to account for the proceeds within a reasonable time, and without demand in cases where a demand would be impracticable or extremely inconvenient, so that factors abroad who have received goods to sell, without special instructions as to the mode of remittance, are held according to the course of business, to render an account of their sales or pay over the proceeds thereof within a reasonable time, and if they neglect to do this, such negligence is a breach of contract and subjects them to an action. So, likewise, after the lapse of a reasonable time from the receipt of goods and a neglect to account for them, the fair presumption is that the goods have been sold and the money received for them, and an action for money had and received may be maintained.[2]

It is the duty of an agent who has collected money for his principal to give him notice thereof within a reasonable time after its receipt.[3] This affords the principal opportunity to give such directions in regard to its transmission as he may desire. Such directions, are, indeed, usually given at the time of the employment of the agent, and whenever they are given, it is the duty of the agent, as has been seen, to observe them.

Where no such instructions are given, it has been said that good faith on the part of the agent requires that he should, after deducting his commission, remit the money to his principal by some safe and appropriate means within a reasonable time;[4] but

[1] Leake v. Sutherland, 25 Ark. 219.

[2] Eaton v. Welton, 32 N. H. 352; Clark v. Moody, 17 Mass. 145; Haas v. Damon, 9 Iowa, 589; Torrey v. Bryant, 16 Pick. (Mass.) 528; Langley v. Sturtevant, 7 Pick. (Mass.) 214; Cockhill v. Kirkpatrick, 9 Mo. 697; Dodge v. Perkins, 9 Pick. (Mass.) 368.

[3] Jett v. Hempstead, 25 Ark. 463; Whitehead v. Wells, 29 Ark. 99; Dodge v. Perkins, *supra*; Williams v. Storrs, 6 Johns. (N. Y.) Ch. 353, 10 Am. Dec. 340.

[4] Bedell v. Janney, 9 Ill. (4 Gilm.) 193; Lillie v. Hoyt, 5 Hill (N. Y.) 395, 40 Am. Dec. 360.

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where he acts for a foreign principal, he is not bound to take the risk of the remittance by methods of his own selection, but having advised the principal of the collection, the agent may await the principal's directions as to the manner in which the remittance shall be made.[1]

§ 531. **Necessity for Demand before Action.** No action can, ordinarily, be maintained against an agent for money received by him for his principal until after a demand has been made upon him for its payment, with which he has refused or neglected to comply.[2] Such a demand and refusal or neglect to pay are essential averments in the declaration or complaint, without which the action cannot ordinarily be sustained.[3]

As a general rule in such cases, it may be presumed, as it has been said, that payment has been delayed by reason of the want of safe and convenient means of transmission or of some other good and sufficient cause, and that the recipient of the money, still considering himself entitled to no more than enough to reasonably compensate him for his services in collecting, will pay it over on demand.[4] This rule, however, presupposes that the agent has duly performed his duty of notifying the principal of the receipt of the money.[5]

[1] Ferris v. Paris, 10 John. (N. Y.) 285, 286; Lyle v. Murray, 4 Sandf. (N. Y.) 590.

[2] Armstrong v. Smith, 3 Blackf. (Ind.) 251; Judah v. Dyott, *Id.* 324, 25 Am. Dec. 112; English v. Devarro, 5 Id. 588; Hannum v. Curtis, 13 Ind. 206; Jones v. Gregg, 17 Ind. 84; Black v. Hersch, 18 Ind. 342, 81 Am. Dec. 362; Catterlin v. Somerville, 22 Ind. 482; Bougher v. Scobey, 23 Ind. 583; Nutzenholster v. State, 37 Ind. 457; Heddens v. Younglove, 46 Ind. 212; Cummins v. McLain, 2 Ark. 412; Sevier v. Holliday, 2 Ark. 512; Palmer v. Ashley, 3 Ark. 75; Taylor v. Spears, 6 Ark. 381, 44 Am. Dec. 519; Warner v. Bridges, *Id.* 385; Roberts v. Armstrong, 1 Bush (Ky.) 263, 89 Am. Dec. 624; State v. Sims, 76 Ind. 329; Baird v. Walker, 12 Barb. (N. Y.) 298, 301; Colvin v. Holbrook, 2 N. Y. 130; Williams v. Storrs, 6 Johns. (N. Y.) Ch. 353, 10 Am. Dec. 340; Haas v. Damon, 9 Iowa, 589; Burton v. Collin, 3 Mo. 315; Waring v. Richardson, 11 Ired. (N. C.) L. 77; Cockrill v. Kirkpatrick, 9 Mo. 688; Pierse v. Thornton, 44 Ind. 235; Terrell v. Butterfield, 92 Ind. 1; Claypool v. Gish, — Ind. —, 9 N. E. Rep. 382. But see *contra*, Lillie v. Hoyt, 5 Hill (N. Y.) 395, 40 Am. Dec. 360.

[3] Claypool v. Gish, *supra*. This averment is so essential that a motion to arrest will be sustained on account of its absence. Pierce v. Thornton, *supra*; Eberhart v. Reister, 96 Ind. 478.

[4] Bedell v. Janney, 9 Ill. 193.

[5] Jett v. Hempstead, 25 Ark. 463; Haas v. Damon, 9 Iowa 589; Ferris v. Paris, 10 Johns. (N. Y.) 285;

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But where he has not given such notice, and so long a time has elapsed since the collection of the money as to rebut the presumption above referred to, he may well be considered as having appropriated it to his own use, and then neither law nor reason requires that before he can be sued for his non-feasance, he should be requested to do what his conduct sufficiently indicates his determination not to do.[1]

This rule is also subject to the exception that no demand is necessary where it would be impracticable or extremely inconvenient, as in the case above referred to, of a factor resident abroad.[2] So, of course, no demand is necessary where the law makes it the duty of the agent to account without a demand.[3]

So no demand is required where the agency is denied, or a claim is set up exceeding the amount collected, or the agent's responsibility is disputed.[4]

Although the death of the principal, as has been seen, ordinarily terminates the relation, yet if after his death the agent collects money and converts it to his own use, the personal representative of the principal may recover it.[5] The mere fact that the agent has once tendered the money will not relieve him if, upon a subsequent proper demand, he refuses or neglects to pay it over.[6]

§ 532. **When Agent liable for Interest.** An agent may become liable to his principal for interest upon moneys in his hands by virtue of an express or implied promise to pay such interest. But he will also be chargeable with interest upon all moneys in his possession which he has neglected or refused to pay over, or to apply to the purpose for which he received it, and such interest will be computed from the time of such neglect or refusal. Interest in these cases is allowed upon the ground that the agent has retained in his possession money, of which it was his duty to make some other disposition.[7]

Thus, as has been seen, it is the duty of an agent who has col-

Cooley v. Betts, 24 Wend. (N. Y.) 203.

[1] Bedell v. Janney, *supra*.

[2] Clark v. Moody, 17 Mass. 145; Eaton v. Welton, 33 N. H. 352.

[3] Dodge v. Perkins, 9 Pick. (Mass.) 368.

[4] Waddell v. Swann, 91 N. C. 108; Wiley v. Logan, 95 N. C. 358.

[5] Clegg v. Bamberger, — Ind. —, 9 North E. Rep. 700.

[6] Clegg v. Bamberger, *supra*.

[7] See cases following.

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lected money for his principal, to give him notice of that fact within a reasonable time. Failing in this duty, he is properly chargeable with interest from the time when such notice should have been given, even though he has acted in good faith.[1] *A fortiori* is he chargeable with interest where, having collected money, he neglects or refuses upon proper demand to pay it over, or converts it to his own use.[2]

So if he has received money to be devoted to a specific purpose, as to make an investment, and, contrary to his duty, retains and applies it to his own use, he will be charged with interest from the time of its receipt.[3]

Where, however, the agent is entitled to retain the money, as by virtue of some lien or charge upon it, he can not be chargeable with interest during the period of such retention.[4] So if the principal voluntarily permits the money to remain in the hands of his agent, who holds himself in readiness to pay over upon demand, the agent will not be chargeable with interest,[5] unless he has been able to so invest or use the money as to make it earn interest, for which he would be chargeable.[6]

§ 533. **When Liability barred by Statute of Limitations.** Statutes of limitation begin to operate only when a right of action has accrued. The determination therefore of the question when the statute begins to run against the principal depends upon the other question of the time when his right of action accrued. As has been seen, the general rule, subject to certain exceptions already noted, is that the right of action does not

[1] Dodge v. Perkins, 9 Pick. (Mass.) 368; Clark v. Moody, 17 Mass. 145.

[2] Anderson v. State, 2 Ga. 870; Bedell v. Janney, 9 Ill. 193; Board of Justices v. Fennimore, 1 N. J. L. 242; People v. Gasherie, 9 Johns. (N. Y.) 71; Harrison v. Long, 4 Desau. (S. Car.) 110; Hill v. Williams, 6 Jones (N. Car.) Eq. 242.

[3] Hill v. Hunt, 9 Gray (Mass.) 66.

[4] Thompson v. Stewart, 3 Conn. 171, 8 Am. Dec. 168.

[5] Gunn v. Howell, 35 Ala. 144; Nisbet v. Lawson, 1 Ga. 275; Hackleman v. Moat, 4 Blackf. (Ind.) 164; Gordon v. Zacharie, 15 La. Ann. 17; Wheeler v. Haskins, 41 Me. 432; Hyman v. Gray, 4 Jones (N. Car.) L. 155; Rowland v. Martindale, 1 Bailey (S. Car.) Ch. 226; Hauxhurst v. Hovey, 26 Vt. 544.

[6] Bassett v. Kinney, 24 Conn. 267; Williams v. Storrs, 6 Johns. (N. Y.) Ch. 353, 10 Am. Dec. 340; Landis v. Scott, 32 Penn. St. 495.

Where agent mixes principal's money with his own by depositing it in a general bank account, he may be charged with interest. Blodgett's Estate v. Converse's Estate, — Vt. —, 15 Atl. Rep. 109.

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accrue until a demand has been made with which the agent has refused or neglected to comply. It is therefore the general rule that the statute of limitations begins to operate upon a claim against an agent for money or property received by him, only from the time when he has rendered an account showing a balance due from him, or when a demand has been made upon him and he has refused or neglected to account.[1]

As has already been observed, this rule is subject to a variety of exceptions growing out of the peculiar circumstances of individual cases. Thus where the necessity for a demand is negatived by the arrangement between the parties, or where, as is the case of a foreign factor, a demand might be impracticable or highly inconvenient,[2] no demand is necessary. So if a collecting agent has neglected to give his principal notice of the fact of the collection in order that the latter may give him instructions as to the disposition of the money, he can not complain if the statute does not begin to run, unless he can show affirmatively that by the exercise of reasonable diligence the principal could have ascertained the fact of collection and made a demand accordingly.[3]

Upon receiving notice of the receipt of the money, it is the duty of the principal to demand it or give instructions as to the disposition of it within a reasonable time, and if he omits to do so, he will put the statute in motion, from the time of such omission.[4]

[1] Judah v. Dyott, 8 Blackf. (Ind.) 324, 25 Am. Dec. 112; Jett v. Hempstead, 25 Ark. 463; Whitehead v. Wells, 29 Ark. 99; Dodds v. Vannoy, 61 Ind. 89; Lynch v. Jennings, 43 Ind. 276; Green v. Williams, 21 Kan. 64; Taylor v. Spears, 8 Ark. 429; Hyman v. Gray, 4 Jones (N. Car.) L. 155; Merle v. Andrews, 4 Tex. 200; Baker v. Joseph, 16 Cal. 173; Lever v. Lever, 1 Hill (S. Car.) Ch. 62; Roberts v. Armstrong, 1 Bush (Ky.) 263; Voss v. Bachop, 5 Kan. 59; Krutz v. Fisher, 8 Kan. 90; Egerton v. Logan, 81 N. Car. 172; Jayne v. Mickey, 55 Penn. St. 260; Stiles v. Donaldson, 2 Yates (Penn.) 105; Mandeville v. Welch, 5 Wheaton (U. S.) 277; Baird v. Walker, 12 Barb. (N. Y.) 298; Halden v. Crafts, 4 E. D. Smith (N. Y.) 490; Sawyer v. Tappan, 14 N. H. 352; Hutchins v. Gilman, 9 N. H. 360; Taylor v. Bates, 5 Cow. (N. Y.) 379; Hays v. Stone, 7 Hill (N. Y.) 128; Krause v. Dorrance, 10 Penn St. 462, 51 Am. Dec. 496; Staples v. Staples, 4 Me. 532.

[2] Clark v. Moody, 17 Mass. 145; Eaton v. Welton, 32 N. H. 352; Haas v. Damon, 9 Iowa 589.

[3] Jett v. Hempstead, 25 Ark. 468; Whitehead v. Wells, 29 Ark. 99; Drexel v. Raimond, 23 Penn. St. 21. See Rhines v. Evans, 66 Penn. St. 192; Campbell v. Boggs, 48 Penn. St. 524.

[4] Jett v. Hempstead, *supra*.

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§ 534. **Form of Action—When equitable.** It seems to be well settled that the mere relation of principal and agent is not sufficient to authorize the principal to come into a court of equity for an accounting. For very many of the questions arising between them, the ordinary legal remedies are entirely adequate; and where this is the case, resort cannot be had to equity.[1] When, however, the agency is one of a strictly fiduciary character, involving a question of confidence between the parties, and fraud is alleged or a discovery sought, or where the account is so complicated that it cannot be settled at law without great difficulty, a bill in equity may be maintained.[2]

§ 535. **Of the Agent's Right of Set-off.** The right of set-off, recoupment and counter claim in actions at law between principal and agent is governed ordinarily by the same rules that apply in other cases. This right, however, may be waived by contract, express or implied, and it cannot be insisted upon where its enforcement would result in a violation of the agent's duty to his principal.[3] The receipt of money by an agent to be applied to a specific purpose, imposes upon him the duty not to apply it to another and different purpose. He cannot therefore apply it to his own use, by using as a set-off against it, a demand due him from his principal.[4]

Thus where the principal authorized his agent to collect certain rents, and apply them first to the payment of debts due to third persons and then to the payment of a debt due the agent, but the agent applied the whole amount upon his own debt, it was held, in an action by the principal to recover the amount collected, that the agent could not set off the debt due to himself.

[1] Knotts *v.* Tarver, 8 Ala. 743; Crothers *v.* Lee, 29 Ala. 337; Kirkman *v.* Vanlier, 7 Ala. 224; Paulding *v.* Lee, 20 Ala. 768; Halsted *v.* Rabb, 8 Porter, (Ala.) 63; Russell *v.* Little, 28 Ala. 160; Coquillard *v.* Suydam, 8 Blackf. (Ind.) 24; Powers *v.* Cray, 7 Ga. 206; Moxon *v.* Bright, L. R. 4 Ch. Ap. 292; Navulshaw *v.* Brownrigg, 2 DeGex. M. & G. 441.

[2] Thornton *v.* Thornton, 31 Gratt. (Va.) 212; Taylor *v.* Tompkins, 2 Heisk. (Tenn.) 89; Halsted *v.* Rabb, *supra*; Moxon *v.* Bright, *supra*; Makepeace *v.* Rogers, 4 DeG. J. & S. 649.

[3] Tagg *v.* Bowman, 108 Penn. St. 273, 56 Am. Rep. 204.

[4] Tagg *v.* Bowman, *supra*; Tagg *v.* Bowman, 99 Penn. St. 376; Smuller *v.* Union Canal Co., 37 Penn. St. 68; Bank *v.* Macalester, 9 Penn. St. 475; Ardesco Oil Co. *v.* North American Co., 66 Penn. St. 375; Middletown, &c. Road *v.* Watson, 1 Rawle (Penn.) 330.

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The money collected by the agent, said the court, belonged to the principal, and as it came into the agent's hands, it was impressed with a trust in favor of the principal which required its application to the objects specified in their order. So long as there was anything due upon the preferred objects, the agent had no right to appropriate any of the money to the payment of his own claim. If he did so, it was a manifest breach of the trust under which it was received.[1]

And the same principle applies wherever the agent has received money of his principal by virtue of any special authority. Thus an agent employed to collect a claim, when he has received the money, has no right to set off against it an antecedent debt or claim owing to him by the principal, without first showing that the latter has agreed that he might so apply it.[2]

§ 536. **How far Principal may follow Trust Funds.** It may be stated as a general principle that, wherever property or funds have come into the hands of the agent impressed with a trust in favor of the principal, such property or funds may be followed by the principal as long as they can be identified until they come into the possession of a *bona fide* purchaser for value without notice of the trust.[3] So if the property or funds have been disposed of or reinvested, the trust will in equity adhere to the proceeds in the same manner and to the same extent as to the original estate, —that is as long as they can be traced and until they are acquired

[1] Tagg *v.* Bowman, *supra.*

[2] Simpson *v.* Pinkerton, Penn. 10 W. N. C. 423; Middletown, &c. Road *v.* Watson, *supra.*

[3] National Bank *v.* Insurance Co. 104 U. S. 54; McLeod *v.* Evans, 66 Wis. 401, 57 Am. Rep. 287; Peak *v.* Ellicott, 30 Kan. 158, 46 Am. Rep. 90; Farmers' & Mechanics' Bank *v.* King, 57 Penn. St. 202, 98 Am. Dec. 215; VanAlen *v.* American National Bank, 52 N. Y. 1; Riehl *v.* Evansville Foundry Assn, 104 Ind. 70, 8 N. East Rep. 633; Pugh *v.* Pugh, 9 Ind. 132; Baker *v.* New York National Bank, 100 N. Y. 31, 53 Am. Rep. 150.

In re District Bank, 11 Ch. D. 772, 32 Eng. Rep. 810; Knatchbull *v.* Hallett, 13 Ch. D. 696, 36 Eng. Rep. 779; Rolfe *v.* Gregory, 4 DeG. J. & S. 576; Leigh *v.* Macaulay, 1 Y. & C. Ex. 260; Smith *v.* Barnes, L. R. 1 Eq. 65 Boursot *v.* Savage, L. R. 2 Eq. 134; Newton *v.* Newton, L. R. 6 Eq. 135; Heath *v.* Crealock, L. R. 18 Eq. 215; Griffin *v.* Blanchar, 17 Cal. 70; Sharp *v.* Goodwin, 51 Cal. 219; Scott *v.* Umbarger, 41 Cal. 410; Price *v.* Reeves, 38 Cal. 457; Siemon *v.* Schurck, 29 N. Y. 598; Swinburne *v.* Swinburne, 28 N. Y. 568; Stephens *v.* Board of Education, 79 N. Y. 183; Holden *v.* Bank, 72 N. Y. 286; Newton *v.* Porter, 69 N. Y. 133; Dotterer, *v.* Pike, 60 Ga. 29; Phelps *v.* Jackson, 31 Ark. 272; Planters' Bank *v.*

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by a *bona fide* purchaser without notice.[1] It does not matter that the legal title to the fund may have changed. Equity will follow it through any number of transmutations and preserve it for the owner so long as it can be identified.[2] And if it can not be identified by reason of being mingled with the funds or property of the agent, then the principal will be entitled to a charge upon the whole mass to the extent that the trust fund is traceable into it.[3] It is not necessary to trace the trust fund into any specific property. If it can be traced into the estate of the defaulting agent it is sufficient.[4]

In case of the bankruptcy of the agent, neither the property nor the money would pass to his assignees for general administration, but would be subject to the paramount claim of the principal.[5]

The fact that the agent may be prosecuted criminally does not prevent the principal from following and recovering his money.[6]

Prater, 64 Ga. 609; Veile *v.* Blodgett, 49 Vt. 270; Mercier *v.* Hemme, 50 Cal. 606. Boyd *v.* Brinckin, 55 Cal. 427; Burnett *v.* Gustafson, 54 Iowa 86.

[1] National Bank *v.* Insurance Co., 104 U. S. 54; Pennell *v.* Deffell, 4 DeG. M. & G. 372; Frith *v.* Cartland, 2 Hem. & M. 417; Taylor *v.* Plumer, 3 M. & S. 562; Knatchbull *v.* Hallett, 13 Ch. Div. 696, 36 Eng. Rep. 779.

[2] Farmers' &c. Bank *v.* King, 57 Penn. St. 202, 98 Am. Dec. 215.

[3] Peak *v.* Ellicott, 30 Kans. 158, 46 Am. Rep. 90; *In re*, District Bank, 11 Ch. Div. 772, 33 Eng. Rep. 810; Knatchbull *v.* Hallett, L. R. 13 Ch. Div. 696, 36 Eng. Rep. 779.

[4] McLeod *v.* Evans, 66 Wis. 401, 57 Am. Rep. 287; Francis *v.* Evans, 69 Wis. 115, 33 N. W. Rep. 93; Bowers *v.* Evans, — Wis. —, 36 N. W. Rep. 629; Frith *v.* Cartland, 2 Hem. & M. 417; Pennell *v.* Deffell, 4 DeG. M. & G. 372; Knatchbull *v.* Hallett, L. R. 13 Ch. Div. 696, 36 Eng. Rep. 779; National Bank *v.* Insurance Co. 104 U. S. 54; Van Alen *v.* American Nat. Bank, 52 N. Y. 1; Peak *v.* Ellicott, 30 Kans. 158, 46 Am. Rep. 90; People *v.* City Bank, 96 N. Y. 32; Riehl *v.* Evansville Foundry Assn. 104 Ind. 70, 3 N. East. Rep. 633. But see Cavin *v.* Gleason, 105 N. Y. 256; Hopkins' Appeal, — Penn. —, 9 Atl. Rep. 867; Continental Nat. Bank *v.* Weems, 69 Tex. 489, 5 A. St. Rep. 85.

[5] Baker *v.* New York National Bank, 100 N. Y. 31, 53 Am. Rep. 150; McLeod *v.* Evans, 66 Wis. 401, 57 Am. Rep. 287; Peak *v.* Ellicott, 30 Kans. 158, 46 Am. Rep. 90; Chesterfield Mnfg. Co. *v.* Dehon, 5 Pick. (Mass.) 7, 16 Am. Dec. 367; Merrill *v.* Bank of Norfolk, 19 Pick. (Mass.) 32. Thompson *v.* Perkins, 3 Mason (U. S. C. C.) 232; Duguid *v.* Edwards, 50 Barb. (N. Y.) 388; Harrison *v.* Smith, 83 Mo. 210; Stoller *v.* Coates, 83 Mo. 514; Thompson *v.* Gloucester City Sav. Inst. — N. J., — 8 Atl. Rep. 97.

[6] Riehl *v.* Evansville Foundry Assn. 104 Ind. 70, 3 North E. Rep. 633, disapproving Campbell *v.* Drake, 4 Ired. (N. C.) Eq. 94, and Pascoag Bank *v.* Hunt, 8 Edw. (N. Y.) Ch. 583.

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The principal cannot, of course, both compel payment from the agent of the amount misappropriated, and also have a decree investing him with the title to the property acquired with it by the agent, but he may have a judgment against the agent for the amount of the trust money, less the sum so recovered.[1]

§ 537. **Same Subject—Illustrations.** These principles have found frequent illustration. Thus in a recent case in Kansas, it appeared that the maker of a note, originally given to bank A, but then held by bank B, had left with bank A sufficient funds for the purpose of paying the note when due, and that bank A had accepted the money for that purpose. Instead of paying the note, however, bank A appropriated the money to its own uses, and shortly afterward made an assignment for the benefit of its creditors. The maker of the note then brought an action to recover the money from the assignee. The assignee defended upon the ground that the result of the transaction was merely to create the relation of debtor and creditor between the bank and the maker of the note, and that the latter must therefore stand in the same situation as other creditors. But the court said: "On the other hand, as respects this specific sum, the relation between the plaintiff and the bank must be regarded as that of principal and agent. After the bank received this sum to satisfy the note of the plaintiff, the bank held the money in a fiduciary capacity; if the money was not applied according to the understanding of the parties to the satisfaction of the note, it should have been returned to the plaintiff. It was not deposited to be checked out or to be loaned, or otherwise used by the bank; in law the bank held it as a trust fund, and not as the assets of the bank. The defendant as assignee of the bank, succeeds to all the rights of the bank, but as such assignee, he has no lawful authority to retain a trust fund in his hands, belonging to the plaintiff, and which the bank, at the time of receiving the same, promised and agreed to apply in payment of plaintiff's note. As the money was a trust fund, and never belonged to the bank, its creditors will not be injured if it is turned over by the assignee to its owner. Even if the trust fund has been mixed with other funds of the bank, this cannot prevent the plaintiff from follow-

[1] Riehl v. Evansville Foundry Assn. *supra*; Barker v. Barker, 14 Wis. 131; Murray v. Lydburn, 2 Johns. (N. Y.) Ch. 441.

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ing and reclaiming the fund; because if a trust fund is mixed with other funds, the person equitably entitled thereto may follow it, and has a charge on the whole fund for the amount due."[1]

So where the owner of a draft delivered it to a banker for the purpose of collecting it, and the banker, having appropriated it to his own use, made an assignment, it was held that the owner of the draft might recover the amount of it from the assignee. It is not necessary, said the court in this case, to trace the trust fund into some specific property in order to enforce the trust, but it is sufficient if it can be traced into the estate of the defaulting agent. And it was further held that the fact that the plaintiff, believing the estate to be solvent, had filed his claim as a general creditor and received a dividend which he still retained, did not prevent him, when he subsequently found that the estate was insolvent, from insisting upon the trust character of his claim and recovering the balance.[2]

V.

TO GIVE NOTICE.

§ 538. **Duty to give Notice of Facts material to Agency.** It is the duty of the agent to give to his principal reasonable and timely notice of every fact coming to his knowledge in reference to his agency, and which it may be material for the principal to know in order for the protection or preservation of his interests.[3]

Thus if property of the principal in the agent's possession is attached[4] or seized[5] as the property of another, or if it is exposed to danger, or if having undertaken to insure it, he finds himself unable to do so,[6] or if claims and demands in his hands to receive payment are not paid when due;[7] in these and other ob-

[1] Peak v. Ellicott, 80 Kans. 158, 46 Am. Rep. 90.

[2] McLeod v. Evans, 66 Wis. 401, 57 Am. Rep. 257, followed in Francis v. Evans, 69 Wis. 115, 33 N. W. Rep. 93; Bowers v. Evans, — Wis. —, 36 N. W. Rep. 629. But see Cavin v. Gleason, 105 N. Y. 256.

[3] Arrott v. Brown, 6 Whart. (Penn.) 9; Harvey v. Turner, 4 Rawle (Penn.) 223; Moore v. Thompson, 9 Phila. 164; Devall v. Burbridge, 4 Watts & Serg. (Penn.) 305; Hegenmyer v. Marks, 37 Minn. 6, 5 Am. St. Rep. 808.

[4] Moore v. Thompson, *supra*.

[5] Devall v. Burbridge, *supra*.

[6] Callander v. Oelrichs, 5 Bing. N. C. 58.

[7] Harvey v. Turner, *supra*; Arrott v. Brown, *supra*.

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vious cases, it is the duty of the agent to give his principal notice that he may take such steps as he deems desirable for his protection, and if the agent fails in the performance of this duty to the injury of the principal, he must respond to the latter in damages.

This duty as will be seen hereafter is made the basis of the rule that notice to the agent of facts material to the agency, shall be deemed constructive notice to the principal.[1]

[1] See *post*, § 718, *et seq.*

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CHAPTER III.

THE DUTIES AND LIABILITIES OF THE AGENT TO THIRD PERSONS.

A. PRIVATE AGENTS.

§ 539. Agent not liable to third Person for Non-feasance.
540. Liable when he binds himself Liable for Misfeasance.

I. In Contract.

1 Where he acts without Authority.

541. In general.
542. Where Agent erroneously believing himself authorized makes express Representations as to his Authority.
543. Where agent makes express Representations known to him to be false.
544. Where Agent knowing he has no Authority, makes a Contract implying its Possession.
545. Where Agent erroneously believing himself authorized makes no express Representations.
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547. How in Case of Public Agent.
548. Contract must have been one enforceable against Principal if authorized.
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550. When Agent liable on Contract itself.

2. Where though Authorized he fails to bind his Principal.

551. In general.
§ 552. Where Agent intending to bind Principal uses apt Words to bind himself.
553. Where Agent intending to bind Principal binds no one.
554. Where Agent conceals Fact of Agency or Name of Principal.
555. Where Agent makes full Disclosure.
556. When Agent acts for a foreign Principal.
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564. Agent liable without Notice for Money illegally obtained.
565. Agent not liable for Money voluntarily paid.
566. Where Agent is a mere Stakeholder.

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581. Liability not affected by Motive.

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585. Same Subject—When Jurisdiction presumed—Superior and inferior courts.

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588. What Duties are Judicial and Quasi-Judicial.

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589. Same Immunity extends to legislative Action.

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590. In general—Liable to Party specially injured.

591. Same Subject — Nature of Duty governs Liability.

592. Same Subject—What Duties are ministerial.

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593. Public officers of Government not liable for Acts of official Subordinates.

594. Same Subject—To what Officers this Rule applies.

III. For Torts of his private Servant or Agent.

595. Liable for Torts of his private Servant or Agent.

A. PRIVATE AGENTS.

§ 539. **Agent not liable to third Person for Non-feasance.** The agent's primary duty is to his principal. To him alone does he stand in the relation of privity and confidence. To him alone

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does he owe the performance of those duties which are implied from that relation, or which he has expressly assumed, and to him alone is the agent responsible for a failure to perform them.

It is therefore the general rule that no action can be maintained by third persons against the agent to recover damages for any injury which they may have sustained by reason of the non-performance or neglect of a duty which the agent owes to his principal.[1]

§ 540. **Liable when he binds himself—Liable for Misfeasance.** An agent, however, like every other person, is bound in the course of the discharge of his duty to his principal, to exercise a due regard for the rights and privileges of others. If he fails in this duty and by his wilful act or by his negligent conduct inflicts an injury upon a third person, he is liable to that third person in the same manner as though he were not an agent. This obligation is not one which grows out of his relation as an agent but one which the law imposes upon every responsible member of society.

So, notwithstanding the fact of his agency, the agent may so contract as to bind himself to third persons. This may be the result of a direct intention so to do, or it may be the result of an ineffectual attempt to bind his principal. So, also, as will be seen, the agent may make himself liable to third persons by assuming to have and to exercise an authority which he does not in fact possess.

These various forms of liability will be considered in this Chapter, under the two subdivisions: The agent's liability to third persons, I. On contracts. II. For his torts.

[1] Carey *v.* Rochereau, 16 Fed. Rep. 87; Delaney *v.* Rochereau, 34 La. Ann. 1123, 44 Am. Rep. 456; Reid *v.* Humber, 49 Ga. 207; Denny *v.* Manhattan Co., 2 Den. (N. Y.) 115 s. c. 5 *Id.* 639; Henshaw *v.* Noble, 7 Ohio St. 231; Colvin *v.* Holbrook, 2 N. Y. 126; Montgomery Bank *v.* Albany Bank, 7 N. Y. 459; Lane *v.* Cotton, 12 Mod. 488; Feltus *v.* Swan, 62 Miss. 415; Stephens *v.* Bacon, 7 N. J. L. 1; Labadie *v.* Hawley, 61 Tex. 177, 48 Am. Rep. 278; Fish *v.* Dodge, 4 Denio (N. Y.) 317, 47 Am. Dec. 254; Brown *v.* Dean, 123 Mass. 269; Brown *v.* Lent, 20 Vt. 533; Bell *v.* Josselyn, 3 Gray (Mass.) 311.

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I.

IN CONTRACT.

1. Where he Acts without Authority.

§ 541. **In general.** The question of the liability of the agent to third persons upon contracts made or attempted to be made by him as agent, but without authority, presents many phases. Thus an agent in dealing with third persons may make an express assertion of his authority to perform the act in question, (a) knowing at the time that he has no such authority; or (b) believing in good faith, though erroneously, that he has such authority. So under the same circumstances, he may deal with third persons making no express assertion of authority, but that only, if any, which arises from his assuming to act as agent, and as before, either knowing that he has not the requisite authority, or believing in good faith, but erroneously, that he is competent,

Or again believing himself to be or not to be authorized, but the question not being free from doubt, he may fully and fairly disclose to the other party the facts in regard to his authority and leave the other party to determine for himself whether he will rely upon it or not.

This absence or want of authority in any given case may result either, 1. Because he never possessed it; 2. Because once having it, it has since expired, or 3. Because while having some authority, or authority to perform this act in another way, he has exceeded his authority, or failed to observe the methods prescribed for him.

§ 542. **Where Agent erroneously believing himself authorized, makes express Representations as to his Authority.** Where the agent believing himself authorized to perform the act in question, in good faith makes an express representation that he is duly authorized, when in fact he is not, he is liable to the party with whom he deals for any damages which the latter may sustain by reason of such want of authority. The fact that he acted in good faith, does not relieve him from liability. If he expressly agrees for authority, he must make the agreement good or be responsible for the consequences.[1]

[1] Kroeger *v.* Pitcairn, 101 Penn. St. 211, 47 Am. Rep. 718; Bartlett *v.* Tucker, 104 Mass. 336, 6 Am. Rep. 240; Jefts *v.* York, 10 Cush. (Mass.) 392, s. c. 4

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§ 543. **Where Agent makes express Representations known to him to be false.** There can be no question that where an agent makes an express representation as to his authority which he knows to be untrue, with the intention to deceive or mislead the other party, and thereby does so deceive or mislead him to his damage, he is liable to such other party for the damage so incurred. This rule rests upon the plainest and most familiar principles of justice and requires no extended discussion.[1]

§ 544. **Where Agent knowing he has no Authority, makes a Contract implying its Possession.** Where an agent who knows that he has no authority, although he makes no express representation as to it, yet deals with the other party as one possessing competent authority, and does not disclose his lack of it, whereby the other party suffers injury, the agent will be liable for the injury so occasioned. This rule rests upon the same principles as the preceding one. For the agent induces the other party to enter into the contract on what amounts to a misrepresentation of a fact peculiarly within his own knowledge, and it is but just that he who does so should be considered as holding himself out as one having competent authority, and as insuring the other party against the consequences arising from the want of such authority.[2]

§ 545. **Where Agent erroneously believing himself authorized, makes no express Representations.** And the same result is reached where the agent in good faith, but erroneously, believing himself authorized, assumes to deal with third persons as one authorized to act for a certain principal, although he makes no express representation as to his authority. By undertaking to act as agent for another in any given capacity, he tacitly and impliedly represents himself to be authorized as a matter of fact to act in that capacity, and is liable to those who have relied thereon in good faith for such injury as they may sustain, if it appears that he assumed as true what he did not know to be so.[3]

Cush. 371, 50 Am. Dec. 791; Bank of Hamburg *v.* Wray, 4 Strob. (S. C.) 87, 51 Am. Dec. 659.

[1] Kroeger *v.* Pitcairn, 101 Penn. St. 311, 47 Am. Rep. 718; Smout *v.* Ilbery, 10 Mees. & Wels. 1; Bank of Hamburg *v.* Wray, 4 Strob. (S. C.) 87, 51 Am. Dec. 659.

[2] Kroeger *v.* Pitcairn, *supra*; Dale *v.* Donaldson Lumber Co. 48 Ark. 188, 3 Am. St. Rep. 224.

[3] Kroeger *v.* Pitcairn, 101 Penn. St. 311, 47 Am. Rep. 718; Bartlett *v.* Tucker, 104 Mass. 336, 6 Am. Rep. 240; Jefts *v.* York, 10 Cush. (Mass.) 392, s. c. 4 *Id.* 371, 50 Am. Dec. 791; Bank

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In such a case the loss must fall somewhere, and as between the third person and the agent both equally innocent, it must be borne by him by whose act it was made possible. Of course, if the other party knew, or by the exercise of reasonable care might have discovered the want of authority, he cannot recover.[1]

This implied warranty by the agent of his authority must ordinarily be limited to its existence as a matter of fact, and not be held to include a warranty of its adequacy or sufficiency in point of law.[2]

§ 546. **Where Agent discloses all the Facts relating to his Authority.** Where, however, the agent, acting in good faith, fully discloses to the other party, at the time, all the facts and circumstances touching the authority under which he assumes to act, so that the other party from such information or otherwise, is fully informed as to the existence and extent of his authority, he cannot be held liable.[3]

It is material in these cases that the party complaining of a want of authority in the agent should be ignorant of the truth touching the agency. If he has full knowledge of the facts, or of such facts as are sufficient to put him upon inquiry, and he fails to avail himself of such knowledge or of the means of knowledge reasonably accessible to him, he cannot say that he was misled simply on the ground that the other assumed to act as agent without authority.[4]

of Hamburg *v.* Wray, 4 Strob. (S.C.) L. 87, 51 Am. Dec. 659; McCurdy *v.* Rogers, 21 Wis. 197, 91 Am. Dec. 468; Randall *v.* Trimen, 16 C. B 786; Collen *v.* Wright, 8 E. & B. 647; Richardson *v.* Williamson, L. R. 6 Q. B. 276; Weeks *v.* Propert, L. R. 8 C. P. 427, 6 Eng. Rep. 193; Beattie *v.* Lord Ebury, L. R. 7 H. L. 102, 9 Eng. Rep. 64.

[1] Newman *v.* Sylvester, 42 Ind. 112; Jenkins *v.* Atkins, 1 Humph. (Tenn.) 294, 34 Am. Dec. 648.

[2] See remarks of Mellish, L. J. in Beattie *v.* Lord Ebury, L. R. 7 Ch. Ap. 777; 8 Eng. Rep. 625, cited in full in note to § 553, *post*.

[3] The rule has been stated by a learned judge in Missouri as follows: "Where all the facts are known to both parties, and the mistake is one of law as to the liability of the principal, the fact that the principal can not be bound is no ground for charging the agent." Michael *v.* Jones, 84 Mo. 578. To same effect are Western Cement Co. *v.* Jones, 8 Mo. App. 373; Humphrey *v.* Jones, 71 Mo. 62; Ware *v.* Morgan, 67 Ala. 461; Hall *v.* Lauderdale, 46 N. Y. 70.

[4] Ogden *v.* Raymond, 22 Conn. 379, 58 Am. Dec. 429; Newman *v.* Sylvester, 42 Ind. 112; Hall *v.* Huntoon, 17 Vt. 244, 44 Am. Dec. 332; McCurdy *v.* Rogers, 21 Wis. 197, 91 Am. Dec. 468; New York, &c. Co. *v.* Harbison,

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Of course if the agent conceals or misrepresents material facts to the detriment of the other party, he cannot claim exemption.[1]

§ 547. **How in Case of Public Agent.** Where the agent is a public agent and that fact is known to the other party, the latter will be presumed to have knowledge of the nature and extent of the agent's authority, it being determined by law of which every person is bound to take notice. Where such an agent, therefore, discloses the source of the authority under which he assumes to act, and practices no fraud or misrepresentation, he will not be held liable upon the ground of an implied warranty of authority.[2]

§ 548. **Contract must have been one enforceable against Principal if authorized.** In order, however, to make an agent liable who has assumed without authority to make a contract in the name of his principal, the unauthorized contract must have been one which the law would enforce against the principal if it had been authorized by him. Otherwise, the anomaly would exist of giving a right of action against an assumed agent for an unauthorized representation of his power to make the contract, when a breach of the contract itself, if it had been authorized, would have furnished no ground of action against the principal.[3]

§ 549. **In what Form of Action is Agent liable.** Much question has been raised as to the form of action in which the agent who acts without authority is to be held liable; whether assumpsit can be maintained or only a special action on the case. It would seem that this is a question to be determined largely by the particular facts of each case.[4]

Where an agent who knows that he has no authority, makes express assertions that he possesses it or so acts as to amount to

16 Fed. Rep. 688; Murray v. Carothers, 1 Metc. (Ky.) 71; Curtis v. United States, 2 Nott & H. (Ct. Cl.) 144; Baltimore v. Reynolds, 20 Md. 1; State v. Hastings, 10 Wis. 518; Hull v. Marshall County, 12 Iowa 142.

[1] Newman v. Sylvester, 42 Ind. 112; Ogden v. Raymond, 22 Conn. 379, 58 Am. Dec. 429; Walker v. Bank 9 N. Y. 582; Jefts v. York, 10 Cush. (Mass.) 392.

[2] McCurdy v. Rogers, 21 Wis. 197, 91 Am. Dec. 468; New York, &c. Co. v. Harbison, 16 Fed. Rep. 688; Perry v. Hyde, 10 Conn. 329; Murray v. Carothers, 1 Metc. (Ky.) 71. See also Sanborn v. Neal, 4 Minn. 126, 77 Am. Dec. 502.

[3] Dung v. Parker, 52 N. Y. 494; Baltzen v. Nicolay, 53 N. Y. 467.

[4] Patterson v. Lippincott, 47 N. J. L. 457, 1 Atl. Rep. 506, 54 Am. Rep. 178.

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an assertion of authority, and by so doing deceives and injures the other party who has relied thereon, it can not be doubted that an action on the case for the deceit is an appropriate remedy.[1] At the same time, an action of assumpsit upon the express or implied warranty of authority might also be maintained instead of the action on the case.[2]

Where, however, the agent acting in good faith and supposing himself authorized, has made express or implied assertions of authority, an action of assumpsit seems the more appropriate remedy. Yet in this case, also, an action on the case might be maintained.

[1] "The remedy against one who fraudulently represents himself as the agent of another, and in that capacity undertakes to make a contract binding upon his principal, is an action on the case for the deceit and not an action of assumpsit upon the contract." WALTON, J., in Noyes *v.* Loring, 55 Me. 408, citing Long *v.* Colburn, 11 Mass. 97, 6 Am. Dec. 160; Ballou *v.* Talbot, 16 Mass. 461, 8 Am. Dec. 146; Jefts *v.* York, 4 Cush. (Mass.) 371, 50 Am. Dec. 791, s. c. 10 Cush. (Mass.) 392; Abbey *v.* Chase, 6 Cush. (Mass.) 54; Smout *v.* Ibery, 10 Mees. & Wels. 1; Jenkins *v.* Hutchinson, 13 Ad. & El. N. S. 744.

It is evident, however, from the context and from the cases cited, that "the contract" referred to by the learned judge is the contract assumed to be made by the agent for his alleged principal, and not an express or implied contract or warranty of authority.

[2] "When an agent makes a contract beyond his authority, by which the principal is not bound by reason of the fact that it was unauthorized, the agent is liable in damages to the person dealing with him upon the faith that he possessed the authority which he assumed. The ground and form of his liability in such a case have been the subject of discussion, and there are conflicting decisions upon the point; but the later and better considered opinion seems to be that his liability, when the contract is made in the name of his principal, rests upon an implied warranty of his authority to make it, and the remedy is by an action for its breach. (Collen *v.* Wright, 8 E. & B. 647; White *v.* Madison, 26 N. Y. 117; Dung *v.* Parker, 52 N. Y. 494.) The reason why the agent is liable in damages to the person with whom he contracts, when he exceeds his authority, is that the party dealing with him is deprived of any remedy upon the contract against the principal. The contract, though in form the contract of the principal, is not his in fact, and it is but just that the loss occasioned by there being no valid contract with him should be borne by the agent who contracted for him without authority." ANDREWS, J., in Baltzen *v.* Nicolay, 53 N. Y. 467. "Later cases," says SCUDDER, J., in Patterson *v.* Lippincott *supra*, "have held * * * that he may be sued either for breach of warranty or for deceit, according to the facts of each case," citing Jenkins *v.* Hutchinson, 13 Ad. & El. (Q. B.) N. S. 744; Lewis *v.* Nicholson, 18 Ad. & El. (Q. B.) N. S. 503.

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§ 550. When Agent liable on Contract itself. Whether the agent can be held liable upon the contract itself which he has, without authority, assumed to make, is also a question which has been much discussed. It would seem, however, that this question, like the last one, is to be determined largely by the circumstances of each case. Where the promise is made in the name of the principal and as his contract, the better opinion is that the agent can not be held liable upon it, but only for the deceit or breach of warranty, even in the case of a written contract, where the assumed relation of agency appears upon the face of it.[1] Some courts have, indeed, manifested a disposition in this latter case to reject the words referring to the alleged principal as mere surplusage, and to hold the agent liable upon the remainder as upon his own contract.[2] This, however, as has been well said,[3] is rather to make a new contract for the parties than to construe the one which they have made for themselves. Where, however, the agent, in undertaking, without authority, to bind

[1] Jefts v. York, 4 Cush. (Mass.) 371, 50 Am. Dec. 791; Long v. Colburn, 11 Mass. 97, 6 Am. Dec. 160; Ballou v. Talbot, 16 Mass. 461, 8 Am. Dec. 146; Jefts v. York, 10 Cush. (Mass.) 395; Trowbridge v. Scudder, 11 Cush. (Mass.) 83, 87; Draper v. Massachusetts, &c. Co. 5 Allen (Mass.) 339; Sherman v. Fitch, 98 Mass. 63; Bartlett v. Tucker, 104 Mass. 340, 6 Am. Rep. 240; Tucker Mnfg. Co. v. Fairbanks, 98 Mass. 105; McCurdy v. Rogers, 21 Wis. 197, 21 Am. Dec 468; Noyes v. Loring, 55 Me. 408; Johnson v. Smith, 21 Conn. 627; Patterson v. Lippincott, 47 N. J. L. 457, 1 Atl. Rep. 506, 54 Am. Rep. 178; Taylor v. Shelton, 30 Conn. 122; Duncan v. Niles, 32 Ill. 532, 534. "That an agent may bind himself personally," said CHURCH, Ch. J., in Johnson v. Smith, 21 Conn. 627, even when acting really or professedly as agent, is not denied; and in the execution of a simple contract as well as a specialty; and this will be so, in all cases, where, by language already expressive of such an intent, he has substituted his own responsibility for that of his principal. So, also, if he use language of personal obligation in the body of the contract, although he may sign as agent, he will bind himself if he had no authority to bind, and has not bound, his principal by his act. But in case of a defective power to bind the principal, if the agent speaks only in the language of the principal and does not use apt language to bind himself, he will not be liable on the contract thus made, but collaterally only for a false assumption of authority to act for another," citing Jones v. Downman, 4 Ad. & El. N. S. 235, 45 Eng. Com. Law, 234.

[2] See Richie v. Bass, 15 La. Ann. 668; Keener v. Harrod, 2 Md. 63; Weare v. Gove, 44 N. H. 196; Sinclair v. Jackson, 8 Cow. (N. Y.) 543; Meech v. Smith, 7 Wend. (N. Y.) 315; Palmer v. Stephens, 1 Den. (N. Y.) 741.

[3] Hall v. Crandall, 29 Cal. 567, 89 Am. Dec. 64.

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another, has used apt words to bind himself, there is abundant reason and justice in holding him liable upon the contract itself as made.[1] So if, notwithstanding the fact of his assumed agency, the credit was given to him personally, or if he has expressly pledged his own responsibility, he may undoubtedly be held liable, upon the contract made by him.[2]

The rule sometimes asserted that wherever the agent fails to create a right of action against his principal upon the contract, he makes himself liable thereon, cannot therefore be sustained as a general rule.[3] The agent is only liable on the contract in those cases in which he has used apt words to bind himself, or has expressly pledged his personal responsibility, or in which the credit was given to him personally.[4]

[1] Hall *v.* Crandall, *supra.*

[2] See *post*, § 558.

[3] Dusenbury *v.* Ellis, 3 Johns. Cas. (N. Y.) 70, 2 Am. Dec. 144; White *v.* Skinner, 13 Johns. (N. Y.) 307, 7 Am. Dec. 381; Rossiter *v.* Rossiter, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; Collins *v* Allen, 12 Wend. (N. Y.) 356, 27 Am. Dec. 130; Mott *v.* Hicks, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550. These early New York cases which are the foundation of most of the similar rulings in other States have been very much modified if not entirely overruled by the later cases in the Court of Appeals. Dung *v.* Parker, 52 N. Y. 494; Baltzen *v.* Nicolay, 53 N. Y. 467; White *v.* Madison, 26 N. Y. 117. Thus Gillaspie *v.* Wesson, 7 Port. (Ala.) 454, 31 Am. Dec. 715, is based upon the early New York cases. See also Clark *v.* Foster, 8 Vt. 98; Savage *v.* Rix, 9 N. H. 263; Hatch *v.* Smith, 5 Mass. 42; Byars *v.* Doores, 20 Mo. 284; Coffman *v.* Harrison, 24 Mo. 524.

[4] Ogden *v.* Raymond, 22 Conn. 379, 58 Am. Dec. 429. "We are aware," said ELLSWORTH, J. in this case, "that it is not unfrequently laid down as a rule of law that if an agent does not bind his principal he binds himself; but this rule needs qualification and can not be said to be universally true or correct. * * * If the form of the contract is such that the agent personally covenants and then adds his representative character, which he does not in truth sustain, his covenant remains personal and in force, and binds him as an individual; but if the form of the contract is otherwise, and the language when fairly interpreted, does not contain a personal undertaking or promise, he is not personally liable, for it is not his contract, and the law will not force it upon him. He may be liable, it is true, for tortious conduct if he has knowingly or carelessly assumed to bind another without authority; or, when making the contract, has concealed the true state of his authority, and falsely led others to repose in his authority; but as we have said, he is not *of course* liable on the contract itself nor in any form of action whatever."

"The authorities are somewhat conflicting as to the liability of an agent in action *ex contractu;* but the weight of authority, we think is, that to charge an agent in such action, the credit must have been given to him, or there must be an express contract, and if there is a

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It may be said that this rule will result in many cases in binding neither the assumed agent nor his alleged principal upon the contract. But if the other party fails to have a remedy either upon the contract itself, or upon the express or implied undertaking for authority, it will be in those cases in which he was fully informed by the agent of the source and nature of the authority under which he assumed to act, and was put in a situation to determine for himself whether to rely upon it or not.

2. *Where, though Authorized, he fails to bind his Principal.*

§ 551. In general. But it is not alone in those cases in which he acts without authority, that the agent makes himself liable to third persons. This result may ensue, under a variety of circumstances, even though the agent were fully authorized to bind his principal.

Thus the agent intending to bind his principal may, from the failure to use apt words for that purpose, not only not bind his principal, but pledge his personal responsibility. So he may conceal the fact of his agency and contract as the ostensible principal.

So, though disclosing the fact of his agency, he may voluntarily enter into personal obligations.

written contract, there must be apt words in it to charge him." DOWNER J. in McCurdy *v.* Rogers, 21 Wis. 197, 91 Am. Dec. 468. To same effect, see Newman *v.* Sylvester, 42 Ind. 106; Duncan *v.* Niles, 32 Ill. 532, 83 Am. Dec. 293; Abbey *v.* Chase, 6 Cush. (Mass.) 56; Harper *v.* Little, 2 Me. 14, 11 Am. Dec. 25; Stetson *v.* Patten, 2 Me. 358. 11 Am. Dec. 111; McHenry *v.* Duffield, 7 Blackf. (Ind.) 41. So in a leading case in California, the rule is well stated thus: "In all such cases the remedy against the agent is an action to recover the money, if any has been paid him, or the value of the work or labor, if any has been performed for him, under the supposed contract, or special damages resulting to the plaintiff by reason of the defendant's wrong in undertaking to act for another without authority. If an agent, in executing a contract, employ terms which, in legal effect, charge himself he may be sued upon the instrument itself as a contracting party. This is so because, by the use of such terms, he has made the contract his own. But if the instrument does not contain such terms, or, in other words, contains language which in legal effect binds the principal only, the agent can not be sued on the instrument itself, for the obvious reason that the contract is not his. If, then, the contract is not binding upon the principal because the agent had no authority to make it, and is not binding on the agent because it does not contain apt words to charge him personally, it is wholly void." SANDERSON, J. in Hall *v.* Crandall, 29 Cal. 567, 89 Am. Dec. 64.

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§ 552. **Where Agent intending to bind Principal, uses apt Words to bind himself.** It often happens that an agent seeking and intending to bind his principal upon a contract, so defectively executes it that he fails to accomplish that purpose. In such cases it is not unfrequently the result that no one is bound; but, more often, it is found that the agent has so executed as to bind himself.

This whole subject has been fully discussed under the head of the Execution of the Authority,[1] and nothing further needs to be added to it here, than that where by those rules of construction it is determined that the agent has contracted in his personal capacity, he is, of course, bound upon the contract to the person with whom it was made.

§ 553. **Where Agent intending to bind Principal, binds no one.** Where the agent intending to bind his principal uses such language that neither the principal nor the agent is bound upon the contract, there has been said, in many cases, to be no liability attaching to the agent. He can not be held liable upon the contract itself, because he has used no language sufficient to charge him. He cannot be held liable upon any express or implied warranty of authority, because there is no failure or lack of authority. It is simply a case of defective execution. If, however, the agent has expressly warranted the sufficiency of his method of execution, he could undoubtedly be held liable upon such warranty.

Whether there is in every case from the mere fact that the agent assumes to execute in a certain manner, an implied warranty of the sufficiency of that manner to bind the principal, is a question not settled by the authorities. Upon reason, it would seem that this question is to be determined by substantially the same considerations that apply to the case of a warranty of authority. It is, indeed, simply a question of a warranty of authority to execute in that form.

If the agent knowing a certain form to be insufficient in point of fact, yet assumes to adopt it, to the damage of an innocent third party who has relied thereon, he should certainly be held liable for the deceit. And so where no deceit is practiced, unless the agent fully discloses the nature and limitations of his authority so that the other party may judge for himself as to the proper

[1] See *ante*, § 408, *et seq.*

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method, it would seem that he is still to be held liable for a defect in fact as upon as implied warranty. But for a defect in point of law only, the agent would not ordinarily be bound.[1]

[1] In reversing the judgment of the Vice Chancellor in Beattie v. Lord Ebury, L. R. 7 Ch. Ap. 777, 8 Eng. Rep. 625, involving the liability of the directors of a corporation for making a representation to the manager of a bank to the effect that they had power to overdraw the account of the corporation, Sir G. MELLISH, L. J. said: "The Vice-Chancellor has decided that they are so liable on the authority of three cases, which are all cases in the Courts of Law, and which come to this, that where an agent makes a contract on behalf of his principal, he impliedly warrants that he has authority to bind that principal, and if it turns out that he has no authority to bind his principal and the principal repudiates the obligation, and loss is thereby occasioned, then an action on that warranty can be maintained. But if those cases are examined it will be found in all of them, that there was a misrepresentation in point of facts as to the agent having power to bind his principal, and though I have not found any case in the Courts of Law on the question, I have no doubt myself that it would be held that if there is no misrepresentation in point of fact, but merely a mistake or misrepresentation in point of law, that is to say, if the person who deals with the agent is fully aware in point of fact what the extent of the authority of the agent is to bind his principal, but makes a mistake as to whether that authority is sufficient in point of law or not, under those circumstances I have no doubt that the agent would not be liable. For instance, supposing when an agent comes and proposes to make a contract on behalf of his principal, instead of trusting his representation that he has power to bind his principal, the person dealing with the agent were to ask to see his authority, and a power of attorney executed by the principal was shown to him, and he took the opinion of his lawyer as to whether the power of attorney was sufficient to bind the principal, and was advised that it was sufficient to bind the principal, and then after that, a contract was made, and it turned out when the point was raised in a court of law that the power of attorney was insufficient,—under such circumstances I am clearly of opinion that there would be no warranty on the part of the agent that the power of attorney was good in point of law.

I will shortly state the three cases which were relied upon before the Vice-Chancellor to show that they all involve a misrepresentation in point of fact. The first case mentioned on the subject was Collen v. Wright, 8 E. & B. 647. That was a simple case, where the steward of a gentleman executed an agreement for a lease in his name, and when a suit was brought for specific performance, it turned out that a gentleman had never given any authority to the steward to make an agreement for a lease in his name. Specific performance was therefore refused. The plaintiff then brought an action against the steward to recover damages, and was held entitled to recover. There it is perfectly plain that the defendant had made a misrepresentation in point of fact.

The next case was the case of Richardson v. Williamson, Law Rep 6 Q. B., 276. There the plaintiff lent £70

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§ 554. **Where Agent conceals Fact of Agency or Name of Principal.** An agent who conceals the fact of his agency and contracts as the ostensible principal is undoubtedly liable in the same manner and to the same extent as though he were the real principal in interest.[1] So though the agent discloses the fact that he is an agent, but conceals the name of his principal, he may be held personally liable as principal.[2]

In these cases, the other party may also, at his option, ordinarily hold the real principal liable when discovered,—a subject to be hereafter considered.[3]

to a benefit building society, and received a receipt signed by the defendants, as two of the directors, certifying that the money had been lent, and then it turned out that in point of law they had no power to borrow money. But, then, their power to borrow money depended upon whether they had made a rule to borrow money, because a benefit building society may receive money, at any rate to a certain amount, on deposit, if it has a rule enabling it so to receive money. Therefore that was taken as a representation by the directors that they had such a rule, and that the borrowing was within the rule when, in point of fact, there was no such rule at all.

Then the third case, and the one which I think has been principally relied upon in the argument before us, was Cherry v. Colonial Bank of Australasia, Law Rep., 3 P. C., 24. There the directors of a joint stock company gave authority to their manager to overdraw the account. If the facts of the case are examined it will be found that the directors had power to borrow money, provided they got the consent of a meeting of the shareholders but not otherwise. There was, therefore, a misrepresentation in point of fact, because where they represented they had power to borrow, they practically represented they had obtained authority from a meeting of the shareholders to enable them to borrow."

See also cases cited in § 546 *ante*.

[1] Bickford v. First Nat. Bank, 42 Ill. 238, 89 Am. Dec. 436; Wheeler v. Reed, 36 Ill. 82; Gerard v. Moody, 48 Ga. 96; Poole v. Rice, 9 W. Va. 73; Baltzen v. Nicolay, 53 N. Y. 470; Mills v. Hunt, 20 Wend. (N. Y.) 431; Baldwin v. Leonard, 39 Vt. 260, 94 Am. Dec. 324; Jones v. Ætna Ins. Co., 14 Conn. 501; York County Bank v. Stein, 24 Md. 447; Cobb v. Knapp, 71 N. Y. 348, 27 Am. Rep. 51; McClellan v. Parker, 27 Mo. 162; Beymer v. Bonsall, 79 Penn. St. 298; Bartlett v. Raymond, 139 Mass. 275; Murphy v. Helmrick, 66 Cal. 69; Button v. Winslow, 53 Vt. 430; Nixon v. Downey, 49 Iowa, 166; Merrill v. Wilson, 6 Ind. 426; Pierce v. Johnson, 34 Conn. 274; Mithoff v. Byrne, 20 La. Ann. 363; McComb v. Wright, 4 Johns. (N. Y.) Ch. 659; Forney v. Shipp, 4 Jones (N. C.) L. 527; Meyer v. Barker, 6 Binn. (Penn.) 228; Davenport v. Riley, 2 McCord (S. C.) 198, Conyers v. Magrath, 4 McCord (S. C.) 392; Bacon v. Sondley, 3 Strobh. (S. C.) 542; Royce v. Allen, 28 Vt. 234; Ye Seng Co. v. Corbitt, 9 Fed. Rep. 423; Brent v. Miller, 81 Ala. 309.

[2] Welch v. Goodwin, 133 Mass. 71 25 Am. Rep. 24.

[3] See *post*, §§ 695–701.

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The duty rests upon the agent, if he would avoid personal liability, to disclose his agency, and not upon others to discover it.[1] It is not, therefore, enough that the other party has the means of ascertaining the name of the principal; he must have actual knowledge or the agent will be bound. There is no hardship to the agent in this rule, as he always has it in his power to relieve himself from personal liability by fully disclosing his principal and contracting only in the latter's name. If he does not do this, it may well be presumed that he intended to make himself personally responsible.[2]

An agent who does not disclose his principal and to whom a personal credit is given, can not escape responsibility merely because he generally acts for a disclosed principal in other transactions.[3]

Notice of the agency to one member of a firm, has been held not to be sufficient notice to the firm to relieve the agent from personal responsibility for transactions subsequently had with another member, who did not know, and was not informed of the agency.[4]

The subsequent disclosure of the principal by the agent is not sufficient, nor is the commencement of an action against the principal conclusive evidence of an intention to hold him alone.[5] Nothing short of satisfaction from the principal would in such a case be conclusive evidence of a discharge of the agent.[6] Whether the agent has, in fact, been released is a question to be determined from all the circumstances of the case.[7]

§ 555. **Where Agent makes full Disclosure.** The converse of the rule laid down in the preceding section is, of course, true.

[1] Baldwin v. Leonard, 39 Vt. 260, 94 Am. Dec. 324.

[2] Cobb v. Knapp, 71 N. Y. 349, 27 Am. Rep. 51; Raymond v. Crown, &c. Mills, 2 Metc. (Mass.) 319. But see Worthington v. Cowles, 112 Mass. 30, where the rule is laid down that the agent is bound unless from his disclosures the other party understood, or ought as a reasonable man to have understood, that he was dealing with the principal.

[3] Brent v. Miller, 81 Ala. 309; Wood v. Brewer, 73 Ala. 259.

[4] Baldwin v. Leonard, 39 Vt. 260, 94 Am. Dec. 324.

[5] Cobb v. Knapp, 71 N. Y. 349, 27 Am. Rep. 51; Raymond v. Crown, &c. Mills, 2 Metc. (Mass.) 319; Curtis v. Williamson, L. R. 10, Q. B. 57, 11 Eng. Rep. 149.

[6] Beymer v. Bonsall, 79 Penn. St. 298; Berghoff v. McDonald, 87 Ind. 549. That judgment without satisfaction constitutes election, see Priestly v. Fernie, 3 H. & C. 977; Curtis v. Williamson, *supra*.

[7] Cobb v. Knapp, *supra*.

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If the agent makes a full disclosure of the fact of his agency and of the name of his principal, and contracts only as the agent of the named principal, he incurs no personal responsibility.[1]

§ 556. **Where Agent acts for a foreign Principal.** A distinction formerly prevailed in those cases in which the principal was a resident of a foreign state or country. In such cases it was presumed that credit was given to the agent personally although the agent disclosed his agency.[2] But this rule no longer prevails in this country and the contracts of agent in behalf of foreign principals stand upon the same ground as those made for domestic employers, it being in each case a question of intention to be gathered from all of the facts and circumstances of that case.[3]

§ 557. **Where there is no responsible Principal.** Akin to these cases is that where the agent assumes to represent a principal who has no legal existence or status, or who has no legal responsibility. Thus where a committee, appointed by a political meeting for that purpose, ordered a public dinner for the party, it was held that the members were personally liable. There was here no legal body to be bound. It did not rise to the dignity of a voluntary society or a club, for, said the court, "a club is a definite association organized for indefinite existence; not an ephemeral meeting for a particular occasion, to be lost in the crowd at its dissolution. It would be unreasonable to presume that the plaintiff agreed to trust to a responsibility so desperate, or furnish a dinner on the credit of a meeting which had vanished into nothing. It was already defunct; and we are not to imagine that the plaintiff consented to look to a body which had lost its individuality by the dispersion of its members in the general mass." [4]

[1] Whitney *v.* Wyman, 101 U. S. 392; Dunton *v.* Chamberlain, 1 Ill. App. 361; Barry *v.* Pike, 21 La. Ann. 221; Aspinwall *v.* Torrance, 1 Lans. (N. Y.) 381; Kean *v.* Davis, 20 N. J. 425.

[2] See Story on Agency, § 268.

[3] Maury *v.* Ranger, 38 La. Ann. 485, 58 Am. Rep. 197; Bray *v.* Kettell, 1 Allen (Mass.) 80; Goldsmith *v.* Manheim, 109 Mass. 187; Oelricks *v.* Ford, 23 How. (U. S.) 49; Rogers *v.* March, 33 Me. 106; Green *v.* Kopke, 18 C. B. 549; Wilson *v.* Zulueta, 14 Ad. & Ell. N. S. (Q. B.) 405; Paice *v.* Walker, L. R. 5 Ex. 173; Armstrong *v.* Stokes, L. R. 7 Q. B. 603, 3 Eng. Rep. 217; Hutton *v.* Bulloch, L. R. 9 Q. B. 572, 10 Eng. Rep. 184.

[4] Eichbaum *v.* Irons, 6 Watts & Serg. (Penn.) 67, 40 Am. Dec. 540. See also Blakely *v.* Bennecke, 59 Mo. 193, an action upon an instrument signed by one as captain of a military

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§ 558. **Where Agent contracts personally.** It is undoubtedly competent for the agent, although fully authorized to bind his principal, to pledge instead his own personal responsibility, if he so prefers. The presumption is that the agent intends to bind his principal, but where he expressly charges himself personally, he will be so held.[1] Such a personal undertaking is not necessarily inconsistent with his character as agent, and where he has so promised personally, the mere addition of the word "agent," "trustee," etc., to a written promise, will ordinarily, as has been seen, be regarded as mere *descriptio personæ*.[2]

Where the promise is in writing, its construction and effect are ordinarily questions of law to be determined by the court, but where the promise is not in writing, the question of whether the credit was given to the agent personally is always one of fact to be determined from all the circumstances of the case.[3] In either event, the law aims to ascertain the intent of the parties, and when that is ascertained it is conclusive.[4] The fact that the agent was known to be insolvent may be taken into consideration in determining whether the credit was given to the agent or his principal.[5] Where dealings are had with the agent of a known principal, the legal presumption is, as has been seen, that the credit was given to the principal rather than to the agent personally, and this presumption will prevail in the absence of evidence that the credit was given exclusively to the agent,[6] and

company. Edings *v.* Brown, 1 Rich. (S. C.) 255; Steele *v.* McElroy, 1 Sneed (Tenn.) 341, where the committee of an unincorporated Masonic lodge were held personally liable.

[1] Johnson *v.* Smith, 21 Conn. 627; Hall *v.* Crandall, 29 Cal. 567, 89 Am. Dec 64; Higgins *v.* Senior, 8 Mees. & Wels. 834; Magee *v.* Atkinson, 2 Mees. & Wels. 440.

[2] Duval *v.* Craig, 2 Wheat. (U. S.) 45; Townsend *v.* Hubbard, 4 Hill (N. Y.) 351; Quigley *v.* De Haas, 82 Penn. St. 267; Whitehead *v.* Reddick, 12 Ired. (N. Car.) L. 95; Oliver *v.* Dix, 1 Dev. & Bat. (N. C.) Eq. 158; Appleton *v.* Binks, 5 East. 147; Tippets *v.* Walker, 4 Mass. 595; Bryson *v.* Lucas, 84 N. C. 680, 37 Am. Rep. 634.

[3] Cobb *v.* Knapp, 71 N. Y. 348, 27 Am. Rep. 51; Steamship Co. *v.* Merchants' Desp. Trans. Co., 135 Mass. 421; Hovey *v.* Pitcher, 13 Mo. 191; Fleming *v.* Hill, 62 Ga. 751; Whitney *v.* Wyman, 101 U. S. 392. See also cases cited in note 7.

[4] Whitney *v.* Wyman, *supra*; Worthington *v.* Cowles, 112 Mass. 30.

[5] Garrett *v.* Trabue, 83 Ala. 227.

[6] Meeker *v.* Claghorn, 44 N. Y. 349, 352; Foster *v.* Persch, 68 N. Y. 400; Ferris *v.* Kilmer, 48 N. Y. 300; Michael *v* Jones, 84 Mo. 578; Hall *v.* Lauderdale, 46 N. Y. 70; Bank of Genesee *v.* Patchin Bank, 19 N. Y. 312; Key *v.* Parnham, 6 Har. & J. (Md.) 416. Says SWAYNE, J., in Whitney *v.* Wyman, *supra*, "Where

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the burden of proof rests upon the party alleging it. Where, however, the contract or dealings are such as *prima facie* bind the agent, the burden of proof that in fact they bound the principal, is upon the agent.[1]

Of course if the other party knowing the principal, has seen fit to give credit to the agent exclusively, he cannot, as will be seen, afterwards resort to the principal.[2]

§ 559. **Same Subject—Public Agent.** It is also competent for a public agent to bind himself personally, if he so elects, but it is not presumed that he will or has done so. Indeed, the presumption that the agent of a known principal intends to bind the latter rather than himself, is stronger in the case of a public agent than in that of the agent of an individual. It is incumbent, therefore, upon him who seeks to hold a known public agent personally responsible, to adduce clear proof of an intention so to be bound.[3]

3. *Where the Agent has received Money.*

§ 560. **In general.** The question of the liability of the agent to third persons, for money received by him, may arise under two states of fact. It may be money which the agent has received from such third persons to be paid over to his principal, and which being paid to the agent by them through mistake or fraud, they are desirous of recovering before it reaches the hand of his principal. Or it may be money received by the agent from his principal to be paid to such third persons, but which the agent

the principal is disclosed, and the agent is known to be acting as such, the latter can not be made personally liable unless he agreed to be so."

[1] Gillaspie v. Wesson, 7 Port. (Ala.) 454; Lazarus v. Shearer, 2 Ala. 718; Drake v. Flewellen, 33 Ala. 106; Pratt v. Beaupre, 13 Minn. 187; Rossiter v. Rossiter, 8 Wend. (N. Y.) 494; 24 Am. Dec. 62.

[2] Raymond v. Crown, &c. Mills, 2 Metc. (Mass.) 319; James v. Bixby, 11 Mass. 34; Mauri v. Hefferman, 13 Johns. (N. Y.) 58; Miller v. Watt, 70 Ga. 335; Stehn v. Fasnacht, 20 La. Ann. 83; Shattuck v. Eastman, 12 Allen (Mass.) 370; Brown v. Rundlett, 15 N. H. 360; Sydnor v. Hurd, 8 Tex. 98; Hinsdale v. Partridge, 14 Vt. 547.

[3] New York, &c. Co. v. Harbison, 16 Fed. Rep. 688; Hall v. Lauderdale, 46 N. Y. 70; Gill v. Brown, 12 Johns. (N. Y.) 385; Miller v. Ford, 4 Rich. (S. C.) L. 376, 55 Am. Dec. 687; Hodgson v. Dexter, 1 Cranch (U. S. C. C.) 109; Macbeath v. Haldimand, 17 R. (Durnf. & E.) 172; Ogden v. Raymond, 22 Conn. 379, 58 Am. Dec. 429; Walker v. Swartwout, 12 Johns. (N. Y.) 444, 7 Am. Dec. 334.

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has failed or refused to pay to them, either for some purposes of his own, or because he has been directed by his principal so to do.

a. Where Money has been paid to him for Principal.

§ 561. **Not liable for Money paid over to Principal before Notice.** An agent to whom money has by mistake been voluntarily paid for the use of his principal, is not liable to the person so paying it where, before notice of such mistake, he has paid it over to his principal. In such event, the person paying it must look to the principal.[1]

The agent, however, will be liable if after being apprised of the mistake and required not to pay it over, he then pays the money to his principal.[2]

§ 562. **Not liable where before Notice his Situation has been changed.** So an agent receiving money by mistake on account of his principal is not liable where, before notice of the mistake, he has done some act upon the assumption that the payment was good, by which he will be prejudiced if it be held invalid.[3]

But so long as he stands in his original situation, and until there has been a change of circumstances by his having paid over the money to his principal or done something equivalent to it, he remains liable.[4]

The mere forwarding of his account to his principal and placing the money to his credit, is not such a change of circumstances as will relieve him.[5]

[1] Law *v.* Nunn, 3 Ga. 90; Upchurch *v.* Norsworthy, 15 Ala. 705; Griffith *v.* Johnson, 2 Harr. (Del.) 177; McDonald *v.* Napier, 14 Ga. 89; Garland *v.* Salem Bank, 9 Mass. 408, 6 Am. Dec. 86; Jefts *v.* York, 12 Cush. (Mass.) 196; Hearsey *v.* Pruyn, 7 Johns. (N. Y.) 179; Frye *v.* Lockwood, 4 Cow. (N. Y.) 454; Fowler *v.* Shearer, 7 Mass. 14; Dickens *v.* Jones, 6 Yerg. (Tenn.) 483; Pool *v.* Adkisson, 1 Dana (Ky.) 117; Morrison *v.* Currie, 4 Duer (N. Y.) 79; Langley *v.* Warner, 1 Sandf. (N. Y.) 209; Wallis *v.* Shelly, 30 Fed. Rep. 747; Bailey *v.* Cornell, — Mich—, 33 N. W. Rep. 50.

Elliott *v.* Swartwout, 10 Peters (U. S.) 137; Granger *v.* Hathaway, 17 Mich. 500; Buller *v.* Harrison, 2 Cowp. 568; LaFarge *v.* Kneeland, 7 Cow. (N. Y.) 456; Herrick *v.* Gallagher, 60 Barb. (N. Y.) 566.

[2] Elliott *v.* Swartwout, *supra*; Buller *v.* Harrison, *supra*; LaFarge *v.* Kneeland, *supra*; Herrick *v.* Gallagher, *supra*; O'Connor *v.* Clopton, 60 Miss. 349; Penhallow *v.* Doane, 3 Dall. (U. S.) 54.

[3] Buller *v.* Harrison, 2 Cowp. 568.

[4] Elliott *v.* Swartwout, 10 Peters (U. S.) 137; Buller *v.* Harrison, *supra*; Cox *v.* Prentice, 3 Maule & Sel. 348.

[5] Cox *v.* Prentice, *supra*; Buller *v.* Harrison, *supra*. See also, Smith *v.* Binder, 75 Ill. 492.

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§ 563. **Agent liable for Money mispaid though paid over, if Agency was not known.** Where, however, the third person who paid money to an agent under a mistake of fact had no notice of the agency, he may recover the money so paid from the agent although the latter has paid it over to his principal.[1]

§ 564. **Agent liable without Notice for Money illegally obtained.** An agent who has obtained money from third persons illegally, as by compulsion or extortion,—the persons paying it having done so with no intent or purpose that he should pay it to his principal—is liable to the persons from whom he received it, although he has paid it over to his principal without notice not to do so.[2]

Money so paid is not paid voluntarily nor on the account of the principal, but merely as the result of the agent's illegal demands.

This principle has been frequently applied to the cases of excise and custom-house officers, tax collectors, sheriffs, and other officers who by virtue of their office have exacted and enforced the payment of illegal fees, taxes and duties.

§ 565. **Agent not liable if Money voluntarily paid.** But if the money was voluntarily paid for the use of the principal, though paid under a mistake of law as to the liability to pay it, it will be a complete defense to the agent that before he had received notice of the mistake, he had paid it over to his principal.[3]

§ 566. **Where Agent is a mere Stakeholder.** Where an agent, who stands in the situation of a stakeholder, receives money to be paid over upon the happening of a certain contingency or the performance of given conditions, and pays it over before the happening of the contingency or the performance of the conditions, such payment will be no defense to an action by the party ultimately found to be entitled to receive the money.[4]

[1] Smith v. Kelly, 43 Mich. 390; Newall v. Tomlinson, L. R. 6 C. P. 405.

[2] Ripley v. Gelston, 9 Johns. (N. Y.) 201, 6 Am. Dec. 271; Frye v. Lockwood, 4 Cow. (N. Y.) 456; Elliott v. Swartwout, 10 Peters (U. S.) 137; Metcalf v. Denson, 4 J. Baxt. (Tenn.) 565; Snowden v. Davis, 1 Taunt. 358.

[3] Elliott v. Swartwout, 10 Pet. (U. S.) 137; Mowatt v. Wright, 1 Wend. (N. Y.) 355; Branham v. San José, 24 Cal. 585; Silliman v. Wing, 7 Hill (N. Y.) 159.

[4] Burrough v. Skinner, 5 Burr. 2639; Edwards v. Hodding, 5 Taunt. 815.

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b. Where Money has been Paid to Agent for Third Person.

§ 567. **When Agent liable to such third Person.** Where money has been delivered by a principal to his agent to be, by the latter, paid over to a third person, the duty to make such payment is one which the agent owes, in the first instance, to the principal only. Between the agent and the third person, there is primarily no privity. The former has entered into no relations with the latter by virtue of which he owes to him the performance of any duty other than those imposed upon every member of society.

Until the agent has paid over the money to the third person, or has assumed to the latter the obligation to do so, the principal may at any time revoke or countermand his directions to the agent to make the payment.[1]

Based upon the principle, therefore, that one person can not maintain an action at law upon a contract to which he was not a party, though made for his benefit,[2] the prevailing doctrine is

[1] Williams *v.* Everett, 14 East 582; Tiernan *v.* Jackson, 5 Pet. (U. S.) 580; Seaman *v.* Whitney, 24 Wend. (N. Y.) 260, 35 Am. Dec. 618; Brind *v.* Hampshire, 1 Mees. & Wels. 365; Scott *v.* Porcher, 3 Meriv. 652; Stewart *v.* Fry, 7 Taunt. 339; Denny *v.* Lincoln, 5 Mass. 385.

[2] While this principle is not recognized by the courts of all of the States, it is believed to be supported by the better reasons, and the weight of authority. See Pipp *v.* Reynolds, 20 Mich. 88; Turner *v.* McCarty, 22 Mich. 265; Hicks *v.* McGarry, 38 Mich. 667; Nolan *v.* Manton, 46 N. J. L. 231, 50 Am. Rep. 403; Sergeant *v.* Stryker, 1 Harr. (N. J. L.) 464; Williams *v.* Everett, 14 East 582; Tiernan *v.* Jackson, 5 Pet. (U. S.) 580; Seaman *v.* Whitney, 24 Wend. (N. Y.) 260; 35 Am. Dec. 618; Ferris *v.* Carson Water Co., 16 Nev. 44, 40 Am. Rep. 485.

The contrary doctrine was finally established in New York after much doubt and dissent in the case of Lawrence *v.* Fox, 20 N. Y. 268, re-affirmed in Burr *v.* Beers, 24 N. Y. 178, 80 Am. Dec. 327, and followed in many subsequent cases. Becker *v.* Torrancy 31 N. Y. 631, 643; Dingeldein *v.* Third Ave. R. R. Co., 37 Id. 575, 577; Turk *v.* Ridge, 41 Id. 201, 206, Barker *v.* Bradley, 42 Id. 316, 322; Coster *v.* Mayor, 43 Id. 399, 411. Hutchings *v.* Miner, 46 Id. 456, 460; Claflin *v.* Ostrom, 54 Id. 581, 584; Glen *v.* Hope Mut. Ins. Co., 56 Id. 379, 381; Barlow *v.* Myers, 64 Id. 43, 21 Am. Rep. 582; Simson *v.* Brown, 68 Id. 355, 358; Campbell *v.* Smith, 71 Id. 26, 28; Bennett *v.* Bates, 94 Id. 354, 370.

But the courts of that State have declared themselves disinclined to extend the doctrine, Barlow *v.* Myers, *supra.* See also Ricard *v.* Sanderson, 41 N. Y. 179; Freeman *v.* Auld, 44 N. Y. 55; Hutchings *v.* Miner, 46 N. Y. 456; Garnsey *v.* Rogers, 47 N. Y. 233, 7 Am. Rep. 440; Vrooman *v.* Turner, 69 N. Y. 284, 25 Am. Rep. 195.

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that a third person can not sue an agent at law to recover money which the agent has promised his principal to pay to such third person. In order to maintain such an action against the agent, it is necessary to show that he has in some way, in dealings with such third person, so recognized and assented to the appropriation of the money to the latter as to create a privity between them.[1] When this has been done, the principal can no longer

The New York doctrine also prevails in Kansas. See Burton v. Larkin, 36 Kan. 246; 59 Am. Rep. 541, citing the Kansas cases.

[1] Williams v. Everett, 14 East. 582. This case, which is a leading one upon the subject, has been so often cited as to seem to warrant a full statement of the facts upon which it arose and of the judgment pronounced.

Said Lord ELLENBOROUGH, Chief Justice: "The action was for money had and received, brought by the plaintiff to recover 300 £, being part of the amount of a bill of 1126 £,2 s., remitted by one James Kelly from the Cape of Good Hope to the defendant's house, in a letter dated Cape Town, 8th July, 1809, in which Kelly says, 'I remit you by the Warley 1126 £, 2 s., which I particularly request you will order to be paid to the following persons, who will produce their letters of advice from me on the subject,' &c. Amongst the persons, he names the plaintiff Williams for 300 £. And he afterwards made another remittance for 500 £ on the same terms. And then he adds: 'I desire the amounts paid each person to be put on the back of their respective bills, &c., 'and that every bill paid off be cancelled.' Williams, by his attorney, long before the bills became due, gave the defendant, Everett, notice of a letter he had received from Kelly, ordering his debt of 300 £ to be paid out of that remittance, and offered him an indemnity of a banking house if he would hand over the bill to him; but Everett refused to indorse the bill away, or to act upon the letter; admitting, however, that he had received the letter directing the application of the money in the manner already stated. The question at the trial was whether the plaintiff was entitled to receive from the defendants the amount of his demand on Kelly for 300 £ out of the bill for 1126 £, 2 s which was admitted to have been received by the defendants when it became due. * * * * The question which has been argued before us is whether the defendants, by receiving this bill, did not accede to the purposes for which it was professedly remitted to them by Kelly, and bind themselves so to apply it; and whether, therefore, the amount of such bill paid to them when due did not instantly become, by operation of law, money had and received to the use of the several persons mentioned in Kelly's letter, as the creditors in satisfaction of whose bills it was to be applied, and of course, as to 300 £ of it, money had and received to the use of the plaintiff. It will be observed that there is no assent on the part of the defendants to hold this money for the purposes mentioned in the letter; but, on the contrary, an express refusal to the creditor so to do. If, in order to constitute a privity between the plaintiff and defendants as to the subject of this demand, an assent express or implied be necessary, the assent can

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revoke the appropriation, nor can the agent refuse to perform it.[1]

Where, however, the agent has previously assumed obligations to third persons for the accommodation of the principal, against which the latter has expressly or impliedly agreed to indemnify him, a delivery of money to the agent for that purpose can not be revoked by the principal;[2] neither can an appropriation of money in the agent's hands be revoked by the principal where, upon the faith of such appropriation the agent has assumed liabilities to third parties.[3] In the concise language of MAULE, "An act done in performance of a binding contract is not revocable."[4]

§ 568. **Same Subject—What constitutes Assent—Consideration.** No express form of words is ordinarily requisite to constitute an

in this case be only an implied one, and that too implied against the express dissent of the parties to be charged. By the act of receiving the bill, the defendants agree to hold it till paid, and its contents, when paid, for the use of the remitter. It is entire to the remitter to give and countermand, his own directions respecting the bill, as often as he pleases, and the persons to whom the bill is remitted, may still hold the bill till received, and its amount when received, for the use of the remitter himself, until by some engagement entered into by themselves with the person who is the object of the remittance, they have precluded themselves from so doing, and have appropriated the remittance to the use of such person. After such a circumstance they cannot retract the consent they may have once given, but are bound to hold it for the use of the appointee. If it be money had and received for the use of the plaintiff under the orders which accompanied the remittance, it occurs as fit to be asked, *when* did it become so? It could not be so before the money was received on the bill becoming due; and at that instant, suppose the defendants had been robbed of the cash or notes in which the bill in question had been paid, or they had been burnt or lost by accident, who would have borne the loss thus occasioned? Surely the remitter Kelly, and not the plaintiff and his other creditors, in whose favour he had directed the application of the money according to their several proportions to be made. This appears to us to decide the question, for in all cases of specific property lost in the hands of an agent, where the agent is not himself responsible for the cause of the loss, the liability to bear the loss is the test and consequence of being the proprietor, as the principal of such agent."

[1] Wyman *v.* Smith, 2 Sandf. (N.Y.) 331; Williams *v.* Everett, 14 East 582; Stevens *v.* Hill, 5 Esp. 247; Walker *v.* Rostron, 9 Mees. & Wels. 411; Griffin *v.* Weatherby, Law Reports, 3 Q. B. 753; Yates *v.* Hoppe, 9 Man. G. & S. (9 Com. B.) 541, 67 Eng. Com. L. 540.

[2] Yates *v.* Hoppe, *supra*.

[3] Walker *v.* Rostron, *supra*.

[4] In Yates *v.* Hoppe, *supra*.

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assent on the part of the agent to the appropriation. Like other promises, this may be implied.

The direction from the principal to the agent may often be in substance or in form an ordinary bill of exchange, to which the rules relating to the acceptance of such paper will apply. As is said by a learned writer,[1] an acceptance, according to the law merchant, may be (1) expressed in words, or (2) implied from the conduct of the drawee. (3) It may be verbal or written. (4) It may be in writing on the bill itself or on a separate paper. (5) It may be before the bill is drawn or afterward. And (6) there may be absolute, conditional and qualified acceptances.

By the statutes of many of the States, however, the rule of the law merchant has been changed, and an acceptance must be in writing.

The question of the consideration for the appropriation by the principal may, in certain cases, become material. When it is so, the ordinary rules of law apply. The existence of a debt, although it be not due, is a good consideration for such an appropriation to pay it.[2]

No new or separate consideration moving from the third person to the agent is necessary to sustain the latter's assent to the appropriation of the money,[3] when directed by the principal.

II.

IN TORT.

a. For Non-feasance.

§ 569. **In general—Not liable.** As has been seen,[4] it is the general rule that an agent is not liable to third persons for injuries received by them in consequence of his not performing some duty which he owed to his principal. This rule and the reasons for it are well stated in a recent case in Louisiana. "At common law, an agent is personally responsible to third parties for doing something which he ought not to have done, but not for not doing something which he ought to have done; the agent in the latter case being liable to his principal only. For non-feasance,

[1] 1 Daniel Neg. Inst. § 496.

[2] Walker v. Rostron, 9 Mees. & Wels. 411, 420.

[3] 1 Daniel Neg. Inst. § 174.

[4] See *ante*, § 539 and cases there cited.

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or mere neglect in the performance of duty, the responsibility therefor must arise from some express or implied obligation between particular parties standing in privity of law or contract with each other. No man is bound to answer for such violation of duty or obligation except to those to whom he has become directly bound or amenable for his conduct. * * * An agent is not responsible to third persons for any negligence in the performance of duties devolving upon him purely from his agency, since he cannot, as agent, be subject to any obligations toward third persons, other than those of his principal. Those duties are not imposed upon him by law. He has agreed with no one, except his principal, to perform them. In failing to do so he wrongs no one but his principal, who alone can hold him responsible." [1]

§ 570. **Same Subject—Illustrations.** In accordance with this rule it is held that an agent having charge of a building, and owing to his principal the duty to keep it in repair, is not liable to a stranger who receives an injury on account of the agent's neglect to repair.[2]

And so it has been held that an agent who has charge of a plantation is not liable to the owner of an adjoining plantation for injuries caused from the neglect and refusal of the agent to keep open a drain, which it was his duty to his principal to keep open.[3] The fact that the motive of the agent in failing or refusing to perform his duty was malicious, and that he intended thereby to injure the other party was held to be immaterial, "for" said the court, "whatever motive operated on the agent, the charge against him was only that he had failed to do, and not that he had done anything maliciously, and for non-feasance or omission to act at all, the agent is answerable only to his employer." [4]

So an agent who had rented a house for his principal and had

[1] Delaney v. Rochereau, 34 La. Ann. 1123, 44 Am. Rep. 456.

[2] Delaney v. Rochereau, 34 La. Ann. 1123, 44 Am. Rep. 456; Carey v. Rochereau, 16 Fed. Rep. 87. But see Campbell v. Portland Sugar Co., 62 Me. 552, 16 Am. Rep. 503, where agents who had charge of a wharf and who had agreed with the lessee to make all necessary repairs, were held liable for an injury to a stranger caused by the defective condition of the wharf.

[3] Feltus v. Swan, 62 Miss. 415.

[4] *Idem.*

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authorized the tenant to erect a cooking range upon the premises was held not liable for an injury to an adjoining proprietor caused by the use of the range, because if the agent, in permitting the range to be erected, violated any duty, it was a duty which he owed to his principal only and not to third persons.[1]

b. For Misfeasance.

§ 571. **Agency no Excuse for Misfeasance.** But an agent, like any other person, is bound in the performance of his duty to his principal to recognize and respect the rights and privileges of others, and if he fails to do so, either negligently or intentionally, and thereby causes injury to a stranger, he is liable to the stranger for the damages sustained, and the fact that the injury occurred while in the performance of his agency will constitute no defense.[2] In certain of such cases, the principal will be liable also, but that fact either does not relieve the agent.[3]

As is said in the Louisiana case above referred to: "Every one, whether he is principal or agent, is responsible directly to persons injured by his own negligence, in fulfilling obligations resting upon him in his individual character and which the law imposes upon him independent of contract. No man increases or diminishes his obligations to strangers by becoming an agent. If, in the course of his agency, he comes in contact with the person or property of a stranger, he is liable for any injury he may do to either, by his negligence, in respect to duties imposed by law upon him in common with all other men. * * * The

[1] Labadie v. Hawley, 61 Tex. 177, 48 Am. Rep. 278.

[2] Delaney v. Rochereau, 34 La. Ann. 1123, 44 Am. Rep. 456; Berghoff v. McDonald, 87 Ind. 549; Crane v. Onderdonk, 67 Barb. (N. Y.) 47; Bennett v. Ives, 30 Conn. 329; Poole v. Adkisson, 1 Dana (Ky.) 110; Campbell v. Hillman, 15 B. Mon. (Ky.) 508; Josselyn v. McAllister, 22 Mich. 300; Starkweather v. Benjamin, 32 Mich. 306; Weber v. Weber, 47 Mich. 569; Hedden v. Griffin, 136 Mass. 229, 49 Am. Rep. 25; Reed v. Petterson, 91 Ill. 288, 297. "In torts," said a learned judge in Indiana, "the relation of principal and agent does not exist; they are all wrong doers, and may be sued jointly or separately; and the liability of each and all does not cease until payment has been made or satisfaction rendered or something equivalent thereto." FRANKLIN, C. in Berghoff v. McDonald, 87 Ind. 549. See also Bell v. Josselyn, 3 Gray (Mass.) 309, 63 Am. Dec. 741; Nowell v. Wright, 3 Allen (Mass.) 169; Gilmore v. Driscoll, 122 Mass. 208; Osborne v. Morgan, 130 Mass. 103, 39 Am. Rep. 437; Campbell v. Portland Sugar Co., 62 Maine, 562, 16 Am. Rep. 503. But see Leuthold v. Fairchild, 35 Minn. 111.

[3] Weber v. Weber, 47 Mich. 569.

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whole doctrine on that subject culminates in the proposition that wherever the agent's negligence, consisting in his own wrong doing, therefore in an act, directly injures a stranger, then such stranger can recover from the agent damages for the injury."[1]

§ 572. **Same Subject—Distinction between Non-feasance and Misfeasance.** Some confusion has crept into certain cases from a failure to observe clearly the distinction between non-feasance and misfeasance. As has been seen, the agent is not liable to strangers for injuries sustained by them because he did not undertake the performance of some duty, which he owed to his principal and imposed upon him by his relation, which is non-feasance. Misfeasance may involve, also, to some extent the idea of not doing, as where the agent while engaged in the performance of his undertaking does not do something which it was his duty to do under the circumstances,—does not take that precaution, does not exercise that care,—which a due regard for the rights of others requires. All this is not doing, but it is not the not doing of that which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not-doing which constitutes actionable negligence in any relation.

Upon this distinction, the language of Chief Justice GRAY may be noticed to advantage: "It is often said in the books that an agent is responsible to third persons for misfeasance only, and not for non-feasance. And it is doubtless true that if an agent never does anything towards carrying out his contract with his principal, but wholly omits or neglects to do so, the principal is the only person who can maintain any action against him for the non-feasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot by abandoning its execution midway, and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards.

[1] BERMUDEZ, C. J. in Delaney v. Rochereau, 34 La. Ann. 1123, 44 Am. Rep. 456.

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This is not non-feasance or doing nothing, but it is misfeasance, doing improperly."[1]

This distinction may also be further illustrated by the language of Judge METCALF in a case where an agent had been charged with negligence in admitting water into the pipes in a building without first seeing that they were in a proper condition. "Non-feasance," said the learned judge, "is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do; and malfeasance is the doing of an act which a person ought not to do at all. The defendant's omission to examine the state of the pipes in the house before causing the water to be let on was a non-feasance. But if he had not caused the water to be let on, that non-feasance would not have injured the plaintiff. If he had examined the pipes and left them in a proper condition, and then caused the letting on of the water, there would have been neither non-feasance nor misfeasance. As the facts are, the non-feasance caused the act done to be a misfeasance. But from which did the plaintiff suffer? Clearly from the act done, which was no less a misfeasance by reason of its being preceded by a non-feasance."[2]

§ 573. **Same Subject—Principal's Knowledge or Direction no Defense.** It does not relieve the agent that the wrong was committed with the knowledge of the principal, or by his consent or express direction,[3] because no one can lawfully authorize or direct the commission of a wrong. *A fortiori* is it no defense that the agent in committing the wrong violated his instructions from his principal.[4] Neither is it material that the agent derives no personal advantage from the wrong done.[5] All persons who are active in defrauding or injuring others are liable for what they do, whether they act in one capacity or another. No one can lawfully pursue an employment known to be fraudulent, and while it may be true that the principal is often liable for the

[1] In Osborne v. Morgan, 130 Mass. 102, 39 Am. Rep. 437.

[2] In Bell v. Josselyn, 3 Gray (Mass.) 309, 63 Am. Dec. 741.

[3] Weber v. Weber, 47 Mich. 569; Lee v. Matthews, 10 Ala. 682, 44 Am. Dec. 498; Baker v. Wasson, 53 Tex. 157; Johnson v. Barber, 5 Gil. (Ill.) 425, 50 Am. Dec. 416.

[4] Starkweather v. Benjamin, 32 Mich. 306; Johnson v. Barber, *supra*.

[5] Weber v. Weber, *supra*.

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fraud of his agent, though himself honest, his own fraud will not exonerate his fraudulent agent.[1]

The fact that the agent acted in good faith, supposing the principal had a legal right to have done what was done, is no defense. He who intermeddles with property not his own must see to it that he is protected by the authority of one who is himself, by ownership or otherwise, clothed with the authority he attempts to confer.[2]

§ 574. **Same Subject—Illustrations.** In accordance with these principles it is held that an agent who, for his principal, wrongfully takes or detains or sells the goods of another, is personally liable in an action of replevin, trover or other action for the tort,[3] even though he acted in good faith, supposing the goods to be his principal's, and although he has delivered the property to his principal.[4] So an agent who negligently sets fire to another's property, is liable for the injury although it was done under his principal's direction.[5] An agent who fraudulently induces a person to take out an insurance policy is liable to an action for the injury sustained;[6] in such a case the party deceived has two remedies; he may retain the policy and sue for damages, or he may rescind the contract and recover from the agent the premium paid. So an insurance agent who misrepresents material facts to the insured by reason of which the insured loses his claim against the company for a loss sustained, is personally responsible to the insured for the amount.[7] An agent is responsible individually

[1] Weber *v.* Weber, *supra;* Starkweather *v.* Benjamin, *supra*; Josselyn *v.* McAllister, 22 Mich. 300.

[2] Spraights *v.* Hawley, 39 N. Y. 441, 100 Am. Dec. 452; Kimball *v.* Billings, 55 Me. 147, 92 Am. Dec. 581; Everett *v.* Coffin, 6 Wend. (N. Y.) 609, 22 Am. Dec. 551; Williams *v.* Merle. 11 Wend. (N. Y.) 80, 25 Am. Dec. 604.

[3] Berghoff *v.* McDonald, 87 Ind. 549; Kimball *v.* Billings, 55 Me. 147, 92 Am. Dec. 581; Spraights *v.* Hawley, 39 N. Y. 441, 100 Am. Dec. 452.

[4] Lee *v.* Mathews, 10 Ala. 682, 44 Am. Dec. 498; Perkins *v.* Smith, 1 Wils. 328; Stephens *v.* Elwall, 4 Maule & Sel. 259; Kimball *v.* Billings, *supra*; Spraights *v.* Hawley, *supra*; McCombie *v.* Davies, 6 East. 538; Baldwin *v.* Cole, 6 Mod. 212; Thorp *v.* Burling, 11 Johns. (N. Y.) 285; Farrar *v.* Chauffetete, 5 Den. (N. Y.) 527; Pierson *v.* Graham, 33 Eng. Com. L. 468; Everett *v.* Coffin, 6 Wend. (N. Y.) 609, 22 Am. Dec. 551; Spencer *v.* Blackman, 9 Wend. (N. Y.) 167; Williams *v.* Merle, 11 Wend. (N. Y.) 80, 25 Am. Dec. 604.

[5] Johnson *v.* Barber, 5 Gil. (Ill.) 425, 50 Am. Dec. 416.

[6] Hedden *v.* Griffin, 136 Mass. 229, 49 Am. Rep. 25.

[7] Kroeger *v.* Pitcairn, 101 Penn. St. 311, 47 Am. Rep. 718.

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to the purchaser for a fraud committed by him in the sale of property, though he does not profess to sell the property as his own, but acts throughout in his capacity as an agent.[1] An agent who negligently directs water to be admitted to water pipes in a room in a house owned by his principal, but which is under his general management, without first examining the condition of the pipe is liable to the tenant of a room below for injury resulting therefrom.[2] So a surveyor is personally liable for a trespass committed by him, though the act was done in behalf and under the direction of a highway board by whom he was employed.[3]

§ 575. **Liability in respect to Subagents.** Whether a subagent is to be considered the agent of the agent or of the principal is a question which has been already considered.[4] Where in accordance with the rules there laid down it is determined that the subagent is to be regarded as the agent of the agent, the latter will be liable to the subagent, the principal and third persons as a principal,[5]—a subject hereafter to be discussed. But where, on the other hand, the subagent is found to be the agent of the principal, then the intermediate agent will not be liable to the subagent or to third persons as a principal.[6]

The subagent, like the agent, is personally responsible to third persons for his own misfeasances, although the agent or the principal may be responsible also.[7] He would not, however, be liable to third persons for non-feasance. On these subjects, the rules laid down above respecting the liability of the agent to third persons, apply, *mutatis mutandis*, to the subagent.

§ 576. **Same Subject—Agent who conceals Principal liable as Principal to Subagent.** The rule that an agent who conceals his principal may himself be charged as principal, has been applied in favor of subagents who have received injuries while in the employment of the agent as an ostensible principal. In such

[1] Campbell *v.* Hillman, 15 B. Mon. (Ky.) 508, 61 Am. Dec. 195.

[2] Bell *v.* Josselyn, 3 Gray (Mass.) 309, 63 Am. Dec. 741. But see Bissell *v.* Roden, 84 Mo. 63, 84 Am. Dec. 71.

[3] Mill *v.* Hawker, L. R. 10 Ex. 92, 12 Eng. Rep. (Moak) 538.

[4] See *ante*, § 197.

[5] See *ante*, §§ 192–197.

[6] Stone *v.* Cartwright, 6 T. R. 411.

[7] Stone *v.* Cartwright, *supra;* Bush *v.* Steinman, 1 Bos. & Pul. 404; Denison *v.* Seymour, 9 Wend. (N. Y.) 9; Rapson *v.* Cubitt, 9 M. & W. 710; Quarman *v.* Burnett, 6 M. & W. 499.

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cases the agent is liable to the subagent in the same manner as though he were in fact the real principal.[1]

B. PUBLIC AGENTS.

I.

LIABILITY FOR THEIR OWN TORTS.

§ 577. **In general—Classification.** Public agents may be divided into two classes based upon the character and manner in which they serve the public. One class embraces those whose duty is owing primarily to the public collectively and not to any particular individual; who act for the public at large and who are ordinarily paid out of the public treasury. The other class includes those who, while they may not owe to the public as such the performance of any given duty, become by virtue of an employment by an individual to do some act for him in an official capacity, under a special and particular obligation to him as an individual. This class usually receive their compensation from fees paid by each individual who employs them.

Another classification is made based upon the nature of the duties to be performed. One class includes those whose duties are of a purely *judicial* nature; another, those whose duties are of a *quasi-judicial* or *discretionary* character; another, those whose duties are *legislative*, and still another those whose duties are *ministerial* in their nature.

In respect to this classification it will be found that it is not always easy to determine whether the given duty is judicial or discretionary, or whether it is ministerial in its nature, particularly in view of the fact that the same officer may often, in the same transaction even, be compelled to exercise both functions.

It will be evident that the question of the liability of the public agent may involve not only his responsibility for his own torts, but for those of his subordinates, assistants and employees.

§ 578. **No Action by Individual for Breach of Duty owing**

[1] Malone v. Morton, 84 Mo. 486; McGowan v. St. Louis, &c. R. R. Co., 61 Mo. 528.

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solely to the Public. The first question for determination in considering the liability of a public officer to private action, is whether such officer owes any duty to the individual. Public officers are chosen upon public grounds; they are part of the machinery of the government, and they owe the performance of the duties imposed upon them primarily to the public.

Many of them in the course of the performance of their duties, incur obligations to individuals, but these obligations are so incurred as a part of their public duty attaching to these individuals as distributive members of the public, and not because the performance of these duties for these particular individuals, was the object and end of their appointment.

Other of the public agents may never come under any obligation to individuals at all.

Unless, therefore, it appears that the duty violated was one owing to the individual complaining of its non-performance, and unless it appears that he has sustained a special injury therefrom, no civil action can be maintained against the officer. Recourse in such a case must be had by a public prosecution.[1]

§ 579. **Liable for Wrongs committed in private Capacity.** It will be understood that it is the liability of public agents for wrongs committed while they were acting, or assuming to act, in their public capacity, that is now to be considered, and not their liability for those wrongs which they may commit as private individuals. For the latter they are, of course, liable like any other private individuals, and their official character affords them no defense.

1. *Judicial Officers.*

§ 580. **Judicial Officers not liable when acting within their Jurisdiction.** It is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions without apprehension of personal consequences to himself. No civil action, therefore, can be sustained against a judicial officer by one claiming to have been injured by his judicial action within his jurisdiction.[2] From the very nature

[1] Moss v. Cummings, 44 Mich. 359; Butler v. Kent, 19 Johns. (N. Y.) 223, 10 Am. Dec. 219; Cooley on Torts, 379.

[2] Randall v. Brigham, 7 Wall. (U. S.) 535; Bradley v. Fisher, 13 Wall. (U. S.) 335; Fray v. Blackburn, 3 Best &

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of the case, he is called upon to exercise *his judgment*, and his duty to the individual is performed when he has exercised it, however erroneous or disastrous in its consequences it may appear either to the party or to others.

Smith, 576; Yates v. Lansing, 5 Johns. (N. Y.) 282; 9 Id. 395, 6 Am. Dec. 290; Lange v. Benedict, 73 N. Y. 12, 29 Am. Rep. 80; Floyd v. Barker, 12 Coke 25; Hire v. Sedgwick, 2 Roll. 109; Hammond v. Howell, 1 Mod. 184; Groenvelt v. Burwell, 1 Salk. 396, 1 Ld. Raym. 454; Miller v. Seare, 2 Bl. 1145; Mostyn v Fabrigas, 1 Cowp. 172; Phelps v. Sill, 1 Day (Conn.) 315; Morgan v. Dudley, 18 B. Mon. (Ky.) 693, 68 Am. Dec. 735; Piper v. Pearson, 2 Gray (Mass.) 120, 61 Am. Dec. 438; Clarke v. May, 2 Gray (Mass.) 410, 61 Am. Dec. 470; Ela v. Smith, 5 Gray (Mass.) 136, 66 Am. Dec. 356; Barksloo v. Randall, 4 Blackf. (Ind.) 476, 32 Am. Dec. 46; Pratt v. Gardner, 2 Cush. (Mass.) 63, 48 Am. Dec. 652; Bailey v. Wiggins, 5 Harr. (Del.) 462, 60 Am. Dec. 650; Terry v. Huntington, Hard. 480; Bushell's Case, 1 Mod. 119; Gwinne v. Pool, Lutw. 290; Ackerly v. Parkinson, 3 Maule & S. 411; Garnett v. Ferrand, 6 B. & C. 611; Miller v. Hope, 2 Shaw, 125; Dicas v. Lord Brougham, 6 C. & P. 249; Houlden v. Smith, 14 Ad. & El. (N. S.) 841, 19 L. J. Q. B. 170; Ward v. Freeman, 2 Ir. C. L. Rep. 460; Kemp v. Neville, 10 C. B. (N. S.) 523; Scott v. Stansfield, 3 L. R. Ex. 220; Butler v. Potter, 17 Johns. (N. Y.) 145; Little v. Moore, 4 N. J. 74; Hamilton v. Williams, 26 Ala. 527; Craig v. Burnett, 33 Ala. 728; Carter v. Dow, 16 Wis. 298; Wall v. Trumbull, 16 Mich. 228; Clark v. Holdridge, 58 Barb. (N. Y.) 61; McCall v. Cohen, 16 S. Car. 445, 42 Am. Rep. 641; Grove v. Van Duyn, 44 N. J. L. 654; Busteed v. Parsons, 54 Ala. 393, 25 Am. Rep. 688; Rains v. Simpson, 50 Tex. 495, 32 Am. Rep. 609; Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65; Lowther v. Earl of Radnor, 8 East. 113; Pike v. Carter, 3 Bing. 78; Basten v. Carew, 3 B. & C. 652; Holroyd v. Breare, 2 B. & Ald. 473; Fawcett v. Fowlis, 7 B. & C. 394; Evans v. Foster, 1 N. H. 374; Burnham v. Stevens, 33 N. H. 247; Jordan v. Hanson, 49 N. H. 199, 6 Am. Rep. 508; Ramsey v. Riley, 18 Ohio, 157; Stone v. Graves, 8 Mo. 148, 40 Am. Dec. 131; Lenox v. Grant, 8 Mo. 254; Taylor v. Doremus, 16 N. J. 473; Morris v. Carey, 27 N. J. 377; Mangold v. Thorpe, 33 N. J. 134; Hamilton v. Williams, 26 Ala. 527; Walker v. Hallock, 32 Ind. 239; Morrison v. McDonald, 21 Me. 550; Downing v. Herrick, 47 Me. 462; Londegan v. Hammer, 30 Iowa, 508; Fuller v. Gould, 20 Vt. 643; Ely v. Thompson, 3 A. K. Marsh. 70; Reid v. Hood, 2 N. & McCord (S. C.) 168, 10 Am. Dec. 582; Wilson v. Mayor, 1 Den. (N. Y.) 595, 43 Am. Dec. 719; East River Gas L. Co. v. Donnelly, 93 N. Y. 557; Steele v. Dunham, 26 Wis. 393; Porter v. Haight, 45 Cal. 631; Harman v. Brotherson, 1 Den. (N. Y.) 537; Palmer v. Lawrence, 6 Lans. (N. Y.) 282; Wertheimer v. Howard, 30 Mo. 420; Chickering v. Robinson, 3 Cush. (Mass.) 543; Way v. Townsend, 4 Allen (Mass.) 114; Millard v. Jenkins, 9 Wend. (N. Y.) 298; Wickware v. Bryan, 11 Wend. (N. Y.) 545; Raymond v. Bolles, 11 Cush. (Mass.) 315; Lilienthal v. Campbell, 22 La. Ann. 600; Cunningham v. Bucklin, 8 Cow. (N. Y.) 178, 18 Am. Dec. 432; Pickett v. Wallace, 57 Cal. 555.

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Judicial offices would either go unfilled, or they would be filled only by truckling, time-serving men, if the judicial officer might be called upon, by every person disappointed by his judgment, to defend that judgment at his peril before some other court or tribunal.

As has been well said by Lord TENTERDEN: "In the imperfection of human nature, it is better that an individual should suffer a wrong, than that the course of justice should be impeded and fettered by constant and perpetual restraint and apprehension on the part of those who are to administer it."[1]

§ 581. **Liability not affected by Motive.** Nor can this exemption of judicial officers from civil liability be affected by the motives with which they are alleged to have performed their duties. If the officer be in fact corrupt, the public has its remedy, but the defeated suitor can not attempt to redress himself in an action against the judge, by alleging that the judgment against him was the result of corrupt or malicious motives.[2] The reasons for this rule have been well stated by a distinguished judge, as follows: "Controversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in the courts, in which there is great conflict in the evidence and great doubt as to the law which should govern their decision. It is this class of cases which imposes upon the judge the severest labor, and often creates in his mind a painful sense of responsibility. Yet it is precisely in this class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything, but the soundness of the decision, in explanation of the action of the judge. Just in proportion to the strength of his convictions of the correctness of his own view of the case, is he apt to complain of the judgment against him, and from complaints of the judgment, to pass to the ascription

[1] In Garnett v. Ferrand, 6 B. & C. 611.

[2] Bradley v. Fisher, 13 Wall. (U. S.) 335; Fray v. Blackburn, 3 Best & Smith, 576; Floyd v. Barker, 12 Coke 25; Rains v. Simpson, 50 Tex. 495, 32 Am. Rep. 609; Weaver v. Devendorf, 3 Den. (N. Y.) 117; Pratt v. Gardner, 2 Cush. (Mass.) 63, 48 Am. Dec. 652; Cunningham v. Bucklin, 8 Cow. (N. Y.) 178, 18 Am. Dec. 433; Stone v. Graves, 8 Mo. 148, 40 Am. Dec. 131; Henke v. McCord, 55 Iowa 378; Jones v. Brown, 54 Iowa, 74, 37 Am. Rep. 185; Green v. Talbot, 36 Iowa 499; Wasson v. Mitchell, 18 Iowa 158.

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of improper motives to the judge. When the controversy involves questions affecting large amounts of property, or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision often finds vent in imputations of this character, and from the imperfection of human nature, this is hardly a subject of wonder. If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts, would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action.

If upon such allegations a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection, to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party,—and that judge perhaps one of an inferior jurisdiction,—that he had decided as he did with judicial integrity; and the second judge would be subjected to a similar burden, as he in his turn might also be held amenable by the losing party."[1]

§ 582. **This Immunity extends to Judicial Officers of all Grades.** This exemption from civil action extends to every judicial officer, from the highest judge in the land to the humblest justice who tries petty cases.[2] Whoever is invested with judicial powers, whether of high or low degree, cannot be called to account to the private individual for his acts within his jurisdiction although, as has been seen, the aggrieved party may allege that the act was corrupt or malicious.[3] For such acts, the officer must account only to his conscience and the State.

[1] FIELD, J. in Bradley v. Fisher, 13 Wall. (U. S.) 335.

[2] Garnett v. Ferrand, 6 B. & C. 611; Butler v. Potter, 17 Johns. (N Y.) 145; Pratt v. Gardner, 2 Cush. (Mass.) 63, 48 Am. Dec. 652; Carter v. Dow, 16 Wis. 298; Wall v. Trumbull, 16 Mich. 228.

[3] See cases cited under Note 2 *supra*. There are some dicta to the

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§ 583. **Jurisdiction essential.** But in order that there shall be this immunity from civil action, the act done by the officer must have been done in a matter within his jurisdiction.[1] By this is meant, when the officer assumed to do the act as a judge, that he had judicial jurisdiction of the person acted upon, and of the subject-matter as to which it was done.[2]

Jurisdiction of the person exists when the person acted upon is before the judge, either constructively or in fact, by reason of the service upon him of appropriate process duly issued and executed.[3] Jurisdiction of the subject-matter exists when the officer possesses the powers lawfully conferred to deal with the general subject involved in the action.[4]

Jurisdiction of the subject-matter does not mean that the officer has by the appropriate and proper procedure brought the particular matter in question within his jurisdiction;—whether he has done so or not is often the point most difficult to determine;—but it means that he is by law invested with authority to deal with similar cases,—with cases of that class.

§ 584. **Act must be confined within his Jurisdiction.** And not only must the judge have jurisdiction of the person and the subject-matter, but the act must be confined within that jurisdiction. It must have been done as a judge in his judicial capacity, and within his jurisdiction.[5] "For," as has been said, "it is plain that the fact that a man sits in the seat of justice, though having a clear right to sit there, will not protect him in every act which he may choose or chance to do there. Should such an one, rightfully holding a court for the trial of civil actions, order the head of a by stander stricken off, and be obeyed, he would be liable."[6]

So where a judge was charged with maliciously conspiring with others to institute in his court a malicious prosecution against the

contrary, but they are not sustained by the authorities. The principle is of universal application under the conditions named—judicial duty, jurisdiction.

[1] See cases cited under note 2, § 580, *supra*.

[2] Lange v. Benedict, 73 N. Y. 12, 29 Am. Rep. 80. "Jurisdiction in a judge may be defined as the authority of law to act officially in the matter then in hand." Cooley on Torts, p 417.

[3] Lange v. Benedict, *supra*.

[4] Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129.

[5] Lange v. Benedict, 73 N. Y. 12, 29 Am. Rep. 80.

[6] FOLGER, J. in Lange v. Benedict, *supra*.

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plaintiff, it was held that the defendant's judicial character was no defense, for the act of entering into such an agreement was not done in the course of any judicial proceeding or in the discharge of any judicial function or duty.[1]

§ 585. **Same Subject—When Jurisdiction presumed—Superior and inferior Courts.** A marked distinction is made by the law between courts of general and superior jurisdiction, and those of limited and inferior jurisdiction. In favor of the former, it is presumed that they have not acted without jurisdiction. Whoever assails them, therefore, upon that ground, must be prepared to show wherein the lack of jurisdiction lies.[2] On the contrary, no such presumption is indulged in favor of courts whose jurisdiction is limited and inferior. In such a case the jurisdiction must be made to appear,—that is, it must appear by the record itself. If, therefore, the court acquires jurisdiction only in a certain way, or by certain procedure, or upon a certain contingency, this prerequisite must appear upon the face of the proceedings to have existed in the way and to the extent specified, or the proceedings must fail. Whoever relies upon the judgment of such a court must establish every fact necessary to give it jurisdiction.[3]

This distinction becomes of great importance in determining the liability of the judicial officer who has erroneously assumed

[1] Stewart v. Cooley, 23 Minn. 347, 23 Am. Rep. 690. As to this case Judge COOLEY says: "The wrongful act on the part of the judge here must have consisted in the issuing of process; and as to that he could have had no discretion, if the complaint was sufficient, or if he had, it was a judicial discretion, and to hold him liable by charging some bad motive lying back of it, seems to come directly within the condemnation of Bradley v. Fisher, 13 Wall. 335 above referred to." Cooley on Torts, p. 412, note 5.

[2] Lowry v. Erwin, 6 Rob. (La.) 192, 39 Am. Dec. 556; Palmer v. Oakley, 2 Doug. (Mich.) 433, 47 Am. Dec. 41; Kenney v. Greer, 13 Ill. 432, 54 Am. Dec. 439; Reynolds v. Stansbury, 20 Ohio 344, 55 Am. Dec. 459.

[3] Rossiter v. Peck, 3 Gray (Mass.) 539; Case v. Woolley, 6 Dana (Ky.) 17, 32 Am. Dec. 54; Bloom v. Burdick, 1 Hill (N. Y.) 130, 37 Am. Dec. 299; Lowry v. Erwin, 6 Rob. (La.) 192, 39 Am. Dec. 556. Levy v. Shurman, 6 Ark. 182, 42 Am. Dec. 690; Gay v. Lloyd, 1 Greene (Iowa) 78, 46 Am. Dec. 499; Palmer v. Oakley, 2 Doug. (Mich.) 433, 47 Am. Dec. 41; Spear v. Carter, 1 Mich. 19, 48 Am. Dec. 688; Kenney v. Greer, 13 Ill. 432, 54 Am. Dec. 439; Reynolds v. Stansbury, 20 Ohio, 344, 55 Am. Dec. 459; Tucker v. Harris, 13 Ga. 1, 58 Am. Dec. 488.

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jurisdiction, or has erroneously decided that the power to do a certain act is within the jurisdiction conferred upon him.

If an officer of inferior powers erroneously decides that he has jurisdiction of the subject-matter, or if, having jurisdiction to a limited extent, he exceeds that limit, he is, by a great number of authorities, held to be liable to the party injured thereby. Such a proceeding is without the jurisdiction which the officer, at his peril, is bound not to exceed, and though the act of deciding upon the question of his jurisdiction is, in a measure, a judicial one, yet if as a matter of fact and law he has not jurisdiction, his assumption or exercise of it will, according to these authorities, constitute an actionable wrong, however honest may have been his intention to keep within his powers.[1]

This rule and the reasons for it are well stated in a leading case in Massachusetts.[2] Here, the defendant, a justice of the peace of the county of Middlesex, had assumed jurisdiction of an offense of which the police court of the city of Lowell had by statute exclusive jurisdiction. In the course of the trial of the case, the defendant committed the plaintiff for contempt for refusing to testify. The defendant had authority to so commit the plaintiff if he had had jurisdiction of the offense, but it was held that having no jurisdiction of the offense, the defendant had no power to commit, this power being merely incidental to the authority to try. In giving the opinion of the court, BIGELOW, J., said: "The decision of this case depends on the familiar and well settled rule concerning the liability of courts and magistrates, exercising an inferior and limited jurisdiction, for acts done by them, or by their authority, under color of legal proceedings. One of the leading purposes of every wise system of law is to secure a fearless and impartial administration of justice, and at the same time to guard individuals against a wanton and oppressive abuse of legal authority. To attain this end,

[1] Wingate v. Waite, 6 Mees. & W. 739; Houlden v. Smith, 14 Q. B. 841; Case of the Marshalsea, 10 Coke 68; Groenvelt v. Burwell, 1 Ld. Raym, 454; Yates v. Lansing, 5 Johns. (N. Y.) 282; Phelps v. Sill, 1 Day (Conn.) 315; Palmer v. Carroll, 24 N. H. 314; Craig v. Burnett, 32 Ala. 728; Clarke v. May, 2 Gray (Mass.) 410, 61 Am. Dec. 470; Piper v. Pearson, 2 Gray (Mass.) 120, 61 Am. Dec. 438; Kelly v. Bemis, 4 Gray (Mass.) 84; Hendrick v. Whittemore, 105 Mass. 28; Morrill v. Thurston, 46 Vt. 732; Carleton v. Taylor, 50 Vt. 220; Vaughn v. Congdon, 56 Vt. 111, 48 Am. Rep. 758.

[2] Piper v. Pearson, 2 Gray (Mass.) 120, 61 Am. Dec. 438.

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the common law affords to all inferior tribunals and magistrates complete protection in the discharge of their official functions, so long as they act within the scope of their jurisdiction, however false and erroneous may be the conclusions and judgments at which they arrive.

But on the other hand, if they act without any jurisdiction over the subject-matter, or if having cognizance of a cause, they are guilty of an excess of jurisdiction, they are liable in damages to the party injured by such unauthorized acts. In all cases, therefore, where the cause of action against a judicial officer, exercising only a special and limited authority, is founded on his acts done *colore officii*, the single inquiry is whether he has acted without any jurisdiction over the subject-matter, or has been guilty of an excess of jurisdiction. By this simple test his legal liability will at once be determined.[1] If a magistrate acts beyond the limits of his jurisdiction, his proceedings are deemed to be *coram non judice* and void; and if he attempts to enforce any process founded on any judgment, sentence or conviction in such case, he thereby becomes a trespasser."[2]

§ 586. **Same Subject—Limitations of this Rule.** This doctrine has, however, met with much forcible and reasonable dissent in recent times. There are undoubtedly cases where it is properly applicable, as where jurisdiction is assumed or exercised without even the color of authority, or beyond limits which are clearly and unambiguously defined, or in the face of express statutory prohibitions. But where on the other hand, the officer has jurisdiction of the subject-matter, *i. e.* of that class of cases, but the question of jurisdiction in that particular case depends upon some question for judicial determination, as upon the proper legal construction to be placed upon a doubtful statute, or upon the technical legal sufficiency of the averments of a preliminary complaint or affidavit,—questions upon which he is bound to decide, and questions, too, upon which, as is often the case, the learned judges of the courts of last resort are unable to agree,—

[1] Citing 1 Chitty Pl. 6th Am. Ed. 90, 209–213; Beaurain *v.* Scott, 3 Camp. 388; Ackerley *v.* Parkinson, 3 Maule & Sel. 425, 428; Borden *v.* Fitch, 15 Johns. (N. Y.) 121, 8 Am. Dec. 225; Bigelow *v.* Stearns, 19 Johns. (N. Y.) 39, 10 Am. Dec. 189; Allen *v.* Gray, 11 Conn. 95.

[2] Citing 1 Chitty Pl. 210; Bigelow *v.* Stearns, *supra*; Clarke *v.* May, 2 Gray (Mass.) 410, 61 Am. Dec. 470.

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it certainly seems not only impolitic, but a violation of the well established principle governing the liability of judicial officers to hold the inferior officer liable, at any rate where he has acted in good faith and with an honest endeavor to do the right.

Indeed, it is difficult to see why in this, as in any other case of judicial action, the question of immunity should not be decided regardless of the motive alleged.

That is the doctrine that is applied to the judges of superior courts. Thus in the leading case upon the subject in this country, it is said: "A distinction must be observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised, are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. Thus, if a probate court, invested only with authority over wills, and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if, on the other hand, a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, which is not by the law made an offense, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked. Indeed, some of the most difficult and embarrassing questions which a judicial officer

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is called upon to consider and determine, relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. * * *

The exemption of judges of the superior courts of record from liability to civil suit for their judicial acts, existing when there is jurisdiction of the subject matter, though irregularity and error attend the exercise of the jurisdiction, the exemption cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into, judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort." [1]

And this rule has in recent cases been extended to the case of inferior magistrates. Thus in an action [2] against a justice of the

[1] FIELD, J., in Bradley v. Fisher, 13 Wall. (U. S.) 335.

[2] Grove v. Van Duyn, 44 N. J. L. 654, 42 Am. Rep. 648. And to the same effect are McCall v. Cohen, 16 S. Car. 445, 42 Am. Rep. 641; Ackerley v. Parkinson, 3 M. & S. 411; Maguire v. Hughes, 13 La. Ann. 281; Henke v. McCord, 55 Iowa 378; Lange v Benedict, 73 N. Y. 12, 29 Am. Rep. 80, is an interesting case upon the general question under consideration.

See also per MARCY, J., in Savacool v. Boughton 5 Wend. (N. Y.) 172, 21 Am. Dec. 181: "Many cases may be found wherein it is stated generally that when an inferior court exceeds its jurisdiction, its proceedings are entirely void, and afford no protection to the court, the party, or the officer who has executed its process. This proposition is undoubtedly true in its largest sense, where the proceedings are *coram non judice*, and the process by which the officer seeks to make out his justification shows that the court had not jurisdiction; but I apprehend that it should be qualified where the subject matter of the suit is within the jurisdiction of the court, and the alleged defect of jurisdiction arises from some other cause."

See also Jordan v. Hanson, 49 N. H. 199, 6 Am. Rep. 508.

Why a distinction should be made between officers of different grades, but both dealing judicially with the same question, is not easy to determine satisfactorily. Judge COOLEY, considering this question in his work on Torts, says:

"Why the law should protect the one judge and not the other, and why if it protects one only, it should be the very one who, from his higher position and presumed superior learning and ability ought to be most free from error, are questions of which the following may be suggested as the solution: The inferior judicial

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peace, the Court of Errors and Appeals of New Jersey held him not liable for erroneously assuming that certain facts constituted an offense within his jurisdiction. BEASLEY, C. J., states the true rule in respect to the actionable responsibility of a judicial officer having the right to exercise general powers, to be "that he is so responsible in any given case belonging to a class over which he has cognizance, unless such case is by complaint or other proceeding, put, at least colorably, under his jurisdiction. When the judge is called upon by the facts before him to decide whether his authority extends over the matter, such an officer is not excused for exceeding his jurisdiction because, a limited authority only having been conferred upon him, he best observes the spirit of the law by solving all questions of doubt against his jurisdiction. If he errs in this direction, no harm is done, because he can always be set right by the court having appellate authority over him, and he can have no occasion to take hazards so long as his decision is subject to review. The rule of law, therefore, which compels him to keep within his jurisdiction at his peril, cannot be unjust to him, because, by declining to exercise any questionable authority, he can always keep within safe bounds, and will violate no duty in doing so. Moreover, in doing so he keeps with the presumptions of law, for these are always against the rightfulness of any authority in an inferior court which, under the law, appears doubtful. On the other hand, when a grant of general jurisdiction is made, a presumption accompanies it that it is to be exercised generally until an exception appears which is clearly beyond its intent; its very nature is such as to confer upon the officer entrusted with it more liberty of action in deciding upon his powers than could arise from a grant expressly confined within narrow limits, and the law would be inconsistent with itself if it were not to protect him in the exercise of this judgment. Moreover, for him to decline to exercise an authority because of the existence of a question, when his own judgment favored it, would be to that extent to decline the performance of duty, and measurably to defeat the purpose of the law creating his office; for it can not be supposed that this contemplated that the judge should act officially as though all presumptions opposed his authority when the fact was directly the contrary." Cooley on Torts, 420.

But the same author in his work on Taxation, page 793, Ed. 1886, says: "It has been made a question whether these principles should apply to a case in which these officers are accused of having been actuated by malice, and when the impelling motive has been to inflict injury upon the parties assessed. It has already been seen that assessments, purposely made excessive through evil motive, may be reached and corrected in equity. But to subject every tax officer to the necessity of explaining and justifying his motives to the satisfaction of others, under a penalty of personal responsibility, is perhaps to go beyond what is necessary to the protection of tax payers; and in matters depending on judgment of values would be so dangerous to the

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act is a judicial act, and such officer is not liable in a suit to the person affected by his decision, whether such decision be right or wrong. But when no facts are present, or only such facts as have neither legal value nor color of legal value in the affair, then, in that event, for the magistrate to take jurisdiction is not in any manner the performance of a judicial act, but simply the commission of an official wrong. This criterion seems a reasonable one, it protects a judge against the consequences of every error of judgment, but leaves him answerable for the commission of a wrong that is practically wilful. Such protection is necessary to the independence and usefulness of the judicial officer, and such

officers that it is doubtful if sound policy could sanction it. In a leading case in New York it is declared that the question of motive is not to be raised in a suit against assessors who have kept within their jurisdiction. The assessors, it was said, were judges acting clearly within the scope and limit of their authority. They were not volunteers, but the duty was imperative and compulsory; and acting, as they did, in the performance of a public duty, in its nature judicial, they were not liable to an action, however erroneous or wrongful their determination may have been or however malicious the motive which produced it. Such acts, when corrupt, may be punished criminally, but the law will not allow malice and corruption to be charged in a civil suit against such an officer for what he does in the performance of a judicial duty. The rule extends to judges from the highest to the lowest; to jurors, and to all public officers, whatever name they may bear, in the exercise of judicial power. It of course applies only where the judge or officer had jurisdiction of the particular case, and was authorized to determine it. If he transcends the limits of his authority, he necessarily ceases, in the particular case, to act as judge, and is responsible for all consequences. But with these limitations, the principle of irresponsibility, it was said, so far as respects a civil remedy, is as old as the common law itself. Weaver v. Devendorf, 3 Denio, 117, 120. There is some apparent dissent from this doctrine, but it can hardly be said that there is opposing authority. See Stearns v. Miller, 25 Vt. 20; Parkinson v. Parker, 48 Ia. 667; Dillingham v. Snow, 5 Mass. 547; and compare Babcock v. Granville, 44 Vt. 325.

The same reasons which exempt assessors from responsibility to tax payers exempt them also when the injury from erroneous action results to the public instead of to individuals. Assessors are not therefore liable to a parish in failing to levy a tax equal to the amount voted, where they have acted under an honest belief that they were carrying out the views of the parish. First Parish v. Fiske, 8 Cush. 264. Nor for neglect to commit the tax list to the proper collector, when by an honest mistake of duty it has been committed to another. Lincoln v. Chapin, 132 Mass. 470. For malfeasance in office assessors as well as other officers are liable to criminal penalties. Dillingham v. Snow, 5 Mass. 547."

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responsibility is important to guard the citizen against official oppression."

§ 587. **Not liable when Jurisdiction is assumed through Mistake of Fact.** But even under the more stringent rule, judicial officers can not be held liable for acting without jurisdiction or for exceeding the limits of their authority, where the defect or want of jurisdiction is occasioned by some facts or circumstances applicable to a particular case of which the officer had neither knowledge nor the means of knowlege. In other words, if the want of jurisdiction over a particular case is caused by matters of fact, it must be made to appear that they were known or ought to have been known, to the officer in order to hold him liable for acts done without jurisdiction. Otherwise the maxim *Ignorantia facti excusat* applies.[1]

2. *Quasi-judicial Officers.*

§ 588. **What Duties are judicial—Quasi-judicial.** This immunity from private action is not confined to those only who sit as judges in courts. It extends for the protection of every officer who is called upon to exercise duties which are in their nature judicial,—which are to be performed according to the dictates of his judgment.[2]

Such duties, when not conferred upon courts, or the judges of courts, have sometimes been termed *quasi-judicial* or *discretionary*, but no particular advantage is apparent from the use of this distinctive term. The question depends in each case upon the character of the act.[3] If it be judicial in its nature, the officer acts judicially and is exempt. Nor is it material that the officer usually or often acts ministerially; in those cases in which he does act judicially, he is, nevertheless, exempt.[4]

[1] Clarke *v.* May, 2 Gray (Mass.) 410; 61 Am. Dec. 470; Pike *v.* Carter, 3 Bing. 78 s. c. 10 Moo. 376; Lowther *v.* Earl of Radnor, 8 East. 113; Calder *v.* Halket, 3 Moo. P. C. C. 28; Vaughn *v.* Congdon, 56 Vt. 111, 48 Am. Rep. 758.

[2] See *post*, p. 422, n. 4. "Judicial power," says a learned judge, "is authority vested in some court, officer or person, to hear and determine, when the rights of persons, or property, or the propriety of doing an act are the subject-matter of adjudication. Official action, the result of judgment or discretion, is a judicial act." CLOPTON, J. in Grider *v.* Tally, 77 Ala. 422, 54 Am. Rep. 65.

[3] Wall *v.* Trumbull, 16 Mich. 228.

[4] Wall *v.* Trumbull, *supra*; Jenkins *v.* Waldron, 11 Johns. (N. Y.) 114; 6 Am. Dec. 359; Weaver *v.* Devendorf, 3 Den. (N. Y.) 117.

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This principle embraces the action of arbitrators in their decision upon the controversy submitted to them;[1] jurors in their deliberations and verdicts;[2] assessors in the valuation of property for taxation;[3] commissioners appointed to determine and award damages for property taken by virtue of the right of eminent domain;[4] officers authorized to lay out, alter or discontinue highways;[5] highway officers in deciding upon exemption from highway taxes;[6] members of municipal boards in deciding upon the allowance of claims;[7] collectors of customs in the sale of perishable property;[8] inspectors of elections[9] and board of registration[10] in deciding upon the existence of the necessary qualifications of a voter; school officers in deciding upon the removal of a teacher;[11] aldermen in deciding upon the letting of contracts;[12] a board of county commissioners in deciding upon an application for a permit to sell intoxicating liquors;[13] boards of supervisors

[1] Jones v. Brown, 54 Iowa, 74, 37 Am. Rep. 185; Pappa v. Rose, L. R. 7 C. P. 32, 1 Eng. Rep. 87, s. c. on appeal L. R. 7 C. P. 525, 8 Eng. Rep. 875.

[2] Hunter v. Mathis, 40 Ind. 356; Turpen v. Booth, 56 Cal. 65, 38 Am. Rep. 48.

[3] Wall v. Trumbull, 16 Mich. 228; Dillingham v. Snow, 5 Mass. 547; Easton v. Calendar, 11 Wend. (N. Y.) 90; Weaver v. Devendorf, 3 Den. (N. Y.) 117; Vail v. Owen, 19 Barb. (N. Y.) 22; Brown v. Smith, 24 Id. 419; People v. Reddy, 43 Id. 539; Vose v. Willard, 47 Id. 320; Bell v. Pierce, 40 Id. 51, Barhyte v. Shepherd, 35 N. Y. 238; Western R. R. Co. v. Nolan, 48 Id. 513; Pentland v. Stewart, 4 Dev. & Bat. (N. C.) 386; Steam Navigation Co. v. Wasco County, 2 Ore. 209; Macklot v. Davenport, 17 Iowa, 379; Muscatine, &c. R. R. Co. v. Horton, 38 Id. 33; Walker v. Hallock, 32 Ind. 239; Lilienthal v. Campbell, 22 La. Ann. 600; Williams v. Weaver, 75 N. Y. 30; Buffalo &c. R. R. Co. v. Supervisors, 48 N. Y. 93; McDaniel v. Tebbetts, 60 N. H. 497; Wilson v. Marsh, 34 Vt. 352; San José Gas Co. v. January, 57 Cal. 614.

[4] Van Steenbergh v. Bigelow, 3 Wend. (N. Y.) 42.

[5] Sage v. Laurain, 19 Mich. 137.

[6] Harrington v. Commissioners, &c. 2 McCord (S. C.) 400.

[7] Wall v. Trumbull, 16 Mich. 228.

[8] Gould v. Hammond, 1 McAllister (U. S. C. C.) 235.

[9] Gordon v. Farrar, 2 Doug. (Mich.) 411; Jenkins v. Waldron, 11 Johns. (N. Y.) 114, 6 Am. Dec. 359; Miller v. Rucker, 1 Bush. (Ky.) 135; Carter v. Harrison, 5 Blackf. (Ind.) 138; Rail v. Potts, 8 Humph. (Tenn.) 225; Peavey v. Robbins, 3 Jones (N. C.) L. 339; Caulfield v. Bullock, 18 B. Mon. (Ky.) 494; Elbin v. Wilson, 38 Md. 135; Friend v. Hamill, 34 *Id.* 298.

[10] Fausler v. Parsons, 6 W. Va. 486, 20 Am. Rep. 431.

[11] Burton v. Fulton, 49 Penn. St. 151. See also Chamberlain v. Clayton, 56 Iowa 331, 41 Am. Rep. 101.

[12] East River Gas L. Co. v. Donnelly, 25 Hun (N. Y.) 614, s. c. 93 N. Y. 557.

[13] State v. Commissioners, 45 Ind. 501.

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in determining upon the sufficiency of a bond of an officer, and whether by failing to file a new bond required by them, he has forfeited his office;[1] pilot officers in deciding that a pilot was no longer authorized to act as such and therefore revoking his license.[2]

An attempt has been made in some cases to make a distinction between those officers whose duties lie outside the domain of courts—the so-called *quasi*-judicial officers—and the judges of courts, to the effect that while the latter are exempt, the former may be made liable if their motives were corrupt or malicious.[3] This distinction, however, is believed to be not well founded. If the action is really judicial, the immunity which adheres to judicial action should be applied whether the officer sits upon the bench of a regularly established court or not. As has been said, if the action can be maintained by the allegation of improper motives, no litigant will fail to allege them, and the public officer may be constantly called upon to defend himself from actions brought with motives fully as malicious as those which are alleged to have inspired him. Public policy requires that *all* judicial action shall be exempt from question in private suits, and the best considered cases so declare the rule.[4]

[1] People v. Supervisors, 10 Cal. 344, 346.

[2] Downer v. Lent, 6 Cal. 94, 65 Am. Dec. 489.

[3] See Hoggatt v. Bigley, 6 Humph. (Tenn.) 236; Baker v. State, 27 Ind. 485; Chickering v. Robinson, 3 Cush. (Mass.) 543; Gregory v. Brooks, 37 Conn. 365.

[4] This distinction was expressly repudiated so far as it applied to judge of superior courts in Bradley v. Fisher, 13 Wall. (U. S.) 335, and the reasons there given apply with equal force to all judicial action. It was also repudiated as to *arbitrators* in Jones v. Brown, 54 Iowa 74, 37 Am. Rep. 185, and it was doubted even as to that class called *quasi*-judicial officers in Chamberlain v. Clayton, 56 Iowa 331, 41 Am. Rep. 101. So in a recent case before the Court of Appeal of New York, an action was brought against the members of a common council for damages alleged to have been sustained because the defendants wilfully and corruptly refused to accept the plaintiff's bid for doing certain public work, but the complaint upon demurrer was held to state no cause of action. DANFORTH J. said that it is "the well settled rule of law that no public officer is responsible in a civil suit for a judicial determination, however erroneous or wrong it may be, or however malicious even the motive which produced it." East River Gas L. Co. v. Donelly, 93 N. Y. 557, affirming 25 Hun, 614.

The distinction was also ignored in an action against pilot commissioners for "wrongfully and maliciously" revoking a pilot's license. Downer v.

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3. *Legislative Officers.*

§ 589. **Same Immunity extends to Legislative Action.** The same immunity from private action extends to legislative officers while acting within the limits assigned to them. While their duties are not strictly judicial in their nature, they are called upon to exercise discretion, judgment and foresight. They are chosen to make such provisions, within their jurisdiction, as to them seem for the best interests of their constituents, and they cannot be called upon to defend their action at the suit of private individuals, even though it be alleged that they acted corruptly or maliciously.[1]

This exemption is not confined to the state or national legislatures but it applies also to inferior legislative bodies such as boards of supervisors, county commissioners, city councils and other bodies of a like nature.[2]

4. *Ministerial Officers.*

§ 590. **In general—Liable to party specially Injured.** Some consideration has already been given to the question of when the duties to be performed are so particular to the individual as to give him a right of action for an injury sustained by him in consequence of the failure to perform such duties.[3]

In accordance with the principles there laid down, it may be said that wherever the law imposes upon a public officer the performance of ministerial duties, in which a private individual has a special and direct interest, the public officer is liable to such individual for any injury which he may sustain in consequence of the failure or neglect of the officer either to perform them at all, or to perform them properly. In such a case the officer is liable as well for non-feasance as for misfeasance or malfeasance.[4]

Lent, 6 Cal. 94, 65 Am. Dec. 489, and in an action against *grand jurors*; Turpen v. Booth, 56 Cal. 65, 38 Am. Rep. 48. So it is said by BEARDSLEY, J. "The rule extends to judges from the highest to the lowest; to jurors and *to all public officers whatever name they may bear*, in the exercise of judicial power." In Weaver v. Devendorf, 3 Den. (N. Y.) 117. See also Robinson v. Rowland, 26 Hun (N. Y.) 501; Scott v. Stansfield, L. R. 3 Ex. 220.

[1] See Cooley on Torts, 376.

[2] Jones v. Loving, 55 Miss. 109, 30 Am. Rep. 508; County Commissioners v. Duckett, 20 Md. 469; Borough of Freeport v. Marks, 59 Penn. St. 253; Baker v. State, 27 Ind. 485. See City of Pontiac v. Carter, 32 Mich. 164.

[3] *Ante*, § 578.

[4] Rowning v. Goodchild, 2 W. Bl.

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It is no defense to such an officer upon whom the law has imposed the positive duty of performance, that he was mistaken as to the nature or extent of his obligation, or that he acted in entire good faith and with an honest intention to do his duty.[1]

So it is immaterial that the duty is one primarily imposed upon public grounds, and therefore a duty owing primarily to the public; the right of action springs from the fact that the private individual receives a special and peculiar injury from the neglect in performance, against which it was in part the purpose of the law to protect him.[2] It is also immaterial that the failure in performance is made by law a penal offense.[3]

§ 591. **Same Subject—Nature of the Duty governs Liability.** Here, as in the case of judicial officers, it is the nature of the duty, rather than the title of the officer, that determines the liability. Judicial officers are frequently called upon to perform purely ministerial duties, and as to those duties the rule governing ministerial action applies.[4]

§ 592. **Same Subject—What Duties are ministerial.** The difficulty in dealing with questions of judicial and ministerial action does not lie so much in the determination of the proper principle of law to be applied when the nature of the action has been ascertained, as in determining whether the given act is judicial or ministerial in its character.

The majority of cases, perhaps, are easily distinguished, but there are still many others which lie so near the line that courts

906; Ashby *v.* White, 2 Ld. Raym, 938; Lane *v.* Cotton, 1 Salk. 17; Amy *v.* Supervisors, 11 Wall. (U. S.) 136; Sawyer *v.* Corse, 17 Gratt. (Va.) 230, 94 Am Dec. 445; Bassett *v.* Fish, 12 Hun (N. Y.) 209; Piercy *v.* Averill, 37 *Id.* 360; Bennett *v.* Whitney, 94 N. Y. 302; Jenner *v.* Joliffe, 9 Johns. N. Y. 381; Adsit *v.* Brady, 4 Hill (N. Y.) 630, 40 Am. Dec. 305; Rounds *v.* Mansfield, 38 Me. 586; Bailey *v.* Mayor, 3 Hill N. Y. 531, 38 Am. Dec. 669; Maxwell *v.* Pike, 2 Me. 8; McCarty *v.* Bauer, 8 Kan. 237; Wilson *v.* Mayor, 1 Den. (N. Y.) 595, 43 Am. Dec. 719; Robinson *v.* Chamberlain, 34 N. Y. 389, 90 Am. Dec. 713; Raynsford *v.* Phelps, 43 Mich. 342, 38 Am. Rep. 189; Clark *v.* Miller, 54 N. Y. 528, 534; Keith *v.* Howard, 24 Pick. (Mass.) 292; Hover *v.* Barkhoof, 44 N. Y. 113; St. Joseph F. & M. Ins. Co. *v.* Leland, 90 Mo. 177, 59 Am. Rep. 9; Grider *v.* Tally, 77 Ala. 422, 54 Am. Rep. 65.

[1] Amy *v.* Supervisors, 11 Wall. (U. S.) 136.

[2] Raynsford *v.* Phelps, 43 Mich. 342, 38 Am. Rep. 189.

[3] Raynsford *v.* Phelps, *supra;* Hayes *v.* Porter, 22 Me. 371.

[4] People *v.* Provines, 34 Cal. 520; People *v.* Bush, 40 Cal. 344; Grider *v.* Tally, 77 Ala. 422, 54 Am. Rep. 65.

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have found it extremely difficult to decide upon the true nature of the duty.

No inflexible rule can be laid down by which this difficulty can be solved in every case. Each case must be determined upon an examination of all of its facts. The most important criterion, perhaps, is that the duty has been positively imposed by law and its performance is required at a time and in a manner specifically designated, nothing being left to the judgment or discretion of the officer. As is said by a learned judge: "The duty is ministerial, when the law, exacting its discharge, prescribes and defines the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion. Official action, the result of performing a certain specific duty arising from designated facts, is a ministerial act." [1]

In the same line, a ministerial act has also been defined as "an act performed in a prescribed manner, in obedience to the law or the mandate of legal authority, without regard to, or the exercise of, the judgment of the individual upon the propriety of the act's being done." [2]

That a necessity may exist for the ascertainment, from personal knowledge or by information derived from other sources, of those facts or conditions, upon the existence or fulfilment of which, the performance of the act becomes a clear and specific duty, does not operate to convert the act into one judicial in its nature. Such is not the judgment or discretion which is an essential element of judicial action.[3]

Thus a sheriff must determine whether process coming into his hands for service, is issued from a court of competent jurisdiction and is regular on its face, and a treasurer of public money must ascertain whether a warrant for its payment is drawn by such an officer and is in such form that its payment becomes a duty; but the execution of the process and the payment of the warrant are ministerial acts. A judge must determine whether a judgment is entered according to the verdict of the jury or the the consideration of the court, and whether a bill of exceptions

[1] CLOPTON, J. in Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65.

[2] In Pennington v. Streight, 54 Ind. 376; Flournoy v. City of Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468.

[3] Grider v. Tally, *supra*; Flournoy v. City of Jeffersonville, *supra;* Betts v. Dimon, 8 Conn. 107; Ray v. City of Jeffersonville, 90 Ind. 572.

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correctly recites the proceedings; but the act of signing the judgment and bill of exceptions is ministerial.

It has been said that, perhaps, as safe a criterion as any other to ascertain whether a private suit will or will not lie, is to adopt the rule which governs in cases in which a mandamus would or would not be granted to compel the officer to perform the duty.[1]

This rule is that in matters which require judgment and consideration to be exercised by the officer, or which are dependent upon his discretion, mandamus will not be granted, but that for ministerial acts in the performance of which no exercise of judgment or discretion is required, the writ will be granted.[2]

II.

LIABILITY FOR THE TORTS OF THEIR OFFICIAL SUBORDINATES.

§ 593. **Public Officer of Government not liable for Acts of his official Subordinate.** Public officers of the government, in the performance of their public functions, are not liable to third persons for the misconduct, negligence or omissions of their official subordinates.[3] This immunity rests upon motives of public policy, the necessities of the public service, and the perplexities and embarassments of a contrary doctrine.[4]

These official subordinates are themselves public officers though of an inferior grade, and are directly liable, in those cases in which any public officer is liable, for their own defaults. Such subordinate officers are not infrequently appointed directly by the governmental power and removable only at its pleasure, but even in those cases in which they are appointed and removed by their immediate official superior, the latter is not liable, unless he has himself been negligent either in their selection or retention,[5]

[1] Rains v. Simpson, 50 Tex. 495, 32 Am. Rep. 609.

[2] Carrick v. Lamar, 116 U. S. 423; Decatur v. Paulding, 14 Pet. (U. S.) 497; United States v. Guthrie, 17 How. (U. S.) 284; United States v. Commissioner, 5 Wall. (U. S.) 563; Litchfield v. Register, 9 Wall. (U. S.) 575.

[3] City of Richmond v. Long, 17 Gratt. (Va.) 375, 94 Am. Dec. 461; Sawyer v. Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445; Dunlop v. Munroe, 7 Cranch. (U. S.) 242; Tracy v. Cloyd, 10 W. Va. 19; Lane v. Cotton, 1 Ld. Raym. 646; Whitfield v. Lord Le Despencer, 2 Cowp. 754.

[4] City of Richmond v. Long, 17 Gratt. (Va.) 375, 94 Am. Dec. 461.

[5] Wiggins v. Hathaway, 6 Barb. (N. Y.) 632; Schroyer v. Lynch, 8 Watts. (Penn.) 453.

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or in the manner of their appointment or qualification;[1] or in superintending the discharge of the duties in his office.[2]

§ 594. **Same Subject—To what Officers this Rule applies.** This rule has frequently been applied to the officials of the post office department, and the law is well settled both in England and America, that the postmaster general, the local postmasters, and their assistants and clerks appointed and sworn as required by law, are public officers, each of whom is responsible for his own defaults only, and not for those of any of the others, although selected by him, and subject to his orders,[3] unless he has negligently or wilfully appointed or retained unfit or improper persons;[4] or has failed to require of them conformity to the prescribed regulations;[5] or has so carelessly conducted the affairs of his office as to furnish opportunity for such default;[6] or unless he has co-operated in, or authorized the wrong.[7]

Whether contractors for carrying the mail are public governmental officers within the meaning of this rule, so as to be exempt from liability for the defaults of their subordinates, is a question upon which there is a conflict of authority, but the better opinion is that they are not.[8]

So it has been held that the captain of a ship of war, whose subordinate officers are appointed by the government, is not liable for an injury caused by the negligence of his lieutenant.[9]

And a confederate district commissary in Virginia during the late war, was held not responsible for the misfeasances and wrong

[1] Bishop v. Williamson, 11 Me. 495.

[2] Dunlop v. Munroe, 7 Cranch (U. S.) 242; Schroyer v. Lynch, *supra*.

[3] Keenan v. Southworth, 110 Mass. 474, 14 Am. Rep. 613; Lane v. Cotton, 1 Ld. Raym. 646; Whitfield v. Lord Le Despencer, 2 Cowp. 754; Dunlop v. Munroe, 7 Cranch. (U. S.) 242; Schroyer v. Lynch, 8 Watts. (Penn.) 453; Bishop v. Williamson, 11 Me. 495; Hutchins v. Brackett, 22 N. H. 252, 53 Am. Dec. 249.

[4] Wiggins v. Hathaway, 6 Barb. (N. Y.) 632.

[5] Bishop v. Williamson, 11 Me. 495. In this case the postmaster was held liable for the default of an assistant whom he had not required to take the oath prescribed by law. To same effect: Sawyer v. Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445; Bolan v. Williamson, 1 Brev. (S. C.) 181.

[6] Dunlop v. Munroe, 7 Cranch. (U. S.) 242; Ford v. Parker, 4 Ohio St. 576.

[7] Tracy v. Cloyd, 10 W. Va. 19.

[8] Sawyer v. Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445; *contra*, Conwell v. Voorhees, 13 Ohio 523, 42 Am. Dec. 206; Hutchins v. Brackett, 22 N. H. 252, 53 Am. Dec. 248.

[9] Nicholson v. Mounsey, 15 East. 384.

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doings of his subordinates unless he co-operated in or authorized the wrong.[1] This rule has also been extended to the case of persons acting in the capacity of public agents engaged in the public service and acting solely for the public benefit, although not strictly filling the character of officers or agents of the government. Thus it has been held that overseers of highways intrusted with the supervision of highways, discharging the duties gratuitously and being personally guilty of no negligence, are not responsible for an injury sustained by an individual through the negligence of workmen employed under them.[2] So trustees and commissioners acting gratuitously for the benefit of the public and intrusted with the conduct of public works are not liable for an injury occasioned by the negligence or unskillfulness of workmen and contractors necessarily employed by them in the execution of the work.[3]

A collector of customs is not personally liable for a tort committed by his subordinates, there being no evidence to connect the collector personally with the wrong, or that the subordinates were not competent, or were not properly selected for their positions.[4]

III.

FOR TORTS OF HIS PRIVATE SERVANT OR AGENT.

§ 595. **Liable for Torts of his private Servant or Agent.** A public officer is subject to the same liability for the torts of his own private servant or agent as adheres to any other principal.[5]

[1] Tracy v. Cloyd, *supra*.

[2] Holliday v. St. Leonard, 11 Com. B. (N. S.) 192.

[3] Hall v. Smith, 2 Bing. 156; Harris v. Baker, 4 Maule & S. 27; Sutton v. Clarke, 6 Taunt. 34; Holliday v. St. Leonard, *supra*.

[4] Robertson v. Sichel, 127 U. S. 507.

[5] Sawyer v. Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445.

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CHAPTER IV.

THE DUTIES AND LIABILITIES OF THE PRINCIPAL TO THE AGENT.

§ 596. In general—Payment of Compensation—Indemnity.

I. The Payment of Compensation.

1. The Agent's Right to Compensation.

597. Agreement to pay Compensation.
598. Express Agreement conclusive.
599. When Agreement must be express.
600. When Agreement to pay will not be implied.
601. When Promise to pay will be implied.
602. Unauthorized Agent entitled to Compensation if Acts are ratified.

2. The Amount of the Compensation.

603. Express Contract governs.
604. May be left for Principal to determine.
605. In the Absence of express Agreement, Law implies reasonable Compensation.
606. What Elements may be considered.
607. What Evidence as to Value is admissible.
608. Agent continuing after Expiration of Term presumed to be at prior Compensation.

3. When Compensation is Considered to be Earned.

609. In general.
610. Compensation earned when Undertaking fully completed.
§ 611. Same Subject — When full Performance a Condition precedent.
612. Same Subject — Not defeated by Principal's Default.
613. Same Subject — No Defense that Principal realized no Profit.

1. Revocation by Act of Principal.

614. When Agent is entitled to Compensation if Authority is revoked before Performance.

a. Authority Rightfully Revoked.

615. Same Subject — Authority rightfully Revoked.
616. Same Subject — Agency at Will of the Principal.
617. Same Subject — Agency terminable on Contingency.
618. Same Subject — Agency terminable only on Breach of express or implied Condition.
619. Same Subject — When terminated for Agent's Misconduct.

b. Authority Wrongfully Revoked.

620. When Agent discharged without Cause, Breach of implied Contract.
621. Same Subject — Breach of express Contract, Agent's Remedies.
622. Same Subject — The Measure of Damages.
623. Same Subject—Duty of Agent to seek other Employment.

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§ 624. When Right of Action accrues.
625. No Damages if Agent acquiesces in Discharge.

2. Revocation by Operation of Law.

626. No Damages where Agency revoked by Death of the Principal.
627. Same Rule where Agency revoked by Insanity of the Principal.
628. Rule where Agency revoked by Bankruptcy of Principal.
629. Rule where Agency revoked by Death of the Agent.
630. Rule where Agency revoked by Insanity of the Agent.
631. How when Agency terminated by Agent's Sickness or Incapacity.

3. Abandonment by Agent.

632. 1. When Abandonment lawful.
633. 2. When Abandonment wrongful.
634. Same Subject — Entire and severable Contracts, Right to Compensation.
635. Same Subject — The Rules Stated.
636. Same Subject — The more liberal Rule, Britton *v.* Turner.
637. Same Subject — Further of the rule of Britton *v.* Turner.
638. Brief Absences no Abandonment.
639. Condonation of Abandonment.
640. What will excuse Abandonment — Sickness — Epidemic.
641. Contracts not to terminate without Notice. Forfeiture for Breach.
642. Same Subject — What works a Forfeiture.
643. Agent cannot recover Compensation from either Party when double Agency unknown.
§ 644. Same Subject — May recover when double Agency was fully known and assented to.
645. Agent cannot Recover Compensation if Agency was unlawful.
646. When Agent can recover for extra Services.
647. Principal's Right of Recoupment.
648. Same Subject — What Damages may be Recouped.
649. Same Subject — Limit of Recovery.
650. Same Subject — Not cut off by Assignment.
651. No Recoupment against an Infant.

II. The Agent's Right to Reimbursement.

652. Agent must be reimbursed for proper Outlays.

III. The Agent's Right to Indemnity.

653. Agent must be indemnified against Consequences of lawful Acts.
654. No Indemnity where Act is unlawful.

IV. The Agent's Right to Protection from Injury.

655. In general.

1. From the Risks incident to the Business.

656. General Rule — Principal not liable.

2. From the Negligence of the Principal.

657. Principal responsible for his own Negligence.
658. 1. For dangerous Premises.
659. 2. For dangerous Tools and Machinery.
660. 3. For Injuries resulting from Failure to repair as agreed.
661. Same Subject.

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§ 662. 4. For Employment of incompetent Servants.
663. 5. For injuries outside of Employment.
3. For Negligence of his General Superintendent.
664. Principal cannot relieve himself by delegating Duties.
665. Liable for Negligence of general Agent or Superintendent.
666. When liable to Agents of Contractor.
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§ 596 **In general — Payment of Compensation — Indemnity.** It is obvious that the most important claims which the agent has upon the principal are 1. The payment of his compensation, and 2. Indemnity against loss and injury incurred in the performance of his duties. Incidental to these, and to secure their recognition and observance, is 3. The agent's right of lien.

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L

THE PAYMENT OF COMPENSATION.

1. *The Agent's Right to Compensation.*

§ 597. **Agreement to pay Compensation—Express—Implied.** It is entirely competent for the parties to agree expressly not only that the agent shall be compensated for his services, but that his compensation shall be a certain sum, or shall be paid in a certain way, or shall be ascertained in a particular manner. It is also competent for them to agree that he shall be compensated only in a certain event, or that he shall receive no compensation at all.

In practice, however, it is frequently if not commonly found that the parties have not made any express agreement at all, or that if they have attempted to do so, the agreement does not provide for all of the details or contingencies, so that the questions are constantly arising, when will the law imply a promise to pay compensation, and how shall the amount to be paid be ascertained.

§ 598. **Express Agreement conclusive.** Wherever the parties have expressly agreed upon the fact that compensation shall or shall not be paid, or shall be paid only in a certain event, that agreement, in the absence of fraud or mistake of fact, is conclusive. If the principal has expressly agreed to pay a compensation, the fact that the service was, through no fault of the agent, of no value to him furnishes no excuse for not paying. So if the agent has expressly agreed to serve without compensation, he will have no claim for wages however beneficial his services may have proved to the principal. And so if compensation is to be paid only in a certain event or upon the happening of a given contingency, no claim can arise except upon the happening of the event on contingency agreed upon.[1]

§ 599. **When Agreement must be express.** There are certain cases where the promise to pay compensation must have been express. Thus where services are rendered for each other by near relatives or others constituting members of the same family, the law presumes that they are inspired by motives of affection,

[1] Zerrahn v. Ditson, 17 Mass. 553; Lockwood v. Levick, 8 C. B. (N. S.) 603.

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gratitude or other considerations than those of a pecuniary nature, and in order to rebut this presumption, there must be clear and unequivocal evidence of a promise or agreement to pay for the services rendered. There must be shown to have been something more than a mere *intention* to pay, based upon gratitude or friendship. There must have been an *agreement* to pay.[1] This rule is most frequently applied to cases where the relation sustained is rather that of master and servant than that of principal and agent, but the underlying principle is the same.[2]

§ 600. **When Agreement to pay will not be implied.** The mere fact that services have been rendered by the agent for the principal is not, of itself, sufficient to raise a promise to pay therefor, but they must have been rendered under circumstances from which a promise to pay can be inferred.[3] No recovery can be had for services, however valuable, or however necessary, which have been rendered without the express or implied request of the principal. A man can not, by mere obtrusion of services create an obligation to pay for them.[4]

[1] Hall *v.* Finch, 29 Wis. 278, 9 Am. Rep. 559; Thorp *v.* Bateman, 37 Mich. 68; Coe *v.* Wager, 42 Mich. 49; Duffey *v.* Duffey, 44 Penn. St. 399; Houck *v.* Houck, 99 Penn. St. 552; Hall *v.* Hall, 44 N. H. 293; Kaye *v.* Crawford, 22 Wis. 322; Griffin *v.* First National Bank, 74 Ill. 259; Wilson *v.* Wilson, 52 Iowa, 44; Allen *v.* Allen, 60 Mich. 635; Briggs *v.* Briggs, 46 Vt. 571; Scully *v.* Scully, 28 Iowa, 548; Curry *v.* Curry, 114 Penn. St. —; Keegan *v.* Malone, 62 Iowa, 208; Ayres *v.* Hull, 5 Kans. 419; Sawyer *v.* Hebard, 58 Vt. 375; King *v.* Kelly, 28 Ind. 89; Faloon *v.* McIntyre, 118 Ill. 292; Morris *v.* Barnes, 85 Mo. 412.

[2] See the discussion in Wood's Master and Servant, sec. 72. See also 26 Cent. L. Jour. 51.

[3] Wood *v.* Brewer, 66 Ala. 570; Cincinnati, &c. R. R. Co. *v.* Lee, 37 Ohio St. 479; Lange *v.* Kaiser, 34 Mich. 318.

[4] This rule is tersely expressed by BELL, J. as follows: "It is settled that no man can do another an unsolicited kindness, and make it a matter of claim against him; and it makes no difference whether the act was done from mere good will or in the expectation of compensation. Unless the party benefited has done some act from which his assent to pay for the service may be fairly inferred, he is not bound to pay." In Chadwick *v.* Knox, 31 N. H. 226, 64 Am. Dec. 329; citing Reason *v.* Wirdnam, 1 Car. & P. 434; Pelly *v.* Rawlins Peak's Ad. Cas. 226; Alexander *v.* Vane, 1 Mees. & Wels. 511; Parker *v.* Crane, 6 Wend. (N. Y.) 647; 1 Sel. N. P. 48; 2 Greenl. Ev. 83. See also, Palmer *v.* Haverhill, 98 Mass. 487; Bartholomew *v.* Jackson, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237. In this case the plaintiff had voluntarily removed defendant's wheat from a burning field to save it from destruction. PLATT, J. said: "The plaintiff performed the service with-

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So no recovery can be had for services, although requested, if they were rendered as a spontaneous act of kindness or in hope of receiving compensation, but without an express or implied promise to pay it. *A fortiori* can no recovery be had for services volunteered upon the chances of obtaining future employment. Such services are mere gratuities.[1]

Illustrations of this are found where one undertakes to do some act for another out of kindness or friendship merely, or with a hope and, perhaps, an expectation that the other will recognize the value of the services and compensate him accordingly. So architects, engineers, authors, artists and others who undertake to furnish a satisfactory plan, design, machine, story or other thing in competing for a prize, contract or reward, but without success, can have no claim for compensation in the absence of an express agreement to pay it, although they may have been requested to compete.[2]

No contract for payment will be implied where the implication would be repugnant to an express promise, or where the circumstances rebut all the grounds upon which a promise to pay could be inferred.[3] So where the circumstances account for the transaction on some ground more probable than that of a promise of recompense, no promise will be implied.[4]

All contracts for services must be good or bad at their incep-

out the privity or request of the defendant, and there was, in fact, no promise express or implied. If a man humanely bestows his labor, and even risks his life, in voluntarily aiding to preserve his neighbor's house from destruction by fire, the law considers the service rendered as gratuitous, and it therefore forms no ground of action." Seals *v.* Edmondson, 78 Ala. 295, 49 Am. Rep. 51; Allen *v.* Bryson, 67 Iowa, 591, 56 Am. Rep. 358.

[1] Osborne *v.* Governors, 2 Strange, 728; Scott *v.* Maier, 56 Mich. 554, s. c. sub. nom; Scott *v.* Martin, 56 Am. Rep. 402; Wood *v.* Ayres, 39 Mich. 345, 33 Am. Rep. 396; Bartholomew *v.* Jackson, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237; James *v.* O'Driscoll, 2 Bay (S. C.) 101, 1 Am. Dec. 632; St. Jude's Church *v.* VanDenberg, 31 Mich. 287; Livingston *v.* Ackeston, 5 Cow. (N. Y.) 531; Nicholson *v.* Chapman, 2 H. Blackstone 254; Smart *v.* Guardians, 36 Eng. L. & Eq. 496; Otis *v.* Jones, 21 Wend. (N. Y.) 394; Ehle *v.* Judson, 24 Wend. (N. Y.) 97; Eastwood *v.* Kenyon, 11 Ad. & El. 438; Hertzog *v.* Hertzog, 29 Penn. St. 465; Seals *v.* Edmondson, 78 Ala. 295; 49 Am. Rep. 51.

[2] Scott *v.* Maier, 56 Mich. 554, 56 Am. Rep. 396; Palmer *v.* Haverhill, 98 Mass. 487.

[3] Watson *v.* Steever, 25 Mich. 386; Coe *v.* Wager, 42 Mich. 49; St. Jude's Church *v.* VanDenberg, 31 Mich. 287.

[4] Wood *v.* Ayres, 39 Mich. 345, 33 Am. Rep. 396.

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tion, and a party will not be permitted on account of subsequent events, to recover for services which when rendered were intended to be gratuitous.[1]

Neither will purely gratuitous services furnish a good consideration for a subsequent promise to pay for them,[2] but when beneficial services, not intended to be gratuitous, have been rendered under such circumstances that no legal claim exists therefor, a subsequent promise to pay in consideration of the benefit received is binding.[3]

§ 601. **When Promise to pay will be implied.** But whenever services are rendered by one person at the express request of another, the law will, except in the case of near relatives or others who are members of the same family, presume that the person for whom they were rendered intended to pay for them.[4] If the latter alleges that they were to be gratuitous, the burden of proof is upon him to establish it.[5] This is particularly true where the services rendered are in the line of the agent's business or profession, or of a kind that are usually paid for. Thus if one employs an attorney to try his case in court, or a physician to attend his child in illness, or an auctioneer to sell his goods at an auction, or a broker to effect insurance upon his ship, or an architect to superintend the building of his house, but says nothing about paying, the law will presume that the agent was to be paid for his services, and if the party alleges that the services were to be rendered without charge, he must prove it.

So though there be no express request, a promise to pay may be implied from the circumstances of the case. Thus if beneficial services are rendered for a person under such circumstances as to show that the agent expects to be paid for them as a matter of right, and the person for whom they are rendered does nothing to disabuse him of this expectation, but permits him to ren-

[1] James v. O'Driscoll, 2 Bay (S. Car.) 101, 1 Am. Dec. 632.

[2] Allen v. Bryson, 67 Iowa, 591, 56 Am. Rep. 358, citing Cook v. Bradley, 7 Conn. 57, 18 Am. Dec. 79; Williams v. Hathaway, 19 Pick. (Mass.) 387; Dawson v. Dawson, 12 Iowa, 512; McCarthy v. Hampton, 61 Iowa, 282.

[3] Snyder v. Castor, 4 Yeates (Penn.) 353; Davison v. Davison, 18 N. J. Eq. 246; Lee v. Lee, 6 G. & J. (Md). 316; Little v. Dawson, 4 Dall. (Penn.) 111.

[4] VanArmen v. Byington, 88 Ill. 443; Weeks v. Holmes, 12 Cush. (Mass.) 215.

[5] Dougherty v. Whitehead, 81 Mo. 255; Lewis v. Trickey, 20 Barb. (N. Y.) 387.

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der the services, the law will imply a promise to pay for them.[1] This is but the ordinary rule of good faith. As has been seen, services are not to be obtruded upon another against his will, but one who stands by and permits another to render him valuable services under such circumstances as to convince any reasonable man that they were being done, though mistakenly, with the expectation of being paid for them as a matter of legal right and not as a matter of hope or expectancy, and says or does nothing to prevent it, can not be permitted to avail himself of the benefits of the services but refuse to pay for them, upon the ground that they were rendered without his request or order.[2]

In accordance with these principles it is held that a consulting physician or surgeon who, at the request of the attending physician, and with the consent of the patient, renders services to the patient, may recover their reasonable value from the patient although the attending physician had agreed with the patient to pay therefor, of which fact the consulting physician was ignorant. Agreements of such a nature are exceptional, said the court, and if the exceptional contract is to bind the consulting physician or surgeon it must be brought to his knowledge before his services are accepted by the patient.[3] So where an attorney

[1] McCrary v. Ruddick, 33 Iowa, 521; James v. Bixby, 11 Mass. 34; Muscott v. Stubbs, 24 Kan. 520; Garrey v. Stadler, 67 Wis. 512, 58 Am. Rep. 877; Shelton v. Johnson, 40 Iowa, 84; Phillips v. Jones, 1 Ad. & Ell. 333; Peacock v. Peacock, 2 Camp. 45; Scully v. Scully, 28 Iowa, 548; Waterman v. Gilson, 5 La. Ann. 672; Lucas v. Godwin, 3 Bing. (N. C.) 737; Trustees v. Allen, 14 Mass. 175; Weston v Davis, 24 Me. 374; Dougherty v. Whitehead, 31 Mo. 255; Louis v. Trickey, 20 Barb. (N. Y.) 387.

[2] The principle here involved is said by BREWER, J. to be "not merely that one party has done work which benefits the other, because it was never the law that one party could force a contract upon the other, but also that such other party, knowing that the services are being performed for his benefit and on his account, makes no objection, but permits the party to continue doing the work and performing the services." In Muscott v. Stubbs, 24 Kan. 520.

[3] Garrey v. Stadler, 67 Wis. 512, 58 Am. Rep. 877; Shelton v. Johnson, 40 Iowa 84. In this case, DAY, J. lays down the broad rule that "where a party, knowingly and without objection, permits another to render service for him of any kind whatever, the law implies a promise to pay what the same is reasonably worth." See also Bartlett v. Sparkman, — Mo. —, 14 West. Rep. 735, where the act of an agent in calling doctor A, though sent for doctor B, was held ratified because the principal did not dissent.

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who had undertaken to defend a certain action and pay for such counsel as he desired, employed as counsel, a firm of attorneys who were not informed of this arrangement, and the counsel performed valuable services for the defendants with their knowledge and coöperation, it was held that the defendants were liable for the value of the services so rendered. The court said that if the defendants did not intend that the consulting attorneys should look to them for payment for the services they were rendering, they should have objected or informed them of the special contract, but that by their silence with full knowledge of what was being done, and by receiving and enjoying the benefit of the services rendered, a promise to pay therefor would be implied. It would have been otherwise if the consulting attorneys had been informed of the special arrangement or had the circumstances been such as to raise a presumption that they had such information.[1]

§ 602. **Unauthorized Agent entitled to Compensation if Acts are ratified.** As has been seen, the effect of the ratification of the unauthorized act of an agent is retroactive and gives validity to the act from the beginning.[2] If therefore one acts as agent without authority but his acts are subsequently ratified by the principal, he is entitled to the same compensation and the same remedies as if the acts had been originally duly authorized.[3]

2. *The Amount of the Compensation.*

§ 603. **Express Contract governs.** The question of the agent's *right* to receive a compensation having been determined in his favor, the next inquiry is as to the *amount* to be paid to him. If the parties have made an express agreement in reference to this matter, such agreement is conclusive upon all questions arising within its scope.[4] There can not be both an express and an implied agreement in reference to the same matter, and the express agreement, if any, must govern.

[1] McCrary *v.* Ruddick, 83 Iowa, 521. See case where the same principle was recognized, but where the court held that the facts did not warrant the application. Muscot *v.* Stubbs, 24 Kan. 520.

[2] See *ante*, §§ 171, 174.

[3] Wilson *v.* Dame, 58 N. H. 392.

[4] Wallace *v.* Floyd, 29 Penn. St. 184, 72 Am. Dec. 620; Hamilton *v.* Frothingham, 59 Mich. 253.

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§ 604. **May be left for Principal to determine.** It is competent for the parties to agree that the compensation shall be such an amount as the principal may fix. Thus if the agent agree to serve for such compensation as the principal shall, at the termination of the agency, determine to be right and proper under all the circumstances, the amount so fixed by the principal, if he acts honestly and in good faith, is conclusive, although as a matter of fact it be less than the services were really worth.[1]

Agreements of this sort, however, must be clear, and appear to have been fairly made.[2]

§ 605. **In the Absence of express Agreement, Law implies reasonable Compensation.** Where, however, there is no express agreement as to the amount, the law implies a promise to pay what the services are reasonably worth.[3] The question of reasonable value, in this, as in other cases, is one to be determined from all the facts and circumstances surrounding the case.[4]

§ 606. **What Elements may be considered.** In determining the amount of this reasonable compensation, there are many elements to be taken into consideration. All services are not to be estimated by the same standard. In every case the nature of the undertaking, its dangers and responsibilities, the amount involved, the skill, ability and reputation of the agent, the result attained, the previous study, preparation and expense required, as well as the actual time consumed, are to be taken into consideration, and the value of the services is to be estimated accordingly.[5]

§ 607. **What Evidence as to Value is admissible.** In many cases custom may have gone far towards establishing the amount of compensation to be paid for certain services, and where par-

[1] Butler *v.* Winona Mill Co., 28 Minn. 205, 41 Am. Rep. 277.

[2] Millar *v.* Cuddy, 43 Mich. 273, 38 Am. Rep. 181. This case has been cited as opposed to the preceding one. Upon examination it will be found not to be so. In the former there was no question as to the contract, in the latter the court held that such a contract *could* be made, but had not been in that case.

[3] McCrary *v.* Ruddick, 33 Iowa 520; Shelton *v.* Johnson, 40 Iowa 84; Millar *v.* Cuddy, 43 Mich. 273, 38 Am. Rep. 181; Stockbridge *v.* Crooker, 84 Me. 349; Nauman *v.* Zoerhlaut, 21 Wis. 466; Jones *v.* School District, 8 Kans. 362.

[4] Ruckman *v.* Bergholz, 38 N. J. L. 531; Eggleston *v.* Boardman, 37 Mich. 14.

[5] Eggleston *v.* Boardman, 37 Mich. 14; Vilas *v.* Downer, 21 Vt. 419; Kentucky Bank *v.* Combs, 7 Penn. St. 543; Stanton *v.* Embrey, 93 U. S. 548.

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ties either expressly or impliedly deal with reference to such a custom, evidence of the amount so fixed is admissible.[1]

So evidence of what is usually charged for similar services by other persons in the same line of business at the same place is admissible.[2] It is also competent to show by persons acquainted with the value of like services, what is their opinion as to the value of the services in question.[3] This is a well-recognized use of what is ordinarily known as expert testimony. If such a witness knows the value of such services, it is not necessary that he should be shown to be acquainted with the amounts which others are in the habit of charging in like cases,[4] nor is it necessary that he should have personal acquaintance with the agent, or personal knowledge of the services rendered,[5] but he may give his opinion upon a hypothetical question covering the elements in controversy.

Ordinarily the testimony of what such a witness would himself have charged is not admissible,[6] yet if the evidence given in reply to such a question is manifestly based upon the witness's opinion as to its value and not upon any uncertain standard of his own, the form of the question might be disregarded.[7]

So evidence of what was paid to a particular agent in another case is not, ordinarily, admissible; such evidence having no necessary tendency to prove either the *usual* charge or the actual value, inasmuch as there may have been in that case peculiar circumstances or elements which would not exist in another.[8] But upon cross-examination, in order to test either the good faith or the qualifications of the witness, it might be proper to inquire of him what he would have performed the same service for,[9] or to ascertain the extent of his knowledge as to the price usually paid by inquiring what had to his knowledge been paid in given cases.[10]

[1] Stanton v. Embrey, 93 U. S. 548.

[2] Eggleston v. Boardman, 37 Mich. 14; Stanton v. Embrey, 93 U. S. 548.

[3] Bowen v. Bowen, 74 Ind. 470; Johnson v. Thompson, 72 Ind. 167, 37 Am. Rep. 152; Parker v. Parker, 83 Ala. 459.

[4] Commissioners v. Chambers, 75 Ind. 409.

[5] Mish v. Wood, 34 Penn. St. 451; Miller v. Smith, 112 Mass. 470; Whitbeck v. New York, &c. R. R. Co., 36 Barb. (N. Y.) 644.

[6] Fairchild v. Railroad Co., 8 Ill. App. 591.

[7] See Elting v. Sturtevant, 41 Conn. 176.

[8] Eggleston v. Boardman, 37 Mich. 14; Lakeman v. Pollard, 43 Me. 463, 69 Am. Dec. 77.

[9] Gilman v. Gard, 29 Ind. 291.

[10] Lakeman v. Pollard, *supra*.

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§ 608. **Agent continuing after Expiration of Term presumed to be at prior Compensation.** If an agent employed at a compensation for a definite term, continues in the principal's service after the expiration of that term, without any new or other arrangement, he will be presumed to be continuing on the old terms and there can be no recovery on a quantum meruit.[1]

3. *When Compensation is Considered to be Earned.*

§ 609. **In general.** The question when the agent's compensation is to be deemed to be earned, is one depending upon a variety of considerations.

Thus it may appear:—

a. That the agent has fully completed his undertaking.

b. That he has only partially completed his undertaking.

c. That he has done nothing at all.

The fact that he has not completed his undertaking may be attributable to one of the following causes:—

a. That his authority was revoked before he had had time or opportunity to perform fully.

b. That he had abandoned the agency before he had made full performance.

The revocation of his authority may have been:—

a. By act of the principal.

b. By operation of law.

If revoked by the act of the principal, that act may have been:—

a. For sufficient cause.

b. For insufficient cause.

So if the agent abandoned the agency, such abandonment may, under the circumstances have been:—

a. Justifiable, or

b. Unjustifiable.

Again if the undertaking was performed in part, such part performance may have been:—

a. Of value to the principal, or

b. Of no value to the principal.

§ 610. **Compensation earned when Undertaking fully com-**

[1] Wallace *v.* Floyd, 29 Penn. St. 184, 72 Am. Dec. 620; Rauck *v.* Albright, 36 Penn. St. 371. See *ante*, § 212.

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pleted. When the agent has fully completed his undertaking according to its terms, he is entitled to his compensation. In many cases, there is no difficulty in determining when this time arrives, but in others it is not easy to decide upon the full measure of the agent's undertaking or upon the fact of its performance. Each case rests upon its own peculiar facts and circumstances, and the inquiry in every instance must be: 1. What did the agent undertake to do? 2. Has he done it, and if not, then, 3. To whose act or to what occurrence, is the failure to be attributed.

§ 611. **Same Subject—When full Performance a Condition precedent.** It is entirely competent for the parties to agree that the full performance of a particular undertaking shall be a condition precedent to the right to recover any compensation, and where such a contract is fairly made it will be enforced, and will be conclusive unless it appears that the performance has been waived or prevented by the principal.

Thus where by a special contract, a broker is not to be paid his commission unless he sells certain property at a stipulated price, the sale by him at such a price is condition precedent to his right to compensation, unless pending the negotiations and while his authority remains unrevoked, the principal consents to a sale at a different price.[1] For a like reason if the promise is to pay a compensation if the sale is effected within a certain time, a sale within that time, unless excused or prevented by the principal, is a condition precedent to the right to compensation.[2]

§ 612. **Same Subject—Not defeated by Principal's Default.** If it be found that the agent has done all that he undertook to do, his right to his compensation is complete, and he cannot be deprived of it, because the principal then fails to avail himself of the benefits of the act or refuses to do what he had agreed to do upon performance. Neither can the principal then defeat the agent's claim by revoking his authority or withdrawing the subject-matter from his possession or control.[3]

Thus an agent who is employed to procure a loan for his principal is entitled to his commission when he procures a lender, ready, willing and able to loan the money upon the terms proposed. His right to his commission does not depend upon the

[1] Jones v. Adler, 34 Md. 440. See Stewart v. Mather, 32 Wis. 344.

[2] Irby v. Lawshe, 62 Ga. 216.

[3] See cases cited in note 3, *post*.

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contingency of the principal's acceptance of the loan, but upon his performance of his part of the contract, and the principal cannot deprive the agent of his commission by refusing to accept the loan which the agent's efforts have resulted in securing.[1] Upon the same principle it is held that an agent who undertakes to negotiate a sale of his principal's property, has earned his commission when he has procured a purchaser who is able, willing and ready to purchase it upon the terms designated, and the principal cannot defeat the agent's claim by then refusing to sell at all, or only upon different terms, or by ignoring the agent and secretly consummating the sale with the purchaser so produced without the further intervention of the agent.[2] The act of the agent must, however, have been the immediate means of securing the purchaser or lender. In this case it is the *causa causans* and not the *causa proxima* that the law looks to.[3]

§ 613. **Same Subject—No Defense that Principal realized no Profit.** So if the agent has done all that he undertook to do, the fact that the services proved to be of no value to the principal, or that the latter did not realize from them the expected profit, furnishes no ground, upon which to deprive the agent of his compensation.[4] And it is immaterial whether this result be attributable to the act of the principal or of third persons: the principal and not the agent must run the risk of his undertaking's proving profitless.

1. *Revocation by the act of Principal.*

§ 614. **When Agent is entitled to Compensation if Authority is revoked before Performance.** The question of the agent's right to compensation when his authority has been revoked before full performance, depends, as has been seen, upon a variety

[1] Vinton *v.* Baldwin, 88 Ind. 104, 45 Am. Rep. 447.

[2] Love *v.* Miller, 53 Ind. 294, 21 Am. Rep. 192; Vinton *v.* Baldwin, *supra;* Reyman *v.* Mosher, 71 Ind. 596; Moses *v.* Bierling, 31 (N. Y.) 462; Mooney *v.* Elder, 56 N. Y. 238; Fraser *v.* Wyckoff, 63 N. Y. 445; Wylie *v.* Marine Nat. Bank, 61 N. Y. 415; Hinds *v.* Henry, 36 N. J. L. 328; Hannan *v.* Moran,—Mich.— 15 West. Rep. 211. See also Tombs *v.* Alexander, 101 Mass. 255, 3 Am. Rep. 349; Walker *v.* Tirrell, 101 Mass. 257, 3 Am. Rep. 352; Richards *v.* Jackson, 31 Md. 250, 1 Am. Rep. 49. See this subject fully discussed under the title "Brokers," *post.*

[3] Attrill *v.* Patterson, 58 Md. 226.

[4] Lockwood *v.* Levick, 8 C. B. (N. S.) 603.

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of considerations. The revocation may have resulted from the act of the principal or by operation of law; if revoked by the act of the principal, such revocation may, as to the agent, have been rightful or wrongful.

It has been seen [1] that unless the authority of the agent be coupled with an interest, it may be revoked by the principal at any time. As has been already explained,[2] what is meant by this is, that the relation between the principal and the agent, being a personal one founded upon trust and confidence, the law will not undertake to compel the principal to continue to employ an agent against his will,—will not, in other words, enforce specific performance of the contract. But notwithstanding the fact that he possesses this power to revoke, the principal, as has been seen,[3] may expressly or impliedly agree not to exercise it, and where such an agreement is made, the principal will be liable if he violates it, without good cause, in the same manner as for the violation of any other contract.

In the absence, therefore, of an express or implied agreement that the agency shall continue for a definite time, it will be presumed to be an agency at will merely, terminable at the will of either party at any time.[4] And the same rule applies although the agent may have been employed to do a specific thing, unless there is an express or implied agreement on the part of the principal that he will continue to employ the agent until completion, and on the part of the agent that he will continue to act until full performance—it is still at will merely; no implied agreement to continue the agency until completion arises from the mere fact of such an employment.

So, as has been seen,[5] the agent may be under an agreement to act for a certain period with no corresponding obligation on the part of the principal to employ him during that period.

a. Authority Rightfully Revoked.

§ 615. **Same Subject—Authority rightly revoked.** In using the expressions *rightfully* and *wrongfully* revoked it will be understood that the question of the principal's *power* to revoke is not involved, but whether by express or implied agreement having

[1] *Ante*, § 204.
[2] *Ante*, § 209.
[3] *Ante*, § 209.
[4] *Ante*, § 210.
[5] *Ante*, §§ 211, 212.

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undertaken not to exercise that power, he has, nevertheless, exercised it in violation of the agreement.[1]

In this view of the case the principal may rightfully revoke the agent's authority in one of two cases: a. Where the authority was conferred to continue only during the will of the principal; and, b. Where, though the authority was to continue for a definite time, it was subject to revocation upon the happening of a certain event or upon the breach of an express or implied condition of its continuance, and the event has happened or the breach has occurred. What misconduct on the part of the agent will constitute a breach of the implied conditions of every employment, has previously been considered.[2]

§ 616. **Same Subject—Agency at Will of the Principal.** Where an agency has been created to endure at the will of the principal and is terminated by him, without fault of the agent, after the agent has entered upon the performance, but before full completion, the agent will ordinarily be entitled to compensation for the reasonable value of the work already done, and to be reimbursed for the costs and expenses which he had fairly and in good faith incurred in the performance of the agency up to that time.[3] This will always be the case where, from the nature of the employment, the principal receives the full value of the agent's services as they are rendered. It will also be true in all other cases except those in which the full performance of the undertaking is expressly or impliedly made a condition precedent to the right to compensation,—a subject hereafter considered.

It is undoubtedly competent for the agent to agree that he shall receive no compensation if his authority is terminated before performance, even though it be so terminated at the mere whim or caprice of the principal, and where such an agreement is fairly made it will be enforced.[4]

Where the agency is thus at the will of the principal, the agent cannot, if it be revoked, recover damages for this withdrawal of the power to act, or for the commissions or compensa-

[1] See *ante*, § 209.

[2] See *ante*, § 214.

[3] United States *v.* Jarvis, Davies (U. S. C. C.) 274; Chambers *v.* Seay, 73 Ala. 372.

[4] Tyler *v.* Ames, 6 Lans. (N. Y.) 280; Spear *v.* Gardner, 16 La. Ann. 383; Adriance *v.* Rutherford, 57 Mich. 170; Hotchkiss *v.* Gretna Gin. & Compress Co., 36 La. Ann., 517.

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tion he might have earned had the authority not been revoked.[1] Nor can it make any difference that the principal acted unreasonably, capriciously or maliciously in revoking the authority. An action cannot be based upon the doing of what one has a legal right to do, even though the act be prompted by malice.[2]

§ 617. **Same Subject—Agency terminable on Contingency.** The same rule would apply where the authority was terminable by the principal upon the happening of a certain contingency. Unless the agent had expressly or impliedly agreed that in the event of such a termination he should have no compensation, he would be entitled to receive the reasonable value of the services already rendered, and to be reimbursed for the expenses and charges which he had fairly and in good faith incurred in the performance of the agency. The agent, however, would not be entitled to recover anything by way of compensation for any damages occasioned by the revocation, as for wages or profits which he might have earned had the revocation not occurred, although the revocation was without reasonable cause.[3]

§ 618. **Same Subject—Agency terminable only on Breach of express or implied Conditions.** But where the agent is employed for a definite term, he can be discharged without liability only when there has been a breach of some express or implied condition in the contract creating the agency.[4] Where these conditions are express, they usually declare what shall be the result of their breach, but, in the absence of such a provision, a breach of an express condition which the parties have made sufficient to terminate the agency, would absolve the principal from liability for future wages and for damages occasioned by the revocation, but would not, in the absence of a stipulation to that effect, ordinarily deprive the agent of compensation for services previously performed, unless terminated for the agent's gross misconduct.[5] Of the implied conditions of the agency, the most important are those

[1] North Carolina State L. Ins. Co. v. Williams, 91 N. C. 69, 49 Am. Rep. 687; Jacobs v. Warfield, 23 La. Ann. 395; Kirk v. Hartman, 63 Penn. St. 97; Coffin v. Landis, 10 Wright. (Penn.) 426.

[2] Payne v. Western &c. R. Co., 13 Lea (Tenn.) 507, 49 Am. Rep. 666; Heywood v. Tillson, 75 Me. 225, 46 Am. Rep. 373, and cases there cited.

[3] See preceding section and authorities cited.

[4] See *ante*, § 210.

[5] See *post*, § 619. See also *ante*, § 215.

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which relate to the honesty and fidelity with which the agent performs his duty.[1]

§ 619. **Same Subject—When terminated for Agent's Misconduct.** It is, as has been previously stated,[2] an implied condition in every contract of agency, that the agent will not wilfully disobey reasonable and lawful instructions; that he will not willingly permit his principal's interests to suffer; that he will be honest and faithful, and will exercise reasonable care and diligence in the discharge of his duties; and that he will not violate the principles of morality or the laws of the land. For a breach of this implied condition, as has been seen, the principal may, in certain cases, lawfully discharge the agent, although he had been employed for a definite period. What these cases are has already been considered.[3] Where, then, it is found that the misconduct of the agent was such as to justify his discharge, the question arises: What effect has such discharge upon (*a.*) future commissions or compensation, and, (*b.*) commissions or compensation previously earned but not yet paid? Upon the first branch of the question there can be no doubt that a discharge for cause not only does not render the principal liable to the agent for damages therefor, but also absolves him from all claim for commissions or compensation which but for such discharge, the agent might have thereafter earned.[4] But upon the other branch of the question the law is not so clear. It is held in many cases that where the agent is unfaithful to his trust, and abuses the confidence reposed in him, or misconducts himself in the management of the agency, he will forfeit his right to compensation.[5] It is not every case of misconduct, however, even though sufficient to warrant the agent's discharge, which will deprive him of compensation already earned. If the agent were guilty of such misconduct as amounts to treachery, or if he wholly failed to recognize the duties and responsibilities imposed upon him by his situation, or so conducts himself that his services are of no value, it is entirely just and

[1] See *post*, § 619.
[2] See *ante*, § 214.
[3] See *ante*, § 214.
[4] Murdock *v.* Phillips Academy, 12 Pick. (Mass.) 244; Du Quoin &c. Mining Co. *v.* Thorwell, 3 Ill. App. 394.
[5] Sea *v.* Carpenter, 16 Ohio, 412; Vennum *v.* Gregory, 21 Iowa 326; Cleveland &c. R. R. Co. *v.* Pattison, 15 Ind. 70; Porter *v.* Silvers, 35 Ind. 295; Sumner *v.* Reicheniker, 9 Kan. 320; Spain *v.* Arnott, 2 Stark, 227.

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reasonable that he should receive no compensation whatever, and to this extent the law is well settled.[1]

But if on the other hand, though the agent has been negligent or has not performed according to his undertaking, his services are still of some appreciable and substantial value to the principal, over and above all damages sustained by him by reason of the default, the agent should be entitled to recover that value.[2]

b. Authority Wrongfully Revoked.

§ 620. When Agent discharged without Cause—Breach of implied Contract. But where, by express or implied contract, the agency has been created to endure for a definite period, it may not be terminated by the principal unless for the agent's default or by virtue of some agreement to that effect, without liability to the agent. As has been seen[3] where no definite time is agreed upon, the agency is ordinarily held to be one to continue during the will of the principal. But it is not necessary that there should be an express agreement that the agency shall not be thus terminated without liability at the mere will of the principal. It may be implied as in other cases, and such an implied understanding is frequently demanded by the rules of ordinary good faith between parties. It is, of course, always within the power of the agent to protect himself by an express agreement, and in many cases the absence of such an agreement will put the agent at the mercy of the principal's will.

Thus the mere fact that an agent is employed to perform a certain act will not, of itself, amount to an undertaking on the part of the principal that the agent shall be permitted to complete the act, at all events, and the principal may fairly, and in good faith, revoke the agency without liability, at any time before performance. But where the act is one which requires time and labor for its completion, and the agent has, within a reasonable time, brought the act to the very verge of completion

[1] Brannan v. Strauss, 75 Ill. 234; Myers v. Walker, 31 Ill. 354; Sumner v. Reicheniker, 9 Kan. 320.

[2] Massey v. Taylor, 5 Cold. (Tenn.) 447; Lawrence v. Gullifer, 38 Me. 532; Kessee v. Mayfield, 14 La. Ann. 90; Carroll v. Welch, 26 Tex. 147; Congregation v. Peres, 2 Cold. (Tenn.) 620; Green v. Hulett, 22 Vt. 188; Eaken v. Harrison, 4 McCord. (S. C.) 249.

[3] See *ante*, § 210.

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so that success is certain and immediate, it would be the height of injustice to permit the principal then to withdraw the authority and terminate the agency and appropriate the benefit of it, without being liable to the agent for any of the compensation which he had so nearly earned. So where an agent is employed to perform an act which involves expenditure of labor and money before it is possible to accomplish the desired object, and after the agent has in good faith incurred expense and expended time and labor, but before he has had a reasonable opportunity to avail himself of the results of this preliminary effort, it could not be permitted that the principal should then terminate the agency and take advantage of the agent's services without rendering any compensation therefor. Thus if after a broker, employed to sell property, had in good faith expended money and labor in advertising for and finding a purchaser, and was in the midst of negotiations which were evidently and plainly approaching success, the seller should revoke the authority with the purpose of availing himself of the broker's efforts and avoiding the payment of his commissions, it could not be claimed that the agent had no remedy. In these cases it might well be said that there was an implied contract on the part of the principal to allow the agent a reasonable time for performance, that full performance was wrongfully prevented by the principal's own acts, and that the agent had earned his commission.[1]

§ 621. **Same Subject—Breach of express Contract—Agent's Remedies.** Where, however, there has been an employment for a definite period, and the agent is discharged without cause before the expiration of that period, or is not permitted to undertake the performance at all, the principal is liable to the agent for the damages occasioned thereby, as in any other case of the breach of a contract.

There has been, and still is, much uncertainty and confusion in the cases as to the exact remedies which the agent, in such a case, may pursue, and as to the measure and nature of the damages he may recover, but it is believed that the preponderance of authority and reason is in harmony with the following rule:—

An agent thus wrongfully discharged or prevented from performing his undertaking has his choice of three remedies:

[1] Sibbald v. Bethlehem Iron Co., 83 N. Y. 378, 38 Am. Rep. 441; Wylie v. Marine Nat. Bank, 61 N. Y. 415.

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1. He may elect to consider the contract as rescinded, and at once bring an action to recover the *value* of the services, if any, rendered up to the time of the discharge, less the amount already paid to him; or

2. He may at once bring an action for the breach of the contract and may recover the probable damages resulting therefrom; or

3. He may wait until the end of the term, and then bring his action for the breach of the contract and recover the actual damages he has sustained thereby.[1]

He cannot, however, pursue all of these remedies, and a recovery under one will be a bar to a recovery under the others.[2]

The second and third of these remedies are in addition to his right of action for wages earned but not paid.[3]

§ 622. **Same Subject—The Measure of Damages.** By pursuing the first of these remedies, the agent elects to treat the contract as rescinded. He has, however, rendered valuable services for the principal, and there being now no contract to fix the price, he is entitled to recover their value upon a *quantum meruit.*[4] In this recovery he is not limited by the contract price, not only because the contract has been rescinded, but because it may be that on account of a fixed employment, or because of an expectation of an increased compensation at a later period in the service, he agreed to render the services in question for less than their actual value. Such a recovery should, of

[1] Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; James v. Allen County, 44 Ohio St. 226, 58 Am. Rep. 821; Weed v. Burt, 78 N. Y. 192; Saxonia &c. Co. v. Cook, 7 Colo. 569; Richardson v. Eagle Machine Works, 78 Ind. 422, 41 Am. Rep. 584; Goodman v. Pocock, 15 Ad. & Ell. (N. S.) 576; Elderton v. Emmons, 6 Man. G. & S. (C. B.) 160; Smith v. Hayward, 7 Ad. & Ell. 544; Classman v. Lacoste, 28 Eng. L. & Eq. 140; Gardenhire v. Smith, 39 Ark. 280.

[2] Richardson v. Eagle Machine Works, 78 Ind. 422, 41 Am. Rep. 584; James v. Allen County, 44 Ohio St. 226, 58 Am. Rep. 821. Where, however, an agent employed at a salary to be paid monthly is wrongfully discharged, it was held that he might bring an action for the month's salary at the end of each month, and that a recovery for one month would not bar a recovery for a subsequent month. Isaacs v. Davies, 68 Ga. 169.

[3] Richardson v. Eagle Machine Works, 78 Ind. 422, 41 Am. Rep. 584; James v. Allen County, 44 Ohio St. 226, 58 Am. Rep. 821.

[4] Smith on Master and Servant, 96.

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course, be less the actual amount, if any, which has been already paid to him.

The two other remedies proceed upon the theory that the contract still continues in force, though broken by the principal, and the recovery had is for *damages for the breach*, and not for *wages*. A recovery was formerly allowed for wages upon the ground of a constructive service, but the doctrine of constructive service is almost universally repudiated in modern times.[1] It is, however, still recognized in a few States.[2] Under this theory it was incumbent upon the agent to hold himself in readiness, at all times, to perform the service, and having done so, he was permitted at the end of the term to recover his wages as such, the same as if he had in fact performed the service. If the wages were to be paid in installments, he might, under this rule, sue for and recover them as they became due.[3] By holding himself in readiness to perform, but being wrongfully prevented by the principal, he was deemed in law to have constructively performed. This doctrine is, however, as is said by a learned judge,[4] so opposed to principle, so clearly hostile to the great mass of the authorities, and so wholly irreconcilable to that great and beneficent rule of the law that a person discharged from service must not remain idle but must accept employment elsewhere, if offered, that it cannot be sustained. If a person discharged from service may recover wages or treat the contract as still subsisting, then he must remain idle in order to be always ready to perform the service. He is placed in the predicament of being called upon by one rule of law to accept other employment if offered, and by another rule to remain idle in order to recover full wages. The doctrine is also not only at war with principle, but with the rules of political economy, as it encourages idleness

[1] Howard *v.* Daly, 61 N. Y. 362, 19 Am. Rep. 285; James *v.* Allen County, 44 Ohio St. 226, 58 Am. Rep. 821; Richardson *v.* Eagle Machine Works, 78 Ind. 422, 41 Am. Rep. 584; Archard *v.* Hornor, 8 C. & P. 349; Smith *v.* Hayward, 7 Ad. & Ell. 544; Aspdin *v.* Austin, 5 Ad. & Ell. (N. S.) 671; Fewings *v.* Tisdal, 1 Exch. 295; Elderton *v.* Emmons, 6 C. B. 160; Goodman *v.* Pocock, 15 Ad. & Ell. (N. S.) 582.

[2] Strauss *v.* Meertief, 64 Ala. 299, 38 Am. Rep. 8; Davis *v.* Ayres, 9 Ala. 292; Ramey *v.* Holcombe, 21 Ala. 567; Fowler *v.* Armour, 24 Ala. 194.

[3] Strauss *v.* Meertief, 64 Ala. 299, 38 Am. Rep. 8; Davis *v.* Preston, 6 Ala. 83.

[4] DWIGHT, C. in Howard *v.* Daly, 61 N. Y. 362, 19 Am. Rep. 285.

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and gives compensation to men who fold their arms and decline service, equal to those who perform with willing hands their stipulated amount of labor.

If the action is brought at once upon the discharge, the measure of damages is *prima facie* a sum equal to the stipulated compensation.[1] This sum, however, the principal may reduce if possible by showing the probability of the agent's being able to secure other employment before the term would have expired. The burden of this proof would be upon the defendant.[2] If this rule seems harsh, it is to be remembered that the principal has brought the action upon himself by his own wrongful act, and it is but just that if there be doubt as to the agent's finding other employment, the burden of it should fall upon him who might have prevented any doubt at all by performing his agreement. The damages for the breach of contract could not exceed the stipulated sum.[3] The agent is entitled to compensation, but not to be placed in a better situation than he would have been if the principal had not made default. Where the action is not brought until the end of the term, the measure of damages can then be more certainly ascertained. It will then be known how much the agent has been able to earn,[4] or by the exercise of reasonable diligence might have earned,[5] at other employment, and to this extent therefore the principal's liability is diminished. The rule in this case, as in the other, is compen-

[1] Ricks *v.* Yates, 5 Ind. 115; Richardson *v.* Eagle Machine Works, 78 Ind. 422, 41 Am. Rep. 584; Howard *v.* Daly, *supra;* Callo *v.* Brouncker, 4 C. & P. 518; Fawcett *v.* Cash. 5 B. & Ad. 904; Ansley *v.* Jordan, 61 Ga. 482; Webster *v.* Wade, 19 Cal. 291; Utter *v.* Chapman, 38 Cal. 659; Gazette Printing Co. *v.* Morss, 60 Ind. 153; Jaffray *v.* King, 34 Md. 217; Railroad Co. *v.* Slack, 45 Md. 161; Horn *v.* Western Land Assn., 22 Minn. 233; Hunt *v.* Crane, 33 Miss. 569, 69 Am. Dec. 381.

[2] Howard *v.* Daly, 61 N. Y. 362, 19 Am. Rep. 285; Ricks *v.* Yates, 5 Ind. 115.

[3] Meade *v.* Rutledge, 11 Tex. 44.

[4] Emmens *v.* Elderton, 13 Com. Bench, 508; Utter *v.* Chapman, 38 Cal. 659; Williams *v.* Chicago Coal Co., 60 Ill. 149; Gazette Printing Co. *v.* Morss, 60 Ind. 153; Sutherland *v.* Wyer, 67 Me. 64; Railroad Co. *v.* Slack, 45 Md. 161; Williams *v.* Anderson, 9 Minn. 50; Leatherberry *v.* Odell, 7 Fed. Rep. 641; Squire *v.* Wright, 1 Mo. App. 172; King *v.* Steiren, 44 Penn. St. 99; Kirk *v.* Hartman, 63 Penn. St. 97; Barker *v.* Knickerbocker L. Ins. Co., 24 Wis. 630.

[5] Gazette Printing Co. *v.* Morss, 60 Ind. 153; Williams *v.* Chicago Coal Co., 60 Ill. 149; Railroad Co. *v.* Slack, *supra*; Congregation *v.* Peres, 2 Coldw. (Tenn.) 620.

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sation to the agent. *Prima facie* the stipulated sum would be the measure of the damages, and the burden is upon the principal to establish either that the agent has obtained other employment or that he might by the exercise of reasonable diligence have so obtained it.[1]

This action proceeds, as has been said, for the breach of the contract, and the right of action accrues upon the breach. In cases, therefore, of employment for a long term of years, the agent by deferring his action until the end of the term, would incur the liability of having the Statute of Limitations operate against his claim.

If the agent is informed that his authority is revoked or that he will not be permitted to continue its execution, he is justified in accepting this as conclusive. It is not necessary that he should go through the barren form of offering to perform. His readiness may be shown by other evidence.[2]

§ 623. **Same Subject—Duty of Agent to seek other Employment.** It is the duty of the agent wrongfully discharged to exercise reasonable diligence in seeking and obtaining other employment, and thus to reduce his damages as far as he is able.[3]

This rule, however, does not impose upon the agent the duty to accept *any* other employment that may be offered. By other employment is meant employment of the same general nature but not that which is of an entirely different or more menial kind.[4]

Thus a person employed as a bookkeeper would not be compelled to accept employment as a farm laborer, nor would a per-

[1] Ansley v. Jordan, 61 Ga. 482; Horn v. Western Land Ass'n, 22 Minn. 233; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Leatherberry v. Odell, 7 Fed. Rep. 641; King v. Steiren, 44 Penn. St. 99; Kirk v. Hartman, 63 Penn. St. 97; Barker v. Knickerbocker Life Ins. Co., 24 Wis. 630.

[2] Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Carpenter v. Holcomb, 105 Mass. 284; Wallis v. Warren, 4 Exch. 361; Levy v. Lord Herbert, 7 Taunt. 314.

[3] Goodman v. Pocock, 15 Q.B. 574; Beckham v. Drake, 9 M. & W. 79; Emmens v. Elderton, 13 Com. Bench 508; Utter v. Chapman, 38 Cal. 659; Williams v. Chicago Coal Co., 60 Ill. 149; Stone v. Vimont, 7 Mo. App. 277; Chamberlin v. Morgan, 68 Penn. St. 168; Shannon v. Comstock, 21 Wend. (N. Y.) 457; King v. Steiren, 44 Penn. St. 99; Armfield v. Nash, 31 Miss. 361; Ward v. Ames, 9 Johns. (N. Y.) 138.

[4] Wolf v. Studebaker, 65 Penn. St. 459; Costigan v. Railroad Co., 2 Denio (N. Y.) 609; Sheffield v. Page, 1 Sprague (U. S. D. C.) 285.

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son employed as an actor or singer be under obligation to accept employment as a clerk in a store.

Neither is the agent ordinarily bound to seek employment in another locality,[1] nor with an objectionable employer.[2] The question of locality, however, is one depending upon the facts and circumstances of each case. What might reasonably be deemed the same locality in the case of one employment might not coincide with a like view of another employment. If having made a reasonable effort to find other employment but without success, the agent then does work for himself the principal is not ordinarily entitled to have the value of it deducted from the agent's claim.[3] Were the agent to embark in some regular business upon his own account this rule might be different.[4]

§ 624. **When Right of Action accrues.** The right of action accrues when the breach of contract occurs. Where the agent is wrongfully discharged after entering upon the performance of his agency, there can be no question, as has been seen, that he has then a cause of action, for the breach.[5]

Where, however, before the time arrives for performance to begin and before the agent has entered upon it, the principal repudiates the contract and informs the agent that he will not permit him to undertake the performance of it when the performance is due, some question has arisen whether such repudiation may be treated as a present breach, or whether the agent must wait until the time for performance arrives and then tender his services. The weight of authority both in England and America, sustains the doctrine of a present breach in case of such repudiation.[6]

The theory of the decisions in this class of cases is, that there

[1] Harrington *v.* Gies, 45 Mich. 374; Strauss *v.* Meertief, 64 Ala. 299, 38 Am. Rep. 8.

[2] "Any reasonable objection, because of capacity, reputation, mode of dealing and transacting business, or of habits or morals, which could be made to the person from whom employment could be obtained, would afford a justification to the plaintiff for rejecting it when offered, or excuse him from not making exertion to secure it." BRICKELL, C. J., in Strauss *v.* Mertief, 64 Ala. 299, 38 Am. Rep. 8.

[3] Harrington *v.* Gies, 45 Mich. 374.

[4] See Perry *v.* Simpson Waterproof Mfg. Co., 37 Conn. 520.

[5] See *ante*, § 621.

[6] Dugan *v.* Anderson, 36 Md. 567, 11 Am. Rep. 509; Howard *v.* Daly, 61 N. Y. 362, 19 Am. Rep. 285; Hochster *v.* De la Tour, 2 E. & B. 678; Danube & Black Sea Ry Co. *v.* Xenos, 13 Com. Bench (N. S.) 825.

This principle has been frequently

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is a breach of the contract when the principal repudiates it and declares he will no longer be bound by it. The agent has an inchoate right to the performance of the bargain which becomes complete when the time for performance has arrived. In the meantime, he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with in various ways for his benefit and advantage. Of all such advantages the repudiation of the contract by the principal, and the announcement that it never will be fulfilled, must, of course, deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus*, and that upon it, the agent, if he so elect, may at once treat it as a breach of the entire contract and bring his action accordingly. The contract having been thus broken by the principal, and treated as broken by the agent, performance at the appointed time becomes excluded, and the breach, by reason of the future non-performance, becomes virtually involved in the action as one of the consequences of the repudiation of the contract, and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for the performance may yet be remote. Such a course, it is said, must lead to the convenience of both parties, and though decisions ought not to be founded upon grounds of convenience alone, they yet tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the principal, the agent may in many cases avert, or at all events materially lessen, the injurious effects which would otherwise flow from the non-fulfillment of the contract; and in assessing the damages for breach of the performance, a jury will, of course, take into account whatever the agent has done or has had the means of doing, and, as a prudent man,

applied in sustaining an immediate right of action for breach of a promise to marry where before the time arrives the defendant utterly repudiates it and declares that he will not perform it. Burtis *v.* Thompson, 42 N. Y. 246, 1 Am. Rep. 516; Holloway *v.* Griffith, 32 Iowa, 409, 7 Am. Rep. 208; Frost *v.* Knight, L. R. 7 Ex. 111, 1 Eng. Rep. (Moak) 218, 5 Albany L. Jour. 235.

Upon the general principle of the right of action before time for performance arrives, see Daniels *v.* Newton, 114 Mass. 530, 19 Am. Rep. 384.

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ought in reason to have done, whereby his loss has been, or would have been, diminished.[1]

§ 625. **No Damages if Agent acquiesces in Discharge.** If the agent, though wrongfully discharged acquiesces in, and consents to, the termination of the agency, no damages can be recovered for it.[2] But in order to effect this result the evidence of acquiescence must be clear. The mere fact that the agent did not protest, or that he peaceably and quietly surrendered his trust, would not justify a claim of acquiescence.

2. *Revocation by Operation of Law.*

§ 626. **No Damages where Agency revoked by Death of the Principal.** As has been seen, the death of the principal, by operation of law, revokes the agency. The agent in such a case is, of course, entitled to the compensation earned up to the time of the death, but he is afterwards entitled neither to future wages nor to damages for the termination of the agency.[3]

§ 627. **Same Rule where Agency revoked by Insanity of the Principal.** And the same rule would probably be applied where the agency is revoked by the after-occurring insanity of the principal.

§ 628. **Rule where Agency revoked by Bankruptcy of Principal.** But the fact that the principal becomes bankrupt furnishes no defense to an action brought by an agent, employed for a definite time, to recover damages for a refusal or neglect of the principal to employ him after the bankruptcy.[4]

§ 629. **Rule where Agency revoked by Death of the Agent.** Where the agency is terminated before full performance, by the death of the agent, his representatives are entitled to recover the value of his services already rendered. And even in the case of an entire contract for the performance of a given service, the representatives of the deceased agent may recover the value of the services rendered less the damages, if any, sustained by the principal from the non-performance of the undertaking.[5]

[1] MILLER, J., in Dugan *v.* Anderson, 36 Md. 567, 11 Am. Rep. 509.

[2] Patnote *v.* Sanders, 41 Vt. 66; Boyle *v.* Parker, 46 Vt. 343.

[3] Yerrington *v.* Greene, 7 R. I. 589, 84 Am. Dec. 578.

[4] Lewis *v.* Atlas Mutual Life Ins. Co., 61 Mo. 534; Vanuxem *v.* Bostwick, — Penn. St. —, 7 Atl. Rep. 598.

[5] Ricks *v.* Yates, 5 Ind. 117; Persons *v.* McKibben, Id. 261; Wolfe *v.* Howes, 20 N. Y. 197, 75 Am. Dec. 388.

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§ 630. **Rule where Agency revoked by Insanity of the Agent.** Where the agency is terminated by the agent's insanity, the question of his rights and liabilities would be determined by the same principles which govern in the case of his sickness or other incapacity,—a subject considered in the following section.

§ 631. **How when Agency terminated by Agent's Sickness or Incapacity.** Where the agency is terminated by the sickness or other physical disability of the agent, which incapacitates him from completing the performance of his undertaking, he will be entitled to recover the reasonable value of his services up to the time of his incapacity. And even though the contract be entire to perform a stipulated service for a stipulated price, so that, under other circumstances, full performance would ordinarily be considered a condition precedent to the right to recover compensation, yet if the agent be disabled by sickness or other act of God from accomplishing a full performance, he is entitled to recover the reasonable value of his services, less the probable cost of completing the undertaking.[1] If, however, the sickness was such that it could have been anticipated at the time the service was undertaken, this rule would not apply.[2]

3. *Abandonment by Agent.*

§ 632. **1. When Abandonment lawful.** Where the agency is created to endure for an indefinite period, it is, as has been seen, ordinarily held to be an agency at will merely and it may be lawfully terminated by either party at his will at any time.[3] Analogous to this is the somewhat common arrangement that the relation shall continue so long as each of the parties or either of the parties, is satisfied. In the event of dissatisfaction, the party having the option may lawfully terminate the agency

[1] Fuller *v.* Brown, 11 Metc. (Mass.) 440; Ryan *v.* Dayton, 25 Conn. 188, 65 Am. Dec. 560; Green *v.* Gilbert, 21 Wis. 395; Hillyard *v.* Crabtree, 11 Tex. 264; Fenton *v.* Clark, 11 Vt. 557; Seaver *v.* Morse, 20 Vt. 620; Coe *v.* Smith, 4 Ind. 79; Wolfe *v.* Howes, 20 N. Y. 197, 75 Am. Dec. 388; Lakeman *v.* Pollard, 43 Me. 463, 69 Am. Dec. 77.

[2] Jennings *v.* Lyons, 29 Wis. 553, 20 Am. Rep. 57.

[3] DeBriar *v.* Minturn, 1 Cal. 453; Franklin Mining Co. *v.* Harris, 24 Mich. 115; Palmer *v.* Marquette, &c. Co., 32 Mich. 274; Tatterson *v.* Suffolk Mnfg. Co., 106 Mass. 56; Harper *v.* Hassard, 113 Mass. 187; Peacock *v.* Cummings, 46 Penn. St. 434.

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upon that ground.[1] In cases of this nature there being no agreement to continue the agency for a definite time, no forfeiture can result from its termination by the party having the right. The agent, therefore, would be entitled to recover the stipulated compensation for the services rendered without diminution on the ground of the termination of the agency.

The same result ensues, also, in those cases in which the agency, though primarily for a definite time, may, by the terms of the contract creating it, be terminated upon the happening of a given event, or the arising of a certain contingency. If terminated in the manner and upon the event specified, the agent may recover full compensation for the services rendered.[2]

So though employed for a definite time, if the conduct of the principal is such as to justify the agent in abandoning the service, the agent will be entitled to recover the value of his services.[3]

§ 633. 2. **When Abandonment wrongful.** But where, on the other hand, the agent has agreed that he will continue to act for a definite period; or that he will fully perform a given undertaking; or that he will terminate the relation only upon the happening of a certain event or the arising of a certain contingency; or that he will not terminate it in any case without giving a specified notice; and he does terminate it in violation of this agreement, without good cause, the termination in the sense of which we have spoken, as being a breach of his contract, must be regarded as wrongful.[4] True, as has been seen,[5] he has the *power* to terminate it. The law will not compel him to continue performance in accordance with his agreement. But under his contract, his *right* to terminate is suspended and if he insists upon exercising his power, he must answer for the broken contract.[6]

§ 634. **Same Subject—Entire and severable Contracts—Right to Compensation.** The question of the right to recover com-

[1] Spring *v.* Ansonia Clock Co., 24 Hun (N. Y.) 175; Provost *v.* Harwood, 29 Vt. 219; Rossiter *v.* Cooper, 23 Vt. 522; Patrick *v.* Putnam, 27 Vt. 759.

[2] Winship *v.* Base Ball Association, 78 Me. 571.

[3] Bishop *v.* Ranney, — Vt. — 7 Atl. Rep. 820; Patterson *v.* Gage, 23 Vt. 558, 56 Am. Dec. 96; Warner *v.* Smith, 8 Conn. 14.

[4] See *ante*, § 233.

[5] See *ante*, § 233.

[6] Word *v.* Winder, 16 La. Ann. 111.

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pensation for services rendered in part performance of an undertaking to act for a given period, or to accomplish a given object, but which has been abandoned by the agent before full performance, is one of the most vexatious and difficult ones in the law. It is certain that the parties may expressly agree that no compensation shall be paid unless the undertaking is performed, and in such a case if the agent abandons the undertaking, without fault of the principal, before full performance, he cannot recover. Full performance is here expressly made a condition precedent to the right to compensation.[1]

But the most difficult question arises where the agreement is not thus express and it becomes necessary to determine whether under all the facts and circumstances of a given case full performance was intended by the parties to be a condition precedent. In determining this question it is important to ascertain whether the contract is *entire* or *severable*. As is well said by Mr. Parsons in his treatise on Contracts,[2] no precise rules can be given by which this question in a given case may be settled. Like most other questions of construction it depends upon the intention of the parties, and this must be discovered in each case by considering the language employed and the subject-matter of the contract. If, says he, the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed or is left to be implied by law, such a contract will generally be held to be severable. And the same rule holds where the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed, although the latter is in its nature single and entire. But if on the other hand, the consideration to be paid is entire and single, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items. In accordance with this rule a contract by which A agrees to serve B for an indefinite time at a given sum per month, would be held to be severable.[3] So an agreement by A to serve B for one year at a certain sum per month to be paid at the expiration of each month, is so far severable that A would have a right of action for the stipulated sum

[1] See *ante*, § 610.

[2] Parsons on Contracts, 7th Ed. Vol. 2 p. *517.

[3] *Idem*, p. *521.

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at the expiration of each month.[1] But a contract by A to serve B for one year for a given sum is plainly entire.[2] And so a contract by A to serve B for one year for a given sum per month is held to be entire.[3] In both cases, no time for payment being specified, the law presumes that it was to be paid only when the year's service was performed.[4]

So a contract to perform a given duty for a given sum would be entire,[5] but a contract to perform the same duty for a given sum to be paid in installments as the performance progressed would be severable so far as the right to recover the several installments is concerned.[6]

§ 635. **Same Subject—The Rules stated.** Where the contract was thus found to be entire, it was early established as the doctrine of the common law that full performance of it was a condition precedent to the right to recover the stipulated compensation.[7] If the agent should voluntarily fail, though by a single day, to complete the designated term, he could recover nothing upon the contract for all the services previously rendered, because the contract had not been fully performed on his part. Neither could a recovery be had upon the basis of an implied

[1] See Capron *v.* Strout, 11 Nev. 304; Thayer *v.* Wadsworth, 19 Pick. (Mass.) 349.

[2] Stark *v.* Parker, 2 Pick. (Mass.) 267, 13 Am. Dec. 425. In this case the party agreed to work for one year for $120. Eldridge *v.* Rowe, 2 Gilm. (Ill.) 91, 43 Am. Dec. 41; Miller *v.* Goddard, 34 Me. 102, 56 Am. Dec. 638. Put see Purcell *v.* McComber, 11 Neb. 209, re-reported in note to 35 Am. Rep. 476.

[3] Thus a contract to work "for eight months for $104, or $13 a month," is entire. Reab *v.* Moor, 19 Johns. (N. Y.) 337. So a contract to work "seven months at $12 per month," was held to be an entire contract to pay $84, at the end of the seven months and not a contract to pay $12, at the end of each month. Davis *v.* Maxwell, 12 Metc. (Mass.) 286. See also Nichols *v.* Coolahan, 10 Metc. (Mass.) 449; Eldridge *v.* Rowe, *supra;* Rex *v.* Birdbrooke, 4 T. R. 245; Diefenback *v.* Stark, 56 Wis. 462, 43 Am. Rep. 719; Jennings *v.* Lyons, 39 Wis. 553, 20 Am. Rep. 57. A contract with a teacher to teach ten months at a given sum per month is entire. Wilson *v.* Board of Education, 63 Mo. 137.

[4] Davis *v.* Maxwell, 12 Metc. (Mass.) 286.

[5] Reab *v.* Moor, 19 Johns. (N. Y.) 337.

[6] Woods *v.* Russell, 5 B. and Ald. 942; Clarke *v.* Spence, 4 A. & E. 448; Laidler *v.* Burlinson, 2 M. &. W. 602; Cunningham *v.* Morrell, 10 Johns. (N. Y.) 203, 6 Am. Dec. 332.

[7] Spain *v.* Arnott, 2 Stark. 256; Cutter *v.* Powell, 6 T. R. 320; Ellis *v.* Hamlen, 3 Taunt. 51; Sinclair *v.* Bowles, 9 B. & C. 92; Waddington *v.* Oliver, 2 B. & P. (N. R.) 61.

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contract to pay for the services actually rendered, because the existence of the express contract left no room for an implied one. *Expressum facit cessare tacitum* was the maxim applied.[1] And this rule has been adopted and still prevails in the majority of the American States.[2]

In declaring this rule in a leading case [3] it is said by the learned judge: "Courts of justice are eminently characterized by their obligation and office to enforce the performance of contracts, and to withhold aid and countenance from those who seek, through their instrumentality, impunity or excuse for the violation of them. And it is no less repugnant to the well established rules of civil jurisprudence, than to the dictates of moral sense, that a party, who deliberately and understandingly enters into an engagement and voluntarily breaks it, should be permitted to make that very engagement the foundation of a claim to compensation for services under it. The true ground of legal demand in all cases of contracts between parties is that the party claiming has done all which on his part was to be performed by the terms of the contract to entitle him to enforce the obligation

[1] Stark *v.* Parker, 2 Pick. (Mass.) 267, 13 Am. Dec. 425.

[2] Lantry *v.* Parks, 8 Cow. (N. Y.) 63; Smith *v.* Brady, 17 N. Y. 173, 72 Am. Dec. 442; Olmstead *v.* Beale, 19 Pick (Mass.) 528; Thayer *v.* Wadsworth, Id. 349; Davis *v.* Maxwell, 12 Metc. (Mass.) 290; Stark *v.* Parker, 2 Pick. (Mass.) 267, 13 Am. Dec. 425; Henson *v.* Hampton, 32 Mo. 408; Posey *v.* Garth, 7 Mo. 96, 37 Am. Dec. 183; Caldwell *v.* Dickson, 17 Mo. 575; Schnerr *v.* Lemp, 19 Mo. 40; Brown *v.* Fitch, 33 N. J. L. 418; Bragg *v.* Bradford, 33 Vt. 35; Patnote *v.* Sanders, 41 Vt. 66; Ripley *v.* Chipman, 13 Vt. 268; Martin *v.* Schoenberger, 8 W. & S. (Penn.) 367; Alexander *v.* Hoffman, 5 Id. 382; Dunn *v.* Moore, 16 Ill. 151; Eldridge *v.* Rowe, 2 Gilm. (Ill.) 91, 43 Am. Dec. 41; Mack *v.* Bragg, 30 Vt. 571; Clark *v.* School District, 29 Vt. 217; De Camp *v.* Stevens, 4 Blackf. (Ind.) 24; Hutchinson *v.* Wetmore, 2 Cal. 310, 56 Am. Dec. 337; Hogan *v.* Titlow, 14 Cal. 73; Miller *v.* Goddard, 34 Me. 102, 56 Am. Dec. 638; Green *v.* Gilbert, 21 Wis. 395; Evans *v.* Bennett, 7 Wis. 404; Henderson *v.* Stiles, 14 Ga. 135; Cody *v.* Raynaud, 1 Col. 272; Givhan *v.* Dailey, 4 Ala. 336; Whitley *v.* Murray, 34 Ala. 155; Abernathy *v.* Black, 2 Cold. (Tenn.) 314; Larkin *v.* Buck, 11 Ohio St. 561; Halloway *v.* Lacy, 4 Humph. (Tenn.) 468; Clark *v.* Gilbert, 26 N. Y. 279; Holmes *v.* Stummel, 24 Ill. 370; Jewell *v.* Thompson, 2 Litt. (Ky.) 52; Morford *v.* Ambrose, 3 J. J. Marsh. (Ky.) 688; Preston *v.* American Linen Co., 119 Mass. 400; Byrd *v.* Boyd, 4 McCord. (S. C.) 246; Cox *v.* Adams, 1 N. & McC. (S. C.) 284; Steamboat Co. *v.* Wilkins, 8 Vt. 54; Sherman *v.* Transportation Co., 31 Vt. 162; Dover *v.* Plemmons, 10 Ired. (N. C.) L. 28; Angle *v.* Hanna, 22 Ill. 429.

[3] Lincoln, J., in Stark *v.* Parker, 2 Pick. (Mass.) 267, 13 Am. Dec. 425.

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of the other party. * * * It will be found that a distinction has been uniformly recognized in the construction of contracts between those in which the obligation of the parties is reciprocal and independent, and those where the duty of the one may be considered as a condition precedent to that of the other. In the latter cases it is held that the performance of the precedent obligation can alone entitle the party bound to it to his action. * * * Nothing can be more unreasonable than that a man who deliberately and wantonly violates an engagement should be permitted to seek, in a court of justice, an indemnity from the consequences of his voluntary act, and we are satisfied that the law will not allow it. * * * The agreement of the defendant was as entire on his part to pay, as that of the plaintiff to serve. The latter was to serve one year, the former to pay one hundred and twenty dollars. * * * The performance of a year's service was in this case a condition precedent to the obligation of payment. The plaintiff must perform the condition before he is entitled to recover anything under the contract; and he has no right to renounce his agreement and recover upon a *quantum meruit*.[1] * * * The law, indeed, is most reasonable in itself. It denies only to a party an advantage from his own wrong. It requires him to act justly, by a faithful performance of his own engagements, before he exacts the fulfillment of dependent obligations on the part of others. It will not admit of the monstrous absurdity that a man may voluntarily and without cause violate his agreement, and make the very breach of that agreement the foundation of an action which he could not maintain under it. An apprehension that this rule may be abused to the purposes of oppression by holding out an inducement to the employer, by unkind treatment, near the close of a term of service, to drive the laborer from his engagement to the sacrifice of his wages, is wholly groundless. It is only in cases where the desertion is voluntary and without cause on the part of the laborer, or fault or consent on the part of the employer, that the principle applies. Wherever there is a reasonable excuse, the law allows a recovery. To say that this is not a sufficient pro-

[1] Citing McMillan *v.* Vanderlip, 12 Johns. (N. Y.) 165, 7 Am. Dec. 299; Jennings *v.* Camp, 13 Id. 94, 7 Am. Dec. 367; and Reab *v.* Moor, 19 Id. 337; Waddington *v.* Oliver, 2 B. & P. (N. R.) 61; Ellis *v.* Hamlen 3 Taunt. 51.

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tection, that an excuse may in fact exist in countless secret and indescribable circumstances, which from their very nature are not susceptible of proof, or which, if proved, the law does not recognize as adequate, is to require no less than that the law should presume what can never be legally established, or should admit that as competent which by positive rules is held to be wholly immaterial."

§ 636. **Same Subject—The more liberal Rule—Britton v. Turner.** This rule, however, while perhaps strictly and severely just, as a principle of retributive justice has not met with universal approval, and a strong tendency has been manifested in many cases to mitigate its severity by the application of a more liberal and equitable principle, and to allow the agent, though in default, to recover the actual value of his services to the principal.

The principles adopted in such cases are so clearly enunciated in the justly celebrated case of Britton *v.* Turner,[1] as to justify, perhaps, a somewhat liberal extract from it, particularly inasmuch as the contract and breach were there exactly the same as in the leading case of Stark *v.* Parker to which reference has just been made, and where an opposite conclusion was reached. "It may be assumed," said PARKER, J., "that the labor performed by the plaintiff, and for which he seeks to recover a compensation in this action, was commenced under a special contract to labor for the defendant the term of one year for the sum of one hundred and twenty dollars, and that the plaintiff has labored but a portion of that time, and has voluntarily failed to complete the entire contract. It is clear, then, that he is not entitled to recover upon contract itself, because the service, which was to entitle him to the sum agreed upon, has never been performed. But the question arises, can the plaintiff, under these circumstances, recover a reasonable sum for the service he has actually performed under the count in *quantum meruit*?

Upon this, and questions of a similar nature, the decisions to be found in the books are not easily reconciled.

It has been held, upon contracts of this kind for labor to be performed at a specified price, that the party who voluntarily fails to fulfill the contract, by performing the whole labor contracted for, is not entitled to recover anything for the labor actually per-

[1] 6 New Hampshire, 481, 26 Am. Dec. 713.

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formed, however much he may have done towards the performance, and this has been considered the settled rule of law upon the subject.[1]

That such rule in its operation may be very unequal, not to say unjust, is apparent. A party who contracts to perform certain specified labor, and who breaks his contract in the first instance, without any attempt to perform it, can only be made liable to pay the damages which the other party has sustained by reason of such non-performance, which in many instances may be trifling;—whereas a party who, in good faith, has entered upon the performance of his contract and nearly completed it and then abandoned the further performance—although the other party has had the full benefit of all that has been done, and has, perhaps, sustained no actual damage,—is in fact subjected to a loss of all which has been performed, in the nature of damages for the non-fulfillment of the remainder, upon the technical rule that the contract must be fully performed in order to a recovery of any part of the compensation. By the operation of this rule, then, the party who attempts performance may be placed in a much worse situation than he who wholly disregards his contract, and the other party may receive much more, by the breach of the contract than the injury which he has sustained by such breach, and more than he could be entitled to were he seeking to recover damages by an action.

The case before us presents an illustration. Had the plaintiff in this case never entered upon the performance of his contract, the damage could not probably have been greater than some small expense and trouble incurred in procuring another to do the labor, which he had contracted to perform. But having entered upon the performance, and labored nine and a half months, the value of which labor to the defendant, as found by the jury, is ninety-five dollars, if the defendant can succeed in this defense, he in fact receives nearly five-sixths of the value of a whole year's labor, by reason of the breach of contract by the plaintiff,—a sum not only utterly disproportionate to any probable, not to say

[1] Citing Stark v. Parker, 2 Pick. (Mass.) 267, 13 Am. Dec. 425; Faxon v. Mansfield, 2 Mass. 147; McMillan v. Vanderlip, 12 Johns. (N. Y.) 165, 7 Am. Dec. 299; Jennings v. Camp, 13 Johns. (N. Y.) 94, 7 Am. Dec. 367; Reab. v. Moor, 19 Johns. (N. Y.) 337; Lantry v. Parks, 8 Cow. (N. Y.) 63; Sinclair v. Bowles, 9 Barn. & Cress. 92; Spain v. Arnott, 2 Stark 256.

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possible, damages, which could have resulted from the neglect of the plaintiff to continue the remaining two and a half months, but altogether beyond any damage which could have been recovered by the defendant had the plaintiff done nothing towards the fulfillment of his contract. * * *

It is said that where a party contracts to perform certain work and to furnish materials, as for instance, to build a house, and the work is done, but with some variations from the mode prescribed by the contract, yet if the other party has the benefit of the labor and materials, he should be bound to pay so much as they are reasonably worth.[1] * * * It is, in truth virtually conceded in such cases that the work has not been done, for if it had been, the party performing it would be entitled to recover upon the contract itself, which, it is held, he cannot do.

Those cases are not to be distinguished, in principle, from the present, unless it be in the circumstance that where the party has contracted to furnish materials and do certain labor, as to build a house in a specified manner, if it is not done according to the contract, the party for whom it is built may refuse to receive it—elect to take no benefit from what has been performed; and therefore if he does receive, he shall be bound to pay the value; whereas, in a contract for labor merely, from day to day, the party is continually receiving the benefit of the contract under an expectation that it will be fulfilled, and can not, upon the breach of it, have an election to refuse to receive what has been done and thus discharge himself from payment.

But we think this difference in the nature of the contracts does not justify the application of a different rule in relation to them. The party who contracts for labor merely, for a certain period, does so with full knowledge that he must, from the nature of the case, be accepting part performance from day to day, if the other party commences the performance, and with knowledge also that the other may eventually fail of completing the entire term.

If under such circumstances, he actually receives a benefit from the labor performed, over and above the damage occasioned

[1] Citing 2 Stark. Ev. 97, 98; Hayward v. Leonard, 7 Pick. (Mass.) 181, 19 Am. Dec. 268; Smith v. First Cong. M. H., 8 Pick. (Mass.) 178; Jewell v. Schroeppel, 4 Cow. (N. Y.) 564; Hayden v. Madison, 7 Greenl. (Me.) 78; Bull. N. P. 139; 4 Bos. & Pul. 355; 10 Johns. (N. Y.) 36; 13 Id. 97; 7 East. 479.

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by the failure to complete, there is as much reason why he should pay the reasonable worth of what has thus been done for his benefit, as there is when he enters and occupies the house which has been built for him, but not according to the stipulations of the contract, and which he, perhaps, enters, not because he is satisfied with what has been done, but because circumstances compel him to accept it such as it is, that he should pay for the value of the house. * * *

In neither case has the contract been performed. In neither, can an action be sustained on the original contract. In both, the party has assented to receive what is done. The only difference is, that in the one case the assent is prior, with a knowledge that all may not be performed; in the other, it is subsequent, with a knowledge that the whole has not been accomplished. * * *

We hold, then, that where a party undertakes to pay upon a special contract for the performance of labor, or the furnishing of materials, he is not to be charged upon such special agreement until the money is earned according to the terms of it; and where the parties have made an express contract, the law will not imply and raise a contract different from that which the parties have entered into, except upon some farther transaction between the parties.

In case of a failure to perform such special contract by the default of the party contracting to do the service, if the money is not due by the terms of the special agreement, he is not entitled to recover for his labor, or for the materials furnished, unless the other party receives what has been done or furnished, and upon the whole case derives a benefit from it.[1]

But if, where a contract is made of such a character, a party actually receives labor or materials and thereby derives a benefit and advantage, over and above the damage which has resulted from the breach of the contract by the other party, the labor actually done, and the value received furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of such excess. This may be considered as making a new case, one not within the original agreement, and the party is entitled to 'recover on his new case for the work done, not as agreed, but yet accepted by the defendant.'[2]

[1] Citing Taft v. Montague, 14 Mass. 282. 7 Am. Dec. 215; 2 Stark. Ev. 644.

[2] Citing 1 Danes Abr. 224.

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If on such failure to perform the whole, the nature of the contract be such that the employer can reject what has been done, and refuse to receive any benefit from the part performance, he is entitled so to do, and in such case is not liable to be charged, unless he has before assented to and accepted of what has been done, however much the other party may have done towards the performance. He has, in such case, received nothing, and having contracted to receive nothing but the entire matter contracted for, he is not bound to pay, because his express promise was only to pay on receiving the whole, and having actually received nothing, the law cannot and ought not to raise an implied promise to pay. But where the party receives value, takes and uses the materials, or has advantage from the labor, he is liable to pay the reasonable worth of what he has received.[1] And the rule is the same, whether it was received and accepted by the assent of the party prior to the breach, under a contract by which, from its nature, he was to receive labor from time to time until the completion of the whole contract; or whether it was received and accepted by an assent subsequent to the performance of all which was in fact done. If he received it under such circumstances as precluded him from rejecting it afterwards, that does not alter the case; it has still been received by his assent. * * *

The benefit and advantage which the party takes by the labor, therefore, is the amount of value which he receives, if any, after deducting the amount of damage; and if he elects to put this in defense he is entitled so to do, and the implied promise which the law will raise, in such case, is to pay such amount of the stipulated price for the whole labor, as remains after deducting what it would cost to procure a completion of the residue of the service, and also any damage which has been sustained by reason of the non-fulfillment of the contract. If, in such case, it be found that the damages are equal to, or greater than, the amount of the labor performed, so that the employer, having a right to the full performance of the contract, has not, upon the whole case, received a beneficial service, the plaintiff can not recover.

This rule, by binding the employer to pay the value of the service he actually receives, and the laborer to answer in damages where he does not complete the entire contract, will leave no

[1] Citing Farnsworth v. Garrard, 1 Camp. 38.

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temptation to the former to drive the laborer from his service, near the close of his term, by ill-treatment, in order to escape from payment; nor to the latter to desert his service before the stipulated time, without a sufficient reason; and it will, in most instances, settle the whole controversy in one action and prevent a multiplicity of suits and cross-actions."

§ 637. **Same Subject—Further of the Rule of Britton v. Turner.** Concisely stated, the doctrine of this case may be said to be that where a party fails to comply substantially with his agreement, he can not, unless it is apportionable, sue or recover upon the agreement at all. But where anything has been done from which the other party has received substantial benefit and which he has appropriated, a recovery may be had upon a *quantum meruit*, based upon that benefit. The basis of this recovery is not the original contract, but a new implied agreement deducible from the delivery and acceptance of some valuable service or thing. The defaulting plaintiff can in no case recover more than the contract price, and he cannot recover that if his work is not reasonably worth it, or if, by paying it, the rest of the work will cost the defendant more than if the whole had been completed under the contract.

Notwithstanding much opposition, this rule has gradually worked its way into judicial favor and is now adopted and enforced in Michigan,[1] Iowa,[2] Nebraska,[3] Kansas,[4] Texas,[5] Indiana,[6]

[1] Allen v. McKibben, 5 Mich. 449.

[2] Pixler v. Nichols, 8 Iowa 106; McClay v. Hedge, 18 Id. 66; McAfferty v. Hale, 24 Id. 356; Byerlee v. Mendell, 39 Id. 382; Wolf v. Gerr, 43 Id. 339. In McClay v. Hedge, Judge DILLON says: "This question was settled in this State by the case of Pixler v. Nichols, 8 Iowa 106, which distinctly recognized and expressly followed Britton v. Turner, 6 N. H. 481. That celebrated case has been criticised, doubted, and denied to be sound. It is frequently said to be good equity but bad law; yet its principles are gradually winning their way into professional and judicial favor. It is bottomed on justice and is right upon principle, however it may be upon the technical and more illiberal rules of the common law as found in the older cases."

[3] Purcell v. McOmber, 11 Neb. 209; also reported in note to 85 Am. Rep. 476.

[4] Duncan v. Baker, 21 Kan. 99; also reported in note to 31 Am. Rep. at p. 102.

[5] Carroll v. Welch, 26 Tex. 147.

[6] Coe v. Smith, 4 Ind. 82, 58 Am. Dec. 618; Ricks v. Yates, 5 Ind. 115.

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Missouri[1] and Mississippi.[2] After some leaning in favor of it in Wisconsin, it has there been finally denied.[3]

§ 638. **Brief Absences no Abandonment, When.** The question of what shall be deemed to be an abandonment of the services, is one to be determined by the facts and circumstances of each case. There are undoubtedly cases in which instant and constant attention and care are required, where any absence from the post of duty might occasion serious if not irreparable loss. In such cases a wilful absence of an hour might be deemed to be an abandonment or furnish good cause for the dismissal of the agent. But in other cases an absence for a day or more might result in no loss and ought reasonably to be considered neither ground for dismissal nor an abandonment of the service.[4] The nature of the employment, the necessities of the case, the probability of loss, the reason of the absence, are all to be taken into consideration, and it is for the jury to say, under all of the circumstances, whether there was an abandonment in fact, or whether the principal was justified in treating it as such.[5] Thus where the foreman of a fruit package factory, employed for a year, was absent upon necessary and reasonable business for less than a day, his absence involving no serious loss, it was held that this was neither an abandonment of the service nor a good ground for his dismissal;[6] so in another case, the absence of a school teacher for four days, it not appearing that there was any serious loss occasioned, or that the business of the school had been impeded a single hour thereby, was held to be not a sufficient reason for a discharge.[7] On the other hand, the absence of a plantation overseer for a single day was held to be a sufficient reason for his dismissal, it appearing that the absence was for the purpose of provoking a discharge in order to create a cause of action.[8]

[1] Downey *v.* Burke, 23 Mo. 228.

[2] Robinson *v.* Sanders, 24 Miss. 391.

[3] Diefenback *v.* Stark, 56 Wis. 462, 43 Am. Rep. 719.

[4] See cases cited in following notes. See also Wood, Master *v.* Servant. Second Ed. p. 219.

[5] Shaver *v.* Ingham, 58 Mich. 649, 55 Am. Rep. 712; Lakeman *v.* Pollard, 43 Me. 463, 69 Am. Dec. 77; Partington *v.* Wamsutta Mills, 110 Mass. 467: Heber *v.* United States Flax Mfg. Co., 13 R. I. 303; Nayler *v.* Fall River Iron Works, 118 Mass. 317.

[6] Shaver *v.* Ingham, *supra.*

[7] Fillieul *v.* Armstrong, 7 Ad. & El. 557.

[8] Ford *v.* Danks, 16 La. Ann. 119. See Edwards *v.* Levy, 2 Fost. & Fin. 94; Wright *v.* Gihon, 3 C. & P. 583.

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§ 639. **Condonation of Abandonment.** Even if the agent has been absent without authority, yet if the principal subsequently receive him back and permit him to continue the performance with no notice that a forfeiture has been incurred, or would be insisted upon, a condonation will be presumed. It is certainly equitable and in accordance with well established principles, to hold that where an employee for a fixed period, without any fault of the employer, absents himself for a short time, and then the employer, with knowledge of the facts, receives him back into his service without objection, and retains him until the termination of the contract, he thereby waives the right to declare the contract forfeited as to the services actually rendered.[1]

§ 640. **What will excuse Abandonment—Sickness—Epidemic.** Where sickness or other physical incapacity which could not be foreseen, renders the temporary or permanent cessation from service imperative, the agent cannot be deemed to have abandoned the service.[2] Such misfortunes are classed among other acts of God for which the individual cannot be held responsible. So an agent is under no obligation to imperil his life by remaining at his post in the vicinity of a prevailing epidemic so dangerous in its character as to justify a man of ordinary care and prudence in refusing to remain, nor does it make any difference that subsequent developments demonstrate that he was actually in no danger. The propriety of his conduct is for the jury to determine from the facts as they were presented to him.[3]

An agent therefore who is thus compelled by a *vis major* to abandon the service, although undertaken for a definite time by

[1] Bast *v.* Byrne, 51 Wis. 531, 37 Am. Rep. 841; Ridgway *v.* Hungerford Market Co., 3 Ad. & El. 171; Prentiss *v.* Ledyard, 28 Wis. 131; McGrath *v.* Bell, 33 N. Y. Super. 195. In Bast *v.* Byrne the agent agreed to work a year for a fixed price. He worked up to the end of the year but was absent at different times, nine days and a half in all, but he was held entitled to full pay.

[2] Lakeman *v.* Pollard, 43 Me. 463, 69 Am. Dec. 77; Jennings *v.* Lyons, 39 Wis. 557, 20 Am. Rep. 57; Ryan *v.* Dayton, 25 Conn. 188, 65 Am. Dec. 560; Greene *v.* Linton, 7 Port. (Ala.) 133, 31 Am. Dec. 707; Wolfe *v.* Howes, 20 N. Y. 197, 75 Am. Dec. 388; Dickey *v.* Linscott, 20 Me. 453, 37 Am. Dec. 66; Leopold *v.* Salkey, 89 Ill. 420; Harrington *v.* Fall River Iron Works, 119 Mass. 82; Callahan *v.* Shotwell, 60 Mo. 398; Hubbard *v.* Belden, 27 Vt. 645; Smith *v.* Hill, 18 Ark. 173; Hunter *v.* Waldron, 7 Ala. 753; Moulton *v.* Trask, 9 Metc. (Mass.) 577.

[3] Lakeman *v.* Pollard, *supra.*

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an entire contract, may recover upon a *quantum meruit* for the value of the services actually performed.[1]

§ 641. **Contracts not to terminate without Notice—Forfeiture for Breach.** It is not uncommon to provide that the agency, though otherwise at will, shall not be terminated by one or either party without notice to the other, either fixed or reasonable. Such agreements are valid, and, if violated, will furnish ground for an action for the damages sustained. They will not, however, work a forfeiture of wages, unless it is expressly so stipulated.[2] The law abhors forfeitures, and will not lightly imply them.

It is, therefore, common to provide that, if the agent terminates the relation without giving the specified notice, he shall forfeit to the principal either all, or a certain portion, of the compensation then earned but unpaid. Such stipulations, when fairly made and not unreasonable or oppressive in their effects, will be enforced by the law.[3] It would not be reasonable, however, to make the forfeiture cover a very long period,[4] or be out of proportion to the principal's loss.[5]

It is not necessary that the stipulation should take the form of a written contract between the parties. If the agent has notice of such a regulation at the time he enters upon performance, and accepts the agency under it; or if he has notice at any subsequent time during the service and continues to serve under it, he will be bound.[6] He cannot be bound, however, by a regulation or usage of which he had no notice,[7] and he may always show that as a matter of fact he had none.

§ 642. **Same Subject—What works a Forfeiture.** Here, too, as in other cases, a mere temporary absence will not work a forfeiture, nor will it result from absence on account of sickness,

[1] Lakeman *v.* Pollard, *supra;* Ryan *v.* Dayton, *supra;* Greene *v.* Linton, *supra;* Wolfe *v.* Howes, *supra.*

[2] Hunt *v.* Otis, 4 Metc. (Mass.) 463.

[3] Richardson *v.* Woehler, 26 Mich. 90; Harmon *v.* Salmon Falls Mnfg Co., 35 Me. 447, 58 Am. Dec. 718; Walsh *v.* Walley, L. R. 9 Q. B. 367, 9 Eng. Rep. (Moak) 338.

[4] Richardson *v.* Woehler, *supra.*

[5] Basye *v.* Ambrose, 28 Mo. 39; Schimpf *v.* Tennessee Mnfg Co. — Tenn. —, 6 S. W. Rep. 131.

[6] Harmon *v.* Salmon Falls Mnfg Co., *supra;* Bradley *v.* Salmon Falls Mnfg Co., 30 N. H. 487; Collins *v.* New England Iron Co., 115 Mass. 23; Pottsville Iron and Steel Co. *v.* Good, — Penn. St. —, 9 Atl. Rep. 497.

[7] Stevens *v.* Reeves, 9 Pick. (Mass.) 198.

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severe bodily injury, or other unforeseen emergency. To work a forfeiture, said a learned judge,[1] the abandonment of the employer's service must be the direct, voluntary act, or the natural and necessary consequence of some voluntary act, of the person employed, or the result of some act committed by him with a design to terminate the contract or employment, or render the further prosecution impossible. But a forfeiture of wages is not incurred, where the abandonment is immediately caused by acts or occurrences not foreseen or anticipated, over which the person employed had no control, and the natural and necessary consequence of which was not to cause the termination of the employment of a party under a contract for services or labor.

§ 643. **Double Agency—Agent cannot recover Compensation from either Party when double Agency unknown.** As has been seen, the law will not permit the agent to put himself in such a situation that his own interests will conflict with those of the principal. The latter is entitled to the disinterested skill, diligence and zeal of the agent for his own exclusive benefit, and unless the principal expressly consents to it, the agent cannot divide this duty and give a part to another. Hence it is the rule of the law that, unless with the free and intelligent consent of his principal, given after full knowledge of all of the circumstances, the agent cannot in the same transaction, act both for the principal and the adverse party.[2]

If, therefore, without such consent, the agent undertakes to also serve the other party in the same transaction, he commits such a breach of his duty to his own principal, and so violates the rules of sound policy and morality, that he forfeits all right to compensation from the principal who first employed him.[3]

[1] BIGELOW, C. J. in Hughes *v.* Wamsutta Mills, 11 Allen (Mass.) 201.

[2] See *ante*, §§ 66–68.

[3] Scribner *v.* Collar, 40 Mich. 375, 29 Am. Rep. 541; Raisin *v.* Clark, 41 Md. 158, 20 Am. Rep. 66; Bell *v.* McConnell, 37 Ohio St. 396, 41 Am. Rep. 528; Rice *v.* Wood, 113 Mass. 133, 18 Am. Rep. 459; Lynch *v.* Fallon, 11 R. I. 311, 23 Am. Rep. 458; Watkins *v.* Cousall, 1 E. D. Smith (N. Y.) 65; Vanderpoel *v.* Kearns, 2 Id. 170; Everhart *v.* Searle, 71 Penn. St. 256; Meyer *v.* Hanchett, 39 Wis. 419, S. C. 43 Id. 246; Lloyd *v.* Colston, 5 Bush. (Ky.) 587; Walker *v.* Osgood, 98 Mass. 348, 93 Am. Dec. 168; Farnsworth *v.* Hemmer, 1 Allen (Mass.) 494, 79 Am. Dec. 750; De Steiger *v.* Hollington, 17 Mo. App. 382; Webb *v.* Paxton, — Minn. —, 32 N. W. Rep. 749; Morison *v.* Thompson, L. R. 9 Q. B. 480, 10 Eng. Rep. (Moak) 129; Bollman *v.* Loomis, 41 Conn. 581.

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And for the same reason, he cannot recover compensation from the second employer, who was ignorant of the first engagement.[1]

And if the second employer has knowledge of the first engagement, then both he and the agent are guilty of the wrong committed against the first employer, and the law will not enforce an executory contract entered into in fraud of his rights.

It is no answer to say that the second employer, having knowledge of the first employment, should be held liable on his promise because he could not be defrauded in the transaction. The contract itself is void as against public policy and good morals, and both parties thereto being *in pari delicto* the law will leave them as it finds them. *Ex dolo malo non oritur actio* is the maxim of the law. The result in such cases is therefore that the agent can recover from neither party unless his double employment was known and assented to by both.[2]

§ 644. **Same Subject—May recover when double Agency was fully known and assented to.** There is some conflict in the decisions upon the question of the agent's right to recover compensation from both parties, even when the double employment is fully known and assented to. It is said, and with no little reason, that even in this case the contract is opposed to public policy on account of the natural and legitimate tendency of such employments.[3] But while all such transactions are properly viewed with suspicion, the weight of reason and authority is in favor of their validity when fairly made.[4] The agent may not be able to serve each of his principals with all his skill, energy or ability. He may not be able to obtain for a selling principal the highest price which could be obtained, nor for a purchasing

[1] Bell *v.* McConnell, 37 Ohio St. 396, 41 Am. Rep. 528; Rice *v.* Wood, 113 Mass. 133, 18 Am. Rep. 459; Raisin *v.* Clark, 41 Md. 158, 20 Am. Rep. 66; Lynch *v.* Fallon, 11 R. I. 311, 23 Am. Rep. 458; Bollman *v.* Loomis, 41 Conn. 581; Farnsworth *v.* Hemmer, 1 Allen (Mass.) 494, 79 Am. Dec. 756.

[2] Bell *v.* McConnell, 37 Ohio St. 396, 41 Am. Rep. 528; Farnsworth *v.* Hemmer, 1 Allen (Mass.) 494, 79 Am. Dec. 756; Walker *v.* Osgood, 98 Mass. 348, 93 Am. Dec. 168; Smith *v.* Townsend, 109 Mass. 500; Rice *v.* Wood, 113 Mass. 133, 18 Am. Rep. 459; Bollman *v.* Loomis, 41 Conn. 581; Everhart *v.* Searle, 71 Penn. St. 256.

[3] See Meyer *v.* Hanchett, 43 Wis. 246.

[4] Bell *v.* McConnell, 37 Ohio St. 396, 41 Am. Rep. 528; Adams Mining Co. *v.* Senter, 26 Mich. 73; Fitzsimmons *v.* Southern Express Co., 40 Ga. 330, 2 Am. Rep. 577; Alexander *v.* University, 57 Ind. 466; Joslin *v.* Cowee, 56 N. Y. 626; Rolling Stock Co. *v.* Railroad, 34 Ohio St. 450.

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principal the lowest price for which the property could have been purchased. But he can render to each a service entirely free from falsehood and fraud; a fair and valuable service in which his best judgment and soundest discretion are fully and freely exercised. And such a service is all that either of his principals contracted for, or had reason to expect.[1]

§ 645. **Agent cannot recover Compensation if Agency was unlawful.** The law will not lend its aid to the enforcement of an illegal contract. If, therefore, the undertaking of the agent was to perform some act which was forbidden by law, or which was opposed to the public policy, he can recover no compensation for the act though it be fully performed according to the agreement.[2]

Some discussion has been given to this question in earlier chapters of this work, and it will not be necessary here to determine what the undertakings are which come within the limits of this rule.[3]

[1] In Adams' Mining Co. *v.* Senter, 26 Mich. at p. 77. CAMPBELL, J. in speaking of the acts of an agent acting for each of two mining companies, says: "It is claimed that upon the principle that a man cannot contract with himself, and cannot occupy positions involving a conflict of duties, all of his dealings whereby the property of one company was transferred to, or used for, the other, should be held unlawful. There is no validity in such a proposition. The authority of agents may, where no law is violated, be as large as their employers may choose to make it. There are multitudes of cases where the same person acts under power from different principals in their mutual transactions. Every partnership involves such double relations. Every survey of boundaries, by a surveyor jointly agreed upon, would come within similar difficulties. It is only where the agent has personal interests conflicting with those of his principal, that the law requires peculiar, safeguards against his acts. There can be no presumption that the agent of the two parties will deal unfairly with either. And when they both deliberately put him in charge of their separate concerns, and there is any likelihood that he may have to deal with the rights of both in the same transactions, instead of lessening his powers, it may become necessary to enlarge them far enough to dispense with such formalities as one man would use with another, but which could not be possible for a single person to go through alone."

[2] Trist *v.* Child, 21 Wall. U. S. 441; Marshall *v.* Baltimore & Ohio R. R. Co., 16 How. (U. S.) 314; Clippinger, *v.* Hepbaugh, 5 W. & S. (Penn.) 315, 40 Am. Dec. 519; Harris *v.* Roof, 10 Barb. (N. Y.) 489; Rose *v.* Truax, 21 *Id.* 361; Gray *v.* Hook, 4 N. Y. 449; Tool Co. *v.* Norris, 2 Wall. (U. S.) 45; Swayze *v.* Hull, 3 Halst. (N. J.) 54, 14 Am. Dec. 399; Gulich *v.* Ward, 5 Halst. (N. J.) 87, 18 Am. Dec. 389.

[3] See *ante*, §§ 18–40.

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§ 646. **When Agent can recover for extra Services.** Where the agent is employed at a fixed salary and the principal enlarges his powers or imposes additional duties upon him, but without stipulating for an increased compensation, the rate fixed will be deemed to be full compensation for all the services rendered, and no extra compensation can be recovered for the performance of the added duties. To warrant such a recovery there must be an express or implied promise to pay for them,[1] or a legal custom to that effect.[2]

§ 647. **Principal's Right of Recoupment.** Instead of resorting to an independent action for the recovery of the damages he may have sustained by reason of the agent's failure to perform his undertaking, the principal may recoup them in an action brought against him by the agent to recover his compensation.[3]

This defense is distinguishable from set-off in three important particulars: 1. The claim sought to be taken advantage of by recoupment must be confined to matters arising out of, and connected with, the transaction or contract upon which the suit is brought. The claims and demands of both parties must spring out of the same contract or transaction, and not out of separate and different transactions. 2. It is immaterial whether the damages sought to be recouped are liquidated or unliquidated, it being well settled that unliquidated damages growing out of the same transaction from which the plaintiff's cause of action arises,

[1] Moreau *v.* Dumagene, 20 La. Ann. 230; City of Decatur *v.* Vermillion, 77 Ill. 315; Marshall *v.* Parsons, 9 C. & P. 656; Guthrie *v.* Merrill, 4 Kan. 187; Fraser *v.* United States, 16 Ct. of Cl. 507; Carr *v.* Chartiers Coal Co., 25 Penn. St. 337; Jordan *v.* Jordan, 65 Ga. 351; Pew *v.* Gloucester Bank, 130 Mass. 391.

As to effect of statutes fixing the number of hours which shall constitute a day's work see Luske *v.* Hotchkiss, 37 Conn. 219, 9 Am. Rep. 314; McCarthy *v.* Mayer, 96 N. Y. 1, 48 Am. Rep. 601.

[2] United States *v.* Macdaniel, 7 Pet. (U. S.) 1; United States *v.* Fillebrown, 7 Pet. (U. S.) 28.

[3] Blodgett *v.* Berlin Mills Co., 52 N. H. 215; Mobile, &c. R. R. Co. *v.* Clanton, 59 Ala. 392, 31 Am. Rep. 15; Brunson *v.* Martin, 17 Ark. 270; Lee *v.* Clements, 48 Ga. 128; Houston *v.* Young, 7 Ind. 200; Stoddard *v.* Treadwell, 26 Cal. 294; Still *v.* Hall, 20 Wend. (N. Y.) 51; Phelps *v.* Paris, 39 Vt. 511; Cilley *v.* Tenny, 31 Vt. 401; DeWitt *v.* Cullings, 32 Wis. 298; Harper *v.* Ray, 27 Miss. 622; Dunlap *v.* Hand, 26 Id. 460; Runyan *v.* Nichols, 11 Johns. (N. Y.) 547; Swift *v.* Harriman, 30 Vt. 607; Marshall *v.* Hann, 17 N. J. L. 425.

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may be recouped. 3. The remedy is conferred and regulated by common law rules and not by statutory regulations.[1]

The occasion for the resort to recoupment may arise under one of two states of fact: *a.* Where the agent sues upon the contract itself; and *b.* where he sues upon a *quantum meruit.* In the first case, the agent treats the contract as being substantially performed, and bases his action upon it. It therefore becomes an essential portion of his case to show what the contract was, and that its performance has been such as to entitle him to the stipulated compensation. In the second case, the agent disregards the contract and sues for the value of his services as though no special contract existed. In this case it becomes necessary for the principal to set up the contract and its breach in his defense.

§ 648. **Same Subject—What Damages may be recouped.** It is indispensable that the damages sought to be recouped should grow out of the same contract or transaction as that upon which the plaintiff's action is based.[2] The principal can not therefore recoup damages for a wrong or injury done by the agent outside of, and disconnected with, the scope of his employment.[3] But, within this limit, whatever damages the principal may have sustained by reason of the agent's inefficiency, negligence, misconduct, or failure to perform the express or implied covenants, agreements or conditions of his undertaking, and which would furnish the basis of an action by the principal against the agent, may be recouped by the principal in the action brought by the agent.[4]

Thus in an action by a railway conductor for his wages, the company may recoup damages resulting to it from a collision caused by his negligence;[5] so in an action by an agent to recover

[1] Ward *v.* Fellers, 3 Mich. 281; Wheat *v.* Dotson, 12 Ark. 699; Baltimore & Ohio R. R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775; Myers *v.* Estell, 47 Miss. 4.

[2] Lufburrow *v.* Henderson, 30 Ga. 482; Mayberry *v.* Leech, 58 Ala. 339; Desha *v.* Robinson, 17 Ark. 288; Hart *v.* Francis, 2 Col. 719; Sanger *v.* Fincher, 27 Ill. 346; Waterman *v.* Clark, 76 Ill. 428; Fessenden *v.* Forest Paper Co., 63 Me. 175; Bartlett *v.* Farrington, 120 Mass. 284; Hulme *v.* Brown, 3 Heisk. (Tenn.) 679; Ward *v.* Wilson, 3 Mich. 1; Allen *v.* McKibbin, 5 Mich. 449; Hill *v.* Southwick, 9 R. I. 299, 11 Am. Rep. 250; Harris *v.* Gamble, 6 Ch. Div. 748, 28 Eng. Rep. (Moak) 310.

[3] Nashville, &c. R.R. Co. *v.* Chumley, 6 Heisk. (Tenn.) 327.

[4] See cases cited in preceding section, note 1.

[5] Mobile, &c. Ry. Co. *v.* Clanton, 59 Ala. 392, 31 Am. Rep. 15.

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his wages, the principal may recoup the damages he has sustained by reason of the seduction of his daughter by the agent;[1] so where a mill operative left his employment without having given the previous notice of his intention to leave which the contract required, in consequence of which the work at the mill was hindered and delayed, it was held that the damages thereby occasioned to the mill owner might be recouped against the claim for wages.[2]

So in such an action, the principal may show in his defense that the agent embezzled or wasted the goods or money committed to his care;[3] that the agent wilfully destroyed the principal's property;[4] that by the agent's negligence the property was lost, destroyed or injured;[5] that the agent failed to furnish certain materials which he had agreed to furnish, whereby the principal was compelled to furnish them;[6] that the agent failed to pay certain damages which he had agreed to pay, by reason of which the principal was obliged to pay them.[7]

So the principal may recoup damages which he has incurred to third persons by reason of the agent's misconduct or neglect, or his failure to observe and perform the principal's instructions.[8]

§ 649. **Same Subject—Limit of Recovery.** Damages, however, can be recouped by way of mitigation only, and can not be made the basis of a recovery of the excess.[9] And having once offered and used them in recoupment, the principal can not afterwards bring an action for the excess.[10] If, therefore, the principal's damages exceed the plaintiff's claim, he should bring an independent action for them in the first instance.

[1] Bixby *v.* Parsons, 49 Conn. 483, 44 Am. Rep. 246.

[2] Satchwell *v.* Williams, 40 Conn. 371.

[3] Heck *v.* Shener, 4 Serg. & R. (Penn.) 249, 8 Am. Dec. 700; Brunson *v.* Martin, 17 Ark. 270; Allaire Works *v.* Guion, 10 Barb. (N. Y.) 55.

[4] Allaire Works *v.* Guion, 10 Barb. (N. Y.) 55; see also Brigham *v.* Hawley, 17 Ill. 38; Lee *v.* Clements, 48 Ga. 128; Fowler *v.* Payne, 49 Miss. 321; Sanger *v.* Fincher, 27 Ill. 347; Wilder *v.* Stanley, 49 Vt. 105.

[5] Allaire Works *v.* Guion, *supra.*

[6] Newton *v.* Forster, 12 M. & W. 772.

[7] Barker *v.* Troy, &c. R. R. Co., 27 Vt. 766.

[8] Campbell *v.* Somerville, 114 Mass. 334.

[9] Ward *v.* Fellers, 3 Mich. 281; Britton *v.* Turner, 6 N. H. 481, 26 Am. Dec. 713; Fowler *v.* Payne, 52 Miss. 210; Streeter *v.* Streeter, 43 Ill. 156; Holcraft *v.* Mellott, 57 Ind. 539; Brunson *v.* Martin, 17 Ark. 270.

[10] Ward *v.* Fellers, 3 Mich. 281.

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The measure of damages is, also, substantially the same as though an independent action were brought to recover them.[1] The limit of the recoupment must, therefore, be the actual damages which directly and proximately result from the negligence, default or misconduct of the agent, and must not exceed the amount claimed by him.[2] Indirect, remote or speculative damages, except in case of fraud where a more liberal rule prevails, are no more to be recovered by recoupment than by an independent action.[3]

§ 650. **Same Subject—Not cut off by Assignment.** The right of recoupment attaches to the contract and goes with it into whosesoever hands the right may come, to sue upon it.[4] The principal may, therefore, avail himself of this defense against the assignee of the agent even though he be a *bona fide* holder.[5]

§ 651. **No Recoupment against an Infant.** Where, however, the agent is an infant, no recoupment can be had against him, of damages arising from his failure to perform the express or implied duties imposed upon him by the contract of agency.[6] "Recoupment is, in substance and effect, a cross-action, and unless the party whom it is attempted to subject to it could be compelled to respond for the damages by an independent action against him, he cannot be reached by recoupment."[7]

II.

THE AGENT'S RIGHT TO REIMBURSEMENT.

§ 652. **Agent must be reimbursed for proper Outlays.** The performance of the agency is undertaken for the benefit of the

[1] Myers v. Estell, 47 Miss. 4; Estell v. Myers, 54 *Id.* 147.

[2] Satchwell v. Williams, 40 Conn. 371.

[3] Blanchard v. Ely, 21 Wend. (N. Y.) 342, 34 Am. Dec. 250; Finney v. Cadwallader, 55 Ga. 75; Pettee v. Tennessee Mfg. Co., 1 Sneed (Tenn.) 381.

[4] Bixby v. Parsons, 49 Conn. 483, 44 Am. Rep. 246.

[5] Bixby v. Parsons, *supra.*

[6] Widrig v. Taggart, 51 Mich. 103; Whitmarsh v. Hall, 3 Denio (N. Y.) 375; Derocher v. Continental Mills, 58 Me. 217; 4 Am. Rep. 286; Robinson v. Weeks, 56 Me. 102; Vent v. Osgood, 19 Pick. (Mass.) 575; Gaffney v. Hayden, 110 Mass. 137, 14 Am. Rep. 580; Meeker v. Hurd, 31 Vt. 642; Dallas v. Hollingsworth, 3 Ind. 537; Meredith v. Crawford, 34 Ind. 399; Ray v. Haines, 52 Ill. 485.

[7] GRAVES, C. J., in Widrig v. Taggart, *supra.*

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principal. To him belong all the profits and advantages resulting from its execution. He is also entitled to all of the profits and advantages acquired by the agent during the course of the performance. It is eminently just and proper, therefore, that the principal should bear the natural and legitimate burdens of the transaction, and that the agent should not be called upon to suffer loss or injury for his acts done in the proper discharge of his duties. And such is the rule of law.

The agent is entitled to be reimbursed by the principal, for all of his advances, expenses and disbursements, made in the course of his agency on account of or for the benefit of his principal, when such advances, expenses and disbursements have been properly incurred, and reasonably and in good faith paid, without any default on the part of the agent.[1]

The agent cannot, however, claim to be reimbursed for expenses or disbursements which have been rendered necessary by his own neglect to use reasonable care and diligence, or which have been incurred in violation of the express or implied conditions of the agency, or in opposition to the instructions of his principal. If such expenses are incurred, the agent must bear them himself.[2] The right to reimbursement extends only to such expenses as are incurred by the agent in the honest management of the business, and without default on his part.[3]

III.

THE AGENT'S RIGHT TO INDEMNITY.

§ 653. **Agent must be indemnified against Consequences of lawful Acts.** The agent has the right to assume that the principal will not call upon him to perform any duty which would render him liable in damages to third persons. Having no personal interest in the act, other than the performance of his duty, the agent should not be required to suffer loss from the doing of an act, apparently lawful in itself, and which he has undertaken to do by the direction, and for the benefit and advantage of his

[1] Ruffner v. Hewitt, 7 W. Va. 585; Warren v. Hewitt, 45 Ga. 501; Maitland v. Martin, 86 Penn. St. 120; Beach v. Branch, 57 Ga. 362; Searing v. Butler, 69 Ill. 575; Elliott v. Walker, 1 Rawle (Penn.) 126.

[2] Godman v. Meixsel, 65 Ind. 32.

[3] Maitland v. Martin, 86 Penn. St. 120.

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principal. If in the performance of such an act, therefore, the agent invades the rights of third persons and incurs liability to them, the loss should fall rather upon him for whose benefit and by whose direction it was done, than upon him whose only intention was to do his duty to his principal. Wherever, then, the agent is called upon by his principal to do an act which is not manifestly illegal, and which he does not know to be wrong, the law implies a promise on the part of the principal to indemnify the agent for such losses and damages as flow directly and immediately from the execution of the agency.[1] Thus an agent is entitled to be indemnified when he is compelled to pay damages for taking personal property by direction of his principal, which, though claimed adversely by another, he had reasonable ground to believe to belong to his principal.[2] So where an agent, acting under the direction of his principal, cuts timber by mistake partly upon the land of another, which his principal receives and disposes of, the agent is entitled to recover of his principal what he is obliged to pay as damages for the trespass.[3]

So where a party is employed in his usual course of business as an auctioneer or warehouseman to sell or deliver goods, by one who claims to have a right to do so, the law will imply a promise to indemnify him, if he be compelled to pay damages to another who establishes a superior right to the goods.[4] And so when a railroad conductor, who had acted under express instructions from the company, was charged in damages to one whom he had ejected from the train for not producing such a ticket as he had been directed, though unlawfully, to insist upon, it was held that he was entitled to be indemnified by the company.[5] So where an agent authorized to contract for the use of a vessel of the principal's, and who did so in his own name, was compelled to pay damages because the principal refused to furnish the vessel according to the agreement, it was held that he could

[1] Moore v. Appleton, 26 Ala. 633, S. C. 34 Ala. 147, 73 Am. Dec. 448; Ramsay v. Gardner, 11 Johns. (N.Y.) 439; Stocking v. Sage, 1 Conn. 522; Greene v. Goddard, 9 Metc. (Mass.) 212; Powell v. Newburgh, 19 Johns. (N. Y.) 284.

[2] Moore v. Appleton, 26 Ala. 633, s. c. 34 Ala. 147, 73 Am. Dec. 448; Avery v. Halsey, 14 Pick. (Mass.) 174.

[3] Drummond v. Humphreys, 39 Me. 347.

[4] Nelson v. Cook, 17 Ill. 443; Adamson v. Jarvis, 4 Bing. 66, 18 Eng. Com. L. 343; Butts v. Gibbins, 2 Ad. & El. 57, 29 Eng. Com. L. 37.

[5] Howe v. Buffalo, &c. R. R Co., 37 N. Y. 297.

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recover from the principal.[1] So where an agent who had purchased property for his principal, was sued and arrested for the price and was compelled to pay it, it was held that the principal was bound to reimburse him for the amount paid and for his costs and attorney's fees.[2] In such a case the agent need not wait to be sued by the third party for damages, but may pay them at once and thereupon recover from the principal.[3] He can, however, recover from the principal only the amount of damages actually sustained by the third person, though he may, in fact, have paid him more.[4]

It is immaterial whether the agent be sued alone or jointly with the principal. The right to indemnity exists in either case.[5]

§ 654. **No Indemnity where Act is unlawful.** The principal cannot, however, require the agent to perform an unlawful act, and if the agent performs an act which he knows to be such, or which he must be presumed to have known was unlawful, he must answer for it like any other wrong doer, and like other wrong doers he is entitled neither to indemnity nor contribution.[6] And in such a case not only does the law not *imply* a promise to indemnify, but it will not enforce even an express promise to that effect.

An express bond, therefore, or other formal written agreement to indemnify the agent against consequences of a proposed act known, or which he must be presumed to have known, to be unlawful, is void, as against the peace and policy of the law. But this rule does not extend to cases where parties, in the prosecution of their legal rights, in good faith, have committed an unintentional wrong against another, but is limited to those cases where the intention is to commit a trespass, and does not include cases where the parties are actuated by honest motives in the assertion of what they believe to be their rights under the law, although it should subsequently transpire that they were not justified in doing the acts contemplated by them when the bond was executed.[7]

[1] Saveland v. Green, 36 Wis. 612.

[2] Clark v. Jones, 16 Lea (Tenn.) 351.

[3] Saveland v. Green, 36 Wis. 612.

[4] Saveland v. Green, 36 Wis. 612.

[5] Moore v. Appleton, 26 Ala. 633, s. c. 34 Ala. 147, 73 Am. Dec. 448.

[6] Coventry v. Barton, 17 Johns. (N. Y.) 142, 8 Am. Dec. 376.

[7] Coventry v. Barton, *supra*; Allaire

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But where the act, though unlawful, has already been committed, a bond or other agreement based upon sufficient consideration to indemnify the agent against the consequences of it is valid.[1]

IV.

THE AGENT'S RIGHT TO PROTECTION FROM INJURY.

§ 655. **In general.** It is not within the scope of this work to enter into a minute discussion of the liability of the employer for injuries happening to his employee in the course of his employment, either through the negligence of the employer or of a fellow-employee. These questions belong more appropriately to treatises on the subjects of Master and Servant, Torts and Negligence. A general statement of the rules which govern in these cases is, however, deemed pertinent and will be given.

1. *From the Risks incident to the Business.*

§ 656. **General Rule—Principal not liable.** Every undertaking for the rendition of services is attended with more or less of risk incident to the business itself. Risks of this nature are as much within the knowledge and control of the agent as of the principal, and are presumably contemplated and considered by the agent when he accepts the undertaking. They result from no fault or neglect of the principal, but arise from the very nature of the thing to be done.

It is, therefore, the rule of the law that the principal is not

v. Ouland, 2 Johns. (N. Y.) Cas. 54; Castle v. Noyes, 14 N. Y. 332; Nelson v. Cook, 17 Ill. 449; Stanton v. McMullen, 7 Ill. App. 326; Moore v. Appleton, 26 Ala. 633; Ives v. Jones, 3 Iredell's (N. Car.) L. 538, 40 Am. Dec. 421; Holman v. Johnson, 1 Cowp. 341; Howe v. Buffalo, &c. R. R. 37 N. Y. 299; Stone v. Hooker, 9 Cow. (N. Y.) 154; Jacobs v. Pollard, 10 Cush. (Mass.) 288; Shotwell v. Hamblin, 23 Miss. 156; Forniquet v. Tegarden, 24 Miss. 96; Cumpston v. Lambert, 18 Ohio, 81; Jameison v. Calhoun, 2 Speer (S. Car.) 19; Kemper v. Kemper, 3 Rand (Va.) 8; Davis v. Arledge, 3 Hill (S. Car.) L. 170, 30 Am. Dec. 360; Atkins v. Johnson, 43 Vt. 78, 5 Am. Rep. 260; Armstrong v. Clarion Co., 66 Penn. St. 218; Arnold v. Clifford, 2 Sumner (U. S. C. C.) 238.

[1] Hacket v. Tilley, 11 Mod. 93; Kneeland v. Rogers, 2 Hall (N. Y. Sup. Ct.) 579; Hall v. Huntoon, 17 Vt. 244; Knight v. Nelson, 117 Mass. 458; Griffiths v. Hardenbergh, 41 N. Y. 464; Doty v. Wilson, 14 Johns. (N. Y.) 378.

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responsible to the agent for injuries received in the execution of the undertaking and which result from the natural and ordinary risks and perils which are incident to the performance of such services.[1]

This rule has been founded upon two reasons. One is that above mentioned, that the agent knowing that he will be exposed to incidental risks, must be supposed to have contracted that, as between himself and the principal, he would assume the responsibility of the result.[2] The other is that this rule best subserves and promotes the public interests. If the agent is to take the risks himself, he will naturally be more careful and prudent than if he could demand indemnity from his principal. The result of this care and prudence is, not only that injuries are less liable to occur to the agent himself, but that they are also much less liable to happen to third persons, with the care of whose persons or property the agent may be intrusted.[3]

2. *From the Negligence of the Principal.*

§ 657. **Principal responsible for his own Negligence.** But although the agent thus assumes the responsibility of the risks which are incident to the employment, he has a right to expect that the principal will not add to or increase these risks or create others by his own personal negligence. It has been seen that the fact of the agency is no excuse to the agent for injuries resulting to others by his own neglect. No man can relieve himself from

[1] Clarke *v.* Holmes, 7 H. & N. 937; Gibson *v.* Erie Ry Co., 63 N. Y. 449, 20 Am. Rep. 552; Hayden *v.* Smithville Mfg Co., 29 Conn. 548; Farwell *v.* Boston and Worcester R. R., 4 Metc. (Mass.) 49, 38 Am. Dec. 339; Bryant *v.* Burlington, &c. Ry Co., 66 Iowa, 305, 55 Am. Rep. 275; Sweeney *v.* Central Pac. R. R. Co., 57 Cal. 15; Bell *v.* Western, &c. R. R. Co., 70 Ga. 566; Dowell *v.* Burlington, &c. Ry Co., 62 Iowa 629; Wonder *v.* Baltimore, &c. R. R. Co., 32 Md. 411, 3 Am. Rep. 143; Yeaton *v.* Boston, &c. R. R. Co., 135 Mass. 418; Fort Wayne, &c. R. R. Co. *v.* Gildersleeve, 33 Mich. 133; Hathaway *v.* Michigan Cent. R. R. Co., 51 Mich. 253; Pennsylvania R. R. Co. *v.* Wachter, 60 Md. 395; Moulton *v.* Gage, 138 Mass. 390; Watson *v.* Railway Co., 58 Tex. 434; Lansing *v.* N. York Cent. R. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Sweeney *v.* Berlin, &c. Co., 101 N. Y. 520, 54 Am. Rep. 722.

[2] Hutchinson *v.* Railway Co., 5 Exch. 343.

[3] Priestley *v.* Fowler, 3 Mees & Wels. 1; Illinois Central R. R. Co. *v.* Cox, 21 Ill. 20; Lawler *v.* Androscoggin R. R. Co., 62 Me. 463, 16 Am. Rep. 492; Hanrathy *v.* Northern, &c. R. R. Co., 46 Md. 280.

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the responsibilities which rest alike upon all persons by becoming an agent, and the same rule applies to the principal.

If, therefore, injury results to the agent from the personal negligence of the principal, the principal is liable in the same manner and to the same extent as though the relation did not exist.[1]

This negligence of the principal may consist in his failure to observe one or more of several duties which he owes to the agent, the more important of which deserve specific mention.

§ 658. 1. **For dangerous Premises.** The principal may incur liability to the agent for injuries received by the latter from the perils or dangers of the principal's premises, of which the agent had no knowledge or notice and which he had no reason to expect, but of which the principal knew, or by the exercise of reasonable care and diligence might have known. It is the general rule of the law that the owner or occupant of land or other premises is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any business to be there transacted or permitted by him, for an injury there occasioned by the unsafe condition of the land or other premises, or of the access to it, which is known to him and not to them, and which he has negligently suffered to exist and of which he has given no notice.[2] And this rule applies for the protection of the agent as well as of a stranger. Where the service is to be performed upon the principal's premises, it is the duty of the principal to provide a suitable place in which the agent, exercising due care, can perform his duty without exposure to dangers that do not ordinarily come within the obvious scope of such employments as usually carried on.[3] The agent has a reasonable right to expect that if the lands and premises of the principal, where it is his express or implied right or duty to go or to be, in the performance of his undertaking, contain dangers from which he may suffer injury and which exist to the knowledge of the principal, but of which he is ignorant, he will receive

[1] Chicago & N. W. Ry Co. v. Bayfield, 37 Mich. 205; Quincy Mining Co. v. Kitts, 42 Mich. 34; Johnson v. Boston Tow Boat Co., 135 Mass. 215, 46 Am. Rep. 458.

[2] Carleton v. Iron Co., 99 Mass. 216; Pierce v. Whitcomb, 48 Vt. 127, 21 Am. Rep. 120; Corby v. Hill, 4 C. B. (N. S.) 556; Sweeny v. Old Colony, &c. R. R. Co., 10 Allen (Mass.) 368, 87 Am. Dec. 644.

[3] Coombs v. New Bedford Cordage Co., 102 Mass. 572, 3 Am. Rep. 506; Swoboda v. Ward, 40 Mich. 420.

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notice of them so as to be upon his guard.[1] This duty of warning would be increased if the agent were, to the knowledge of the principal, so ignorant or inexperienced as to be less likely to anticipate dangers from the employment than a person of greater knowledge or experience.[2]

But this rule does not apply to dangers in places where the agent has no express or implied right or duty to be. If the agent impelled by mere idle curiosity goes into a place of danger, into which the principal had no reasonable ground to anticipate that he might go, the principal would not be liable;[3] but the principal must take into his consideration the age, habits and instincts of his agents, and will be liable if he fails to warn them of dangers known to him in places where he might reasonably have anticipated that their natural instincts or curiosity might lead them.[4]

§ 659. 2. **For dangerous Tools and Machinery.** And the same rule applies to the use of dangerous tools and machinery, where the principal has expressly or impliedly undertaken to furnish them. The principal is under no obligation to provide the newest, latest or best machinery, tools or appliances, or to adopt every new improvement; but he may conduct his business with such machinery, tools and appliances as he deems best adapted to his purposes and means, provided he uses reasonable prudence and care in the selection of such as are reasonably safe and proper for use, and keeps them in a reasonable state of repair.[5]

[1] Parkhurst v. Johnson, 50 Mich. 70, 45 Am. Rep. 28; Strahlendorf v. Rosenthal, 30 Wis. 674.

[2] Parkhurst v. Johnson, 50 Mich. 70, 45 Am. Rep. 28; Coombs v. New Bedford Cordage Co., 102 Mass. 572, 3 Am. Rep. 506; Smith v. Oxford Iron Co., 42 N. J. L. 467; Baker v. Allegheny, &c. R. R. Co., 95 Penn. St. 211; Jones v. Florence Mining Co., 66 Wis. 268, 57 Am. Rep. 269; Bartonshill Coal Co. v. Reid, 3 Macq. 266; Hill v. Gust. 55 Ind. 45; Anderson v. Morrison, 22 Minn. 274; St. Louis, &c. Ry. Co. v. Valirius, 56 Ind. 511; Thompson v. Chicago, &c. Ry Co., 14 Fed. Rep. 564; Sullivan v. India, &c. Co., 113 Mass. 396.

[3] Severy v. Nickerson, 120 Mass. 306; Pierce v. Whitcomb, 48 Vt. 127, 21 Am. Rep. 120; Wright v. Rawson, 52 Iowa, 329, 35 Am. Rep. 275; Pittsburg, &c R. R. Co. v. Sentmeyer, 92 Penn. St. 276, 37 Am. Rep. 684; Doggett v. Illinois Cent. R. R. Co., 34 Iowa 284.

[4] Atlanta Cotton Factory Co. v. Speer, 69 Ga. 137, 47 Am. Rep. 750.

[5] Wormell v. Maine Central R. R. Co., 79 Me. 397, 1 Am. St. Rep. 321; Sweeney v. Berlin & Jones Envelope Co., 101 N. Y. 520, 54 Am. Rep. 722; Lake Shore, &c. Ry. Co. v. McCormick, 74 Ind. 440; Coombs v. New Bedford Cordage Co., 102 Mass. 572, 3 Am. Rep. 506; Brann v. Chicago,

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It may be said that the use of any machinery involves more or less of risk, and in many cases the degree of risk is very great. This risk, however, is a risk incident to the business, and if the agent, being of sufficient age and experience to appreciate the dangers accepts the employment,[1] or continues in it,[2] knowing or having full opportunity to know, of the dangers, he assumes the responsibility of injury.

But even in this case, a duty of warning attaches to the principal. If there are concealed dangers known to the principal, but of which the agent is ignorant, it is the duty of the principal to notify the agent of their existence.[3] So if, by reason of the

&c. R. R. Co., 53 Iowa 595, 36 Am. Rep. 243; Corcoran v. Holbrook, 59 N. Y. 517, 17 Am. Rep. 369; Ford v. Fitchburg R. R. Co., 110 Mass. 240, 14 Am. Rep. 598; Wonder v. Baltimore, &c. R. R. Co., 32 Md. 411, 3 Am. Rep. 143; Michigan Cent. R. R. Co. v. Smithson, 45 Mich. 212; Jones v. Granite Mills, 126 Mass. 84, 30 Am. Rep. 661; Western, &c. R. R. Co. v. Bishop, 50 Ga. 465; Payne v. Reese, 100 Penn. St. 301; Louisville, &c. R. R. Co. v. Orr, 84 Ind. 50; Philadelphia, &c. R. R. Co. v. Keenan, 103 Penn. St. 124; Fort Wayne, &c. R. Co. v. Gildersleeve, 33 Mich. 133.

[1] Dowling v. Allen, 74 Mo. 13, 41 Am. Rep. 298; Smith v. St. Louis, &c. Ry. Co., 69 Mo. 32, 33 Am. Rep. 484; Porter v. Hannibal, &c. R. R. Co., 71 Mo. 66, 36 Am. Rep. 454; Coombs v. New Bedford Cord Co., 102 Mass. 572, 3 Am. Rep. 506; Sweeney v. Central Pac. R. R. Co., 57 Cal. 15; Hayden v. Smithsville Mfg. Co., 29 Conn. 584; Bell v. Western, &c. R. R. Co., 70 Ga. 566; Dowell v. Burlington, &c. R. R. Co., 62 Iowa 629; Yeaton v. Boston, &c. R. R. Co., 135 Mass. 418; Fort Wayne, &c. R. R. Co. v. Gildersleeve, 33 Mich. 133; Hathaway v. Michigan Cent. R. R. Co., 51 Mich. 253; Richards v. Rough, 53 Mich. 212; Gibson v. Erie Ry. Co., 63 N. Y. 449, 20 Am. Rep. 552; Laning v. New York Cent. R. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Watson v. Railway Co., 58 Tex. 434; Wonder v. Baltimore, &c. R. R. Co., 32 Md. 411, 3 Am. Rep. 143.

[2] Swoboda v. Ward, 40 Mich. 420; Richards v. Rough, 53 Mich. 212; Pingree v. Leyland, 135 Mass. 398; Huddleston v. Lowell Machine Shop, 106 Mass. 282; Umback v. Lake Shore, &c. Ry. Co., 83 Ind. 191; Bell v. Western, &c. R. R. Co., 70 Ga. 566; McGlynn v. Brodie, 31 Cal. 376; Sowden v. Idaho Mining Co., 55 Cal. 443; Camp Point Mfg. Co. v. Ballou, 71 Ill. 417; Kroy v. Chicago, &c. R. R. Co., 32 Iowa 357; Behm v. Armour, 58 Wis. 1; Sullivan v. Louisville Bridge Co., 9 Bush. (Ky.) 81; Porter v. Hannibal, &c. R. R. Co., 71 Mo. 66.

[3] Dowling v. Allen, 74 Mo. 13, 41 Am. Rep. 298; Grizzle v. Frost, 3 Fost & Fin. 622; Baxter v. Roberts, 44 Cal. 187, 13 Am. Rep. 160; Ford v. Fitchburg R. R. Co., 110 Mass. 240; Texas, &c. Ry. Co. v. McAtee, 61 Tex. 695; Ryan v. Fowler, 24 N. Y. 410; Paterson v. Wallace, 1 Macq. 748; Atchison, &c. R. R. Co. v. Holt, 29 Kan. 149; Malone v. Hawley, 46 Cal. 409; Hayden v. Smithville Mfg. Co., 29 Conn. 548.

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youth or inexperience of the agent, he is not aware of the dangers involved, it is the duty of the principal to inform the agent of them if they are known to him.[1] It is not enough in these cases that the dangerous parts of the machinery should be visible, because the agent, though knowing the fact, may be utterly ignorant of the risks.[2]

That the principal knew or by the exercise of proper care and diligence might have known of the danger, is an essential ingredient of the cause of action and a declaration or complaint which does not allege it is fatally defective.[3]

§ 660. 3. **For injuries resulting from Failure to repair as agreed.** Should the agent discover that the service has become more hazardous than usual, or than he had anticipated, by reason of defective machinery, the retaining of unfaithful fellow-servants, or of any other cause, the general rule is that he must quit the service or assume the extra risks to which he is exposed.[4] But this general rule is subject to certain exceptions. The agent has a right to expect that, if the defect were brought to the knowledge of the principal, he would remedy or remove it. But on the other hand, the agent has no right to complain of dangers or defects known to him but which he fails to communicate to the principal, so as to give the latter an opportunity to remove them. Where, therefore, the agent discovers defects in machinery, or anything else that renders the service more hazardous, he should at once report the same to the principal or to the person who represents him in that respect, and unless he does so, he cannot recover from the principal for injuries occasioned by extra perils which he voluntarily encounters without notice to the

[1] Smith *v.* Peninsular Car Works, 60 Mich. 501, 1 Am. St. Rep. 542; Coombs *v.* New Bedford Cordage Co., 102 Mass. 572, 3 Am. Rep. 506; Grizzle *v.* Frost, 3 Fost. & Fin. 622; Swoboda *v.* Ward, 40 Mich. 420; Hill *v.* Gust, 55 Ind. 45; Sullivan *v.* India Mfg. Co., 113 Mass. 396; St. Louis, &c. Ry. Co. *v.* Valirius, 56 Ind. 511; Dowling *v.* Allen, 74 Mo. 13, 41 Am. Rep. 298.

[2] Coombs *v.* New Bedford Cordage Co., 102 Mass. 572, 3 Am. Rep. 506; Clarke *v.* Holmes, 7 H. & N. 937, Dowling *v.* Allen, 74 Mo. 13, 41 Am. Rep. 298.

[3] Priestly *v.* Fowler, 3 M. & W. 1, Griffiths *v.* London, &c. Docks Co., 13 Q. B. Div. 259, 37 Eng. Rep. 649, Buzzell *v.* Laconia Mfg. Co., 48 Me. 113, 77 Am. Dec. 212; Noyes *v.* Smith, 28 Vt. 59, 65 Am. Dec. 222.

[4] Missouri Furnace Co. *v.* Abend, 107 Ill. 44, 47 Am. Rep. 425; Eureka Co. *v.* Bass, 81 Ala. 200, 60 Am. Rep. 152.

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principal. The relation of principal and agent, or of master and servant, imposes no obligation on the principal or master to take more care of the agent or servant than the latter is willing to observe for his own safety.[1] But where the principal, on being notified by the agent of defects that render the service he is engaged in more hazardous, expressly promises to make the necessary repairs, the agent may continue in the employment for a reasonable time to permit the performance of the promise, without being guilty of negligence, and if any injury results therefrom he may recover, unless the danger were so imminent that no prudent person would undertake to perform the service.[2] The reason upon which the rule is said to rest, is that the promise of the principal to repair defects relieves the agent from the charge of negligence in continuing in the service after the discovery of the extra perils to which he would be exposed.[3]

§ 661. **Same Subject.** The mere fact that the agent has complained of the defect will not entitle him to recover. There must, in addition, be shown a promise to repair upon which the agent has relied. And if he continues to serve without further assurances after the expiration of a reasonable time from the date of the promise to repair, he will, ordinarily, be deemed to have accepted the risk of the dangers, and the principal will not be liable.[4] Whether under the circumstances and in view of the

[1] Missouri Furnace Co. *v.* Abend, *supra*; Indianapolis, &c. R. R. Co. *v.* Flanigan, 77 Ill. 365; Pennsylvania Co. *v.* Lynch, 90 Ill. 334; Columbus, &c. Ry. Co. *v.* Troesch, 68 Ill. 545, 18 Am. Rep. 578.

[2] Eureka Co. *v.* Bass, 81 Ala. 200; 60 Am. Rep. 152; Missouri Furnace Co. *v.* Abend, *supra*; Greene *v.* Minneapolis and St. Louis Ry. Co., 31 Minn. 248, 47 Am. Rep. 785; Manufacturing Co. *v.* Morrissey, 40 Ohio St. 148, 48 Am. Rep. 669; Galveston, &c. Ry. Co. *v.* Drew, 59 Tex. 10, 46 Am. Rep. 261; Hough *v.* Railway Co., 100 U. S 213; Holmes *v.* Clarke, 6 H. & N. 348; Clarke *v.* Holmes, 7 H. & N. 937; Patterson *v.* Pittsburg, &c. R. R. Co., 76 Penn. St. 389, 18 Am. Rep. 412; Conroy *v.* Vulcan Iron Works, 62 Mo. 35; LeClair *v.* Railroad Co., 20 Minn. 9; Brabbits *v.* Ry. Co., 38 Wis. 289.

But see Sweeney *v.* Berlin, &c. Co., 101 N Y. 520, 54 Am. Rep. 722.

[3] Missouri Furnace Co. *v.* Abend, *supra*; Clarke *v.* Holmes, *supra*; Hough *v.* Railway Co., *supra*.

[4] East Tennessee, &c. R. R. Co. *v.* Duffield, 12 Lea (Tenn.) 63, 47 Am. Rep. 319; Galveston, &c. Ry. Co. *v.* Drew, 59 Tex. 10, 46 Am. Rep. 261; Conroy *v.* Vulcan Iron Works, 62 Mo. 35, s. c. 6 Mo. App. 102; Crutchfield *v.* Railroad Co., 78 N. C. 300; Eureka Co. *v.* Bass, 81 Ala. 200, 60 Am. Rep. 152.

In Eureka Co. *v.* Bass, *supra*, SOMERVILLE, J., says: "We have said that the carrying of the risk by the em-

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promise to repair, the agent exercised due care in continuing to use the defective machinery, is a question for the jury to determine.[1]

This question most frequently occurs in those cases where the defects or dangers arise after the agent has entered upon his service, and not to those where he was fully aware of the dangers before he accepted the employment, but even in such cases the agent has a right to rely upon the principal's promise that he will repair. But this rule presupposes that there are defects in the tools, machinery or appliances furnished. If on the other hand those furnished by the principal are reasonably safe and proper for use, although not the best possible, or of the latest design, the principal has done his duty and the agent assumes

ployer will be implied to continue only for a reasonable time after the making of the promise by him to remove the danger producing it. The injury, in other words, must have occurred within the time at which the defects were promised to be removed. If the employee continues to expose himself to the danger by remaining in the service longer than this, he does so in face of the fact that the promise of the employer is violated, and that he has no reasonable expectation of its fulfillment. He can no longer therefore rely upon the promise, and must know that his continuance in service under such circumstances is equally as hazardous and hopeless of remedy as if no assurance or promise had ever been made. A promise already broken can afford no reasonable guaranty of the fulfillment of any expectation based on its disappointed assurances. For a servant or employee to persist in exposing himself to danger on the faith of such a promise may often be a want of that ordinary prudence which the law exacts of him at every stage of his employment, according to the degree and nature of the danger. His continuance in the service for an unreasonable length of time after such promise is a waiver of the defects agreed to be remedied by his employer. The risk, therefore, again becomes his own, and his conduct, as we have said, though not necessarily, or *per se* negligent, may or may not become negligent according to the circumstances of the particular case. Greene *v.* Minn. & St. Louis R. Co., 31 Minn. 248, 47 Am. Rep. 785; Missouri Furnace Co. *v.* Abend, 107 Ill. 44, 47 Am. Rep. 425; Manufacturing Co. *v.* Morrissey, 40 Ohio St. 148, 48 Am. Rep. 669; Woodward Iron Co. *v.* Jones, 80 Ala. 123; Shear. & Redf. Neg. § 96; Beach Contr. Neg., § 140; 2 Thomp. Neg. 1009, 1010; Patterson *v.* Pittsburg, &c. R. R. Co., 76 Penn. St. 389, 18 Am. Rep. 412; Lansing *v.* N. Y. Cent. R. R. Co., 49 N. Y. 512, 10 Am. Rep. 417; Saunders Neg. 127; Holmes *v.* Clarke, 6 Hurl. & N. 349; 30 L. J. Ex. 135; Wood Mast. and Serv."

[1] Hough *v.* Railway Co., 100 U. S. 213; Ford *v.* Fitchburg R. R. Co., 110 Mass. 261, 14 Am. Rep. 598; Laning *v.* New York Cent. R. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Snow *v.* Housatonic R. R. Co., 8 Allen (Mass.) 441, 82 Am. Dec. 720.

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the risk. In such a case, not even the express promise of the principal that he will furnish new or better ones, or will take greater precautions for the agent's safety, will give the agent a right of action for an injury received from the old.[1]

§ 662. 4. **For Employment of incompetent Servants.** It is the duty of the principal to use reasonable care and prudence in the selection and employment of his agents and servants, and for a want of such care and prudence, he is liable to all of his other servants and agents who suffer injury therefrom.[2] This being his duty as to the selection and employment, he is under a like duty as to the retention of his servants and agents. If having received knowledge of their incompetence or unfitness, he still retains them in his employ, he must respond in damages to others who are injured thereby.[3]

He is not a guarantor, however, of the fitness or competence of those whom he employs, and it is not enough to show the fact of the incompetence, but it must also be shown, in the one case that he might by exercise of reasonable care and diligence have discovered it, and in the other case that knowledge, or facts sufficient to have led to knowledge, of the incompetency had been brought home to him.[4]

[1] Marsh v. Chickering, 101 N. Y. 356; reported also in note to 54 Am. Rep. at p. 727; Sweeney v. Berlin, &c. Envelope Co., 101 N. Y. 520, 54 Am. Rep. 722.

[2] Moss v. Pacific R. R. Co., 49 Mo 167, 8 Am. Rep. 126; Columbus, &c. R. R. Co. v. Troesch, 68 Ill. 545, 18 Am. Rep. 578; Harper v. Indianapolis, &c. R. R. Co., 47 Mo. 567, 4 Am. Rep. 353; Davis v. Detroit, &c. R. R. Co., 20 Mich. 105, 4 Am. Rep. 364; Tyson v. Railroad Co., 61 Ala. 554; Chicago, &c. R. R. Co., v. Harney, 28 Ind. 28; Blake v. Maine Cent. R. R. Co., 70 Me. 60; Bunnell v. St. Paul, &c. Ry Co., 29 Minn. 305; Harper v. Indianapolis, &c. R. R. Co., 47 Mo. 567; New Orleans, &c. R. R. Co. v. Hughes, 49 Miss. 258; Gilman v. Eastern R. R. Co., 13 Allen (Mass.) 433, 90 Am. Dec. 210.

[3] Laning v. New York Cent. R. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Baulec v. New York, &c. R. R. Co., 59 N. Y. 356, 17 Am. Rep. 325; Pittsburg, &c. R. R. Co. v. Ruby, 38 Ind. 294, 10 Am. Rep. 111; Chapman v. Erie Ry Co., 55 N. Y. 579; Davis v. Detroit, &c. R. R. Co., 20 Mich. 105, 4 Am. Rep. 364.

[4] Huffman v. Chicago, &c. R. R. Co. 78 Mo. 50; Kersey v. Kansas City, &c. R. R. Co., 79 Mo. 362; East Tennessee, &c. R. R. Co. v. Gurley, 12 Lea (Tenn.) 46; Alabama, &c. R. R. Co. v. Waller, 48 Ala. 459; Ohio, &c. Ry Co. v. Collarn, 73 Ind. 261, 38 Am. Rep. 134; Chicago, &c. R. R. Co. v. Doyle, 18 Kan. 58; Huntingdon, &c. R. R. Co. v. Decker, 84 Penn. St. 419.

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§ 663. **5. For injuries outside of Employment.** It is those risks only which are incident to the undertaking of the agent, which he is deemed to have assumed, and not those of some other or different duty or employment.[1] Hence, if the principal requires of the agent the performance of an act outside of the scope of his employment, it is his duty to fully inform the agent of the perils of the undertaking and warn him against them. If he fails in this duty and the agent thereby suffers injury, the principal is liable.[2]

This is particularly true where the agent is young or inexperienced, and not likely to anticipate or guard himself against injury. It is, of course, true that the agent would be under no obligation to obey instructions which required of him the performance of a duty beyond the scope of his undertaking, but, as has been well said, where one contracts to submit himself to the orders of another, there must be some presumption that the orders he receives are lawful. The giving of the orders is, of itself, an assumption that they are lawful, and the servant or agent who refused to obey would take upon himself the burden of showing a lawful reason for the refusal, and in case of a failure so to do, he would incur the double risk of losing his employment and being compelled to pay damages. These are sufficient reasons for excusing him if he declines to take this responsibility in any case in which doubts can fairly exist; he should assume that the order is given in good faith and in the belief that it is rightful, and if in his own judgment it is unwarranted, it is not for the principal to insist that he was wrong in not refusing obedience.[3] But it has been held that where the agent is of mature age and intelligence, and knows the increased hazard and that it is not embraced within the scope of his duties, he cannot recover of the principal for injuries received by reason of his

[1] Chicago, &c. Ry Co. *v.* Bayfield, 37 Mich. 205; Railroad Co. *v.* Fort, 17 Wall. (U.S.) 553; Lalor *v.* Chicago, &c. R. R. Co., 52 Ill. 401, 4 Am. Rep. 616.

[2] Chicago, &c. Ry Co. *v.* Bayfield, 37 Mich. 205; Lalor *v.* Chicago, &c. R. R. Co., 52 Ill. 401, 4 Am. Rep. 616; Wheeler *v.* Wason Mfg. Co., 135 Mass. 294; Thompson *v.* Hermann, 47 Wis. 602, 32 Am. Rep. 784; O'Connor *v.* Adams, 120 Mass. 427; Jones *v.* Lake Shore, &c. Ry Co., 49 Mich. 573; Broderick *v.* Detroit Union Depot Co., 56 Mich. 261, 56 Am. Rep. 382.

[3] Chicago, &c. Ry Co. *v.* Bayfield, 37 Mich. 205; Thompson *v.* Hermann, 47 Wis. 602, 32 Am. Rep. 784.

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ignorance and inexperience, although he undertook the act for fear of losing his position.[1]

3. *For Negligence of his General Superintendent.*

§ 664. **Principal can not relieve himself by delegating Duties.** The principal can not relieve himself from responsibility to his agents by delegating the performance of his duties to a superior agent or general manager or superintendent. The duty to exercise reasonable care and prudence in the selection and care of machinery, and in the employment and retention of other agents and servants is an absolute one which attaches to the relation, and if he sees fit to entrust to an *alter ego* the general performance of his duties as principal he must personally answer for the manner in which they are performed.[2]

§665. **Liable for Negligence of general Agent or Superintendent.** It is therefore well settled that where the principal entrusts to a general agent the power and the duty to purchase, control or keep in repair the implements or machinery to be used, or the power and duty to employ, regulate and discharge on his account the agents or servants to be employed, the principal is liable to an agent or servant for a neglect in the performance of these duties by such general agent, in the same manner and to the same extent as though the neglect had been that of the principal himself were he personally managing and controlling the business.[3]

[1] Leary *v.* Boston & Albany R. R., 139 Mass. 580, 52 Am. Rep. 733; Cummings *v.* Collins, 61 Mo. 520; Woodley *v.* Metropolitan Ry Co., 2 Exch. Div. 506, 21 Eng. Rep. (Moak) 506. But *contra*, see Jones *v.* Lake Shore, &c. Ry Co., 49 Mich. 573; Lalor *v.* Chicago, &c. Ry Co., 52 Ill. 401, 4 Am. Rep. 616.

[2] See cases cited in following section.

[3] Bushby *v.* New York &c. R. R. Co. 107 N. Y. 374, 1 Am. St. Rep. 844; Flike *v.* Boston, &c. R. R. Co. 53 N. Y. 549, 13 Am. Rep. 545; Corcoran *v.* Holbrook, 59 N. Y. 517, 17 Am. Rep. 369; Malone *v.* Hathaway, 64 N. Y. 5, 21 Am. Rep. 573; Fuller *v.* Jewett, 80 N. Y. 46, 36 Am. Rep. 575; Brothers *v.* Cartter, 52 Mo. 373, 14 Am. Rep. 424; Mullan *v.* Philadelphia, &c. Steamship Co. 78 Penn. St. 25, 21 Am. Rep. 2; Ford *v.* Fitchburg R. R. Co. 110 Mass. 240, 14 Am. Rep. 598; Meara's Admr. *v.* Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633; Gunter *v.* Graniteville Mnfg Co. 18 S. C. 262, 44 Am. Rep. 573; Mitchell *v.* Robinson, 80 Ind. 281, 41 Am. Rep; 812; Cowles *v.* Richmond, &c. R. R. Co. 84 N. C. 309, 37 Am. Rep. 620; Tyson *v.* North, &c. R.R. Co. 61 Ala. 554. 32 Am. Rep. 8; Dowling *v.* Allen, 74 Mo. 13, 41 Am. Rep. 298;

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Such a general agent or superintendent, called by whatever name, is not a fellow-servant or co-employee of the agents or servants employed by and acting under him. For the time being he stands in the principal's shoes and his neglect is the neglect of the principal.[1] This rule applies alike to corporations and to individuals, although from the very nature of the case, the occasions or necessities for the employment of such a general agent are much greater in the case of corporations than in that of individuals.[2]

§ 666. **When liable to Agents of Contractor.** Care should be taken, however, to distinguish between the case considered in the last section, and that of an independent contractor who has undertaken to perform certain services for the principal, and to furnish the necessary machinery, appliances and labor. The agent or servant of such a contractor could not be considered to be the agent or servant of the principal, nor could the contractor himself be considered such an *alter ego* of the principal as to render the latter liable, to a servant or agent of the contractor, for an injury occasioned by the neglect of the contractor in furnishing and keeping in repair the necessary machinery, or in employing or retaining incompetent servants.[3] The principal would, however, be liable to the servant or agent of the contractor for an injury received from perils or dangers in the principal's premises, where such servant or agent had a right to be, of which the principal had knowledge but of which the agent or servant was left in ignorance. This liability does not rest upon the relation of principal and agent, or of master and ser-

East Tennessee, &c. R. R. Co. v. Duffield, 12 Lea (Tenn.) 63, 47 Am. Rep. 319; Wilson v. Willimantic Linen Co. 50 Conn. 433, 47 Am. Rep. 658; Ryan v. Bagaley, 50 Mich. 179, 45 Am. Rep. 35; Brown v. Sennett, 68 Cal. 225, 58 Am. Rep. 8; Beeson v. Green Mountain Co. 57 Cal. 20; Gormley v. Vulcan Iron Works, 61 Mo. 492; Shanny v. Androscoggin Mills, 66 Me. 420; Cumberland, &c. R. R. Co. v. State, 44 Md. 283, s. c. 45 Md. 229; Brabbits v. Chicago &c. Ry Co. 38 Wis. 289; Harper v. Indianapolis, &c. R. R. Co. 47 Mo. 567, 4 Am. Rep. 353.

[1] See cases, *supra*.

[2] See cases, *supra*.

[3] Knoxville Iron Co. v. Dobson, 7 Lea (Tenn.) 367; Hilliard v. Richardson, 3 Gray (Mass.) 349, 63 Am. Dec. 743; Boswell v. Laird, 8 Cal. 469, 68 Am. Dec. 345; Kellogg v. Payne, 31 Iowa, 575; Allen v. Willard, 57 Penn. St. 374; McCafferty v. Spuyten Duyvil, &c. R. R. Co. 61 N. Y. 178, 19 Am. Rep. 267; King v. New York, &c. R. R. Co. 66 N. Y. 181, 23 Am. Rep. 37.

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vant, but upon the broad and familiar principle that every man who expressly or by implication invites others to come upon his premises, assumes to all who accept the invitation, the duty of warning them of any danger in coming, which he knows of or ought to know of, and of which they are not aware.[1] So if the principal was by the terms of the contract under obligation to the contractor to furnish the necessary machinery or appliances, or to supply a portion of the labor, he would be liable to the agent or servant of the contractor for an injury sustained by reason of his neglect to use due and reasonable care in selecting and keeping in repair the proper machinery or appliances, or in employing and retaining competent servants.[2]

4. *For Negligence of Fellow-servant.*

§ 667. **Principal not liable to one Servant for Negligence of a Fellow-servant.** The principle is now firmly established in the law, both in England and the United States, that a master is not liable to one servant for an injury received by the latter, resulting from the negligence, carelessness or misconduct of a fellow-servant engaged in the same general business.[3] It is inevitable

[1] Samuelson *v.* Cleveland Iron Mining Co. 49 Mich. 164, 43 Am. Rep. 456; Southcote *v.* Stanley, 1 H. & N. 247; Indermaur *v.* Dames, L. Repts. 1 C. P. 274, s. c. 2 Id. 311; Francis *v.* Cockrell L. R. 5 Q. B. 184; Elliott *v.* Pray, 10 Allen (Mass.) 378; Coughtry *v.* Woolen Co. 56 N. Y. 124, 15 Am. Rep. 387; Tobin *v.* Portland, &c. R. R. Co. 59 Me. 183, 8 Am. Rep. 415; Latham *v.* Roach, 72 Ill. 179; Gillis *v.* Pennsylvania R. R. Co. 59 Penn. St. 129; Malone *v.* Hawley, 46 Cal. 409; Deford *v.* Keyser, 30 Md. 179; Pierce *v.* Whitcomb, 48 Vt. 127, 21 Am. Rep. 120.

[2] Coughtry *v.* Globe Woolen Co. 56 N. Y. 124, 15 Am. Rep. 187. In this case, O contracted to put a cornice on defendant's mill, defendant agreeing to erect the necessary scaffolding free of cost to O. Defendant erected the scaffolding so negligently that it fell, killing a servant of O, who was at work upon it. It was held that defendant was liable. The court distinguish the case from Winterbottom *v.* Wright, 10 M. &. W. 109; Longmeid *v.* Halliday, 6 Eng. Law & Eq. 761; Loop *v.* Litchfield, 42 N. Y. 351, 1 Am. Rep. 543; Losee *v.* Clute, 51 N. Y. 494, 10 Am. Rep. 638.

[3] The cases upon this point are exceedingly numerous, and no attempt will be made to cite them all. But the following are among the number: Priestley *v.* Fowler, 3 M. & W. 1; Hutchinson *v.* York, &c. Ry Co. 5 Ex. 343; Wigmore *v.* Jay, 5 Ex. 354; Clarke *v.* Holmes, 7 H. & N. 937; Wiggett *v.* Fox, 11 Ex. 832; Beeson *v.* Green Mountain G. M. Co., 57 Cal. 20; Colorado, &c. R. R. *v.* Ogden, 3 Colo. 499; Shields *v.* Yonge, 15 Ga. 349, 60 Am. Dec. 698; Illinois, &c. R. R. *v.* Cox, 21 Ill. 20; Chicago, &c. R.

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in those employments where the servant is liable to come in contact with other servants, engaged in the same general business, that he will incur more or less of risk from their negligence

R. v. Keefe, 47 Id. 108; Columbus, &c. Ry v. Troesch, 68 Id. 545; 18 Am. Rep. 578; Ohio, &c. R. R. v. Tindall, 13 Ind. 366; Wilson v. Madison, &c. R. R., 18 Id. 226; Gormley v. Ohio, &c. Ry, 72 Id. 31; Ohio, &c. Ry v. Collarn, 73 Id. 261, 38 Am. Rep. 134; Robertson v. Terre Haute, &c. R. R. 78 Ind. 77, 41 Am. Rep. 552; Helfrich v. Williams, 84 Ind. 553; Louisville, &c. R. R. v. Collins, 2 Duv. 114; Hubgh v. N. O. & C. R. R. 6 La. Ann, 495, 54 Am. Dec. 565; Satterly v. Morgan, 35 La. Ann. 1166; Osborne v. Knox, &c. R. R. 68 Me. 49; Blake v. Maine Central R. R. 70 Id. 60, 35 Am. Rep. 297; O'Connell v. Baltimore, &c. R. R. 20 Md. 212; Shauck v. Northern, &c. Ry, 25 Id. 462; Cumberland Coal, &c. Co. v. Scally, 27 Id. 589; Haurathy v. Northern, &c. Ry 46 Id. 280; Pennsylvania R. R. v. Wachter, 60 Id. 395; Kelley v. Norcross, 121 Mass. 508; Harkins v. Standard Sugar Refinery, 123 Id. 400; Colton v. Richards, 123 Id. 484; Kelley v. Boston Lead Co., 128 Id. 456; Curran v. Merchants' Mfg. Co. 130 Id. 374, 39 Am. Rep. 457; McDermott v. City of Boston, 133 Mass. 349; Flynn v. City of Salem, 134 Id. 351; Floyd v. Sugden, Id. 563; Day v. Toledo, &c. Ry, 42 Mich. 523; Smith v. Flint, &c. Ry, 46 Id. 258, 41 Am. Rep. 161; Greenwald v. Marquette, &c. R. R. 49 Mich. 197; Brown v. Winona, &c. R. R. 27 Minn. 162, 38 Am. Rep. 285; Collins v. St. Paul, &c. R. R. 30 Minn. 31; Brown v. Minneapolis, &c. Ry, 31 Id. 553; Chicago, &c. R. R. v. Doyle, 60 Miss. 977; Brothers v. Cartter, 52 Mo. 373, 14 Am. Rep. 424, Conner v. Chicago, &c. R. R. 59 Mo. 285; McAndrews v. Burns, 39 N. J. L. 117; Sherman v. Rochester, &c. R. R. 17 N. Y. 153; Laning v. N. Y. Cent. R. R. 49 Id. 521, 10 Am. Rep. 417; Crispin v. Babbitt, 81 N. Y. 516, 37 Am. Rep. 521; McCosker v. Long Island R. R. 84, N. Y. 77: Harvey v. N. Y. Cent. &c. R. R., 88 Id 481; Young v. N. Y. &c. R. R. 30 Barb. 229; Marvin v. Muller, 25 Hun 163; Cowles v. Richmond, &c. R. R., 84 N. C. 309, 37 Am. Rep. 620; Columbus, &c. R. R. v. Webb, 12 Ohio St. 475; Pittsburg, &c. Ry v. Devinney, 17 Id. 197; Lake Shore, &c. Ry v. Knittal, 33 Id. 468; Railway Co. v. Ranney, 37 Id. 665; Willis v. Oregon, &c. R. R., 3 West Coast Rep. 240 (Or.); Weger v. Pennsylvania R. R. 55 Pa. St. 460; Lehigh Valley Coal Co. v. Jones, 86 Id. 432, 6 Rep. 125; 17 Alb. L. J. 513; Delaware, &c. Canal Co. v. Carroll, 89 Pa. St. 374; Keystone Bridge Co. v. Newberry, 96 Id. 246, 42 Am. Rep. 543; Mann v. Oriental Print Works, 11 R. I. 152; Lasure v. Graniteville Mfg. Co. 18 S. C. 275; Guntir v. Graniteville Mfg. Co. Id. 262, 44 Am. Rep. 573; Ragsdale v. Memphis, &c. R. R., 3 Baxt. (Tenn.) 426; Nashville, &c. R. R. v. Wheless, 10 Lea (Tenn.) 741, 43 Am. Rep. 317; Houston, &c. R. R. v. Myers, 55 Tex. 110; Texas Mexican Ry v. Whitmore, 58 Id. 276; Davis v. Central Vermont R. R., 55 Vt. 84, 45 Am. Rep. 590; Brabbits v. Chicago, &c. R. R., 38 Wis. 289; Naylor v. Chicago, &c. Ry, 53 Id. 661; Howland v. Milwaukee, &c. Ry, 54 Id. 226: Hoth v. Peters, 55 Id. 405; Whitnam v. Wisconsin, &c. R. R., 58 Id. 408; Heine v. Chicago, &c. Ry, Id. 525; Hough v. Railway Co., 100 U. S. 213; Halverson v. Nisen, 3 Saw. (U. S. C. C.) 562; Melville v. Missouri River,

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or default, but this is one of the risks incident to the business, and, by accepting the employment, the servant assumes this with the others.[1]

The servant, at the same time, has a right to rely upon the principal's performance of his duty to use due and reasonable care and diligence to select and retain none but competent and careful servants. If, therefore, as has been seen, the servant receives injury by reason of the employment of a fellow-servant, who was employed, or who has been retained, in violation of this duty of the principal's, the principal is liable.[2]

So, too, as it is those risks only which are incident to his employment, which the servant assumes, he does not assume the responsibility for negligence or misconduct of other servants engaged in another and different employment.[3]

§ 668. **Same Subject—Who is a Fellow-Servant?** The question, who is a fellow-servant engaged in the same business, within this rule is one, in many cases, very difficult of determination. It is well settled, however, that where there is one general object, in attaining or furthering which the servant is engaged, the rule applies although he and the servant, through whose negligence he was injured, were not engaged in doing the same kind of work.[4] Nor is the liability of the master enlarged where the

&c. R. R., 4 McCrary (U. S. C. C.) 194; Yager v. Atlantic, &c. R. R., 4 Hughes (U. S. C. C.) 192; Jordan v. Wells, 3 Woods (U. S. C. C.) 527; Thompson v. Chicago, &c. Ry, 18 Fed. Rep. 239, Crew v. St. Louis, &c. Ry, 20 Id. 87.

[1] Lovell v. Howell, L. R. 1 C. P. Div. 167, 16 Eng. Rep. 501, where ARCHIBALD, J. states the rule: "When a man enters into the services of a master, he tacitly agrees to take upon himself to bear all ordinary risks which are incident to his employment, and, amongst others, the possibility of injury happening to him from the negligent acts of his fellow-servants or fellow-workmen." See generally cases cited in preceding note.

[2] Harper v. Indianapolis, &c. R. R. Co., 47 Mo. 567, 4 Am. Rep. 353; Illinois Cent. R. R. v. Jewell, 46 Ill. 99; Wright v. New York Cent. R. R. Co., 25 N. Y. 565; Snow v. Housatonic, &c. R. R., Co., 8 Allen (Mass.) 444; 85 Am. Dec. 720; Noyes v. Smith, 28 Vt. 63, 65 Am. Dec. 222.

[3] Pool v. Chicago, &c. Ry Co., 56 Wis. 227; Cumberland, &c. R. R. Co. v. State, 44 Md. 283; Green v. Banta, 48 N. Y. Super. 156; Nashville, &c. R. R. Co. v. Jones, 9 Heisk. (Tenn.) 27; Sheehan v. New York, &c. R. R. Co., 91 N. Y. 332; Shanny v. Androscoggin Mills, 66 Me. 420.

[4] Laning v. New York Central R. R. Co., 49 N. Y., 521, 10 Am. Rep. 417; Blake v. Maine Central R. R. Co., 70 Me. 60, 35 Am. Rep. 297; Charles v. Taylor, L. R. 3 C. P. D. 492; Lovell v. Howell, 1 Id. 161;

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servant who has sustained the injury is of a grade inferior to that of the servant or agent whose negligence, carelessness or misconduct has caused the injury, if the services of each, in his particular labor, are directed to the same general end.[1] Nor does it make any difference that the servant guilty of the negligence is a servant of superior authority, whose lawful directions the servant injured was bound to obey,[2] unless such superior servant arises to the grade of the *alter ego* of the principal.[3] If they

16 Eng. Rep. (Moak) 501; Tunney v. Midland Ry. Co., L. R. 1 C. P. 296; Seaver v. Boston, &c. R. R. Co., 14 Gray (Mass.) 467; Wonder v. Baltimore & Ohio R. R. Co., 32 Md. 411, 3 Am. Rep. 143.

[1] Laning v. New York Central R. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Lawler v. Androscoggin R. R. Co., 62 Me. 463, 16 Am. Rep. 492; Feltham v. England, L. R. 2 Q. B. 33; Brown v. Winona, &c. R. R. Co., 27 Minn. 162, 38 Am. Rep. 285; Thayer v. St. Louis, &c. R. R. Co., 22 Ind. 26; Columbus, &c. R. R. Co. v. Arnold, 31 Ind. 174; Peterson v. Whitebreast, 50 Iowa, 673; Shauck v. Northern, &c. R. R. Co., 25 Md. 462; Albro v. Agawam Canal Co., 6 Cush. (Mass.) 75; Hurd v. Vermont, &c. R. R. Co., 32 Vt. 473; Pittsburg, &c. Ry Co. v. Lewis, 33 Ohio St. 196; Warner v. Erie Ry Co., 39 N. Y. 468; Sherman v. Rochester, &c. R. R. Co., 17 N. Y. 153; Wood v. New Bedford Coal Co., 121 Mass. 252; Malone v. Hathaway, 64 N. Y. 5, 21 Am. Rep. 573; Pittsburg, &c. R. R. Co. v. Devinney, 17 Ohio St. 197; St. Louis, &c. R. R. Co. v. Britz, 72 Ill. 256.

[2] Laning v. New York Central R. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Lawler v. Androscoggin R. R. Co., 62 Me. 463, 16 Am. Rep. 492; Blake v. Maine Central R. R. Co., 70 Me. 60, 35 Am. Rep. 297; Brown v. Winona, &c. R. R. Co., 27 Minn. 162, 38 Am. Rep. 285; Beaulieu v. Portland Co., 48 Me. 295; Gillshannon v. Stony Brook R. R. Co., 10 Cush. (Mass.) 228; Hurd v. Vermont Central R. R. Co., 32 Vt. 473; Collier v. Steinhart, 51 Cal. 116; McLean v. Mining Co., Id. 255; McDonald v. Manufacturing Co., 67 Ga. 761; Kenney v. Shaw, 133 Mass. 501; O'Connor v. Roberts, 120 Mass. 227; Floyd v. Sugden, 134 Mass. 563; Marshall v. Schricker, 63 Mo. 308; Keystone Bridge Co. v. Newberry, 96 Penn. St. 246, 42 Am. Rep. 543; Hoth v. Peters, 55 Wis. 405; Dwyer v. American Express Co., Id. 453; Malone v. Hathaway, 64 N. Y. 5, 21 Am. Rep. 573; Reese v. Biddle, 112 Penn. St. 72; Conley v. Portland, 78 Me. 217; Gonsior v. Minneapolis, &c. Ry Co., 36 Minn. 385, 31 N. W. Rep. 515.

[3] Ryan v. Bagaley, 50 Mich. 179, 45 Am. Rep. 35; Chicago, &c. Ry Co. v. Bayfield, 37 Mich. 205; Railroad Co. v. Fort, 17 Wall. (U. S.) 553; Wilson v. Willimantic Co., 50 Conn 433, 47 Am. Rep. 653; Mitchell v. Robinson, 80 Ind. 281, 41 Am. Rep. 812; Dowling v. Allen, 74 Mo. 13, 41 Am. Rep. 298; Beeson v. Green Mountain Min. Co., 57 Cal. 20; Chicago, &c. R. R. Co. v. May, 108 Ill. 288; Gormly v. Vulcan Iron Works, 61 Mo. 492; Corcoran v. Holbrook, 59 N. Y. 517, 17 Am. Rep. 369; Berea Stone Co. v. Kraft, 31 Ohio St. 287, 27 Am. Rep. 510; Brothers v. Cartter, 52 Mo. 373, 14 Am. Rep. 424; Mullan v. Philadelphia Steamship Co. 78 Penn. 25, 21 Am. Rep. 2; Tyson

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are in the employment of the same master, engaged in the same general business and performing duties and services for the same general purposes, they are fellow-servants within the meaning of this rule, and the master is not liable.[1] It is immaterial, also, that the service was an occasional or job service. It is the quality, and not the length of time, or extent of the work, which fixes, in this respect, the character of the servant and the service. The servant may be engaged by the day, week or year, or by piece-work, yet if his employment is in the way of accomplishing a result which the other employees are also working to bring about, their service is common.[2]

§ 669. **Volunteer assisting Servant can not recover.** It is well settled that a person who, without any employment and without any interest in the performance or result of the service, voluntarily undertakes to perform service for another, or to assist the servants of another in the service of their master, either at the request or without the request of such servants, who have no authority to employ other servants, stands in the relation, for the time being, of a fellow-servant with those whom he undertakes to assist and is to be regarded as assuming all the risks incident to the business. If he is injured by the negligence of such servants, he has, therefore, no recourse to the principal.[3]

But the rule is otherwise where the person injured, is not a mere volunteer, but assists for the purpose of aiding or advanc-

v. North, &c. R. R. Co., 61 Ala. 554, 32 Am. Rep. 8; Gunter v. Graniteville Mfg. Co., 18 S. C. 262, 44 Am. Rep. 573; Mulcairns v. Janesville, 67 Wis. 24; Brown v. Sennett, 68 Cal. 225.

[1] Laning v. New York Central R. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Lawler v. Androscoggin R. R. Co., 62 Me. 463, 16 Am. Rep. 492; Blake v. Maine Central R. R. Co., 70 Me. 60, 35 Am. Rep. 297; Cooley on Torts, 543; Fisk v. Central Pac. R. R. Co., 72 Cal. 38, 1 Am. St. Rep. 22. Appended to this case will be found a valuable collection of the cases upon the question of who are fellow-servants.

[2] Ewan v. Lippincott, 47 N. J. L. 192, 54 Am. Rep. 148.

[3] Flower v. Pennsylvania R. R. Co., 69 Penn. St. 210, 8 Am. Rep. 251; New Orleans, &c. R. R. Co. v. Harrison, 48 Miss. 112, 12 Am. Rep. 356; Osborne v. Knox & Lincoln R. R., 68 Me. 49, 28 Am. Rep. 16; Mayton v. Texas & Pacific R. R. Co., 63 Tex. 77, 51 Am. Rep. 637; Street Railway Co. v. Bolton, 43 Ohio St. 224, 54 Am. Rep. 803; Eason v. S. & E. T. Ry Co., 65 Tex. 577, 57 Am. Rep. 606; Degg v. Midland Ry Co., 1 H. & N. 773; Potter v. Faulkner, 1 Best & S. 800.

But see Cleveland v. Spier, 16 C. B. (N. S.) 398; Althorf v. Wolfe, 22 N. Y. 355.

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ing his own, or his own master's business. Though performing a service which may be beneficial to both parties, he is doing so in his own behalf, or in the behalf of his own master, and not as servant of the master whose servants he assists. Their request or acquiescence gives him the right to assist, but the fact that he does so in his own behalf, or in behalf of his own master, however beneficial may be his assistance to the master of the other servants, gives him the right to be protected against their negligence.[1] The act done by him, should, however, be a prudent and reasonable one, and not a wrongful interference and intermeddling with business in which he had no concern.[2]

§ 670. **Contributory Negligence of Servant defeats his Recovery.** The same rules which govern the question of contributory negligence in other cases apply here. A servant has no cause of action against his master for an injury resulting from the negligence of the master, if the servant's own negligence contributed to cause the injury.[3] And where a servant knows as fully as the master of the existence of that which is at last the producing cause of the injury, and, except upon the master's promise to amend the defect, continues voluntarily and of his own accord in the master's employ, exposed to the effects when they shall come, his so remaining in the service may be such contributory negligence as to defeat a recovery.[4] But where the continuance in the service, or the undertaking of the dangerous

[1] Street Railway Co. *v.* Bolton, 43 Ohio St. 224, 54 Am. Rep. 803; Eason *v.* S. & E. T. Ry Co., *supra*; Wright *v.* London, &c. Ry Co., 1 Q. B. Div. 252; Holmes *v.* North Eastern Ry Co., L. R. 4 Ex. 254.

[2] Street Railway Co. *v.* Bolton, 43 Ohio St. 224, 54 Am. Rep. 803.

[3] Buzzell *v.* Laconia Mnfg. Co., 48 Me. 113, 77 Am. Dec. 212; Campbell *v.* Atlanta, &c. R. R. Co., 53 Ga. 488; Cunningham *v.* Railway Co., 17 Fed. Rep. 882; Honor *v.* Albrighton, 93 Penn. St. 475; Muldowney *v.* Illinois Central R. R. Co., 39 Iowa, 615; State *v.* Malster, 57 Md. 287; Vicksburg, &c. R. R. Co. *v.* Wilkins, 47 Miss. 404, Baker *v.* Hughes, 2 Col. 79; Green, &c. Ry Co. *v.* Breamer, 97 Penn. St. 103; Wormell *v.* Maine Cent. R. R. Co., 79 Me. 397, 1 Am. St. Rep. 321.

[4] East Tennessee, &c. R. R. Co. *v.* Duffield, 12 Lea (Tenn.) 63, 47 Am. Rep. 319; McGlynn *v.* Brodie, 31 Cal. 376; Sowden *v.* Idaho Quartz Mining Co., 55 Cal. 443; Hayden *v.* Smithville, &c. Co., 29 Conn. 548; Bell *v.* Western, &c. R. R. Co., 70 Ga. 566; Sullivan *v.* Louisville Bridge Co., 9 Bush. (Ky.) 81; Camp Point Mfg. Co. *v.* Ballou, 71 Ill. 417; Chicago, &c. R. R. Co. *v.* Clark, 11 Ill. App. 104; Umback *v.* Lake Shore, &c. Ry Co., 83 Ind. 191; Kroy *v.* Chicago, &c. R. R. Co., 32 Iowa, 357; Muldowney *v.* Illinois Cent. R. R. Co., 39 Iowa, 615; Snow *v.* Housatonic R.

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task, cannot be regarded as purely voluntary, a more serious question arises. Ordinarily it may be presumed that the master knows better than the servant the dangers of the employment. There is, too, as has been seen, a presumption that the master's orders are proper and lawful, and the servant who disobeys them must take upon himself the burden of showing that they were otherwise.[1]

It is to be expected therefore that great weight will be given by the servant to his master's orders which he has undertaken to obey, and where the service is continued, or the task undertaken, by the express order or command of the master or those who represent him, this fact must be taken into consideration in determining the question of the servant's contributory negligence. The command of the master would not justify the servant in going into plain, undoubted and imminent danger, such as no man of ordinary prudence would encounter. But in determining this question, too, regard must be had to the exigencies of the case. A prudent man even will run more risks in times of hazard or threatened disaster, than at other times when there is no pressing need. And so under such circumstances men cannot be expected to weigh the chances with nice precision. Each case is left to be judged by its own circumstances and surroundings. The rule of contributory negligence is, therefore, to be modified in this regard, that if the servant incur risk by the express command of the master or his agent, and the danger was not so inevitable or imminent that a man of ordinary prudence would not, under the circumstances, have incurred it, the servant is not to be deemed guilty of contributory negligence.[2]

This question is for the jury to determine, and the extent of

R. Co., 8 Allen (Mass.) 441; Huddleston v. Lowell Machine Shop, 106 Mass. 282; Pingree v. Leyland, 135 Mass. 398; Swoboda v. Ward, 40 Mich. 420; Richards v. Rough, 53 Mich. 212; Porter v. Hannibal, &c. R. R. Co., 71 Mo. 66; Behm v. Armour, 58 Wis. 1; Greenleaf v. Illinois Cent. R. R. Co., 29 Iowa 14, 4 Am. Rep. 181; Ladd v. New Bedford R. R. Co., 119 Mass. 412, 20 Am. Rep. 331; Kelley v. Silver Spring Co., 12 R. I. 112, 34 Am. Rep. 615; Mansfield Coal & Coke Co. v. McEnery, 91 Penn. St. 185, 36 Am. Rep. 662.

[1] See *ante*, § 663.

[2] East Tennessee, &c. R. R. Co. v. Duffield, 12 Lea (Tenn.) 63, 47 Am. Rep. 319; Guthrie v. Louisville, &c. R. R. Co., 11 Lea (Tenn.) 372, 47 Am. Rep. 286; Chicago, &c. Ry Co. v. Bayfield, 37 Mich. 205; Frandsen v. Chicago, &c. R. R. Co., 36 Iowa 372; Patterson v. Pittsburg, &c. R. R. Co., 76 Penn. St. 389, 18 Am. Rep. 412.

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the danger, the fact that it was incurred under the direct order of the master or his agent, and the exigency of the occasion, are essential elements to be taken into consideration.[1]

§ 671. **Agreements to waive Liability invalid.** It is frequently attempted by employers to obtain from their employees at the time of entering upon the service and in consideration of it, a waiver of the liability of the master for injuries that may happen through the negligence of the master or of other servants. Such waivers, however, are quite generally held to be opposed to public policy and void,[2] though they have been sustained in England [3] and in Georgia.[4]

V.

AGENT'S RIGHT TO A LIEN.

§ 672. **In general.** Having ascertained the rights of the agent to commissions, reimbursement and indemnity, it becomes material to determine the means by which those rights may be enforced. The most important of these is the agent's right of lien.

Liens of various sorts, in recent times, are provided and regulated by statute, but it is not the intention here to determine how far the statutes have protected agents. So liens or charges may be created by the express contract of the parties, but these, also, are not now to be considered. The lien to be here considered is that which exists by the common law, as distinguished from statutory liens and those created by express contract.

§ 673. **Lien defined—General and particular Liens.** A lien

[1] Patterson *v.* Pittsburg, &c. R. R. Co., *supra*; Laning *v.* New York Cent. R. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Greene *v.* Minn. & St. L. R. R. Co., 31 Minn. 248, 47 Am. Rep. 785; Missouri Furnace Co. *v.* Abend, 107 Ill. 44, 47 Am. Rep. 425; Manufacturing Co. *v.* Morrissey, 40 Ohio St. 148, 48 Am. Rep. 669.

[2] Kansas Pac. Ry Co. *v.* Peavey, 29 Kans. 169, 44 Am. Rep. 630, 11 Am. & Eng. R. R. Cases, 260; Railway Co. *v.* Spangle, 44 Ohio St. 471, 58 Am. Rep. 833; Roesner *v.* Hermann, 10 Biss. (U. S. C. C.) 486, 8 Fed. Rep. 782; Little Rock & Ft. Smith Ry Co. *v.* Eubanks, — Ark. —, 3 S. W. Rep. 808.

[3] Griffiths *v.* Earl of Dudley, 9 Q. B. Div. 357.

[4] Western, &c. R. R. Co. *v.* Bishop, 50 Ga. 465; Western, &c. R. R. Co. *v.* Strong, 52 Ga. 461; Galloway *v.* Western, &c. R. R. Co., 57 Ga. 512.

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at common law has been defined to be the right of detaining the property on which it operates until the claims which are the basis of the lien are satisfied.[1] It has also been defined as an obligation which, by implication of law and not by express contract, binds real or personal estate for the discharge of a debt or engagement, but does not pass the property in the subject of the lien.[2]

The main distinction between common law liens and other liens is that possession is essential to the former class and not always to the latter.[3]

Liens are either general or particular. A general lien is a right to retain the property of another to cover and secure a general balance due from the owner to the person who has possession.[4] A particular or specific lien is a right to retain particular property of another for charges incurred, or trouble undergone, with respect to that property.[5]

The former being regarded as an encroachment on the common law, is not favored by courts of law or equity, and will be strictly

[1] Ames v. Palmer, 42 Me. 197, 66 Am. Dec. 271; Oakes v. Moore, 24 Me. 214, 41 Am. Dec. 379; Hammonds v. Barclay, 2 East 235: "The word lien, in common parlance, is somewhat indiscriminately used, as if it embraced every species of special property which one may have in goods, the general ownership of which is in another. It originally, and more appropriately, was used to signify the right which artisans and others, who had bestowed labor upon an article, or done some act in reference to it, had, in some instances, of a detention thereof till reimbursed for their expenditures and labor bestowed thereon. Such may be termed a lien at common law." WHITMAN, C. J., in Oakes v. Moore, *supra*.

[2] Fisher on Mortgages, § 149. Evans on Agency, 362.

[3] "The common law recognized the right of innkeepers, carriers and certain artisans and mechanics to hold a lien upon property delivered to them for their charges. Innkeepers and carriers had such a lien upon the theory that they were bound to serve all persons who required their services; and artisans upon the theory that by their labor and skill, the specific property bailed to them had been increased in value. In both cases to make the lien operative, it is necessary that the lien holder keep the actual possession of the property to which the lien attaches. Statutory liens are analogous to the latter class of common law liens named above, but, unlike them, no possession of the property is required. The protection afforded at common law by possession, is, in the case of statutory liens, accomplished through an attachment of the property." Quimby v. Hazen, 54 Vt. 132.

[4] McIntyre v. Carver, 2 Watts & Serg. (Penn.) 392, 37 Am. Dec. 519 and note. Evans on Agency, 363.

[5] *Idem.*

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construed. It can, in the absence of an express contract, be claimed only as arising from dealings in a particular trade or line of business in which the existence of a general lien has been judicially proved and acknowledged, or upon express evidence being given that, according to the established custom, a general lien is claimed and allowed.[1] Particular liens on the other hand are favored.[2]

§ 674. **Foundation of the Claim of Lien.** The common law lien found its origin in principles of natural equity and commercial necessity. Its earliest form was the particular or specific lien, and it was first applied for the protection of those who were required by law to render services or to receive goods for all who sought their aid, as in the case of common carriers and innkeepers.[3] Manifest justice required that those who were thus obliged to serve should have some compulsory means of obtaining compensation. A lien was also allowed to those who had, by their own peril, labor and expense, rescued, from loss or destruction at

[1] McIntyre *v.* Carver, *supra*; Rushforth *v.* Hadfield, 7 East 229; Bevan *v.* Waters, 3 C. & P. 520; Scarfe *v.* Morgan, 4 M. & W. 283; Houghton *v.* Matthews, 3 Bos. & Pul. 494; Bleaden *v.* Hancock, 4 Car. & P. 156.

[2] Scarfe *v.* Morgan, *supra*; Bevan *v.* Waters, *supra*; McIntyre *v.* Carver, *supra*. "It is not to be doubted," said GIBSON, C. J., "that the law of particular or specific lien on goods in the hands of a tradesman or artisan for the price of work done on them, though there is no trace of its recognition in our own books, was brought hither by our ancestors; and that it is a part of our common law. It was as proper for their condition and circumstances here as it had been in the parent land; and though a general lien for an entire balance of accounts was said by Lord ELLENBOROUGH, in Rushforth *v.* Hadfield, 7 East 229, to be an encroachment on the common law, yet it has never been intimated that a particular lien on specific chattels, for the price of labor bestowed on them, does not grow necessarily and naturally out of the transactions of mankind as a matter of public policy." McIntyre *v.* Carver, 2 Watts & Serg. (Penn.) 392.

[3] Naylor *v.* Mangles, 1 Esp. 109; Carlisle *v.* Quattlebaum, 2 Bailey (S. C.) 452; Quimby *v.* Hazen, 54 Vt. 132.

"The innkeeper is bound to receive and entertain travellers, and is answerable for the goods of the guest although they may be stolen or otherwise lost without any fault on his part. Like a common carrier, he is an insurer of the property, and nothing but the act of God or public enemies will excuse a loss. On account of this extraordinary liability the law gives the innkeeper a lien on the goods of the guest for the satisfaction of his reasonable charges. It was once held that he might detain the person of a guest, but that doctrine is now exploded and the lien is confined to the goods." BRONSON, J., in Grinnell *v.* Cook, 3 Hill (N.Y.) 485, 38 Am. Dec. 663.

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sea, the goods or property of another who was unable to protect them. Here, too, obvious equity, as well as commercial necessity, demanded that if the owner would reclaim his goods he should first pay the reasonable charges of him by whose exertions they had been preserved.[1]

It was, however, soon extended to the case of those who, while not required by law to render service, yet by their skill or labor had imparted additional value to the goods or property of another.[2] That these persons, also, should have a lien upon the goods or property for the reasonable value of their services was obviously just and so plainly conducive to confidence and security in the transaction of affairs, that this principle has become firmly established in our law, and has in modern times been extended by statutory enactments to a great variety of cases not contemplated by the common law.

[1] Fitch *v.* Newberry, 1 Doug. (Mich.) 1, 40 Am. Dec. 83. While the right of lien as finder or preserver extends only to those goods which are lost at sea, yet if the owner of goods lost on land offers a reward to him who will restore the property, a lien thereon is thereby created to the extent of the reward so offered. Wood *v.* Pierson, 45 Mich. 313; Preston *v.* Neale, 12 Gray (Mass.) 222; Cummings *v.* Gann, 52 Penn. St. 484; Wentworth *v.* Day, 3 Metc. (Mass.) 352, 37 Am. Dec. 145.

[2] "The right of lien has always been admitted where the party was bound by law to receive the goods; and in modern times the right has been extended so far that it may be laid down as a general rule, that every bailee for hire, who by his labor and skill has imparted an additional value to the goods, has a lien upon the property for his reasonable charges. This includes all such mechanics, tradesmen, and laborers as receive property for the purpose of repairing or otherwise improving its condition." BRONSON, J., in Grinnell *v.* Cook, 3 Hill (N. Y.) 485, 38 Am. Dec. 663. To same effect are Morgan *v.* Congdon, 4 N. Y. 551; Nevan *v.* Roup, 8 Iowa 207; Wilson *v.* Martin, 40 N. H. 88; Moore *v.* Hitchcock, 4 Wend. (N. Y.) 292; Gregory *v.* Stryker, 2 Den. N.Y. 628.

But except where there is an obligation by law to take and care for property, no lien for simply keeping and caring for it exists at common law, upon the ground that the bailee has added no value to the property. Thus agisters and livery stable keepers have no lien for keeping animals in the absence of a statute or an express contract to that effect. Grinnell *v.* Cook, *supra*; Lewis *v.* Tyler, 23 Cal. 364; Goodrich *v.* Willard, 7 Gray (Mass.) 183; Wills *v.* Barrister, 36 Vt. 220; Wallace *v.* Woodgate, 1 Car. & P. 575; Bevan *v.* Waters, 3 Car. & P. 520; Judson *v.* Etheridge, 1 Cromp. & M. 743; Jackson *v.* Cummins 5 Mees. & Wels. 342; Miller *v.* Marston, 35 Me. 153, 56 Am. Dec. 694; McDonald *v.* Bennett, 45 Ia. 456; Allen *v.* Ham, 63 Me. 532; Mauney *v.* Ingram, 78 N. C. 96.

But on the ground of increased value, the horse trainer has a lien. Har-

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§ 675. **Nature of Lien.** This lien conferred by the common law does not create an estate or title in the property over which it prevails. It is a simple right of retainer merely, and is neither a *jus ad rem* nor a *jus in re*.

It is purely personal to the lien holder, and is neither assignable by him, nor can it be attached as personal property or as a chose in action of the person who is entitled to it.[1] Being thus a personal privilege, no person but the lien holder can avail himself of it. It cannot be set up by a third person as a defense to an action brought by the owner of the goods.[2]

§ 676. **Requisites of Lien—Possession.** The common law lien being thus a mere right of retainer, it follows that the exclusive possession of the property by the person claiming the lien, is indispensable to its existence and continuance.[3] If the person holds the property in subordination to the will and control of another, no right of retainer attaches. No lien exists, therefore, in favor of the mere workman or servant of the contractor.[4] But the possession of such a workman or servant is the

ris *v.* Woodruff, 124 Mass. 205; Bevan *v.* Waters, *supra*; Towle *v.* Raymond, 58 N. H. 64; so has the horse doctor; Lord *v.* Jones, 24 Me. 439, 41 Am. Dec. 391; so has the owner of a stallion for the services of the stallion, Scarfe *v.* Morgan, 4 Mees. & Wels. 270; Sawyer *v.* Gerrish, 70 Me. 254.

[1] Meany *v.* Head, 1 Mason, (U. S. C. C.) 319, Story J.; Lovett *v.* Brown, 40 N. H. 511; Holly *v.* Huggeford, 8 Pick. (Mass.) 73, 19 Am. Dec. 303; Jones *v.* Sinclair, 2 N. H. 321, 9 Am. Dec. 75; Daubigny *v.* Duval, 5 T. R.. (Durnf. & E.) 606.

[2] Trespass or trover by the owner of goods consigned to a factor who has a lien thereon for a balance due him from the owner, can be maintained against an officer who attaches the goods as the property of the factor, and the lien of the factor being a privilege personal to him, cannot be set up by the officer to defeat the action. Holly *v.* Huggeford, *supra*; Jones *v.* Sinclair, *supra*.

[3] McIntyre *v.* Carver, 2 Watts & Serg. (Penn.) 392, 37 Am. Dec. 519; Tucker *v.* Taylor, 53 Ind. 93; Nevan *v.* Roup, 8 Iowa 207; Oakes *v.* Moore, 24 Me. 214, 41 Am. Dec. 379; *Ex parte* Foster, 2 Story (U. S. C. C.) 144; McFarland *v.* Wheeler, 26 Wend. (N. Y.) 467; Collins *v.* Buck, 63 Me. 459; Robinson *v.* Larrabee, 63 Me. 116; Rice *v.* Austin, 17 Mass. 197; Winter *v.* Coit, 7 N. Y. 288; Heard *v.* Brewer, 4 Daly (N. Y.) 136; Sawyer *v.* Lorillard, 48 Ala. 332; Elliott *v.* Bradley, 23 Vt. 217; Donald *v.* Hewitt, 33 Ala. 534, 73 Am. Dec. 431; Miller *v.* Marston, 35 Me. 153, 56 Am. Dec. 694; Jenkins *v.* Eichelberger, 4 Watts (Penn.) 121, 28 Am. Dec. 691.

[4] Hollingsworth *v.* Dow, 19 Pick. (Mass.) 228; McIntyre *v.* Carver, *supra*; Wright *v.* Terry, — Fla. —, 2 South. Rep. 6.

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possession of the employer or master, and is sufficient to maintain the latter's right of lien.[1]

§ 677. **Possession must have been lawfully acquired.** In order to sustain the lien, the possession of the property must have been obtained in good faith, and from one having the power and the right to confer it. A person can neither acquire a lien by his own wrongful act, nor can he retain one when he obtains possession of the property without the consent of the owner express or implied.[2]

If, therefore, the person claiming a lien acquired possession by misrepresentation or fraud, or from an agent or servant or other person having no right or power to confer it,[3] he cannot main-

[1] Heard *v.* Brewer, *supra*; Elliott *v.* Bradley, *supra*.

[2] Fitch *v.* Newberry, 1 Doug. (Mich.) 1, 40 Am. Dec. 33; Madden *v.* Kempster, 1 Camp 12; Burn *v.* Brown, 2 Stark N. P. 272.

"To create a lien on a chattel," said McKINLEY, J., "the party claiming it must show the just possession of the thing claimed; and no person can acquire a lien, founded upon his own illegal or fraudulent act, or breach of duty; nor can a lien arise, where from the nature of the contract between the parties, it would be inconsistent with the express terms or the clear intent of the contract." Randel *v.* Brown, 2 How. (U. S.) 406.

[3] An exception to this general rule exists in the case of an innkeeper. It was settled at an early period in the common law that an innkeeper has a lien on a horse brought by a guest, though the guest had no right to do so, if the innkeeper had no knowledge of the wrong and acted honestly, and this rule has been approved in this country. The reason given for the rule is that the innkeeper is bound to receive the guest and cannot stop to inquire whether he is the true owner of the property he brings or not. Yorke *v.* Grenaugh, 2 Ld. Raym. 867; Johnson *v.* Hill, 3 Stark 172; Snead *v.* Watkins, 1 C. B. (N. S.) 267; Grinnell *v.* Cook, 3 Hill (N. Y.) 485, 38 Am. Dec. 663; Jones *v.* Morrill, 42 Barb. (N. Y.) 626. In Turrill *v.* Crawley, 13 Q. B. 197, the lien was maintained on a carriage brought by the guest; and in Threfall *v.* Borwick, 26 L. T. Rep. N. S. 794, 2 Eng. Rep. (Moak) 689, affirmed in the Exchequer Chamber, L. R. 10 Q. B. 210, 12 Eng. Rep. (Moak) 266, upon a piano. Manning *v.* Hallenbeck, 27 Wis. 202.

This exception has not been made in this country in the case of common carriers, and it is well settled that the carrier cannot maintain a lien, against the true owner, upon goods wrongfully delivered to the carrier for transportation. Fitch *v.* Newberry, 1 Doug. (Mich.) 1, 40 Am. Dec. 33; Robinson *v.* Baker, 5 Cush. (Mass.) 137, 51 Am. Dec. 54; Clark *v.* Lowell, &c. R. R. Co., 9 Gray (Mass.) 231; Gilson *v.* Gwinn, 107 Mass. 126; Everett *v.* Saltus, 15 Wend. (N. Y.) 474; Brower *v.* Peabody, 13 N. Y. 121; Martin *v.* Smith, 58 N. Y. 672. "There is an obvious ground of distinction," said RANSOM, J., "between the cases of carrying goods by a common carrier, and the furnishing keep

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tain the lien although he might have done so if he had acquired the possession fairly.

§ 678. **Possession must be continuous.** It is also indispensable that the possession should be continuous. A voluntary surrender of the property, therefore, to the owner or some one on his behalf, terminates the lien, unless it is consistent with the contract, course of business or intention of the parties that it should continue.[3] And having once voluntarily relinquished the property, the party cannot regain his lien by recovering possession of the goods, without the consent or agreement of the owner.[4] If, however, the property be taken from the possession of the party claiming the lien by fraud or misrepresentation, the lien is not lost[5] and will revive if his possession be restored.[6]

The lien is not lost by a mere temporary parting with the possession for a special purpose, when there was no intention to relinquish or release the lien.[6]

§ 679. **Possession must have been acquired in Course of Employment.** In order to maintain the lien upon a specific chattel the possession must have been acquired in the course of the employment in respect of which the lien is claimed.[7] A mere credi-

ing for a horse by an innkeeper. In the latter case, it is equally for the benefit of the owner to have his horse fed by the innkeeper, in whose custody he is placed, whether left by a thief, or by himself or agent; in either case, food is necessary for the preservation of his horse, and the innkeeper confers a benefit upon the owner by feeding him. But can it be said that a carrier confers a benefit on the owner of goods by carrying them to a place where, perhaps, he never designed and does not wish them to go?" In Fitch *v.* Newberry, *supra.* This distinction would, however, be without force in the case of the carriage and the piano above cited, and the rule must be sustained on other grounds.

[1] Tucker *v.* Taylor, 53 Ind. 93; Nevan *v.* Roup, 8 Iowa 207; Oakes *v.* Moore, 24 Me. 214, 41 Am. Dec. 379; *Ex parte* Foster, 2 Story (U. S. C. C.) 144; McFarland *v.* Wheeler, 26 Wend. (N. Y.) 467; Walcott *v.* Keith, 22 N. H. 196; Collins *v.* Buck, 63 Me. 459; Sawyer *v.* Lorillard, 48 Ala. 332; Way *v.* Davidson, 12 Gray (Mass.) 465; Bowman *v.* Hilton, 11 Ohio 303; Sears *v.* Wills, 4 Allen (Mass.) 212.

[2] Robinson *v.* Larrabee, 63 Me. 116; Spaulding *v.* Adams, 32 Me. 212; Nash *v.* Mosher, 19 Wend. (N. Y.) 431.

[3] Nevan *v.* Roup, *supra.*

[4] Bigelow *v.* Heaton, 6 Hill (N. Y.) 43; Ash *v.* Putnam, 1 Id. 302; Wallace *v.* Woodgate, 1 C. & P. 575.

[5] Wallace *v.* Woodgate, *supra.*

[6] Hays *v.* Riddle, 1 Sandf. (N. Y.) 248; Reeves *v.* Capper, 5 Bing. N. C. 136; Robinson *v.* Larrabee, 63 Me. 116.

[7] Scott *v.* Jester, 13 Ark. 438; Thacher *v.* Hannahs, 4 Robert (N. Y.) 407.

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tor happening to have the goods of his debtor in his possession has no lien thereon to secure payment of the debt.[1] Nor does the mere fact that a person occupies a position, or pursues a calling, in respect to which a lien ordinarily attaches give him a lien upon property which chances to be in his possession. The possession must have been acquired by virtue of his position, or in the pursuit of the calling in which he is engaged.[2]

Thus a factor can only claim a lien upon goods which came into his possession as factor;[3] an attorney only upon the deeds and papers which came into his hands in the character of an attorney;[4] a broker only upon the property which was delivered to him in that capacity.[5]

§ 680. **No Lien if contrary to Intention of Parties—Waiver.** A lien is presumed to be something of value. It may in its inception be waived or given up without any valuable consideration, but when it has once attached, an executory agreement to waive or surrender it will not be obligatory unless based upon a legal consideration.[6]

A lien will not attach if it be inconsistent with the terms upon which possession was obtained.[7] The existence of a special contract is not, of itself, inconsistent with a lien, but if it expressly or impliedly waives it, the lien can not exist.[8]

So it is a general principle that an agreement to give credit, or a special contract for a particular mode of payment,[9] or the taking of a note, acceptance or other security payable at a future time,[10] or an agreement to deliver the property before payment or

[1] Allen *v.* Megguire, 15 Mass. 496.

[2] Dixon *v.* Stansfeld, 10 C. B. 398; "A man is not entitled to a lien simply because he happens to fill a character which gives him such a right unless he has received the goods or done the act in the particular character to which the right attaches." JARVIS, C. J.

[3] Drinkwater *v.* Goodwin, 1 Cowp. 251.

[4] Stevenson *v.* Blakelock, 1 Maule & Sel. 535.

[5] Dixon *v.* Stansfeld, *supra*.

[6] Danforth *v.* Pratt, 42 Me. 50.

[7] Crawshay *v.* Homfray, 4 Barn. & Ald. 50; Chase *v.* Westmore, 5 Maule & Sel. 180.

[8] Farrington *v.* Meek, 30 Mo. 578; Leese *v.* Martin, L. R. 17 Eq. 224; Brandao *v.* Barnett, 12 Cl. & F. 787.

[9] Raitt *v.* Mitchell, 4 Camp. 146; Cowell *v.* Simpson, 16 Ves. Jr. 280; Chandler *v.* Belden, 18 Johns. (N. Y.) 157, 9 Am. Dec. 193; Hutchins *v.* Olcutt, 4 Vt. 549, 24 Am. Dec. 634; Moore *v.* Hitchcock, 4 Wend. (N. Y.) 296; Stoddard Woolen Manufactory *v.* Huntley, 8 N. H. 441, 31 Am. Dec. 198; Stevenson *v.* Blakelock, 1 M. & S. 535.

[10] Hutchins *v.* Olcutt, 4 Vt. 549, 24

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before the time of payment arrives,[1] is a waiver of the lien. An agreement to pay a fixed price is no waiver.[2]

§ 681. **Waiver by inconsistent Conduct.** The lien will, however, be waived by a general refusal of the person, to whom it inures, to deliver the property, accompanied by a claim of title in himself, or by a claim to retain it on other grounds distinct from his lien.[3] But a claim of right to detain the goods in respect of two sums, as to one only of which the person has a lien, is not a waiver.[4] Whether the lien is lost by a general refusal to de-

Am. Dec. 634; Hewison v. Guthrie, 2 Bing. N. C. 755; Cowell v. Simpson, 16 Ves. Jr. 275; Au Sable Boom Co. v. Sanborn, 36 Mich. 358; Bunney v. Poyntz, 4 B. & Ad. 568. Unless the paper be dishonored while the property yet remains in the agent's hands. Feise v. Wray, 3 East. 93. It makes no difference whether the note is payable on demand or at a future time, or whether negotiable or not. Hutchins v. Olcutt, *supra*. A factor's lien for money and supplies to make a crop is not waived by taking personal security for such money and supplies. Story v. Flournoy, 55 Ga. 56.

[1] Chandler v. Belden, 18 Johns. (N. Y.) 157, 9 Am. Dec. 193.

[2] The Hostler's case, Metc. Yelv. 67 and note; Hutton v. Bragg, 7 Taunt. 14; Raitt v. Mitchell, 4 Camp. 146; Stoddard Woolen Manufactory v. Huntley, 8 N. H. 441, 31 Am. Dec. 198. "A particular lien," said WOODWARD, J., "is given by the common law to any one who takes property in the way of his trade or occupation, to bestow labor and expense upon it. And it exists equally whether there be an agreement to pay a stipulated price, or only an implied contract to pay a reasonable price, 2 Kent's Com. 635. It was said by HOLROYD, J. in Crawshay v. Homfray, 4 Barn. & Ald. 50, that the principle laid down in Chase v. Westmore, 5 Maule & Selw. 180, where all the cases came under the consideration of the court, was this, that a special agreement did not of itself destroy the right to retain; but that it did so only where it contained some special term inconsistent with that right. In 2 Selwin's Nisi Prius, 540, the rule is stated to be, that the right of detaining a thing until the money due upon it be paid, may be waived by a special agreement as to the time or mode of payment; but not merely by an agreement for the payment of a fixed sum," in Mathias v. Sellers, 86 Penn. St. 486, 27 Am. Rep. 723. To the same point see also Hanna v. Phelps, 7 Ind. 21, 63 Am. Dec. 410.

[3] White v. Gainer, 9 Moore, 41; 2 Bing. 23, 1 Car. & P. 324; Boardman v. Sill, 1 Camp. 410 Note; Dirks v. Richards, 5 Scott's N. R. 534; Weeks v. Goode, 6 Com. B. N. S. 367; Cannee v. Spauton, 8 Scott's N. R. 714 s. c. 7 Man. & G. 903: Dows v. Morewood, 10 Barb. (N. Y.) 183; Holbrook v. Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607; Everett v. Saltus, 15 Wend. (N. Y.) 474; Judah v. Kemp, 2 Johns. (N. Y.) Cas. 411; Rogers v. Weir, 34 N. Y. 463; Picquet v. McKay, 2 Blackf. (Ind.) 465; Hanna v. Phelps, 7 Ind. 21, 63 Am. Dec. 410; Leigh v. Mobile, &c. R. R. Co. 58 Ala. 165.

[4] Scarfe v. Morgan, 4 Mees & Wels. 270.

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liver the goods, without specifying any grounds, is a question upon which the authorities are in conflict, but the better opinion is thought to be that it is.[1]

§ 682. **Claim of Lien no Waiver of personal Remedies.** In general, the lien holder has recourse to the personal responsibility of the debtor as well as the lien upon the goods,[2] but he may waive this personal responsibility if he so elects. Whether he has done so in any given case, is a question of fact to be determined from its own circumstances.[3] So although there may have been an undertaking to resort to the goods in the first instance, this will not prevent recourse to the debtor after the proceeds of the goods are exhausted, unless there has been an agreement to look exclusively to the goods.[4]

§ 683. **How Lien may be enforced.** It is a general rule that a mere lien can not, in the absence of a statute authorizing it, be enforced by sale of the property.[5] In such a case, either the ordinary proceedings at law to an execution upon which the property may be seized and sold, must be resorted to, or recourse must be had to the more appropriate remedy of an action in equity. An exception, however, is made in the case of factors, who may, as will be hereafter seen,[6] sell the goods in their possession to reimburse themselves for their advances. So where the case amounts to a bailment or a pledge of the property, or to a deposit by way of security for a loan, a different rule applies and the bailee or pledgee may, after reasonable demand and notice, sell the property at public sale.[7]

[1] Hanna *v.* Phelps, *supra;* Dows *v.* Morewood, *supra*; Spence *v.* McMillan, 10 Ala. 583. *Contra*, see Everett *v.* Coffin, 6 Wend. (N. Y.) 603; Buckley *v.* Handy, 2 Miles (Penn.) 449.

[2] Graham *v.* Ackroyd, 10 Hare 192; Peisch *v.* Dickson, 1 Mason (U. S. C. C.) 10; Beckwith *v.* Sibley, 11 Pick. (Mass.) 482; Colley *v.* Merrill, 6 Greenl. (Me.) 50; Upham *v.* Lefavour, 11 Metc. (Mass.) 174.

[3] Burrill *v.* Phillips, 1 Gall. (U. S. C. C.) 360; Peisch *v.* Dickson, 1 Mason (U. S. C. C.) 9.

[4] Gihon *v.* Stanton, 9 N. Y. 476; Parker *v.* Brancker, 22 Pick. (Mass.) 40; Burrill *v.* Phillips, *supra;* Peisch *v.* Dickson, *supra*; Stoddard Woolen Mfg. Co. *v.* Huntley, 8 N. H. 441, 31 Am. Dec. 198.

[5] Briggs *v.* Boston, &c. R. R. Co. 6 Allen (Mass.) 246; Fox *v.* McGregor, 11 Barb. (N. Y.) 41; Hunt *v.* Haskell, 24 Me. 339, 41 Am. Dec. 387; Crumbacker *v.* Tucker, 9 Ark. 365; Bailey *v.* Shaw, 24 N. H. 297, 55 Am. Dec. 241.

[6] See *post*, chapter on Factors.

[7] Parker *v.* Brancker, 22 Pick. (Mass.) 40; Porter *v.* Blood, 5 Pick.

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§ 684. **How these Rules apply to Agents.** It has not been the purpose here to go minutely into the question of the right of lien as applied to agents of various kinds, but rather to state the most important principles governing liens in general, leaving their particular application to be considered hereafter when treating more fully of the more prominent classes of agents.[1]

But in general it may be said that there exists a particular right of lien in the agent for all his commissions, expenditures, advances and services in and about the property or thing intrusted to his agency, whenever they were proper or necessary or incident thereto.[2] Thus it is said by a learned judge in New York, "An agent may have a lien on the property or funds of his principal for moneys advanced or liabilities incurred in his behalf; and if moneys have been advanced or liabilities incurred upon the faith of the solvency of the principal, and he becomes insolvent while the proceeds and fruit of such advances or liabilities are in the possession of the agent, or within his reach, and before they have come to the actual possession of the principal, within every principal of equity, the agent has a lien upon the same for his protection and indemnity."[3]

So where a principal consigns goods to an agent to sell under an agreement that the agent will accept bills drawn upon him by the principal, it is a necessary inference that the bills were drawn and accepted upon the credit of the goods, and the agent has a lien upon the goods in his hands for the amount of his acceptances.[4] So an agent employed to obtain a loan upon a commission, has a lien for the same upon the loan which he secures.[5]

(Mass.) 54; Howard v. Ames, 3 Metc. (Mass.) 308; Potter v. Thompson, 10 R. I. 1.

[1] See *post* as to the liens of Attorneys, Auctioneers, Factors and Brokers in the respective chapters devoted to those agents.

[2] McKenzie v. Nevius, 22 Me. 138, 38 Am. Dec. 291; McIntyre v. Carver, 2 W. & S. (Penn.) 392, 37 Am. Dec. 519; Nevan v. Roup, 8 Iowa 207; Morgan v. Congdon, 4 N. Y. 552; Grinnell v. Cook, 3 Hill (N. Y.) 485, 38 Am. Dec. 663; Gregory v. Stryker, 2 Den. (N. Y.) 631; Wilson v. Martin, 40 N. H. 88; Farrington v. Meek, 30 Mo. 581, 77 Am. Dec. 627; Lovett v. Brown, 40 N. H. 511; Danforth v. Pratt, 42 Me. 50; Moore v. Hitchcock, 4 Wend. (N. Y.) 292; Mathias v. Sellers, 86 Penn. St. 486, 27 Am. Rep. 723.

[3] Muller v. Pondir, 55 N. Y. 325.

[4] Nagle v. McFeeters, 97 N. Y. 196; Holbrook v. Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607; Bank v. Jones, 4 N. Y. 497; *In re* Pavy's Co., 1 Ch. Div. 631, 16 Eng. Rep. 661.

[5] Vinton v. Baldwin, 95 Ind. 433.

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§ 685. **Agent's Lien ordinarily a particular Lien.** It will be seen hereafter, in cases which stand upon distinctive grounds, that an agent may have a general lien, as in the case of bankers, factors and attorneys. But the lien of an agent employed for a specific transaction is ordinarily a particular lien, and is confined to the retention of the property for services and disbursements in reference to that property only, and not for a general balance of account, nor for services in reference to other property or affairs, unless by general usage, special agreement or mode of dealing, a general lien has been established.[1]

§ 686. **For what Sums the Lien attaches.** Except by virtue of a special agreement, the lien attaches only for debts which are certain and liquidated, and not for contingent, prospective or speculative damages or liabilities.[2] The debts must also have been incurred by the express or implied authority of the principal, and not as the result of the agent's own wrong, neglect or breach of instructions.[3] They must also have been incurred for lawful and legitimate purposes, and must be due as a matter of right and not as mere matter of favor.[4]

The lien attaches also, in the absence of an express agreement enlarging its scope, only to debts arising or incurred in transactions had in the particular character by virtue of which the agent claims the lien, and not from other and dissimilar transactions;[5] and the demand must be due from the person whose goods are sought to be retained, and not from a stranger, and must accrue to the agent who claims the lien.[6]

VI.

AGENT'S RIGHT OF STOPPAGE IN TRANSIT.

§ 687. **Agent liable for Price of Goods, may stop them in Transit.** An agent who has made himself liable for the price

[1] McKenzie *v.* Nevius, 22 Me. 138, 38 Am. Dec. 291; Adams *v.* Clark, 9 Cush. (Mass.) 215, 57 Am. Dec. 41; Jarvis *v.* Rogers, 15 Mass. 396; Rushforth *v.* Hadfield, 6 East. 519; Wright *v.* Snell, 5 B. & Ald. 350; Barry *v.* Boninger, 46 Md. 59; Stevens *v.* Robins, 12 Mass. 182; Scott *v.* Jester, 8 Eng. (Ark.) 437; Castellain *v.* Thompson, 13 C. B. (N. S.) 105.

[2] Story on Agency, § 364.

[3] See *ante*, § 673.

[4] Story on Agency, § 364, *ante*, § 673.

[5] See *ante*, § 679.

[6] Story on Agency, § 365.

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of goods consigned by him to his principal, by obtaining them in his own name, and on his own credit may stop them while in transit if the principal becomes insolvent.[1] The principle upon which this rule is based is that the relation of the parties under such circumstances is rather like that of vendor and vendee than of principal and agent.[2]

The right, however, would not exist if at the time of the consignment the agent is indebted to the principal on a general balance of account to a greater amount than the value of the goods, and if such consignment has been made in order to cover this balance.[3] Nor does the right exist if the agent is only a surety for the price of the goods.[4]

So the right is lost where the agent, in pursuance of a contract between the principal and a third person who has bought the goods of the principal and paid him for them, delivers the goods to a carrier to be shipped to the purchaser, taking the shipping receipt in the name of the principal, although the principal fails to pay the agent for the goods, before they are delivered to the purchaser.[5]

§ 688. **Right exercised as in other Cases.** The agent's right of stoppage *in transitu* is to be exercised in the same manner, and is subject to be defeated by the same contingencies as in the case of the exercise of the same right by any other vendor.[6]

§ 689. **Right of such an Agent to retain the Title until paid for.** Where an agent purchases goods intended for his principal, but, according to the express or implied agreement of the parties, buys them upon his own credit or with funds furnished by himself, he may retain the title to the goods until they are paid for by the principal.[7]

[1] Newhall *v.* Vargas, 13 Me. 93, 29 Am. Dec. 489; Seymour *v.* Newton, 105 Mass. 272; Feise *v.* Wray, 3 East. 93; D'Aquila *v.* Lambert, 1 Amb. 399; s. c. 2 Eden 75; Tucker *v.* Humphrey, 4 Bing. 516; Hawkes *v.* Dunn, 1 Cromp. & Jer. 519.

[2] Newhall *v.* Vargas, *supra.*

[3] Wiseman *v.* Vandeputt, 2 Vern. 203; Vertue *v.* Jewell, 4 Camp. 31; Ewell's Evans on Agency, 377.

[4] Siffken *v.* Wray, 6 East 371; Ewell's Evans on Agency, 377

[5] Gwyn *v.* Richmond & Danville R. R. Co., 85 N. C. 429, 39 Am. Rep. 708.

[6] See Parsons on Contracts, Vol. 1, Chap. VI.; Benjamin on Sales, §§ 829–868.

[7] Farmers', &c. Bank *v.* Logan, 74 N. Y. 568; Turner *v.* Trustees, 6 Exch. 543; Mirabita *v.* Imperial, &c. Bank, L. R. 3, Exch. Div. 164, 31 Eng. Rep. (Moak) 200; Shepherd *v.* Harrison, L. R. 4 Q. B. 196; Ogg *v.* Shuter, 1 C. P. D. 47, 15 Eng. Rep. (Moak) 231.

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This rule has been well stated by FOLGER, J., as follows: "When commercial correspondents, on the order of a principal, make a purchase of property ultimately for him, but on their own credit, or with funds furnished or raised by them, and such course is contemplated when the order is given, they may retain the title in themselves until they are reimbursed. One of the means by which this may be done, is by taking the bill of sale in their own names, and, when the property is shipped, by taking from the carrier a bill of lading in such terms as to show that they retain the power of control and disposition of it. This results necessarily from the nature of the transaction. It is not, at once, an irrevocable appropriation of the property to the principal. It rests for all of its efficiency and prospect of performance, upon the intention to withhold and the withholding the right to the property, so that the right may be used to procure the money with which to pay. It contemplates no title in the principal until he has reimbursed to his correspondents the price paid by them or to the person with whom they have dealt, the money obtained from him, with which to pay that price. From the start, the idea formed and nursed is, that the property shall be the means of getting the money with which to pay for it, and that the title shall not pass to him who is to be the ultimate owner until he has repaid the money thus got.

Although such correspondents act as agents, and are set in motion by the principal who orders the purchase, yet their rights as against him, in the property are more like those of a vendor against a vendee in a sale not wholly performed, where delivery and payment have not been made and where delivery is dependent upon payment. * * *

If the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order and does so, not as agent or on behalf of the purchaser but on his own behalf, he thereby reserves to himself a power of disposing of the property, and consequently there is no final appropriation and the property does not on shipment pass to the purchaser. So if the vendor deals with, or claims to retain, the bill of lading in order to secure the contract price, as when he sends it forward with a draft attached, and with directions that it is not to be delivered to the purchaser until payment of the draft, the appropriation is not absolute, and until payment, or tender of the price,

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is conditional only, and until then the property of the goods does not pass to the purchaser. We see no principle which distinguishes the case of a vendor and vendee, in this respect, from that of a correspondent or agent, buying for another, yet paying the price from his own means, or from moneys by agreement raised upon the property, or upon his own credit, and holding the property as security until the principal has made reimbursement. Such is the purpose of the parties. There is no intent that the property shall be appropriated until payment is made. And unless third parties are unavoidably misled to their harm, they have no cause to complain of a purpose so reasonable and productive of so good results."[1]

VII.

RIGHTS OF SUBAGENT AGAINST PRINCIPAL.

§ 690. **When Principal liable for his Compensation.** The right of the subagent to recover his compensation from the principal depends upon considerations already discussed. As has been seen, where the appointment of the subagent is expressly or impliedly authorized by the principal, the latter is liable for the subagent's compensation, but where the agent, having undertaken the performance of some duty to his principal, employs upon his own account a servant or subagent to assist him, the subagent must look to his immediate employer,—the agent,—and not to the principal.[2]

§ 691. **Same Rules govern Reimbursement and Indemnity.** And the same principles would govern the subagent's claim for reimbursement for expenses and indemnity against loss or injury.[3]

§ 692. **How as to Protection against Injury.** So where in accordance with the principles referred to, the subagent is to be deemed the agent of the principal, he would be entitled to the same remedies as any other agent for an injury occasioned by the principal's negligence.[4] Where, however, he is the agent of the

[1] Farmers', &c. Bank v. Logan, 74 N. Y. 568; Moors v. Kidder, 106 N. Y 32.

[2] See *ante*, § 197.

[3] See *ante*, §§ 649–651.

[4] See *ante*, § 652 *et seq.*

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agent merely, the same rules would apply which govern the relation to the agents or servants of an independent contractor.[1]

§ 693. **When Subagent entitled to a Lien.** A subagent appointed without the express or implied authority of the principal and who is therefore regarded as the agent or servant of the agent merely, can by virtue of that relation acquire no lien or charge upon the goods or property of the principal confided to the possession of the agent.[2] But where the subagent, being appointed by the express or implied authority of the principal, is, in law, to be regarded as the agent of the latter, such subagent is entitled to a lien to the same extent as any other agent.[3] So although the appointment of the subagent was originally unauthorized, yet if his appointment has been subsequently ratified by the principal, by availing himself of the proceeds or benefits accruing from his acts, or otherwise, the subagent's lien will attach.[4]

At the same time, however, the subagent, though appointed without authority, "will be at liberty to avail himself of his general lien against the principal to the extent of the lien particular or general, which the agent himself has against the principal, by way of substitution to the rights of the agent, if the acts of the latter or his own are not tortious."[5]

So in many cases, proceeds Judge Story, "a subagent who acts without any knowledge or reason to believe that the party employing him is acting as an agent for another, will acquire a rightful lien on the property for his general balance. Thus, for example, if a subagent or broker, at the request of an agent, should effect a policy on a cargo, supposing it to be for the agent himself, but in fact it should be for a third person for whom the agent has purchased the cargo, and afterwards, and while the policy is in the broker's hands, he should make advances to the

[1] See *ante*, § 663.

[2] Story on Agency, § 389; Maanss v. Henderson, 1 East 335; Man v. Shiffner, 2 East 523; Westwood v. Bell, 4 Camp 348.

[3] Story on Agency, § 389; McKenzie v. Nevius, 22 Me. 138, 38 Am. Dec. 291.

[4] Story on Agency, § 389; McKenzie v. Nevius, *supra*.

[5] Story on Agency, § 389; McKenzie v. Nevius, *supra*; Maanss v. Henderson, 1 East 335; Man v. Sheffner, 2 East 523; McCombie v. Davies, 7 East 7; Solly v. Rathbone, 2 M. & S. 298; Cochran v. Irlam, 2 M. & S. 301, note; Schmaling v. Thomlinson, 6 Taunt. 147.

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agent, before any notice of the real state of the title to the property, he will be entitled to a lien on the policy, and on the money received on it, to the extent of the money so advanced, and also (as it should seem), for his general balance of account against the agent." [1]

[1] Story on Agency, § 390; Mann v. Forrester, 4 Camp. 60; Westwood v. Bell, 4 Camp. 349.

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CHAPTER V.

THE DUTIES AND LIABILITIES OF THE PRINCIPAL TO THIRD PERSONS.

§ 694. Purpose of chapter.

I. LIABILITY OF PRINCIPAL IN CONTRACT.

1. The Liability of an Undisclosed Principal.

695. Undisclosed Principal liable when discovered on simple Contracts.
696. Same Subject — The Rule stated.
697. Same Subject — Of the first Exception.
698. Same Subject — Of the second Exception.
699. Same Subject — What constitutes an Election.
700. Same Subject — Election must be made within a reasonable Time.
701. Rule applies to all simple Contracts.
702. Does not apply to Contract under Seal. When.

2. The Liability of a Disclosed Principal.

a. For Agent's Acts and Contracts.

703. In general.
704. Principal liable for Agent's Acts and Contracts in Execution of Authority.
705. Same Subject — The Rule stated.
706. Third Person must ascertain Agent's Authority.
707. What constitutes Authority.
708. Same Subject—Secret Instructions and Restrictions.
709. General and special Agents.
710. Same Subject — Special Agent's Authority must be strictly pursued.
711. Effect of Ratification.
712. Performance of unlawful Act not enforced.
713. Principal not bound where Agent has an adverse Interest.

b. For the Agent's Statements and Representations.

714. When Agent's Admissions and Representations binding on Principal.
715. What embraced within *Res Gestæ*.
716. Agent's Authority must be first shown.
717. When Principal bound by Agent's Representation of extrinsic Facts upon which Authority depends.

c. By notice given to the Agent.

718. General Rule — Notice to the Agent is Notice to the Principal.
719. Same Subject — The Reason of the Rule.
720. Same Subject — Notice acquired during Agency.
721. Same Subject — Knowledge acquired prior to Agency.
722. Same Subject — Of the first Exception.
723. Same Subject — Of the second Exception.
724. What Notice includes — Actual and constructive Notice.

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§ 725. Rule applies only to Matters within Agent's Authority.
726. Notice after termination of Authority does not bind.
727. Notice must be of some material Matter.
728. Notice to Subagent when Notice to Principal.
729. These Rules apply to Corporations.
730. Same Subject — When Notice to Director is Notice to Corporation.
731. Same Subject — Notice to Stockholder not Notice to the Corporation.

II. Liability of the Principal in Tort.

a. For Agent's Wrongful Acts.

732. In general.
733. Principal liable for Acts expressly directed.
734. Liable for Agent's negligent Act in Course of Employment.
735. Same Subject — Acts in the Course of his Employment.
736. Same Subject — Illustrations.
737. Not liable for Negligence not in Course of Employment.
738. Same Subject — Illustrations.
739. Liability for Agent's fraudulent Act.
740. When Principal liable for Agent's willful or malicious Act.
741. Same Subject — Illustrations.
742. Same Subject — Liability for excessive Force.
743. Liability of Principal for Agent's false or fraudulent Representations.
744. Same Subject — Third Person's Remedies.
745. Principal's civil Liability for Agent's criminal or penal Act.
746. Principal's criminal Liability for Agent's criminal or penal Act.
747. Principal's Liability for Acts of independent Contractor.
748. Same Subject — Illustrations.
749. Principal's Liability for Acts of Subagent.
750. Effects of Ratification.
751. The Measure of Damages against the Principal.
752. Unsatisfied Judgment against Agent no Bar to Action against Principal.

§ 694. **Purpose of Chapter.** It is obvious that one of the most important questions in the law of agency is that which deals with the duties and liabilities of the principal to third persons, based upon and growing out of the acts, declarations, contracts and misconduct of the agent in his dealings and transactions with them. To some extent and for some time, the agent has been invested with the personality of his principal and sent out into the world to obtain for the principal the profits, benefits or other objects which he desired, and to bind the principal when necessary by such representations, contracts and other acts as are suitable to the occasion, and within the terms and objects of the authorization.

In pursuing these objects, the agent may have kept either the fact of the agency, or the name of his principal, or both, con-

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cealed from the persons with whom he dealt, and in this event the question arises whether, in either case, the actual principal can be made liable when discovered.

Or the agent may have disclosed both the fact of his agency and the name of his principal, and in this event it is material to know whether the act, contract or representation of the agent, assumed to be done or made by virtue of his authority, was in fact within its nature and its scope.

So the question may arise how far the principal can be held responsible for the wrongs committed by the agent in pursuance of, or while engaged in, the undertaking. For convenience of treatment there will be considered:—

I. The liability of the principal in contract, including:—
   1. The liability of an undisclosed principal.
   2. The liability of a disclosed principal.

II. The liability of the principal in tort.

I.

LIABILITY OF PRINCIPAL IN CONTRACT.

1. *The Liability of an Undisclosed Principal.*

§ 695. **Undisclosed Principal liable when discovered on simple Contracts.** It has been seen in an earlier part of this work[1] that, if the agent conceals either the fact of his agency or the name of his principal, he may be held personally liable upon the contracts made by him. This is so because the agent, having failed to disclose a responsible principal, must be presumed to have intended to make himself liable. But this liability of the agent is not exclusive. Although the principal was concealed, the contract has been made by his authority and for his benefit and advantage. In point of law the contract is, in reality, the contract of the principal,[2] though ostensibly the contract of the agent. Hence, although the agent, under the rules stated, is primarily liable, the principal, when discovered, should be held liable also at the election of the party who has dealt with the agent under a misapprehension of his true character.

§ 696. **Same Subject—The Rule stated.** It is, therefore, the

[1] See *ante*, § 554.

[2] Cothay *v.* Fennell, 10 B. & C. 671.

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rule of the law that an undisclosed principal, when subsequently discovered, may, at the election of the other party if exercised within a reasonable time, be also held liable upon all simple contracts made in his behalf by his duly authorized agent, although the credit was originally given to the agent under a misapprehension as to his true character.[1]

This rule, however, is subject to certain exceptions:—

1. That the principal is not liable where, before the other party has intervened with his claim, the principal has settled with, paid or credited the agent in good faith and in reliance upon such a state of conduct or representations on the part of the other party, as to reasonably lead the principal to infer that the agent had already settled with such other party. This rule rests upon the familiar doctrine of estoppel.[2]

2. That the principal cannot be held liable where the other party, with full knowledge as to who was the principal, and with the power of choosing between him and the agent, has distinctly and unquestionably elected to treat the agent alone as the party liable.[3]

§ 697. **Same Subject—Of the first Exception.** This subject has been much discussed in the English courts and various and

[1] Hyde v. Wolf. 4 La. 234, 23 Am. Dec. 484; Episcopal Church v. Wiley, 2 Hill (S. C.) Ch. 584, s. c., 1 Riley (S. C.) Ch. 156, 30 Am. Dec. 386; Smith v. Plummer, 5 Whart. (Penn.) 82, 34 Am. Dec. 530; Taintor v. Prendergast, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; Henderson v. Mayhew, 2 Gill (Md.) 393, 41 Am. Dec. 434, Hunter v. Giddings, 97 Mass. 41, 93 Am. Dec. 54; Exchange Bank v. Rice, 107 Mass. 37, 9 Am. Rep. 1; Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Cobb v. Knapp, 71 N. Y. 348, 27 Am. Rep. 51; Merrill v. Kenyon, 48 Conn. 314, 40 Am. Rep. 174; Byington v. Simpson, 134 Mass. 169, 45 Am. Rep. 314; Mayhew v. Graham, 4 Gill (Md.) 363; Inglehart v. Thousand Island Hotel Co. 7 Hun (N. Y.) 547; Coleman v. First National Bank, 53 N. Y. 393; Dykers v. Townsend, 24 N. Y. 61; Ford v. Williams, 21 How. (U. S.) 287; Huntington v. Knox, 7 Cush. (Mass.) 371; Eastern R. R. Co. v. Benedict, 5 Gray (Mass.) 566; Hubbert v. Borden, 6 Whart. (Penn.) 91; Borcherling v. Katz, 37 N. J. Eq. 150; Lerned v. Johns, 9 Allen (Mass.) 419; National Ins. Co. v. Allen, 116 Mass. 398, Meeker v. Claghorn, 44 N. Y. 349; Jessup v. Steurer, 75 N. Y. 613; Higgins v. Senior, 8 Mees. & Wells, 834; Browning v. Provincial Ins. Co., L. R. 5 P. C. App. 263; Calder v. Dobell, L. R. 6 C. P. 486. Trueman v. Loder, 11 Ad. & Ell. 594; Smethurst v. Mitchell, 1 E. & E. 622; Thomson v. Davenport, 9 B. &. C. 78.

[2] See following section and cases cited.

[3] See section 698 and cases cited.

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conflicting rules have been laid down in successive cases. Some of these rules have been adopted by the courts and textwriters in this country, but have been afterwards denied or limited by later cases in the English courts, and the result has been an exceedingly unsatisfactory condition of the law.

One of the earliest of these cases is that of Thomson *v.* Davenport,[1] decided in the court of King's Bench, in 1829. In that case the agent disclosed that he was acting for a principal in Scotland but did not disclose his principal's name. Lord TENTERDEN, in his opinion, said: "I take it to be a general rule, that if a person sells goods (supposing at the time of the contract he is dealing with a principal), but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal," and BAYLEY, J., in the same case, said: "Where a purchase is made by an agent, the agent does not, of necessity, so contract as to make himself personally liable; but he *may* do so. If he does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification, that the principal shall not be prejudiced by being made personally liable if the justice of the case is that he should not be personally liable. If the principal has paid the agent, or if the state of accounts between the agent and the principal would make it unjust that the seller should call on the principal, the fact of payment or such a state of accounts would be an answer to the action brought by the seller where he had looked to the responsibility of the agent."

The rule as laid down by Lord TENTERDEN was approved by Mr. Parsons in his work on Contracts,[2] and by Judge STORY in his work on Agency.[3] It was also adopted in Indiana.[4]

Following this case came Heald *v.* Kenworthy,[5] decided in the Exchequer in 1855, in which these expressions of Lord TENTERDEN and BAYLEY, J., were shown to be mere dicta, and were held

[1] 9 Barn. & Cress. 78.
[2] I. Parsons on Contracts, 63.
[3] Story on Agency, 449.
[4] Thomas *v.* Atkinson, 38 Ind. 248.
[5] 10 Exch. 739.

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by the court to be inaccurate statements of the law. PARKE, B., limited the rule to those cases where the principal has been misled by the action of the seller, saying: "If the conduct of the seller would make it unjust for him to call upon the buyer for the money, as for example, where the principal is induced by the conduct of the seller to pay his agent the money on the faith that the agent and seller have come to a settlement on the matter, or if any representation to that effect is made by the seller, either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal."

Afterwards arose the case of Armstrong *v.* Stokes,[1] decided in the court of Queen's Bench in 1872. In this case J. & O. Ryder, who were commission merchants at Manchester, acting sometimes for themselves, and sometimes as agents, having received an order for goods from defendants, bought them of plaintiff, without disclosing that they were not acting for themselves.

J. & O. Ryder delivered the goods to defendants who paid for them in good faith. Afterward J. & O. Ryder failed, not having paid the plaintiff. Later it was discovered by plaintiff that J. & O. Ryder had bought the goods for the defendants and thereupon the plaintiff brought the action to charge defendants as undisclosed principals, but it was held that defendants' payment to J. & O. Ryder was a bar to recovery. BLACKBURN, J., who delivered the opinion of the court (BLACKBURN, MELLOR AND LUSH), held that the rule laid down by PARKE, B., was too narrow and cited and approved that advanced by Lord TENTERDEN and Mr. Justice BAYLEY.

Referring to the rule of PARKE, B., the court say: "We think that if the rigid rule thus laid down were to be applied to those who were only discovered to be principals after they had fairly paid the price to those whom the vendor believed to be the principals, and to whom alone the vendor gave credit, it would produce intolerable hardship. It may be said, perhaps truly, this is the consequence of that which might originally have been a mistake, in allowing the vendor to have recourse at all against one to whom he never gave credit, and that we ought not to establish an illogical exception in order to cure a fault in a rule. But we find an exception (more or less extensively expressed)

[1] L. R. 7 Q. B. 598, 3 Eng. (Moak) 217.

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always mentioned in the very cases that lay down the rule; and without deciding anything as to the case of a broker, who avowedly acts for a principal (though not necessarily named), and confining ourselves to the present case, which is one in which, to borrow Lord TENTERDEN'S phrase in Thomson *v.* Davenport,[1] the plaintiff sold the goods to J. & O. Ryder (the agents), 'supposing at the time of the contract he was dealing with a principal,' we think such an exception is established. We wish to be understood as expressing no opinion as to what would have been the effect of the state of the accounts between the parties if J. & O. Ryder had been indebted to the defendants on a separate account, so as to give rise to a set-off or mutual credit between them. We confine our decision to the case where the defendants, after the contract was made, and in consequence of it, *bona fide* and without moral blame, paid J. & O. Ryder at a time when the plaintiff still gave credit to J. & O. Ryder and knew of no one else. We think that after that it was too late for the plaintiff to come upon the defendant."

This case, in its turn, was followed by Irvine *v.* Watson,[2] decided in the Queen's Bench in 1879 in which BOWEN, J., laid down the following rules: "There are two classes of sales through an agent to an undisclosed principal which it is necessary to distinguish. 1. Where the seller supposes himself to be dealing with a principal, but discovers afterwards that he has been selling to an agent, and that there is an undisclosed principal behind, the law allows the seller to have recourse on such discovery to the undisclosed principal, provided always[3] that the principal has not meanwhile paid the agent, or that the state of accounts between the principal and agent does not render it unjust, *i. e.*, inequitable that the seller should any longer look to the principal for payment. This statement of the proviso which relieves the undisclosed principal in certain cases from all necessity to pay the seller was thought by PARKE, B., and the other judges in Heald *v.* Kenworthy[4] to be too large without further explanation, and they expressed the view that the only case in which the seller under such circumstances was precluded from

[1] *Supra.*

[2] 5 Q. B. Div. 102, 29 Eng. Rep. (Moak) 186.

[3] See, per Lord TENTERDEN, C. J. and BAYLEY, J. in Thomson *v.* Davenport, 9 B. & C. 78.

[4] 10 Exch. 745.

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having recourse to the undisclosed principal when discovered, was when the seller, by some conduct of his own, had misled the principal into paying or settling with his agent in the interim. The principal, such is the reasoning of the Court of Exchequer, has originally authorized his agent to create a debt, and the principal cannot be discharged from the debt unless the seller has estopped himself, by his conduct, from enforcing it against him. The court of Queen's Bench in Armstrong *v.* Stokes,[1] do not adopt this narrower version of Lord TENTERDEN's and Mr. Justice BAYLEY's proviso. They revert to the wider language used by Lord TENTERDEN and BAYLEY, J., in Thomson *v.* Davenport,[2] and it must now be taken to be the law that a seller who has given credit to an agent, believing him to be a principal, cannot have recourse against the undisclosed principal, if the principal has *bona fide* paid the agent at a time when the seller still gave credit to the agent, and knew of no one else except him as principal.

2. The present case is one that belongs to a distinct but analogous class. At the time of the dealing in the goods, the seller was informed that the person who came to buy was buying for a principal, but was not told, and did not ask, who that principal was, nor anything further about him. Thomson *v.* Davenport[3] is the leading authority to show that, in such a case, where no payment or settlement in account between the undisclosed principal and his agent has intervened, the seller may afterwards have recourse to the undisclosed principal. But what if the undisclosed principal has meanwhile innocently paid or settled with his agent? If indeed such payment or settlement is the result of any misleading conduct on the part of the seller, then, no doubt, the general principal alluded to in Heald *v.* Kenworthy,[4] would equally apply, and the seller could no longer pursue his remedy against the man whom he had misled. But is this the only proviso, or must a wider proviso still in the present class of cases be engrafted on the statement of the rule, similar to the proviso as finally sanctioned in Armstrong *v.* Stokes.[5] This was a case in which, at the time of sale, exclusive credit had been given by the seller to the agent, who bought in his own name as princi-

[1] *Supra.*
[2] *Supra.*
[3] *Supra.*
[4] *Supra.*
[5] *Supra.*

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pal. In the present instance the agent bought, it is true, in his own name, but held out to the seller the additional advantage of the credit of an unnamed principal behind. What difference to the liability of the principal does this make? It is obvious that when, as in Armstrong *v.* Stokes,[1] the seller deals exclusively with the agent as principal, the seller sells knowing, if his buyer turns out to have a principal behind him, the principal will have, at all events, been justified in assuming, as the fact is, that the seller deals simply with the agent. The principal may be expected to arrange with his agent on this basis. If before recourse is had to him, the undisclosed principal has put his agent in funds to pay, the seller cannot afterward object that the undisclosed principal, who had a right to suppose his credit was not looked to in the matter, should have held his hand. The case is altered where the agent, when buying, states he has a principal whose existence, though he does not name him, he is authorized in mentioning. I think that the liability of the principal, who under such circumstances pays his agent, to pay over again to the seller must depend in each case on what passes between the seller and the agent, acting within the scope of his authority, and on the precise nature of the contract which the agent has lawfully made. * * * The essence of such a transaction is that the seller, as an ultimate resource, looks to the credit of some one to pay him if the agent does not. Till the agent fails in payment, the seller does not want to have recourse to this additional credit. It remains in the background: but if, before the time comes for payment, or before, on non-payment by the agent, recourse can be fairly had to the principal whose credit still remains pledged, the principal can pay or settle his account with his own agent, he will be depriving the seller behind the seller's back of his credit. It surely must, at all events, be the law that in the case of sales of goods to a broker the principal, known or unknown, cannot, by paying or settling before the time of payment comes, with his own agent, relieve himself from responsibility to the seller, except in the one case, where exclusive credit was given by the seller to the agent. But may the payment or settlement to or with the agent be safely made in such a case after the day of payment has arrived, and if so within what time? It seems to me that it can only

[1] *Supra.*

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safely be made if a delay has intervened which may reasonably lead the principal to infer that the seller no longer requires to look to the principal's credit,—such a delay, for example, as leads to the inference that the debt is paid by the agent, or to the inference that, though the debt is not paid, the seller elects to abandon his recourse to the principal and to look to the agent alone."

This case (Irvine *v.* Watson), however, went to the Court of Appeal[1] where, while the result reached below was affirmed, the court declare the rule as laid down by PARKE, B., in Heald *v.* Kenworthy, to be the true one.

The court did not expressly overrule Armstrong *v.* Stokes as the difference in the facts enabled them to draw a distinction between the cases, but BRAMWELL, L. J., said: "It is to my mind certainly difficult to understand that distinction, or to see how the mere fact of the vendor's knowing or not knowing that the agent has a principal behind him can affect the liability of that principal. I should certainly have thought that his liability would depend upon what he himself knew, that is to say, whether he knew that the vendor had a claim against him and would look to him for payment in the agent's default," and BRETT, L. J., said: "If the case of Armstrong *v.* Stokes arises again, we reserve to ourselves sitting here, the right of reconsidering it." The distinction of PARKE, B., was again approved in Davison *v.* Donaldson,[2] decided in the Court of Appeal in 1882.

The result, therefore, of the English cases seems to be to limit the exception to that first stated by PARKE, B.

The subject has not been much considered in the United States but wherever the question has arisen, the tendency has been to follow the rule laid down by Judge STORY and Prof. PARSONS, based upon the dictum of Lord TENTERDEN. A general statement of the rule was made in a recent case in the New York Court of Appeals with the exception, "provided he has not in the meantime in good faith paid the agent,"[3] but the statement was a mere dictum.

The rule of PARKE, B., seems to be eminently reasonable and

[1] 5 Q. B. Div. 414. 29 Eng. Rep. 871.

[2] L. R. 9 Q. B. Div. 623.

[3] Knapp *v.* Simon, 96 N. Y. 284. See also Ketchum *v.* Verdell, 42 Ga. 534, Emerson *v.* Patch, 128 Mass. 541; Fradley *v.* Hyland, 37 Fed. Rep. 49; Laing *v.* Butler, 37 Hun, 144.

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just. If a principal sends an agent to buy goods for him and on his account, it is not unreasonable that he should see that they are paid for. Although the seller may consider the agent to be the principal, the actual principal knows better. He can easily protect himself by insisting upon evidence that the goods have been paid for or that the seller with full knowledge of the facts has elected to rely upon the responsibility of the agent, and if he does not, but, except where misled by some action of the seller, voluntarily pays the agent without knowing that he has paid for them, there is no hardship in requiring him to pay again. If the other party has the right, within a reasonable time, to charge the undisclosed principal upon his discovery,—and this right seems to be abundantly settled in the law of agency—it is difficult to see how this right of the other party can be defeated, while he is not himself in fault, by dealings between the principal and the agent, of which he had no knowledge, and to which he was not a party.

§ 698. **Same Subject—Of the second Exception.** The second exception to the rule rests upon obvious grounds. The other party is at liberty on discovering the principal, to elect to hold either the agent or the principal, but he cannot hold both.[1] And having once made an affirmative election to hold the agent, he cannot be permitted afterwards to reverse his action and proceed against the principal. If the principal, being apprised of the fact that the other party has elected to look to the agent, settles with the agent upon that basis and either pays him or allows him a corresponding credit, nothing could be more unjust than to permit the other party afterwards to repudiate his action with the agent and resort to the principal.[2]

[1] Paterson *v.* Gandasequi, 15 East. 62; Bush *v.* Devine, 5 Harr. (Del.) 375; Silver *v.* Jordon, 136 Mass. 319; Addison *v.* Gandasequi, 4 Taunt, 574; Thomson *v.* Davenport, 9 B. & C. 78; Schepflin *v.* Dessar, 20 Mo. App. 569.

[2] Thomson *v.* Davenport, 9 Barn. & Cress. 78; Horsfall *v.* Fauntleroy, 10 Barn. & Cress. 755; Smyth *v.* Anderson, 7 Com. Bench. 21; Irvine *v.* Watson, Law Repts. 5 Q.B. Div. 102, 29 Eng. Rep. (Moak) 186; Armstrong *v.* Stokes, L. R. 7 Q. B. 599, 3 Eng. Rep. 217; Heald *v.* Kenworthy, 10 Exch. 739; Kymer *v.* Suwercropp, 1 Camp. 109; Macfarlane *v.* Giannacopulo, 3 Hurl. & Nor. 859; Clealand *v.* Walker, 11 Ala. 1058, 46 Am. Dec. 238; Cheever *v.* Smith, 15 Johns. (N. Y.) 276; Bush *v.* Devine, 5 Har. (Del.) 375; Brown *v.* Bankers &c. Tel. Co. 30 Md. 39; Schepflin *v.* Dessar, 20 Mo. App. 569; Hyde *v.* Wolfe, 4

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And these rules apply not only to the case where the principal at the time of the dealing with the agent, was unknown or undisclosed, but they apply equally where at that time the other party knew both the fact of the agency and the name of the principal. As has been seen in an earlier portion of this work,[1] where an agent acts in behalf of a known principal, there is a presumption that he intends to charge that principal and not himself. This presumption, however, is not conclusive, and the agent is at liberty, if he sees fit, to charge himself personally. *E converso* there is a presumption that the other party gave credit to the principal rather than to the agent, but this presumption is not indisputable, and the other party, knowing the principal, may still elect to rely upon the responsibility of the agent alone. Whether he has done so or not is a question to be determined from all the facts and circumstances of the case. But if it be found that he has done so, his election so to do is conclusive, and he cannot afterwards hold the principal.[2]

§ 699. **Same Subject—What constitutes an Election.** It is impossible to lay down any general rule by which it can, in all cases, be determined, what constitutes an election to hold the agent only. The other party may, of course, by some express and unequivocal act, done with that direct intent, declare his intention to treat the agent only as his debtor; but, in the majority of the cases, the intention of the other party is to be gathered from his words and conduct, and the various circumstances which surround the case. This much, however, may be said, that if the statements and conduct of the other party have been such as reasonably to lead a prudent man to the conclusion that the agent only will be held liable, and if the principal acts in good faith upon this belief, in paying, crediting, or settling with the agent, he cannot afterward be held liable to the other party. This ordinarily is a question of fact to be determined by the jury, under proper directions from the court, from all the facts and circumstances which surround the case,[3] although there may undoubt-

La. 234; 23 Am. Dec. 484; Homans v. Lambard, 21 Me. 398; Paterson v. Gandasequi, 15 East, 62; Addison v. Gandasequi, 4 Taunt. 574.

[1] *Ante*, § 558.

[2] Schepflin v. Dessar, 20 Mo. App. 569; Silver v. Jordan, 136 Mass. 319.

[3] Curtis v. Williamson, L. R. 10 Q. B. 57, 11 Eng. Rep. (Moak) 149; Calder v. Dabell, L. R. 6 C. P. 486; Merrill v. Kenyon, 48 Conn. 314, 40 Am. Rep. 174; Cobb v. Knapp, 71 N. Y. 348, 27 Am. Rep. 51.

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edly be cases in which the act of the other party in regard to his dealings or proceedings with the agent, with full knowledge of the facts and with freedom of choice, may be such as to preclude him in point of law from afterwards resorting to the principal.

But here, as in other cases of election, this full knowledge of the facts and freedom of choice are, subject to the exceptions already stated, indispensable; the other party cannot be deemed to have made an election when he had no knowledge that there was any choice, and this knowledge must include not only the fact of the agency but the name of the principal.[1]

Thus the taking of an agent's promissory note or acceptance for the price of goods sold to him by one who knew he was acting as agent but who did not know for whom, will not conclude the seller from holding the principal also when subsequently discovered,[2] nor will the fact that the vendor charged the goods to the agent,[3] or sent him a statement of the account made out in his name,[4] supposing him to be the principal, prevent the vendor from subsequently charging the real principal when ascertained to be such. So the mere filing of an affidavit of proof against the estate of an insolvent agent to an undisclosed principal, after that principal was discovered, is not conclusive evidence of an election to treat the agent only as the debtor.[5]

Nor can the mere commencement of an action against the agent, after the discovery of the principal, be deemed conclusive of such an election.[6] In such a case it has been held that nothing less than satisfaction would discharge either.[7]

[1] Curtis *v.* Williamson, L. R. 10 Q. B. 57, 11 Eng. Rep. 149; Merrill *v.* Kenyon, 48 Conn. 314, 40 Am. Rep. 174.

[2] Merrill *v.* Kenyon, *supra*; Pope *v.* Meadow, &c. Co., 20 Fed. Rep. 35. "If the vendor on a sale made to an agent, take the promissory note of the agent for the amount of the purchase, on failure of payment by the agent, the principal would be equally liable to an action by the vendor, founded upon the original consideration, as if the note had been given by the plaintiff himself." Keller *v.* Singleton, 69 Ga. 703.

[3] Raymond *v.* Crown, &c. Mills, 2 Metc. (Mass.) 319; French *v.* Price, 24 Pick. (Mass.) 13; Guest *v.* Burlington Opera House Co., — Iowa —, 38 N. W. Rep. 158.

[4] Henderson *v.* Mayhew, 2 Gill. (Md.) 393, 41 Am. Dec. 434.

[5] Curtis *v.* Williamson, L. R. 10 Q. B. 57, 11 Eng. Rep. 149.

[6] Cobb *v.* Knapp, 71 N. Y. 348, 27 Am. Rep. 51; Curtis *v.* Williamson, *supra*; Raymond *v.* Crown, &c. Mills, 2 Metc. (Mass.) 319; Ferry *v.* Moore, 18 Ill. App. 135.

[7] Beymer *v.* Bonsall, 79 Penn. St. 298; Maple *v.* Railroad Co., 40 Ohio

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These facts, however, are proper to be taken into consideration, with others, in determining the question of the election.

But where the creditor with knowledge of the principal's liability sees fit to take the individual note of the agent, without taking, at the time of the transaction, any steps indicative of an intent to hold the principal, this is equivalent to a discharge of the principal as a matter of law.[1] And the case is much stronger where after the taking of the note and before any claim is made upon the principal, the latter has paid, credited or settled with the agent.[2]

§ 700. **Same Subject—Election must be made within a reasonable Time.** This right of the other party to hold the principal when discovered, must be exercised within a reasonable time after he is disclosed, and if not so exercised it will be deemed to be waived.[3] What is a reasonable time, in this as in other cases, is a question to be determined with reference to all of the facts and circumstances of the case.

§ 701. **Rule applies to all simple Contracts.** This rule applies to all simple contracts whether written or unwritten, entered into by an agent in his own name and within the scope of his authority, although the name of the principal does not appear in the instrument, and was not disclosed, and although the party dealing with the agent supposed that the latter was acting for himself;[4] and this rule obtains as well in respect to contracts which are required to be in writing, as those to whose validity a writing is not essential.[5]

St. 313, 48 Am. Rep. 685. But see Priestley v. Fernie, 3 H. & C. 977; Paterson v. Gandasequi, 15 East 62.

[1] Ames Packing & Prov. Co. v. Tucker, 8 Mo. App. 95; Addison v. Gandasequi, 4 Taunt 574, 2 Smith's L. C. 369; Paterson v. Gandasequi, 15 East 62, 2 Smith's L. Cas. 360; Paige v. Stone, 10 Metc. (Mass.) 160, 43 Am. Dec. 420; Wilkins v. Reed, 6 Greenl. (Me.) 220, 19 Am. Dec. 211; French v. Price, 24 Pick. (Mass.) 13; Green v. Tanner, 8 Metc. (Mass.) 411; Chapman v. Duraut, 10 Mass. 47; Tudor v. Whiting, 12 Mass. 212; James v. Bixby, 11 Mass. 34.

[2] Schepflin v. Dessar, 20 Mo. App. 569; see cases cited to note 2 of preceding section.

[3] Smethurst v. Mitchell, 1 Ell. & Ell. 622; Curtis v. Williamson, L. R. 10 Q. B. 57, 11 Eng Rep. 149; Irvine v. Watson, 5 Q. B. Div. 102, 29 Eng. Rep. 186.

[4] Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Dykers v. Townsend, 24 N. Y. 61; Coleman v. First Nat. Bank, 53 N. Y. 393; Ford v. Williams, 21 How. (U. S.) 289.

[5] Borcherling v. Katz, 37 N. J. Eq. 150; Briggs v. Partridge, *supra*.

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It does not violate the principle which forbids the contradiction of a written agreement by parol evidence, nor that which forbids the discharging of a party by parol from the obligations of his written contract. The writing is not contradicted, nor is the agent discharged; the result is merely, that an additional party is made liable. It is said by a learned judge in a Massachusetts case: "Whatever the original merits of the rule that a party not mentioned in a simple contract in writing may be charged as a principal upon oral evidence, even where the writing gives no indication of an intent to bind any other person than the signer, we cannot reopen it, for it is as well settled as any part of the law of agency."[1]

§ 702. **Does not apply to Contracts under Seal—When.** It is a fundamental principle of common law that, upon an instrument under seal, those persons only can be charged who appear upon its face to be the parties to it.[2] This principle, however, as has been seen, has been modified in modern times in respect to those instruments to the validity of which a seal was not required, though they were in fact sealed. In regard to such instruments a decided tendency has been manifested to regard the seal, in certain cases, as mere surplusage and to reject it as such.

It may therefore be said to be the rule that where the seal was not essential to the validity of the contract, if the interest of the principal appears upon its face, or if it has been ratified and confirmed by him, and if he has received and accepted the benefits of the performance of the other party, the principal may be held liable in assumpsit upon the promise contained in the instrument, which may be resorted to, to ascertain the terms of the agreement.[3]

[1] HOLMES, J., in Byington v. Simpson, 134 Mass. 169, 45 Am. Rep. 314, citing Huntington v. Knox, 7 Cush. (Mass.) 371; Eastern R. R. v. Benedict, 5 Gray (Mass.) 561; Lerned v. Johns, 9 Allen (Mass.) 419; Hunter v. Giddings, 97 Mass. 41; Exchange Bank v. Rice, 107 Mass. 37, 9 Am. Rep. 1; National Ins. Co. v. Allen, 116 Mass. 398; Higgins v. Senior, 8 M. & W. 834.

[2] "Where a contract is made by deed, under seal, on technical grounds, no one but a party to the deed is liable to be sued upon it, and, therefore, if made by an attorney or agent, it must be made in the name of the principal, in order that he may be a party, because otherwise he is not bound by it." SHAW, C. J., in Huntington v. Knox, 7 Cush. (Mass.) 374.

[3] Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Stowell v. Eldred,

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But where a contract under seal is made with the agent alone, the fact of the agency or the name of the principal not being known or disclosed, and the contract remaining executory, the principal who has neither ratified it, nor received the benefit of it cannot be held even though the seal was not essential.[1]

39 Wis. 614; Randall v. VanVechten, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330; DuBois v. Delaware & Hudson Canal Co., 4 Wend. (N. Y.) 285; Lawrence v. Taylor, 5 Hill (N. Y.) 107; Moore v. Granby Mining Co., 80 Mo. 86.

[1] Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617, is a leading case. In this case it appeared that an agent appointed by parol, had, without disclosing his agency, made in his own name a contract under seal for the purchase of real estate, but it was held that the contract was not enforceable against the principal either as a contract under seal or as a simple contract. ANDREWS, J., said: "Can a contract under seal, made by an agent in his own name for the purchase of land, be enforced as the simple contract of the real principal when he shall be discovered? No authority for this broad proposition has been cited. There are cases which hold that when a sealed contract has been executed in such form that it is, in law, the contract of the agent and not of the principal, but the principal's interest in the contract appears upon its face, and he has received the benefit of performance by the other party, and has ratified and confirmed it by acts *in pais*, and the contract is one which would have been valid without a seal, the principal may be made liable in assumpsit upon the promise contained in the instrument, which may be resorted to to ascertain the terms of the agreement. * * *

The plaintiff's agreement in this case was with Hurlburd (the agent) and not with the defendant. The plantiff has recourse against Hurlburd on his covenants, which was the only remedy which he contemplated when the agreement was made. No ratification of the contract by the defendant is shown. To change it from a specialty to a simple contract, in order to charge the defendant, is to make a different contract from the one the parties intended. A seal has lost most of its former significance, but the distinction between specialties and simple contracts is not obliterated. A seal is still evidence, though not conclusive, of a consideration. The rule of limitation in respect to the two classes of obligations is not the same. We find no authority for the proposition that a contract under seal may be turned into the simple contract of a person not in any way appearing on its face to be a party to, or interested in it, on proof *de hors* the instrument, that the nominal party was acting as the agent of another, and especially in the absence of any proof that the alleged principal has received any benefit from it, or has in any way ratified it, and we do not feel at liberty to extend the doctrine applied to simple contracts executed by an agent for an unnamed principal, so as to embrace this case." See also Tuthill v. Wilson, 90 N. Y. 423.

So the rule that an unnamed and unknown principal shall stand liable for the contract of his agent, does not apply to a lease under seal. The relation between the owner of land

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2. *The Liability of a Disclosed Principal.*

a. For Agent's Acts and Contracts.

§ 703. **In general.** In an earlier portion of this work the questions of what constitutes the authority of an agent,[1] how it should be interpreted and construed,[2] and how it should be executed,[3] have been considered at some length. It remains now to apply the principles there laid down to the question of the liability of the principal for the acts, contracts, and declarations of the agent made or done in the actual or assumed exercise of that authority.

§ 704. **Principal liable for Agent's Acts and Contracts in Execution of Authority.** It is the fundamental principle of the law of agency, that what one person does for and by the authority of another is to be considered as the act of that other. The principle has taken the form of the familiar maxim *Qui facit per alium, facit per se.* That this should be so, is an obvious natural and moral necessity as well as a legal one, founded upon manifest doctrines of good faith and moral and legal responsibility. That it is not, however, a principle of unlimited application in the law of agency, has already been shown.[4] It is not every act done by one person for another which is binding upon the latter. The act done must have been a lawful one, done in the name and behalf of that other, and by his express or implied authority. What acts are lawful to be done by an agent have been determined.[5]

§ 705. **Same Subject—The Rule stated.** Out of these principles grows the general rule that the lawful acts and contracts of the agent, done or made for the principal and in his behalf, are binding upon the principal if so done or made by the agent while

and those who occupy it is of a purely legal character, and the fact that a lessee takes a lease for an unnamed principal, but in his own name, will not render the unnamed principal liable for the rent. Borcherling *v.* Katz, 37 N. J. Eq. 150, although the fact of the agency is recited and it extrinsically appears that the lessee acted as agent and although the principal occupies the premises without assignment of the lease and furnishes money to pay the rent. Kiersted *v.* Orange, &c. R. R. Co., 69 N. Y. 343, 25 Am. Rep. 199; Taft *v.* Brewster, 9 Johns. (N. Y.) 334, 6 Am. Dec. 280; Stone *v.* Wood, 7 Cow. (N. Y.) 453, 17 Am. Dec. 529; Guyon *v.* Lewis, 7 Wend. (N. Y.) 26.

[1] See *ante*, § 271 *et seq.*

[2] See *ante*, § 293 *et seq.*

[3] See *ante*, § 407 *et seq.*

[4] See *ante*, §§ 275–291.

[5] See *ante*, § 18 *et seq.*

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he was acting in the course of his undertaking and within the apparent scope of his authority,[1] or if they have subsequently, with full knowledge of the facts, been ratified and confirmed by the principal.[2]

The converse of this rule follows as a necessary consequence. If the act done or contract made was not a lawful one, the law, as has been seen, will not enforce it.[3] If the agent acted for himself and in his own behalf instead of for his principal, and the other party with full knowledge so dealt with him, the principal is not liable.[4] If the agent were not acting in the course of his principal's business, but was acting entirely outside of that, and for some purpose of his own, the act is not the principal's, unless he has adopted it.[5] If the act done or contract made was not within the scope of his authority, but exceeded or disregarded it, then no liability attaches to the principal, unless he voluntarily affirms and ratifies it.[6]

Some of these rules deserve and will receive a fuller consideration.

§ 706. **Third Person must ascertain Agent's Authority.** Every person dealing with an assumed agent is bound, at his peril, to ascertain the nature and extent of the agent's authority. The very fact that the agent assumes to exercise a delegated power is sufficient to put the person dealing with him upon his guard, to satisfy himself that the agent really possesses the pretended power.[7]

If, having relied upon it, he seeks to hold the alleged principal responsible, he must be prepared to prove, if either be denied, not only that the agency existed, but that the agent had the authority which he exercised.[8]

§ 707. **What constitutes Authority.** An attempt has been made in an earlier portion of the work to show what constitutes authority.[9] It has been seen that it is a composite matter into which a number of different elements may enter.[10] All authority emanates from the principal, who may confer as little or as much as suits his purposes, and unless an alleged authority can be traced

[1] *Ante*, §§ 275–291.
[2] See Book I, Chap. V. of Ratification.
[3] See *ante*, §§ 275–291.
[4] See *ante*, §§ 698–700.
[5] See *post*, §§ 733–742.
[6] See *post*, §§ 706–711.
[7] See *ante*, §§ 288–291.
[8] See *ante*, § 276.
[9] See *ante*, § 282.
[10] See *ante*, § 283.

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home to him as its author and its source, it can not operate against him. It rests upon his will and intention. That will and intention may find expression in words, but it may also be declared by conduct. The authority of the agent, then, so far as third persons are concerned, is as broad not only as the words of the principal, but as broad also as his acts and conduct. In other phrase, it is, so far as third persons are concerned, as broad as the principal has made it appear to be.[1] As respects the mutual rights and dealings of the principal and agent, the *actual* authority may govern; but as respects the liability of the principal to third persons for the acts and contracts of the agent, it is the *apparent* authority which controls. This apparent authority may be the result of his negligent act—of his omission, silence, or acquiescence.[2] Every person is presumed by law to contemplate and intend the natural, proximate and legitimate results of his own acts, and he cannot avoid them by asserting that he did not really intend or contemplate them. If the principal leads third persons, acting reasonably and in good faith, to believe that his agent possesses a certain authority, then, as to them, he does possess it.[3]

§ 708. **Same Subject—Secret Instructions and Restrictions.** As has been seen, however, the agent's authority is not unlimited. The principal may impose upon it as many limitations and restrictions as he thinks best, and these limitations and restrictions are binding upon third persons if they have notice of them or might with reasonable diligence have ascertained them.[4] The principal cannot, however, expect third persons to have notice of limitations and restrictions which are in their nature secret and undisclosed. And while, as has been stated, persons dealing with the agent are bound to know the extent of his authority, they may reasonably take the visible and apparent interpretation of that authority by the principal himself as the true one, and as the one by which he chooses to be bound. It is therefore the rule of the law that the rights of third parties, who have reasonably and in good faith relied upon the apparent authority of the agent, cannot be prejudiced by secret limitations or restrictions upon it of which they had no notice.[5]

[1] See *ante*, §§ 283–285.
[2] See *ante*, § 282.
[3] See *ante*, §§ 282–285.
[4] See *ante*, § 279.
[5] See *ante*, § 279.

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§ 709. **General and special Agents.** These principles apply to all agents whether they be general or special. It is true, of course, that the scope of the general agent's authority is, from the very nature of the case, wider and more flexible than that of the special agent. The latter is essentially and necessarily limited and restricted. In the former case, particular instructions are unusual; in the latter, they are expected. In each case the actual authority will be the apparent authority, unless the principal gives to the apparent authority a wider scope. In neither case can the apparent authority be controlled by secret limitations. The true distinction between general and special agents lies then, as has been stated, in this, that the apparent scope of the special authority is naturally and necessarily a limited one. Of these limitations, its very nature gives peculiar warning to which the persons interested must give heed.[1]

§ 710. **Same Subject—Special Agent's Authority must be strictly pursued.** When, therefore, it is said that the act of the agent must be within the scope of his authority in order to be binding upon the principal, the statement applies alike to general and special agents. None the less true on this account, however, is the well settled and often asserted rule that the authority of the special agent must be strictly pursued. It is in its nature limited, and these limits may not be exceeded.[2]

§ 711. **Effect of Ratification.** Although the agent may have acted beyond the scope of his authority, or may have acted without any authority at all, the principal may yet subsequently see fit to recognize and adopt the act as his own. This recognition and adoption is termed ratification, the doctrine of which has been hereinbefore discussed.[3] By such ratification, as has there been seen, the principal accepts the act with its burdens and responsibilities precisely as though he had previously authorized it.[4]

§ 712. **Performance of unlawful Act not enforced.** No contract for the performance of an act which is either illegal in itself or which is opposed to public policy, will be enforced.[5] No authority to make any such contract or to perform any such act can,

[1] See *ante*, § 285.
[2] See *ante*, § 288.
[3] See *ante*, chapter on Ratification.
[4] See *ante*, *Idem*.
[5] See *ante*, § 18 *et seq.*

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as has been seen,[1] be lawfully delegated. And even though the agent deeming himself authorized should perform the act or execute the contract with all formalities, yet such performance or such contract will furnish no ground of action. The law leaves all such parties where it finds them.[2]

§ 713. **Principal not bound where Agent had an adverse Interest.** As has been seen, the principal is entitled to demand and receive from the agent a loyal, zealous and disinterested service. He presumptively contracts for the exercise of all the agent's skill, knowledge and ability in his own behalf and for his own advantage, and the policy of the law will not tolerate the existence of a secret and undisclosed interest in the agent antagonistic to that of his principal, on account of the temptation offered to the agent to sacrifice the principal's interests to his own. The principal may, if he sees fit, intrust his interests in the hands of an agent whom he knows to also have an interest in the same transaction which is or may be adverse to his own. But this is not to be presumed, and it must appear that the interest of the agent was fully and fairly disclosed to the principal.[3]

Where, therefore, the agent while ostensibly acting only for his principal, is secretly acting as the agent of the other party, or is himself the other party, the acts done or contracts made by him will not be binding upon the principal if he sees fit to repudiate them.[4]

This rule is frequently applied to the case of the agent who, while apparently acting only for his principal in the purchase or sale of property, is, in reality, acting under the commission of the contemplated purchaser or seller, and more often, to the case of the agent who, being authorized to sell or buy property for the principal, secretly sells to or buys of himself.

b. For the Agent's Statements and Representations.

§ 714. **When Agent's Admissions and Representations binding on Principal.** The statements, representations and admissions of the agent, made in reference to the act which he is

[1] See *ante*, § 20 *et seq.*

[2] See *ante*, § 20.

[3] See *ante*, § 454 *et seq.*

[4] Wassell *v.* Reardon, 11 Ark. 705, 54 Am. Dec. 245; Herman *v.* Martineau, 1 Wis. 151, 60 Am. Dec. 368; Switzer *v.* Skiles, 3 Gilm. (Ill.) 529, 44 Am. Dec. 723; Harrison *v.* McHenry, 9 Ga. 164, 52 Am. Dec. 435. See also *post*, §§ 797, 798.

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authorized to perform and while engaged in its performance, are binding upon the principal in the same manner and to the same extent as the agent's act or contract under like circumstances, and for the same reason. While keeping within the scope of his authority and engaged in its execution, he is the principal, and his statements, representations and admissions in reference to his act are as much the principal's as the act itself. Such statements, representations and admissions are therefore admissible in evidence against the principal in the same manner as if made by the principal himself.[1]

[1] "The acts of an agent," said Mr. Justice HARLAN in a recent case, "within the scope of the authority delegated to him, are deemed the acts of the principal. Whatever he does in the lawful exercise of that authority, is imputable to the principal, and may be proven without calling the agent as a witness. So in consequence of the relation between him and the principal, his statement or declaration is, under some circumstances, regarded as of the nature of original evidence, 'being' says Phillips, 'the ultimate fact to be proved and not an admission of some other fact.' 1 Phil. Ev. 381. 'But it must be remembered,' says GREENLEAF, 'that the admission of the agent can not always be assimilated to the admission of the principal. The party's own admission, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made during the continuance of the agency, in regard to a transaction then depending, *et dum fervet opus*. It is because it is a verbal act, and part of the *res gestæ* that it is admissible at all; and, therefore, it is not necessary to call the agent to prove it; but wherever what he did is admissible in evidence, there it is competent to prove what he said about the act *while he was doing it*.' 1 Greenl. Ev. § 113. This court had occasion in Packet Co. *v.* Clough, 20 Wall. 540 to consider this question. Referring to the rule as stated by Mr Justice STORY in his treatise on Agency, § 134, that 'where the acts of the agent will bind the principal, there his representations, declarations and admissions respecting the subject-matter will also bind him, *if made at the same time and constituting part of the res gestæ*.' The court speaking by Mr. Justice STRONG, said, 'a close attention to this rule, which is of universal acceptance, will solve almost every difficulty. But an act done by an agent cannot be varied, qualified or explained, either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done, at a later period. The reason is that the agent to do the act is not authorized to narrate what he had done, or how he had done it, and his declaration is no part of the *res gestæ*.'" Vicksburg &c. R. R. *v.* O'Brien, 119 U. S. 99.

That the statements, representations and admission of the agent made while acting within the scope of his authority and in reference to the business which he is employed to transact, may be received in evidence against the principal, see Perkins *v.*

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But it is obvious from this statement of the rule that not every statement, representation or admission which the agent may choose to make is binding upon the principal. In order to have that effect, the statement or admission must have been made, (1) in respect to a matter within the scope of his authority. The term authority as here used has the same significance which it has in reference to the agent's act or contract. If, therefore, the statements, representations or admissions offered in evidence were made by one who either had no authority at all, or had no authority to represent the principal in the matters concerning which they were made, they are not admissible against the principal.[1] So, (2) the statements, representations or admissions

Bennett, 2 Root (Conn.) 30; Mather v. Phelps, 2 Id. 150, 1 Am. Dec. 65; Haven v. Brown, 7 Greenl. (Me.) 421, 22 Am. Dec. 208; Stockton v. Demuth, 7 Watts. (Penn.) 39, 32 Am. Dec. 735; Franklin Bank v. Pennsylvania &c. Co. 11 Gill & John. (Md.) 28, 33 Am. Dec. 687; Stiles v. Western R.R Co., 8 Metc. (Mass.) 44, 41 Am. Dec. 486; Ball v. Bank of Alabama, 8 Ala. 590, 42 Am. Dec. 649; Hammatt v. Emerson, 27 Me. 308, 46 Am. Dec. 598; Cunningham v. Cochran, 18 Ala, 479, 52 Am. Dec. 230; Moore v. Bettis, 11 Humph. (Tenn.) 67, 53 Am. Dec. 771; Innis v. Steamer Senator, 1 Cal. 459, 54 Am. Dec. 305; Burnham v. Ellis, 39 Me. 319; 63 Am. Dec. 625; Tuttle v. Brown, 4 Gray (Mass.) 457, 64 Am. Dec. 80; Dick v. Cooper, 24 Penn. St. 217, 64 Am. Dec. 652; Coweta Falls Muf'g Co. v. Rogers, 19 Ga. 416; 65 Am. Dec. 602; Burnside v. Grand Trunk Ry Co. 47 N. H. 554, 93 Am. Dec. 474: Bass v. Chicago & N. W. Ry Co., 42 Wis. 654, 24 Am. Rep. 437; Anderson v. Rome &c. R. R. Co., 54 N. Y. 334; White v. Miller, 71 N. Y. 118; Pinnix v. McAdoo, 68 N. C. 56; Willard v Buckingham, 36 Conn. 395; Robinson v. Walton, 58 Mo. 380; Linblom v. Ramsey, 75 Ill. 246; Lafayette &c. R. R. Co. v. Ehman, 30 Ind. 83, Rowell v. Klein, 44 Ind. 290; Burnham v. Grand Trunk Ry Co. 63 Me. 298; Campbell v. Hastings, 29 Ark. 512; Ashmore v. Penn. Steam Towing Co. 38 N. J. L. 18; Dickman v. Williams, 50 Miss. 500; Galceran v. Noble, 66 Ga. 367; Mutual Ben. L. Ins. Co. v. Cannon, 48 Ind. 264; Chorpenning v. Royce, 58 Penn. St. 476; Stewartson v. Watts, 8 Watts (Penn.) 392; City Bank v. Bateman, 7 Har. & J. (Md.) 104; Central Branch U. P. R. R. Co. v. Butman, 22 Kan. 639; Merchants &c. Trans. Co. v. Leysor, 89 Ill. 43; Wilson Sew. Mach. Co. v. Sloan, 50 Iowa 367; McCormick v. Demary, 10 Neb. 515; Dowdall v. Pennsylvania R. R. Co. 13 Blatch. (U. S. C. C.) 403.

[1] Fogg v. Pew, 10 Gray (Mass.) 409, 71 Am. Dec. 662; Lamm v. Port Deposit &c. Assn. 49 Md. 233, 33 Am. Rep. 246; Stiles v. Western R. R. Co. 8 Metc. (Mass.) 44, 41 Am. Dec. 486; Corbin v. Adams, 6 Cush. (Mass.) 93; Wakefield v. South Boston R. R., 117 Mass. 544; Mobile &c. R. R. v. Ashcroft, 48 Ala. 15; Robinson v. Fitchburg &c. R. R. Co., 7 Gray (Mass.) 92; Green v. Ophir, &c. Co. 45 Cal. 522; Memphis &c. R. Co. v. Maples, 63 Ala. 601; Meyer v. Virginia &c. R. Co., 16 Nev. 341; Mundhenk v. Central Iowa Ry Co., 57 Iowa 718; Balti-

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must have been made in reference to the subject-matter of his agency. The mere idle, desultory or careless talk of the agent, having no legitimate reference to or bearing upon the business of his principal, can not be binding upon the latter.[1] And (3) the statements, representations or admissions must have been made by the agent at the time of the transaction, and either while he was actually engaged in the performance, or so soon after as to be in reality a part of the transaction. Or, to use the common expression, they must have been a part of the *res gestæ*. If on the other hand, they were made before the performance was undertaken, or after it was completed, or while the agent was not engaged in the performance, or after his authority had expired, they are not admissible.[2] In such a case they amount to no

more &c. R. R. Co. v. Christie, 5 W. Va. 325; Anderson v. Rome &c. R. R. Co., 54 N. Y. 334; Chicago R. R. Co. v. Riddle, 60 Ill 534; Chicago R. R. Co. v. Lee, 60 Ill. 501; Rowell v. Klein, 44 Ind. 290.

[1] See cases cited in following note.

[2] Roberts v. Burks, Littells Sel. Cas. (Ky.) 411, 12 Am. Dec. 325; State Bank v. Johnson, 1 Mill. (S. C.) 404, 12 Am. Dec. 645; Thallhimer v. Brinkerhoff, 4 Wend. (N. Y.) 394, 21 Am. Dec. 155; Haven v. Brown, 7 Greenl. (Me.) 421; 23 Am. Dec. 208; Hubbard v Elmer, 7 Wend (N. Y.) 446, 22 Am. Dec. 590; Davis v. Whitesides, 1 Dana. (Ky.) 177, 25 Am. Dec. 138; Franklin Bank v. Pennsylvania &c. Co. 11 Gill. & John. (Md) 28, 33 Am. Dec. 687; Reynolds v. Rowley, 3 Rob. (La.) 201, 38 Am. Dec. 233; Whiteford v. Burckmyer, 1 Gill. (Md.) 127, 39 Am. Dec. 640; Innis v. Steamer Senator, 1 Cal. 459, 54 Am. Dec. 305; Marshall v. Haney, 4 Md. 498, 59 Am. Dec. 92; Cobb v. Johnson, 2 Sneed (Tenn) 73, 62 Am. Dec. 457; Burnham v. Ellis, 39 Me. 319, 63 Am. Dec. 625; Converse v. Blumrich, 14 Mich. 109, 90 Am. Dec. 230; Anthony v. Eastabrook, 1 Colo. 75, 91 Am. Dec. 702; Sweetland v. Illinois &c. Telegraph Co., 27 Iowa, 433, 1 Am. Rep. 285; Keeley v. Boston &c. R. R. Co. 67 Me. 163, 24 Am. Rep. 19; First Nat. Bank v. Ocean Nat. Bank 60 N. Y. 278, 19 Am. Rep. 181; Durkee v. Central Pac. R. R. Co., 69 Cal 533, 58 Am. Rep. 562; Hawker v. Baltimore & Ohio R. R. Co., 15 W. Va. 628, 36 Am. Rep. 825; McDermott v. Hannibal &c. R. R. Co., 73 Mo. 516, 39 Am. Rep. 526; Randall v. Northwestern Tel. Co. 54 Wis. 140, 41 Am. Rep. 17; Ryan v. Gilmer, 2 Mont. 517. 25 Am. Rep. 744: Adams v. Hannibal &c. R. R. Co. 74 Mo. 553, 41 Am. Rep. 333; Waldele v. New York Central, &c. R. R. Co. 95 N. Y. 274, 47 Am. Rep. 41; American Steamship Co. v. Landreth, 102 Penn. St. 131, 48 Am. Rep. 196, Sullivan v. Oregon &c. Co., 12 Oregon 392, 53 Am. Rep. 364; North River Bank v. Aymar, 3 Hill (N. Y.) 262; Sandford v. Handy, 23 Wend. (N. Y.) 260; Bank of U. S. v. Davis, 2 Hill (N.Y.) 451; Carpenter v. American Ins. Co., 1 Story (U. S. C. C.) 57; Randel v. Chesapeake & Del. Canal Co. 1 Harr. (Del.) 234; Lee v. Munroe, 7 Cranch (U. S.) 366; Stewartson v. Watts, 8 Watts (Penn.) 392; Lobdell v. Baker

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more than a mere narrative of a past transaction, and do not bind the principal. The reason is that, while the agent was authorized to act or speak at the time and within the scope of his authority, he is not authorized, at a subsequent time, to narrate what he had done or how he did it.

§ 715. **What embraced within Res Gestæ.** The question of what declarations and admissions constitute a part of the *res gestæ*, is one exceedingly difficult of determination, and upon which the authorities are conflicting. It was formerly held, and the doctrine still prevails in some jurisdictions, that the declarations and admissions must be strictly contemporaneous with the act; that if they were not made until the act in controversy was completed, although made immediately afterwards, and on the spot, they were not admissible.[1]

The tendency of many of the later cases in the United States is, however, to regard the mere point of time as less material, and to treat the declarations and admissions as admissible if they spring from the transaction in controversy and tend to qualify, characterize or explain it, and are voluntary and spontaneous, and are made at a time so near as to preclude the idea of deliberate

1 Metc. (Mass.) 193; Gott *v.* Dinsmore, 111 Mass. 45; Brooks *v.* Jameson, 55 Mo. 505; Robinson *v.* Walton, 58 Mo. 380; McComb *v.* Railroad Co. 70 N. C. 178, Linblom *v.* Ramsey, 75 Ill. 246; Newton *v.* White, 53 Ga. 395: Adams *v.* Humphreys, 54 Ga. 496; Swenson *v.* Aultman 14 Kan. 273; Fairlie *v.* Hastings, 10 Ves. Jr. 125; Dawson *v.* Atty., 7 East 367, Fitzherbert *v.* Mather, 1 T. R. 12; Bree *v.* Holbech, 2 Dougl. 654.

1 "What an agent has said may be what constitutes the agreement of the principal; or the representations or statements made may be the foundation of, or the inducement to, the agreement. Therefore, if a writing is not necessary by law, the evidence must be admitted to prove the agent did make that statement or representation. So with regard to acts done, the words with which these acts are accompanied frequently tend to determine their quality. The party therefore to be bound by the act must be affected by the words. But except in one or the other of these ways, I do not know how what is said by an agent can be evidence against the principal. The mere assertion of a fact cannot amount to proof of it, though it may have some relation to the business in which the person making that assertion was employed as agent." Sir William GRANT in Fairlie *v.* Hastings, 10 Ves. Jr. 127.

"The declarations or confessions of an agent, except they be made at the time, and compose a part of acts done by him for his principal within the scope of his authority, cannot be given in evidence to charge the principal." MILLS J., in Roberts *v.* Burks, Littell's Sel. Cas. (Ky.) 411, 12 Am. Dec. 325.

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design.[1] According to the doctrine of these cases, each transaction is to be judged by its own peculiar facts, without conclusive regard to a fixed interval of time, and with more regard to the question whether the declarations or admissions seem to have been voluntarily and spontaneously made, under the immediate influence of the principal transaction, and are so connected with it as to characterize or explain it. The scope of the rulings upon the subject can be best shown by some illustrations from the decided cases.

Thus in an action to recover damages for a breach of warranty, on the sale of a chattel, the declaration of the vendor's agent that the chattel was defective, made eight months

[1] "Declarations to be a part of the *res gestæ* are not required to be precisely concurrent in point of time with the principal fact; if they spring out of the principal transaction, if they tend to explain it, are voluntary and spontaneous, and are made at a time so near it as to preclude the idea of deliberate design, then they are to be regarded as contemporaneous, and are admissible." SPRAGUE, J., in People *v.* Vernon, 35 Cal. 49, 95 Am. Dec. 50, citing, 1 Greenl. Ev. § 108; Mitchum *v.* State, 11 Ga. 615; Commonwealth *v.* McPike, 3 Cush. (Mass.) 181 (50 Am. Dec. 727).

"I do not understand that declarations by persons whose duty it is to make them, in order to constitute a part of the *res gestæ*, are required to be precisely concurrent in point of time with the principal transaction. If they spring from it, and tend to explain it, are voluntary and spontaneous, and are made at a time so near as to preclude the idea of design to misrepresent, they may be regarded as so nearly contemporaneous as to be admissible." SHERWOOD, J., in Keyser *v.* Chicago & G. T. Ry Co. — Mich. — 33 N. W. Rep. 867, citing Scaggs *v.* State, 8 Sm. & Mar. (Miss.) 722; Insurance Co. *v.* Mosley, 8 Wall. (U. S.) 397; Commonwealth *v.* McPike, 3 Cush. (Mass.) 181; Harriman *v.* Stowe, 57 Mo. 93; Crookham *v.* State, 5 W. Va. 510; Boothe *v.* State, 4 Tex. App. 202; Regina *v.* Abraham, 2 Car. & K. 550; Hanover R. Co. *v.* Coyle, 55 Penn. St. 402; Brownell *v.* Pacific R. Co. 47 Mo. 239; People *v.* Vernon, 35 Cal. 49, 95 Am. Dec. 50; Handy *v.* Johnson, 5 Md. 450; Carter *v.* Buchannon, 3 Ga. 513; Mitchum *v.* State, 11 Ga. 615; Courtney *v.* Baker, 2 Jones & Sp. (N. Y.) 529; O'Connor *v.* Chicago, &c. Ry Co. 27 Minn. 166; Armil *v.* Chicago, &c. R. R. Co. 70 Iowa 130; State *v.* Horan, 32 Minn. 394, 20 N. W. Rep. 905; Lund *v.* Tyngsborough, 9 Cush. (Mass.) 36.

"The modern doctrine has relaxed the ancient rule that declarations, to be admissible as part of the *res gestæ*, must be strictly contemporaneous with the main transaction. It now allows evidence of them when they appear to have been made under the immediate influence of the principal transaction, and are so connected with it as to characterize or explain it." Dissenting opinion of WAITE, C. J., MILLER, FIELD and BLATCHFORD, J. J., in Vicksburg, &c. R. R. *v.* O'Brien, 119 U. S. 99.

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after the sale and not connected with any present business transaction, was held to be inadmissible;[1] so an admission by the general agent of a telegraph company of its liability for an accident, alleged to have been caused by its negligence, two months after the accident, has been held to be not admissible;[2] so the admissions made by the engineer of an engine which had killed some cattle, made while he was still on the engine where it had been thrown from the track by the accident, but made an hour after the accident, were held to be incompetent;[3] so evidence of the statement of a railroad roadmaster that a certain employee, through whose incompetence an accident had happened, was incompetent, made several days after the accident, has been held to be inadmissible;[4] so in an action against a railroad company for personal injuries sustained by a passenger, evidence of the declarations of the conductor and engineer "a few minutes" after the accident, was held incompetent;[5] so in two like cases

[1] White *v.* Miller, 71 N. Y. 118, 27 Am. Rep. 18.

[2] Randall *v.* Northwestern Tel. Co. 54 Wis. 140, 41 Am. Rep. 17.

[3] Hawker *v.* Baltimore & Ohio R. R. Co. 15 W. Va. 628, 36 Am. Rep. 825.

[4] McDermott *v.* Hannibal, &c. R. R. Co. 73 Mo. 516, 39 Am. Rep. 526. Statements "a few days" afterwards inadmissible. Robinson *v.* Fitchburg, &c. R. R. Co. 7 Gray (Mass.) 92; so are statements made two and a half days afterward. Packet Co. *v.* Clough, 20 Wall. (U. S.) 528.

[5] Alabama, &c. R. R. Co. *v.* Hawk, 72 Ala. 112, 47 Am. Rep. 403. In this case the court lay down the rule that "Perfect coincidence of time between the declaration and the main fact is not of course required. It is enough that the two are substantially contemporaneous; they need not be literally so. The declarations must however be so proximate in point of time as to grow out of, elucidate and explain the character and quality of the main fact, and must be so closely connected with it as virtually to constitute but one entire transaction, and to receive support and credit from the principal act sought to be thus elucidated and explained. The evidence offered must not have the ear-marks of a device, or afterthought, nor be merely narrative of a transaction which is really and substantially past," citing Thomp. Car. 557, 558; Gandy *v.* Humphries, 35 Ala. 617; Henderson *v.* State, 70 Ala. 23; Enos *v.* Tuttle, 3 Conn. 250; Scaggs *v.* State, 8 Sm. & M. (Miss.) 722; Commonwealth *v.* Hackett, 2 Allen (Mass.) 136; Luby *v.* Hudson R. R. Co. 17 N. Y. 131; McDermott *v.* Hannibal, &c. R. R. Co. *supra*. Yet they reach the conclusion "that the declarations of the conductor and engineer cannot, under a proper application of this principle, be regarded as a part of the *res gestæ* of the accident resulting in injury to the plaintiff. The time—'a few minutes'—does not appear to be so proximate to the main transaction, nor are the declarations made otherwise so closely connected with it, as an elucidating circumstance, as justly

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evidence of similar declarations made, in one case,[1] ten to thirty minutes, and in the other,[2] five minutes, after the accident, was held inadmissible; so in action for injuries sustained by a passenger from the overturning of a stage sleigh, the declarations of the driver, made on the spot and immediately after the accident occurred, that it happened through his carelessness, were held inadmissible;[3] so in an action against a railroad company for

to authorize the conclusion that they are not merely narrative of a past occurrence, which at the moment was finished and complete."

[1] Vicksburg, &c. R. R. v. O'Brien, 119 U. S. 99. "It was," said the court, "in its essence, the mere narration of a past occurrence, not a part of the *res gestæ*—simply an assertion or representation, in the course of conversation, as to a matter not then pending, and in respect to which his authority as engineer had been fully exerted. It is not to be deemed part of the *res gestæ* simply because of the brief period intervening between the accident and the making of the declaration. The fact remains that the occurrence had ended when the declaration in question was made, and the engineer was not in the act of doing anything that could possibly affect it. If his declaration had been made the next day after the accident, it would scarcely be claimed that it was admissible evidence against the company. And yet the circumstance that it was made between ten and thirty minutes,—an appreciable period of time—after the accident, cannot, upon principle, make this case an exception to the general rule. If the contrary view should be maintained, it would follow that the declarations of the engineer if favorable to the company, would have been admissible in its behalf as part of the *res gestæ* without calling him as a witness,—a proposition that will find no support in the law of evidence. The cases have gone far enough in the admission of the subsequent declarations of agents as evidence against their principals. These views are fully sustained by adjudications in the highest courts of the States," citing Luby v. Hudson River R. R. 17 N. Y. 131; Pennsylvania R. R. Co. v. Books, 57 Penn. St. 339; Dietrich v. Baltimore, &c. R. R., 58 Md. 347; Lane v. Bryant, 9 Gray (Mass.) 245, 69 Am. Dec. 282; Chicago, &c. R. R. Co. v. Riddle, 60 Ill. 534; Virginia, &c. R. R. Co. v. Sayers, 26 Gratt. (Va.) 328. Chicago, &c. Ry Co. v. Fillmore, 57 Ill. 265; Michigan Cent. R. R. Co. v. Coleman, 28 Mich. 440; Mobile, &c. R. R. Co. v. Ashcraft, 48 Ala. 15; Bellefontaine Ry Co. v. Hunter, 33 Ind. 335, 5 Am. Rep. 201; Adams v. Hannibal, &c. R. R. Co., 74 Mo. 553, 41 Am. Rep. 338; Kansas, &c. R. R. Co. v. Pointer, 9 Kan. 620; Roberts v. Burks, Litt. (Ky.) Sel. Cas. 411, 12 Am. Dec. 325; Hawker v. Baltimore & Ohio R. R. Co. 15 W. Va. 628, 36 Am. Rep. 825; WAITE, C. J. and FIELD, MILLER and BLATCHFORD, J. J. dissented.

[2] Durkee v. Central Pacific R. R. Co. 69 Cal. 533, 58 Am. Rep. 562.

[3] Ryan v. Gilmer, 2 Mont. 517, 25 Am. Rep. 744. The declaration of a driver of a street car made as he was getting off the car immediately after running into the plaintiff, as to the cause of the accident, held inadmissible in Luby v. Hudson River R. R. Co., 17 N. Y. 131. So the declaration of a street car driver immedi-

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running over a man, evidence of admissions by one trainman to another immediately after the accident, was declared incompetent.[1]

But on the other hand in a recent action brought against a railroad company for negligently injuring the plaintiff, declarations made by the engineer immediately after stopping his train and backing up to the place of the accident, as to the reason why he did not stop his train before the accident, were not only held to be competent, but similar declarations made by the engineer when he arrived at his destination about fifty minutes later, were also admitted;[2] so in a case involving the liability of a railroad company for baggage lost by fire, the declarations of the baggage master as to the origin of the fire, made in view of the ruins but about fourteen hours after the fire, were admitted;[3] so, in a number of cases, declarations made within so short a time after the occurrence as properly to be designated as immediately made, have been held admissible.[4]

§ 716. **Agent's Authority must be first shown.** As has been seen,[5] however, the fact of the agent's authority can neither be established, nor can its scope or effect be extended or enlarged, by his own statements, representations or declarations, so as to charge the principal. There must be first a *prima facie* showing of his authority by other evidence, before the admissions, de-

ately after an accident that he was very sorry and that it was his fault, held inadmissible. Williamson *v.* Cambridge R. R. Co., 144 Mass. 148, 10 N. E. Rep. 790, and to same effect in Lane *v.* Bryant, 9 Gray (Mass.) 245, 69 Am. Dec. 282, where BIGELOW, J. says, "It is no more competent because made immediately after the accident than if made a week or a month afterwards."

[1] Adams *v.* Hannibal & St. Joseph R. R. Co., 74 Mo. 553, 41 Am. Rep. 323. Declarations immediately after, not admissible. Cleveland, &c R. R. Co. *v.* Mara, 26 Ohio, St. 185.

[2] Keyser *v.* Chicago & G. T. Ry Co. — Mich. —, 33 N. W. Rep. 867.

[3] Illinois Cent. R. R. Co. *v.* Tronstine, 64 Miss. 834. *Contra*, Michigan Cent. R. R. Co. *v.* Carrow, 73 Ill. 348.

[4] O'Connor *v.* Chicago, &c. Ry Co., 27 Minn. 166; Bass *v.* Chicago, &c. Ry Co., 42 Wis. 654, 24 Am. Rep. 437; Brownell *v.* Pacific R. R. Co., 47 Mo. 239; Toledo, &c. Ry Co. *v.* Goddard, 25 Ind. 185. Where a boy who had driven against a foot passenger on the street immediately stopped his horse and came back and said he did not mean to, Judge COOLEY said: "It was as much a part of the *res gestæ* as would have been an exclamation at the very instant the plaintiff was struck." Cleveland *v.* Newsome, 45 Mich. 62. To same effect are: Little Rock, &c. Ry Co. *v.* Leverett, — Ark. —, 8 S. W. Rep. 58.

[5] See *ante*, § 100.

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clarations or representations, if otherwise competent, can be admitted.[1]

§ 717. **When Principal bound by Agent's Representation of extrinsic Facts upon which Authority depends.** In a recent case in the New York Court of Appeals[2] it is said: "It is a settled doctrine of the law of agency in this State, that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice.[3] * * * If there be any exception to the rule within our jurisdiction, it arises in the case of municipal corporations, whose structure and functions are sometimes claimed to justify a more restricted liability." In accordance with this rule, it was there held that a carrier which had authorized an agent to issue bills of lading in its name, upon receipt of property for transportation, is liable upon a bill of lading issued by such agent and transferred by the shipper to one who, on the faith of it, had discounted a draft on the consignee, although in fact no property had been received by the carrier.

A different result has in some cases[4] been reached upon the same state of facts, but the doctrine of the New York court seems most consonant with reason and justice.[5]

[1] See *ante*, § 100, Smith *v.* Kron, 96 N. C. 392.

[2] Bank of Batavia *v.* New York, &c. R. R. Co., 106 N. Y. 195, 60 Am. Rep. 440, 35 Am. L. Reg. 573.

[3] Citing North River Bank *v.* Aymar, 3 Hill (N. Y.) 262; Griswold *v.* Haven, 25 N. Y. 595, 82 Am. Dec. 380; New York, &c. R. R. Co. *v.* Schuyler, 34 N. Y. 30; Armour *v.* Michigan Cent. R. R. Co., 65 N. Y. 111, 22 Am. Rep. 603.

[4] That the carrier may show the non-receipt of the goods even as against a *bona fide* transferee for value, see Black *v.* Wilmington, &c. R. R. Co., 92 N. C. 42, 53 Am. Rep. 450; Baltimore, &c. R. R. Co. *v.* Wilkens, 44 Md. 11, 22 Am. Rep. 26; Grant *v.* Norway, 10 C. B. 665, 2 Eng. Law & Eq. 337; The Freeman *v.* Buckingham, 18 How. (U. S.) 182; The Loon, 7 Blatch. (U. S. C. C.) 244; Louisiana Nat. Bank *v.* Laveille, 52 Mo. 380; Pollard *v.* Vinton, 105 U. S. 7; Hunt *v.* Railroad Co., 29 La. Ann. 446.

[5] In addition to the cases cited in note 2, *supra*, the New York rule is approved in Brooke *v.* New York, &c. R. R. Co., 108 Penn. St. 529, reported also in note 53 Am. Rep. 453; Sioux City R. R. Co. *v.* First

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It is in accordance with the same principle that a bank is held liable upon a check, which its cashier has certified as good, although in fact the drawer had no funds, where third persons have in good faith acquired rights in such check relying upon the certificate.[1]

c. By notice given to the Agent.

§ 718. **General Rule—Notice to the Agent is Notice to the Principal.** It is a general rule, settled by an unbroken current of authority, that notice to an agent while acting within the scope of his authority and in reference to a matter over which his authority extends, is notice to the principal.[2]

In respect to this rule two important elements will be noticed. The first of these is that the notice or knowledge, which will affect the principal, is that only which is *possessed* by the agent while he is agent, and while he is acting within the scope of his authority. Whether the notice or knowledge must in all cases have been *acquired* by the agent during the agency, is a question upon which there is some divergence of authority, and which will be noticed in a following section.[3]

The second element is that the notice or knowledge, which shall be imputed to the principal, is that only which relates to the subject-matter of that agent's authority, or, in other words, is that only which relates to the business or transaction in reference to which that agent is authorized to act by and for the principal.[4]

Nat. Bank, 10 Neb. 556, 35 Am. Rep. 488; Coventry *v.* Great Eastern R. R. Co., 11 Q. B. Div. 776, 37 Eng. Rep. 589; Savings Bank *v.* Railroad Co., 20 Kans. 519.

[1] Hill *v.* Nation Trust Co., 108 Penn. St. 1, 56 Am. Rep. 189; Merchants' Bank *v.* State Bank, 10 Wall. (U. S.) 604; Espy *v.* Bank of Cincinnati, 18 Wall. (U. S.) 604; Farmers', &c. Bank *v.* Butchers' &c. Bank, 16 N. Y. 125, 69 Am. Dec. 678.

[2] Reynolds *v.* Ingersoll, 11 Smedes & M. (Miss.) 249, 49 Am. Dec. 57; Ross *v.* Houston, 25 Miss. 591, 59 Am. Dec. 231; Woodfolk *v.* Blount, 3 Hay. (Tenn.) 147, 9 Am. Dec. 736; Barnes *v.* McClinton, 3 Pen. & Watts (Penn.) 67, 28 Am. Dec. 62; Weisser *v.* Denison, 10 N. Y. 68, 61 Am. Dec. 731; Backman *v.* Wright, 27 Vt. 187, 65 Am. Dec. 187; Farmers', &c. Bank *v.* Payne, 25 Conn. 444, 68 Am. Dec. 362; Hunter *v.* Watson, 12 Cal. 377, 73 Am. Dec. 543; Nashville, &c. R. R. Co. *v.* Elliott, 1 Coldw. (Tenn.) 611, 78 Am. Dec. 506; Russell *v.* Sweezey, 22 Mich. 235; Sandford *v.* Nyman, 23 Mich. 326; Peoria Ins. Co. *v.* Hall, 12 Mich. 202; Taylor *v.* Young, 56 Mich. 285; Campau *v.* Konan, 39 Mich. 362; Saulsbury *v.* Wimberly, 60 Ga. 78; Roach *v.* Karr, 18 Kans. 529.

[3] See *post*, § 721.

[4] See *post*, § 723.

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§ 719. **Same Subject—The Reasons of the Rule.** Two general theories prevail as to the foundation upon which this rule is based, and the results of these respective theories are not entirely alike. The first finds the reason of the rule in the legal identity of the agent with the principal,—in the fact that the agent, while keeping within the scope of his authority, is, as to the matters embraced within it, for the time being the principal himself, or, at all events, the *alter ego* of the principal—the principal's other self. Whatever notice or knowledge, then, reaches the agent under these circumstances, in law reaches the principal. It is the legitimate and necessary result of this view, therefore, that only such notice or knowledge as comes to the agent, while he is agent, is thus binding upon the principal.[1]

The other theory is based upon the rule that it is the duty of the agent to disclose to his principal, all notice or knowledge which he may possess and which is necessary for the principal's protection or guidance. This duty the law presumes the agent to have performed, and, according to the view now being considered, imputes to the principal whatever notice or knowledge the agent then possessed, whether he has in fact disclosed it or not.[2] According to this view, therefore, it is immaterial when

[1] "The agent stands in place of the principal, and notice therefore to the agent is notice to the principal; but he cannot stand in the place of the principal until the relation of principal and agent is constituted, and as to all the information which he previously acquired, the principal is a mere stranger." Sir JOHN LEACH in Mountford *v.* Scott, 3 Madd. 40. "It is only during the agency that the agent represents and stands in the shoes of the principal. Notice to him then, is notice to the principal. Notice to him twenty-four hours before the relation commenced is no more notice than twenty-four hours after it has ceased would be." SHARSWOOD, J., in Houseman *v.* Girard, &c. Building Assn., 81 Penn. St. 256.

Somewhat of double ground was taken by the Supreme Court of Michigan: "The reason upon which the doctrine of notice to the agent being held notice to the principal rests, is that the agent is substituted in the place of, and represents, the principal in the particular transaction, and therefore while acting in such matters he takes the place of the principal and the latter is bound by the agent's act in the light of the knowledge then possessed by the agent." MARSTON, C. J., in Advertiser & Tribune Co. *v.* Detroit, 48 Mich. 116.

[2] "The general rule that a principal is bound by the knowledge of his agent is based on the principle of law, that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject matter of negotiation, and the presumption that he will perform that duty." BRADLEY, J., in The

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or how the agent obtained the information, if he then possessed it.

The courts have not, however, always recognized these differences, nor have their decisions in all cases been consistent with the theory adopted.

§ 720. **Same Subject—Notice acquired during Agency.** So far as that notice or knowledge which is acquired during the agency is concerned, the result, under either theory is obviously the same.

Such notice or knowledge is chargeable to the principal in the same manner, and with the same effect, as though it had been communicated to or acquired by him in person.

§ 721. **Same Subject—Knowledge acquired prior to Agency.** The theory based upon the legal identity of the parties, and limiting the application of the rule to such notice or knowledge as was acquired during the agency, was at first adopted by the English courts,[1] and has since been followed by the courts of many of the United States.[2] The other theory, however, based upon the duty of the agent to disclose to his principal all knowl-

Distilled Spirits, 11 Wall.(U. S.) at p. 367.

[1] Preston *v.* Tubbin, 1 Vern. 287; Brotherton *v.* Hatt, 2 Vern. 574; Fitzgerald *v.* Fauconberge, Fitz Gibbon, 207; Lowther *v.* Carlton, 2 Atk. 242; Warrick *v.* Warrick, 3 Atk. 294; Worsley *v.* Scarborough, 3 Atk. 392; Le Neve *v.* Le Neve, 3 Atk. 648; Mountford *v.* Scott, 3 Madd. 26, s. c. on appeal, 1 Turn. & Russ. 279; Hiern *v.* Mill, 13 Ves. Jr. 120.

[2] "It is well settled," said C. J. SHARSWOOD, "that the principal is only to be affected by knowledge acquired in the course of the business in which the agent was employed." Houseman *v.* Girard, &c. Ass'n, 81 Penn. St. 256, citing Hood *v.* Fahnestock, 8 Watts. (Penn.) 489; Bracken *v.* Miller, 4 Watts. & Serg. (Penn.) 110; Martin *v.* Jackson, 3 Casey (27 Penn. St.) 508, 67 Am. Dec. 489. To same effect are, Willis *v.* Vallette, 4 Metc. (Ky.) 186; Howard Ins. Co. *v.* Halsey, 8 N. Y. 271; McCormick *v.* Wheeler, 36 Ill. 114, 85 Am. Dec. 388; Mundine *v.* Pitts, 14 Ala. 84; Wiley *v.* Knight, 27 Ala. 336. (But see Smyth *v.* Oliver, 31 Ala. 39. Pepper *v.* George, 51 Ala. 190;) Williams *v.* Tatnall, 29 Ill. 564; Congar *v.* Railroad Co., 24 Wis. 158; Pritchett *v.* Sessions, 10 Rich. (S. C.) L. 293; Barnes *v.* McClinton, 3 Pen. & Watts. (Penn.) 67, 23 Am. Dec. 62; Weisser *v.* Denison, 10 N. Y. 68; 61 Am. Dec. 731; Farmers', &c. Bank, *v.* Payne, 25 Conn. 444, 68 Am. Dec. 362; Bank of United States *v.* Davis, 2 Hill (N. Y.) 451; North River Bank *v.* Aymar, 3 Hill (N. Y.) 262; Hayward *v.* National Ins. Co., 52 Mo. 181, 14 Am. Rep. 400.

See also the recent case declaring this the rule in Pennsylvania, although it is held otherwise by the United States Supreme Court, Satterfield *v.* Malone, 35 Fed. Rep. 445.

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edge and information possessed by the agent in relation to the subject-matter of the agency, and therefore charging the principal with it, has since been firmly established by the English courts,[1] and has been adopted by the Supreme Court of the United States,[2] and by many of the States.[3]

This theory, however, recognizes certain exceptions which are clearly founded upon and consistent with it. Thus the agent could not reasonably be expected to disclose information which, though once possessed by him, had been, in fact, forgotten. So the law would not compel him to disclose what it was his legal duty to conceal. So the agent could not be deemed to have disclosed that information which, from his relations to the subject-matter, or his previous conduct, it is certain he would not disclose. Subject to these exceptions, it is believed that this theory is supported by the better reason and by a clear preponderance of authority. The rule deducible from these authorities may be said to be the following:—

The law imputes to the principal, and charges him with, all notice or knowledge relating to the subject-matter of the agency which the agent acquires or obtains while acting as such agent and within the scope of his authority, or which he may previously have acquired, and which he then had in mind,[4] or which he had

[1] Dresser *v.* Norwood, 17 Com. Bench (N. S.) 466; Rolland *v.* Hart, L. R. 6 Ch. App. 678.

[2] The Distilled Spirits, 11 Wall. (U. S.) 367.

[3] Hunter *v.* Watson, 12 Cal. 377, 73 Am. Dec. 543; Bierce *v.* Red Bluff Hotel, 31 Cal. 160; Hart *v.* Bank, 23 Vt. 252; Whitten *v.* Jenkins, 34 Ga. 305; Day *v.* Wamsley, 33 Ind. 147; Cummings *v.* Harsabraugh, 14 La. Ann. 711; Hovey *v.* Blanchard, 13 N. H. 148; Bank *v.* Campbell, 4 Hump. (Tenn.) 396; Campau *v.* Konan, 39 Mich. 362; Chouteau *v.* Allen, 70 Mo. 290; Lebanon Savings Bank *v.* Hollenbeck, 29 Minn. 322; Abell *v.* Howe, 43 Vt. 403; Yerger *v.* Barz, 56 Iowa, 77; Fairfield Savings Bank *v.* Chase, 72 Me. 226, 39 Am. Rep. 319; Suit *v.* Woodhall, 113 Mass. 391; Shafer *v.* Phœnix Ins. Co., 53 Wis. 361; Wilson *v.* Minnesota, &c. Ins. Ass'n, 36 Minn. 112, 1 Am. St. Rep. 659.

[4] "Knowledge of an agent acquired previous to the agency, but appearing to be actually present in his mind during the agency and while acting for his principal in the particular transaction or matter, will, as respects such transaction or matter, be deemed notice to his principal and will bind him as fully as if originally acquired by him." Lebanon Savings Bank *v.* Hollenbeck, 29 Minn. 322.

"We think," said POLLOCK, C. B. "that in a commercial transaction of this description, where the agent of the buyer purchases on behalf of his principal, goods of the factor of the seller, the agent having present to his mind, at the time of the purchase,

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acquired so recently as to reasonably warrant the assumption that he still retained it;[1] Provided, however, that such notice or knowledge will not be imputed; 1. Where it is such as it is the agent's duty not to disclose,[2] and, 2. Where the agent's relations to the subject-matter, or his previous conduct, render it certain that he will not disclose it,[3] and, 3. Where the person claiming the bene-

knowledge that the goods he is buying are not the goods of the factor though sold in the factor's name, the knowledge of the agent, however acquired, is the knowledge of the principal." Dresser *v.* Norwood, 17 C. B. (N. S.) 466.

Of this case Mr. Justice BRADLEY says: "So that in England the doctrine now seems to be established, that if the agent, at the time of effecting a purchase, has knowledge of any prior lien, trust or fraud affecting the property, no matter when he acquired such knowledge, his principal is affected thereby. If he acquire the knowledge when he effects the purchase, no question can arise as to his having it at that time; if he acquired it previous to the purchase, the presumption that he still retains it and has it present to his mind, will depend on the lapse of time, and other circumstances. Knowledge communicated to the principal himself, he is bound to recollect, but he is not bound by knowledge communicated to his agent, unless it is present to the agent's mind at the time of effecting the purchase. Clear and satisfactory proof that it was so present, seems to be the only restriction required by the English rule as now understood. With the qualification that the agent is at liberty to communicate his knowledge to his principal, it appears to us to be a sound view of the subject." The Distilled Spirits, 11 Wall. (U. S.) 367.

"We think, all things considered," said PETERS, J., "the safer and better rule to be that the knowledge of an agent, obtained prior to his employment as agent, will be an implied or imputed notice to the principal, under certain limitations and conditions which are these: The knowledge must be present to the mind of the agent when acting for the principal—so fully in his mind that it could not have been at the time forgotten by him; the knowledge or notice must be of a matter so material to the transaction as to make it the agent's duty to communicate the fact to his principal, and the agent must himself have no personal interest in the matter which would lead him to conceal his knowledge from his principal, but must be at liberty to communicate it." Fairfield Savings Bank *v.* Chase, 72 Me. 226, 39 Am. Rep. 319.

Knowledge or notice will not bind if it does not appear to have been retained. Yerger *v.* Barz, 56 Iowa, 77.

[1] Knowledge acquired not only during the continuance of the agency but also that possessed by the agent so shortly before as necessarily to give rise to the inference that it remained fixed in his memory when the employment began binds the principal. Chouteau *v.* Allen, 70 Mo. 290.

[2] The Distilled Spirits, 11 Wall. (U. S.) 367; Fairfield Savings Bank *v.* Chase, 72 Me. 226, 39 Am. Rep. 319.

[3] See *post*, 723.

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fit of the notice, or those whom he represents, colluded with the agent to cheat or defraud the principal.[1]

This rule does not depend, in either case, upon the fact that the agent *has* disclosed the knowledge or information to his principal; subject to the exceptions named, the law conclusively presumes that he has done so, and charges the principal accordingly.[2] What present knowledge, previously acquired, may reasonably be attributed to the agent, is a question to be governed by the facts of each particular case. "It may fall to be considered," said Lord ELDON, "whether one transaction might not follow so close upon the other as to render it impossible to give a man credit for having forgotten it. I should be unwilling to go so far as to say, that, if an attorney has notice of a transaction in the morning, he shall be held in a court of equity to have forgotten it in the evening; it must in all cases depend upon the circumstances."[3]

The burden of proof rests upon the party asserting the fact of notice or knowledge.

§ 722. **Same Subject—Of the first Exception.** The first of these exceptions is well settled, both in England and in this country. It is most frequently applied to the case of attorneys and others, upon whom rests the duty of maintaining a professional secrecy. This secrecy the law will not permit, much less require, to be violated.[4] As is well said by Mr. Justice BRADLEY,

[1] National L. Ins. Co. v. Minch, 53 N. Y. 144. "The rule which charges the principal with what the agent knows is for the protection of innocent third persons and not for those who use the agent to further their own frauds upon the principal."

[2] The Distilled Spirits, 11 Wall. (U. S.) 367; Dresser v. Norwood, 17 C. B. (N. S.) 466.

[3] Mountford v. Scott, 1 Turn. & Russ. 274; The Distilled Spirits, 11 Wall. (U. S. 367.

[4] It has been held generally in many cases that knowledge acquired by an attorney while acting for one client will not affect a subsequent client. Hood v. Fahnestock, 8 Watts (Penn.) 489, 34 Am. Dec. 489; Willis v. Vallette, 4 Metc. (Ky.) 186; McCormick v. Wheeler, 36 Ill. 114, 85 Am. Dec. 386; Herrington v. McCollum, 73 Ill. 476; Pepper v. George, 51 Ala. 190; Terrell v. Bank, 12 Ala. 502; Bierce v. Red Bluff Hotel Co., 31 Cal. 160; Martin v. Jackson, 27 Penn. St. 504, 67 Am. Dec. 489; Allen v. McCalla, 25 Iowa 464, 96 Am. Dec. 56; Haven v. Snow, 14 Pick. (Mass.) 28; Lowther v. Carlton, 2 Atk. 242; Worsley v. Scarborough, 3 Id. 392; Warrick v. Warrick, 3 Id. 294, Campbell v. Benjamin, 69 Ill. 244.

And so it has been held that knowledge acquired by an attorney while acting for one client will not affect another client for whom he is acting in another matter at the same time. Ford v. French, 72 Mo. 250. But the better rule is believed to be

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"When it is not the agent's duty to communicate such knowledge, when it would be unlawful for him to do so, as, for example, when it has been acquired confidentially as attorney for a former client in a prior transaction, the reason of the rule ceases, and in such a case an agent would not be expected to do that which would involve the betrayal of professional confidence, and his principal ought not to be bound by his agent's secret and confidential information." [1]

§ 723. **Same Subject—Of the second Exception.** The rule is based, as has been seen, upon the principle that it is the duty of the agent to communicate to his principal the knowledge possessed by him relating to the subject-matter of the agency, and material to the principal's protection and interests. This presumption, however, will not prevail where it is certainly to be expected that the agent will not perform this duty, as where the agent, though nominally acting as such, is in reality acting in his own or another's interest, and adversely to that of his principal.[2] Much less will it be entertained where the agent is openly

that in either case such notice binds the principal unless acquired under such circumstances as to make it privileged. Abell *v.* Howe, 43 Vt. 403; Hunter *v.* Watson, 12 Cal. 377, 73 Am. Dec. 543; Hart *v.* Bank 33. Vt. 252; The Distilled Spirits, 11 Wall. (U. S.) at p. 367.

[1] The Distilled Spirits, 11 Wall. (U. S.) 367.

[2] "While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating." DEVENS, J. in Innerarity *v.* Merchants' National Bank, 139 Mass. 332, 52 Am. Rep. 710, citing Kennedy *v.* Green, 3 Myl. & Keene 699, Cave *v.* Cave, 15 Ch. Div. 639; In re European Bank, 5 Ch. Ap. 358; In re Marseilles Extension Ry, L. R. 7 Ch. Ap. 161, (1 Eng. Rep. [Moak] 490); Atlantic National Bank *v.* Harris, 118 Mass. 147; Loring *v.* Brodie, 134 Mass. 453. See also Atlantic Cotton Mills *v.* Indian Orchard Mills, — Mass —, 17 North E. Rep. 496.

One of the most recent cases on the point is Dillaway *v.* Butler, 135 Mass. 479. A to whom B was indebted, advised C to lend money to B on the security of a mortgage on personal property, and acted as C's agent in completing the transaction. With the money thus obtained B paid A the debt he owed him. Both A and B acted in fraud of a statute of the State, but C had no knowledge of the fraud. It was held that the knowledge of A was not in law imputable to C al-

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and avowedly acting for himself and not as agent.[1] In such cases the presumption is that the agent will conceal any fact which might be detrimental to his own interests, rather than that he will disclose it. This rule applies to the agents of corporations as well as to those of private individuals. In such a case, says HORTON, C. J., "neither the acts nor the knowledge of an officer of a corporation will bind it in a matter in which the officer acts for himself, and deals with the corporation as if he had no official relation with it."[2]

though A had acted for C in the negotiation.

Kennedy *v.* Green, 3 Myl. & Keene, 699, (cited above) is a leading case upon this subject. There one Bostock a solicitor, who was solicitor both for Mrs. Kennedy and Mr. Kirby, was employed to negotiate the assignment for a large sum of a mortgage from the former to the latter. At the time of the execution of the assignment, he obtained also, by fraudulent practices, a receipt from the assignor for the money. Having obtained the money from his client, the assignee, instead of turning it over to his other client, the assignor of the mortgage, he embezzled it. Mrs. Kennedy thereupon brought an action against Green, the solicitor's assignee in bankruptcy, and Mr. Kirby, praying that the assignment of the mortgage might be declared void, and that the premises be reassigned to her. The Master of the Rolls granted the relief prayed for upon the ground that knowledge of Bostock's fraud was to be imputed to his client Kirby, and also upon the ground that the appearance of the deeds of assignment was such as to put a prudent man upon inquiry. Upon appeal the decision was affirmed upon the second ground, the Lord Chancellor being of opinion that Kirby was not to be charged with actual notice of the fraud, which though known to his solicitor who was the perpetrator of the fraud, it was equally certain that the solicitor would conceal.

[1] Speaking of the general rule, in Frenkel *v.* Hudson, 82 Ala. 158, 60 Am. Rep. 736. SOMERVILLE, J. says: "It has no application however, to a case where the agent acts for himself, in his own interest, and adversely to that of the principal. His adversary character and antagonistic interests take him out of the operation of the general rule, for two reasons: *first*, that he will very likely, in such case, act for himself, rather than for his principal; and, *secondly*, he will not be likely to communicate to the principal a fact which he is interested in concealing. It would be both unjust and unreasonable to impute notice by mere construction under such circumstances, and such is the established rule of law on this subject." Citing Terrell *v.* Branch Bank of Mobile, 12 Ala. 502; Lucas *v.* Bank of Darien, 2 Stew. (Ala.) 321; Wickersham *v.* Chicago Zinc Co. 18 Kans. 481, 26 Am. Rep. 784; Angell and Ames on Corp. §§ 308, 309; Story on Agency § 140.

[2] Wickersham *v.* Chicago Zinc Co. 18 Kans. 481, 26 Am. Rep. 784. See *post* § 729; Frenkel *v.* Hudson, 82 Ala. 158; 60 Am. Rep. 736. Reid *v.* Bank of Mobile, 70 Ala. 199.

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§ 724. **What Notice includes—Actual and constructive Notice.** The notice which will affect the principal may be the direct and unequivocal information of the fact, or it may, in certain cases, be inferred from the existence of other facts. The former is sometimes termed actual notice, and the latter constructive notice. The distinction, however, is not of any great practical importance, and perhaps, strictly the latter is to be regarded as much actual notice as the former. In either event, it is well settled that the principal may be bound by the one as fully as by the other. The rule as to what will constitute constructive notice may be said to be that wherever a party has knowledge of any fact sufficient to put a prudent man upon an inquiry which, if prosecuted with ordinary diligence, would lead to actual notice, he will be charged with the knowledge which might have been acquired by such diligence.[1] The presumption that he would have acquired such knowledge is not, however, indisputable, and it is always open to the party to show that he used such diligence without avail.[2]

§ 725. **Rule applies only to Matters within Agent's Authority.** This rule which imputes to the principal the knowledge possessed by the agent, applies only to cases where the knowledge is possessed by an agent within the scope of whose authority the subject-matter lies. In other words, the knowledge or notice must come to an agent who has authority to deal in reference to those matters which the knowledge or notice affects, and whose duty it therefore is to communicate it to his principal. The fact that some other agent, employed in reference to different and distinct transactions, may have had notice or knowledge will not affect the principal.[3]

"This," says DIXON, C. J., "seems very clear when we consider the reason and ground upon which this doctrine of constructive notice rests. The principal is chargeable with the knowledge of his agent because the agent is substituted in his place and represents him in the particular transaction; and it would seem to be an obvious perversion of the doctrine, and lead to

[1] Williamson v. Brown, 15 N. Y. 354; Baker v. Bliss, 39 Id. 70; Cambridge Valley Bank v. Delano, 48 Id. 326; Hood v. Fahnestock, 1 Penn. St. 479, 44 Am. Dec. 147; Chapman v. Glassell, 18 Ala. 50, 48 Am. Dec. 41.

[2] Williamson v. Brown, 15 N. Y. 354.

[3] Congar v. Chicago, &c. Ry Co. 24 Wis. 157, 1 Am. Rep. 164.

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most injurious results, if, in the same transaction, the principal were likewise to be charged with the knowledge of other agents, not engaged in it and to whom he had delegated no authority with respect to it, but who were employed by him in other and wholly different departments of his business."[1] Whether the rule be based upon the ground specified by the learned judge, or upon the duty of the agent to communicate, the result is the same,—no duty of communication would rest upon an agent where, from the nature of the acts to be performed by him, the knowledge or notice would appear to be of no use or interest to the principal.

But where two agents are employed to accomplish the same object, notice to, or knowledge by, one of them only, is notice to the principal, although the one to whom notice is given is not the one who finally accomplishes the object, and although the agent who had the notice or knowledge did not impart it to his principal.[2]

§ 726. **Notice after Termination of Authority does not bind.** It follows as a necessary conclusion from the principles considered, that notice to an agent, after his authority has entirely ceased, or after his authority to represent the principal in respect to the matters to which the notice relates has terminated, is not notice to the principal.[3] Under neither of the theories discussed, could such notice be imputed to the principal.

[1] In Congar v. Chicago, &c. Ry Co. *supra.*

[2] This rule is well illustrated in a recent case in the English Court of Appeal. Blackburn v. Vigors, 17 Q. B. Div. 553.* The plaintiff had instructed a broker to effect for him a re-insurance upon an over-due ship. While this broker was acting on behalf of the plaintiff, he received information of a material fact tending to show that the ship was lost. He did not communicate this information to the plaintiff and failed to effect the insurance. Afterwards the plaintiff employed another broker who obtained insurance from the defendant upon the ship, lost or not lost. Subsequent events showed that the ship had in fact been lost some time before the plaintiff attempted to effect the reinsurance, but neither the plaintiff nor the broker who finally obtained the insurance knew of, or concealed from defendant, any fact tending to show that the ship was lost. It was held that the knowledge of the first broker must be imputed to the plaintiff and that he could not recover on the policy. Fitzherbert v. Mather, 1 T. R. 12; Gladstone v. King, 1 M. & S. 34 and Proudfoot v. Montefiore, L. R. 2 Q. B. 511, were cited and relied upon.

[3] Boardman v. Taylor, 66 Ga. 638. Notice to former agent of a corpora

* This case was reversed in 12 App. Cases, 531, 38 Eng. Rep. 455.

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§ 727. **Notice must be of some material Matter.** The knowledge or notice which is to bind the principal must be of some matter so material to the transaction as to make it the agent's duty to communicate it to the principal.[1] It must also come from such an apparently authentic and reliable source, that an ordinarily prudent man would be required to give heed to it. But neither the principal nor the agent is bound to regard that which appears to be mere idle and baseless rumor or report.[2]

§ 728. **Notice to Subagent when Notice to Principal.** The question whether notice to a subagent is notice to the principal depends upon considerations already stated.[3] If the subagent be one whom the agent was expressly or impliedly authorized to appoint, he is to be deemed to be the agent of the principal, and notice to such subagent would be notice to the principal as in the case of other agents. But if the subagent be the agent of the agent merely, then there is no privity between him and the principal, and his knowledge cannot be imputed to the principal.[4]

§ 729. **These Rules apply to Corporations—Notice to Agent.** These rules apply with particular force to the case of corporations. From the very nature of the case, the executive functions of a corporation can only be exercised through the medium of the corporate agents to whom and through whom all notice to the corporation must come. Notice to the officers and agents of a corporation therefore, in reference to those matters to which their authority relates, is notice to the corporation.[5]

tion is not notice to the corporation after the agent has severed his connection with it. Great Western Ry v. Wheeler, 20 Mich. 419.

[1] Fairfield Savings Bank v. Chase, 72 Me. 226, 39 Am. Rep. 319.

[2] See Kerns v. Swape, 2 Watts (Penn.) 75; Jaques v. Weeks, 7 Id. 261; Pittman v. Sofley, 64 Ill. 155; Mulliken v. Graham, 72 Penn. St. 484.

[3] *Ante*, § 197.

[4] Hoover v. Wise, 91 U. S. 308; Storrs v. City of Utica, 17 N. Y. 104, 72 Am. Dec. 437; Boyd v. Vanderkemp, 1 Barb. Ch. (N. Y.) 273; Rourke v. Story, 4 E. D. Smith (N. Y.) 54; Lincoln v. Battelle, 6 Wend. (N. Y.) 475.

[5] Holden v. New York, &c. Bank, 72 N. Y. 286; Union Bank v. Campbell, 4 Humph. (Tenn.) 394; Waynesville Nat. Bank v. Irons, 8 Fed. Rep. 1; Hart v. Farmers', &c. Bank, 33 Vt. 252; Mihills Mnfg Co. v. Camp, 49 Wis. 130; Webb v. Graniteville Mnfg Co. 11 S. C. 396, 32 Am. Rep. 479; Farmers', &c. Bank v. Payne, 25 Conn. 444, 68 Am. Dec. 362; Wilson v. McCullough, 23 Penn. St. 440, 62 Am. Dec. 347; Fairfield Savings Bank v. Chase, 72 Me. 228, 39 Am. Rep. 319.

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But the peculiar characteristics of corporations render it imperative that this rule be kept within its proper limits. Not every person who is a member of a corporation, or who is connected with it, is its agent. Nor is every agent to be deemed to be an agent for all purposes. The magnitude of their business and the extent of territory over which their operations extend, require, in the case of many corporations, that their business be divided into several departments, each with its own complement of superior and inferior agents, and that agents be employed in various capacities, at different points. Attention, then, must be given to the questions whether the assumed agent is, in reality, the agent of the corporation in the given transaction, and if so, does the notice or knowledge relate to matters within the scope of his authority.

Regard must also be had to an exception to the general rules which has been previously considered. The doctrine of imputed notice rests, as has been seen, upon the principle that it is the duty of the agent to disclose to his principal all such knowledge and information as the agent possesses which is material to the subject-matter of the agency, and the law conclusively presumes that he has done so. Where, however, the agent has an interest in the transaction which would be prejudiced by the disclosure of the information, this presumption does not prevail. If, then, an officer or agent of the corporation himself deals, as a party in interest, with the corporation, the corporation will not be charged with notice of the information which he possesses relating to the transaction and which he does not disclose. In such a case the assumed agent is in reality the adverse party, and cannot be treated as an agent at all. He is seeking to promote and protect his own interests, and it is not to be expected that he can or will at the same time protect and advance those of the corporation.[1]

[1] Wickersham v. Chicago Zinc Co. 18 Kan. 481, 26 Am. Rep. 784; Barnes v. Trenton Gas L. Co., 27 N. J. Eq. 33; First Nat. Bank of Hightstown v. Christopher, 11 Vroom (40 N. J. L.) 435, 29 Am. Rep. 262, s. c. 8 Cent. L. Jour. 181, 8 Rep. 403; Innerarity v. Merchants' Nat. Bank, 139 Mass. 332, 52 Am. Rep. 710; Lyne v. Bank of Kentucky, 5 J. J. Marsh. (Ky.) 545; Commercial Bank v. Cunningham, 24 Pick. (Mass.) 270; Washington Bank v. Lewis, 22 Pick. (Mass.) 24; Stevenson v. Bay City, 26 Mich. 44; Gallery v. National, &c. Bank, 41 Mich. 169; Stratton v. Allen, 1 C. E. Green (N. J.) Eq. 229; Winchester v. Baltimore, &c. R. R. 4 Md. 231; Third

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These cases, however, are to be distinguished from those where the agent for some purpose of his own, fraudulently assigns, conveys or appropriates to the use of his principal the property of another. In such a case, if the principal after knowledge of the fraud seeks to appropriate and retain the benefit derived from the agent's fraud, he will be held to have ratified the fraud and will be chargeable with it.[1]

§ 730. Same Subject—When Notice to Director is Notice to Corporation. The question frequently arises whether notice to a director of a corporation is notice to the corporation. In dealing with this question, regard must be had to the scope and nature of the director's powers. The directors of a corporation are not individually its agents for the transaction of its ordinary business, which is usually delegated to its executive officers, such as its president, secretary, treasurer and the like. Directors are, it

National Bank *v.* Harrison, 10 Fed. Rep. 243; Louisiana State Bank *v.* Senecal, 13 La. 525; Seneca County Bank *v.* Neass, 5 Den. (N. Y.) 329; Hummell *v.* Bank of Monroe, — Iowa, —, 37 N. W. Rep. 954. Thus where the general superintendent of a corporation conveyed to it, with warranty, lands which he had purchased in his own interests and which were subject to a prior lease, of which he had actual knowledge, it was held that his knowledge could not be imputed to the corporation. Wickersham *v.* Chicago Zinc Co. 18 Kans. 481, 26 Am. Rep. 784. So where the president of a corporation conveyed to it land subject to a prior equity against himself, the corporation was held not chargeable with his knowledge. Frenkel *v.* Hudson, 82 Ala. 158, 60 Am. Rep. 736.

[1] Thus if the cashier or other officer of a bank who is secretly a defaulter takes or uses the money of A without authority to make good or cover up his default, the bank, if it seeks to retain the money after notice of the fraud will be held charged with the cashier's fraud and can acquire no title against A. Atlantic Cotton Mills *v.* Indian Orchard Mills, — Mass. —, 17 North E. Rep. 496. So a bank is chargeable with notice of facts vitiating the title to securities obtained by the collusion of its teller with an officer of another bank, by certifying as "good" the check of an irresponsible person which is taken by such other bank. Atlantic Bank *v.* Merchants' Bank, 10 Gray (Mass.) 532. So where the treasurer of a town, being also cashier of a bank, gave a note as treasurer of the town to raise money for his private use, and discounted the note as cashier, the bank was held charged with knowledge of his fraud. Bank of New Milford *v.* Town of New Milford, 36 Conn. 93. So where the cashier of a bank, who was also treasurer of another corporation, deposited securities of the latter to obtain a loan for the use of the former bank. Fishkill Savings Inst. *v.* Bostwick, 19 Hun (N. Y.) 354. See also Holden *v.* New York, &c. Bank, 72 N. Y. 286. But see Hummell *v.* Bank of Monroe, — Iowa, —, 37 N. W. Rep. 954.

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is true, possessed of extensive powers even to the extent of absolute control over the management of its affairs, but these powers reside in them as a board and not as individuals, and only when acting as a board in their collective capacity are they the representatives of the corporation. Notice to them when assembled as a board would undoubtedly be notice to the corporation.[1] So notice to an individual director which is in fact communicated to the board by him, is notice to the corporation, for this thus becomes notice to the board.[2]

But it is well settled, as a general rule, that the mere private knowledge of one or more individual directors concerning any business of the corporation, but which is not by them communicated to the board, is not to be imputed to the corporation.[3] This rule, however, is subject to certain exceptions resting upon obvious principles. Thus it has been held that notice communicated to a director officially for the express purpose of being communicated to the board is notice to the board, although he may have failed to do so, as it is clearly his duty to so communicate it and he ought to be conclusively presumed to have done his duty.[4]

So it has been held that a corporation is properly to be charged with information possessed by an individual director, whether disclosed or not, if, while possessing such knowledge, he acts with the board and as a member of it, upon the very matter to which

[1] First National Bank of Hightstown v. Christopher, 11 Vroom (40 N. J. L.) 435, 29 Am. Rep. 262; Fulton Bank v. New York, &c. Canal Co., 4 Paige (N. Y.) 127; Toll Bridge Co. v. Betsworth, 30 Conn. 380.

In re Marseilles, &c. Ry Co., 7 Ch. Ap. 161, 1 Eng. Rep. (Moak) 490.

[2] Farmers', &c. Bank v. Payne, 25 Conn. 444, 68 Am. Dec. 362; Bank of Pittsburgh v. Whitehead, 10 Watts (Penn.) 397, 36 Am. Dec. 186.

[3] Wilson v. McCullough, 23 Penn. St. 440, 62 Am. Dec. 347; Farmers', &c. Bank v. Payne, 25 Conn. 444, 68 Am. Dec. 362; Farrel Foundry v. Dart, 26 Conn. 376; Winchester v. Baltimore, &c. R. R. Co., 4 Md. 231; General Ins. Co. v. United States Ins. Co., 10 Md. 517, 69 Am. Dec. 174; United States Ins. Co. v. Shriver, 3 Md. Ch. 381; First National Bank of Hightstown v. Christopher, 11 Vroom (40 N. J. L.) 435, 29 Am. Rep. 262; Westfield Bank v. Cornen, 37 N. Y. 320, 93 Am. Dec. 573; Bank of U. S. v. Davis, 2 Hill (N. Y.) 463; National Bank v. Norton, 1 Hill (N. Y.) 572; Atlantic Bank v. Savery, 18 Hun 41, s. c. 82 N. Y. 291, 303; Getman v. Second National Bank, 23 Hun (N. Y.) 503; Sawyer v. Pawners' Bank, 6 Allen (Mass.) 207.

[4] United States Ins. Co. v. Shriver, 3 Md. Ch. 381; Boyd v. Chesapeake, &c. Canal Co., 17 Md. 195, 79 Am. Dec. 646.

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the information relates.[1] In such a case there is the strongest possible duty resting upon the director to communicate his information to the board, and it may well be presumed, as against the corporation, that he has done so. But, in accordance with the exception which has been heretofore noticed, that the agent will not be presumed to communicate information hostile to his own interests, it has been held that when a director is himself dealing as the other party with the corporation, the corporation will not be charged with notice of that knowledge possessed by the director which his own interest impelled him to conceal,[2] even though he acts with the board in reference to it.[3] A director may, also,

[1] National Security Bank v. Cushman, 121 Mass. 490; Innerarity v. Merchants' National Bank, 139 Mass. 332, 52 Am. Rep. 710; Union Bank v. Campbell, 4 Humph. (Tenn.) 394; Bank of United States v. Davis, 2 Hill (N. Y.) 451; Clerk's Savings Bank v. Thomas, 2 Mo. App. 367.

[2] "A bank or other corporation can act only through agents, and it is generally true, that if a director, who has knowledge of the fraud or illegality of the transaction, acts for the bank, as in discounting a note, his act is that of the bank and it is affected by his knowledge. National Security Bank v. Cushman, 121 Mass. 490. But this principle can have no application where the director of the bank is the party himself contracting with it. In such case the position he assumes conflicts entirely with the idea that he represents the interests of the bank. To hold otherwise might sanction gross frauds by imputing to the bank a knowledge those properly representing it could not have possessed." DEVENS, J. in Innerarity v. Merchants' National Bank, 139 Mass. 332, 52 Am. Rep. 710. In this case A shipped a cargo to B for sale on A's account, but gave B a bill of lading in latter's name. B was a director in defendant's bank. B borrowed a large sum of money of the bank and, without authority of A, pledged the bill of lading as security. B met and acted with the board in approving the loan but gave the board no notice of the true ownership of the cargo, nor did the bank have notice from any other source. In an action by the owner of the cargo it was held that the bank could not be charged with knowledge of the director's fraud.

In First National Bank of Hightstown v. Christopher, 40 N. J. L. 435, 29 Am. Rep. 262, P a member of a firm, procured at a bank of which he was a director, the discount of a note belonging to the firm, knowing that the note had been obtained by fraud, but not disclosing this fact to the other officers of the bank. The bank sued upon the note and were allowed to recover, the court holding that the knowledge of the director could not be imputed to the bank. To same effect: Commercial Bank v. Cunningham, 24 Pick. (Mass.) 270, 35 Am. Dec. 322; National Security Bank v. Cushman, 121 Mass. 491; Frost v. Belmont, 6 Allen (Mass.) 163. See also Atlantic Cotton Mills v. Indian Orchard Mills, — Mass. —, 17 North E. Rep. 496.

[3] Innerarity v. Merchants' National Bank, 139 Mass. 352, 52 Am. Rep. 710; Custer v. Tompkins County

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either by custom, acquiescence or express appointment, be charged with the performance of certain corporate duties, in respect to which he is to be regarded like any other agent of the corporation, and notice to him regarding such matters will be notice to the corporation.[1]

§ 731. **Same Subject—Notice to Stockholder not Notice to the Corporation.** The stockholders of a corporation, as such, are in no sense the agents of the corporation. They may, of course, be invested, like other individuals, with representative powers by the corporation and would in that event be treated like other agents; but their mere position as stockholders gives them no such authority. Notice to a stockholder is, therefore, not notice to the corporation.[2]

II.

LIABILITY OF THE PRINCIPAL IN TORT.

a. For Agent's Wrongful Acts.

§ 732. **In general.** The wrongful act of the agent, for which it may be sought to hold the principal liable, may have been one committed by the express directions of the principal. For such an act the principal will be seen to be liable, and upon the familiar maxim, *Qui facit per alium, facit per se.*[3]

But the question most frequently arises in cases where there was either no express direction at all, or an express direction not to do the act complained of. The same general principles which govern the liability of the principal in contract, will be found to apply here. In the execution of his authority, the agent represents the principal. While so acting, the agent's act is the act of the principal, and whatever injuries may result to third persons, from the manner in which the act is performed, are properly attributable to the principal. These injuries may be

Bank, 9 Penn. St. 27; Terrell v. Branch Bank of Mobile, 12 Ala. 502. United States Bank v. Davis, 2 Hill (N. Y.) 451; and Union Bank v. Campbell, 4 Humph. (Tenn.) 394, are *contra*. These cases, however, have been criticised and denied. See Inerarity v. Merchants' National Bank, *supra*. They are also cited with approval in Tagg v. Tennessee National Bank, 9 Heisk. (Tenn.) 479.

[1] Smith v. South Royalton Bank, 32 Vt. 341.

[2] Housatonic, &c. Bank v. Martin, 1 Metc. (Mass.) 294; Union Canal v. Loyd, 4 Watts. & S. (Penn.) 393.

[3] State v. Smith, 78 Me. 260, 57 Am. Rep. 802.

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the result of some act, either of commission or of omission, on the part of the agent, but in either event they have come to the third person because the agent, whom the principal set in motion, has neglected some duty which the circumstances imposed upon him.

It will be noticed, too, that the question of authority to do or not to do the particular act complained of, is not the criterion by which the liability of the principal is to be determined. If the agent be acting in the execution of his general authority to act, *i. e.*, in the scope of his employment, it is enough. Liability for what is done in accomplishing the object, follows as the result of the relation.

At the same time it is not to be inferred that every tortious act of the agent is to be attributed to the principal. The rule must be kept within the operation of the reasons upon which it is based. If, therefore, the agent goes beyond and outside of his employment to accomplish some independent purpose of his own, he cannot thereby carry the principal's responsibility with him. These general principles will be more fully discussed in the following sections.

§ 733. **Principal liable for Acts expressly directed.** For injuries which occur to third persons as the natural, proximate and legitimate result of an act which the principal has expressly directed or authorized his agent to do, the principal is clearly and unquestionably liable. Such results are the direct outgrowth of the deliberate intention of the principal, and he is as much to be charged with the responsibility as if he had performed the act in person.[1] This same principle is frequently applied to the case of independent contractors, and while the principal is not, as will be seen,[2] responsible for the acts of the contractor under all circumstances, yet wherever he has authorized or directed the doing of an act which is either in itself a source of injury, or which from its very nature is liable to cause injury to third persons, the principal is properly held responsible.[3]

[1] State v. Smith, 78 Me. 260, 57 Am. Rep. 802; Scott v. Shepherd, 2. W. Blackstone, 892; Guille v. Swan, 19 Johns. (N. Y.) 382, 10 Am. Dec. 234; Eaton v. European, &c. Ry Co., 59 Me. 520; Bacheller v. Pinkham, 68 Me. 255.

[2] See *post*, § 747.

[3] See *post*, §§ 747, 748.

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§ 734. **Liable for Agent's negligent Act in Course of Employment.** But the principal is not responsible for the results of his own intentional acts alone. He is liable also to third persons for injuries sustained by them on account of the negligence of an agent—not standing in the relation of independent contractor—in the performance of his undertaking.[1] In determining the principal's liability for the agent's negligence, the important inquiry is, not whether the agent was authorized to do or omit to do the act, the doing or not doing of which constitutes the negligence complained of, or whether the act was done or omitted in violation of the principal's instructions; but whether the act was done or omitted by the agent while engaged in the business of his principal.[2] As is well said by a learned judge, "In most cases where the master has been held liable for the negligence of his servant, not only was there an absence of authority to commit the wrong, but it was committed in violation of the duty which the servant owed the master. The principal is bound by a contract made in his name by an agent, only when the agent has actual or apparent authority to make it; but the liability of a master for the tort of his servant does not depend primarily upon the possession of an authority to commit it. The question is not solved by comparing the act with the authority.

It is sufficient to make the master responsible *civiliter*, if the wrongful act of the servant was committed in the business of the master, and within the scope of his employment, and this, although the servant, in doing it, departed from the instructions of his master. This rule is founded upon public policy and con-

[1] Cosgrove v. Ogden, 49 N. Y. 255, 10 Am. Rep. 361; Smith v. Webster, 23 Mich. 298; Higgins v. Watervliet Turnpike Co., 46 N. Y. 23, 7 Am. Rep, 293; Garretzen v. Duenckel, 50 Mo. 104, 11 Am. Rep. 405; Wilton v. Middlesex R. R. Co., 107 Mass. 108, 9 Am. Rep. 11; Pickens v. Diecker, 21 Ohio St. 212, 8 Am. Rep. 55; Jackson v. Second Ave. R. R. Co., 47 N. Y. 274, 7 Am. Rep. 448; Goddard v. Grand Trunk Ry. Co., 57 Me. 202, 2 Am. Rep. 39; Passenger R. R. Co. v. Young, 21 Ohio St. 518, 8 Am. Rep. 78; Bryant v. Rich, 106 Mass. 180, 8 Am. Rep. 311; Chicago, &c. R. R. v. Dickson, 63 Ill. 151, 14 Am. Rep. 114; Evans v. Davidson, 53 Md. 245, 36 Am. Rep. 400; Noblesville, &c. R. R. Co. v. Gause, 76 Ind. 142, 40 Am. Rep. 224; Quinn v. Power, 87 N. Y. 535, 41 Am. Rep. 392; Mulvehill v. Bates, 31 Minn. 364, 47 Am. Rep. 796; Stone v. Hills, 45 Conn. 44, 29 Am. Rep. 635; Chicago, &c. R. R. Co. v. Flexman, 103 Ill. 546, 42 Am. Rep. 33.

[2] Cosgrove v. Ogden, 49 N. Y. 255, 10 Am. Rep. 361.

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venience. Every person is bound to use due care in the conduct of his business. If the business is committed to an agent or servant, the obligation is not changed. The omission of such care is the omission of the principal, and for injury resulting therefrom to others, the principal is justly held liable. If he employs incompetent or untrustworthy agents, it is his fault; and whether the injury to third persons is caused by the negligence or positive misfeasance of the agent, the maxim *respondeat superior* applies, provided, only, that the agent was acting at the time for the principal and within the scope of the business entrusted to him." [1]

So, too, it is immaterial that the act was committed without the principal's knowledge, or that it was the result of the agent's misapprehension or misapplication of his principal's instructions, and was an act which the principal never intended should be done; if in fact it was done by the agent in the course of his employment, and not in the willful departure from it, the principal is liable.[2] It is immaterial also that the agent acted under a misapprehension as to the facts, or that he misjudged, or came to an erroneous conclusion regarding, the facts. If the principal put the agent into a situation where his duty requires him to determine the facts and act upon them, the principal must be held responsible to those who may suffer injury from the erroneous judgment of the agent.[3]

§ 735. **Same Subject—Acts in the Course of his Employment.** But in determining the scope of the employment, regard must be had, as in other cases, to the nature and extent of the agent's authority. Here, too, the material questions are, (1) What authority has the principal held the agent out as possessing? and, (2) Was the agent at the time acting within its scope? These are questions which are to be determined largely by the principles which have already been discovered. No general rule can be laid down by which all cases can be decided. In every instance it becomes a mixed question of law and fact, to be settled by reference to the peculiar facts and circumstances of the case. If

[1] ANDREWS, J., in Higgins *v.* Watervliet Turnpike Co., 46 N. Y. 23, 7 Am. Rep. 293.

[2] Chicago City Ry Co. *v.* McMahon, 103 Ill. 485, 42 Am. Rep. 29, and cases in note 1, p. 564.

[3] Higgins *v.* Watervliet Turnpike Co., 46 N. Y. 23, 7 Am. Rep. 293, and cases in note 1, p. 564.

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upon such an investigation, it be found that the agent was acting as such, within the apparent scope of his authority and in the performance of his undertaking, the principal is liable for the agent's negligent omission or commission, although the agent was not authorized to do the particular act complained of, or had received express instructions not to do it.[1]

This question can not, perhaps, be rendered clearer than by reference to some of the decided cases in which it has been determined.

§ 736. **Same Subject—Illustrations.** Thus where the principal instructed his agent to get a certain team of horses, intending that the agent should get them with the owner's consent, but the agent, misapprehending the instructions, took the horses without getting the owner's consent, and in using them killed one of them, it was held the principal was liable;[2] so where a father sent his son to get some cattle in a certain pasture, and the son, not finding them there, searched for them in the vicinity and having found them in a neighboring pasture, drove off with them, by mistake, two heifers belonging to another, it was held that the father was liable;[3] so where a master sent his servant to get some lumber belonging to him at a saw-mill, telling him to inquire of the sawyer, who would inform him which was the lumber, and the servant inquired, but was given such directions that he took the plaintiff's lumber, it was held that the master was liable;[4] so where a servant being sent to cut trees in a certain vicinity, ignorantly cut them on plaintiff's land, the master was held responsible.[5]

So where a railway engineer, who was running his train at a time when he had been expressly forbidden to do so, collided with a special train containing the plaintiff and thereby caused him serious injury, it was held that the disobedience of the engineer constituted no defense;[6] and where the agent of a lumber company caused lumber to be negligently piled in a place where his principal had instructed him not to have it piled,

[1] See cases cited in following section.

[2] Moir v. Hopkins, 16 Ill. 313, 63 Am. Dec. 312.

[3] Andrus v. Howard, 36 Vt. 248, 84 Am. Dec. 680.

[4] May v. Bliss, 22 Vt. 477.

[5] Luttrell v. Hazen, 3 Sneed (Tenn.) 20.

[6] Philadelphia & Reading R. R. Co. v. Derby, 14 How. (U. S.) 468.

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and the lumber fell upon and injured the plaintiff, the lumber company was held liable;[1] and where a clerk in a gun-store who had been expressly instructed not to load guns in the store, loaded one for the purpose of showing it to a customer, and in doing so the gun was carelessly discharged and shot the plaintiff, it was held that the clerk's principal was responsible.[2] So although a street car conductor may have been instructed not to carry passengers without payment of fare, yet if he negligently injures one whom he invited to ride free, the company is liable.[3]

So where a farm laborer, at work with others in his employer's corn-field, undertook to drive out some trespassing cattle, and, in so doing, carelessly killed one of them, it was held that driving out the cattle was within the scope of his employment, and that the employer was liable;[4] so where the conductor of a street car, deeming the plaintiff to be drunk and disorderly, forcibly ejected him from the car, it was held that the street car company was responsible, although the conductor might have been mistaken in his judgment;[5] and where the keeper of a toll-gate, who had charge of the gate at all hours but was not required to collect toll after nine o'clock in the evening, negligently let the beam of the gate down upon the plaintiff who was attempting to pass after that hour and injured her, it was held that the keeper was still acting in the course of his employment, and that his employer was liable;[6] so a teamster engaged in delivering coal for his employer, a coal dealer, is unquestionably acting within the scope of his employment in removing an iron plate in a sidewalk covering the coal cellar into which he is to put the coal, and if he negligently leaves the open hole unguarded, his employer is liable for an injury to one who thereby falls into it;[7] so where the pilot of a ferry-boat went out of his usual course to accommodate a passenger who was carried gratuitously, and in so doing negligently collided with a canal boat and killed the plaintiff's intestate, it was held that he was acting within the scope of his

[1] Cosgrove v. Ogden, 49 N. Y. 255, 10 Am. Rep. 361.

[2] Garretzen v. Duenckel, 50 Mo. 104, 11 Am. Rep. 405.

[3] Wilton v. Middlesex R. R. Co., 107 Mass. 108, 9 Am. Rep. 11.

[4] Evans v. Davidson, 53 Md. 245, 36 Am. Rep. 400.

[5] Higgins v. Watervliet Turnpike & R. R. Co., 46 N. Y. 23, 7 Am. Rep. 293.

[6] Noblesville, &c. Co. v. Gause, 76 Ind. 142, 40 Am. Rep. 224.

[7] Whiteley v. Pepper, 2 Q. B. Div. 276, 20 Eng. Rep. (Moak) 341.

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employment, and that his principal was liable;[1] so where a teamster employed by a flour merchant to deliver goods, having started out with a wagon load for different customers, left by the road side several bags of bran, while he went up a side road to deliver some flour, intending to take up the bran on his return,—his object being to lighten his load, and thus finish the delivery sooner so as to get time to attend to some business of his own,—and the bran frightened a passing horse and caused injury, it was held that the flour merchant was responsible.[2] The court said: "He left the bags to expedite delivery. Did it make the business his own because he dispatched it more speedily than it would naturally have been done? He was sent by the defendant to deliver the flour and bran. Did he do anything else than deliver them? His whole object in leaving the bran by the side of the road was to gain time. Suppose he had driven the horse with such speed as amounted to carelessness in order to gain time, and had injured a person by so doing; would he be transacting his own business while driving so rapidly, so that the defendant would not be liable? Suppose he had left the bran out of consideration for his horse, and the same result had followed; would the defendant be excused?"

The fact that the agent or servant is given quite large discretion or control as to the means or methods to be employed, or that he acts in some degree for himself, does not of itself determine that his acts are not within the scope of his employment. Thus where the defendant, who was the owner of a horse and express wagon, entrusted them to a driver with general authority to secure such business as he could, make his own contracts and to drive wherever it might be necessary to go in order to receive or deliver articles which he might be employed to transport, and the driver, while drawing a load for himself, negligently injured the plaintiff, it was held that the fact that the driver was carrying his own property was immaterial and that, while the defendant might require the driver to account to him for the value of the time occupied, he was none the less liable to the plaintiff;[3] so where the defendant, the proprietor of a cab, entrusted it to a driver with general authority to seek business at such places and

[1] Quinn v. Power, 87 N. Y. 535, 41 Am. Rep. 392.

[2] Phelon v. Stiles, 43 Conn. 426.

[3] Mulvehill v. Bates, 31 Minn. 364, 47 Am. Rep. 796

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in such manner as he pleased, the driver guaranteeing the proprietor a fixed sum per day, and the driver, while returning the cab one evening, went a little out of his way for a purpose of his own, and while so doing negligently injured the plaintiff, it was held that the relation of master and servant existed between the proprietor and the driver, that the driver was acting within the scope of his employment, and that the proprietor was liable;[1] and so where a traveling salesman who had no particular instructions as to the route he should pursue, or as to the mode of travel he should adopt, while traveling under his employment, hired a team and carriage to go from one town to another and, while so engaged, negligently permitted the team to run away and cause injury, his employers were held liable.[2]

It is likewise immaterial that the agent or servant is acting temporarily for, or under the immediate direction of, another person, if he be still employed in and about his principal's business. Thus where the owners of a carriage were in the habit of frequently hiring a team and driver for it from the same person, and, upon one of these occasions, the driver by his negligence caused injury to a third person, it was held that the driver, though subject to the general directions of the owners of the carriage as to the course to be pursued, etc., was still engaged in the business of his master, and that the latter was liable. And it was further held to make no difference that the owners of the carriage had always been driven by the same driver, he being the only regular coachman in the employ of the owners of the horses; or that the owners of the carriage had always paid him a fixed sum for each drive; or that they provided him with a livery which he left at their house at the end of each drive, and that the injury in question was occasioned by his leaving the horses while so depositing the livery where he was accustomed to leave it.[3] In this case

[1] Venables v. Smith, 2 Q. B. Div. 279, 20 Eng. Rep. (Moak) 845. The question of the relation existing between the parties was decided in view of a special statute making the proprietor liable, but the question of the scope of the employment was decided upon common law principles.

[2] Pickens v. Diecker, 21 Ohio St. 212, 8 Am. Rep. 55.

[3] Quarman v. Burnett, 6 Mees. & Wels. 499. Of this case Judge COOLEY says that it is one which, "whether correctly decided or not, has been too often and too generally recognized and followed to be questioned now." Joslin v. Grand Rapids Ice Co., 50 Mich. 516, 45 Am. Rep. 54. To the same point: Fenton v. Dublin Steam Packet Co., 8 Ad.

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Baron PARKE said: "Upon the principle that *qui facit per alium facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable who stood in the relation of master to the wrong-doer,—he who selected him as his servant, from the knowledge of, or belief in, his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey." That person was the owner of the horses, and not any one at whose service the horses and driver were temporarily placed. And it is immaterial to the application of the principle, that the hirer of the team selected, or asked expressly for, a particular driver.[1]

§ 737. **Not liable for Negligence not in Course of Employment.** But a principal or master is not liable for the acts of his agent or servant not within the real or apparent scope of his employment. If the agent or servant, therefore, steps outside of his employment to do some act for himself, not connected with his principal's business, the latter will not be liable for the agent's negligence while so engaged. Beyond the scope of his employment, the agent or servant is as much a stranger to his principal as though he were a third person.[2]

In determining whether a particular act was done in the course of the agent's employment, it is proper to inquire whether the agent was at the time serving his principal. If the act was done while the agent or servant was at liberty from the service, and

& El. 853; Dalyell *v.* Tyrer, El. Bl. & El. 899; Rapson *v.* Cubitt, 9 Mees. & Wels. 709; Hobbit *v.* London, &c. Ry Co., 4 Exch. 254.

Weyant *v.* Railroad Co., 3 Duer (N. Y.) 360; Blake *v.* Ferris, 5 N. Y. 48, 55 Am. Dec. 304.

[1] Quarman *v.* Burnett, *supra;* Holmes *v.* Onion, 2 Com. Bench (N. S.) 790; Joslin *v.* Grand Rapids Ice Co., *supra.* In this case S was in the regular employ of the defendant. On the day the injury occurred C hired of defendant one of its teams to assist him in his work, and requested that S be sent as driver. While S was driving the team in the business of C the injury occurred, but it was held that the Ice Co. was liable.

[2] Butler *v.* Basing, 2 C. & P. 613; Lamb *v.* Palk, 9 Id. 629; Joel *v.* Morison, 6 Id. 501; Storey *v.* Ashton, L. R. 4 Q. B. 479; Croft *v.* Alison, 4 B. & Ald. 590; Marsh *v.* South Carolina R. R. Co., 56 Ga 274; Richmond Turnpike Co. *v.* Vanderbilt, 1 Hill (N. Y.) 480; Isaacs *v.* Third Ave. R. R. Co., 47 N. Y. 122, 7 Am. Rep. 418; Wilson *v.* Peverly, 2 N. H. 548; Chicago, &c. Ry Co. *v.* Bayfield, 37 Mich. 205; Maddox *v.* Brown, 71 Me. 432, 36 Am. Rep. 336; Stone *v.* Hills, 45 Conn. 44, 29 Am. Rep. 635; Morier *v.* St. Paul, &c. Ry Co., 31 Minn. 351, 47 Am. Rep. 793.

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was pursuing his own ends exclusively, the principal is not liable.[1] If the servant or agent was at the time acting for himself and as his own master *pro tempore*, the principal is not liable.[2] If the servant or agent step aside from the principal's business, for however short a time, to do some act of his own, not connected with the principal's business, the relation of principal and agent or of master and servant, is, for the time, suspended.[3]

§ 738. **Same Subject—Illustrations.** The cases upon this point are numerous, but a few of them will serve to illustrate the principle. Thus where the defendant's teamster, having finished his day's work, had returned to the defendant's premises for the purpose of putting up his horse as was his duty, but instead of doing so drove off again on business of his own, and, in returning, injured the plaintiff, the defendant was held not liable.[4] MAULE,

[1] Butler v. Basing, 2 C. & P. 613, and cases *supra*.

[2] Bard v. Yohn, 26 Penn. St. 482, and cases *supra*.

[3] Joel v. Morison, 6 C. & P. 501, and cases *supra*.

[4] Mitchell v. Crasweller, 13 Com. Bench 237. So in Storey v. Ashton, L. R. 4, Q. B. 476, the defendant intrusted his servant with his horse and cart for the day, and when his work was ended and it was his duty to drive home, the servant for a purpose of his own and without express or implied authority from his master, drove in an entirely different direction and by his carelessness injured the plaintiff. The court held the master not liable.

In Sleath v. Wilson, 9 C. & P. 607, ERSKINE, J., said in his charge to the jury: "But whenever the master has intrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it. * * * The master in such a case will be liable, and the ground is, *that he has put it in the servant's power to mismanage the carriage by intrusting him with it.*" But this reason of ERSKINE, J., was disapproved in Storey v. Ashton, *supra*. In that case COCKBURN, C. J., said: "I think the judgment of Maule and Cresswell, JJ., in Mitchell v. Crassweller, (*supra*) expresses the true view of the law, and the one which we ought to abide by; and that we cannot adopt the view of ERSKINE, J., in Sleath v. Wilson, that it is because the master has intrusted the servant with the control of the horses and cart that the master is responsible. The true rule is that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant. I am very far from saying, if the servant when going on his master's business took a somewhat longer road, that owing to this deviation he would cease to be in the employment of the master so as to divest the latter of all liability; in such cases it is a question of degree as to how far the deviation could be considered a separate journey. Such a consideration is not applicable to the present case, because here the carman started on an entirely new and independent

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J., said: "At the time of the accident the servant was not going a roundabout way to the stable, and, as one of the cases expresses it, making a detour. He was not engaged in the business of his employer. But in violation of his duty, so far from doing what he was employed to do, he did something totally inconsistent with his duty, a thing having no connection whatever with his employer's service. The servant only is liable and not the employer. All the cases are reconcilable with that. The master is liable even though the servant, in the performance of his duty, is guilty of a deviation or failure to perform it in the strictest and most convenient manner. But where the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant, and therefore is not responsible for the negligence of the servant in doing it."

And so in a recent case in Maine, it appeared that the defendant's son, a minor of the age of seventeen years, took his father's horse and carriage, which he had been allowed to use without restriction, and drove to a store for the purpose of depositing money which, as treasurer of a Sunday school, he had received the day before. Entering the store to make the deposit, he left the horse unfastened and unattended, and the horse ran away, colliding with plaintiff's team, and caused the injury for which the action was brought against the father. The horse and carriage were taken in the father's absence, and without his knowledge. The court held that, under these circumstances, the son could not be considered as engaged in the business of his father, or as acting for him, and that the father was therefore not liable.[1]

journey, which had nothing at all to do with his employment. It is true that in Mitchell v. Crassweller the servant had got nearly, if not quite, home, while in the present case, the carman was a quarter of a mile from home; but still he started on what may be considered a new journey entirely for his own business, as distinct from that of his master; and it would be going too far to say that under such circumstances the master was liable."

[1] Maddox v. Brown, 71 Me. 432, 36 Am. Rep. 336. If a master gives his servant liberty for a day to go to a fair, and to take the master's horse and wagon, the master is not liable to third persons for an injury done by the servant during the day with the horse and wagon. Bard v. Yohn, 26 Penn. St. 482. The owner of a horse is not liable for an injury caused by the negligent driving of a borrower, to a third person, if the horse was not being used at the time in the owner's

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So a truck-driver, having finished his master's business and being directed to put up his team and while on his way to the barn for that purpose, was met by another of the defendant's servants, at whose request and for whose accommodation he went to deliver a trunk. On the way he negligently ran over and killed the plaintiff's intestate, but it was held that he was not then engaged in the master's business and the master was therefore not liable.[1]

In a recent case in Connecticut it appeared that the defendants ordered their teamster to deliver a load of paper to T. On reaching T's, he requested the teamster to carry the paper four and a half miles further on to Hartford and, at the railway station there, to get some freight for T and bring it to him. The teamster consented, and while getting the freight his team, which he had left unhitched at the station, ran away and injured plaintiff's property. The court held that when the teamster accepted instructions from T and became a carrier of merchandise for him to and from a railway station in an adjoining town, he temporarily threw off his employers' authority, abandoned their business and left their service, and that the defendants were therefore not liable.[2]

So where workmen employed upon a railroad, during the noon hour built a fire by the side of the track to cook their dinner,

business. Herlihy v. Smith, 116 Mass. 265. A coachman, after having used his master's horse and carriage in going upon an errand for his master, instead of taking them to the stable, used them in going upon an errand of his own without his master's knowledge or consent, and while so doing negligently ran into and injured the plaintiff's horse, but it was held that the master was not liable. Sheridan v. Charlick, 4 Daly (N. Y.) 338.

[1] Cavanagh v. Dinsmore, 12 Hun (N. Y.) 465.

[2] Stone v. Hills, 45 Conn. 44, 29 Am. Rep. 635. In Lamb v. Palk, 9 C. & P. 629, where a servant driving his master's horse got off the carriage and took hold of a horse standing before a van and caused the van to move so as to make room for the carriage to pass, whereby a packing case fell from the van and broke the thills of plaintiff's gig, it was held that the master was not liable for the injury. In Campbell v. City of Providence, 9 R. I. 262, the defendant, a hack owner, employed a person as day driver. The driver used the hack at night without the master's knowledge or consent. It was held that the master could not be held responsible for an omission on the part of the driver to comply with the terms of a city ordinance during the time of such unauthorized use of the hack.

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and the fire spread to an adjoining field, it was held that the railway company was not responsible.[1]

In a recent English case it appeared that defendants were solicitors occupying offices over plaintiffs' store. The defendants employed clerks whose duties were performed in the general office in which there was a lavatory for their use. They had express orders that no clerk was to go into the private offices after the members of the firm had left them. On the day in question, one of the clerks, after the solicitors had gone, went into one of the private offices to wash his hands at the lavatory in that room. He negligently left the water tap turned and the water flooded the plaintiffs' premises. The plaintiffs brought their action against the solicitors, and it was urged that the clerk was acting within the scope of his employment.

But GROVE, J., said: "I am of opinion that the verdict should be entered for the defendants. No doubt this question is a very nice one, and there may be cases close to the line between the liability and non-liability of a master for the act of another person done in the 'course of his employment' if he is a servant, or 'within the scope of his authority' when he is an agent, for * * such is the mode in which those terms have been applied by the courts, although the words 'scope of authority' may cover both cases. * * *

Although a definition is difficult, I should say that the act,

[1] Morier v. St. Paul, &c. Ry. Co., 31 Minn. 351, 47 Am. Rep. 793. In Woodman v. Joiner, 10 Jur. (N. S.) 852, the plaintiff permitted the defendant to use his shed temporarily as a carpenter shop, and the defendant's workman in lighting his pipe set the shed on fire; held, that the defendant was not liable. In the one case, cooking dinners and in the other lighting and smoking pipes, was no part of the servant's duties. See also Wilson v. Peverly, 2 N. H. 548. In Aycrigg v. New York, &c. R. R. Co., 30 N. J. L. 460, it appeared that the captain of a ferry boat which was lying at the wharf, saw a barge on fire in the river, and without any orders so to do, went out into the river and attempted to tow the burning barge up stream. In doing this the barge was brought against another boat to which the fire was communicated and it was injured. It was held that going to the aid of the burning barge was outside of the scope of the duty of the captain of the ferry boat, and that his employers were not liable.

So where the servant of a stable keeper killed a horse by immoderate driving, at a time when he was driving without authority and upon purposes of his own, his master was held not liable. Adams v. Cost, 62 Md. 264, 50 Am. Rep. 211.

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for which the master is to be held liable, must be something incident to the employment for which the servant is hired, and which it is his duty to perform. * * * I think I should have come to the same conclusion as that I have arrived at, if there had been no express prohibition in the case, and it had merely been shown that the clerks had a room of their own and a lavatory where they could wash their hands. Then what possible part of the clerk's employment could it be for him to go into his master's room to use his master's lavatory, and not only the water, but probably his soap and towels, solely for his, the clerk's, own purposes? What is there in any way incident to his employment as a clerk? I see nothing. The case seems to me just the same as if he had gone up two or three flights of stairs and washed his hands in his master's bed-room. It is a voluntary trespass on the portion of the house private to his master. I do not use the word trespass in the sense of anything seriously wrong, but he had no business there at all. In doing that which his employment did not in any way authorize him to do, he negligently left the stop-cock open and the water escaped and did damage. I think there was nothing in this within the scope of his authority or incident to the ordinary duties of his employment." [1]

§ 739. **Liability for Agent's fraudulent Act.** The principal is also liable for the wrongful, fraudulent or deceitful act of the agent committed within the scope of his authority.[2] As is said

[1] Stevens v. Woodward, 6 Q. B. Div. 318, 29 Eng. Rep. (Moak) 645. GROVE, J., further said: "The case is a little stronger by reason of the prohibition, but I quite agree * * * that there are cases where a prohibition would have no effect, and I cannot put a nearer one than that I suggested during the argument; suppose this were not a clerk, but a housemaid whose duty it was to clean up the room and attend to the lavatory and wipe out the basin, then I think, that although she was expressly prohibited from using the basin, and was told not to leave the tap open, yet, notwithstanding the prohibition, her act of using the basin and omitting to turn off the water would be so incident to her employment that the master would be liable." LINDLEY, J., concurred, saying: "I am of the same opinion and I agree for much the same reasons. I do not see on what principle the defendants are to be held liable for the negligent acts of a man who trespasses in their room and leaves their tap running. The facts show that the clerk was a trespasser after his master had left."

[2] Johnson v. Barber, 5 Gilm. (Ill.) 425, 50 Am. Dec. 416, Armstrong v. Cooley, 5. Gilm. (Ill.) 512; Sherman v. Dutch, 16 Ill. 285; Moir v. Hop-

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by a learned judge in a case involving the fraudulent disposition by an agent of bonds of a third person, with which he had been intrusted by his principal: "It is difficult to understand upon what ground the principal should be held liable for the negligence of his agent and not for his fraud, where the act is done or omitted to be done to the very property as to which the agency exists, and in the course of the agency. Fraud by which the property is lost is generally considered one of the forms of gross negligence. What is the proper understanding of the phrase 'within the scope of the agency?' Does 'the scope' include negligence and exclude fraud? It cannot properly be restricted to what the parties intended in the creation of the agency, for that would also exclude negligence, as no agent is appointed for the purpose of being negligent, any more than for the purpose of acting fraudulently. The question cannot be determined by the authority intended to be conferred by the principal. We must distinguish between the authority to commit a fraudulent act, and the authority to transact the business in the course of which the fraudulent act was committed. Tested by reference to the intention of the principal, neither negligence nor fraud is within 'the scope of the agency'; but tested by the connection of the act with the property and business of the agency, fraud in taking the very property is as much 'within the scope of the agency' as negligence in allowing others to take it. The proper inquiry is, whether the act was done in the course of the agency and by virtue of the authority as agent. If it was, then the principal is responsible, whether the act was merely negligent or fraudulent."[1]

§ 740. **When Principal liable for Agent's wilful or malicious Act.** While, as has been seen, it is well settled that the principal is liable for the negligent act of his agent, committed in the course of his employment, it has been held in many cases,[2] that he is not liable for the agent's willful or malicious act.

kins, Id. 315; Keedy v. Howe, 72 Ill. 136; Locke v. Stearns, 1 Metc. (Mass.) 560, 35 Am. Dec. 382; Reynolds v. Witte, 13 S. Car. 5, 36 Am. Rep. 678.

[1] Reynolds v. Witte, *supra*.

[2] McManus v. Crickett, 1 East, 106; Wright v. Wilcox, 19 Wend. (N. Y.) 345, 32 Am. Dec. 507; Tuller v. Voght; 13 Ill. 285; Brown v. Purviance, 2 H. & G. (Md.) 316; Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168; Church v. Mansfield, 20 Conn. 284; Bard v. Yohn, 26 Penn. St. 482; Mali

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In the language of Judge COWEN, which fairly states the doctrine of these cases, "The dividing line is the wilfulness of the act."[1]

The tendency of modern cases, however, is to attach less importance to the intention of the agent and more to the question whether the act was done within the scope of the agent's employment; and it is believed that the true rule may be said to be that the principal is responsible for the wilful or malicious acts of his agent, if they are done in the course of his employment and within the scope of his authority;[2] but that the principal is not liable for such acts, unless previously expressly authorized, or subsequently ratified, when they are done outside of the course of the agent's employment, and beyond the scope of his authority, as where the agent steps aside from his employment to gratify some personal animosity, or to give vent to some private feeling of his own.[3]

The question of what acts are within the scope of the employment, is no less difficult of determination here than in those cases where the principal's liability for the agent's negligence is involved, but the principles are the same. Indeed, the determination of whether the principal would have been liable had the same injury resulted from the agent's negligence or unskillfulness, will often be of aid, for if the act in the latter case would be within the scope of the employment, it is none the less so where the intention was wilful. Where the principal owes to third per-

v. Lord, 39 N. Y. 381, 100 Am. Dec. 448; State v. Morris, &c. R. R. Co., 3 Zab. (N. J.) L. 360; Illinois Cent. R. R. Co. v. Downey, 18 Ill. 259.

[1] In Wright v. Wilcox, 19 Wend. (N. Y.) 345, 32 Am. Dec. 507.

[2] Croaker v. Chicago, &c. Ry Co., 36 Wis. 657, 17 Am. Rep. 504; Redding v. South Carolina R. R. Co., 3 S. C. 1, 16 Am. Rep. 681; Stewart v. Brooklyn, &c. R. R. Co., 90 N. Y. 588, 43 Am. Rep. 185; Chicago, &c. R. R. Co. v. Flexman, 103 Ill. 546, 42 Am. Rep. 33; Goddard v. Grand Trunk Ry Co., 57 Me. 202; 2 Am. Rep. 39; McKinley v. Chicago, &c. Ry Co., 44 Iowa 314, 24 Am. Rep. 748; Noblesville, &c. Co. v. Gause, 76 Ind. 142, 40 Am. Rep. 224; Gilliam v. South, &c. Alabama R. R. Co., 70 Ala. 268; Chicago, &c. Ry Co. v. Dickson, 63 Ill. 151, 14 Am. Rep. 114; Nashville, &c. R. R. Co. v. Starnes, 9 Heisk. (Tenn.) 52, 24 Am. Rep. 296; Shea v. Sixth Ave. R. R. Co., 62 (N. Y.) 180, 20 Am. Rep. 480; Little Miami R. R. Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373; Carter v. Howe Sewing Machine Co., 51 Md. 290, 34 Am. Rep. 311.

[3] McManus v. Crickett, 1 East 106; Gilliam v. South, &c. Alabama R. R. Co., 70 Ala. 268; Stevens v. Woodward, 6 Q. B. Div. 318, 29 Eng. Rep. p. 645; and cases cited in note 2, page 576.

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sons the performance of some duty, as to do or not to do a particular act, and he commits the performance of this duty to an agent, the principal cannot escape responsibility *civiliter* if the agent fails to perform it, whether such failure be accidental or willful, or whether it be the result of negligence or of malice.[1]

These principles, as will be seen, have been most frequently applied in modern times to the case of railroad companies and other carriers of persons, and it has been thought that a different rule of liability attached to such companies than applies to other principals. It is believed, however, that there is no real ground for the distinction. Another element does, however, enter into these cases, in respect of which they differ from many others, and this is the peculiar and exacting nature of the duty which such carriers owe to their passengers. While carriers of persons are not insurers of the safety of their passengers, they are bound to exercise the highest degree of care for their safety, protection and comfort. They are bound to take all those precautions and exert all of those efforts which are requisite to render the transportation most comfortable and least annoying to their passengers,[2] and not only this, but there is also an implied stipulation on their part, says Judge STORY, "not for protection merely, but for respectful treatment, for that decency of demeanor which constitutes the charm of social life, for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. In respect to females, it proceeds yet further; it includes an implied stipulation against general obscenity, that immodesty of approach which borders on lasciviousness and against that wanton disregard of the feelings which aggravates every evil."[3]

§ 741. **Same Subject—Illustrations.** The scope of the rulings

[1] Croaker v. Chicago &c. Ry Co., 36 Wis. 657, 17 Am. Rep. 504; Goddard v. Grand Trunk Ry Co., 57 Me. 202, 2 Am. Rep. 39; Passenger Ry Co. v. Young, 21 Ohio St. 518, 8 Am. Rep. 78; Bryant v. Rich, 106 Mass. 180, 8 Am. Rep. 311; Sherley v. Billings, 8 Bush (Ky.) 147, 8 Am. Rep. 451; Shea v. Sixth Ave. R. R. Co., 62 N. Y. 180, 20 Am. Rep. 480; Rounds v. Delaware &c. R. R. Co., 64 N. Y. 129, 21 Am. Rep. 597; Hanson v. European &c. Ry Co., 62 Me. 84, 16 Am. Rep. 404; McKinley v. Chicago &c. Ry Co., 44 Iowa 314, 24 Am. Rep. 748.

[2] See cases cited in preceding note.

[3] In Chamberlain v. Chandler, 3 Mason (U. S. C. C.) 242.

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upon this subject can be best illustrated by some selections from the adjudicated cases. Thus in a leading case in New York,[1] in which the older and more rigid rule was adhered to, it appeared that a son while driving his father's horses and wagon about his father's business, seeing some boys attempting to get into the wagon, whipped up his horses and the wagon ran over one of the boys who was seen to be between the wheels when the horses were started. An action was brought against the father and the son jointly to recover damages, and a verdict rendered against them both. But COWEN J., said: "It is impossible to sustain this verdict against the father. It is difficult to infer from the evidence, anything short of a design in Stephen (the son), to throw the plaintiff's boy from the wagon; and the judge, as I understand the charge, told the jury that the defendants were jointly liable in that view. If Stephen, in whipping the horses, acted with the willful intention to throw the plaintiff's boy off, it was a plain trespass, and nothing but a trespass, for which the master of Stephen is no more liable than if his servant had committed any other assault and battery. All the cases agree that a master is not liable for the willful mischief of his servant, *though he be at the time, in other respects, engaged in the service of the former.*[2] Why is the master chargeable for the act of his servant? Because what a man does by another he does by himself. The act is within the scope of the agency. 'A master is not answerable,' says Mr. Hammond, 'for every act of his servant's life, but only for those done in his relative capacity. To charge the master, it must always be shown or presumed, that the relation of master and servant subsisted between them in the particular affair. If the master is liable under other circumstances, he is so, not *quatenus* master, but as any one would be who instigates an injury.' *The dividing line is the willfulness of the act.* If the servant make a careless mistake of commission or omission, the law holds it to be the master's business negligently done. It is of the very nature of business that it may be well or ill done. We frequently speak of a cautious or careless driver in another's employment. Either may be in the pursuit of his master's busi-

[1] Wright v. Wilcox, 19 Wend. (N. Y.) 343, 32 Am. Dec. 507.

[2] Citing 1 Chit. Pl. 69; McManus v. Crickett, 1 East. 106, Hammond on Parties 83; Croft v. Alison, 4 Barn. & Ald. 590; 1 Chit. Gen. Pr. 80; Bowcher v. Noidstrom, 1 Taunt. 568.

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ness, and negligence in servants is so common, that the law will hold the master to the consequences as a thing that he is bound to foresee and provide against.

But it is different with a willful act of mischief. To subject the master in such a case, it must be proved that he actually assented, for the law will not imply assent. In the particular affair, there is, then, no longer the presumed relation of master and servant. The distinction seems to resolve itself into a question of evidence."

The rule here announced by Judge Cowen is undoubtedly that laid down by the older cases.[1] But the better and more modern rule clearly is that the mere nature of the act is not the only criterion, but that the most important test is whether the act was done in the course of the employment. Thus RYAN, C. J., says: "We cannot help thinking that there has been some useless subtlety in the books in the application of the rule *respondeat superior*, and some unnecessary confusion in the liability of principals for willful and malicious acts of agents. This has probably arisen from too broad an application of the *dictum* of Lord Holt, that 'no master is chargeable with the acts of his servant but when he acts in the execution of the authority given to him, and the act of the servant is the act of the master.'[2] For this would seem to go to excuse the master for the negligence as well as for the malice of his servant. One employing another in good faith to do his lawful work, would be as little likely to authorize negligence as malice; and either would be equally *dehors* the employment. Strictly, the act of the servant would not, in either case, be the act of the master. It is true that so great an authority as Lord KENYON denies this, in the leading case of McManus *v.* Crickett,[3] which has been so extensively followed; and again, in Ellis *v.* Turner,[4] distinguishes between the negligence and the willfulness of the one act of the agent, holding the principal for

[1] McManus *v.* Crickett, 1 East. 106; Ellis *v.* Turner, 8 T. R. 531; Middleton *v.* Fowler, 1 Salk. 282; Croft *v.* Alison, 4 B. & Ald. 590; Bowcher *v.* Noidstrom, 1 Taunt. 568. See also Tuller *v.* Voght, 13 Ill. 285; Brown *v.* Purviance, 2 H. & G. (Md.) 316; Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168; Church *v.* Mansfield, 20 Conn. 284; Bard *v.* Yohn, 26 Penn. St. 482; Mali *v.* Lord. 39 N. Y. 381, 100 Am. Dec. 448; State *v.* Morris &c. Ry Co., 3 Zab (N. Y.) 360; Illinois Cent. R. R. Co. *v.* Downey, 18 Ill. 259.

[2] Middleton *v.* Fowler, 1 Salk. 282.

[3] 1 East. 106, *supra*.

[4] 8 Term Rep. 531.

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the negligence but not for the willfulness. It is a singular comment on these subtleties, that McManus *v.* Crickett appears to rest on Middleton *v.* Fowler, the only adjudged case cited to support it; and that Middleton *v.* Fowler, was not a case of malice, but of negligence, Lord HOLT holding the master in that case not liable for the negligence of his servant, in such circumstances as no court could now doubt the master's liability. In spite of all the learned subtleties of so many cases, the true distinction ought to rest, it appears to us, on the condition whether or not the act of the servant be in the course of his employment."[1]

It does not, by any means, follow from this rule that the principal is liable for *any* willful or malicious act of his agent, but only for those which are committed by the agent while acting in the course of his employment and within the scope of his authority. At the same time, it is not to be inferred that the principal's liability depends upon whether he has or has not intentionally authorized the doing of the wrongful act. If he has done so, he is, of course, liable. But what is meant, is, that if the agent, while engaged in doing something which he is authorized to do, and while acting in the execution of his authority, inflicts an injury upon third persons, though willfully or maliciously, the principal is liable. But if, on the other hand, the agent steps aside from his employment to do some act having no connection with the principal's business, and to which he is inspired by pure personal and private malice or ill will, the principal is not liable.

Thus it is held that where the engineer upon a locomotive engine wantonly and maliciously sounds the whistle so as to frighten the horses of the plaintiff, a traveller upon the highway, causing them to run away and injure the plaintiff,[2] or where he wantonly and willfully runs down and kills the plaintiff's cattle,[3] the engineer's principal is responsible for the injury so inflicted. But in

[1] Croaker *v.* Chicago & Northwestern Ry Co. 36 Wis. 657, 17 Am. Rep. 504; See also Redding *v.* South Carolina R. R. Co., 3 S. C. 1, 16 Am. Rep. 681.

[2] Chicago, Burlington & Quincy R. R. Co. *v.* Dickson, 63 Ill. 151, 14 Am. Rep. 114; Nashville & Chattanooga R. R. Co. *v.* Starnes, 9 Heisk. (Tenn.) 52, 24 Am. Rep. 296; Toledo, Wabash & West. Ry Co. *v.* Harmon, 47 Ill. 298.

[3] Illinois &c. R. R. Co. *v.* Middlesworth, 46 Ill. 494; Detroit &c. R. R. Co. *v.* Barton, 61 Ind. 293; Pritchard *v.* La Crosse &c. R. R. Co., 7 Wis. 232.

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such a case it was held that exemplary or punitive damages should not be awarded in the absence of evidence that the principal, knowing of the reckless or willful character of the agent, still retained him in his employment.[1]

It will be noticed that the person injured in these cases was not a passenger, or other person, to whom the principal sustained any particular duty by contract of carriage or otherwise.

So a principal is responsible for a malicious prosecution instituted or conducted by his agent in the course of his employment. For such a prosecution begun or carried on by the express instructions of the principal, he is, of course, liable; so also if he has subsequently ratified and confirmed the act; and although there are conflicting decisions, the better rule seems to be that if the action is instituted or prosecuted by the agent, while engaged in the course of his employment, and within the scope of his authority, the principal is liable, even though it were done without his knowledge or consent, or contrary to his instructions.[2] And a corporation is liable for a malicious prosecution,[3] or for a false imprisonment,[4] by its agent, under the same circumstances as an individual.

[1] Nashville &c. R. R. *v.* Starnes, *supra*. See Cleghorn *v.* New York &c. R. R. Co., 56 N. Y. 44, 15 Am. Rep. 375; Goddard *v.* Grand Trunk Ry Co., 57 Me. 202, 2 Am. Rep. 39; Bass *v.* Chicago & N. W. Ry Co. 42 Wis. 654, 24 Am. Rep. 437.

[2] See cases cited in two following notes:

Contra, only when expressly authorized or ratified:—Wallace *v.* Finberg, 46 Tex. 35; Dally *v.* Young, 3 Ill. App. 39.

[3] Wheless *v.* Second Nat. Bank, 1 Baxt. (Tenn.) 469, 25 Am. Rep. 783; Goodspeed *v.* East Haddam Bank, 22 Conn. 530; 58 Am. Dec. 439; Iron Mountain Bank *v.* Mercantile Bank, 4 Mo. App. 505; Williams *v.* Planters' Ins. Co., 57 Miss. 759, 34 Am. Rep. 494; Vance *v.* Erie Ry Co., 32 N. J. L. 334; Copley *v.* Grover & Baker Sewing Machine Co., 2 Woods (U. S. C.C.) 494; National Bank *v.* Graham, 100 U. S. 699; Edwards *v.* Midland Ry Co., 6 Q. B. Div. 287, 29 Eng. Rep. (Moak) 621; Wheeler & Wilson Mnf'g Co. *v.* Boyce, 36 Kans. 350, 59 Am. Rep. 571.

Contra, Owsley *v.* Montgomery &c. R. R. Co., 37 Ala. 560; Childs *v.* Bank of Missouri, 17 Mo. 213. Not where the prosecution was a *criminal* one, Gillett *v.* Missouri Valley R. R. Co., 55 Mo. 315, 17 Am. Rep. 653; Only when expressly authorized or ratified. Carter *v.* Howe Machine Co., 51 Md. 290, 34 Am. Rep. 311.

[4] Wheeler & Wilson Manf'g Co. *v.* Boyce, 36 Kans. 350, 59 Am. Rep. 571. "It is a well established principle of jurisprudence" says JOHNSTON, J. in this case, "that corporations may be held liable for torts involving a wrong intention, such as false imprisonment, and exemplary damages may be recovered against them for the wrongful acts of their

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But where in addition to the duties which are owing to every individual, the principal has assumed special responsibilities by contract or operation of law, as to carry the individual as a passenger in a public conveyance, the rule of liability is properly enforced with great strictness. It has been thought that these cases stood upon a distinct ground, but the distinction seems to be unnecessary. There can certainly be no question that an agent who violates the duty which the principal owes to the passenger, is to be deemed to have done so while acting in course of his employment.

Thus where a railway brakeman assaulted and grossly insulted a passenger, upon the false pretense that the passenger had not surrendered his ticket, the company was held liable.[1] And the same result ensued where the conductor of a passenger train had willfully and wrongfully caused passengers to be ejected from the train;[2] where the steward and some of the table waiters upon a passenger-boat wrongfully and without provocation assaulted a passenger;[3] where the conductor of a passenger train kissed a female passenger against her will;[4] where a brakeman struck a passenger in the face with a lantern because the passenger, who had lost his watch, said he thought the brakeman had it;[5] where the driver of a street railroad car maliciously assaulted a passenger because the passenger expostulated with the driver about an assault made by the driver upon another person outside the car;[6] and where a railway brakeman made a malicious assault upon a passenger who had attempted to enter the wrong car.[7]

But where a prospective passenger, while seeking to get his trunk checked, provoked a personal quarrel with the baggage-

servants and agents done in the course of their employment, in all cases, and to the same extent, that natural persons committing like wrongs would be held liable. In such cases the malice and fraud of the authorized agents are imputable to the corporations for which they acted."

[1] Goddard *v.* Grand Trunk Ry, 57 Me. 202, 2 Am. Rep. 39.

[2] Passenger R. R. Co. *v.* Young, 21 Ohio St. 518, 8 Am. Rep. 78.

[3] Bryant *v.* Rich, 106 Mass. 180, 8 Am. Rep. 311; same point, Sherley *v.* Billings, 8 Bush (Ky.) 147, 8 Am. Rep. 451.

[4] Croaker *v.* Chicago & N. W. Ry Co., 36 Wis. 657, 17 Am. Rep. 504.

[5] Chicago & Eastern R. R. Co. *v.* Flexman, 103 Ill. 546, 42 Am. Rep. 33.

[6] Stewart *v.* Brooklyn &c. R. R. Co., 90 N. Y. 588, 43 Am. Rep. 185.

[7] McKinley *v.* Chicago & N. W. Ry Co., 44 Iowa, 314, 25 Am. Rep. 748.

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master and was struck by the latter as an act of personal resentment, it was held that the company was not liable.[1]

§ 742. **Same Subject—Excessive Force.** The principal is also liable to third persons, where the agent, though authorized to use reasonable force or proper means, negligently, or wilfully and maliciously, uses excessive force or improper means in the course of his employment, by reason of which such third persons receive injury.[2]

It is immaterial, in this respect, whether the excessive force or improper means be the result of a lack of judgment or careless inattention or active wilfulness; if the act be done in the course of the employment, the principal is liable.[3]

The principle is of frequent application to the case of the agents and servants of carriers who undertake, with unnecessary force and violence, or at improper times or places, to eject from their conveyances persons whom they would be authorized to remove under proper circumstances,[4] but it is by no means confined to such cases. It applies wherever the circumstances are appropriate, regardless of the nature of the occupation.

§ 743. **Liability of Principal for Agent's false or fraudulent Representations.** The liability of the principal for the agent's false or fraudulent representations, rests upon the same ground as his liability for the other torts of the agent. For such false representations as he has expressly authorized, he is, of course, liable. But he is liable, also, for the agent's false or fraudulent representations made in the course of the employment, and within the scope of the authority, although they were made without

[1] Little Miami R. R. Co. *v.* Wetmore, 19 Ohio St. 110, 2 Am. Rep. 378.

[2] Higgins *v.* Watervliet, Turnpike, &c. Co., 46 N. Y. 23, 7 Am. Rep. 293; Rounds *v.* Delaware, &c. R. R. Co., 64 N. Y. 129, 21 Am. Rep. 597; Hoffman *v.* New York, &c. R. R. Co., 87 N. Y. 25, 41 Am. Rep. 337; Hanson *v.* European, &c. Ry. Co., 62 Me. 84, 16 Am. Rep. 404.

[3] Hoffman *v.* New York, &c. R. R. Co., *supra*. In this case ANDREWS, J., says: "Assuming the case made by the plaintiff, the act was flagrant, reckless and illegal; but the point is, was the act within the scope of the employment and authority? If it was, and the servant in doing what he did undertook to act for the company, and not for himself or for his own ends, the company is not exonerated although the servant may have deviated from instructions in executing the authority, or may have acted without judgment, or even brutally."

[4] See cases cited in note 1, *supra*.

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his knowledge or consent, or even in violation of his express instructions.[1] He is not, however, liable for every false or fraudulent statement or representation which the agent may see fit to make. The representation, which is to bind the principal, must be made in reference to the subject-matter of his agency; it must be made while the agent is acting as such; and the making of such a representation must be within the apparent scope of his authority.[2]

[1] "When a principal authorizes an agent to do a certain thing, he is answerable for and bound by the acts and representations of the agent in accomplishing that end, even though the agent is guilty of fraud in bringing about the result. Having given such authority, the principal is responsible for the fraudulent as well as the fair means used by the agent, if they are in the line of accomplishing the object of the agency. Having put the agent in a position where he may perpetrate a fraud upon innocent third parties, the principal will not be allowed, as against such third parties, to retain the fruits of the fraud and defeat a claim of reparation by saying that he justifies the end, but not the means used by the agent. Conceding that the principal is innocent of any active fraud, yet, when a case arises that he or an innocent third party must suffer by the fraud of the agent, the principal who conferred authority upon the agent must suffer the loss rather than the innocent third party. This the principal may generally avoid by submitting to a rescission of the contract, and restoring what he may have received as the fruit of the agent's bad faith. To thus bind the principal by the fraud of the agent is not to bind him beyond the scope of the agency. In such a case, the agent does not exceed his authority, but perpetrates a fraud in the exercise of his authority to accomplish the object of the agency, and in such case the principal is liable for the fraud, although he may not have directed it nor had knowledge of it. The fraud of the agent becomes the fraud of the principal as to third parties." ZOLLARS, C. J., in Wolfe *v.* Pugh, 101 Ind. 293, 304. See also Rhoda *v.* Annis, 75 Me. 17, 46 Am. Rep. 354; Eilenberger *v.* Protective Mut. F. Ins. Co., 89 Penn. St. 464; Tagg *v.* Tennessee Nat. Bank, 9 Heisk. (Tenn.) 479; Reynolds *v.* Witte, 13 S. Car. 5, 36 Am. Rep. 678; Locke *v.* Stearns, 1 Metc. (Mass.) 560; White *v.* Sawyer, 16 Gray (Mass.) 586; Howe *v.* Newmarch, 12 Allen (Mass.) 49; Pratt *v.* Bunker, 45 Me. 569; Stickney *v.* Munroe, 44 Me. 195; Lynch *v.* Mercantile Trust Co., 18 Fed. Rep. 486; Jewett *v.* Carter, 132 Mass. 335; Kibbe *v.* Hamilton Ins. Co., 11 Gray (Mass.) 163.

Contra, see Kennedy *v.* McKay, 14 Vroom. (N. J.) 288, 39 Am. Rep. 581. A principal who employs an agent to sell his real estate is liable for a false representation made by the agent as the condition, situation, title, boundaries and encumbrances of the land. Rhoda *v.* Annis, 75 Me. 17, 46 Am. Rep. 354; Wolfe *v.* Pugh, 101 Ind. 293; Lynch *v.* Mercantile Trust Co., 18 Fed. Rep. 486; Law *v.* Grant, 37 Wis. 548; or for a fraudulent statement as to when possession would be given, Lamm *v.* Port Deposit Homestead Assn, *post*.

[2] Lamm *v.* Port Deposit Homestead Assn, 49 Md. 233, 33 Am. Rep. 246.

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In order to maintain an action for the fraud, it must appear, in this, as in other cases, 1. That the representations were made with a knowledge of their falsity, and with an intent to deceive; or, 2. That they were made recklessly and heedlessly, and without any knowledge or reasonable ground for belief in reference to the subject; or 3. That, though they were believed to be true, the party making them had no reasonable grounds for such belief, and yet made the representations positively, as of facts known to him to be true. 4. It must also appear that they were material, and that the other party was deceived by them.[1]

The representations must also be representations of *fact*, as distinguished from representations of *law*; and they must also be assertions of *fact* as distinguished from the mere expression of *opinion*. They must also be representations, upon which the other party, whom they affect injuriously, had a right to rely, and did rely. If the representation be mere matter of opinion, or be of a fact equally within the knowledge of both parties, or be one upon which the party had no right to rely, then the representation, though acted upon, will create no cause of action.[2] Thus one who has a claim against an insurance company for a loss, and is induced, by the false representations of the company's agent that his policy has been forfeited by non-occupancy, or that he has no enforceable claim, to settle for less than the amount of his claim, has no cause of action against the company for such representations.[3] So, in an action against a corporation, for deceit by false representations, made by an agent, in the sale of goods manufactured and sold by it for a particular purpose, there can be no recovery without proof of bad faith or absence of reasonsonable grounds of belief.[4]

[1] Erie City Iron Works *v.* Barber, 106 Penn. St. 125, 51 Am. Rep. 508; Cowley *v.* Smith, 46 N. J. L. 380, 50 Am. Rep. 432. These cases are particularly full upon the subject, the latter containing a valuable collection of the English cases. See also Lynch *v.* Mercantile Trust Co., 18 Fed. Rep. 486.

[2] Ætna Ins. Co. *v.* Reed, 33 Ohio St. 283; Mayhew *v.* Phœnix Ins. Co., 23 Mich. 105; Thompson *v.* Phœnix Ins. Co., 75 Me. 55; 46 Am. Rep. 357; Foley *v.* Cowgill, 5 Blackf. (Ind.) 18, 33 Am. Dec. 49; Moore *v.* Turbeville, 2 Bibb. (Ky.) 602, 5 Am. Dec. 642; Saunders *v.* Hatteman, 2 Ired. (N. C.) 32, 37 Am. Dec. 404; Anderson *v.* Burnett, 5 How. (Miss.) 165, 35 Am. Dec. 425.

[3] Thompson *v.* Phœnix Ins. Co., *supra;* Ætna Ins. Co. *v.* Reed, *supra;* Mayhew *v.* Phœnix Ins. Co., *supra.*

[4] Erie City Iron Works *v.* Barber, 106 Penn. St. 125, 51 Am. Rep. 508.

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Less than this will, in many cases, suffice to sustain an action for a breach of warranty, for damages may be recovered for such a breach, though the party making the warranty in good faith believed it to be true,[1] but less than this will not sustain an action for the fraud.

These rules apply as well where the principal is a corporation as in any other case.[2]

§ 744. **Same Subject—Third Person's Remedies.** The party injured by the agent's fraud, if he desires to take the initiative, has ordinarily his choice of three remedies: *a.* he may promptly restore what he has received under the contract, rescind the contract, and recover what he has parted with in pursuance of it;[3] or *b.* he may retain what he has received, and bring his action for the fraud practiced upon him;[4] or, *c.* he may retain what he has received and, waiving the fraud, bring his action, based upon the contract, for damages sustained by reason of its breach.[5] If, on the other hand, he prefers to act upon the defensive, he may avail himself of the fraud either in total bar[6] of an action brought against him by the principal, or by way of the reduction of damages.[7]

§ 745. **Principal's civil Liability for Agent's criminal or penal Act.** The principal's civil liability for his agent's criminal or penal act rests upon the same considerations, and is, in many aspects, of the same nature, as his liability for his agent's torts generally. Thus, as an illustration of that class of cases in which a criminal intent is necessary to constitute the offense, the malicious assault of a conductor upon a railway passenger may be

[1] Erie City Iron Works *v.* Barber, *supra*. This principle is elementary, and requires no extensive citation of authorities in this place.

[2] "As it can only speak or act by agent, there is stronger reason for holding it answerable for the acts and representations of the agent, done within the ostensible scope of his authority and while transacting the business of the principal, than when the principal is a natural person. However the same rule applies alike to natural and artificial persons." TRUNKEY, J., in Erie City Iron Works *v.* Barber, 106 Penn. St. 125, 51 Am. Rep. 508; Lamm *v.* Port Deposit Homestead Assn, 49 Md. 233, 33 Am. Rep. 246.

[3] Wolfe *v.* Pugh, 101 Ind. 293; Rhoda *v.* Annis, 75 Me. 17, 46 Am. Rep. 354.

[4] Rhoda *v.* Annis, *supra*; Lynch *v.* Mercantile Trust Co., 18 Fed. Rep. 486.

[5] Rhoda *v.* Annis, *supra*.

[6] See *post*, §§ 773–775.

[7] See *post*, §§ 773–775.

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adverted to. Here, as has been seen, the principal is liable in a civil action by the person injured, for damages occasioned by the injury. At the same time the assault is an offense against the State, which the State may and does punish as such. As respects the individual injured the act is a tort; as respects the State, it is a crime.

But there is also another class of cases where the liability is not dependent upon the intent, but upon the question of the infraction. These are usually the subject of express statutory prohibition, based often upon the police power of the State, and making that, which might under other circumstances be a thing innocent or indifferent in itself, a wrong prohibited under a penalty,—a *malum prohibitum* as distinguished from a *malum in se*. Of this class, the now common legislation providing for the recovery of penalties or damages for the prohibited sale of intoxicating liquors, furnishes a well-recognized illustration.

Thus in an action to recover a penalty fixed by law, alleged to be due by reason of the unlawful sale of intoxicating liquors by an agent, the Supreme Court of Massachusetts said: "The action is brought under a statute which makes that a tort which was not so before, and provides for the recovery of damages against the tort-feasor. The tort consists in selling intoxicating liquor to one who has the habit of using it to excess, after notice of his habit and a request from his wife not to sell such liquor to him. The defendant engages in the business of selling liquor voluntarily. He chooses to intrust the details of the business to a servant. If he forbids the making of sales to the intemperate person, and his servant negligently, through forgetfulness of the instruction given him, or through a failure to recognize the person, continues to make sales to that person, there is no reason why the defendant should not be responsible for the wrongful act. The sale is his sale, made in the performance of his business, and is an act within the general scope of the servant's employment." [1] And the same result would, within the principles already considered, undoubtedly follow though the act was willful.[2]

[1] George v. Gobey, 128 Mass. 289, 35 Am. Rep. 376. See also Worley v. Spurgeon, 38 Iowa 465; Peterson v. Knoble, 35 Wis. 85; Smith v. Reynolds, 8 Hun (N. Y.) 130.

[2] Kreiter v. Nichols, 28 Mich. 496; Kehrig v. Peters, 41 Mich. 475.

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But here, as in other cases, the principal is liable only while the agent was acting within the scope of his employment. If the agent has gone outside of that, to commit a criminal act, the principal is not liable. Thus where an armed watchman, employed by the owners of a brewery to guard their premises and preserve the peace, pursued a person, who had been acting on the premises in a drunken and disorderly manner, and, while the latter was retreating and was off of the premises, killed him, it was held that the proprietors of the brewery were not liable. Without determining whether the principals would be liable in any event for such an act, the court held that the fact that the deceased was retreating from the brewery at the time he was shot, showed conclusively that the shot was not fired either in the defense of the brewery or in the line of the watchman's duty.[1]

Neither will the penalty fixed by law attach to the principal where the act, on account of which it is alleged to have been incurred, was committed by the agent without the knowledge or consent of the principal, and for some private and personal object of the agent. This rule is well illustrated by the decisions growing out of the enactments against usury.

Thus, if the principal place in the hands of his agent money to be loaned on the principal's account, and the agent, by the authority, or with the knowledge and consent of the principal, exacts or receives from the borrower something by way of bonus, commission or interest in excess of legal interest, the taint of usury will attach to the principal, if he receives the excess, or if he permits the agent to keep it as part of his compensation.[2] And the same result will attach although the principal did not authorize or have knowledge of the usury at the time, if with knowledge, he subsequently receives the benefit of it.[3]

But where the agent is authorized to loan for legal interest only, and, without the knowledge or consent of the principal, exacts from the borrower a usurious interest for the agent's own private benefit, and the principal does nothing subsequently to ratify the act, the usury will not affect the principal.[4] In such a

[1] Golden v. Newbrand, 52 Iowa 59, 35 Am. Rep. 257.

[2] Payne v. Newcomb, 100 Ill. 611, 39 Am. Rep. 69; Rogers v. Buckingham, 33 Conn. 81; Philo v. Butterfield, 3 Neb. 256; Cheney v. White, 5 Neb. 261, 25 Am. Rep. 487; Cheney v. Woodruff, 6 Neb. 151.

[3] Payne v. Newcomb, *supra*.

[4] Dagnall v. Wigley, 11 East 43;

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case, the fact that the principal receives from the agent the obligations of the borrower and attempts to enforce them, will not be deemed to be a ratification of the usury.[1] Where, however, the agent takes the security in his own name, as principal, upon usurious interest, the borrower supposing him to be the principal, the real principal, if he seeks to avail himself of the security, will be bound by the usury.[2]

§ 746. **Principal's criminal Liability for Agent's criminal or penal Acts.** But it is not only in a civil action that the principal may be made liable for the criminal or penal acts of his agent; he may be held criminally liable also under certain circumstances. Thus the principal is unquestionably so liable, in greater or less

Solarte *v.* Melville, 7 B. & C. 430; Barretto *v.* Snowden, 5 Wend. (N. Y.) 181; Condit *v.* Baldwin, 21 N. Y. 219, 78 Am. Dec. 137; Bell *v.* Day, 83 N. Y. 165; Conover *v.* Van Mater, 18 N. J. Eq. 481; Rogers *v.* Buckingham, 33 Conn. 81; Gokey *v.* Knapp, 44 Iowa 32; Wyllis *v.* Ault, 46 Iowa 46; Bingham *v.* Myers, 51 Iowa 397, 33 Am. Rep. 140; Call *v.* Palmer, 116 U. S. 98; Muir *v.* Newark Savings Inst., 1 Green (N. J.) Eq. 537; Manning *v.* Young, 28 N. J. Eq. 568; Gray *v.* Van Blarcom, 29 Id. 454. See also Ballinger *v.* Bourland, 87 Ill. 513, 29 Am. Rep. 69; Phillips *v.* Roberts, 90 Ill. 492; Boylston *v.* Bain, Id. 283; Acheson *v.* Chase, 28 Minn. 211.

See also Sherwood *v.* Roundtree, 32 Fed. Rep. 113 (distinguishing Call *v.* Palmer, *supra*); Fisher *v.* Porter, 23 Fed. Rep. 162; Coudert *v.* Flagg, 31 N. J. Eq. 394; White *v.* Dwyer, 31 Id. 40; Forbes *v.* Baaden, 31 Id. 381; Boardman *v.* Taylor, 66 Ga. 838; Cox *v.* Life Ins. Co., 113 Ill. 382 (distinguishing Payne *v.* Newcomb, *supra*); Borcherling *v.* Trefz, 40 N. J. Eq. 502; Eddy *v.* Badger, 8 Biss. 238; Fellows *v.* Longyor, 91 N. Y. 330; Wyck *v.* Watters, 81 N. Y. 352; Dusenbury *v.* Seeley, 87 N. Y. 634; Alger *v.* Gardner, 54 N. Y. 360; Lyon *v.* Simpson, 12 Daly (N. Y.) 58; Wyeth *v.* Braniff, 84 N. Y. 627.

The contrary rule is enforced in Nebraska. Thus in Philo *v.* Butterfield, 3 Neb. 256, the court say: "It is a settled rule of law which will not be questioned, that in all cases where a person employs another as his agent to loan money for him, and places the funds in the hands of the agent for such purpose, the principal is bound by the acts of his agent; and if the agent charges the borrower of such money unlawful interest, or even demands and receives from the borrower a bonus for such loan, and appropriates it to his own individual use, either with or without the knowledge of his principal, the principal is affected by the act of his agent," and this doctrine is reaffirmed in later cases: Cheney *v.* White, 5 Neb. 261, 25 Am. Rep. 487; Cheney *v.* Woodruff, 6 Neb. 151; Olmstead *v.* New England Mortgage Security Co., 11 Neb. 487; Cheney *v.* Eberhardt, 8 Neb. 423.

[1] Thompson *v.* Craig, 16 Abb. Pr. N. S. 33; Smith *v.* Tracy, 36 N. Y. 84; Hoover *v.* Greenbaum, 62 Barb. (N. Y.) 188.

[2] Erickson *v.* Bell, 53 Iowa 627, 36 Am. Rep. 246.

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degree, where he is present and co-operates with the agent, or encourages, aids or abets him; or where, though not present, he expressly or impliedly commands, encourages or incites the doing of the act.[1] He would be so liable if he directed the doing of an act which was in itself a crime, or which necessarily involved or required the commission of a crime.[2]

But as a general rule he cannot be held criminally liable for the act of his agent committed without his knowledge or consent.[3] There is, however, a class of cases, as has been seen, where, by statutory enactment, the doing of a certain act, otherwise perhaps innocent or indifferent, or at the most not criminal, is expressly prohibited under a penalty. Of this class are many of the statutes in the nature of police regulations which impose penalties for their violation, often irrespective of the question of the intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation exceedingly improbable, if not impossible.[4] Similar to

[1] See Bishop on Crim. Law, § 649.

[2] See Bishop on Crim. Law, §§ 649–651. State v. Smith, 78 Me. 260, 57 Am. Rep. 802.

[3] Commonwealth v. Nichols, 10 Metc. (Mass.) 259, 43 Am. Dec. 432; Hipp v. State, 5 Blackf. (Ind.) 149, 33 Am. Dec. 463; Commonwealth v. Putnam, 4 Gray (Mass.) 16; Somerset v. Hart, 12 Q.B.Div. 360, 37 Eng.Rep. 624. A principal is not liable criminally for the act of his agent in selling liquors to an intoxicated person without the principal's knowledge or assent. People v. Parks, 49 Mich. 333. His assent must be shown. Commonwealth v. Putnam, *supra*.

A principal cannot be arrested under a statute permitting arrest "where defendant has been guilty of a fraud in contracting the debts" for frauds committed without his knowledge or authority by his agent in purchasing goods for him. Hathaway v. Johnson, 55 N. Y. 93, 14 Am. Rep. 186.

[4] In People v. Roby, 52 Mich. 579, 52 Am. Rep. 270, Cooley, C. J. says: "I agree that as a rule there can be no crime without a criminal intent; but this is not by any means a universal rule. One may be guilty of the high crime of manslaughter when his only fault is gross negligence; and there are many other cases where mere neglect may be highly criminal. Many statutes, which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible. Thus, in Massachusetts, a person may be convicted of the crime of selling intoxicating liquor as a beverage, though he did not know it to be intoxicating; Commonwealth v. Boynton, 2 Allen 160; and of the offense of selling adulterated milk, though he was ignorant of its being adulterated; Commonwealth v. Farren, 9 Allen 489; Commonwealth v. Holbrook, 10 Allen, 200;

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these statutes were many of the well settled doctrines of the common law, as for example, the law of libels and nuisances. It is the duty of the principal to see to it that such statutes are not

Commonwealth v. Waite, 11 Allen 264; Commonwealth v. Smith, 103 Mass. 444. See State v. Smith, 10 R. I. 258. In Missouri a magistrate may be liable to the penalty of performing the marriage ceremony for minors without consent of parents or guardians, though he may suppose them to be of the proper age. Beckham v. Nacke, 56 Mo. 546. When the killing and sale of a calf under a specified age is prohibited, there may be a conviction though the party was ignorant of the animal's age. Commonwealth v. Raymond, 97 Mass. 567. See The King v. Dixon, 3 M. & S. 11. In State v. Steamboat Co., 18 Md. 181, a common carrier was held liable to the statutory penalty for transporting a slave on its steamboat, though the persons in charge of its business had no knowledge of the fact. A case determined on the same principle is Queen v. Bishop, 5 Q. B. Div. 259. If one's business is the sale of liquor, a sale made by his agent in violation of the law is *prima facie* evidence of his authority. Commonwealth v. Nichols, 10 Met. 259; and in Illinois the principal is held liable though the sale by his agent was in violation of instructions. Noecker v. People, 91 Ill. 494. In Connecticut it has been held no defense, in a prosecution for selling intoxicating liquor to a common drunkard, that the seller did not know him to be such. Barnes v. State, 19 Conn. 398. It was held in Faulks v. People, 39 Mich. 200, under a former statute, that one should not be convicted of the offense of selling liquors to a minor who had reason to believe and did believe he was of age; but I doubt if we ought so to hold under the statute of 1881, the purpose of which very plainly is, as I think, to compel every person who engages in the sale of intoxicating drinks to keep within the statute at his peril. There are many cases in which it has been held, under similar statutes, that it was no defense that the seller did not know or suppose the purchaser to be a minor. State v. Hartfiel, 24 Wis. 60; McCutcheon v. People, 69 Ill. 601; Farmer v. People, 77 Ill. 323; Ulrich v. Commonwealth, 6 Bush. 400; State v. Cain, 9 W. Va. 559; Commonwealth v. Emmons, 98 Mass. 6; Redmond v. State, 36 Ark. 58; and in Commonwealth v. Finnegan, 124 Mass. 324, the seller was held liable, though the minor had deceived him by falsely pretending he was sent for the liquor by another person. So a person has been held liable to a penalty for keeping naphtha for sale under an assumed name, without guilty knowledge, the statute not making such knowledge an ingredient of the offense. Commonwealth v. Wentworth, 118 Mass. 441. Other cases might be cited, and there is nothing anomalous in these. A person may be criminally liable for adultery with a woman he did not know to be married. Fox v. State, 8 Tex. App. 329; or for carnal knowledge of a female under ten years of age though he believed her to be older. Queen v. Prince, L. R. 2 Cr. Cas. 154; State v. Newton, 44 Ia. 45. And other similar cases might be instanced." See also Halsted v. State, 12 Vroom (N. J.) 552, 32 Am. Rep. 247; Redmond v. State, 36 Ark. 58, 38 Am. Rep. 24; Farrell v. State, 32 Ohio St. 456, 30 Am. Rep. 614; King v. State, 58 Miss. 737, 38 Am. Rep.

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violated by his agents in the course of their employment. For what they may do outside of the employment, he is, of course, not responsible; but if the prohibited act be done by them in the course of their employment, he must respond. This is particularly true in those cases where the principal confides, in a greater or lesser degree, the conduct and management of his business to his agents. He selects his own agents, and has the power, as well as the duty, to control them; and if, by reason of his lack of oversight or their own carelessness or unfaithfulness, the prohibited act is done, he should be held accountable. He certainly cannot relieve himself from responsibility for the manner in which his purposes are carried out, by turning over the management of his business to agents.

Instances of these principles may be found in the case of the publication of libels; the smuggling of goods; the sale of unwholesome or adulterated food; the erection or continuance of nuisances; the transportation of forbidden goods; the transaction of business without a license and the like. Frequent illustrations are also found in the statutes regulating the traffic in intoxicating liquors.

Thus booksellers and publishers have been held criminally liable for publications, issued from their establishment, in the regular course of business, although the particular act of sale or publication was done without their knowledge;[1] a trader has been held liable to a penalty for the illegal act of his agent in harboring and concealing smuggled goods, although the principal was absent at the time;[2] a baker has been held liable to a criminal charge for selling adulterated bread, although the adulteration was put in by his servant, and although he did not know that it was used in improper quantities;[3] the directors of a gas company have been held liable to an indictment for a nuisance created by their superintendent, acting under a general authority to manage the works, though they were personally ignorant of

344; Stern v. State, 58 Ga. 229, 21 Am. Rep. 266; and note 268. George v. Gobey, 128 Mass. 289, 35 Am. Rep. 376.

[1] Rex v. Walter, 3 Esp. 21; Rex v. Gutch, 1 Moo. & M. 437. But see Queen v. Holbrook, 3 Q. B. Div. 60, 28 Eng. Rep. (Moak) 53, as to the effect of the statutes limiting such liability.

[2] Attorney General v. Sidden, 1 Cromp. & Jer. 220.

[3] Rex v. Dixon, 4 Camp. 12.

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the particular plan adopted, and although it was a departure from the original and understood method, which they supposed him to be following;[1] a saloonkeeper has been held criminally responsible for not keeping his saloon closed upon Sunday, though it appeared that it was opened by his clerk, without his knowledge or consent, but while he was on the premises,[2] and an indictment, which alleges that defendant sold spirituous liquors without legal authority and contrary to the statute, is supported by evidence that he sold it by his clerk, servant or agent.[3]

Where the criminal act is committed by a known agent, this is *prima facie* evidence of the principal's authority,[4] but he may rebut the presumption by showing that the act was not in fact authorized or assented to by him.[5]

§ 747. **Principal's Liability for Acts of independent Contractor.** The principal's liability for the acts of his agent, within the scope of his authority, depends upon the fact that the relation of principal and agent exists. It is the principal's will that is to be exercised; his purpose that is to be accomplished; his are the benefits and advantages which ensue. He selects his own agent, puts him in motion, and has the right to direct and control his actions. It is, therefore, just and proper that he should be responsible for what the agent does while so employed.[6]

[1] Rex *v.* Medley, 6 C. and P. 292.

[2] People *v.* Roby, 52 Mich. 579, 50 Am. Rep. 270.

[3] Commonwealth *v.* Park, 1 Gray (Mass.) 553; Commonwealth *v.* Holmes, 119 Mass. 195.

[4] Commonwealth *v.* Nichols, 10 Metc. (Mass.) 259, 43 Am. Dec. 432.

[5] See cases cited in note 3, p. 593.

[6] "Where one person has sustained an injury from the negligence of another, he must, in general, proceed against him by whose negligence the injury was occasioned. If, however, the negligence which caused the injury was that of a servant while engaged in his master's business, the person sustaining the injury may disregard the immediate author of the mischief and hold the master responsible for the damages sustained. The master selects the servant, and the servant is subject to his control, and, in respect of the civil remedy, the act of the servant is, in law, regarded as that of the master. But it is not enough in order to establish a liability of one person for the negligence of another, to show that the person whose negligence caused the injury was at the time acting under an employment by the person who is sought to be charged. It must be shown, in addition, that the employment created the relation of master and servant between them." ANDREWS, J. in King *v.* New York, &c. R. R. Co., 66 N. Y. 181, 23 Am. Rep. 37. See also McCafferty *v.* Spuyten Duyvil, &c. R. R. Co., 61 N. Y. 178, 19 Am. Rep.

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Where, however, the principal has not this right of control a different rule prevails. Neither reason nor justice requires that he should be held responsible for the manner of doing an act when he had no power or right to direct or control that manner.[1] If therefore, the principal, using due care in the selection of the person, enters into a contract with a person exercising an independent employment, by virtue of which the latter undertakes to accomplish a given result, being at liberty to select and employ his own means and methods, and the principal retains no right or power to control or direct the manner in which the work shall be done, such a contract does not create the relation of principal and agent or master and servant, and the person contracting for the work is not liable for the negligence of the contractor, or of his servants or agents, in the performance of the work.[2] The employment is regarded as independent where the person renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished.[3] The independent con-

267; Clark *v.* Fry, 8 Ohio St. 358, 72 Am. Dec. 590.

[1] "The liability of any one, other than the party actually guilty of any wrongful act, proceeds on the maxim, '*Qui facit per alium facit per se.*' The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders, should be responsible for any injury resulting from the want of skill or want of care of the person employed; but neither the principle of the rule, nor the rule itself, can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned." ROLFE, B. in Hobbit *v.* London, &c. Ry Co., 4 Exch. 255.

[2] Milligan *v.* Wedge, 12 Ad. & El. 737; DeForrest *v.* Wright, 2 Mich. 370; Wood *v.* Cobb, 13 Allen (Mass.) 58; Kellogg *v.* Payne, 21 Iowa 575; King *v.* New York, &c. R. R. Co., 66 N. Y. 186, 23 Am. Rep. 37; McCarty *v.* Second Parish, 71 Me. 318, 36 Am. Rep. 320; Harrison *v.* Collins, 86 Penn. St. 156, 27 Am. Rep. 699; Linton *v.* Smith, 8 Gray (Mass.) 147; Bennett *v.* Truebody, 66 Cal. 509, 56 Am. Rep. 117; Bailey *v.* Troy & Boston R. R. Co., 57 Vt. 252, 52 Am. Rep. 129; McCafferty *v.* Spuyten Duyvil, &c. R. R. Co., 61 N. Y. 178, 19 Am. Rep. 267; Hexamer *v.* Webb, 101 N. Y. 377, 54 Am. Rep. 703; Hass *v.* Philadelphia, &c. Steamship Co., 88 Penn. St. 269, 32 Am. Rep. 462; Boswell *v.* Laird, 8 Cal. 469, 68 Am. Dec. 345; Hilliard *v.* Richardson, 3 Gray (Mass.) 349, 63 Am. Dec. 743; City of St. Paul *v.* Seitz, 3 Minn. 297, 74 Am. Dec. 753; Clark *v.* Fry, 8 Ohio St. 358, 72 Am. Dec. 590; Cuff *v.* Newark, &c. R. R. Co., 35 N. J. L. 17, 10 Am. Rep. 205; Ryan *v.* Curran, 64 Ind. 345, 31 Am. Rep. 123; Myer *v.* Hobbs, 57 Ala. 175, 29 Am. Rep. 719.

[3] Harrison *v.* Collins, 86 Penn. St. 153, 27 Am. Rep. 699; Pack *v.* Mayor,

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tractor is usually paid, in common parlance, by the job, but the fact that he is paid by the day does not necessarily destroy the independent character of his employment.[1]

This rule of immunity from liability is, however, subject to certain exceptions. No one can lawfully delegate to another the authority to do an unlawful act, nor can one, upon whom the law imposes the performance of a duty, relieve himself from responsibility for its non-performance, by committing its performance to a substitute. Thus if the thing to be done is in itself unlawful, or if it is *per se* a nuisance, or if it cannot be done without doing damage, he who causes it to be done by another, be the latter servant, agent, or independent contractor, is as much liable for injuries which may happen to third persons from the act done, as though he had done the act in person.[2]

So it is the duty of every person who does in person, or causes to be done by another, an act which from its nature is liable, unless precautions are taken, to do injury to others, to see to it that those precautions are taken, and he cannot escape this duty by turning the whole performance over to a contractor.[3] Of the same nature is the duty which the law imposes upon every person who, for his own purposes, brings on his lands, and collects or keeps there, anything likely to do mischief if it escapes, to keep it in at his peril; and if he does not do so, he is *prima facie* answerable for all the damage which is the natural consequence of its escape.[4]

This distinction has been stated in a recent case as follows: "If the work to be done is committed to a contractor to be

8 N. Y. 222; Barry v. St. Louis, 17 Mo. 121.

[1] Harrison v. Collins, *supra*; Forsyth v. Hooper, 11 Allen (Mass.) 419; Corbin v. America Mills, 27 Conn. 274.

[2] Bailey v. Troy & Boston R. R. Co., 57 Vt. 252, 52 Am. Rep. 129; Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 224; Eaton v. Railroad Co., 59 Me. 520, 8 Am. Rep. 430; Caswell v. Cross, 120 Mass. 545; Water Co. v. Ware, 16 Wall. (U. S.) 566.

[3] Wilson v. White, 71 Ga. 506, 51 Am. Rep. 269; Gray v. Pullen, 5 B. & S. 970, 117 Eng. Com. Law; Bower v. Peate, L. R. 1 Q. B. Div. 341, 16 Eng. Rep. (Moak) 374; Tarry v. Ashton, 1 Q. B. Div. 314, 16 Eng. Rep. (Moak) 367; Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 224; Sturges v. Theological Society, 130 Mass. 414, 39 Am. Rep. 463.

[4] Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 224; Fletcher v. Rylands, L. R. 1 Exch. 265; Shipley v. Fifty Associates, 106 Mass. 194, 8 Am. Rep. 318.

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done in his own way, and is one from which, if properly done, no injurious consequences to third persons can arise, then the contractor is liable for the negligent performance of the work. If, however, the work is one that will result in injury to others unless preventive measures be adopted, the employer cannot relieve himself from liability by employing a contractor to do what it was his duty to do to prevent such injurious consequences. In the latter case, the duty to so conduct one's own business as not to injure another, continuously remains with the employer."[1]

The fact that the contractor expressly agrees to assume responsibility for injuries cannot, of course, relieve the principal if otherwise liable.[2]

§ 748. **Same Subject—Illustrations.** Some illustrations from the numerous cases upon this subject will serve to make the distinction plain. Thus in a leading case in New York, a railroad company let by contract the entire construction of its road, and the contractor sub-let a portion of the work. Through the negligence of the men employed by the sub-contractor in performing the work, stones and rocks were thrown by a blast upon plaintiff's adjoining property, and injured it. The court held that this injury did not necessarily result from the work contracted to be done, but was caused by the unskillful and negligent manner in which a lawful and proper thing was done, and that the railroad company were not responsible.[3]

So the owners of a sugar refinery employed a rigger to remove

[1] POWERS, J. in Bailey v. Troy & Boston R. R. Co., 57 Vt. 252, 52 Am. Rep. 129.

[2] Storrs v. City of Utica, 17 N. Y. 104, 72 Am. Dec. 437.

[3] McAfferty v. Spuyten Duyvil, &c. R. R. Co., 61 N.Y. 178, 19 Am. Rep. 267. The same result was reached in Pack v. Mayor, 8 N. Y. 222, involving the liability of a municipal corporation for injuries caused by negligent blasting done by a sub-contractor employed by one who had taken the contract to grade a street. And so in Tibbetts v. Knox &c. R. R. Co., 62 Me. 437. But a contrary result was reached in Stone v. Cheshire R. R. Co., 19 N. H. 427, 51 Am. Dec. 192, and so where the injury was a necessary result of the work, Carman v. Railroad Co., 4 Ohio St. 399; Teffin v. McCormack, 34 Ohio St. 638. Pack v. Mayor was approved and followed in Kelly v. Mayor, 11 N. Y. 432. See also that railroad company is not liable for negligence of contractor in constructing road. Cunningham v. International R. R. Co., 51 Tex. 503, 32 Am. Rep. 632; for negligent use of a steam shovel, Bailey v. Troy & Boston R. R. Co., 57 Vt. 252, 52 Am. Rep. 129.

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machinery from a railroad car, and place it in their building. It was not contemplated that it would be necessary, nor did it appear to be necessary, that a certain coal-hole should be opened, yet the rigger in the progress of the work, and for some purpose of his own, opened the hole and left it open a few minutes after the work was finished, when a boy fell in and was injured. The court held that the rigger was pursuing an independent employment, and that, as it was not expected that the hole was to be opened, the owners of the refinery were not charged with the duty of guarding it, and were consequently not responsible for the injury.[1] So a person, who carried on the business of slating, was employed to repair the roof of a church; while doing this, with his workmen, a ladder, which they had placed against the building to reach the roof, was blown down and injured a passer-by, who brought an action against the society for damages. The court, however, held that the slater was exercising an independent employment, and that the injury resulted from the careless manner in which he performed an undertaking lawful and proper in itself, and that the society was not liable.[2] So the owner of land contracted with a carpenter to repair a certain house thereon, the latter to furnish the materials and do the work for a specified sum. A teamster employed by the carpenter, piled lumber for the work in the highway where it frightened the plaintiff's horse and caused injury. An action was brought against the owner, but it was held that the carpenter, and not the owner, was at fault.[3] So a public licensed drayman was employed to haul a quantity of salt from a warehouse and deliver it at his employer's store for so much a barrel. While in the act of delivering the salt, the drayman carelessly permitted a barrel to roll against a passer-by, causing an injury, on account of which an action was brought against the employer. It was held, how-

[1] Harrison v. Collins, 86 Penn. St. 153, 27 Am. Rep. 699. The result would undoubtedly have been different had the employment contemplated the opening of the hole. See a similar case where the owner of a building was held not liable for an injury caused by falling through a trap door negligently left open by the servants of a plumber who had been employed to repair the water pipes. Bennett v. Truebody, 66 Cal. 509, 56 Am. Rep. 117.

[2] McCarthy v. Second Parish of Portland, 71 Me. 318, 36 Am. Rep. 320.

[3] Hilliard v. Richardson, 3 Gray (Mass.) 349, 63 Am. Dec. 743. This case contains a valuable and exhaustive review of earlier cases.

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ever, that the drayman was exercising an independent calling and was alone the party liable.[1]

The fact that the employer furnishes the tools, materials or appliances with which the work was to be done by the contractor does not render him liable for negligence in their use by the contractor or his servant.[2] If he negligently furnishes defective appliances, however, he would be liable for an injury happening on that account.[3]

But where a municipal corporation contracted for the digging of a sewer in a public street, and took no measures to provide proper protection against the excavation, it was held liable for an injury to one who fell into it and was hurt. The cause of the accident, the court held, was not the *manner* in which the work was done, but it was the result of the work itself. Said COMSTOCK, J., "A ditch cannot be dug in a public street and left open and unguarded at night without imminent danger of such casualties. If they do occur, who is the author of the mischief? Is it not he who causes the ditch to be dug, whether he does it with his own hands, employs laborers, or lets it out by contract? If by contract, then I admit that the contractor must respond to third parties, if his servants or laborers are negligent in the immediate execution of the work. But the ultimate superior or proprietor first determines that the excavation shall be made, and then he selects his own contractor. Can he escape responsibility for putting a public street in a condition dangerous for travel at night, by interposing the contract which he himself has made for the very thing which creates the danger? I should answer the question in the negative."[4] So the owner of a building

[1] DeForrest v. Wright, 2 Mich. 368.

[2] Riley v. State Line Steamship Co. 29 La. Ann. 791, 29 Am. Rep. 349.

[3] The owner of a mill employed a contractor to put a cornice on the mill, the owner agreeing to erect the necessary scaffolding. The scaffolding was so negligently erected that it fell and killed one of the contractor's servants, who was at work upon it. It was held that the owner was responsible. Coughtry v. Globe Woolen Co. 56 N. Y. 124, 15 Am. Rep. 387. Where the owner agrees to furnish tools to the contractor, with which to do the work agreed, and they are suitable and safe when furnished, the owner is not liable for an injury happening from the lack of repair in the absence of an express agreement on his part to keep the tools in repair. And if the owner agrees to repair the tools when notified that they need it, his duty will not arise until such notice is given. King v. New York &c. R. R. Co., 66 N. Y. 181, 23 Am. Rep. 37.

[4] Storrs v. City of Utica, 17 N. Y.

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employed a contractor to dig a drain from his cellar into the common sewer, and to do so it was necessary to cut through a barrier which had been constructed to prevent the tide waters from flowing into the cellars in that vicinity. The contractor so negligently performed this part of the work that the tide flowed through and caused injury, for which the owner was held responsible, upon the manifest ground that the owner had contracted for the doing of a thing which, if improperly done, was liable to cause mischief, and he was bound to see that the necessary precautions were taken.[1]

§ 749. **Principal's Liability for Acts of Subagent.** The question of the liability of the principal, for the acts of a subagent, has already been considered. It has been seen that, where there was an express or implied consent to the appointment of the subagent, or if his appointment was justified by usage or necessity, there arises such a privity between the subagent and the principal, as renders the latter liable for the acts of the subagent in the same manner and to the same extent as in the case of any other agent.[2] Where no such privity exists,—where the agent stands in the attitude of an independent contractor,—the principal is

104, 72 Am. Dec. 437. Same point. City of St. Paul *v.* Seitz, 3 Minn. 297, 74 Am. Dec. 753.

[1] Sturgis *v.* Theological, &c. Society, 130 Mass. 414, 39 Am. Rep. 468. MORTON, J. said "The owner of a building, who has used due care in the employment of an independent contractor, is not responsible to third persons for the negligence of the latter, occurring in his own work in the performance of the contract, such as the handling of tools or materials, or providing temporary safeguards while doing the work. Hilliard *v.* Richardson, 3 Gray (Mass.) 349, 63 Am. Dec. 743; Conners *v.* Hennessey, 112 Mass. 96; Gorham *v.* Gross, 125 Mass. 232, 28 Am. Rep. 224; Butler *v.* Hunter, 7 H. & N. 826. As to such matters, pertaining to the mode in which he does the work, he is not the servant of the owner. But where the thing contracted to be done from its nature creates a nuisance, or where, being improperly done, it creates a nuisance and causes mischief to a third person, the employer is liable for it. Gorham *v.* Gross, *ubi supra*, and cases cited." In Gorham *v.* Gross, a party wall fell doing injury. Its fall was owing either to the fact that it had not been properly supported, or that it had been negligently built in such cold weather that the mortar froze. The owner and not the contractor was held liable. See also Percival *v.* Hughes, 9 Q. B. Div. 441, 36 Eng. Rep. 402; s. c. on appeal, 8 Ap. Cas. 443, 35 Eng. Rep. 776.

[2] See *ante*, § 197, California Bank *v.* Western Un. Tel. Co., 52 Cal. 289; Louisville, &c. R. R. Co. *v.* Blair, 4 Baxt. (Tenn.) 407.

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liable only in those cases in which he would be liable for the acts of the servants or agents of any other independent contractor.[1]

§ 750. **Effect of Ratification.** It has been seen in an earlier portion of the work that a principal may with a full knowledge of the facts, render himself liable by his ratification not only of his agent's unauthorized contract, but also of his unauthorized tort.[2] But, as has been seen,[3] such full knowledge is indispensable to charge the principal, and the mere appropriation of the fruits of the trespass without such knowledge is not sufficient.[4] So the doctrine of ratification can not be so applied as to authorize one to be made a party to a suit by amendment, when the ratification took place after the suit was instituted.[5]

[1] See *ante*, §§ 747, 748. Principal is not liable for acts of a subagent who is subject to the control of the agent only. Lindsay *v.* Singer Mf'g Co., 4 Mo. App. 570.

[2] See *ante*, Chapter on Ratification.

[3] See *ante*, §§ 128, 129.

[4] Herring *v.* Skaggs, 62 Ala. 180, 34 Am. Rep. 4.

[5] Burns *v.* Campbell, 71 Ala. 271, 289. In this care SOMERVILLE, J. says: "There is no difficulty about the general rules of law governing the ratification of an agent's unauthorized act by a principal. It is settled that where such an agent, acting *in the name and for the benefit of his principal*, commits an unindictable trespass *de bonis asportatis*, or, in other words, a trespass which is voidable merely and not wholly void, as imposing a civil and not a criminal liability upon the perpetrator, the principal, after being fully informed of its tortious nature, may adopt it as his own act, and such ratification ordinarily binds the principal to the same extent, and holds him to the same civil responsibilities as if he had originally authorized it. And for many purposes the ratification will relate back to the date of the unauthorized act so as to constitute the principal a trespasser *ab initio*. Ewell's Evans' Agency, *64, *70–71; Coke's Inst. IV. 317; 1 Brick. Dig. p. 59 § 91; Blevins *v.* Pope, 7 Ala. 371; Story on Agency, §§ 239, 244; Chapman *v.* Lee, 47 Ala. 143; Mound City Ins. Co. *v.* Huth, 49 Ala. 529; 1 Waterman on Trespass § 28. This, however, is upon the *doctrine of relation*, which is a mere legal fiction, having its origin in necessity, and which is never allowed to prevail except for the advancement of right and justice.—Jackson *v.* Ramsay, (3 Cow. 75) 15 Am. Dec. 242, 246; Pierce *v.* Hall, 41 Barb. 142; Menville's case, 18 Co. 19. It cannot be applied so as to authorize one to be made a party defendant to a suit, by amendment, when the act creating his liability was done after the suit was instituted. All pleas setting up defenses to an action, have reference to the time when an action was commenced, excepting pleas to the further maintenance of the action, and pleas *puis darrein continuance*. If a defendant be not liable on the date when the suit is commenced, he can not be made liable at all *in that action* by any subsequent act of adoption or ratification. To create such retro-

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§ 751. **The Measure of Damages against the Principal.** Where the principal is found to be liable for the wrongful act of his agent, the measure of damages is ordinarily full compensation for the injury inflicted.[1] But it is held, in many cases, that he is not liable for exemplary or punitive damages, in those jurisdictions in which such damages are allowed, unless he is himself in fault. The rule of these cases was well stated by CHURCH, C. J., of the New York Court of Appeals, as follows: "For injuries, by the negligence of a servant while engaged in the business of the master, within the scope of his employment, the latter is liable for compensatory damages; but for such negligence, however gross or culpable, he is not liable to be punished in punitive damages unless he is also chargeable with gross misconduct. Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant, knowing that he was incompetent, or, from bad habits, unfit for the position he occupied. Something more than ordinary negligence is requisite; it must be reckless and of a criminal nature, and clearly established. Corporations may incur this liability as well as private persons. If a railroad company, for instance, knowingly and wantonly employs a drunken engineer, or switchman, or retains one after knowledge of his habits is clearly brought home to the company, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages; but I am not aware of any principle which permits a jury to award exemplary damages in a case which does not come up to this standard, or to graduate the amount of such damages by their views of the propriety of the conduct of the defendant, unless such conduct is of the character before specified."[2]

spective liability, with its attendant costs and consequences, would be to pervert the doctrine of relation to an unjust and improper end."

[1] Chicago R. R. Co. *v.* Scurr, 59 Miss. 456, 42 Am. Rep. 373; Croaker *v.* Chicago, &c. Ry Co., 36 Wis. 657, 17 Am. Rep. 504; Pullman Palace Car Co. *v.* Reed, 75 Ill. 125, 20 Am. Rep. 232.

[2] In Cleghorn *v.* New York Cent. R. R. Co., 56 N. Y. 44, 15 Am. Rep. 375, approved in Sullivan *v.* Oregon Ry Co., 12 Oreg. 392, 53 Am. Rep. 364. To same effect: Nashville, &c. R. R. Co. *v.* Starnes, 9 Heisk. (Tenn.) 52, 24 Am. Rep. 296; Croaker *v.* Chicago, &c. Ry Co., *supra;* Hagan *v.* Providence, &c. R. R. Co., 3 R. I. 88; 62 Am. Dec. 377; Turner *v.* North

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But in other cases a more rigid rule is imposed, and it is held that a corporation is liable in exemplary damages for the wrongful act of its agent or servant in all cases in which an individual would be liable to them under like circumstances, although such corporation had not previously authorized or subsequently ratified the act.[1] The case of a corporation, however, and particularly of a carrier of persons, involves elements not appearing ordinarily in the case of a principal who is a private individual, inasmuch as it is only through the medium of its agents and servants that the corporation can act at all, and as the carrier owes to the passenger a peculiar duty; but whatever may be the true rule, in the case of corporations and carriers, in the case of private individuals, the New York rule seems most consonant with reason and justice.[2]

Beach, &c. R. R. Co., 84 Cal. 594; Higgins *v.* Watervliet Co., 46 N. Y. 23, 7 Am. Rep. 293; Allegheny Valley R. R. *v.* McLain, 91 Penn. St. 442; Hays *v.* Houston, &c. R. R. Co., 46 Tex. 272; Houston, &c. Ry Co. *v.* Cowser, 57 Tex. 293. The Amiable Nancy, 3 Wheat. (U. S.) 546.

Knowingly retaining the agent in service after the wrongful act will be a ratification: New Orleans, &c. R. R. Co. *v.* Burke, 53 Miss. 200, 24 Am. Rep. 689; Bass *v.* Chicago, &c. Ry Co., 42 Wis. 654, 24 Am. Rep. 437; Gasway *v.* Atlanta, &c. Ry Co., 58 Ga. 216; Perkins *v.* Missouri, &c. R. R. Co., 55 Mo. 201.

[1] Atlantic, &c. Ry Co. *v.* Dunn, 19 Ohio St. 162, 2 Am. Rep. 382; Goddard *v.* Grand Trunk Ry Co., 57 Me. 202, 2 Am. Rep. 39; Palmer *v.* Railroad, 3 S. C. 580, 16 Am. Rep. 750; Doss *v.* Missouri, &c. R. R. Co., 59 Mo. 27, 21 Am. Rep. 371; Hanson *v.* European, &c. Ry Co., 64 Me. 84, 16 Am. Rep. 404; New Orleans, &c. R. R. Co. *v.* Burke, 53 Miss. 200, 24 Am. Rep. 689; Philadelphia, &c. R. R. Co. *v.* Larkin, 47 Md. 155, 28 Am. Rep. 442; Singer Mfg. Co. *v.* Holdfodt, 86 Ill. 455, 29 Am. Rep. 43; St. Louis, &c. R. R. Co. *v.* Dalby, 19 Ill. 353; Gasway *v.* Atlanta, &c. R. R. Co., 58 Ga. 216; Wabash, &c. Ry Co. *v.* Rector, 104 Ill. 296; Jeffersonville R. R. Co. *v.* Rogers, 38 Ind. 116, 10 Am. Rep. 103; American Express Co. *v.* Patterson, 73 Ind. 430; Hawes *v.* Knowles, 114 Mass. 518; Levi *v.* Brooks, 121 Mass. 501; Forsee *v.* Alabama, &c. R. R. Co., 63 Miss. 66, 56 Am. Rep. 801.

[2] "The rule is," says SOMERVILLE, J., in Burns *v.* Campbell, 71 Ala. 271, 292, "that, where several defendants are sued in *tort* for damages, the malice or other evil motive of *one* can not be matter of aggravation, or ground for vindictive damages against the *other*. Wood's Mayne on Damages, p. 594, § 624. Hence, principals are not generally held liable for such damages by reason of the evil motive of an agent, unless the act of the agent was fully ratified with a knowledge of its malicious, aggravating, or grossly negligent character; or these matters of aggravation were probably consequent on the doing of the wrong ful act ordered by the principal; or unless the agent was employed with

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§ 752. **Unsatisfied Judgment against Agent no Bar to Action against Principal.** A judgment obtained against an agent for a fraud committed by him while acting within the scope of his agency, and which remains wholly unpaid, is no bar to an action by the same plaintiff against the agent's principal to recover damages for the same fraud.[1]

a knowledge of his incompetency. Lienkauf v. Morris, 66 Ala. 406, 415; Pollock v. Gantt, 69 Ala. 373; Kirksey v. Jones, 7 Ala. 622; Field's Law Damages, §§ 86, 87; Wood's Mayne on Dam., p. 57, § 48; Carmichael v. W. and L. Railway Co., 13 Ir. L. R. 313."

[1] Maple v. Railroad Co., 40 Ohio St. 313, 48 Am. Rep. 685.

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CHAPTER VI.

THE DUTIES AND LIABILITIES OF THIRD PERSONS TO THE AGENT.

I. In Contract.

§ 753. In general — Right of Action in Principal alone.
754. Agent may sue on Contract made by him.
755. Agent may sue on Contract made with him personally.
756. Agent may sue when he has a beneficial Interest.
757. Same Subject — Principal may sue or control Action.
758. Agent only may sue on sealed Contract made with him personally.
759. Agent's Rights depend upon the Contract.
§ 760. Right of assumed Agent to show himself Principal.
761. Agent may recover Money paid by him under Mistake or illegal Contract.
762. What Defenses open to third Person.
763. What Damages Agent may recover on Contract.

II. In Tort.

764. Agent may sue for personal Trespass.
765. When Agent may sue for Injuries to Principal's Property.

I.

IN CONTRACT.

§ 753. **In General—Right of Action in Principal alone.** Contracts entered into by the agent with third persons in pursuance of his authority, are presumed to be made on account and in behalf of the principal, and for his benefit and advantage. It is the principal's contract, and the benefits which grow out of it are to be reaped by him. The legal interest in the contract vests in the principal. As a general rule, therefore, where the contract is made by the agent, as such, on behalf of his principal, and the agent has no beneficial interest in the transaction, the right of action is in the principal alone, and the agent cannot sue upon it.[1]

[1] Fisher v. Marsh, 6 B. & S. 411; Buckbee v. Brown, 21 Wend. (N. Y.) 110; Garland v. Reynolds, 20 Me. 45; Commercial Bank v. French, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; Medway Cotton Manufactory v. Adams,

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§ 754. Agent may sue on Contract made by him. But it has been seen that, notwithstanding the fact that the agent has authority, and is expected to bind the third person with whom he deals, to the principal, yet, through failure to use apt and appropriate language, or from a deliberate intention to deal with the agent exclusively, the result of the negotiation may be that the third person has assumed obligations, either *prima facie* or exclusively, to the agent alone. It may thus happen that the legal interest in the contract will be, or will appear to be, in the agent alone, and, in accordance with the well settled rule that an action upon a contract is to be brought in the name of the party in whom the legal interest in the contract is vested,[1] the right of action may be either in the agent alone,[2] or it may be subject to an action by the agent or the principal.[3] This question as to the agent's right of action may arise under a variety of circumstances. Thus the contract may be, (a) an unwritten one, or it may be, (b) a written contract, and if in writing, it may be, (c) under seal. So in his negotiation the agent may have acted, (a) as the agent of a known principal, or, (b) he may have disclosed the fact of his agency, but concealed the name of his principal, or, (c) he may have bargained as the real principal. So the contract upon which the question arises may be, (a) fully executed, or, (b) partially executed, or, (c) wholly executory.

§ 755. Agent may sue on Contract made with him personally. Where the contract is made with the agent personally, whether as a result of the failure to use apt and sufficient language to bind the principal, or of a deliberate intention to deal with the agent alone, the latter is, as has been seen, personally liable upon the contract. And this obligation is reciprocal,—the other party is bound to the agent, and in him vests the legal interest in the contract, and, consequently, the right of action upon it. It is, therefore, a general rule that where a contract, whether written or unwritten, is, in terms, made with the agent personally, he may sue upon it.[4] This rule is unquestioned where the fact of

10 Mass. 360; Lowell *v.* Morse, 1 Metc. (Mass.) 475; Barlow *v.* Congregational Society, 8 Allen (Mass.) 462; Gunn *v.* Cantine, 10 Johns. (N. Y.) 387; Thatcher *v.* Winslow, 5 Mason (U. S. C. C.) 58.

[1] Chitty on Pleadings, 2.

[2] Cocke *v.* Dickens, 4 Yerg. (Tenn.) 29. 26 Am. Dec. 214; Shepherd *v.* Evans, 9 Ind. 260; Rutherford *v.* Mitchell, Mart. & Yerg. (Tenn.) 261.

[3] See *post*, § 757.

[4] Colburn *v.* Phillips, 13 Gray (Mass.) 64. This case contains an

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the agency and the name of his principal are both concealed by the agent. In such a case the agent is, in contemplation of law, the real contracting party, to whom the promises of the other party were made and who is entitled to enforce them.[1] But the rule also applies although both the fact of the agency and the name of the principal were disclosed. If the fact that the agent acts as such appears, but the name of the principal does not appear, the action may be sustained in the name of the agent as the only party disclosed to whom the promise is made.[2] And so, although the name of the principal appears, this fact is not conclusive of the absence of the agent's right of action. The question here, as in the cases that have been considered, is, are the words used in respect to the principal descriptive of the person merely, or do they declare that the promise runs to the principal directly.[3]

exhaustive review of the earlier cases. Van Staphorst *v.* Pearce, 4 Mass. 258; Harp *v.* Osgood, 2 Hill (N. Y.) 216; Grigsby *v.* Nance, 3 Ala. 347; Buffum *v.* Chadwick, 8 Mass. 103; Bird *v.* Daniel, 9 Ala. 302; Doe *v.* Thompson, 22 N. H. 217; Potter *v.* Yale College, 8 Conn. 60; Alsop *v.* Caines, 10 Johns. (N. Y.) 396; Borrowscale *v.* Bosworth, 99 Mass. 378, 383; United States Tel. Co. *v.* Gildersleve, 29 Md. 232, 96 Am. Dec. 519; Sharp *v.* Jones, 18 Ind. 314, 81 Am. Dec. 359; Goodman *v.* Walker, 30 Ala. 482, 68 Am. Dec. 134; Albany & Rensselaer Co. *v.* Lundberg, 121 U. S. 451; Packard *v.* Nye, 2 Metc. (Mass.) 47; Kennedy *v.* Gouveia, 3 Dowl. & R. 503; Parker *v.* Winlow, 7 El. & Bl. 942; Dutton *v.* Marsh, L. R. 6 Q. B. 361; Ludwig *v.* Gillespie, 105 N. Y. 653.

In Rowe *v.* Rand, 111 Ind. 206, NIBLACK, J., lays down the rule as follows: "An agent may sue in his own name: *First*, When the contract is in writing, and is expressly made with him, although he may have been known to act as agent. *Secondly*, When the agent is the only known or ostensible principal, and is, therefore, in contemplation of law the real contracting party. *Thirdly*, When, by the usage of trade, he is authorized to act as owner or as a principal contracting party, notwithstanding his well known position as agent only. But this right of an agent to bring an action, in certain cases, in his own name is subordinate to the rights of the principal, who may, unless in particular cases, where the agent has a lien or some other vested right, bring suit himself, and thus suspend or extinguish the right of the agent." Upon this latter point see *post*, § 757.

[1] Sims *v.* Bond, 5 B. & Ad. 389; Fisher *v.* Marsh, 6 B. & S. 411; Evans *v.* Evans, 3 Ad. & El. 132; Lapham *v.* Green, 9 Vt. 407.

[2] Clap *v.* Day, 2 Greenl. (Me.) 305, 11 Am. Dec. 99; Cocke *v.* Dickens, 4 Yerg. (Tenn.) 29, 26 Am. Dec. 214; Buffum *v.* Chadwick, 8 Mass. 103.

[3] See Albany & Rensselaer Co. *v.* Lundberg, 121 U. S. 451, and cases cited.

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These principles are of frequent application to the case of commercial paper. Thus upon a note or bill payable to "A. B., agent," or to "A. B., agent for C. D.," or to "A. B., trustee," or to "A. B., executor," etc., or to "A. B. for the use of C. D.," the action may be maintained in the name of A. B.[1]

The same rule applies to a promise made to "A. B., cashier," or "A. B., president of C. D. Company." In such cases the action may be brought in the name of the officer, although it is now generally held that the corporation may sue also.[2]

But where the promise is made to the "agent of C. D." or the "Cashier of the E. bank," or to the "treasurer of the F. Co.," and the like, the name of the agent or officer not being disclosed, it is usually regarded as made to the principal directly.[3]

So where an agent carries on business for his principal and appears to be the proprietor and sells goods as the apparent owner, he can sustain an action in his own name for the price.[4] And where the principal carries on business in the name of the agent, actions may be sustained in the name of the agent upon contracts made to him in that name.[5] So where an agent ships goods, taking the bill of lading in his own name, he may sue upon the contract of carriage for damages arising from a breach of it.[6] So one who describes himself as agent, but covenants

[1] Clap v. Day, 2 Greenl. (Me.) 305. 11 Am. Dec. 99; Buffum v. Chadwick, 8 Mass. 103; Goodman v. Walker, 30 Ala. 482; Pierce v. Robie, 39 Me. 205; Rutland, &c. R. R. Co. v. Cole, 24 Vt. 39; Cocke v. Dickens, 4 Yerg. (Tenn.) 29, 26 Am. Dec. 214; Van Staphorst v. Pearce, 4 Mass. 258; Shepherd v. Evans, 9 Ind. 260; Rose v. Laffan, 2 Speers. (S. C.) 424; Alston v. Heartman, 2 Ala. 699; Horah v. Long, 4 Dev. & Bat. (N. C.) 274.

[2] Fairfield v. Adams, 16 Pick. (Mass.) 381; Johnson v. Catlin, 27 Vt. 87. That principal also may sue, see Baldwin v. Bank of Newbury, 1 Wall. (U. S.) 239; First Nat. Bank v. Hall, 44 N. Y. 395; Garton v. Union City Bank, 34 Mich. 279; Barney v. Newcomb, 9 Cush. (Mass.) 46; Rutland, &c. R. R. Co. v. Cole, 24 Vt. 38; Pratt v. Topeka Bank, 12 Kans. 570.

[3] Commercial Bank v. French, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; Ewing v. Medlock, 5 Port. (Ala.) 82; Alston v. Heartman, 2 Ala. 699; Harper v. Ragan, 2 Blackf. (Ind.) 39; Crawford v. Dean, 6 Id. 181; Vermont Central R. R. Co. v. Clayes, 21 Vt. 31; Pigott v. Thompson, 3 Bos. & P. 147.

[4] Gardiner v. Davis, 2 Car. & P. 49; Dancer v. Hastings, 4 Bing. 2; United States Tel. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519.

[5] Alsop v. Caines, 10 Johns. (N. Y.) 396.

[6] Joseph v. Knox, 3 Camp. 320; Blanchard v. Page, 8 Gray (Mass.) 281; Hooper v. Chicago, &c. Ry Co., 27 Wis. 81, 9 Am. Rep. 439; Dunlop

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as in his own right, may maintain an action in his own name against the other party upon the covenants.[1] And a broker may sue a telegraph company in his own name for a breach of contract to transmit an order, in his name though on behalf of his principal, for the purchase or sale of goods;[2] so an agent who, having sold his principal's land, remits the money by express, may sue the express company for a loss of the money through its negligence.[3]

An agent who sells his principal's goods, not as agent but as principal, may sue the purchaser for the price.[4] And on a contract made in the agent's own name for an undisclosed principal, whether the agent describes himself as such or not, either the agent or the principal may sue.[5]

§ 756. **Agent may sue when he has a beneficial Interest.** Mr. CHITTY lays down the rule[6] which has been often cited, that "when an agent has any beneficial interest in the performance of the contract, as for commission, etc., or a special property or interest in the subject-matter of the agreement, he may support an action in his own name upon the contract,[7] as in the case of

v. Lambert, 6 Cl. & Fin. 600; Southern Express Co. v. Craft, 49 Miss. 480, 19 Am. Rep. 4; Finn v. Western R. R. Co., 112 Mass. 524, 17 Am. Rep. 128.

In action sounding in tort, the action must be brought by the party having an interest in the goods. Thompson v. Fargo, 49 N. Y. 188, 10 Am. Rep. 342; Krudler v. Ellison, 47 N. Y. 36, 7 Am. Rep. 402.

[1] Potts v. Rider, 3 Ohio 70, 17 Am. Dec. 581. Upon a contract made between "Gustaf Lundberg, agent for N. M. Hoglund's Sons & Co.," and "Albany and Rensselaer Iron and Steel Co.," signed "Gustaf Lundberg," "Albany & Rensselaer Iron & Steel Co.," Lundberg may sue in his own name. Albany & Rensselaer Co. v. Lundberg, 121 U. S. 451, citing Kennedy v. Gouveia, 3 D. & R. 503; Parker v. Winlow, 7 E. & B. 942; Dutton v. Marsh, L. R. 6 Q. B. 361; Buffum v. Chadwick, 8 Mass. 103; Packard v. Nye, 2 Metc. (Mass.) 47; distinguishing Gadd v. Houghton, 1 Ex. Div. 357, 18 Eng. Rep. 361; and Oelricks v. Ford, 23 How. (U. S.) 49.

[2] United States Tel. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519.

[3] Snider v. Adams Express Co., 77 Mo. 523.

[4] Keown v. Vogel, 25 Mo. App. 35.

[5] Ludwig v. Gillespie, 105 N. Y. 653; Considerant v. Brisbane, 22 N. Y. 389; Schaefer v. Henkel, 75 N. Y. 378.

[6] Chitty on Pleadings, 8, 16 Am. Ed.

[7] Citing Porter v. Raymond, 53 N. H. 519; Treat v. Stanton, 14 Conn. 445; Barnes v. Insurance Co., 45 N. H. 21; Underhill v. Gibson, 2 N. H. 352; Tankersville v. Graham, 8 Ala. 245; Butts v. Collins, 13 Wend. (N. Y.) 139; Colburn v. Phillips, 13 Gray (Mass.) 64; Borrowscale v. Bosworth, 99 Mass. 378, 383.

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a factor or a broker,[1] or a warehouseman or carrier,[2] an auctioneer,[3] a policy broker whose name is on the policy,[4] or the captain of a ship for freight."[5]

A mere interest in commissions to be earned, however, would not, of itself, be sufficient,[6] but the rule must be limited to those cases in which the contract was in the agent's name, or in which he has a lien upon, or a special property in, the subject-matter.[7]

Thus cotton factors who have sold cotton consigned to them may, in their own names, recover the damages resulting from a breach of the contract by the buyer, although they may be bound to pay the damages, when recovered, to their consignors. The factors have a special property in the cotton, and have a lien upon it for their commissions, which commissions attach on the very damages they may recover, and would be increased thereby.[8] So a broker may sue in his own name, for the breach of contract to transmit a telegraph message sent by him, and directing the sale of property of his principal, in which the broker has a special interest and for the sale of which he is entitled to a commission.[9] And agents who have a special interest in goods by reason of advances made for freight upon them, may maintain an action in their own names against a carrier by whose negligence they were injured.[10]

So an auctioneer has such a special property in the goods sold by him, that he may maintain an action for the price, though

[1] Citing Grove *v.* Dubois, 1 T. R. 112; Atkyns *v.* Amber, 2 Esp. 493; Williams *v.* Millington, 1 H. Bl. 82; George *v.* Clagett, 7 T. R. 355: Johnson *v.* Hudson, 11 East, 180; Sadler *v.* Leigh, 4 Camp. 195; Morris *v.* Cleasby, 1 M & S. 581; Sailly *v.* Cleveland, 10 Wend. (N. Y.) 156.

[2] Citing per LORD ELLENBOROUGH in Martini *v.* Coles, 1 M. & S. 147.

[3] Citing Williams *v.* Millington, 1 H. Bl. 81; Coppin *v.* Craig, 2 Marsh. 501; Farebrother *v.* Simmons, 5 B. & Ald. 333; Grice *v.* Kenrick, L. R. 5 Q. B. 340.

[4] Citing PARK on Ins. 403; Grove *v.* Dubois, 1 T. R. 112; Hagedorn *v.* Oliverson, 2 M. & S. 485; Garrett *v.* Handley, 4 B. & C. 666; Cumming *v.* Forester, 1 M. & S. 497; Mellish *v.* Bell, 15 East, 4; Ward *v.* Wood, 13 Mass. 539; Lazarus *v.* Commonwealth Ins. Co., 5 Pick. (Mass.) 76; Farrow *v.* Commonwealth Ins. Co., 18 Id. 53; Rider *v.* Ocean Ins. Co., 20 Id. 259; Williams *v.* Ocean Ins. Co., 2 Metc. (Mass.) 303; Somes *v.* Equitable Ins. Co. 12 Gray (Mass.) 531.

[5] Citing Shields *v.* Davis, 6 Taunt. 65; Brown *v.* Hodgson, 4 Taunt. 189.

[6] Fairlie *v.* Fenton, L. R. 5 Ex. 169.

[7] United States Tel. Co. *v.* Gildersleve, 29 Md. 232, 96 Am. Dec. 519.

[8] Groover *v.* Warfield, 50 Ga. 644.

[9] United States Tel. Co. *v.* Gildersleve, *supra*.

[10] Steamboat Co. *v.* Atkins; 22 Penn. St. 522.

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they were sold as the goods of a named principal.[1] *A fortiori* is this true where by the terms of the sale, the purchase price is to be paid to him.[2]

So a factor has such an interest as will enable him to sue for the price of the goods he sells.[3] But a mere broker can not sue.[4]

§ 757. **Same Subject—Principal may sue or control Action.** It is not to be inferred, however, that the agent is the only party who may maintain the action, for, as will be seen in the following chapter, it is a well settled rule that when a contract, not under seal, is made by an agent for his principal, even though the latter were not disclosed, the principal may sue upon it instead of the agent. And this right of the principal to sue upon the contract takes precedence over that of the agent; the principal being always at liberty to interfere and bring the action in his own name to the exclusion of the agent's right,[5] except where the agent, by lien or otherwise, has an interest or estate in the subject-matter of the action.[6]

§ 758. **Agent only may sue on sealed Contract made with him personally.** But where a contract under seal is made by the agent in his own name, the agent alone is the party in whose name a recovery upon it can be had.[7]

§ 759. **Agent's Rights depend upon the Contract.** The liability of third persons to an agent, upon a contract made with him, is to be ascertained by that contract alone, and cannot be enlarged by reference to any agreement between the agent and the principal by which their mutual rights are to be determined.[8]

[1] Bleecker *v.* Franklin, 2 E. D. Smith (N. Y.) 93; Minturn *v.* Main, 7 N. Y. 220; Hulse *v.* Young, 16 Johns. (N. Y.) 1.

[2] Thompson *v.* Kelly, 101 Mass. 291, 3 Am. Rep. 353.

[3] Graham *v.* Duckwall, 8 Bush. (Ky.) 12; Johnson *v.* Hudson, 11 East 180.

[4] Fairlie *v.* Fenton, L. R., 5 Ex. 169.

[5] 1 CHITTY on Pleading, 9; Morris *v.* Cleasby, 1 M. & Sel. 579; Bickerton *v.* Burrell, 5 M. & Sel. 385; Vischer Yates, 11 Johns. (N. Y.) 23; Yates *v.* Foot, 12 John. (N. Y.) 1; Kelley *v.* Munson, 7 Mass. 318, 324; Corlies *v.* Cumming, 6 Cow. (N. Y.) 181; Borrowscale *v.* Bosworth, 99 Mass. 383; Ludwig *v.* Gillespie, 105 N. Y. 653; Considerant *v.* Brisbane, 22 N. Y. 389; Schaefer *v.* Henkel, 75 N. Y. 378.

[6] Rowe *v.* Rand, 111 Ind. 206

[7] Shack *v.* Anthony, 1 Maule & Sel. 572; Berkeley *v.* Hardy, 5 B. & C. 355; Dancer *v.* Hastings, 4 Bing. 2.

[8] Evrit *v.* Bancroft, 22 Ohio St. 172.

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§ 760. **Right of assumed Agent to show himself Principal.** The question of the right of one, who has contracted in the character of an agent, to throw off this character and show himself to be the real principal in the transaction, is one attended with no little difficulty. Every man has the right to determine for himself with whom he will deal, and he cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or relies upon the character or qualities of an individual, or has reasons why he does not wish to deal with a particular party. In all these cases, he may select the person to whom he will entrust the performance, and, having selected one, he can not be compelled, against his will, to accept performance from another.[1]

It is obvious, also, that an attempt to enforce the performance of a contract which is purely executory, involves different considerations than an endeavor to recover from a third person the stipulated return for a performance fully executed by or on behalf of the agent. Equally manifest is it that the fact whether the agent assumed to act for a named, or for an unnamed principal, is an important element. These considerations suggest a division of the question thus: The right of an assumed agent to show himself to be the real principal, 1. Where he contracted for a named principal and the contract is, *a.* executory, or, *b.* executed 2. Where he contracted for an unnamed principal and the contract is, *a.* executory, or, *b.* executed.

1. *a.* A person who has assumed as the agent of a named principal, to pledge the performance of that principal to a third person, can not, while the contract remains unperformed, insist upon substituting himself as the real principal, without the consent of the other party, in any case in which it may reasonably be considered that the skill, ability or solvency of the named principal was a material ingredient in the contract.[2] If A contract with B

[1] Boston Ice Co. *v.* Potter, 123 Mass. 28, 25 Am. Rep. 9; Boulton *v.* Jones, 2 H. & N. 564; Schmaling *v.* Thomlinson, 6 Taunt. 147.

[2] Rayner *v.* Grote, 15 Mees. & Wels. 359; Schmaltz *v.* Avery, 16 Ad. & Ell. (Q. B.) 655. "In many such cases, such as, for instance, the case of contracts in which the skill or solvency of the person who is named as the principal may reasonably be considered as a material ingredient in the

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as the assumed agent of C for the personal services of C, B can not, by offering to perform the contract himself, recover the stipulated compensation from A. This principle is too plain to require illustration.

1. *b.* A person who has assumed, as the agent of a named principal, to pledge the performance of that principal to a third person, may, if the contract has been performed by himself as principal with the knowledge and express or implied consent of such third person, compel performance to himself on the part of such third person, although personal considerations may have entered into the making of the contract; but where such personal considerations are involved, he can not recover if the performance by himself as principal has been without the knowledge or consent of the other party,[1] If A contracts with B for the personal services of C, and B offers to perform and does perform as being himself C, with the knowledge and without the dissent of A,—hence with A's implied consent,—B may recover of A the stipulated compensation; but not if the performance was without the knowledge,—and hence without the express or implied consent,—of A.

Whether, where the contract can not reasonably be considered to have been entered into from any consideration of personal skill, solvency or other personal reason, it is competent for one, who has contracted as the assumed agent of a named principal, to show himself to be the real principal, and recover upon the contract, whether executed or executory, is not clear from doubt. It has been intimated in one or two cases,[2] that this might be done if notice of the true state of the case were given to the other party before the action was begun, but no case has been discov-

contract, it is clear that the agent cannot then show himself to be the real principal, and sue in his own name; and perhaps it may be fairly urged that this, in all executory contracts, if wholly unperformed, or if partly performed without the knowledge of who is the real principal, may be the general rule." ALDERSON, B. in Rayner *v.* Grote, *supra* at p. 365.

[1] Rayner *v.* Grote, 15 M. & W. 359; Schmaltz *v.* Avery, 16 Q. B. 655; Eggleston *v.* Boardman, 37 Mich. 14; Boston Ice Co. *v.* Potter, 123 Mass. 28, 25 Am. Rep. 9; Winchester *v.* Howard, 97 Mass. 303; 93 Am. Dec. 93; Mudge *v.* Oliver, 1 Allen (Mass.) 74; Orcutt *v.* Nelson, 1 Gray (Mass.) 536. Smelting Co. *v.* Belden Co., 127 U. S. 387.

[2] Bickerton *v.* Burrell, 5 Maule & Sel. 383; Foster *v.* Smith, 2 Cold. (Tenn.) 475, 88 Am. Dec. 604.

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ered in which this precise question was presented for adjudication, and no satisfactory reason is apparent which will permit one, who, in express terms, has made another than himself the party to the contract, by any mere notice to change the essential nature of the agreement, or be permitted to recover, as a party, when he has in terms made himself not a party.[1] The true rule would seem to be that it can not be, in any case, while the contract remains executory, and that, if it can be done where the contract is executed, it can only be to the extent that the execution, by the assumed agent as the real principal, has been with the knowledge and consent of the other party.[2]

2. Where the contract is entered into by the assumed agent, as agent for an unnamed principal, no personal considerations can arise, because as no particular principal is named or known, no particular elements of skill, solvency or ability, are involved. In most of such cases, the words referring to a principal would, in accordance with established rules, be regarded as mere *descriptio personæ*, or be rejected as surplusage. In such a case, the third person must be deemed to be liable to some one, and as no one else is designated, it must be presumed that he is liable to the person who in fact sustained the relation of principal in the transaction, and this principal may as well be the assumed agent as a stranger, In either event, the rights of the third person are not impaired, because he has contracted to answer to any one who might be entitled.[3]

In cases of this nature, it is immaterial whether the claim be made while the contract remains executory or after it is fully executed. The other party is, of course, entitled to be informed as to who the real principal is, whether the agent or a stranger, that he may have opportunity to avail himself of any rights which he may have against such principal.

§ 761. **Agent may recover Money paid by him under Mistake or illegal Contract.** Where an agent pays out the money of his principal to a third person under a mistake of fact,[4] or where

[1] Bickerton *v.* Burrell, 5 M. & S. 383. See also Boston Ice Co. *v.* Potter, *supra.*; Hills *v.* Snells, 104 Mass. 173; Boulton *v.* Jones, 2 H. & N. 564; Schmaling *v.* Thomlinson, 6 Taunt. 147.

[2] See cases in preceding note.

[3] Schmaltz *v.* Avery, 16 Q. B. 655.

[4] Lord Mansfield laid down the rule in an early case as follows; "Where a man pays money by his *agent*, which ought not to have

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he pays it upon a contract which subsequently proves to be illegal, if the agent was ignorant of its illegality at the time,[1] he may sue for and recover it in his own name. Such an action is, ordinarily, the only remedy by which an agent, who has parted with his principal's money under a mistake of fact, and for which he is answerable to his principal, can reimburse himself.[2]

In such cases, however, as will be seen, the principal, being the party to whom the money belongs, and for whose benefit it is to be recovered, may ordinarily sue instead of the agent.[3]

Thus an agent who, not being authorized to exchange money of his principal in his hands, has so exchanged it and received in exchange a worthless counterfeit bill, may maintain an action in his own name to recover the money so paid out by him.[4]

But an agent who has carelessly or mistakenly sold the property of his principal, entrusted to him for sale, for less than the proper price, the purchaser not being in fault, can not recover of such purchaser the difference between the selling price and the real price, although the agent may have paid such difference to his principal in the settlement of the mistake.[5]

§ 762. **What Defenses open to third Person.** "Where the agent sues in his own name,"[6] says Mr. Evans, "the defendant may avail himself of all defenses which would be good at law and in equity:

a. As against the agent who is the plaintiff on the record;[7] or

been paid, either the agent, or principal, may bring an action to recover it back. The agent may, from the authority of the principal; and the principal may, as proving it to have been paid by his agent." Stevenson v. Mortimer, Cowp. 805.

[1] Oom v. Bruce, 12 East, 225. In this case an insurance had been made on goods from a port in Russia to London, by an agent residing in London for a Russian subject. The insurance was in fact made after the commencement of hostilities between Russia and England, but before knowledge of it reached London, and after the ship had sailed and been confiscated. At the trial LORD ELLENBOROUGH ruled that the agent having effected the insurance without any consciousness of its illegality at the time was entitled to recover back the premium paid, as money had and received by the defendant to the plaintiff's use, and without consideration as the risk never attached.

[2] Kent v. Bornstein, 12 Allen (Mass.) 342.

[3] Stevenson v. Mortimer, Cowp. 805.

[4] Kent v. Bornstein, *supra*. In such a case it is not necessary to tender back the worthless bill before bringing the action.

[5] Hungerford v. Scott, 37 Wis. 341.

[6] EVANS on Agency, 387.

[7] Gibson v. Winter, 5 B. & Ad. 96.

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b. As against the principal for whose use the action is brought, provided, of course, a principal exists." [1]

§ 763. What Damages Agent may recover on Contract. Where the action is brought by the agent upon the contract, he may, unless the principal intervenes, recover the full measure of damages for its breach, in the same manner as though the action had been brought by the principal.[2] The fact that the damages, when recovered, will belong to the principal does not affect this right.[3]

But where the principal intervenes, the agent, when permitted to sue at all, can only recover to the extent of his special interest, by virtue of which the action is maintained.

II.

IN TORT.

§ 764. Agent may sue for personal Trespass. For all trespasses and injuries committed by third persons to the agent personally in the course of his employment, the agent may sue and recover in his own name. In a proper case the principal might recover *his* damages also.

Thus an agent, selling goods upon commission, may recover damages from a third person for a libel upon him in reference to the subject-matter of his agency, by reason of which he lost customers and was deprived of the natural gains and profits of the business.[4]

§ 765. When Agent may sue for Injuries to Principal's Property. The possession by a mere servant of his master's goods is ordinarily deemed to be so far the possession of the master, as to give the servant no right of action against one who disturbs that possession,[5] but where the party in possession has a special prop-

See also Leeds *v.* Marine Ins. Co., 6 Wheat. (U. S.) 565.

[1] Grice *v.* Kenrick L. R. 5 Q. B. 344; Smith *v.* Lyon, 3 Camp. 465.

[2] Groover *v.* Warfield, 50 Ga. 644; United States Tel. Co. *v.* Gildersleve, 29 Md. 232, 96 Am. Dec. 519; Joseph *v.* Knox, 3 Camp. 320; Gardiner *v.* Davis, 2 C. & P. 49; Dancer *v.* Hastings, 4 Bing. 2.

[3] Groover *v.* Warfield, *supra*; United States Tel. Co. *v.* Gildersleve, *supra*.

[4] Weiss *v.* Whittemore, 28 Mich. 366.

[5] Faulkner *v.* Brown, 13 Wend. (N. Y.) 63; Tuthill *v.* Wheeler, 6 Barb. (N. Y.) 362.

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erty or interest in them, the rule is different. Thus an agent who is in possession of his principal's goods, having a special property or interest therein, as in the case of a factor, may maintain an action in his own name against any person who wrongfully injures or converts the goods,[1] though such person were the absolute owner.[2] As to all persons except the owner, or those claiming under him, the agent may thus recover the full value of the goods;[3] but as against such owner, or those claiming under him, he can recover only to the extent of his interest.[4] The defendant who has disturbed the agent's possession will not be permitted to set up the rights of a third party in defense, unless he can show that he acted under the authority of such third party.[5] Where, however, such an agent is not in possession, he may, if he can show that he is entitled to immediate possession, recover from one who wrongfully denies him the right.[6] As against a mere wrong doer, he would in this case as in the other, be entitled to recover the full value of the goods;[7] but as against the owner, or one claiming under him, only to the extent of his special property.[8]

[1] Robinson *v.* Webb, 11 Bush (Ky.) 464; Beyer *v.* Bush, 50 Ala. 19; Fitzhugh *v.* Wiman, 9 N. Y. 559; Little *v.* Fossett, 34 Me. 545, 56 Am. Dec. 671; Harker *v.* Dement, 9 Gill (Md.) 7, 52 Am. Dec. 670.

[2] Little *v.* Fossett, *supra*. White *v.* Webb, 15 Conn. 305.

[3] Little *v.* Fossett, *supra*; Harker *v.* Dement, *supra*; Mechanics', &c. Bank *v.* Farmers', &c. Bank, 60 N. Y. 40; Pomeroy *v.* Smith, 17 Pick. (Mass.) 85; Cullen *v.* O'Hara, 4 Mich. 132; Finn *v.* Western R.R. Co., 112 Mass. 524.

[4] Littell *v.* Fossett, *supra*. White *v.* Webb, *supra*; Ingersoll *v.* Van Bokkelin, 7 Cow. (N. Y.) 670; Davidson *v.* Gunsolly, 1 Mich. 388; Burk *v.* Webb, 32 Mich. 178; Treadwell *v.* Davis, 34 Cal. 601; Schley *v.* Lyon, 6 Ga. 530.

[5] Harker *v.* Dement, 9 Gill (Md.) 7, 52 Am. Dec. 670; Duncan *v.* Spear, 11 Wend. N. Y. 54.

[6] Cooley on Torts, 443–447.

[7] See cases in note 3, *supra*.

[8] See cases in note 4, *supra*.

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CHAPTER VII.

THE DUTIES AND LIABILITIES OF THIRD PERSONS TO THE PRINCIPAL.

§ 766. In general.
767. The Rule stated.

1. The Right to Sue on Contract made by Agent.

768. May sue on Contracts made in Name of Principal.
769. May sue on Contracts made in his Behalf but in Agent's Name.
770. Same Subject — How when Contract involves Elements of personal Trust and Confidence.
771. Same Subject—Principal can not sue where Contract solely with Agent personally.
772. Same Subject — Principal's Right superior to Agent's.
773. Principal subject to Defenses which could have been made against Agent.
774. Same Subject—Limitations of Rule.
775. How Principal affected by Agent's Fraud.
776. Third Person can not dispute Principal's Right When—
777. Summary of Rules.

2. Right to Recover Money paid or used by Agent.

778. In general.

A.

779. Right in Cases of first Class.

B.

780. Principal's Right to follow trust Funds
§ 781. Same Subject—Illustrations.
782. Same Subject—Further Illustrations — Restrictive Indorsements.
783. Right to recover Money wrongfully paid by Agent.

3. Right to Recover Property.

784. In general — Principal may recover Property wrongfully applied or disposed of by Agent.
785. Principal's Title can not be divested except by his Consent or voluntary Act.
786. When Possession is Evidence of Authority.
787. Possession coupled with Indicia of Ownership.
788. Same Subject—Illustrations.
789. Principal may recover Property appropriated to Agent's Uses.
790. Right to recover Securities wrongfully released.
791. Right to recover Property wrongfully sold.

4. Right to Recover for Torts.

792. May recover for Injuries occasioned by third Person's Torts.
793. For enticing Agent away.
794. For preventing Agent from performing.
795. For personal Injury to Agent causing Loss of Service.
796. Third Person not liable for Agent's Fraud or Neglect.

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5. Remedies for double Dealing.
§ 797. How when third Person conspires with Agent.
798. How when Agent in secret Employment of the other Party.
6. Conclusiveness of Judgment against Agent.
§ 799. Principal not bound by Judgment against Agent to which he was not a Party.

§ 766. **In general.** The profits, benefits and advantages resulting from the agency belong to the principal. To secure them to him was the object for which the agency was created, and it is therefore his right, not only as against the agent, but as against third persons who have dealt with the agent as such, to obtain and enjoy them. The right, however, is based upon the agent's acts and contracts, and is limited by them. The principal can not avail himself of the advantages of these acts and contracts, and relieve himself of the responsibilities attaching to them. What is said or done by the agent within the scope of his authority is, as has been seen, binding upon the principal. What is said or done by the agent without the scope of his authority, is, as has been seen, not binding upon the principal, unless ratified and approved by him. Such subsequent ratification is equivalent to precedent authorization. One of the most unequivocal evidences of such ratification has been seen to be the fact that the principal, with knowledge of the facts, appropriates to himself the benefits of the agent's unauthorized acts or contracts. These general principles are essential to be borne in mind in considering the questions involved in the subject of this chapter.

§ 767. **The Rule stated.** Keeping in mind these principles it may be said that, subject to certain exceptions and modifications which grow out of them and which will be fully dealt with in the following sections, the principal is entitled to demand, receive and recover from third persons all the rights, profits, benefits and advantages based upon or growing out of his agent's dealings with them, in the same manner and to the same extent as though the same dealings had been had with him in person.[1]

These rights, profits, benefits and advantages may be sought under such circumstances as to involve:

1. The principal's right to sue on contracts made by his agent.

[1] See Story on Agency, § 418. See, generally, the cases cited in the following sections.

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2. His right to recover money paid or used by the agent.
3. His right to recover his property.
4. His right to recover for torts to person or property.
5. His remedies for double dealing between the agent and third persons.
6. The conclusiveness of judgments against the agent.

1. *The Right to Sue on Contracts made by Agent.*

§ 768. **May sue on Contracts made in Name of Principal.** The principal's right to sue upon contracts made by the agent in the name, and for the benefit and advantage of the principal is, of course, unquestioned.[1] Here the principal is the nominal, as well as the real party in interest, and is as much entitled to enforce the contract as though it had been executed by him in person. It has been seen to be the general duty of the agent, authorized to execute a contract in behalf of his principal, to so execute it that it shall be in fact, what it was intended it should be,—a contract running from and to the principal as the party in interest. But, as has been likewise seen, this general duty of the agent is not always performed, and cases are frequent where from a disregard of duty, or a failure to use appropriate language, the contract appears to be one made with the agent rather than with the principal, and it is this class of cases in which difficulties arise.

§ 769. **May sue on Contracts made in his Behalf but in Agent's Name.** It has been seen in the preceding chapter that where the agent contracts for the principal, but in his own name, the agent may, in general, maintain an action upon the contract against the other party. But this right to sue has also there been seen to be subservient to the principal's superior right to maintain the action in his own name upon all simple contracts. Such contracts, though made in the agent's name without the disclosure of his principal, are binding upon the principal, and actions may be maintained upon them by the other party against him when discovered. Being thus liable upon them, he should be entitled to reciprocal rights against the other party. And such is the general rule. All simple contracts made by the agent in the execution of his agency, though

[1] Sharp v. Jones, 18 Ind. 314, 81 Am. Dec. 359.

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made in his own name without disclosing his principal or the fact of the agency, and although the agent acted under a *del credere* commission, may be enforced by the principal, whether he be foreign or domestic, by appropriate actions brought in his own name.[1] Where, however, the contract was under seal, the action should be brought by the principal in the name of the agent.[2] In order to maintain an action it is, of course, necessary for the principal to show the fact of the agency and that the agent, either through previous authorization or a subsequent ratification, had power to bind him to the contract, else there would be no mutuality and consequently no contract.[3] For the purpose of showing that the ostensible party was really but an agent, resort may be had to parol evidence.[4]

[1] Tutt *v.* Brown, 5 Littell (Ky.) 1, 15 Am. Dec. 33; Pitts *v.* Mower, 18 Me. 361, 36 Am. Dec. 727; Gilpin *v.* Howell, 5 Penn. St. 41; 45 Am. Dec. 720; Girard *v.* Taggart, 5 S. & R. (Penn.) 19, 9 Am. Dec. 327; Arlington *v.* Hinds, 1 D. Chip. (Vt.) 431, 12 Am. Dec. 704; Bayley *v.* Onondaga Co. Mut. Ins. Co. 6 Hill (N. Y.) 476, 41 Am. Dec. 759; Violett *v.* Powell, 10 B. Mon. (Ky.) 347, 52 Am. Dec. 548; Ruiz. *v.* Norton, 4 Cal. 355, 60 Am. Dec. 618; Ilsley *v.* Merriam, 7 Cush. (Mass.) 242, 54 Am. Dec. 721; Eastern R. R. Co. *v.* Benedict, 5 Gray (Mass.) 561; 66 Am. Dec. 384; Taintor *v.* Prendergast, 3 Hill (N. Y) 72, 38 Am. Dec. 618; Huntington *v.* Knox, 7 Cush. (Mass.) 371; Edwards *v.* Golding, 20 Vt. 30; Salmon Falls Mnfg Co. *v.* Goddard, 14 How. (U. S.) 446; Foster *v.* Smith, 2 Cold. (Tenn.) 474, 88 Am. Dec. 604; Winchester *v.* Howard, 97 Mass. 303, 93 Am. Dec. 93; Ford *v.* Williams, 21 How. (U. S.) 287; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 Id. 344, 381; Woodruff *v.* McGehee, 30 Ga. 158; Ames *v.* St. Paul &c. R. R. Co. 12 Minn. 413; Mildred *v.* Hermano, 8 App. Cases 874, 36 Eng. Rep. (Moak) 97; Norfolk *v.* Worthy, 1 Camp. 337; Wilson *v.* Hart, 7 Taunt. 295; Bickerton *v.* Burrell, 5 Maule & Sel. 383; Elkins *v.* Boston &c. R. R., 19 N. H. 337.

[2] Violett *v.* Powell, 10 B. Mon. (Ky.) 347, 52 Am. Dec. 548.

[3] Ruiz *v.* Norton, 4 Cal. 355, 60 Am. Dec. 618.

[4] "It is now well settled by authorities," said Chief Justice SHAW of Massachusetts, "that when the property of one is sold by another, as agent, if the principal give notice to the purchaser, before payment to pay to himself, and not to the agent, the purchaser is bound to pay the principal, subject to any equities of the purchaser against the agent.

When a contract is made by deed under seal, on technical grounds, no one but a party to the deed is liable to be sued upon it, and therefore, if made by an agent or attorney, it must be made in the name of the principal, in order that he may be a party, because otherwise he is not bound by it.

But a different rule, and a far more liberal doctrine, prevails in regard to a written contract not under seal. In the case of Higgins *v.* Senior, 8 Mees. & Wels. 834, it is laid down as a gen-

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This right to sue upon the contract embraces every appropriate action by which the rights of the principal can be protected under it, or by which he can secure to himself the benefits and advantages which flow from it. Subject to the exceptions to be hereafter noted, all rights and remedies are open to the principal as though he were in fact, that which he is in contemplation of law,—the actual party to the contract. He may thus not only sue for and recover the direct fruits of the transaction, as the price of his property sold by his agent;[1] or the benefits of an insurance effected by the latter;[2] but he may recover upon col-

eral proposition, that it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract of sale, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals; and this whether the agreement be or be not required to be in writing, by the statute of frauds. But the court mark the distinction broadly between such a case and a case where an agent, who has contracted in his own name, for the benefit, and by the authority of a principal, seeks to discharge himself from liability, on the ground that he contracted in the capacity of an agent. The doctrine proceeds on the ground that the principal and agent may each be bound; the agent, because by his contract and promise he has expressly bound himself; and the principal, because it was a contract made by his authority for his account. Paterson v. Gandasequi, 15 East. 62; Magee v. Atkinson, 2 Mees. & Wels. 440; Trueman v. Loder, 11 Ad. & Ell. 589; Taintor v. Prendergast, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; Edwards v. Golding, 20 Vt. 30. It is analogous to the ordinary case of a dormant partner. He is not named or alluded to in the contract; yet as the contract is shown in fact to be made for his benefit, and by his authority, he is liable.

So, on the other hand, where the contract is made for the benefit of one not named, though in writing, the latter may sue on the contract jointly with others, or alone, according to the interest. Garrett v. Handley, 4 B. & C. 664; Sadler v. Leigh, 4 Campb. 195; Coppin v. Walker, 7 Taunt. 237; Story on Agency, § 410. The rights and liabilities of a principal, upon a written instrument executed by an agent, do not depend upon the fact of the agency appearing on the instrument itself, but upon the facts; 1, that the act is done in the exercise, and 2, within the limits, of the powers delegated; and these are necessarily inquirable into by evidence. Mechanics' Bank v. Bank of Columbia, 5 Wheat. (U. S.) 326;" Huntington v. Knox, 7 Cush. (Mass.) 371. See also that parol evidence is admissible. Salmon Falls Mnfg Co. v. Goddard, 14 How. (U. S.) 446; Briggs v. Munchon, 56 Mo. 467; Bank of Odessa v. Jennings, 18 Mo. App. 651; Oelrichs v. Ford, 21 Md. 489.

[1] Merrick's Estate, 5 W. & S (Penn.) 9; Winchester v. Howard, 97 Mass. 303, 93 Am. Dec. 93.

[2] An undisclosed principal may recover upon an insurance policy taken by the agent in his own name, if the

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lateral obligations, as upon a warranty of quality or title made to the agent.[1] So where an agent lends the money of his principal taking notes payable to his own order secured by mortgages, the principal may enforce or transfer the notes and mortgages.[2]

§ 770. **Same Subject—How when Contract involves Elements of personal Trust and Confidence.** Where the contract, upon which the principal seeks to recover, is one which may reasonably be supposed to have been made with the agent in consideration of some element of personal trust and confidence, a difficult question is raised and one analogous to that, already discussed in the preceding chapter, where an assumed agent proposes to show himself to be the real principal, and to recover upon a similar contract.

The fact that the elements of trust or confidence moved from the other party alone,—that *he* was to do some act involving personal considerations,—could not defeat the principal's right to sue, because it would be no hardship, and involve no prejudice, to the other party, to be required to render his performance to the real principal. But if, on the other hand, these elements moved from the agent,—if they involved the performance by him, as a condition precedent to the right to sue, of some act which must fairly be considered as having been stipulated for in contemplation of his personal skill, influence or solvency,—a different question is presented. And here it would seem that the question whether the contract on the part of the agent was executed or executory must be the test.

For it is certain that if the doing of some personal act, not yet done, is a condition precedent to the right to recover, no undisclosed principal can force his own performance upon the other party in substitution for that of the person for whose individual

agent had no insurable interest. New Orleans Ins. Co. *v.* Spruance, 18 Ill. App. 576; DeVignier *v.* Swanson, 1 Bos. & Pul. 346, note; Browning *v.* Provincial Ins. Co., L. R. 5 Priv. Coun. App. 263, 8 Eng. Rep. 217

[1] "In case of a purchase or exchange of goods by an agent even if the principal be not disclosed, or the bill of sale be made to the agent himself, the property, immediately upon the execution of the contract, rests in the principal; and the right of action upon an implied warranty or on fraudulent representations made to the agent is in the principal, for the damages which ground the action follow the property." 1 Am. Lead. Cas. 643; Cushing *v.* Rice, 46 Me. 303, 71 Am. Dec. 579; Odessa Bank *v.* Jennings, 18 Mo. App. 651.

[2] Caldwell *v.* Meshew, 44 Ark. 564.

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performance the other party had stipulated.[1] If, for example, A contracts with lawyer B to argue A's case in court for a stipulated compensation, lawyer C cannot, against A's will, assert that B was but his agent, and therefore insist upon arguing the cause himself and recovering the compensation.[2] Nor would it make any difference that other people might think or know that C could argue the case a great deal better than B. A having employed B, has a clear right to B's services. If, however, A should, knowingly and without dissent, permit C to make the argument in the place of B, A's right to a personal argument from B must be considered to be waived.[3]

But if, on the other hand, the contract has been fully performed on the part of the agent, no objection could be made to permitting the real principal to require the other party to render performance to him. Thus, in the illustration used, if B, who is in reality C's agent, personally argues A's cause as he agreed, A can suffer no hardship if C should be permitted to recover the compensation.[4] The right of the other party to make the defenses against the principal which he could have made against the agent, had the latter brought the action, is considered in a subsequent section.

§ 771. **Same Subject—Principal cannot sue where Contract is solely with Agent personally.** The right of the principal to sue upon the contract made by the agent in his own name flows from the fact that the agent made the contract in reality, though perhaps this may have been unknown to the other party, as the agent of the principal, and by his authority; and the principal is, therefore, entitled to enforce the contract, not only upon the ground that the benefits of his agent's acts accrue to him, but also upon the ground that he is himself,—when discovered,—liable upon the contract to the other party. If, therefore, as is competent to be done, the other party with knowledge of the agency, dealt with the agent as being in fact the principal, and the agent pledged his individual credit, there, as has been seen, the principal is not bound,—is not a party to the contract and cannot enforce it. Every man has a right to determine for himself

[1] Boston Ice Co *v.* Potter, 123 Mass. 28, 25 Am. Rep. 9; Boulton *v.* Jones, 2 H. & N. 564; King *v.* Batterson, 13 R. I. 117, 43 Am. Rep. 13.

[2] Eggleston *v.* Boardman, 37 Mich. 14

[3] Eggleston *v.* Boardman, *supra.*

[4] Grojan *v.* Wade, 2 Stark. 443; Warder *v.* White, 14 Ill. App. 50.

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what parties he will deal with, and if the other party has expressly dealt with the agent, to the exclusion of the principal, he cannot be made liable to the principal.[1]

§ 772. **Same Subject—Principal's Right superior to Agent's.** The principal's right to bring the action takes precedence of the agent's, and in all cases where either may sue, the principal, by giving notice of his rights to the other party and demanding performance to himself, may cut off the agent's right to sue,[2] except in those cases in which the agent has a lien upon the subject-matter of the contract equal to or greater than the claim of the principal.[3]

Thus if an agent sells goods of his principal but in his own name, the principal may interpose before payment and forbid it to be made to his agent; and a payment made to the agent after such notice will not bind the principal.[4] The mere fact that the agent takes from the purchaser a promissory note payable to the agent personally, will not defeat the principal's right.[5] Of course if the note were negotiable and came into the hands of a *bona fide* holder, such a holder would be protected. But if the note were not so negotiated, or if, by the laws of the state, it did not constitute payment, the principal might bring his action upon the contract of sale,[6] but in such a case he should be prepared to tender back the note upon the trial.

After the principal has interposed and given notice of his claim, his right to sue cannot, of course, be afterwards defeated or impaired by any dealings between the other party and the agent.[7]

§ 773. **Principal subject to Defenses which could have been made against Agent.** But if the principal would avail himself

[1] Humble *v.* Hunter, 12 Q. B. 310; Winchester *v.* Howard, 97 Mass. 303; 93 Am. Dec. 93.

[2] Sadler *v.* Leigh, 4 Camp. 195; Pitts *v.* Mower, 18 Me. 361, 36 Am. Dec. 727; Huntington *v.* Knox, 7 Cush. Mass. 371; Warder *v.* White, 14 Ill. App. 50.

[3] Hudson *v.* Granger, 5 B. & Ald. 27.

[4] Pitts *v.* Mower, *supra*; Huntington *v.* Knox, *supra*.

[5] A principal may sue in his own name on a promissory note, not negotiable made for his benefit although payable to his agent. National Life Ins Co. *v.* Allen, 116 Mass. 398.

[6] Pitts *v.* Mower, *supra*.

[7] Norcross *v.* Pease, 5 Allen (Mass.) 331; Jones *v.* Witter; 13 Mass. 304; Eastman *v.* Wright, 6 Pick. (Mass.) 322; Sigourney *v.* Seveny, 4 Cush. (Mass.) 176; Rockwood *v.* Brown, 1 Gray (Mass.) 261.

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of the benefits of a contract made by an agent in his own name without disclosing his principal, he must also assume the responsibilities of the contract. He must take the contract as it exists at the time he interposes, and subject to all the rights which the other party then possesses against the agent. In the homely but expressive language of a learned judge, the principal must "step into the shoes of the agent." Hence where a third person, who has entered into a contract with the agent in ignorance of the fact that he was not the real principal as he assumed to be, is sued upon the contract by the principal, he may avail himself, as against the principal, of every defense, whether it be by common law or statute, which existed in his favor against the agent at the time the principal first interposed and demanded performance to himself.[1] This right is not affected by the fact that the agent in thus entering into the contract in his own name without disclosing his principal, acted in contravention of the express directions of his principal.[2]

If, therefore, before he has knowledge that the assumed principal was but the agent of another, the other party has made payments to the agent upon the contract, such payments will bind the principal;[3] so if, in such a case, and before the real principal has interposed, the other party has acquired a set-off against the agent, the principal will be bound by the set-off.[4]

This rule, however, does not apply where an agent, as for instance, a mere broker, is authorized to sell the goods of his principal, but is not entrusted either with the possession of the

[1] Rabone v. Williams, 7 T. R. 356, note; George v. Clagett, 7 T. R. 355; Semenza v. Brinsley, 18 C. B. (N. S.) 467, 477; Borries v. Imperial Ottoman Bank, L. R. 9, C. P. 38, 7 Eng. Rep. (Moak) 138; *Ex parte* Dixon, 4 Ch. Div. 133, 19 Eng. Rep. (Moak) 724; Mildred v. Hermano, 8 App. Cas. 874, 36 Eng. Rep. (Moak) 97 and note; Tutt v. Brown, 5 Littell (Ky.) 1, 15 Am. Dec. 33; Taintor v. Prendergast, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; Ruiz v. Norton, 4 Cal. 355, 60 Am. Dec. 618; Ilsley v. Merriam, 7 Cush. (Mass.) 242, 54 Am. Dec. 721; Foster v. Smith, 2 Cold. (Tenn.) 474, 88 Am. Dec. 604; Peel v. Shepherd, 58 Ga. 365; Woodruff v. McGehee, 30 Ga. 158; Baltimore Coal Tar Co. v. Fletcher, 61 Md. 288; Amann v. Lowell, 66 Cal. 306; Bernshouse v. Abbott, 16 Vroom (N. J.) 531, 46 Am. Rep. 789.

[2] *Ex parte* Dixon, 4 Ch. Div. 133, 19 Eng. Rep. (Moak) 724; Peel v. Shepherd, 58 Ga. 365; Eclipse Wind Mill Co. v. Thorson, 46 Iowa, 181.

[3] Peel v. Shepherd, *supra*.

[4] Bernshouse v. Abbott, 16 Vroom (N. J.) 531, 46 Am. Rep. 789, 30 Alb. L. Jour. 51; Baring v. Corrie, 2 B. & Ald. 137; Crosby v. Hill, 39 Ohio St. 100; Harrison v. Ross, 44 N. Y. Super. Ct. 230.

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goods or other *indicia* of property therein. In such a case the purchaser, when sued by the principal, cannot set off a debt due from the agent.[1] Where, on the other hand, as in the case of a factor, the agent is entrusted with the possession of goods sold, and makes the sale in his own name without disclosing his principal, the other party, when sued by the principal upon the contract may set off against him a debt due from the agent.

In order to establish such a set-off the defendant must show:—

1. That the contract was made by a person whom the plaintiff had intrusted with the possession of the goods with power to sell them.

2. That the person sold them as his own goods and in his own name as principal.

3. That the defendant dealt with him as, and believed him to be, the principal in the transaction, up to the time that the set-off accrued.[2]

§ 774. **Same Subject—Limitations of this Rule.** It is obvious that this rule is intended for the protection of third parties who have acquired rights while dealing with the agent as the real principal in ignorance of any other, and who would be prejudiced by permitting another person to interpose and appropriate the benefits of the dealing without recognizing their rights. But where the reason of the rule fails, the rule itself does not apply. Hence if, before the right accrued which they seek to apply against the principal, the other parties had knowledge, or what is equivalent to knowledge, reasonable ground to believe, that the person with whom they were dealing was but an agent, whether the principal was disclosed or not, the rights so acquired cannot be interposed against the action of the principal.[3]

[1] Bernshouse *v.* Abbott, *supra*; Rapone *v.* Williams, 7 T. R. 356, note; Semenza *v.* Brinsley, 18 C. B. (N. S.) 467; Borries *v.* Imperial Ottoman Bank, L. R. 9 C. P. 38, 7 Eng. Rep. (Moak) 138; *Ex parte* Dixon, 4 Ch. Div. 133, 19 Eng. Rep. (Moak) 724; Pratt *v.* Collins, 20 Hun (N. Y.) 126.

[2] Mr. Justice WILLES in Semenza *v.* Brinsley, 18 C. B. (N. S.) 467, 477, as modified by BRETT, J., in *Ex parte* Dixon, 4 Ch. Div. 133, 19 Eng. Rep. (Moak) 724.

[3] Hogan *v.* Shorb, 24 Wend. (N. Y.) 458; Bliss *v.* Bliss, 7 Bosw. (N. Y.) 339; Baring *v.* Corrie, 2 B. & Ald. 137; Childers *v.* Bowen, 68 Ala. 221; Wright *v.* Cabot 47 N. Y. Super Ct. 229, s. c. 89 N. Y. 570; Frame *v.* William Penn Coal Co., 97 Penn. St. 309; Mildred *v.* Hermano, 8 App. Cas. 874, 36 Eng. Rep. (Moak) 97; McLachlin *v.* Brett, 105 (N. Y.) 391; New Zealand Land Co. *v.* Ruston, 5 Q. B. Div. 474, 29 Eng. Rep. 399.

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So in a recent case[1] it is said, "the buyer must be cautious, and not act regardless of the rights of the principal, though undisclosed, if he has any reasonable grounds to believe that the party with whom he deals is but an agent. Hence, if the character of the seller is equivocal,—if he is known to be in the habit of selling sometimes as principal and sometimes as agent, a purchaser who buys with a view of covering his own debt and availing himself of a set-off, is bound to inquire in what character he acts in the particular transaction; and if the buyer chooses to make no inquiry, and it should turn out that he has bought of an undisclosed principal, he will be denied the benefit of his set-off."[2] If by due diligence the buyer could have known in what character the seller acted, there would be no justice in allowing the former to set off a bad debt at the expense of the principal."[3] The defendant is a competent witness upon the question whether he had such knowledge or not.[4]

§ 775. **How Principal affected by Agent's Fraud.** But not only is the principal's action thus subject to the right of set-off which existed as against the agent, but it is also subject to certain defenses and equities growing out of or based upon the agent's fraud, imposition, misrepresentation and misconduct. As has been stated, if the principal would avail himself of the advantages of the agent's acts, he must also assume the responsibilities. Hence it is a rule of universal application, whether the principal be disclosed or not at the time of entering into the contract, that the principal is affected by, and is subject to, every defense which the other party may have, based upon such fraud, imposition, misrepresentation, concealment or other misconduct of the agent as is, either by the prior authorization or a subsequent ratification, properly chargeable to the principal as having been done or committed by the agent within the scope of his authority, although the principal himself may have been entirely innocent.[5]

[1] Miller v. Lea, 35 Md. 396, 6 Am. Rep. 417.

[2] Citing Addison on Cont. 1191.

[3] Citing Fish v. Kempton, 7 M. G. & S. 687.

[4] Frame v. William Penn Coal Co., 97 Penn. St. 309.

[5] DuSouchet v. Dutcher, — Ind. — 15 North E. Rep. 459; Byne v. Hatcher, 75 Ga. 289; Elwell v. Chamberlin, 31 N. Y. 611; Mundorff v. Wickersham, 63 Penn. St. 87; Haskit v. Elliott, 58 Ind. 493; Bennett v. Judson, 21 N. Y. 238; Law v. Grant, 37 Wis. 548; Bowers v. Johnson, 18 Miss. 169; Lawrence v. Hand, 23

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§ 776. **Third Person can not dispute Principal's Right—When.** Where the contract made by the agent has been executed by the principal, the other party can not, when called upon for performance on his part, defeat the principal's right by showing that as between the principal and the agent, the contract was unauthorized. Thus one who borrows money from the principal's agent is estopped to deny the agent's authority to lend it, when called upon by the principal for its repayment.[1]

So where a contract has been made with a subagent for the principal, the party making it can not defeat the principal's action upon it by showing that the appointment of the subagent was unauthorized. Having dealt with him as having authority, he is estopped to deny it.[2]

§ 777. **Summary of Rules.** The following summary of the rules governing the right of the principal to sue upon contracts made by his agent, is adapted from that of Mr. Evans.

I. He may take advantage of all such contracts, whether his name has been disclosed or not, except—

1. Where the contract was in the agent's own name and was under seal.
2. Where the contract is executory and involved considerations personal to the agent.
3. Where the other party, with knowledge of the real principal, elected to deal with the agent exclusively.
4. Where the agent has a lien upon or special property in the subject-matter of the agency, exceeding or equal to the value.

II. This right of the principal is subject to the following qualifications:—

1. Defenses founded upon the fraud of the agent are equally valid against the principal.
2. Where the agent has been allowed to contract as principal, the real principal takes the contract subject to all the equities and rights of which the other party, who has had no notice of the agency, might have availed himself had the agent been in fact the principal.

Miss. 103; National Life Ins. Co. v. Minch, 5 Thomp. & Cook (N. Y.) 545.

[1] See Union Mining Co. v. Rocky Mt. Nat. Bank, 2 Col. 248, s. c. 96 U. S. 640.

[2] Mayer v. McLure, 36 Miss. 389, 72 Am. Dec. 190.

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3. *Right to recover Money paid or used by Agent.*

§ 778. **In general.** The question of the principal's right to recover money belonging to him and paid out or used by his agent may arise under two general states of fact: (*a.*) Where the agent, in the attempted performance of a legitimate and authorized act, has paid out the money by mistake, or under coercion, or without consideration; and (*b.*) Where the agent has, in violation of his duty, paid out or applied the money of his principal to the agent's own uses or purposes.

A.

§ 779. **Right in Cases of first Class.** The right of the principal to recover money paid by his agent to a third person under a mistake of facts; or which was obtained from the agent by fraud or compulsion; or which was extorted from him by unjust and oppressive proceedings;[1] or which was deposited by him upon an illegal wager, or an illegal contract not executed; or which was paid by him upon a consideration which has failed, depends upon the same rules which would apply were the money paid out by the principal himself under the like circumstances, and the principal may recover it wherever he could have recovered it, if paid by him in person.[2]

B.

§ 780. **Principal's Right to follow trust Funds.** The cases of the second class present questions of greater difficulty. Whenever the principal confides to his agent money for the accomplishment of a particular object, or to be appropriated in a specified manner, and whenever money of the principal comes into the hands of the agent which it is his duty to pay over to his principal or to apply in any other designated manner, the law impresses upon that money, for the benefit of the principal, a trust for the performance of the object contemplated which can only be satisfied by its devotion to that object, unless the principal directs it otherwise. While the money remains in the hands of the agent, as has heretofore been seen, he cannot shake off the

[1] Holman *v.* Frost, 26 S. C. 290.

[2] Sadler *v.* Evans, 4 Burr. 1984; Stevenson *v.* Mortimer, Cowp. 805; Ancher *v.* Bank of England, 2 Doug. 637; Sigourney *v.* Lloyd, 8 B. & C. 622.

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trust by any manner or number of alterations or changes in its specific character, unless all trace of it be completely lost, for it is well settled that equity will follow the fund through any number of transmutations and preserve it for the owner as long as it can be identified.[1] As was said by Lord ELLENBOROUGH,[2] "it makes no difference in reason or law into what other form, different from the original, the change may have been made, whether it be into that of promissory notes for the security of the money which was produced by the sale of the goods of the principal, as in Scott *v.* Surman,[3] or into other merchandise, as in Whitecomb *v.* Jacob;[4] for the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail." Neither does it matter in whose name the legal title stands. If the money be converted into a chose in action, the legal right to it may have changed, but equity regards the beneficial ownership.

And this trust is not confined to the period during which the money remains in the possession of the agent, but follows the fund into the hands of whomsoever it may come, until it reaches the possession of one who has an equity superior to that of the principal. Such an one is a *bona fide* holder for value without notice of the trust. For if the fund comes into the hands of a third person who receives it without consideration as a gift, or without parting with value, or with actual or constructive notice of the trust, the principal may recover it from such third person as well as from the agent.[5]

It is not necessary that the third person into whose hands the trust fund may be traced, should be an active wrong doer, or that he should have attempted to defeat the trust. It is enough

[1] Farmers' & Mechanics' Bank *v.* King, 57 Penn. St. 202, 98 Am. Dec. 215; Van Alen *v.* American National Bank, 52 N. Y. 1; National Bank *v.* Insurance Co., 104 U. S. 54.

[2] In Taylor *v.* Plumer, 3 M. & S. 562.

[3] Willes, 400.

[4] 1 Salk. 161.

[5] Farmers' & Mechanics' Bank *v.* King, *supra*; Van Alen *v.* American National Bank, *supra*; National Bank *v.* Insurance Co., *supra*; Jaudon *v.* City Bank, 8 Blatchf. (U. S. C. C.) 430; Fifth National Bank *v.* Village of Hyde Park, 101 Ill. 595, 40 Am. Rep. 218; Riehl *v.* Evansville Foundry Assn, 104 Ind. 70, 3 North E. Rep. 633; Baker *v.* New York Nat. Bank, 100 N. Y. 31, 53 Am. Rep. 150.

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that he is not a *bona fide* holder for value without notice.[1] So it is not necessary that such third person should have had notice of the trust character of the fund at the time it came into his hands. If he receive notice in time to protect himself, it is sufficient.[2] Neither is it necessary that he should have had any notice of its trust character at all up to the time that the principal demands it of him, if he acquired it without consideration.[3]

§ 781. **Same Subject—Illustrations.** These principles have received illustration in a number of cases. Thus, in a leading case in the Supreme Court of the United States, where the general agent of an insurance company, whose business it was to collect and remit to it premiums accruing within the territory assigned to him, deposited such premiums from time to time in a bank to his credit as such "general agent," from which he remitted to his principal by check twice a month, and the bank knew that he was such agent and that the fund so accumulated was made up chiefly of premiums due to the company, it was held that the bank was chargeable with notice of the company's rights therein, although the agent had also deposited some other money therein, and that the company might, in equity, enforce its claim thereon against the bank which claimed a lien upon the deposit for a debt due to it by the agent in his individual capacity.

Said the court: "A bank account, it is true, even when it is a trust fund and designated as such by being kept in the name of the depositor *as trustee*, differs from other trust funds which are permanently invested in the name of trustees for the sake of being held as such; for a bank account is made to be checked against, and represents a series of current transactions. The contract between the bank and the depositor is, that the former will pay according to the checks of the latter, and when drawn in proper form, the bank is bound to presume that the trustee is in the course of lawfully performing his duty, and to honor them accordingly. But when against a bank account, designated as one kept by the depositor in a fiduciary character, the bank seeks to assert its lien as a banker for a personal obligation of the depositor, known to have been contracted for his private benefit, it

[1] Fifth Nat. Bank v. Hyde Park, *supra*.
[2] Farmers' & Mechanics' Bank v. King, *supra*.
[3] Fifth Nat. Bank v. Hyde Park, *supra*.

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must be held as having notice that the fund represented by the account is not the individual property of the depositor, if it is shown to consist, in whole or in part, of funds held by him in a trust relation." [1]

So in a recent case in New York [2] it appeared that a firm of commission merchants, who were insolvent, had deposited in a bank in their own name with the word "agents" added, the proceeds of certain sales made by them for various principals. The deposit was made in this form for the purpose of protecting their principals, which purpose was known to the bank at the time. Upon this deposit, the agents drew a check in favor of the plaintiff, one of the principals, in settlement of a balance due him on sales made by them. In an action brought by the plaintiff on the check, the bank sought, with the consent of the agents, to charge against this deposit an individual debt due from the agents to the bank, but the court held that this could not be done. "It is clear upon the facts," said ANDREWS, J., "that the fund represented by the deposit account was a trust fund, and that the bank had no right to charge against it the individual debt of Wilson & Bro. (the agents.) The bank having notice of the character of the fund, could not appropriate it to the debt of Wilson & Bro., even with their consent, to the prejudice of the *cestui que trusts*. The supposed difficulty in maintaining the action arising out of the fact that the money deposited was not the specific proceeds of the plaintiff's goods, is answered by the case of Van Alen *v.* American National Bank.[3] Conceding that Wilson & Bro. used the specific proceeds for their own purposes, and their identity was lost, yet when they made up the amounts so used, and deposited them in the trust account, the amounts so deposited were impressed with the trust in favor of the principals, and became substituted for the original proceeds and subject to the same equities." The objection that the deposit account represented not only the proceeds of the plaintiffs' goods, but also the proceeds of goods of other persons, and that the other parties interested are not before the court and must be brought in in order to have a complete determination of the controversy, was held to be not well taken. The objection for

[1] National Bank *v.* Insurance Co., 104 U. S. 54.

[2] Baker *v.* New York Nat. Bank, 100 N. Y. 31, 53 Am. Rep. 150.

[3] 52 N. Y. 1.

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defect of parties was not taken in the answer, and moreover, it did not appear that there were any unsettled accounts of Wilson & Bro. with any other person or persons for whom they were agents. The check operated as a setting apart of so much of the deposit account to satisfy the plaintiffs' claim. It did not appear that the plaintiffs were not equitably entitled to this amount out of the fund, or that there was any conflict of interest between the plaintiffs and any other person or persons for whom Wilson & Bro. acted as consignees. The presumption, in the absence of any contrary indication, was that the fund was adequate to protect all interests, and that Wilson & Bro. appropriated to the plaintiffs only their just share.

But where a village treasurer, who stated that he wished to use it to pay warrants drawn in anticipation of the collection of taxes, borrowed at a bank, upon his own note secured by his own collaterals, a sum of money which was placed to the credit of his account as treasurer, and most of it drawn out in payment of proper warrants; and afterwards, when the tax money came in, the treasurer drew a check upon his account as treasurer in payment of the note which was thereupon surrendered to him with the collaterals, it was held by the Supreme Court of Illinois that the village could not recover the amount of the check from the bank, the treasurer having become a defaulter. In this case, although the public money was thus appropriated to the payment of a debt private upon its face, yet the bank assumed and had reason to assume, that it was being used to pay a debt which was in reality a proper charge against the village.[1]

Again where an agent had deposited money of his principal in a bank, in his own name, where it was attached by a creditor of the agent, but the principal gave immediate notice of his rights in the fund, it was held that the attaching creditor stood in no better situation than the agent, and could recover only what the agent could. Said the court: "It is undeniable that equity will follow a fund through any number of transmutations and preserve it for the owner so long as it can be identified. And it does not matter in whose name the legal right stands. If money has been converted by a trustee or agent into a chose in action, the legal right to it may have been changed, but equity regards

[1] Fifth National Bank v. Village of Hyde Park, 101 Ill. 595, 40 Am. Rep. 218.

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the beneficial ownership. It is conceded, for the cases abundantly show it, that when the bank received the deposits, it thereby became a debtor to the depositor. The debt might have been paid in answer to his checks, and thus the liability have been extinguished, in the absence of interference by his principals to whom the money belonged. But surely it cannot be maintained that when the principals asserted their right to the money before its repayment and gave notice to the bank of their ownership and of their unwillingness that the money should be paid to their agent, his right to reclaim it had not ceased. A bank can be in no better situation than any other debtor." [1]

So where a bookkeeper and salesman embezzled the funds of his principal to a large amount, and, with the money, bought real estate which he caused to be conveyed to his wife, and built a house thereon, the wife knowing the source from which her husband obtained the money, it was held that the principal was entitled in equity to recover the property so purchased with his funds.[2]

[1] Farmers' & Mechanics' Bank v. King, 57 Penn. St. 202, 98 Am. Dec. 215.

[2] Riehl v. Evansville Foundry Assn, 104 Ind. 70, 3 North E. Rep. 633.

In National Bank v. Ins. Co., 104 U. S. 54, Mr. Justice MATTHEWS gives the following review of the cases: "In the case of Pannell v. Hurley, 2 Col. C. C. 241, the depositor, having two accounts, one in trust, the other in his own name, drew his check as trustee to pay his private debt to the banker. The Vice Chancellor, KNIGHT BRUCE, put the case thus: 'Money is due from A to B in trust for C. B is indebted to A on his own account. A, with knowledge of the trust, concurs with B in setting one debt against the other, which is done without C's consent. Can it be a question in equity whether such a transaction stand?'

In Bodenham v. Hoskyns, 2 DeG., M. & G. 903, the principle was stated to be one, acted upon daily by courts of equity, 'according to which a person who knows another to have in his hands or under his control moneys belonging to a third person cannot deal with those moneys for his own private benefit, when the effect of that transaction is the commission of a fraud upon the owner.'

In the case of *Ex parte* Kingston, *In re* Gross, Law Rep. 6 Ch. App. 632, a county treasurer had two bank accounts, one headed 'Police Account.' Some of the items to his credit in this account could be traced as having come from county funds, but most of them could not. The checks which he drew upon it were all headed 'Police Account,' and appeared to have been drawn only for county purposes. For the purposes of interest, the bank treated the accounts as one account, and the interest on the balance in his favor was carried to the credit of his private account. The manager of the bank knew he was county treasurer, and understood

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But where an agent collected money belonging to his principal, and without authority loaned it to certain persons to whom he was indebted personally in an amount larger than the sum

that he had been in the habit of paying county moneys into the bank. He absconded, his private account being overdrawn, and the police account being in credit. It was held that the bank was not entitled to set-off the one account against the other, but that the county magistrates could recover the balance standing to the credit of the police account. Sir W. M. JAMES, L. J., said: 'In my mind this case is infinitely stronger than those referred to during the argument, in which a similar claim on the part of bankers was disallowed; for in those cases the bankers relied on cheques drawn by the customers: and if a banker receives from a customer, holding a trust account, a cheque drawn on that account, he is not in general bound to inquire whether that cheque was properly drawn. Here the customer has drawn no cheque, and the bankers are seeking to set off the balance on his private account against the balance in his favor on what they knew to be a trust account.' * * *

In the case of Pennell *v.* Deffell, 4 DeG., M. and G. 372, 388, Lord Justice TURNER said: "It is, I apprehend, an undoubted principle of this court, that as between *cestui que trust* and trustee and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust.' In the same case Lord Justice KNIGHT BRUCE said, (p. 388): 'When a trustee pays trust money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust as much and as effectually as the money so paid would have done, had it specifically been placed by the trustee in a particular repository and so remained; that is to say, if the specific debt shall be claimed on behalf of the *cestuis que trustent*, it must be deemed specifically theirs, as between the trustee and his executors, and the general creditors after his death on one hand, and the trust on the other.' He added, (p. 384): 'This state of things would not, I apprehend, be varied by the circumstance of the bank holding also for the trustee, or owing also to him, money in every sense his own.'

Vice-Chancellor Sir W. PAGE WOOD, in Frith *v.* Cartland, 2 Hem. and M. 417, 420, said that Pennell *v.* Deffell rested upon and illustrated two established doctrines. One was that 'so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust;' the second is, 'that if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own.' The case of Pennell *v.* Deffell, *supra*, was the subject of comment by FRY, J., in *In re* West of England and South Wales District Bank, *Ex parte*, Dale & Co., 11 Ch. D. 772, 32 Eng. Rep. 810. Strongly approving the decision in principle, he felt bound

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loaned, without their having any notice that it was not his, it was held that they had a legal right to appropriate it to the payment of the agent's debt to them, and that the principal could not

nevertheless, by what he considered the weight of authority, not to apply it, in the circumstances of the case before him, where there had been a mingling of trust money with individual money. He said however: 'Does it make any difference that, instead of trustee and *cestui que trust*, it is a case of fiduciary relationship? What is a fiduciary relationship? It is one in which, if a wrong arise, the same remedy exists against the wrong-doer on behalf of the principal as would exist against a trustee on behalf of the *cestui que trust*.

If that be a just description of the relationship, it would follow that wherever fiduciary relationship exists, and money coming from the trust lies in the hands of persons standing in that relationship, it can be followed and separated from any money of their own.'

The whole subject of this discussion was very elaborately and with much learning reviewed by the Court of Appeal in England, in the very recent case of Knatchbull *v.* Hallett, *In re* Hallett's Estate, 13 Ch. D. 696. (36 Eng. Rep. 779). It was there decided that if money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his banker's, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands, although it was mixed with his own moneys; and in that particular the court overruled the opinion in *Ex parte* Dale and Co., *supra*. It was also held that the rule in *Clayton's Case*, 1 Mer. 572, attributing the first drawings out to the first payments in, does not apply; and that the drawer must be taken to have drawn out his own money in preference to the trust money, and in that particular Pennell *v.* Deffell was not followed. The Master of the Rolls, Sir George JESSEL, showed that the modern doctrine of equity, as regards property disposed of by persons in a fiduciary position, is that, whether the disposition of it be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify them. If they cannot be identified by reason of the trust money being mingled with that of the trustee, then the *cestui que trust* is entitled to a charge upon the new investment to the extent of the trust money traceable into it; that there is no distinction between an express trustee and an agent, or bailee, or collector of rents or any body else, in a fiduciary position, and that there is no difference between investments in the purchase of lands, or chattels, or bonds, or loans, or moneys deposited in a bank account. He adopts the principle of Lord ELLENBOROUGH'S statement in Taylor *v.* Plumer, 3 M. & S. 562, that 'it makes no difference, in reason or law, into what other form different from the original, the change may have been made, whether it be into that of promissory notes for the security of money which was produced by the sale of the goods of the principal, as in Scott *v.* Surman, (Willes 400) or into other merchandise, as in Whitecomb *v.* Jacob, 1 Salk. 161; for the product or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertain-

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recover it of them, even after notice that it did not belong to the agent.[1] "The only question," said WILDE, J., "therefore is, whether after notice the defendants could lawfully detain the money; and we are of opinion that they could. As Parkhurst (the agent) was indebted to them in a sum exceeding the loan, they had a legal right of set-off as against Parkhurst, of which they could not be deprived by the intervention of the plaintiffs' claim; and however disingenuous the defendants' conduct may be considered in relation to Parkhurst, they had a legal right thus to secure their own debt. Their refusal to repay the loan according to agreement was a breach of promise; but against this the defendants could set off a breach of promise by Parkhurst, and this set-off is allowed by law. The defendants, therefore, had a legal right to appropriate the money lent, to the payment of their own debt. This distinguishes the present case from that of Mason *v.* Waite, where the money came into the defendant's hands unlawfully, and he had no legal or equitable right to retain it; and also from that of Clarke *v.* Shee.[2] But the law as laid down by Lord MANSFIELD, in the latter case, is decisive against the plaintiff's claim. 'Where money or notes,' it is said, 'are paid *bona fide*, and upon a valuable consideration, they never shall be brought back by the true owner; but where they come *mala fide* into a person's hands, they are in the nature of specific property, and if their identity can be traced and ascertained, the party has a right to recover.'"

§ 782. **Same Subject—Further Illustrations—Restrictive Indorsements.** This question frequently arises in the case of those who have received from a bank, or other agent, negotiable paper which the principal has entrusted to the agent for collection. Where such paper, bearing no indication upon its face of the

ment fail.' But he dissents from the application of the rule made by Lord ELLENBOROUGH, when the latter added, 'which is the case when the subject is turned into money and confounded in a general mass of the same description;' for equity will follow the money even if put into a bag or an undistinguishable mass, by taking out the same quantity. And the doctrine that money has no earmark must be taken as subject to the application of this rule. The Court of Appeals had previously applied the very rule as here stated in the case of Birt *v.* Burt, reported in a note to *Ex parte* Dale and Co., 11 Ch. D. 773, 32 Eng. Rep. 812 n."

[1] Lime Rock Bank *v.* Plimpton, 17 Pick. (Mass.) 159, 28 Am. Dec. 286.

[2] Cowp. 200.

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trust impressed upon it in the agent's hands, comes into the hands of a third person who, in good faith, parts with value for it, in reliance upon the agent's apparent title, such third person will, in accordance with well settled rules, be protected.[1] But where the paper bears, upon its face, evidence that the agent holds it for a special purpose merely, as if it be indorsed "for collection,"[2] or "for collection for account of" the principal,[3] such an indorsement is notice to all who may take the paper of the restricted nature of the agent's title, and the principal may recover the paper or its proceeds from one who claims an adverse title through the agent.[4]

§ 783. Right to recover Money wrongfully paid by Agent. So payments received from an agent by one knowing the agent to be unauthorized to make them, may be recovered by the principal as money wrongfully had and received.[5] *A fortiori* may the principal recover money illegally exacted, or compulsorily obtained, by such third person, from the agent.[6]

3. *Right to recover Property.*

§ 784. In general—Principal may recover Property wrongfully applied or disposed of by Agent. Analogous to the question considered under the last subdivision, is that of the right of the principal to recover property, which has been applied or disposed of by his agent, without the authority or assent of the principal. The general rule is, that a purchaser of property takes only such title as his seller has, and is authorized to transfer; that he acquires precisely such interest as the seller has, and no greater or other. *Nemo plus juris ad alium transferre potest quam ipse habet*, is the maxim of the law. If the agent has no authority to transfer the title, he can, as a rule, confer none upon his transferee.

[1] Hackett v. Reynolds, 114 Penn. St. 328.

[2] Sweeny v. Easter, 1 Wall. (U. S.) 166.

[3] First Nat. Bk of Crown Point v. First Nat. Bk of Richmond, 76 Ind. 561, 40 Am. Rep. 261; Sherman Bank v. Weiss, 67 Tex. 331, 60 Am. Rep. 29; First Nat. Bk v. Bank of Monroe, 33 Fed. Rep. 408; *In re* Armstrong, 33 Fed. Rep. 405; Cecil Bank v. Farmers' Bank, 23 Md. 148; Blaine v. Bourne, 11 R. I. 119, 23 Am. Rep. 429; Sigourney v. Lloyd, 8 B. & C. 622; Treuttel v. Barandon, 8 Taunt. 100.

[4] See cases cited in notes 2 and 3 *supra*.

[5] Demarest v. Barbadoes, 40 N. J. L. 604.

[6] Holman v. Frost, 26 S. Car. 290.

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Wherever, therefore, the agent has, without the authority of his principal, sold, assigned, transferred or disposed of the principal's property to a third person, the principal may, by appropriate action, recover either the property itself, or its value, from such third person, if he refuses to recognize the rights of the principal therein.[1]

This rule is, however, subject to certain exceptions to be hereafter noticed,[2] founded upon the principle that where one of two innocent persons must suffer, the loss must fall upon that one whose act enabled the loss to be incurred.

§ 785. **Principal's Title can not be divested except by his Consent or voluntary Act.** It is a general principle that no man can be divested of his property, without his own consent or voluntary act.[3] Hence whoever claims to have acquired the title to goods of the principal, through some dealing with his alleged agent, must be prepared to show, not only that the agency existed, but that the agent had authority so to transfer the property. Without the co-existence of both of these elements, the title must fail. The question of authority here is the same as in other cases which have been considered. The act must be within the scope of the authority which the principal has held the agent out to the world as possessing.

This rule of apparent authority, is, as has been seen, one intended for the protection of innocent parties who have acquired rights, while relying thereon in good faith, which would be imperilled if the principal were to be permitted to assert that the real authority was less than he had caused or permitted it to appear. When no such rights exist, there is, therefore, nothing to prevent the principal from asserting the actual fact.

"Two things," says Judge ALLEN, "must concur to create an estoppel by which an owner may be deprived of his property, by the act of a third person, without his assent: 1. The owner must

[1] Boisblanc's Succession, 32 La. Ann. 109; Manning v. Keenan, 73 N. Y. 45; Meiggs v. Meiggs, 15 Hun (N. Y.) 453; Loomis v. Barker, 69 Ill. 360; Berthol. v. Quinlan, 68 Ill. 297; Thompson v. Barnum; 49 Iowa, 392; McGoldrick v. Willits, 52 N. Y. 612; Bercich v. Marye, 9 Nev. 312.

[2] See §§ 786, 787, *post*.

[3] Barker v. Dinsmore, 72 Penn. St. 427; Saltus v. Everett, 22 Wend. (N. Y.) 366, 32 Am. Dec. 541; Quinn v. Davis, 78 Penn. St. 15; McMahon v. Sloan, 12 Penn. St. 229, 51 Am. Dec. 602.

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clothe the person assuming to dispose of the property with the apparent title to, or authority to dispose of it; and 2. The person alleging the estoppel must have acted and parted with value, upon the faith of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real."[1]

§ 786. **When Possession is Evidence of Authority.** As a general rule the mere possession by the agent of his principal's property, is not sufficient evidence of authority in the agent to dispose of it.[2] Such possession is as consistent with any one of a variety of purposes, as that the agent should sell or dispose of it.

Thus the property may be in the agent's possession for safe keeping, or for transportation, or for repair, or it may have been borrowed or hired by the agent for some purpose of his own, or the possession may have been tortiously acquired by the agent in violation of his duty to his principal; but in none of these cases, as a rule, could the agent transfer any title to the property, as against the true owner, even to a *bona fide* purchaser.[3] As has been stated in a previous section, *Nemo dat quod non habet.* To this rule, however, there are two well recognized exceptions.

One relates to the case in which the property in the agent's possession consists of money or of negotiable paper. The other to the case in which the principal entrusts the possession of his goods to one whose business it is to sell similar property as the agent of the owners.

The first exception depends upon principles of public policy and the necessities of commerce. Money itself bears no ear-mark of peculiar ownership, and its primary purpose is to pass from hand to hand, as the medium of exchange, without other evidence of its title, as against those who receive it in good faith for valuable consideration in the usual course of business, than its mere possession. And so in regard to negotiable paper. It is intended, so far as this is possible, to represent money, and, like it, to be a means of commercial intercourse unfettered by any qualifications or conditions not appearing on its face. When payable to bearer,

[1] In Barnard v. Campbell, 55 N. Y. 456, 14 Am. Rep. 289.

[2] Covill v. Hill, 4 Denio (N. Y.) 323; Ballard v. Burgett, 40 N. Y. 314; McNeil v. Tenth National Bank, 46 N. Y. 325, 7 Am. Rep. 341.

[3] The borrower of a chattel can confer no title against the lender. McMahon v. Sloan, 12 Penn. St. 229, 51 Am. Dec. 602.

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or endorsed in blank, it passes by mere delivery, and it is a well settled principle of commercial law that he who takes such paper, in good faith, before dishonor and for a valuable consideration, shall not be affected by defects in the title of him from whom it was so obtained, of which the taker had no notice.[1] If, therefore, an agent has in his possession the money of his principal, or his principal's negotiable paper payable to bearer or endorsed in blank, although he has no authority to transfer it, or although he may have acquired its possession tortiously or against the rights of his principal, his transfer of it to one who takes it in the usual course of business, in good faith, before maturity and for valuable consideration, will confer upon such transferee a title which the principal cannot defeat.[2] But in order to effect this result, all of the elements mentioned must co-exist. In default of these the principal, as has been seen in the preceding subdivision, may pursue his property through any number of transmutations so long as he can trace it. If the paper were payable to the order of the principal and was not endorsed, its mere possession would, of course, be no evidence of title in the agent.[3]

The second exception rests upon well recognized principles of estoppel. If a man voluntarily places his property in the possession of one, whose ordinary business it is to sell similar property as the agent of the owners, it is a warrantable inference, in the absence of anything to indicate a contrary intent, that he intends his property to be sold also. Lord ELLENBOROUGH pertinently inquires: "If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one sends goods to an auction room, can it be supposed that he sent them thither merely for safe keeping?"[4] But here, unlike the case of the possession of money or negotiable paper, it is necessary that the agent shall have acquired the possession of the property by the act of the

[1] See Daniel on Neg. Insts, §§769, 862, 51 Am. Dec. 602.

[2] A principal can not recover from a third party who received it in good faith, money of the ordinary currency of the country, intrusted by the principal to the agent for special purposes and misapplied by the agent. Burnham v. Holt, 14 N. H. 367.

[3] Gibson v. Miller, 29 Mich. 355; Morton v. Preston, 18 Mich. 60; Lancaster National Bank v. Taylor, 100 Mass. 18, 97 Am. Dec. 70; Whistler v. Forster, 14 C. B. (N. S.) 248; Central Bank v. Hammett, 50 N. Y. 158.

[4] In Pickering v. Busk, 15 East, 38.

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principal; possession wrongfully obtained would not enable the agent to confer title even upon a *bona fide* purchaser.[1] And it is also necessary that the business of the person to whom it is so confided, be to sell *as agent*, and that the property should appear to have been intrusted to him in the line of his business. If, on the other hand, his business is to sell his own goods, *as the owner*, something more than mere possession is necessary. There must be some act or conduct, on the part of the real owner, whereby the party selling is clothed with the apparent ownership, or authority to sell, which the real owner will not be heard to deny or question to the prejudice of an innocent third party dealing on the faith of such appearance. "If it were otherwise," said a learned judge, "people would not be secure in sending their watches or articles of jewelry to a jewelry establishment to be repaired, or cloth to a clothing establishment to be made into garments."[2]

So, too, it is necessary that the business of the agent be to sell similar property. The mere fact that one puts his horse into the possession of an agent, whose occupation it is to sell jewelry only, would be no evidence of authority to sell the horse.[3] This

[1] Saltus *v.* Everett, 20 Wend. (N. Y.) 366, 32 Am. Dec. 541; Fitch *v.* Newberry, 1 Doug. (Mich.) 1, 40 Am. Dec. 83.

[2] Wilkinson *v.* King, 2 Camp. 335; Pickering *v.* Busk, 15 East. 38; Cole *v.* Northwestern Bank, L. R. 10 C. P. 354, 12 Eng. Rep. (Moak) 418; Levi *v.* Booth, 58 Md. 305, 42 Am. Rep. 332; Johnson *v.* Credit Lyonnais, 2 C. P. Div. 224, 20 Eng. Rep. 486; S. C. on appeal, 3 C. P. Div. 26, 30 Eng. Rep. 19.

[3] "Strangers can only look to the acts of the parties and to the external indicia of property, and not to the private communications which may pass between a principal and his broker; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine that a broker's engagements are necessarily, and in all cases, limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect to the subject-matter, and there would be no safety in mercantile transactions if he could not. If the principal send his commodity to a place, where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one send goods to an auction room, can it be supposed that he sent them thither merely for safe custody? Where the commodity is sent in such a way, and and to such a place, as to exhibit an

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rule, like the other, is for the protection of those only who have, in good faith, parted with value in the usual course of business upon the strength of the authority which the principal has caused or permitted to appear. If the purchaser be in this situation, he is protected and the principal is estopped, as against him, to assert that the agent had no power to sell.[1] But if the purchaser had notice of the agent's want of authority, or if he acted collusively with the agent, or if he has parted with no value, or if he purchased the property out of the usual course of business, he has no equities which are superior to those of the true owner.

The authority implied in such a case is not to be extended beyond its legitimate scope. The authority implied is an authority to sell and not an authority to exchange, pledge or mortgage. Hence a transferee claiming title to the property

apparent purpose of sale, the principal will be bound, and the purchaser safe." Lord ELLENBOROUGH, C. J., in Pickering *v.* Busk, 15 East, 38. See also Folsom *v.* Batchelder, 22 N. H. 51; Nixon *v.* Brown, 57 N. H. 34.

This rule is well illustrated by the recent case of Smith *v.* Clews, 105 N. Y. 283, 59 Am. Rep. 502. In that case it appeared that one Miers was a dealer in diamonds in New York. His business was to procure diamonds from the larger dealers and sell them to his customers. He obtained from the plaintiff a pair of diamonds for which he gave them a receipt stating that they were received by him, "on approval to show to my customers, said knobs to be returned to said A. H. Smith & Co. on demand." Having obtained the diamonds he sold them to defendant who purchased them in good faith, supposing Miers to be the owner and paying him the price. Miers not paying the plaintiffs, they sought to recover them from the defendant, but the court held that plaintiffs, by intrusting them to Miers, a known dealer in such articles, to be shown to a prospective purchaser, had clothed him with apparent authority to sell, and that defendant got a good title. The provision that the diamonds were to be returned upon demand was held by the court to mean that they were to be returned if the purchaser in view did not buy them.

But where the owner of a diamond ring put it into the hands of a jeweler to match it, or failing in that, to get an offer for it, and the jeweller sold it to one who bought in good faith, it was held that the purchaser got no title as against the owner. Authority to get an offer did not confer power to sell. The owner had the right to pass upon the offer himself. Levi *v.* Booth, 58 Md. 305, 42 Am. Rep. 332.

[1] Where the person dealing with the apparent owner of property has actual notice of the rights of the true owner, he can claim no other or greater rights therein than the apparent owner can lawfully convey. Porter *v.* Parks, 49 N. Y. 564.

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through such a transaction could not defeat a recovery by the true owner.[1]

§ 787. Possession coupled with Indicia of Ownership. So where, in addition to the possession of the property, the principal has conferred upon the agent the documents which constitute the usual indicia of ownership, or has otherwise held him out as possessed of the ownership, or power of disposal of the property, a question is presented, similar to the one last under consideration. For where the principal has intentionally or negligently caused or permitted his agent to hold himself out to the world as the owner of property, clothed with the evidences of title, or as having competent authority to transfer the title, and innocent third parties have, in good faith, acquired rights in the property upon the strength of the appearance, the plainest dictates of right and justice require that the principal should not be permitted to deny that the agent was the owner, although as between himself and the agent, the fact may have been otherwise.[2]

"It must be conceded," said Judge RAPALLO, in dealing with the question, "that, as a general rule, applicable to property other than negotiable securities, the vendor or pledgor can convey no greater right or title than he has. But this is a truism, predicable of a simple transfer from one party to another where no other element intervenes. It does not interfere with the well established principle, that where the true owner holds out another, or allows him to appear, as the owner of, or as having full power of disposition over the property, and innocent third parties are

[1] Agent to sell cannot pledge. Loring *v.* Brodie, 134 Mass. 453; McCreary *v.* Gaines, 55 Tex. 485, 40 Am. Rep. 818; City Bank *v.* Barrow 5 App. Cas. 664, 34 Eng. Rep. 41; Voss *v.* Robertson, 46 Ala. 483; Wheeler & Wilson Mfg. Co., *v.* Givan, 65 Mo. 89.

Nor mortgage:—Switzer *v.* Wilvers, 24 Kan. 384, 36 Am. Rep. 259.

Nor exchange:—Bertholf *v.* Quinlan, 68 Ill. 297.

[2] Pickering *v.* Busk, 15 East. 38; Gregg *v.* Wells, 10 Ad. & Ell. 90; Dyer *v.* Pearson, 3 B. & C. 38; Newsom *v.* Thornton, 6 East 17; Taylor *v.* Kymer, 3 B. & Ad. 320; Saltus *v.* Everett, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541; McNeil *v.* Tenth National Bank, 46 N.Y. 325,7 Am. Rep. 341; Moore *v.* Metropolitan National Bank, 55 N. Y. 41, 14 Am. Rep. 173; Root *v.* French, 13 Wend. (N.Y.) 570, 28 Am. Dec. 482; Nixon *v.* Brown, 57 N. H. 34; Barnard *v.* Campbell, 55 N. Y. 456, 14 Am. Rep. 289, s. c. 58 N.Y.73, 17 Am. Rep. 208; Walker *v.* Detroit Transit Ry Co., 47 Mich. 338.

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thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power, which through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance." [1]

The fact that the act of the agent is a fraud upon his principal, does not alter the rule. Indeed, in every case in which the question here under consideration can arise, the act of the agent must have been either a negligent or a willful violation of his duty to his principal, because if the act were in fact authorized, no necessity would exist for the application of the principle of estoppel. But the principal has appointed the agent and put him in motion, and given him the means by which to accomplish the act, and although the principal may be entirely innocent of wrong intention, yet, in accordance with the well settled rule, that where one of two innocent parties must suffer, the loss must fall upon him by whose act it was made possible to occur, the principal must be held bound.[2]

But this rule operates only for the protection of those who, in dealing with the agent, have exercised ordinary caution and prudence, and who have dealt in the ordinary way and in the usual course of business, upon the ordinary evidences of right and authority.[3] So its protection extends only to those who, in reliance upon the apparent ownership, have in good faith acquired interests therein for a valuable consideration. If they have parted with no value, they are entitled to no protection. The payment, or parting with value for the property, by the purchaser, lies at the foundation of the estoppel, for if he has parted with nothing, he can lose nothing if the true owner retakes the goods; and that payment must be occasioned by the acts or omissions of such owner. It is the payment or the parting with value which creates the estoppel, and if that is not done in reliance upon the appearance given by the principal, the latter will not be estopped.[4]

§ 788. **Same Subject — Illustrations.** These principles find

[1] In McNeil *v.* Tenth National Bank, *supra*.

[2] Barnard *v.* Campbell, *supra*.

[3] Barnard *v.* Campbell, *supra*.

[4] Barnard *v.* Campbell, *supra*.

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frequent illustration in the decided cases, a few of which will serve to show the occasion and extent of their application. Among these, Pickering *v.* Busk[1] is a leading case. In that case it appeared that a broker, named Swallow, had purchased for the plaintiff, Pickering, a quantity of hemp, which by the plaintiff's request was transferred upon the books of the wharfinger to the name of Swallow. Another lot subsequently purchased, was transferred to the names of Pickering *or* Swallow, which the court held to be the same, so far as the question there involved was concerned, as though it stood in Swallow's name alone. The plaintiff paid for the hemp. Swallow afterwards wrongfully sold it to defendant's assignors in bankruptcy who relied upon the entry in the wharfinger's books and who paid him for it; and Pickering sued the assignees in trover for the value. But the court held that, by permitting the hemp to appear upon the books of the wharfinger as the property of Swallow, the plaintiff had authorized third persons, who relied upon Swallow's apparent ownership, to believe that he had authority to sell the hemp, and that he could not recover.

McNeil *v.* The Tenth National Bank[2] is also a well considered and valuable case upon this subject. There the plaintiff, who was the owner of bank shares, delivered to his brokers to secure a balance of account, the certificate of the shares, indorsed with an assignment in blank and an irrevocable power of transfer signed and sealed by himself. The brokers, without his knowledge, pledged the shares to the defendant to secure advances made to them, the defendant having no knowledge of the plaintiff's interest. The plaintiff brought an action against the defendant to compel the latter to deliver the shares to him, but it was held that the defendant was entitled to hold the stock as against the plaintiff for the full amount of the advances made and remaining unpaid. In delivering the opinion of the court, RAPALLO, J., said: "Simply entrusting the possession of a chattel to another as depositary, pledgee or other bailee, or even under a conditional executory contract of sale, is clearly insufficient to preclude the real owner from reclaiming his property, in case of an unauthorized disposition of it by the person so intrusted.[3] 'The mere possession of chattels, by whatever means acquired, *if there*

[1] 15 East, 38.
[2] 46 N. Y. 325, 7 Am. Rep. 341.
[3] Citing Ballard *v.* Burgett, 40 N. Y. 314.

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be no other evidence of property or authority to sell from the true owner, will not enable the possessor to give a good title.'[1]

But if the owner intrusts to another, not merely the possession of the property, but also written evidence over his own signature of title thereto, and of an unconditional power of disposition over it, the case is vastly different. There can be no occasion for the delivery of such documents, unless it is intended that they shall be used, either at the pleasure of the depositary or under contingencies to arise. If the conditions upon which this apparent right of control is to be exercised are not expressed on the face of the instrument, but remain in confidence between the owner and the depositary, the case cannot be distinguished in principle from that of an agent who receives secret instructions qualifying or restricting an apparently absolute power. * * *

The holder of such a certificate and power possesses all the external *indicia* of title to the stock, and an apparently unlimited power of disposition over it. He does not appear to have, as is said in some of the authorities cited, concerning the assignee of a chose in action, a mere equitable interest, which is said to be notice to all persons dealing with him that they take subject to all equities, latent or otherwise, of third parties; but, apparently, the legal title and the means of transferring such title in the most effectual manner.

Such, then, being the nature and effect of the documents with which the plaintiff intrusted his brokers, what position does he occupy towards persons who, in reliance upon those documents, have in good faith advanced money to the brokers or their assigns on a pledge of the shares? When he asserts his title, and claims as against them that he could not be deprived of his property without his consent, cannot he be truly answered that by leaving the certificate in the hands of his brokers, accompanied by an instrument bearing his own signature, which purported to be executed for a consideration and to convey the title away from him, and to empower the bearer of it, irrevocably to dispose of the stock, he, in fact 'substituted his trust in the honesty of his brokers for the control which the law gave him over his own property,' and that the consequences of a betrayal of that trust

[1] Citing BRONSON, C. J. in Covill *v.* Hill, 4 Den. (N. Y.) 323.

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should fall upon him who reposed it, rather than upon innocent strangers from whom the brokers were thereby enabled to obtain their money?"[1]

So in Calais Steamboat Co. *v.* Van Pelt,[2] it appeared that Van Pelt, who resided in California, instructed his agent in New York to cause a steamboat to be built, giving the agent express directions to hold himself, the agent, out as owner, and to cause the vessel to be enrolled in his, the agent's, own name, as the principal did not wish to appear, or to be known, as the owner. The agent followed these instructions, but upon the completion of the vessel, sold her to the Steamboat company, who purchased her in good faith without knowledge of Van Pelt's interest, in reliance upon the agent's apparent ownership, and paid the agent her full value. The agent converted the money to his own use, and Van Pelt brought an action against the Steamboat company to establish his title. But the Supreme Court of the United States held that, having held the agent out to the world as owner, and having intentionally clothed him with the documentary evidences of ownership, he could not recover from one who, in good faith, had purchased the property relying upon such apparent ownership.

Nixon *v.* Brown[3] presents another illustration of this principle. Nixon had employed an agent to purchase a horse. The agent made the purchase, but took the bill of sale in his own name. He informed Nixon of the purchase, showed him the bill of sale, and said he would execute a bill of sale to Nixon which would make it all right, but did not do so. It was then arranged that the agent should keep the horse in his possession for the purpose of training him, and the agent went away taking with him the bill of sale. Afterwards the agent sold the horse to Brown who purchased in good faith in reliance upon the apparent title conferred by the bill of sale, and paid the agent the money, with which the latter decamped. Nixon thereupon sued Brown in trover, but was not permitted to recover. The trouble with the plaintiff's claim, said the court, was that he suffered his agent to carry off with him the evidence as to the ownership of

[1] For similar or analogous cases, see Commercial Bank *v.* Kortright, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317; Holbrook *v.* Zinc Co., 57 N. Y. 623; Bartlett *v.* Board of Education, 59 Ill. 371.

[2] 2 Black. (U. S.) 372.

[3] 57 N. H. 34.

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the horse, which was directly calculated to mislead and deceive an innocent purchaser. He selected, as his agent, a person who proved to be a thief. And inasmuch as one of two innocent persons must suffer, it must, in this case, be the plaintiff, because he put it in the power of his agent to deceive the defendant, when it was possible for him to have prevented it.

But in order to estop the true owner it is, as has been seen, indispensable not only that he has clothed the person assuming to dispose of the property, with the apparent title to it, or with apparent authority to dispose of it, but also that the person alleging the estoppel must have acted, and parted with value, upon the faith of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real. This principle is well illustrated by a case which received elaborate consideration in the Court of Appeals of New York.[1] There defendants bought of one Jeffries, on the 21st of August, a quantity of linseed, and, at his request, forwarded to him their notes in payment, which he at once pledged as collateral to a loan. Jeffries did not have the linseed at the time, but on the 24th of August, he purchased it of the plaintiffs, and, by false and fraudulent representations, induced them to deliver it to him without payment. He sent the linseed to the defendants on the 24th of August, and on the next day mailed them the bill of lading. On the 27th of August, Jeffries failed, not having paid for the linseed, and plaintiffs, on account of the fraudulent representations, rescinded the sale, and demanded the linseed of the defendants. Upon their refusing to surrender it, the plaintiffs brought replevin, and were permitted to recover. Defendants assumed the position of *bona fide* purchasers for value, and, claiming that they had purchased upon the faith of the possession conferred by the plaintiffs upon Jeffries, invoked the principle of estoppel for their protection. But the court held that every element of estoppel was wanting. At the time defendants purchased the property and parted with their notes, Jeffries had neither the possession of the property nor the right of possession, nor had he any documentary evidence of title, or any *indicia* of ownership or of dominion over the property of any kind. The plaintiffs had then done nothing to induce the defendants to

[1] Barnard v. Campbell, 55 N. Y. 456, 14 Am. Rep. 289, s. c., on motion for rehearing, 58 N. Y. 73, 17 Am. Rep. 208.

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put their faith in, or give credit to, the claim of Jeffries of the right to sell the property. The defendants parted with the consideration for the seed, not upon the apparent ownership of Jeffries, but upon his assertion of a right of which the plaintiffs had no knowledge, and for which they were in no way responsible.

§ 789. **Principal may recover Property appropriated to Agent's Uses.** As has been seen, an agent having property of his principal in his possession to be disposed of by sale or otherwise for the principal's benefit, can not turn it out to a third person in payment of a debt due such third person by the agent, and, if he does so, the principal may recover it.[1] The fact that the principal also has a right of action against the agent for the wrongful disposition of the property, does not prevent the principal's recovery from the third person who has received it.[2]

So the property of the principal in the agent's hands can not be taken by legal process for the agent's debts, and, if so taken, the principal may recover it.[3]

§ 790. **Right to recover Securities wrongfully released.** Where an agent, without authority, releases security belonging to his principal, the principal may recover it, and his right of action is not lost by mere neglect to dissent, if the other party is not prejudiced thereby.[4]

So where an agent authorized only to sell, collect and take notes, surrendered, before they were due, certain notes running to his principal and took notes payable to himself, it was held that the principal could recover on the original notes.[5]

But where an agent having authority to "assign, satisfy and discharge" all mortgages of his principal in his possession, sold and assigned one to A, and used the money for his own purposes, it was held that A having acted in good faith, was not liable over to the principal.[6]

§ 791. **Right to recover Property wrongfully sold.** As has also been seen, an agent employed to sell his principal's property, whether it be real or personal, cannot, without the principal's

[1] Thompson v. Barnum, 49 Iowa, 392.

[2] Bertholf v. Quinlan, 68 Ill. 297.

[3] Loomis v. Barker, 69 Ill. 360; Farmers' & Mechanics' Bank v. King, 57 Penn. St. 202, 98 Am. Dec. 215.

[4] Whittemore v. Hamilton, 51 Conn. 153.

[5] Robinson v. Anderson, 106 Ind. 252.

[6] Chestwood v. Berrian, 39 N. J. Eq. 203.

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full knowledge and consent, sell it to himself. And what he can not thus do directly, he will not be permitted to do indirectly. If therefore, the agent, in violation of his duty, sell the property ostensibly to a third person,[1] or to a third person in conjunction with himself,[2] but in reality for his own benefit; or if he sells it to a partnership of which he is a member;[3] the sale is voidable at the election of the principal, and the latter may, if he acts within a reasonable time after the facts have come to his knowledge, and if the rights of an innocent third party have not intervened, avoid the sale, upon returning or tendering back the consideration received, and recover the property from such third person or any one to whom it been conveyed with knowledge of the facts.[4] That the principal was not injured, or the property was not sold under its value,[5] or that it was sold for the price fixed by the principal,[6] does not, as has been seen, defeat the principal's right.

4. *Right to Recover for Torts.*

§ 792. **May recover for Injuries occasioned for third Person's Torts.** For wrongs done or injuries committed by third persons to the property or interests of the principal which he has committed to his agent, the principal may ordinarily recover in the same manner and to the same extent as though no agency had existed. Except where the agent has a special interest in the subject-matter of the agency, the possession of the agent is the possession of the principal, who may maintain actions based upon such possession. For the maintenance of those actions which depend upon the right of property, the principal's title to the

[1] Eldridge *v.* Walker, 60 Ill. 230; see Haynie *v.* Johnson, 71 Ind. 394.

[2] Hughes *v.* Washington, 72 Ill. 84.

[3] Francis *v.* Kerker, 85 Ill. 190.

[4] Norris *v.* Tayloe, 49 Ill. 17, 95 Am. Dec. 568.

[5] Lewis *v.* Hillman, 3 H. L. Cas. 607; Trevelyan *v.* Charter, 9 Beav. 140.

[6] Ruckman *v.* Bergholz, 37 N. J. L. 437.

Same principle was applied to a sale by an administrator to a third person in secret trust for the administrator; Ives *v.* Ashley, 97 Mass. 198; Greene *v.* Haskell, 5 R. I. 447.

Agent's clerk can not lawfully purchase and if he does principal may compel him to recover or account for proceeds; Gardner *v.* Ogden, 22 N. Y. 327, 78 Am. Dec. 192; Lingke *v.* Wilkinson, 57 N. Y. 451; Cheeseman *v.* Sturges, 9 Bows. (N. Y.) 255; Levy *v.* Brush, 8 Abb. Pr. N. S. 431; Newcomb *v.* Brooks, 16 W. Va. 71.

Nor his partner; Fulton *v.* Whitney, 5 Hun (N. Y.) 19; Francis *v.* Kerker, 85 Ill. 190.

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thing involved is, of course, sufficient, though the actual custody may have been confided to another.

Hence if, in the dealings through the agent, the principal is injured by the fraud, deceit, negligence or trespass of third persons, he may maintain his action in the same manner as though he had dealt in person.[1]

If the agent has co-operated with the third person in the commission of the injury, the principal may sue both or either of them.[2]

§ 793. **For enticing Agent away.** A principal may maintain an action against a third person who wrongfully induces his agent to abandon his undertaking.[3] Said RODMAN, J., in a recent case: "We take it to be a settled principle of law, that if one contracts upon a consideration to render personal services for another, any third person who maliciously, that is, without a lawful justification, induces the party who contracted to render the service to refuse to do so, is liable to the injured party in an action for damages. It need scarcely be said that there is nothing in this principle inconsistent with personal freedom, else we should not find it in the laws of the freest and most enlightened States in the world. It extends impartially to every grade of service, from the most brilliant and best paid, to the most homely, and it shelters our nearest and tenderest domestic relations from the interference of malicious intermeddlers. It is not derived from any idea of property by the one party in the other, but is an inference from the obligation of a contract freely made by competent persons."[4]

§ 794. **For preventing Agent from performing.** For similar reasons the principal may recover against one who wrongfully

[1] White v. Dolliver, 113 Mass. 400, 18 Am. Rep. 502; Holly v. Huggeford, 8 Pick. (Mass.) 73, 19 Am. Dec. 303. Where the agent of a purchaser of land was deceived by a false entry made by a public officer, the principal may sue for damages. Perkins v. Evans, 61 Iowa, 85.

[2] Taylor v. Plumer, 3 M. & S. 562.

[3] Haskins v. Royster, 70 N. C. 601, 16 Am. Rep. 780; Huff v. Watkins, 15 S. C. 82, 40 Am. Rep. 680; St. Johnsbury, &c. R. R. Co. v. Hunt, 55 Vt. 570, 45 Am. Rep. 639; Walker v. Cronin, 107 Mass. 555; Hart v. Aldridge, Cowp. 54; Gunter v. Astor, 4 J. B. Moore, 12; Lumley v. Gye, 2 El. & Bl. 216, 20 Eng. Law & Eq. 168; Jones v. Blocker, 43 Ga. 331; Salter v. Howard, 43 Ga. 601; Bixby v. Dunlap, 56 N. H. 456, 22 Am. Rep. 475; Daniel v. Swearengen, 6 S. C. 297, 24 Am. Rep. 471.

[4] In Haskins v. Royster, *supra*.

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prevents the agent from performing his undertaking, whereby the principal suffers injury. Thus it has been held that a railroad company may maintain an action against one who maliciously causes the arrest of its engineer while running a train, with intent to delay the train and injure the company.[1]

§ 795. **For personal Injury to Agent causing Loss of Service.** So an action may be maintained against a third person for a personal injury, committed by him upon the agent, and which causes such a disability as prevents the agent from performing his stipulated undertaking, thereby causing injury to the principal.[2]

§ 796. **Third Person not liable for Agent's Fraud or Neglect.** A third person, however, who deals with an agent, is not liable to the principal for a fraud perpetrated by the agent upon his principal in that transaction unless such third person was a party to the fraud;[3] nor does the neglect or want of skill of the agent in the transaction, by which the principal suffers loss or injury, entitle the principal to relief against the other party who has been guilty of no wrong upon his part.[4] If the principal does not obtain as good a bargain, or derive as much benefit from the transaction, as if a more skilful or experienced agent had been employed, he cannot complain if the other party has taken no undue advantage of the agent.

5. *Remedies for Double Dealing.*

§ 797. **How when third Person conspires with Agent.** But where the third person conspires with the agent to perpetrate a fraud upon the principal, he is undoubtedly liable. So where the third person, by surreptitious dealing with the agent, or by corrupting him or leading him astray from his duty, has obtained the property of the principal, or has secured, from the principal, contracts, obligations or rights in action, the defrauded principal, if he acts promptly and before the rights of innocent third parties have intervened, is entitled to recover his property, and to have

[1] St. Johnsbury, &c. R. R. Co. *v.* Hunt, 55 Vt. 570, 45 Am. Rep. 639.

[2] Robert Mary's Case, 9 Coke 113; Ames *v.* Union Ry Co., 117 Mass. 541, 19 Am. Rep. 426; Kennedy *v.* Shea, 110 Mass. 147, 14 Am. Rep. 584; McCarthy *v.* Guild, 12 Metc. (Mass.) 291; Burgess *v.* Carpenter, 2 S. C. 7, 16 Am. Rep. 643, as explained in Daniel *v.* Swearengen, 6 S. C. 297, 24 Am. Rep. 471, is not *contra*.

[3] Mason *v.* Bauman, 62 Ill. 76.

[4] Bacon *v.* Markley, 46 Ind. 116.

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the contracts, obligations or rights of action rescinded, or, if he elects not to have it rescinded, to have such other adequate relief as a court of equity may deep proper under the circumstances.[1]

[1] These principles are admirably illustrated in a recent case in the English Court of Chancery, Panama, &c. Telegraph Co. v. India Rubber, &c. Co., L. R. 10 Ch. App. 515, 14 Eng. Rep. (Moak) 759. In this case it appears that a telegraph works company agreed with a telegraph cable company to lay a cable, the cable to be paid for by a sum payable when the cable was begun, and by twelve installments payable on certificates by the cable company's engineer, who was named in the contract. Shortly afterwards the engineer, who was engaged to lay other cables for the works company, agreed with them to lay this cable, also for a sum of money to be paid to him by installments payable by the works company when they received the installments from the cable company. *Held*, that, under the circumstances, the agreement between the engineer and the works company was a fraud, which entitled the cable company to have their contract rescinded, and to receive back the money which they had paid under that contract.

Sir W. M. JAMES, L. J. said. "According to my view of the law of this court, I take it to be clear that any surreptitious dealing between one principal and the agent of the other principal, is a fraud on such other principal, cognizable in the court. That, I take to be a clear proposition, and I take it, according to my view, to be equally clear that the defrauded principal, if he comes in time, is entitled, at his option, to have the contract rescinded, or, if he elects not to have it rescinded, to have such other adequate relief as the court may think right to give him.

It is said that there is no authority and no *dictum* to that effect. The clearer a thing is, the more difficult it is to find any express authority or any *dictum* exactly to the point. I doubt whether there could be found any authority or any *dictum* exactly laying down the first of the two propositions which I have mentioned, and which nobody has, in the course of the argument, ventured to dispute —that is, that any surreptitious dealing between one principal and the agent for the other principal is a fraud on such other principal cognizable in this court. The other proposition, as to the relief, may perhaps not be found stated in so many terms in any case or in any *dictum*, but many cases may be suggested which probably will be equally without any authority, either in decision or *dictum*. If a man hired a *vetturino* to take him from one place to another, and found that the *vetturino*, after he had accepted the hiring, had conspired with his servant to rob him on the way, he would be entitled to get rid both of the *vetturino* and the servant. So, if a man sits down to a tavern or *osteria* to play at cards or dice with another man for a stake, and finds that his opponent has provided himself with cogged dice or marked cards, the man would be immediately entitled to leave the table, and would not be obliged to procure proper cards or honest dice. I am not aware, however, of any express decision on either of the cases I have suggested.

I am of opinion that where anything in the nature of a fraud in the eye of this court is committed, a man has the right at once to sever the con-

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§ 798. How when Agent in secret Employment of the other Party. As has been seen, an agent who is relied upon to exercise, in behalf of his principal, his skill, knowledge or influence,

nection; and I cannot bring my mind to doubt, that if you find a case where, in the contemplation of this court, a principal is conspiring with the servant of the other principal to cheat his master in the execution of a contract, then in common sense, common justice, common honesty, and in this court, the master is entitled to say, 'I will have nothing more to do with the business;' and in this court a surreptitious sub-contract with the agent is regarded as a bribe to him for violating or neglecting his duty."

Sir G. MELLISH, L. J. said: "I am not quite certain that I go the full length to which the Lord Justice has gone in thinking that, because a person has been party to a fraudulent act of this kind after the contract was made, the mere fact of his having been guilty of such fraudulent conduct, supposing that a full remedy for the fraud could be otherwise obtained, would entitle the other party to say, 'Because you acted fraudulently, therefore I will have nothing more to do with you, and I will not carry out my contract with you.' I am not aware of any authority which has gone to that extent. As far as I know, the consequence of fraud is, that the court will see that the party defrauded obtains, as far as can be given, full redress for the fraud, and I have thought it, therefore, necessary on this part of the case to consider whether the plaintiffs could be relieved from the consequences of this fraud by anything short of the relief which the Vice-Chancellor has given to them.

Now I do not think it necessary to give a conclusive opinion whether at law there would be a defense on the ground, that by the act of the defendants, the performance of the contract has been rendered impossible. No doubt it is a clear principle of law, that if by any act of one of the parties, the performance of a contract is rendered impossible, then the other side may, if they choose, rescind the contract, and, certainly, according to the case of Planche *v.* Colburn, 8 Bing. 14, and other cases, it appears sufficient if the contract cannot be performed in the manner stipulated, though it may be performed in some other manner not very different. Still there may be a question of law in a case of this kind as to how far the certificate of the engineer would be considered so much of the essence of the contract that the plaintiffs, having been deprived of that, would be entitled at law to rescind the contract. But whether it is so or not, I am clearly of opinion that if any fraudulent misconduct of the defendants in entering into an agreement with Sir Charles Bright, which had the effect of making it impossible to keep him as a disinterested engineer —if by that it is rendered impossible that the plaintiffs can have the full benefit of the contract, then it appears to me that there is sufficient to enable them to rescind the contract."

See, also, Atlee *v.* Fink, 75 Mo. 100, 42 Am. Rep. 385, where an agreement secretly made by a lumber dealer with one employed to supervise the erection of buildings for another and to pass upon accounts for materials, but not to make purchases, by which the lumber dealer

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will not be permitted without his principal's full knowledge and consent, to undertake to represent the other party also in the same transaction.[1] Such conduct is a fraud upon his principal, and not only will the agent not be entitled to compensation for services so rendered,[2] but the contract or dealings made or had by the agent, while so acting also for the other party without the knowledge or consent of the principal, are not binding upon the latter, and if they still remain executory, he may repudiate them on that ground, or if they have been executed in whole or in part, he may by acting promptly and before the rights of innocent parties have intervened, restore the consideration received, rescind the contract and recover back the property or rights with which he has parted under it.[3]

It makes no difference that the principal was not in fact injured,[4] or that the agent intended no wrong, or that the other party acted in good faith; the double agency is a fraud upon the principal and he is not bound.[5]

agreed to pay him a commission on sales made to the employer through his influence, was held void as against public policy.

So, where a secret gratuity is given to the agent with the intention of influencing his mind in favor of the giver of the gratuity, and the agent on subsequently entering into a contract with such giver on behalf of his principal, is actually influenced by the gratuity in assenting to stipulations prejudicial to the interests of his principal, although the gratuity was not given directly with relation to that particular contract, the transaction is fraudulent as against the principal and the contract is voidable at his option. Smith v. Sorby, 3 Q. B. Div. 552, 28 Eng. Rep. 455. Even though the agent was not in fact influenced against his principal's interests, the contract is corrupt. Harrington v. Victoria Graving Dock Co. 3 Q. B. Div. 549, 28 Eng. Rep. 453. See also Bollman v. Loomis, 41 Conn. 581; Western Union Tel. Co. v. Railroad Co. 1 McCrary (U. S. C. C.) 418. See also Hegenmyer v. Marks, 37 Minn. 6, 5 Am. St. Rep. 808; Miller v. Louisville, etc, R. R. Co. 83 Ala. 274, 3 Am. St. Rep. 722; note to Potter's Appeal, 7 Am. St. Rep. 280.

[1] See *ante*, §§ 66–68.

[2] See *ante*, §§ 643, 644.

[3] New York Cent. Ins. Co. v. National Ins. Co., 14 N. Y. 85; Mercantile Ins. Co. v. Hope Ins. Co., 8 Mo. App. 408; Utica Ins. Co. v. Toledo Ins. Co., 17 Barb. (N. Y.) 132; Herman v. Martineau, 1 Wis. 151, 60 Am. Dec. 368; Wassell v. Reardon, 11 Ark. 705, 54 Am. Dec. 245; Harrison v. McHenry, 9 Ga. 164, 52 Am. Dec. 435; Switzer v. Skiles, 3 Gilm. (Ill.) 529, 44 Am. Dec. 723.

[4] New York Central Ins. Co. v. National Ins. Co. *supra*.

[5] United States Rolling Stock Co. v. Atlantic, etc. R. R. Co., 34 Ohio St. 450, 32 Am. Rep. 380.

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6. *Conclusiveness of Judgment against Agent.*

§ 799. **Principal not bound by judgment against Agent to which he was not a Party.** A principal and his agent are not in privity with each other respecting property rights, and a judgment against the agent cannot settle the rights of the principal, if he is not made a party to the action in which it was obtained, and has not intervened or appeared therein.[1] Hence it is held that one whose property has been replevied, by a writ against his agent, may retake it by replevin against the plaintiff in the first suit, even during the pending of that action.[2] So he may maintain trover against the plaintiff in the action against the agent, and his right is not barred by the fact that he acted as the attorney for the agent in the action against the latter.[3]

[1] White v. Dolliver, 118 Mass. 400, 18 Am. Rep. 502; Warner v. Comstock, 55 Mich. 615. See Phillips v. Moir, 69 Ill. 155.

[2] White v. Dolliver, *supra*.

[3] Warner v. Comstock, *supra*.

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BOOK V.

PARTICULAR CLASSES OF AGENTS.

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886. How long it continues.
887. Attorney may disclose for his own Protection.

X. Termination of the Relation.

888. By Operation of Law.
889. By Act of the Parties.

§ 800. **Scope of Chapter.** It is not within the scope of this work, to go extensively into the relations of attorneys at law to the State or to the Court. Space will not permit a discussion of this public side of their character, but an attempt will be made to give some of the general rules which govern their relation to their clients and their client's business, viewing them only in the character of private agents.

I.

OF THE OFFICE.

§ 801. **Who meant by Attorney at Law.** Under the English system, legal practitioners are divided into a variety of classes, with distinct powers and duties, and some of these distinctions have been recognized or adopted in several of the United States. As a rule, however, so far as they imply distinct rights and duties pertaining only to distinct classes of practitioners, they have, in the United States become practically obsolete, and the same person is daily seen exercising functions which, under the English system, would be distributed among several. Indeed, it is common for the same person, with propriety, to hold himself out to the public as qualified to act in the several capacities of attorney and counselor at law, and solicitor and counselor in chancery, and proctor in admiralty. In common parlance, such a person is ordinarily spoken of as a lawyer or more frequently as an attorney at law. For the purposes of this chapter, the latter term will be adopted, and, under it, will be considered the rules of law applicable to the relations of one man with his agent or representative in law to whichsoever of the special classes he may technically belong.

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§ 802. **Attorney at Law defined.** For the present purposes, therefore, an attorney at law may be defined to be an officer of a court of justice who is qualified to conduct the cause of a litigant therein.[1] Although he may be and frequently is, employed to take part with others in, or to conduct, the trial only, yet his functions are not confined to that. In ordinary cases, his duties begin with the commencement of the legal controversy and end only with its termination. He is usually employed before any step in the legal procedure is taken, and from that time on, he consults with his client regarding the cause of action or the matter of his defense; he determines upon the nature of relief to be sought and the court in which the remedy is to be pursued; he prepares the necessary preliminary papers and directs the issue and service of process; he prepares, files and serves the pleadings; examines and consults with the witnesses; takes minutes of their expected testimony, and, usually, directs the issue and service of the process for their attendance at the trial; he makes or resists the interlocutory motions and applications incident to the progress of the cause; he prepares the briefs and papers; gives the necessary notice and procures the cause to be placed upon the calendar for trial; he conducts the trial and attends to the subsequent motions and hearings; he directs the issue and service of the process to enforce the judgment; and receives the proceeds and satisfies the judgment on the record.

In addition to these duties, incident to the trial of causes, the attorney at law, in practice, undertakes a great variety of duties having a very remote, if any, connection with the business of courts. Thus he acts as a conveyancer or scrivener, putting into appropriate form the agreements and undertakings of his clients; he searches records, makes abstracts of title, and gives opinions thereon; he gives advice and counsel as to legal questions submitted to him; he attends to the making of loans, and the perfecting and recording of securities; he collects and secures claims; and performs many duties which, in the multiform phases of business transactions, require the attention of one skilled in the knowledge and application of legal principles.

§ 803. **Is an Officer of the Court.** He is not a private agent only, but he is also an officer of the court, owing to it the dis-

[1] See Weeks on Attorneys, § 28, *et seq.*

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charge of a variety of high and important duties, designed and imposed for the furtherance of justice and the legal and orderly conduct of its business. For a violation of these duties, as well as for others which are due more directly to his client, he is liable to be suspended or removed from his office.

Whether his office is to be regarded as, in all respects, a public one, is a question upon which the courts are not fully agreed, but he is, at all events, a *quasi* officer of the State whose justice is administered by the court.[1]

§ 804. **Who may be.** As an officer of the court, the power of the attorney to act as such depends upon the license or permission of the court. The persons to whom such license may be granted, and the terms upon which it shall be granted, are usually prescribed by the legislatures of the States. These provisions are generally acquiesced in by the courts, but whether they are binding upon the courts has been doubted.[2]

[1] "The bar is no unimportant part of the court; and its members are officers of the court. Thomas *v.* Steele, 22 Wis. 207; Cothren *v.* Connaughton, 24 Id. 134. See Bacon's Abr. Attorney H.; 1 Tidds Pr. 60; 3 Black. 25; 1 Kent, 306; *Ex parte* Garland, 4 Wall. 333. And if officers of the court, certainly, in some sense, officers of the state for which the court acts. *Re* Wood. Hopk. 6. This is not really denied in (In the matter of Oaths, &c.) 20 Johns. 492, decided in the same year. And if it were, we have no doubt that the Chancellor was correct, and that attorneys and counselors of a court, though not properly *public* officers are *quasi* officers of the state whose justice is administered by the court." RYAN, C. J., in Matter of Mosness, 39 Wis. 509, 20 Am. Rep. 55.

"An attorney at law is not indeed, in the strictest sense, a public officer. But he comes very near it. As was said by Lord HOLT, 'the office of an attorney concerns the public, for it is for the administration of justice.' White's case, 6 Mod. 18; Bradley's case, 7 Wall. 364, 378, 379." GRAY, C. J., in Robinson's case, 131 Mass. 376, 41 Am. Rep. 239. See also Austin's case, 5 Rawle (Penn.) 191, 28 Am. Dec. 657.

[2] In a Wisconsin case it is said by RYAN, C. J., "The constitution makes no express provision for the bar. But it establishes courts, amongst which it distributes all the jurisdiction of all of the courts of Westminster Hall, in equity and at common law. Putnam *v.* Sweet, 2 Pin. 302. And it vests in the courts all the judicial power of the state. The constitutional establishment of such courts appears to carry with it the power to establish a bar to practice in them. And admission to the bar appears to be a judicial power. It may therefore become a very grave question for adjudication here, whether the constitution does not entrust the rule of admission to the bar, as well as of expulsion from it, exclusively to the discretion of the courts." In Matter of Goodell, 39 Wis. 232, 239, 20 Am. Rep. 42.

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While the conditions fixed in the several States are not uniform, the provision is common, if not universal, that the applicant shall be a citizen of the State; that he shall be of the age of twenty-one years or upwards, that he shall be of good moral character, and that he shall appear to possess sufficient legal learning and ability.

Whether women are entitled to be admitted to the bar is a question which has been discussed under various statutes, and while their right has in some cases been denied, the tendency of modern legislation and of its judicial interpretation is to regard them as eligible.[1]

An alien can not be admitted under a statute providing for the admission of "citizens,"[2] nor can a non-resident of the State claim the right to a license.[3]

§ 805. **Party may appear in Person.** In every criminal prosecution the right of the accused to counsel for his defense is declared by the Constitution, but the accused may none the less conduct his own defense if he prefers; but as a rule the defense cannot be conducted by both the accused and his counsel.[4]

In civil cases, there is no such constitutional guarantee of counsel. There is, however, in the Constitutions of many of the States a declaration of the party's right to conduct his suit in person or by attorney.

§ 806. **May not appear by Agent.** But under a constitutional provision that any suitor "shall have the right to prosecute or defend his suit, either in his own proper person or by an attorney *or agent* of his choice," the Supreme Court of Michigan held that a party can not appear in a court of record by an agent who is not an attorney duly licensed to practice as such.[5]

[1] They are not eligible in Massachusetts. Robinson's case, 131 Mass. 376, 41 Am. Rep. 239; Oregon, *In re* Leonard 12 Oreg. 93, 53 Am. Rep. 323; New York, see note to 53 Am. Rep. p. 325. They are admitted in Connecticut, Matter of Hall, 50 Conn. 131, 47 Am. Rep. 625; Wisconsin, Matter of Goodell, 48 Wis. 693, and, says Judge LANDON in a case referred to in the note above cited, in Iowa, Missouri, Michigan, Utah, District of Columbia, Maine, Ohio, Illinois, Indiana, Kansas, Minnesota, California, Nebraska, Washington Territory and Pennsylvania.

[2] Matter of O'Neill, 90 N. Y. 584.

[3] Matter of Mosness, 39 Wis. 509, 20 Am. Rep. 55. In this case it is said that the legislature has no power to authorize non-residents to be admitted.

[4] See Bishop's Crim. Proc. §962.

[5] Cobb *v.* Judge of Superior Court, 43 Mich. 289.

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II.

OF THE RELATION OF ATTORNEY AND CLIENT.

1. *A Relation of Agency.*

§ 807. **Rules of Agency govern.** The relation of attorney and client is a relation of agency, and, in its general features, is governed by the same rules which apply to other agencies. Many of the applications of these rules to the case of attorneys have been noted in the general development of the principles of agency, to which the earlier portion of this work has been devoted; but the importance of the subject, and the large number of special applications, seem to warrant a more extended examination in this place.

2. *How Created.*

§ 808. **No formal Power necessary.** It was formerly considered necessary that the authority of the attorney to appear for his client should be conferred by a formal warrant of attorney,[1] but, although there are many reasons of convenience and propriety, if not of safety and protection to the parties, which commend this as a desirable course to be pursued in many cases, it can no longer be regarded as necessary. In practice, the mere request of the client is the common method, and is undoubtedly a sufficient authorization, in the absence of a statute or rule of procedure requiring more.[2]

And the rule may be stated still more broadly, for an express request is not indispensable, but the attorney's authority may be inferred from the words or conduct of his client, or his unauthorized appearance and action may be subsequently ratified and confirmed. In this respect, the ordinary rules which govern the appointment of agents generally, apply, and the same kind of evidence which would be admissible to establish the authority of any agent may be used to establish the authority of an attorney.[3]

[1] McAlexander *v.* Wright, 3 T. B. Mon. (Ky.) 189, 16 Am. Dec. 93.

[2] Smith *v.* Black, 51 Md. 247; Eickman *v.* Troll, 29 Minn. 124; Manchester Bank *v.* Fellows, 28 N. H. 302; Bunton *v.* Lyford, 37 N. H 512, 75 Am. Dec. 144; Henck *v.* Todhunter, 7 H. & J. (Md.) 275, 16 Am. Dec. 300.

[3] See *ante*, §§ 109, 182.

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III.

APPEARANCE PRESUMPTIVELY AUTHORIZED.

§ 809. **Presumption of Authority.** An attorney, as has been seen, is an officer of the court, and is responsible to the court for the propriety of his professional conduct, and for the proper exercise of his privileges as such. It is the presumption of the law that he does not violate his duty, or impose upon the court with a false appearance of authority. Wherever, therefore, a regularly admitted attorney appears for a party in a cause, the presumption is that such appearance is authorized.[1] And this rule applies whether the attorney appears for a natural person or a corporation.[2]

§ 810. **The Presumption not conclusive.** This presumption, however, is not conclusive, but the fact of the authority may, in a proper case, be inquired into. The occasion for this inquiry may arise under several states of fact. Thus the authority of the attorney may be questioned during the pendency of the suit in which he assumes to appear, and this may be done either by his alleged client, or by the opposite party. Or the question of his authority may arise, either directly or collaterally, in a subsequent action in which the judgment obtained upon his appearance may be called in question.

a. While Proceedings are Pending.

1. *Opposite party may require production of authority.* The opposite party in a pending suit, having reasonable grounds to doubt the attorney's authority to appear, may apply to the court to require him to produce his authority. But before the court will interfere in such a case, the party making the application

[1] Osborn v. The United States Bank, 9 Wheat. (U.S.) 738; Schlitz v. Meyer, 61 Wis. 418; Low v. Settle, 22 W. Va. 387; Esley v. People, 23 Kan. 510; Piggott v. Addicks, 3 G. Greene (Iowa) 427, 56 Am. Dec. 547; Denton v. Noyes, 6 Johns. (N. Y.) 298, 5 Am. Dec. 237; Arnold v. Nye, 23 Mich. 286; Harshey v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520; Hardin v. Ho-Yo-Po-Nubby's Lessee, 27 Miss, 567; Dorsey v. Kyle, 30 Md. 512, 96 Am. Dec. 617; Hamilton v. Wright, 37 N. Y. 502; Proprietors v. Bishop, 2 Vt. 231; Thomas v. Steele, 22 Wis. 207; Pillsbury v. Dugan, 9 Ohio 117; Leslie v. Fischer, 62 Ill. 118; Hager v. Cochran, 66 Md. 258; Norberg v. Heineman, 59 Mich. 210.

[2] Penobscot Boom Co. v. Lamson, 16 Me. 224, 33 Am. Dec. 656.

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must adduce some facts showing or tending to show that the attorney does not in fact possess the authority which he assumes to exercise. The court will not proceed in such a case upon light or frivolous grounds, but where the facts alleged raise a reasonable presumption that the attorney is acting in the case without authority from the party he assumes to represent, the court will require him to produce his authority.[1]

This showing is usually made upon affidavits,[2] and the burden of proof rests upon him who denies the authority.[3] The question should be raised upon the earliest practicable opportunity. It cannot be raised for the first time on appeal.[4]

2. *What evidence sufficient.* In some cases, the statement of the attorney that he does, in fact, represent the party for whom he assumes to act, has been held sufficient,[5] and the affidavit of the attorney that he was duly authorized, either by the party or his agent, would be competent proof of his authority.[6] So, where the alleged client resides at a distance, letters coming or purporting to come, in due course from himself or his agent, authorizing the commencement of the suit would be sufficient.[7]

[1] Tally *v.* Reynolds, 1 Ark. 99, 31 Am. Dec. 737; Keith *v.* Wilson, 6 Mo. 435, 35 Am. Dec. 443; McAlexander *v.* Wright, 3 T. B. Mon. (Ky.) 189, 16 Am. Dec. 93; West *v.* Houston, 3 Harr. (Del.) 15; McKierman *v.* Patrick, 4 How. (Miss.) 333; People *v.* Mariposa Co. 39 Cal. 683; Leslie *v.* Fischer, 62 Ill. 118; Hamilton *v.* Wright, 37 N. Y. 502.

Showing of authority will not be required on mere demand. Norberg *v.* Heineman, 59 Mich. 210.

[2] Dockham *v.* Potter, 27 La Ann. 73; Tally *v.* Reynolds, *supra*.

[3] Thomas *v.* Steele, 22 Wis. 207; Schlitz *v.* Meyer, 61 Wis. 418; Low *v.* Settle, 22 W. Va. 387; Esley *v.* People, 23 Kan. 510.

[4] State *v.* Carothers, 1 G. Greene (Iowa) 464.

[5] Penobscot Boom Co. Lamson, 16 Me. 224, 33 Am. Dec. 656; Manchester Bank *v.* Fellows, 28 N. H. 302; Bridgton *v.* Bennett, 23 Me. 420.

[6] Eickman *v.* Troll, 29 Minn. 124. Hughes *v.* Osborn, 42 Ind. 450.

[7] Hardin *v.* Ho-Yo-Po-Nubby's Lessee, 27 Miss. 567. "The presumption," said the court in this case, at p. 579, "is in favor of his authority, and though he may be required to show it, yet if he acts in good faith and the want of authority is not manifest, he will not be held to have acted without authority, because it is not shown according to strictly legal rules. If this were not so, the greatest inconvenience in practice would continually occur both to clients and attorneys; for suits are frequently instituted by attorneys under the authority of letters from their clients, who are strangers, and whose handwriting is unknown to them, and could not be proved without great trouble and delay. If required in such a case to produce his authority, the production of the letter, though he might be unable to prove the hand-

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3. *Client may dispute authority.* It has been held in some cases, that an appearance by an attorney binds the party for whom he appears, whether the attorney was employed by the party or not,[1] and that the only remedy of the party, in such a case, was by a proceeding against the attorney.[2] That this is a harsh rule, and that it affords in many cases no security whatever to the party, is too manifest to require argument. That it is opposed to every principle of the law of agency, binding a party who has neither expressly authorized or tacitly consented to the appearance, is equally obvious, and a number of courts have sought to modify it, by holding it to be applicable, only in cases where the attorney is pecuniarily responsible.[3] While the rule, thus modified, would afford relief in some cases, it is also eminently unsatisfactory and unreasonable. No rule of law ought to rest upon the uncertain and shifting conditions of any man's pecuniary responsibility.

And it is believed that no such distinction can be sustained. A party may, by his laches, deprive himself of the right to object, or he may, by acquiescence, give apparent validity to an unauthorized appearance, but these cases stand upon other and familiar ground. The true rule is believed to be that, while the appearance of a regularly admitted attorney is presumed to be

writing, would be sufficient, and so of a letter written by a party purporting to be the agent of the plaintiff. All that is required to be shown in such cases in the first instance, is, that the attorney has acted in good faith and under an authority appearing to be genuine, though informal. It then devolves upon the party impeaching the authority, to show by positive proof, that it is invalid, and insufficient in substance." To same effect, see Savery *v.* Savery, 8 Iowa, 217; Bush *v.* Miller, 13 Barb. (N. Y.) 481; Grignon *v.* Schmitz, 18 Wis. 620.

This presumption does not apply to inferior courts.

[1] Abbott *v.* Dutton, 44 Vt. 546, 8 Am. Rep. 394; St. Albans *v.* Bush, 4 Vt. 58, 23 Am. Dec. 246; Spaulding *v.* Swift, 18 Vt. 214; Newcomb *v.* Peck, 17 Vt. 302; Denton *v.* Noyes, 6 Johns. (N. Y.) 298, 5 Am. Dec. 237. This case has been followed in New York, though often under protest. See Meacham *v.* Dudley, 6 Wend. 515; Ingalls *v.* Sprague, 10 Wend. 673; Gaillard *v.* Smart, 6 Cow. 386; Acker *v.* Ledyard, 8 N. Y. 65; Brown *v.* Nichols, 42 N. Y. 26; Everett *v.* Warner Bank, 58 N. H. 340; Cyphert *v.* McLune, 23 Penn. St. 195; England *v.* Garner, 90 N. C. 197; University *v.* Lassiter, 83 Id. 38; Dorsey *v.* Kyle, 30 Md. 512, 96 Am. Dec. 617.

[2] Anonymous, 1 Salk. 86; Denton *v.* Noyes, *supra*; Bunton *v.* Lyford, 37 N. H. 512, 75 Am. Dec. 144; Munnikuyson *v.* Dorsett, 2 H. & G. (Md.) 378; Dorsey *v.* Kyle, *supra*.

[3] Anonymous, 1 Salk. 86; Denton *v.* Noyes, *supra*.

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authorized, this presumption is not conclusive upon a party who has given no authority or color of authority for it, and that the proceeding taken by the unauthorized attorney will be suspended, or a judgment obtained upon his unauthorized appearance or consent, will be vacated by the court upon a timely application of the party for whom the attorney assumed to act.[1] This relief is usually obtained by motion to the court showing the facts, or, if the defect appear upon the record, by writ of error, and not by *audita querela*.[2]

b. In Actions upon the Judgment.

1. *Foreign Judgments.* The rule is now well settled that in actions brought upon judgments, recovered in other states or countries, it is competent for the defendant to show, notwithstanding any recitals in the judgment record to the contrary, that he was not in fact served with process, and that the appearance entered for him by the attorney was unauthorized.[3] This rule does not conflict with the Constitution of the United States, for it is only when the court had, in fact, jurisdiction of the cause,

[1] Harshey v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520; Marvel v. Manouvrier, 14 La. Ann. 8, 74 Am. Dec. 424; Sherrard v. Nevius, 2 Ind. 241, 52 Am. Dec. 508; Wiley v. Pratt, 23 Ind. 633; Brinkman v. Shaffer, 23 Kan. 528; Reynolds v. Fleming, 30 Kan. 106, 46 Am. Rep. 86; Crichfield v. Porter, 8 Ohio, 518; DeLouis v. Meek, 2 G. Greene, (Iowa) 55, 50 Am. Dec. 491; Ridge v. Alter, 14 La. Ann. 866; Hefferman v. Burt, 7 Iowa, 321, 71 Am. Dec. 445.

[2] Arno v. Wayne Circuit Judge, 42 Mich. 362, where a default entered for not replying to a plea filed by unauthorized attorney was set aside on motion. Where an attorney brings an action without the authority of the plaintiff, it will be stayed on motion of plaintiff without costs. Reynolds v. Howell, L. R. 8 Q. B. 398, 6 Eng. Rep. 129. Remedy is by application direct to the court which rendered the judgment, or by a writ of error, and not by *audita querela*. Abbott v. Dutton, 44 Vt. 546, 8 Am. Rep. 394; Spaulding v. Swift, 18 Vt. 214.

[3] Gleason v. Dodd, 4 Metc. (Mass.) 333; Phelps v. Brewer, 9 Cush. (Mass.) 390; Carleton v. Bickford, 18 Gray (Mass.) 591; McDermott v. Clary, 107 Mass. 501; Gilman v. Gilman, 126 Mass. 26, 30 Am. Rep. 646; Mastin v. Gray, 19 Kan. 458, 27 Am. Rep. 149; Norwood v. Cobb, 24 Tex. 551; Starbuck v. Murray, 5 Wend. (N. Y.) 148, 21 Am. Dec. 172; Aldrich v. Kinney, 4 Conn. 380, 10 Am. Dec. 151; Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589; Latterett v. Cook, 1 Iowa 1, 63 Am. Dec. 428; Baltzell v. Nosler, 1 Iowa, 588, 63 Am. Dec. 466; Harshey v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520; Rape v. Heaton, 9 Wis. 328, 76 Am. Dec. 269.

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and of the parties, that its judgment is entitled to full faith and credit.[1]

2. *Domestic Judgments.* Some doubt has been raised whether this rule applies also to domestic judgments, but the later and better considered cases hold that there is no distinction, and that *any* judgment rendered without jurisdiction, when assailed directly, may be impeached, and that, in doing so, anything contained in the record purporting to give or prove jurisdiction,—as the appearance of an attorney,—may be contradicted by any evidence, extrinsic as well as intrinsic, and may be shown to be untrue and false.[2]

IV.

IMPLIED AUTHORITY OF ATTORNEY.

§ 811. **Has general Control of Conduct of Suit.** A party employs an attorney to conduct and manage his cause in court because he himself lacks the learning, experience and ability necessary to its successful prosecution, and because he believes that the attorney possesses these qualifications. The object sought is the prosecution or defense of the cause, and the authority to accomplish this is confided to the attorney. As in other cases, this authority must carry with it all the incidental and auxiliary powers which are reasonable and proper to carry the main power into effect. Much of the procedure in the case is governed by rules of court with which the attorney is familiar, and which it is his duty to observe. The orderly conduct of the cause requires that the settled course of practice shall be adhered to, with which the attorney, and not the client, is presumed to be acquainted.

When, therefore, a party puts his cause into the hands of an attorney, the latter is necessarily vested with large, if not exclusive authority, to control the conduct and management of the suit in all matters which pertain to the remedy, and which do not involve the substantial rights of the client. For the due and

[1] Gilman *v.* Gilman, 126 Mass. 26, 30 Am. Rep. 646; Pennywit *v.* Foote, 27 Ohio St. 600, 22 Am. Rep. 340, which contains a full review of the cases.

[2] Reynolds *v.* Fleming, 30 Kan. 106, 46 Am. Rep. 86; Ferguson *v.* Crawford, 70 N. Y. 253, 26 Am. Rep. 589; Harshey *v.* Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520.

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orderly conduct of the cause, the court holds the attorney responsible, and these matters the client, while he has an attorney of record, has no right to interfere with or to control.[1] So whatever the attorney does in the prosecution of the remedy, if it be not done fraudulently or collusively, is binding upon the client, although it may result disastrously to him.[2]

And this rule is not confined to the proceedings had in court, but includes all acts, whether done in or out of court, necessary or incidental to the prosecution or defense of the suit, and which affect the remedy only and not the cause of action.[3]

§ 812. **Same Subject—What included.** As incidental to his authority to manage and control the general course and conduct of the cause, the attorney of record has implied power:—

a. To make such affidavits as are required in the progress of the cause, when the facts are within his knowledge.[4]

[1] "A party to an action may appear in his own proper person or by attorney, but he cannot do both. If he appears by attorney, he must be heard through him, and it is indispensable to the decorum of the court, and the due and orderly conduct of a cause that such attorney shall have the management and control of the action, and his acts go unquestioned by any one except the party whom he represents. So long as he remains attorney of record, the court cannot recognize any other as having the management of the cause." SANDERSON, C. J., in Board of Commissioners *v.* Younger, 29 Cal. 147, 87 Am. Dec. 164. To same effect see Mott *v.* Foster, 45 Cal. 72; Nightingale *v.* Oregon Central Ry Co., 2 Sawyer, (U. S. C. C.) 338. But where the client has stipulated in person to settle the cause, he cannot defeat it by insisting that his attorney and not himself was the person who should have signed. McBratney *v.* Rome, &c. R. R. Co., 87 N. Y. 467.

[2] Beck *v.* Bellamy, 93 N. C. 129; Foster *v.* Wiley, 27 Mich. 244; Lee *v.* Grimes, 4 Col. 185; Moulton *v.* Bowker, 115 Mass. 36, 15 Am. Rep. 72; Clark *v.* Randall, 9 Wis. 135, 76 Am. Dec. 252; Pierce *v.* Strickland, 2 Story (U. S. C. C.) 292; Nightingale *v.* Oregon Cent. Ry Co., 2 Sawyer (U. S. C. C.) 338; Jenney *v.* Delesdernier, 20 Me. 183; Benson *v.* Carr, 73 Id. 76; Burgess *v.* Stevens, 76 Id. 559; Levy *v.* Brown, 56 Miss. 83; McCann *v.* McLennan, 3 Neb. 25; Edgerton *v.* Brackett, 11 N. H. 218; Lewis *v.* Sumner, 13 Metc. (Mass.) 269; Shores *v.* Caswell, Id. 413; Wieland *v.* White, 109 Mass. 392; DeLouis *v.* Meek, 2 G. Greene (Iowa) 55, 50 Am. Dec. 491; Howe *v.* Lawrence, 22 N. J. L. 99.

[3] Moulton *v.* Bowker, 115 Mass. 36, 15 Am. Rep. 72.

[4] He may verify, by affidavit, a petition in *scire facias*. Wright *v.* Parks, 10 Iowa, 342. He may make an affidavit to obtain an order of siezure and sale. Simpson *v.* Lombas, 14 La. Ann. 103; or to obtain an attachment, Clark *v.* Morse, 16 La. 575; Austin *v.* Latham, 19 Id. 88; Willis *v.* Lyman, 23 Tex. 268; Manley *v.* Headley, 10 Kan. 88.

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b. To waive a verification.[1]

c. To serve, and accept service of, all necessary and proper papers, notices, etc., during the progress of the cause.[2]

d. To waive formal notice of proceedings in the cause.[3]

e. To waive or extend the time fixed for any motion or proceeding.[4]

f. To consent to a reference of the cause.[5]

g. To submit the cause to arbitrators.[6]

h. To dismiss or discontinue the action.[7]

i. To consent to a nonsuit.[8]

j. To appeal the case.[9]

k. To admit facts for the purposes of trial, either on the trial or before.[10]

l. To stipulate as to the issues to be tried.[11]

m. To waive informalities and technicalities.[12]

n. To release an attachment lien before judgment.[13]

[1] Smith *v.* Mulliken, 2 Minn. 319.

[2] Anderson *v.* Watson, 3 C. & P. 214; Richardson *v.* Daly, 4 M. & W. 384.

[3] Hefferman *v.* Burt, 7 Iowa, 320, 71 Am. Dec. 445.

[4] Hefferman *v.* Burt, *supra.*

[5] Stokely *v.* Robinson, 34 Penn. St. 315; Woder *v.* Powell, 31 Ga. 1; Smith *v.* Bossard, 2 McCord's (S. C.) Ch. 406; Tiffany *v.* Lord, 40 How. (N. Y.) Pr. 481.

[6] Sargeant *v.* Clark, 108 Penn. St. 588; Holker *v.* Parker, 7 Cranch (U. S.) 436; Connett *v.* Chicago, 114 Ill. 233; Tilton *v.* United States Life Ins. Co., 8 Daly (N. Y.) 84; Lee *v.* Grimes, 4 Col. 185; Morris *v.* Grier, 76 N. C. 410; Williams *v.* Tracey, 95 Penn. St. 308; Alton *v.* Gilmanton, 2 N. H. 520; Yates *v.* Russell, 17 Johns. (N. Y.) 461; Haskell *v.* Whitney, 12 Mass. 47; Buckland *v.* Conway, 16 Mass. 396; Fernald *v.* Ladd, 4 N. H. 370; Pike *v.* Emerson, 5 N. H. 393, 22 Am. Dec. 468; Jenkins *v.* Gillespie, 10 Sm. & M. (Miss.) 31, 48 Am. Dec. 732; Beverly *v.* Stephens, 17 Ala. 701; Brooks *v.* New Durham, 55 N. H. 559; *contra* McPherson *v.* Cox, 86 N. Y. 472.

[7] Paxton *v.* Cobb, 2 La. 137; McLeran *v.* McNamara, 55 Cal. 508; Rogers *v.* Greenwood, 14 Minn. 333; Gaillard *v.* Smart, 6 Cow. (N. Y.) 385; Barrett *v.* Third Ave. R. R. Co., 45 N. Y. 628; Davis *v.* Hall, 90 Mo. 659.

[8] Lynch *v.* Coel, 12 L. T. 548.

[9] Grosvenor *v.* Danforth, 16 Mass. 74; Bach *v.* Ballard, 13 La. Ann. 487.

[10] Starke *v.* Kenan, 11 Ala. 819; Farmers' Bank *v.* Sprigg, 11 Md. 389; Pike *v.* Emerson, 5 N. H. 393; Talbot *v.* McGee, 4 T. B. Mon. (Ky.) 377; Lewis *v.* Sumner, 13 Metc. (Mass.) 269.

Admissions to bind the client must be distinct and formal, and made for the purpose of dispensing with proof. Treadway *v.* Sioux City, &c. R. R. Co., 40 Iowa, 526.

[11] Bingham *v.* Supervisors, 6 Minn. 136.

[12] Hanson *v.* Hoitt, 14 N. H. 56.

[13] Benson *v.* Carr, 78 Me. 76; Moul-

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o. To stipulate that judgment in the cause be the same as in another cause then pending involving the same questions.[1]

p. To get necessary briefs printed at client's expense.[2]

q. To bring a new action after a nonsuit.[3]

r. To agree that upon judgment being entered for his client, he will suspend the issue of execution.[4]

s. To remit damages after a verdict.[5]

§ 813. **Same Subject—What not included.** Such an attorney has, however, no implied power:—

a. To admit or accept service of original process by which the court acquires jurisdiction for the first time of the person of his client.[6]

b. To confess or consent to judgment against his client.[7]

c. To enter a retraxit when it is a final bar.[8]

d. To stipulate that the dismissal of an action shall bar an action for malicious prosecution.[9]

e. To compromise the claim of his client.[10]

ton v. Bowker, 115 Mass. 36, 15 Am. Rep. 72; Jenney v. Delesdernier, 20 Me. 183; Pierce v. Strickland, 2 Story (U. S. C. C.) 292.

[1] North Missouri R. R. Co. v. Stephens, 36 Mo. 150, 88 Am. Dec. 138; or that the result in one of several similar causes determine all. Ohlquest v. Farwell—Iowa—32 N. W. Rep. 277.

[2] Weisse v. New Orleans, 10 La. Ann. 46; Williamson, &c. Paper Co. v. Bosbyshell, 14 Mo. App. 534.

[3] Scott v. Elmendorf, 12 Johns. (N. Y.) 317.

[4] Union Bank v. Geary., 5 Pet. (U. S.) 99; Wieland v. White, 109 Mass. 392.

[5] Lamb v. Williams, 1 Salk. 89.

[6] Masterson v. Le Claire, 4 Minn. 163; Reed v. Reed, 19 S. C. 548; Starr v. Hall, 87 N. C. 381.

[7] People v. Lamborn, 2 Ill. 123; Wadhams v. Gay, 73 Ill. 415; Edwards v. Edwards, 29 La. Ann. 597; Pfister v. Wade, 69 Cal. 133; Swinfen v. Swinfen, 24 Beav. 549.

[8] Lambert v. Sandford, 2 Blackf. (Ind.) 137, 18 Am. Dec. 149.

[9] Marbourg v. Smith, 11 Kans. 554.

[10] The English rule is otherwise, but the rule stated in the text is supported by an overwhelming mass of authority in the United States. See Fritchey v. Bosley, 56 Md. 96; Isaacs v. Zugsmith, 103 Penn. St. 77; Jones v. Inness, 32 Kan. 177; Kelly v. Wright, 65 Wis. 236; Roberts v. Nelson, 22 Mo. App. 28; Whipple v. Whitman, 13 R. I. 512, 43 Am. Rep. 42; Mackey v. Adair, 99 Penn. St. 143; North Whitehall v. Keller, 100 Penn. St. 105, 45 Am. Rep. 361; Granger v. Batchelder, 54 Vt. 248, 41 Am. Rep. 846; Ambrose v. McDonald, 53 Cal. 28; Pickett v. Merchants' Nat. Bank, 32 Ark. 346; Mandeville v. Reynolds, 68 N. Y. 528; Wadhams v. Gay, 73 Ill. 415; Roller v. Wooldridge, 46 Tex. 485; Preston v. Hill, 50 Cal. 43; Maddux v. Bevan, 39 Md. 485; Walden v. Bolton, 55 Mo. 405; Spears v. Ledergerber, 56 Mo. 465; Vanderline v. Smith, 18 Mo. App. 55;

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f. To release his client's cause of action.[1]

g. To stipulate not to appeal or move for a new trial.[2]

h. To release the property of the defendant from the lien of a judgment,[3] or from the levy of an execution.[4]

i. To release his client's security without payment.[5]

j. To discharge or release a surety[6] or indorser.[7]

k. To discharge a defendant in custody on a *ca. sa.*, without the plaintiff's consent or without satisfaction.[8]

l. To agree to suspend proceedings on a judgment.[9]

m. To release a garnishee from the attachment of money or property in his hands.[10]

n. To release the interest of parties so as to make them competent as witnesses.[11]

o. To give an extension of time upon the demand.[12]

p. To assign or transfer the demand or suit to a third person.[13]

Grumley *v.* Webb, 48 Mo. 562; Wetherbee *v.* Fitch, 117 Ill. 67; Moye *v.* Cogdell, 69 N. C. 93; Adams *v.* Roller, 35 Tex. 711. *Contra*, Bonney *v.* Morrill, 57 Me. 368. But a fair and judicious compromise made by the attorney with the assent of the real party in interest though without the knowledge of the plaintiff of record will not be disturbed. Whipple *v.* Whitman, 13 R. I. 512, 43 Am. Rep. 42. Authority to compromise a claim does not imply authority to assign it to a third person. Mayer *v.* Blease, 4 S. C. 10.

[1] Mandeville *v.* Reynolds, 68 N. Y. 528; Cox *v.* New York, &c. R. R. Co., 68 N. Y. 414; Gilliland *v.* Gasque, 6 S. C. 406; Wadhams *v.* Gay, 73 Ill. 415.

[2] People *v.* Mayor, &c. of New York, 11 Abb. Pr. 66, *contra*, Pike *v.* Emerson, 5 N. H. 393, 22 Am. Dec. 468.

[3] Phillips *v.* Dobbins, 56 Ga. 617; Fritchey *v.* Bosley, 56 Md. 94; Horsey *v.* Chew, 65 Md. 555

[4] Banks *v.* Evans, 10 Sm. & M. (Miss.) 35, 48 Am. Dec. 784; Benedict *v.* Smith, 10 Paige (N. Y.) 126.

[5] Terhune *v.* Colton, 2 Stock. (N. J.) Eq. 21; Tankersley *v.* Anderson, 4 Desaus. (S. C.) 45.

[6] Savings Inst. *v.* Chinn, 7 Bush (Ky.) 539; Givens *v.* Briscoe, 3 J. J. Marsh. (Ky.) 529; Union Bank *v.* Govan, 10 Sm. & M. (Miss.) 333; Stoll *v.* Sheldon, 13 Neb. 207.

[7] East River Bank *v.* Kennedy, 9 Bosw. (N. Y.) 543; Kellogg *v.* Gilbert, 10 Johns. (N. Y.) 220; York Bank *v.* Appleton, 17 Me. 55.

[8] Kellogg *v.* Gilbert, 10 Johns. (N. Y.) 220, 6 Am. Dec. 335; Treasurers *v.* McDowell, 1 Hill (S. C.) 184, 26 Am. Dec. 166.

[9] Pendexter *v.* Vernon, 9 Humph. (Tenn.) 84.

[10] Quarles *v.* Porter, 12 Mo. 76.

[11] York Bank *v.* Appleton, 17 Me. 55; East River Bank *v.* Kennedy, 9 Bosw. (N. Y.) 543; Murray *v.* House, 11 Johns. (N. Y.) 464; Shores *v.* Caswell, 13 Metc. (Mass.) 413; Ball *v.* Bank of Alabama, 8 Ala. 590, 42 Am. Dec. 649.

[12] Lockhart *v.* Wyatt, 10 Ala. 231, 44 Am. Dec. 481.

[13] Child *v.* Eureka Powder Works, 44 N. H. 354; Russell *v.* Drummond,

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q. To consent to stay the execution if lien will be lost.[1]

r. To waive the right to an inquisition.[2]

s. To give up the demand and take other security.[3]

t. To employ counsel at client's expense.[4]

u. To stipulate that case shall not be tried during certain periods.[5]

v. To undertake journeys on client's behalf and at his expense.[6]

§ 814. **Can not delegate his Powers.** The relation of attorney and client is pre-eminently one of trust and confidence. The client employs a particular attorney because he relies upon *his* skill, learning, ability or integrity. The attorney, in the management of the cause, has from necessity a large discretion and authority as to the general course and conduct of the proceedings, and this fact the client has presumably taken into consideration in making his selection. In accordance with well settled principles of agency, therefore, the rule is rigidly adhered to that those powers committed to an attorney, which involve the exercise on his part of judgment or discretion, or which are based upon considerations of his personal skill or ability, can not be delegated by him to another without the consent of his client.[7]

6 Ind. 216; Craig *v.* Ely, 5 Stew. & P. (Ala.) 354.

[1] Reynolds *v.* Ingersoll, 11 Sm. & M. (Miss.) 249, 49 Am. Dec. 57.

[2] Hadden *v.* Clark, 2 Grant (Penn.) 107.

[3] Tankersley *v.* Anderson, 4 Desau. (S. C.) 44.

[4] Voorhies *v.* Harrison, 23 La. Ann. 85; Young *v.* Crawford, 23 Mo. App. 432.

[5] Robert *v.* Commercial Bank, 13 La. 528, 33 Am. Dec. 570.

[6] *In re* Snell., 5 Ch. Div. 815, 22 Eng. Rep. 485.

[7] "A familiar and general rule of law," says BECK, J. "applicable to the relation of principal and agent is, that the agent cannot delegate the authority conferred upon him to another, so that the principal will be bound by the acts done in the discretion of one to whom the agent attempts to delegate his authority. The rule is based upon the consideration that to the agent is confided the personal trust and confidence which controlled his appointment or selection, and is essential to the existence of the relation of principal and agent. We know of no rule excepting from the operation of this doctrine any attorney at law, whose duties, responsibilities and liabilities arise from the relation of agency existing between him and his client, though they are varied from those of other agents by consideration of the peculiar service he is required to perform. Indeed it would appear, in view of the fact that attorneys are chosen by reason of their peculiar capacities

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Thus the client who has employed an attorney to take charge of his case at the trial, or to argue it in an appellate court, or to undertake to secure a compromise, or to endeavor to collect an account, or to do any other act involving judgment, skill, ability or discretion, is entitled to have the personal services of the attorney for which he stipulated, and the attorney has no right or power to bind his client by subletting or delegating the work to another.[1] If such a delegation were attempted, the client would have the undoubted right to summarily intercept its execution,[2] and if it were fully executed, without his knowledge or consent, the execution would render him liable neither to the original attorney nor to his substitute.[3] But if, having knowledge of the substitution, he should permit the substitute to perform the services without objection, he would be deemed to have assented to it.[4]

So third persons dealing with such a substitute would acquire no rights against the client, inasmuch as the substitute is the agent of the attorney only, and not of his client.[5] Thus if the client entrusts to his attorney a claim or note for collection, and the attorney employs another to do it for him, the latter stands in no relation of privity to the client, and a payment made to the substitute will not be a payment to the client unless actually received by him.[6]

If, however, the note were payable to bearer, or was endorsed in blank, and was paid at maturity to one having the possession

and character, and other personal qualities, that the principles we have stated should be rigidly applied in cases of this kind." In Antrobus v. Sherman, 65 Iowa 230, 54 Am. Rep. 7. To same effect: Dickson v. Wright, 52 Miss. 585, 24 Am. Rep. 677; Danley v. Crawl, 28 Ark. 95; Kellogg v. Norris, 10 Ark. 18; Smalley v. Greene, 52 Iowa 241, 35 Am. Rep. 267.

[1] Eggleston v. Boardman, 37 Mich. 14. An agreement by an attorney to turn over to another attorney, notes which the former holds for collection, is invalid. Smalley v. Greene, *supra*.

[2] Eggleston v. Boardman, *supra*.

[3] Eggleston v. Boardman, *supra*. A client is not liable for costs made by an attorney employed by his attorney. Antrobus v. Sherman, 65 Iowa, 230, 54 Am. Rep. 7.

[4] Eggleston v. Boardman, *supra*. Briggs v. Georgia, 10 Vt. 68.

[5] See *ante*, § 197.

[6] Kellogg v. Norris, 10 Ark. 18; Danley v. Crawl., 28 Ark. 95. At any rate if the debtor knew of the substitution and the substitute did not have possession of the note. Dickson v. Wright, 52 Miss. 585, 24 Am. Rep. 677.

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of it, ready to be delivered upon payment, such payment would be valid and discharge the debtor.[1]

The client may, however, either expressly or by implication authorize the attorney to employ a substitute, or he may subsequently ratify and confirm such delegation, and, in either of these cases, the substitute is the attorney of the client.

The employment of one of a firm of attorneys is an employment of them all, and, unless otherwise stipulated, the cause may be tried, or the business performed, by any one of them.[2]

§ 815. **May employ Subordinates.** But this rule does not require that the attorney should personally perform all of the mechanical and routine labor involved in the cause. From the very necessities of the case, much of this must be done by clerks and subordinates under his direction, and such a performance does not violate the principle under consideration. As has been seen, what is ministerial and mechanical merely may be delegated; but that which involves discretion, judgment or other personal considerations may not. As the rule is sometimes stated, an attorney may employ subordinates but not substitutes.[3]

§ 816. **Authority to bind Client by Bonds.** The necessity for the execution of bonds and other undertakings by the client, frequently arises in the progress of the cause, and it becomes material in many cases, particularly where the client is a non-resident, to determine what authority the attorney possesses by virtue of his general retainer, to execute such bonds in the name of the clients. These bonds and undertakings are often required to be under seal, and it has been seen to be a general rule that authority to execute an instrument under seal can only be conferred by an instrument of like solemnity.[4] Where, therefore, a seal is required, the power to execute the bond could not, where this rule prevails, be implied from a mere general retainer,[5] but if the seal were not required, it could, as has been seen,[6] be rejected as a mere redundancy and the bond, if otherwise authorized, might be given force as a simple contract or undertaking.[7]

[1] Wheeler *v.* Guild, 20 Pick. (Mass.) 545, 33 Am. Dec. 231.

[2] Eggleston *v.* Boardman, *supra*.

[3] Eggleston *v.* Boardman, 37 Mich. 14; McEwen *v.* Mazyck, 3 Rich (S. C.) L. 210.

[4] See *ante*, § 93.

[5] See Clark *v.* Courser, 29 N. H. 170.

[6] See *ante*, § 95.

[7] Schoregge *v.* Gordon, 29 Minn. 367.

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The question of authority must depend largely upon circumstances. Authority to do a given act carries with it implied authority to do those things which are necessary in order to accomplish the main end, and what is necessary must be determined in many cases by reference to the particular facts. Thus if a party sends a claim to an attorney in a distant town for collection, there is implied authority in the attorney to take those steps which are usually taken under like circumstances, and which are necessary to accomplish the purpose. If in such a case there was reasonable ground to believe that the claim would be lost unless the debtor's property was attached or levied upon at once, and there was not sufficient time to communicate with the client, the attorney would undoubtedly be authorized to make the necessary affidavit and execute the proper undertaking in the name of the client to obtain the writ.[1] But it has been held that an attorney under such circumstances is under no *obligation* to make the affidavit or execute the bond.[2] If the client were on the ground where he could be personally consulted, the attorney's authority to bind him would be doubtful.

So it has been held that an attorney authorized to collect for a non-resident client has implied authority to execute in the client's name an undertaking to the sheriff to indemify him against the consequences of levying the client's execution, and that the attorney, acting in good faith may himself indemnify the sheriff, and, if compelled to pay damages thereon, may recover the amount so paid from his client.[3]

[1] Dwight v. Weir, 6 La. Ann. 706; Fulton v. Brown, 10 La. Ann. 350. Clark v. Randall, 9 Wis. 135, 76 Am. Dec 252; Schoregge v. Gordon, 29 Minn. 367.

[2] Foulks v. Falls, 91 Ind. 315.

[3] Clark v. Randall, 9 Wis. 135, 76 Am. Dec. 252, is a leading case upon this question. In this case attorneys at Milwaukee acting for clients in New York in order to induce the marshal, who insisted upon indemnity, to levy an execution for their clients upon a stock of goods which the attorneys believed in good faith to belong to the judgment debtor, gave him their own personal bond. A judgment having been rendered against the marshal at the suit of the parties who established a superior title to the goods, he took legal steps to collect of the attorneys, and they having paid him brought an action against their clients, contending that the latter were bound to reimburse them for all damages which they had sustained in consequence of giving the indemnifying bond. The court in its opinion per COLE, J. said: "It is obvious, therefore, that we have to consider whether the defendants, by virtue of their general authority as

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If, however, the levy were fully completed and the proceeds realized, before the indemnity were given, there would be no

attorneys, and under the circumstances in which they were employed, had the right to give the indemnifying bond, and whether, if so, the plaintiffs in error are bound to save them harmless from any damage they may have sustained thereby.

The general rights, duties, and powers of attorneys in suits brought by non-residents must evidently, we think, be more extensive in this state than they are in England. This arises from the nature and character of the business intrusted to them, and the absolute necessity that they should have full power to promptly do all acts proper and conducive to the collection and security of the debt. As in the present case, a merchant living at a distance of hundreds of miles, sends a claim to an attorney in this state instructing him to be vigilant in looking after it, and to urge payment without fear or favor. We place no further stress upon the precise language used by the plaintiffs in error in their letter addressed to the defendants in error, than to say that we suppose they contain substantially the instructions given in most cases by non-residents to their attorneys here. Living at a distance, they are unable to give specific instructions as to the means to be employed, or the steps to be taken, to secure and collect their claims. Neither are they at hand to give special directions to officers as to the levying of executions or serving attachments, when such directions are absolutely necessary to secure the debts. Besides, unforeseen emergencies frequently arise which require the adoption of some decided line of action to prevent some tricky and dishonest debtor from placing his means entirely beyond the reach of his creditors. In such cases, it is manifestly for the interests of the client that the fullest and largest discretion be given to attorneys in the transaction of the business intrusted to them. They are generally authorized to secure and collect debts, and are clothed with the power of employing all the necessary and usual means for the accomplishment of this object. An authority is always to be construed as including the usual means of executing it with effect. Paley on Agency, c. 3, pt. 1, sec. 5; Story on Agency, sec. 58.

Now, we presume it to be the general understanding and quite uniform practice of the profession in this state, when prosecuting suits for non-residents, to give directions to officers about serving attachments and levying executions, when any instructions are called for. We do not suppose it is customary to write to clients living at a great distance, who can possibly know but little, if anything, of the situation of their debtor's property, for special directions upon these points. The attorney on behalf of and as the agent of the principal gives all proper instructions; and great prejudice, inconvenience, and loss would ensue to the latter if the attorney did not do so. And we think all this comes fairly within the scope of his authority, in order to protect and preserve the interests of his foreign client. 'My own opinion,' says JUSTICE STORY in the case of Pierce *v.* Strickland, 2 Story, 292, 'strongly is that the attorney with us is, by implication, clothed with authority, in all cases of this sort, to do all the acts which are usual and proper to protect the interests of his

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such necessity as would justify the attorney in giving it, nor would there be any consideration for it.

client, in any attachment, as a part of his ordinary duty. It is for the interests of all clients that this authority should exist; for it would be impracticable, in many cases, without great expense and delays, to do many acts which might be indispensable to the security of the clients; and for any abuse or misuse of his authority the attorney would doubtless be liable to his client.' See also Gordon v. Coolidge, 1 Sumn. 537; Union Bank v. Geary, 5 Pet. 99; Holker v. Parker, 7 Cranch. 436; Gorham v. Gale, 7 Cow. 739, 17 Am. Dec. 549; Lynch v. Commonwealth, 16 Serg. & R. 368, 16 Am. Dec. 582; Scott v. Seiler, 5 Watts, 235; Gower v. Emery, 18 Me. 79; Rice v. Wilkins, 21 Id. 558; Briggs v. Georgia, 10 Vt. 68; Hopkins v. Willard, 14 Id. 474; Kimball v. Perry, 15 Id. 414.

We think, therefore, that the defendants in error had an implied authority, by virtue of their employment as attorneys in the suits, to indemnify the marshal, when about to make a levy under the execution; and that their acts in this behalf were binding upon their clients. And if they executed their own indemnifying bond to the officer, and have, in consequence, suffered from it, it is no more than just and proper that their clients reimburse them for all damages they have sustained thereby."

This case was followed and relied upon in Schoregge v. Gordon, 29 Minn. 367. Here an attorney acting for non-resident clients, having obtained judgment, caused an execution to be issued and levied upon property supposed to belong to the debtor. The property being claimed by third parties, the sheriff refused to retain it unless indemnified, the statute giving him the right to insist upon it. Thereupon the attorney, without their express direction or consent, executed, to the sheriff a bond of indemnity, in the name of his clients by himself as their attorney. The third parties established their claim and the sheriff brought an action upon the bond and the question arose whether it was binding upon the clients. VANDERBURGH, J. said: "Having authority to proceed to the enforcement and collection of the judgment, was he also authorized to bind his absent clients by this instrument without their express direction or consent? It must be assumed from the record that the levy was made by the sheriff in good faith, upon property in the possession of the judgment debtor and colorably his, and that the proper demand was made upon him by the claimants under the statute. It is also to be presumed (nothing appearing to the contrary) that the attorney acted in good faith and with reasonable discretion in seeking to retain the levy, and secure his client's claim. The sheriff, under such circumstances, would naturally notify him of the demand and of the necessity for the required indemnity, and look to him for direction in the premises. At the time of the demand, neither the sheriff nor attorneys had incurred any liability by reason of the levy. Barry v. McGrade, 14 Minn. 163. But, after the proper statutory demand, the sheriff might abandon the levy unless his request for indemnity was complied with, however lawful or proper it may have been.

The effect of the statute which is thus interposed for the sheriff's protection is quite material in the con-

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But it has been held that the attorney has no implied authority to bind his client by a bond on appeal,[1] or by a bond in

sideration of this case. As the result of it, when the exigency arises, unless the plaintiff in execution, or some one in his behalf, actively intervene, he may lose the benefit of a valid levy. The execution of the required instrument of indemnity in this case was, therefore, directly in the line of proceedings for the collection of the judgment, and was doubtless considered by the attorney beneficial to his client. Under such circumstances, we are of the opinion that his acts in the matter of the execution of the undertaking should not be deemed to be beyond the scope of his employment. Clark *v.* Randall, 9 Wis. 135 (76 Am. Dec. 252); Wharton on Agency, §§ 585–9; Moulton *v.* Bowker, 115 Mass. 36; Weeks on Attorneys, § 218; Nelson *v.* Cook, 19 Ill. 440; Gorham *v.* Gale, 7 Cow. 739 (17 Am. Dec. 549); Union Bank *v.* Geary, 5 Pet. 99; Newberry *v.* Lee, 3 Hill, 523; Oestrich *v.* Gilbert, 9 Hun (N. Y.) 242; Jenney *v.* Delesdernier, 20 Me. 183. The attorney is answerable to his clients in damages for any abuse of his trust, or the consequences of his ignorance, negligence, or indiscretion; but he is no more likely to abuse his discretion in a proceeding of this kind than in many others of equal importance in the progress of the suit. And, to offset the liability so incurred, the execution creditors will retain the fruits of the levy. The 'undertaking' provided for by the section of the statute under consideration—Gen. St. 1878, c. 66, § 154 (which is a transcript of N. Y. Code, § 216)—need not be executed by the plaintiffs in the suit personally, 1 Wait's Practice, 743–4."

Speaking of Clark *v.* Randall, *supra*, the court say: "We believe the doctrine of that case to be sound and reasonable. We have not omitted to consider the distinction between the power and authority of an attorney before and after judgment. We believe, however, that this distinction is less marked than formerly, in view of the remedies which may be employed after judgment (such as garnishment, supplementary proceedings, &c.), and the extent and variety of the services which may be required to secure and collect the same. If he is employed for such purpose, he must be deemed vested with reasonable discretion in the selection and use of remedies to accomplish the object in view. An exigency arising in the absence of his client, requiring the exercise of his discretion, it may be his duty to act as he would advise his client to act if present, and when he simply adopts a remedy which the law provides, or uses customary expedients or processes to secure and collect the debt, his acts should not be permitted to prejudice public officers and others who are entitled to regard him as the adviser and representative of his client. Jenney *v.* Delesdernier, *supra*, 191; Wieland *v.* White, 109 Mass. 392; Wharton on Agency, § 589. In Butler *v.* Knight, L. R. 2 Exch. 109, 113, the court said, that it would be mischievous to hold 'in any case where evidence existed of the relation of attorney and client having been continued or recreated (after judgment), that the attorney had not authority to act according to the exigency of the case.'"

[1] *Ex parte* Holbrook, 5 Cow. (N.Y.) 35; Clark *v.* Courser, 29 N. H. 170. But see Adams *v.* Robinson, 1 Pick.

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replevin.[1] So it has been held that the employment of an attorney to prosecute an injunction suit, gave him no implied authority to bind his client to indemnify a third person who becomes surety on the injunction bond.[2] The unauthorized execution of the bond or other undertaking could, of course, be subsequently ratified and confirmed by the client, and such a ratification would be conclusively presumed, if the client, with full knowledge of the facts, accepted and retained the proceeds derived from the levy or other act.[3]

§ 817. **Authority to receive Payment.** An attorney to whom a debt or demand is intrusted for collection has undoubted authority to receive payment, and payment to him will discharge the debtor.[4]

Authority to receive payment carries with it, as a necessary incident, the power to deliver to the debtor such discharges, acquittances or evidences of payment as the debtor, upon payment, is entitled to receive.[5] The attorney would also be authorized to accept partial payments to apply on the debt,[6] but he has no implied authority to accept part in satisfaction of the whole, or to grant to the debtor, in consideration of a partial payment, any extensions or other indulgences as to the balance.[7]

This power to receive payment depends upon the fact that the attorney is authorized to collect, and this authority may be withdrawn by the client at any time. It is the duty of a debtor who would make payments to an attorney, to ascertain that the attorney is authorized to receive them, and if he does not, he pays at his peril. If the client has held the attorney out as authorized to receive payment, third persons may rely upon the authority as in other cases, until they have notice that it is withdrawn.[8]

(Mass.) 462, where it was held that the attorney might execute a recognizance on appeal.

[1] Narraguagus Land Proprietors *v.* Wentworth, 36 Me. 339.

[2] White *v.* Davidson, 8 Md. 169, 63 Am. Dec. 699.

[3] Bank of Augusta *v.* Conrey, 28 Miss. 667; Dove *v.* Martin, 23 Miss. 588.

[4] Yates *v.* Freckleton, 2 Doug. 623; Varley *v.* Garrard, 2 Dowl. 490; Powel *v.* Little, 1 W. Black. 8; Hudson *v.* Johnson, 1 Wash. (Va.) 10; Carroll County *v.* Cheatham, 48 Mo. 385.

[5] See *ante*, § 385.

[6] Pickett *v.* Bates, 3 La Ann. 627; Rogers *v.* McKenzie, 81 N. C. 164.

[7] See *ante*, § 378.

[8] See *ante*, § 378.

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Before such notice, payment to the attorney binds his client, but after such notice, it does not.[1]

In ordinary cases the authority of the attorney may be shown, either by direct evidence of his appointment or by acquiescence or ratification or course of dealing.[2] But where money is due upon a written security, a more stringent rule applies. In such cases it is incumbent upon the debtor, if he pays to an attorney, either to have express authority to pay to him, or to see to it, in each instance, that the attorney then has the security in his possession; for if the possession of the securities be withdrawn, although the debtor may have had no notice of the withdrawal, the attorney's authority to receive payment upon them ceases with their withdrawal.[3] The fact that the attorney negotiated the loan, or transacted the business, for which the securities were given, furnishes no exception to this rule.[4]

§ 818. **Same Subject—After Judgment.** Although the early cases lay down the rule that the attorney's authority ceases with the rendition of the judgment, the modern rule is well established that his authority, by virtue of his general retainer, continues for the collection of the judgment,[5] and he may receive the money on it, even after the levy of the execution until the debtor's right to redeem has expired.[6]

Payment of the judgment to him, even by a stranger, is binding upon the client, and upon payment the attorney is authorized to execute and deliver to the debtor a proper satisfaction and discharge of the judgment.[7]

But this rule applies only to the attorney of record in the case. Payment to an attorney who was employed for some specific

[1] Weist v. Lee, 3 Yeates (Penn.) 47.

[2] Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157.

[3] Williams v. Walker, 2 Sandf. (N. Y.) Ch. 325; Doubleday v. Kress, 50 N. Y. 410, 10 Am. Rep. 502; Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157.

[4] Henn v. Conisby, 1 Ch. Cas. 93; Smith v. Kidd, *supra*.

[5] Rogers v. McKenzie, 81 N. C. 164; Miller v. Scott, 21 Ark. 396; Frazier v. Parks, 56 Ala. 363; Wycoff v. Bergen, 1 N. J. L. (Coxe) 214; McCarver v. Nealey, 1 G. Greene, (Iowa) 360; Yoakum v. Tilden, 3 W. Va. 167; White v. Johnson, 67 Me. 287; Gray v. Wass, 1 Me. 257; Conway County v. Little Rock, &c. Ry Co., 39 Ark. 50; Smyth v. Harvie, 31 Ill. 62, 83 Am. Dec. 202.

[6] White v. Johnson, 67 Me. 287.

[7] Miller v. Scott, 21 Ark. 396.

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purpose, as to assist upon the trial only, or to argue a motion, or to collect the evidence, would not be payment to the client.[1]

It is understood also that the question is now as to the power implied from a general retainer. The client, may, of course, expressly confer more; or he may limit the implied power by notice of a contrary purpose.

§ 819. **Same Subject—What constitutes Payment.** But this authority of the attorney to receive payment is authority to receive payment in full only, and in money alone. He has no authority to release or discharge his client's claim or judgment without the actual payment of its full amount.[2] And the payment must be in money.[3] The attorney can neither sell, assign or compromise the debt or judgment, nor receive notes, warrants, goods, chattels or land in payment.[4] The money he receives must also be that which, by the common consent of the community, passes as such at its par value.[5] Thus he may not receive in payment, a county warrant;[6] or a bond;[7] or the note of the debtor or of a third person;[8] or a draft on a third person payable in the future;[9] or a judgment against another;[10] nor can

[1] Cameron v. Stratton, 14 Ill. App. 270.

[2] Beers v. Hendrickson, 45 N. Y. 665; Mandeville v. Reynolds, 68 N. Y. 528; Rice v. Troup, 62 Miss. 186; Miller v. Lane, 13 Ill App. 648; Robinson v. Murphy, 69 Ala. 543; Harrow v. Farrow's Heirs, 7 B. Mon. (Ky.) 126, 45 Am. Dec. 60; Gilliland v. Gasque, 6 S. C. 406; Tankersley v. Anderson, 4 Desau. (S. C.) 44; De-Mets v. Dagron, 53 N. Y. 635; Jewett v. Wadleigh, 32 Me. 110; Vail v. Conant, 15 Vt. 314; Bigler v. Toy, 68 Iowa 687.

[3] Herriman v. Shomon, 24 Kan. 387; 36 Am. Rep. 261; Walker v. Scott, 13 Ark. 644; McCarver v. Nealey, 1 G. Greene (Iowa) 360; Wiley v. Mahood, 10 W. Va. 206; Kent v. Chapman, 18 W. Va. 485; Lord v. Burbank, 18 Me. 178; Vanderline v. Smith, 18 Mo. App. 55.

[4] Herriman v. Shomon, 24 Kan. 387, 36 Am. Rep. 261; Miller v. Lane, 13 Ill. App. 648; Fassitt v. Middleton, 46 Penn. St. 214, 86 Am. Dec. 535; Campbell's Appeal, 29 Penn. St. 401, 72 Am. Dec. 641; Rowland v. Slate, 58 Penn. St. 198; Kirk's Appeal, 87 Penn. St. 243, 30 Am. Rep. 357; Boren v. McGehee, 6 Port. (Ala.) 432, 31 Am. Dec. 695.

[5] See cases cited under notes 1 and 2, p. 685 *post*.

[6] Herriman v. Shomon, *supra*.

[7] Smock v. Dade, 5 Rand. (Va.) 639; 16 Am. Dec. 780; Kirk v. Glover, 5 Stew & P. (Ala.) 340.

[8] Jeter v. Haviland, 24 Ga. 252; Langdon v. Potter, 13 Mass. 319; Garvin v. Lowry, 7 Smed. & M. (Miss.) 24; Jones v. Ransom, 3 Ind. 327; Baldwin v. Merrill, 8 Humph. (Tenn.) 132.

[9] Moye v. Cogdell, 69 N. C. 93.

[10] Clark v. Kingsland, 1 Smed. & M. (Miss.) 248.

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he accept real estate in satisfaction of a money judgment;[1] nor may he receive Confederate notes [2] in payment or depreciated bills of any kind.[3]

So the attorney has no authority to apply his client's claim or judgment in payment of any debt of his own, or to receive his own note or obligation in payment, or to permit a debt owing from himself to be set off against his client's claim.[4]

The client may of course expressly authorize any of these modes of payment to be adopted, but the authority does not flow from the general retainer.

The client may also, as in other cases, ratify an unauthorized act of the attorney, thus giving it validity from the beginning.

§ 820. **Authority to enforce Judgment.** And not only has the attorney authority to receive payment of the judgment, but he has also general authority to take the steps necessary to enforce its payment. For this purpose he may sue out the necessary execution or other process,[5] direct its service by the proper officer,[6] and, as had been seen, may, in some cases, indemnify the officer against liability on account of the service.[7] The authority of the attorney to control the execution is quite plenary. Thus he may give the officer directions relative to his management of the execution ;[8] he may direct the time and manner of enforcing it ;[9]

[1] Stackhouse v. O'Hara, 14 Penn. St. 88; Huston v. Mitchell, 14 S. & R. (Penn.) 307; Stokely v. Robinson, 34 Penn. St. 315; Kirk's Appeal, 87 Penn. St. 243; 30 Am. Rep. 357.

[2] Harper v. Harvey, 4 W. Va. 539; Railey v. Bagley, 19 La Ann. 172; Davis v. Lee, 20 La. Ann. 248.

[3] West v. Ball, 12 Ala. 346; Chapman v. Cowles, 41 Ala. 103; 91 Am. Dec. 508; Lawson v. Bettison, 12 Ark. 401; Trumbull v. Nicholson, 27 Ill. 149; Commissioners v. Rose, 1 Desau. (S. C.) 464; Walker v. Scott, 18 Ark. 648.

[4] Wiley v. Mahood, 10 W. Va. 206; Keller v. Scott, 2 Smed & M. (Miss.) 81; Hamrick v. Combs, 14 Neb. 381; Wilkinson v. Holloway, 7 Leigh (Va.) 277; Child v. Dwight, 1 Dev. & Bat. (N. C.) Eq. 171; Wenans v. Lindsey, 1 How. (Miss.) 577; Cost v. Genette, 1 Port. (Ala.) 212; Gullett v. Lewis, 3 Stew. (Ala.) 23; Craig v. Ely, 5 Stew. & P. (Ala.) 354.

[5] White v. Johnson, 67 Me. 287; Union Bank v. Geary, 5 Pet. (U. S.) 99; Conway County v. Little Rock &c. Ry Co., 39 Ark. 50; Farmers' Bank v. Mackall, 3 Gill. (Md.) 447.

[6] Willard v. Goodrich, 31 Vt. 597; Gorham v. Gale, 7 Cow. (N. Y.) 739; 17 Am. Dec. 549; Lynch v. Commonwealth, 16 Serg. & R. (Penn.) 368; 16 Am. Dec. 583; Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179.

[7] See *ante*, 816.

[8] Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179.

[9] Gorham v. Gale, 7 Cow. (N. Y.)

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he may agree to delay its issue for a limited time,[1] or may stay proceedings under it, when issued, during a reasonable period,[2] if it be done honestly and in the exercise of a reasonable discretion; and, if the lien of the judgment or execution will not thereby be lost, he may direct its return to be delayed;[3] he may direct a sale under it to be suspended;[4] and may direct a postponement of the sale after a levy.[5]

But it is held in New York that the attorney has no implied authority to direct the officer as to what property he shall levy upon, and that, if he does so, his client incurs thereby no liability.[6]

But the attorney has no implied authority to release the lien of the judgment, or the execution upon goods,[7] or land,[8] or discharge the defendant from imprisonment, without full payment or satisfaction;[9] nor has he authority to stay the issue of the execution for so long a period that the lien of the judgment will be lost;[10] nor can he postpone his client's lien to that of others.[11] Neither has the attorney authority to bid for, or purchase, property for his client at an execution sale, or to authorize any one else to bid or purchase for him.[12]

The authority of the attorney to issue execution extends to

789, 17 Am. Dec. 549; Lynch v. Commonwealth, 16 Serg. & R. (Penn.) 368 16 Am. Dec. 582.

[1] Wieland v. White, 109 Mass. 392; Silvis v. Ely, 8 W. & S. (Penn.) 420; White v. Johnson, 67 Me. 287.

[2] Wieland v. White, *supra*; White v. Johnson, *supra*.

[3] McClure v. Colclough, 5 Ala. 65; See Walker v. Goodman, 21 Ala. 657; Crenshaw v. Harrison, 8 Ala. 342.

[4] Lynch v. Commonwealth, *supra*.

[5] Albertson v. Goldsby, 28 Ala. 711, 65 Am. Dec. 380.

[6] Averill v. Williams, 5 Denio (N. Y.) 295; 47 Am. Dec. 252. Welsh v. Cochran, 63 N. Y. 185; Oestrich v. Gilbert, 9 Hun (N. Y.) 244.

[7] Banks v. Evans, 10 Smed. & M. (Miss.) 38, 48 Am. Dec. 734; Jewett v. Wadleigh, 32 Me. 110.

[8] Fritchey v. Bosley, 56 Md. 96; Phillips v. Dobbins, 56 Ga. 617;

[9] Kellogg v. Gilbert, 10 Johns. (N. Y.) 220; 6 Am. Dec. 335; Treasurers v. McDowell, 1 Hill (S. C.) 184, 26 Am. Dec. 166; Jackson v. Bartlett, 8 Johns. (N. Y.) 361; Scott v. Seiler, 5 Watts, (Penn.) 235; Lewis v. Gamage, 1 Pick. (Mass.) 347; Savory v. Chapman, 11 Ad. & Ell. 829; Connop v. Challis, 2 Exch. 484.

[10] Reynolds v. Ingersoll, 11 Smed. & M. (Miss.) 249, 49 Am. Dec. 57.

[11] Fritchey v. Bosley, 56 Md. 96; Phillips v. Dobbins, 56 Ga. 617.

[12] Beardsley v. Root, 11 Johns (N. Y.) 464, 6 Am. Dec. 386; Averill v. Williams, 4 Denio, (N. Y.) 295, 47 Am, Dec. 252; Washington v. Johnson, 7 Humph. (Tenn.) 568; Savery v. Sypher, 6 Wall. (U. S.) 157.

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the issuing of an *alias*, when that becomes necessary.[1] So in a proper case, he may institute supplementary proceedings,[2] or authorize the issue of a *scire facias*, to facilitate or enforce the collection.[3]

V.

DUTIES AND LIABILITIES OF ATTORNEY TO CLIENT.

§ 821. **Bound to highest Honor and Integrity.** The exigencies of life require not only that the client should often entrust to his attorney, the care and management of important affairs of business, involving, perhaps, the client's entire property and possessions, but also, in many cases, that the client's reputation, liberty or life should depend upon the skill, judgment and ability, and above all, upon the integrity, honor and devotion, of the attorney to whom he has confided them. The proper discharge of his duty demands also, in many cases, that the attorney should be made the confidant to whom the secrets of individuals and families, cherished often like life or reputation, or concealed from all other eyes, must be disclosed and communicated. The necessities of the client, too, are known, often, only to his attorney, and strong temptations may present themselves to the latter to make profit from his knowledge and advantages.

These considerations, and many others which readily suggest themselves, demand that he, who holds himself out to the public as one qualified to accept and perform these important trusts, responsibilities and duties, should not only bring to their performance an adequate degree of skill, learning and ability, but that he should also be bound to exercise towards his client, in his relations with him, the highest degree of honor, integrity and fidelity to his client's interests. And this is the law.[4] The relation is one of trust and confidence and the rules which govern the conduct of other persons standing in fiduciary relations, apply with special force to the dealings of the attorney with his client.

§ 822. **Duty to disclose adverse Interests.** It is a necessary

[1] Cheever v. Mirrick, 2 N. H. 376.
[2] Ward v. Roy, 69 N. Y. 96.
[3] Dearborn v. Dearborn, 15 Mass. 316; Nichols v. Dennis, R. M. Charlt. (Ga.) 188.
[4] Cox v. Sullivan, 7 Ga. 144, 50 Am. Dec. 386. See Pomeroy's Eq. Jur. § 902. §§ 1075–1078.

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corollary to the principles of the preceding section, that it is the duty of the attorney to freely and fully disclose to his client any interest which he may have in the subject-matter, any previous obligation which he has incurred in reference to it, and every other bias, interest and undertaking which may disqualify or disable him from rendering to his client that full and perfect allegiance which this relation requires.[1]

§ 823. **Duty to remain loyal.** Equally obvious and imperative is the duty of the attorney to keep himself, during the continuance of the relation, free from entangling or compromising alliances. Like every other servant, he can not serve two masters, and, having undertaken the service of one, he is bound, by all legal and moral rules, to absolutely refrain, not only from putting himself voluntarily in a situation where his duty and his own interest will conflict, but from undertaking or accepting any duties or obligations to those whose interests are opposed to those of his client.

§ 824. **Duty to use reasonable Care and Skill.** "It is the misfortune of members of the learned professions," says Judge COOLEY, "that, in a very considerable proportion of all the cases in which their services are employed, their efforts must necessarily fall short of accomplishing the purpose desired, so that if they do not disappoint expectations, they must at least fail to fulfill hopes. For this reason they are peculiarly liable to the charge of failure in the performance of professional duty, and it is therefore important to know exactly what it is that the professional man promises when he engages his services."[2]

The proper performance of the duties of the attorney at law, particularly where, as in the United States, the same practitioner often undertakes to act in all of the various departments of the profession,—requires upon the part of the attorney the possession and exercise of an adequate degree of learning, skill and diligence. The law, however, is not free from doubt, and it is impossible for any man to know it all. The wisest men in the profession differ, not only as to what the law is, but also as to how it shall be applied. No attorney, therefore, can be rightly held to infallibility.[3] At the same time, there are certain rules

[1] Williams v. Reed, 3 Mason (U. S. C. C.) 404.

[2] Cooley on Torts, p. 648.

[3] "No attorney," said ABBOTT, C.

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and principles of which no one, who undertakes to practice the profession, should be permitted to be ignorant. So it is impossible for any man to exercise perfect care and diligence, but there are also certain things which no man, who assumes the responsibilities of attorney, could be allowed to overlook. Again, it is not unreasonable to expect that the attorney whose practice lies in the courts of the metropolis should be chargeable with a higher degree of skill, in certain departments, than the members of a rural bar,[1] but, on the other hand, the latter, as to the general principles of the profession, should be no more ignorant than the former. It is obvious, therefore, that there must be a rule of responsibility which will neither impose upon the practitioner an unreasonable and hazardous responsibility, nor relieve him from all responsibility whatever.

This rule of responsibility may be stated as follows: A person who holds himself out to the public for employment, as an attorney at law, impliedly contracts with those who employ him:

1. That he possesses that reasonable degree of learning, skill and experience which is ordinarily possessed by attorneys at law, and which is ordinarily regarded by the community and by those conversant with that employment, as necessary and sufficient to qualify him to engage in that business.

2. That he will use reasonable and ordinary care and diligence in the exertion of his skill and the application of his knowledge to accomplish the purpose for which he is employed. But he does not undertake for extraordinary care or diligence or for uncommon skill.

3. That, in exerting his skill and in applying such care and diligence, he will exercise his best judgment.[2]

J. "is bound to know all the law; God forbid that it should be imagined that an attorney, or a counsel, or even a judge is bound to know all the law; or that an attorney is to lose his fair recompense on account of an error, being such an error as a cautious man might fall into." In Montriou v. Jefferys, 2 C. & P. 118.

[1] Weeks on Attorneys, § 289.

[2] See Cooley on Torts, p. 649, where the learned author approves the rule laid down in Leighton v. Sargent, 27 N. H. 460, 59 Am. Dec. 388, upon which the rule given in the text is based. See generally that attorney is bound to the possession and exercise of reasonable skill, care and diligence. Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134; Pennington v. Yell, 11 Ark 212, 52 Am. Dec. 262; Fitch v. Scott, 3 How. (Miss.) 314, 34 Am. Dec. 86; Eggleston v. Boardman, 37 Mich. 14; Holmes v. Peck, 1 R. I. 242; Gilbert v. Williams, 8 Mass. 51, 5 Am. Dec. 77; Caverly v. McOwen,

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In other words, he agrees that he *possesses* at least the average degree of skill and learning in his profession in that part of the country in which he practices, and that he *will exercise* that learning and skill with reasonable care and diligence.[1]

§ 825. **Same Subject—Errors in Law or Judgment.** The law is not only the most comprehensive of sciences, but it is also a constantly progressing one. The daily demands made upon it, by the necessities of our modern civilization, require not only that it should be called upon to adjust new phases of old questions, but that it should prove adequate to the determination of problems entirely new in the history of jurisprudence. Under our complex political system, each State is, within certain limits, the final arbiter of the legal rules which shall prevail within its jurisdiction, and it is inevitable that more or less of conflict should exist. Although the decisions of other States are looked upon with respect, and frequently followed, they are not authoritative, and until a question has been directly passed upon by the court of last resort, the practitioner in any State can feel no absolute certainty as to what the law in his State is upon the question. Upon certain questions, too, the decisions of the State courts are subject to review by the Supreme Court of the United

123 Mass. 574; Stevens *v.* Walker, 55 Ill. 151; Chase *v.* Heaney, 70 Ill. 268; Reilly *v.* Cavanaugh, 29 Ind. 435; Morrill *v.* Graham, 27 Tex. 646; Evans *v.* Watrous, 2 Port. (Ala.) 205; Mardis *v.* Shackleford, 4 Ala. 493; Sevier *v.* Holliday, 2 Ark. 512; Palmer *v.* Ashley, 3 Ark. 75; Wilson *v.* Russ. 20 Me. 421; Pitt *v.* Yalden, 4 Burr. 2060; Kemp *v.* Burt, 4 B. & Ad. 424; Godefroy *v.* Dalton 6 Bing. 460; Laidler *v.* Elliott, 3 B. & C. 738; Lee *v.* Dixon, 3 Fost. & F. 744; Parker *v.* Rolls, 14 Com. B. 691; Montriou *v.* Jefferys, 2 Car. & P. 113; Elkington *v.* Holland, 9 M. & W. 658.

[1] Cooley on Torts, p. 649. The rule is frequently laid down, particularly in the older cases, that the attorney is liable only for gross ignorance or neglect. Gross negligence has been well said to be simply negligence with an epithet. The expression is not accurate. "Some law-writers and some adjudged cases are guilty of inaccuracy in the employment of the phrase 'gross negligence.' Our own court fell into this error in the case of Evans *v.* Watrous, 2 Port. 205. It is there said that an attorney is not liable 'unless he has been guilty of gross negligence.' In the same paragraph it is asserted that he 'is bound to use reasonable care and skill,' and the meaning attributed by the writer of that opinion to the expression 'gross negligence' is the want or absence of 'reasonable care and skill.' Thus explained, that opinion defines the true measure of an attorney's duty and liability." STONE, J., in Goodman *v.* Walker, 30 Ala. 482, 66 Am. Dec. 134.

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States. Solemn decisions pronounced by the court at one period are not unfrequently overruled by the same court at a later period, and rules which have been regarded and acted upon, as sound, for years, are often found to have been erroneous.

With that part of the law which has been made the subject of statutory enactment, less uncertainty exists, but statutes are frequently declared to be unconstitutional by the courts, or are repealed by subsequent legislatures.

It is, therefore, not only impossible for any man to know all the law, but it is also, in many cases, impossible for him to say with certainty what is the law in reference to a particular subject.

But at the same time, the main body of the law is reasonably definite, and there certainly are principles so well established that no lawyer could be permitted to remain in ignorance of them. Thus, in one case,[1] it is said that he is liable for the want of proper knowledge of all matters of law in common use, or of such plain and obvious principles as every lawyer is presumed to understand. So, in another case,[2] it has been said that he is bound to understand the leading and fundamental principles of the common law, and cannot be excused for ignorance of the public statutes of the State. Many attempts have been made to state a comprehensive rule upon this subject, and, in a well considered case,[3] the court lay down the rule to be that, if the law governing the matter in question was well and clearly defined, both in the text-books and in the decisions of his own State, and if it has existed and been published long enough to justify the belief that it was known to the profession, then a disregard of it, by an attorney at law, renders him accountable for the losses caused by such negligence or want of skill;—negligence, if, knowing the rule, he disregarded it; want of skill, if he was ignorant of it.

But in general, no more definite rule upon the subject can be laid down than that already given;—that the attorney contracts for reasonable skill and reasonable diligence, but not for infallibility, or freedom from error. He cannot, therefore, be held liable for an error of law or judgment such as a cautious man

[1] Morrill v. Graham, 27 Tex. 646.
[2] Estate of A. B., 1 Tucker (N. Y. Surrogate) 247.
[3] Goodman v. Walker, 30 Ala. 482. 68 Am. Dec. 134.

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might fall into;[1] nor for an error in construing a doubtful act of the legislature;[2] nor for an error upon a point of law upon which a reasonable doubt may be entertained;[3] nor for an error of judgment upon points of new occurrence, or of nice or doubtful construction.[4] So he cannot be held chargeable with negligence if he accepts, as a correct exposition of the law, a solemn decision of the supreme court of his State, in the absence of a contrary decision of the Supreme Court of the United States, upon a question there subject to review.[5] He is, however, liable for the consequences of ignorance or non-observance of the ordinary rules of practice of the courts in which he undertakes to do business; for the want of reasonable care in the preparation of his cases for trial, in his attendance at the court with his witnesses, and in the management of so much of the conduct of the cause as is entrusted to him.[6]

So he is bound to take notice of changes in or by the public statutes of his State, and will be liable to his client for losses caused by his neglect to do so.[7]

§ 826. **Same Subject—Negligence in Collecting.** It is the duty of the attorney, who undertakes the collection of a claim, to prosecute that object with reasonable diligence. He does not undertake at all events to make the money, nor does he guarantee the solvency of the debtor. Neither does he impliedly agree that he will resort to *all* or *any* means to secure the money, or that he will pursue the debtor with unceasing exertions. He does, however, agree that he will use all reasonable and proper means to make the money, and that he will not permit the claim to be lost through his negligent inattention to his duty.[8]

This undertaking imposes upon the attorney the duty to sue out all process, *mesne* as well as final, which may be necessary to

[1] Montriou v. Jefferys, 2 Car. & P. 113.

[2] Elkington v. Holland, 9 M. & W. 658; Bulmer v. Gilman, 4 Man. & Grang. 108.

[3] Kemp v. Burt, 1 Nev. & Man. 262.

[4] Godefroy v. Dalton, 6 Bing. 460.

[5] Marsh r. Whitmore, 21 Wall (U. S.) 178; Hastings v. Halleck, 13 Cal. 203.

[6] Godefroy v. Dalton, 6 Bing. 460.

[7] Estate of A. B., 1 Tucker (N. Y. Surrogate) 247.

[8] Cox v. Sullivan, 7 Ga. 144, 50 Am. Dec. 386; Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134; Cox v. Livingston, 2 W. & S. (Penn.) 103, 37 Am. Dec. 486; Gilbert v. Williams, 8 Mass. 51, 5 Am. Dec. 77; Fitch v. Scott, 3 How. (Miss.) 314, 34 Am. Dec. 86.

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effect the object; and to pursue the cause, through all its stages, until the money is made or it is demonstrated that it can not be made by legal process.[1] This rule, however, is subject to the exception that the attorney may be justified in ceasing to proceed with the cause, unless specially instructed otherwise, when he is, in good faith, influenced to this course by a prudent regard for the interests of his client.[2] Such delay must, however, be prudent, and reasonable in duration, and must not contravene positive directions.

In accordance with this rule it is his duty to sue out execution and *alias* writs if necessary; to pursue the bail, and all those who have become bound with the defendant, either before or after judgment in the progress of the suit; to pursue the sureties on a forthcoming bond; and to take all such other steps as may reasonably be necessary, either before or after judgment, to recover from any party who has become liable.[3]

The attorney is not, however, bound to institute new collateral suits without special instructions to do so,—as actions against the clerk or sheriff for neglect in the issuing or serving of process. Nor is he bound to attend, in person, to the levy of the execution, or to search for property upon which to make the levy. That is the business of the sheriff.[4] Nor is he liable for the neglect of the sheriff.

So, it has been held, that, where a writ of attachment issues only upon the filing of the necessary affidavit and bond, the attorney is under no obligation to swear to his client's cause of action or to furnish the required bond.[5]

It has been stated that, in the absence of peremptory instructions, the attorney may exercise a reasonable discretion as to when to sue; and what is reasonable is a question to be determined from all the facts and circumstances of the case.[6] But this discretion can not overrule express directions, and if the attorney is instructed to sue at once and fails to do so, he will be liable for a consequent loss of the debt, notwithstanding the attorney may, in good faith, have believed that the delay would promote the

[1] Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262; Crooker v. Hutchinson 2 D. Chip. (Vt.) 117.

[2] Pennington v. Yell, *supra*; Crooker v. Hutchinson, *supra*.

[3] Pennington v. Yell, *supra*.

[4] Pennington v. Yell, *supra*.

[5] Foulks v. Falls, 91 Ind. 315.

[6] Rhines v. Evans, 66 Penn. St. 192.

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interests of his client.[1] So if the attorney delays action until the statute of limitations has run against the claim, he will be liable for the loss sustained.[2]

§ 827. **Same Subject—Negligence in bringing Suit.** The same degree of skill and diligence is requisite here as in other cases:—that which is reasonable under the circumstances. The negligence complained of may consist, (*a*) in not bringing the action in the proper court, or, (*b*) in omitting or disregarding a rule of law or practice in commencing the action, or (*c*) in suing out or using defective process or papers.

a. It is reasonable and proper to hold the attorney chargeable with knowledge of the ordinary and well settled rules, which govern and determine the jurisdiction of the courts in which he practices, and if, through ignorance or inattention, he violates them, thereby causing injury to his client, he is liable.[3] Thus it is held, that if an attorney takes out a writ and proceeds thereon, in a court of special and peculiar jurisdiction, he is bound to acquaint himself with the machinery by which the practice of that court is regulated, and to see that it is adequate to the carrying out of the objects of the suit; and if he fails to do so, and the client suffers loss from a subsequent discovery that the process of the court is not sufficient for the well known needs of the action, the attorney is liable.[4] So if he brings an action in a court of limited jurisdiction on a cause of action arising beyond that jurisdiction, he has been held to be liable.[5]

b. An attorney may also reasonably be held bound to know and observe the well settled rules of law and practice which govern and determine the form of action, the joinder of parties, and the form and sufficiency of the pleadings; and a failure to do so would constitute actionable negligence.

Thus where an attorney filed a declaration in the name of a plaintiff different from the one in whose favor the writ was issued,

[1] Gilbert *v.* Williams, 8 Mass. 51, 5 Am. Dec. 77; Cox *v.* Livingston, 2 W. & S. (Penn.) 103, 37 Am. Dec. 486; Livingston *v.* Cox, 6 Penn. St. 360; in which six months delay against a failing debtor was held unreasonable; Fitch *v.* Scott, 3 How. (Miss.) 314, 34 Am. Dec. 86, where he permitted one term to go by without commencing suit.

[2] Oldham *v.* Sparks, 28 Tex. 425; Hunter *v.* Caldwell, 10 Q. B. 69.

[3] Godefroy *v.* Dalton, 6 Bing. 468.

[4] Cox *v.* Leech, 1 Com. B. (N. S.) 617.

[5] Williams *v.* Gibbs, 6 Nev. & Man. 788.

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the Supreme Court of Alabama, referring to the well known rule laid down by MR. CHITTY, and adopted by that court nearly twenty years before, that "the declaration must pursue the writ in regard to the Christian and surnames of the parties,"[1] said: "This rule, then, had existed and been defined, both in the text-books and our own decisions, for a period of time, before the commencement of this suit, long enough to justify the belief that it was known to the profession. The disregard of so plain a rule betrayed a palpable want of reasonable skill or of reasonable diligence,"[2] and the attorney was held liable.[3]

So where an attorney being instructed to bring an action, under a statute, against *apprentices*, proceeded specifically under a section which applied to *servants* only, he was held to be liable for a loss resulting from the error.[4]

c. It is also the duty of the attorney to use a reasonable degree of skill and diligence in the preparation of the process, notices, and other papers, which he issues or uses in the institution of or progress of the suit.[5] And although the paper be one which it was not his duty, as the attorney, to prepare, yet if he does undertake to prepare it, he is bound to reasonable care.[6] Thus where an attorney in preparing a writ, made use of a printed blank containing the common counts, with blank spaces for the insertion of the amounts, but which omitted the word "hundred" which had formerly been printed in the blank, and the attorney, not noticing the omission, neglected to write in the word hundred, thus reducing the amount claimed from twelve hundred dollars to twelve dollars, it was held that he was liable for a loss of the demand occasioned by the error. It appeared that the new blank had been in use for about a year, and that the attorney, in filling out a similar writ for one of the same parties, had inserted the word hundred in its proper place.[7]

§ 828. **Same Subject—Negligence in Trial of Action.** The attorney, who undertakes the trial of a cause in court, does not thereby agree that he will win it at all events, or that he will

[1] 1 Chitty's Pleading, 279.

[2] Citing Chapman *v.* Spence, 22 Ala. 588.

[3] Goodman *v.* Walker, 30 Ala. 482, 68 Am. Dec. 134.

[4] Hart *v.* Frame, 6 Cl. & Fin. 193.

[5] Goodman *v.* Walker, 30 Ala. 482, 68 Am. Dec. 134; Varnum *v.* Martin, 15 Pick. (Mass.) 440.

[6] Goodman *v.* Walker, *supra*.

[7] Varnum *v.* Martin, *supra*.

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conduct it with the highest degree of learning, skill or eloquence; but his contract is simply for a reasonable degree, as in other cases. But if the attorney fails without good cause to attend the trial at all,[1] or if he permits the cause to be called on without seeing that it is in readiness for trial,[2] or if, without sufficient reason, he abandons the action,[3] or withdraws the defense,[4] or if the action or defense fails by reason of his neglect to make that preparation, or to take those steps, which the circumstances reasonably required, and his client thereby suffers loss, the attorney is responsible.[5]

§ 829. **Same Subject—Negligence in examining Titles.** An attorney who undertakes the examination of titles to real estate, the searching of the records, the preparation of abstracts thereof or the giving of opinions upon such titles, impliedly contracts, with those who employ him, that he possesses that reasonable degree of knowledge and skill which is requisite and necessary under such circumstances; and that he will perform the duty with reasonable and ordinary care and diligence. His failure to possess such reasonable knowledge and skill, or, if possessing it, his failure to exercise it, or his failure to use such reasonable care and diligence, constitutes negligence, and he will be liable to his client for a loss or injury occasioned thereby.[6]

[1] Swannell v. Ellis, 1 Bing. 347.

[2] Reece v. Righy, 4 B. & Ald. 202.

[3] Tenney v. Berger, 93 N. Y. 524, 45 Am. Rep. 263; Evans v. Watrous, 2 Port. (Ala.) 205.

[4] Godefroy v. Jay, 5 Moo. & P. 284.

[5] De Roufigny v. Peale, 3 Taunt. 484. Walsh v. Shumway, 65 Ill. 471.

[6] Mr. Justice CLIFFORD in Savings Bank v. Ward, 100 U. S. 195, lays down the rules as follows: "Attorneys employed by the purchasers of real property to investigate the title of the grantor, prior to the purchase, impliedly contract to exercise reasonable care and skill in the performance of the undertaking, and if they are negligent, or fail to exercise such reasonable care and skill in the discharge of the stipulated service, they are responsible to their employers for the loss occasioned by such neglect or want of care and skill. Addison on Contracts (6th Ed.) 400.

Like care and skill are also required of attorneys when employed to investigate titles to real estate to ascertain whether it is a safe or sufficient security for a loan of money, the rule being that if the attorney is negligent, or fails to exercise reasonable care and skill, in the performance of the service, and a loss results to his employers from such neglect or want of care and skill, he shall be responsible to them for the consequences of such loss. Addison on Torts (Wood's Ed.), 615."

See also Chase v. Heaney, 70 Ill. 268; Ritchey v. West, 23 Ill. 385; McNevins v. Lowe, 40 Ill. 210; Clark v. Marshall, 35 Mo. 429. Rankin v. Schaeffer, 4 Mo. App. 108.

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He does not, unless by express contract, warrant the title to be good, or the search or abstract to be perfect, but he does agree that it is subject to no incumbrances and omits no material fact which, with reasonable and ordinary care and diligence upon his part, might have been discovered.[1] He is not liable for the unsoundness of an opinion upon a matter upon which a reasonable doubt might be entertained,[2] but, upon the other hand, his neglect to observe a plain and ordinary precaution, as to look for judgments where they are made a lien upon the land, would render him responsible for the consequences.[3]

§ 830. **Same Subject—Neglect in preparing Contracts, etc.** The same rule applies to the attorney who undertakes to prepare deeds, contracts, or other conveyances or agreements, for parties who employ him for that purpose. The attorney is not bound to *make* the contract for the parties,—that they must do for themselves; but he does undertake that he possesses reasonable knowledge and skill in such matters, and will use due and reasonable care and diligence in so framing the written evidence of their agreement as to give it binding and legal force and effect.[4]

The extent to which the attorney is bound, under such circumstances, for the sufficiency of the instruments which he prepares, must depend upon the circumstances of each case. If he be, for instance, employed as a mere scribe only, to commit to writing that which is dictated to him by the parties, his liability would be limited to the performance of that undertaking, and if the instrument failed to express the true intention of the parties, the attorney could not be blamed. But if, on the other hand, he is employed to prepare, in due and legal form, according to his knowledge and judgment, an instrument which shall effect a named result, as, for instance, the conveyance of a given interest or estate in lands, his liability would, within the limits of the rule

[1] Rankin *v.* Schaeffer, 4 Mo. App. 108.

[2] As where being in doubt whether an apparent incumbrance was valid, he took the precaution to obtain the written opinion of an eminent counsel, who declared it to be invalid. Watson *v.* Muirhead, 57 Penn. St. 161. But where an attorney ignores a well settled and obvious rule, the fact that he consulted an eminent attorney, is no defense. Goodman *v.* Walker, 30 Ala. 482, 68 Am. Dec. 134.

[3] Gilman *v.* Hovey, 26 Mo. 280.

[4] Parker *v.* Rolls, 14 Com. B. 691; Taylor *v.* Gorman, 4 Ir. Eq. 550; Stott *v.* Harrison, 73 Ind. 17.

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stated, be commensurate with that undertaking. If, therefore, in such a case the instrument failed to accomplish the desired result, from the attorney's neglect to observe the necessary and established forms, or from his careless misdescription of the property, or from his neglectful failure to use apt and appropriate language to express the real agreement of the parties, he would undoubtedly be liable for the injury.[1] It is, ordinarily, no part of the attorney's duty to see to the recording of the conveyances which he prepares, but if he undertakes that duty he will be liable for an injury which may result, either from his neglect to have them recorded at all,[2] or not until another party has acquired priorities by record.[3]

§ 831. **Same Subject—Neglect of Partners, Clerks, etc.** Partnerships of attorneys are governed by the same rules, in respect to the liability of one partner for the acts of another, which apply to trading partnerships. All the members of the firm are liable for the negligence, misconduct or default of each partner in the transaction of the partnership business,[4] and the liability continues notwithstanding a subsequent dissolution of the partnership.[5] If, therefore, one partner receives, professionally, money belonging to a client, and embezzles it;[6] or if any injury occurs from the negligence or lack of skill or knowledge of one partner,[7] all are liable for the loss.

So the attorney is responsible for the negligence or default of his clerk, agent or servant, in the same manner as for his own personal neglect or default,[8] and it is no defense that the clerk was himself a competent attorney.[9] An attorney is not, however, liable for the neglect of a substitute or associate appointed

[1] As where he prepares a simple contract when a sealed one was necessary, as in Parker *v.* Rolls, *supra*; or misdescribes the premises, as in Taylor *v.* Gorman, *supra*; or omits a requisite formality in the acknowledgment, as in Stott *v.* Harrison, *supra*.

[2] Stott *v.* Harrison, 73 Ind. 17.

[3] Miller *v.* Wilson, 24 Penn. St. 114.

[4] Livingston *v.* Cox, 6 Penn. St. 360; Wilkinson *v.* Griswold, 12 Smed. & M. (Miss.) 669; Dwight *v.* Simon, 4 La Ann. 490; Poole *v.* Glot, 4 McCord (S. C.) 259.

[5] Smyth *v.* Harvie, 31 Ill. 62; 83 Am. Dec. 202.

[6] McFarland *v.* Crary, 8 Cow. (N. Y.) 253; Livingston *v.* Cox, 6 Penn. St. 360.

[7] Warner *v.* Griswold, 8 Wend. (N. Y.) 665; Livingston *v.* Cox, *supra*.

[8] Floyd *v.* Nangle, 3 Atk. 568; Birkbeck *v.* Stafford, 14 Ab. (N. Y.) Pr. 285; Walker *v.* Stevens, 79 Ill. 193.

[9] Walker *v.* Stevens, *supra*.

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or employed by him with the client's consent or authority if he used due care in his selection;[1] nor would he be liable for the neglect or default of a mere associate, not a partner or clerk, employed by the client.[2]

§ 831a. **Same Subject—Neglect of Subagent in collecting.** This question has been discussed in an earlier chapter to which the reader is referred.[3]

§ 832. **Liability for exceeding Authority, or violating Instructions.** An attorney at law, like any other agent, is liable to his principal for losses which the latter may sustain, by reason of the attorney's exceeding his authority or acting in violation of express instructions. Thus, if an attorney appears in an action without authority, and the assumed client incurs costs thereby;[4] or if the attorney, without authority, enters a satisfaction of a judgment without full payment, whereby the client loses the balance;[5] or if he neglects to bring an action immediately, as directed, whereby the debtor evades the jurisdiction, or becomes insolvent, or the statute of limitations operates against the claim;[6] or otherwise occasions loss to his client by failing to observe the limits set to his authority, or the instructions given to him, he is liable for the loss.

§ 833. **Liability for Money collected.** It is the duty of an attorney who receives money for his client, to pay it to him within a reasonable time, and, at all events, upon proper demand.[7] Without express authority from his client, the attorney should neither use the money himself, nor commingle it with his own. If it becomes necessary to deposit it, he should make the deposit in the name of his client, for if he deposits it in his own name, though in a separate account, it has been held to be his loss, if the bank fails before payment.[8]

If the attorney neglects or refuses to pay the money to his

[1] See *ante*, §§ 504, 575.

[2] Godefroy *v.* Dalton, 6 Bing. 468; Watson *v.* Muirhead, 57 Penn. St. 247.

[3] See *ante*, § 515 and notes.

[4] O'Hara *v.* Brophy, 24 How. (N. Y.) Pr. 379; Mudry *v.* Newman, 1 Cromp. Mees. & Rosc. 402; Hubbart *v.* Phillips, 13 Mees. & W. 702.

[5] Cox *v.* Livingston, 2 Watts. & S. 103; 37 Am. Dec. 486; Gilbert *v.* Williams, 8 Mass. 51, 5 Am. Dec. 77.

[6] People *v.* Cole, 84 Ill. 327.

[7] Lillie *v.* Hoyt, 5 Hill. (N. Y.) 395, 40 Am. Dec. 360.

[8] Naltner *v.* Dolan, 108 Ind. 500, 58 Am. Rep. 61.

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client, the latter may maintain an action against the attorney for its recovery.[1] Ordinarily such action will not lie until after a demand has been made upon the attorney for the money, and he has neglected or refused to comply with it;[2] but where the attorney has retained the money for an unreasonable time and its retention is unexplained,[3] and where he converts it to his own use,[4] it is held that an action may be maintained without a previous demand.

Liability for Interest.—The same rules govern the liability of the attorney for interest upon the money received by him. Ordinarily he will not be chargeable with interest until a demand has been made for the money;[5] but if he retains it unreasonably without explanation,[6] or if he uses it himself,[7] or if he wrongfully converts it to his own use,[8] or if, upon a dispute arising as to the amount due the client, the attorney makes the client a tender which proves, upon a suit brought, to be insufficient,[9] the client may recover interest.

§ 834. **Attorney liable though acting gratuitously.** It is no defense to an action against an attorney for negligence or misconduct that he acted gratuitously. He is under no obligation to so act, but if he does undertake the performance, he must answer for his negligence or default in the same manner as though he were to receive a reward.[10]

This rule is in accordance with the well settled rule applicable to agents generally which has been discussed in an earlier portion of this work.

§ 835. **The Measure of Damages.** The measure of damages, in an action against the attorney, is the actual loss sustained as

[1] See cases cited in following notes.

[2] Roberts *v.* Armstrong, 1 Bush (Ky.) 263, 89 Am. Dec. 624; Black *v.* Hersch. 18 Ind. 342, 81 Am. Dec. 362; Taylor *v.* Bates, 5 Cow. (N. Y.) 376 Chapman *v.* Burt, 77 Ill. 337.

But see Lillie *v.* Hoyt, 5 Hill (N. Y.) 395, 40 Am. Dec. 360; Schroeppel *v.* Corning, 6 N. Y. 117.

[3] Chapman *v.* Burt, 77 Ill. 337.

[4] Chapman *v.* Burt, *supra*. See also Jordan *v.* Westerman, 62 Mich. 170.

[5] Walpole *v.* Bishop, 31 Ind. 156; Johnson *v.* Semple, 31 Iowa, 49.

[6] Chapman *v.* Burt, *supra*; Dwight *v.* Simon, 4 La Ann. 490.

[7] Mansfield *v.* Wilkerson, 26 Iowa, 482.

[8] Walpole *v.* Bishop, 31 Ind. 156; Chapman *v.* Burt, 77 Ill. 337.

[9] Ketcham *v.* Thorp, 91 Ill. 611.

[10] Eccles *v.* Stephenson, 3 Bibb. (Ky.) 517; Stephens *v.* White, 2 Wash. (Va.) 203; Bradt *v.* Walton, 8 Johns. (N. Y.) 298; O'Hara *v.* Brophy, 24 How. Pr. (N. Y.) 379; Bourne *v.* Diggles, 2 Chit. 311: Whitehead *v.* Greetham, 2 Bing. 464.

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the natural, direct and proximate result of his negligence or default.[1] Compensation to the client is the result aimed at, and it is to be compensation for something which, but for the attorney's negligence, he would have enjoyed. The burden of proving negligence, and that, by it, he has sustained loss, is upon the client.[2] If, therefore, though the attorney may have been negligent, the client has suffered no injury, there is no cause of action.[3] And in an action against the attorney for negligence in collecting, the amount of the debt is not necessarily the measure of damage. In order to make it so, the client must show that it was a valid subsisting debt, that the debtor was solvent, and that the attorney, with reasonable diligence, might have collected the full amount.[4] And it is only for the proximate results of his own negligence, that the attorney is liable. Thus after a client has taken a claim out of the hands of one attorney, that attorney is not responsible for a loss subsequently resulting from the delay or negligence of the client or of another attorney to whom the claim is entrusted.[5]

VI.

LIABILITY OF ATTORNEY TO THIRD PERSONS.

§ 836. **Not liable for Breach of Duty owing to Client only.** The duties of the attorney which arise from the relation of attorney and client, are due from the attorney to his client only, and not to third persons. The latter have not retained or employed the attorney, nor has he rendered any service for them, at their request or in their behalf. No privity of contract exists between them and the attorney. For such injuries, therefore, as third

[1] Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262; Mardis v. Shackleford, 4 Ala. 505; Dearborn v. Dearborn, 15 Mass. 316; Crooker v. Hutchinson, 2 D. Chip. (Vt.) 117; Cox v. Sullivan, 7 Ga. 144, 50 Am. Dec. 386; Nisbet v. Lawson, 1 Ga. 275; Stevens v. Walker, 55 Ill. 151; Grayson v. Wilkinson, 5 Smed. & M. (Miss.) 268; Suydam v. Vance, 2 McLean (U. S. C. C.) 99; Eccles v. Stephenson, 3 Bibb. (Ky.) 517; Rootes v. Stone, 2 Leigh (Va.) 650.

[2] Pennington v. Yell, *supra*. See all cases cited in preceding note.

[3] Harter v. Norris, 18 Ohio St. 492.

[4] Pennington v. Yell, *supra*; Cox v. Sullivan, *supra*; Eccles v. Stephenson, *supra*; Crooker v. Hutchinson, *supra*; Collier v. Pulliam, 18 Lea (Tenn.) 114; Bruce v. Baxter, 7 Id. 477.

[5] Read v. Patterson, 11 Lea (Tenn.) 430; See Batty v. Fout, 54 Ind. 482.

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persons may sustain by reason of the failure or neglect of the attorney to perform a duty which he owed to his client, they have no right of action against the attorney.[1]

Thus one who purchases real estate in reliance upon an opinion of its title given to the vendor by the latter's attorney,[2] or who purchases a mortgage given to secure a loan made upon the strength of a search made by the attorney of the original mortgagee,[3] cannot maintain an action against the attorney for damages if the title prove defective or the search incomplete.

Cases in which the attorney has been guilty of fraud or collusion with intent to injure or deceive the third person, stand upon a different footing. These do not rest upon a privity of contract, but upon intentional wrong doing, and the victim of the wrong has undoubtedly a remedy for it against the attorney as in other cases.[4]

§ 837. **Liable where he contracts personally.** As has been seen, it is the presumption that an agent while acting for his principal, intends to bind the latter and not himself by the contracts which he makes; but it is always competent for the agent to charge himself personally if he so elects.[5] The same rule applies to attorneys and their clients. The attorney occupies a position of greater prominence than agents generally, but his duty requires, and his position gives him, less authority to enter into contracts than is usually conferred upon business agents. He acts primarily for his client and his authorized engagements should be held binding upon the client rather than upon himself, in the absence of evidence that he intended to bind himself.[6]

§ 838. **Liability for Clerk's, Officer's and Witness's Fees.** While recognizing this general rule, (and in pursuance of it, as is said in some cases, though others declare it an exception,) it is held that the attorney is personally liable to clerks of courts and to sheriffs for services performed by these officers, at the attorney's

[1] Savings Bank v. Ward, 100 U. S. 195; Dundee Mortg. & Trust Co. v. Hughes, 20 Fed. Rep. 89; Fish v. Kelly, 17 C. B. (N. S.) 194; Houseman v. Girard &c. Ass'n, 81 Penn. St. 256.

[2] Savings Bank v. Ward, *supra*.

[3] Dundee Mortg. & Trust Co. v. Hughes, *supra*; Houseman v. Girard, &c. Ass'n, *supra*.

[4] Savings Bank v. Ward, *supra*.

[5] See *ante* § 558.

[6] Preston v. Preston, 1 Doug. (Mich.) 292; Wires v. Briggs, 5 Vt. 101, 26 Am. Dec. 284.

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request, in issuing, filing and serving writs and other papers in the cause.[1]

[1] Heath v. Bates, 49 Conn. 342; 44 Am. Rep. 234; Tilton v. Wright, 74 Me. 214, 43 Am. Rep. 578; Adams v. Hopkins, 5 Johns. (N. Y.) 252; Ousterhout v Day, 9 Id. 113; Trustees of Watertown v. Cowen, 5 Paige (N.Y.) 510; Camp v. Garr, 6 Wend. (N.Y.) 535; Campbell v. Cothran, 56 N. Y. 279; Towle v. Hatch, 43 N. H. 270; Tarbell v. Dickinson, 3 Cush. (Mass.) 345.

In Heath v. Bates, *supra*, PARK, C. J. says: "In most cases of agency the principal is what the name imports—the leading person in the transaction. The agent is, as the term implies, a mere subordinate, important only as the representative of the principal; often representing only one principal. An attorney at law, on the other hand, occupies a position of recognized importance in itself, not infrequently of great prominence before the public, in which he often has a large number of clients, his relations to whom are full of detail, and who are little noticed by the public. In these circumstances, if every officer who serves a writ at the attorney's request, if every clerk of court who enters a case for him upon the docket, is to look only to his clients as their debtors, an inconvenience will be wrought that has no commensurate good to counterbalance it. It is true that an officer can refuse to serve a writ unless his fees are paid or secured, but this right is practically of little advantage to him. A writ is sent him by mail by an attorney of some other town or county. It requires immediate service. The officer desires to be prompt and faithful. It is putting upon him an unnecessary burden to require him to take the risk of losing his fees, or to wait till he can hear from the plaintiff or his attorney at the risk of losing all opportunity to make service of the writ. It is perfectly easy for the attorney, if he does not wish to be personally responsible, so to inform the officer when he gives him the writ. It is to be borne in mind that the attorney knows the plaintiff, while the officer may know nothing of him. It is generally the case that an attorney has a running account with certain officers who serve a large number of writs for him, and who would be put to great inconvenience if compelled to make their charges in each case to the plaintiff, especially when they have no knowledge that the attorney has received actual authority to bring the suit. The attorney has already his account with his client, knows what the fact is as to his authority to bring the suit, and could, without inconvenience, have required a prepayment of the expenses of instituting the suit, and ought to have done so. In every view of the case, the rule seems a reasonable one, and the only reasonable one, that an attorney placing a writ in an officer's hands for service is to be regarded as personally requesting the service and as personally liable for it, unless he expressly informs him that he will not be personally liable, or there are circumstances which make it clear that that was the understanding of the parties.

This is really no departure from the general law of agency. An agent can always bind himself personally, where such is his intention. Here it is merely held to be a fair inference from the act of the attorney in placing the writ in an officer's hands and giving no notice to the contrary,

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This liability is based, in some cases, upon the ground that it is a fair inference from his so doing, without giving notice to the contrary, that he intends to be personally liable; while in others, it is sustained only upon the ground of usage or convenience. In a few States the rule is denied altogether.[1]

But the attorney is not presumably liable for witness fees,[2] or the fees of a referee,[3] or of a stenographer employed in the case.[4]

§ 839. **Liability to third Person in Tort.** For such wrongs and injuries as an attorney may commit in his private and individual capacity, he is, of course, liable like any other person. The fact that a wrong-doer happens to be, by profession, an attorney at law, furnishes no more justification than as if he were engaged in any other occupation.

But an important question arises how far an attorney is liable to third persons, for injuries which they may sustain from the act of the attorney, committed while he was acting either really or ostensibly for his client and in his cause.

This question may present itself under two states of fact:—1. Where the attorney is acting in good faith for the benefit of his client, and 2. Where the attorney, though acting ostensibly for his client, is really instigated by private malice against the other party, or becomes a party to his client's malice.

Each of these questions, also, subdivides itself into two branches: *a*. How far the attorney is liable for the institution, conduct and result of the suit; and *b*. How far he is liable for process which he causes to be served.

1. *a*. An attorney at law, who acts in good faith and is prompted only by professional duty and fidelity to his client, is not liable to the other party for injuries which the latter may sustain from the fact that the action was begun or prosecuted, by the attorney's client, either maliciously or without probable cause. The wrong intentions of the client are not to be imputed to his

that he intends to be personally liable for his fees. And this inference undoubtedly accords with the actual fact in the great majority of cases. Indeed the exceptions are probably so few as hardly to be entitled to consideration."

[1] Wires *v.* Briggs, 5 Vt. 101, 26 Am. Dec. 284; Preston *v.* Preston, 1 Doug. (Mich.) 292.

[2] Robins *v.* Bridge, 3 Mees. & Wels. 114.

[3] Judson *v.* Gray, 11 N. Y. 408.

[4] Bonynge *v.* Field, 44 N. Y. Super. Ct. 581; s. c. 81 N. Y. 159.

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attorney who was ignorant of them, and who, himself, had no such intentions. This rule is absolutely imperative for the attorney's protection. He can rely in the first instance only upon the advice and instructions of his client, and it would impose upon the attorney a perilous responsibility if he could justify his participation in the suit only by its result. As is said by a learned judge: "When the client will assume to dictate a prosecution upon his own responsibility, the attorney may well be justified in representing him so long as he believes his client to be asserting what he supposes are his rights, and is not making use of him to satisfy his malice."[1]

2. *a.* "But," proceeds the same judge, "when an attorney submits to be made the instrument of prosecuting and imprisoning a party against whom he knows his client has no just claim, or cause of arrest, and that the plaintiff is actuated by illegal or malicious motives, he is morally and legally just as much liable as if he were prompted by his own malice against the injured party. If he will knowingly sell himself to work out the malicious purposes of another, he is a partaker of that malice as much as if it originated in his own bosom."[2]

In order, however, to render the attorney liable for a malicious prosecution by his client, it must not only appear that the attorney knew that the prosecution was malicious, but that he also knew that it was without cause. It is not enough that he might, with reasonable diligence, have ascertained that there was no probable cause for the prosecution. The attorney has a right, in good faith, to advise and act upon the facts which he gets from his client, and it is not his duty to go elsewhere for information.[3]

An attorney who while acting ostensibly for his client, but actuated by his own personal malice, commences or carries on a malicious prosecution in order to gratify some private purpose of his own is undoubtedly liable to the party injured for the wrong inflicted.[4] In such a case there is neither good faith nor advice of client to justify the action.

[1] Burnap *v.* Marsh, 13 Ill. 535; Peck *v.* Chouteau, 91 Mo. 140, 60 Am. Rep. 236; Stockley *v.* Hornidge, 8 Car. & P. 16, 34 Eng. C. L. 276; Lynch *v.* Commonwealth, 16 S. & R. (Penn.) 368, 16 Am. Dec. 582.

[2] In Burnap *v.* Marsh, *supra*.

[3] Peck *v.* Chouteau, *supra*; Burnap *v.* Marsh, *supra*; Hunt *v.* Printup, 28 Ga. 297.

[4] Stockley *v.* Hornidge, *supra*; Burnap *v.* Marsh, *supra*.

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1. *b.* All persons who direct, cause or participate in a trespass upon another party are, in accordance with well settled rules, liable to that party for the injury inflicted. An attorney who delivers to an officer a writ for service impliedly, if not expressly, directs the officer to proceed to serve the process in accordance with its command. If, therefore the writ be illegal or void, so as to furnish the officer no protection for his proceedings under it, he is, of course, a trespasser, and the attorney is liable with him to the person injured as having directed the commission of the trespass.[1] The party for whom both the attorney and the officer were acting is also liable, as the principal in the transaction.[2] The liability of the parties, in this event, does not depend upon their motive. Although each may have acted in entire good faith,—the client in the prosecution of his supposed rights, the attorney in rendering professional assistance to the client, and the officer in undertaking to execute the writ,—yet mere good faith will not excuse the trespass.[3] The attorney would not be liable to the person injured, if the client delivered the writ to the officer and directed its service, or if the attorney merely communicated to the officer the instructions of his client.[4]

But the attorney by the delivery of the writ directs the officer to proceed according to its command only, and if the officer exceeds its command, or does anything which the writ, if legal, would not justify,—as if he seizes property exempt from execution, or levies upon goods of another than the defendant,—the attorney would not be liable.[5] Even in this case, however, if the attorney directs or advises the act which constitutes the trespass, or if he participates in the act, either in person or by his own clerk, servant or agent, the attorney is liable with the officer to the person trespassed upon for the injury inflicted.[6] The client

[1] Burnap *v.* Marsh, *supra*; Cook *v.* Hopper, 23 Mich. 511. But see Ross *v.* Griffin, 53 Mich. 5.

[2] Foster *v.* Wiley, 27 Mich. 244, 15 Am. Rep. 185; Newberry *v.* Lee, 3 Hill (N. Y.) 525; Barker *v.* Braham, 3 Wils. 368; Bates *v.* Pilling, 6 B. & C. 38.

[3] See Cooley on Torts, Chap. 22.

[4] Cook *v.* Hopper, 23 Mich. 511; Ford *v.* Williams, 13 N. Y. 577, 67 Am. Dec. 83.

[5] Ford *v.* Williams, *supra*; Cook *v.* Hopper, *supra*; Seaton *v.* Cordray, Wright (Ohio) 102; Averill *v.* Williams, 1 Denio (N. Y.) 501; Adams *v.* Freeman, 9 Johns. (N. Y.) 118; Vanderbilt *v.* Richmond Turnpike Co., 2 N. Y. 479, 51 Am. Dec. 315.

[6] Hardy *v.* Keeler, 56 Ill. 152, where the attorney sent his clerk; Cook *v.* Hopper, 23 Mich. 511, where the attorney refused to consent that prop-

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would not, however, be liable in this case unless he advised, directed, participated in or ratified the act.[1] In this case, too, the trespassers are none the less liable because they acted in good faith.[2]

2. *b. A fortiori* will the attorney be liable where he causes, directs or participates in, the service of process, whether it be valid or invalid, without the instruction or knowledge of his client, and without any reasonable or probable cause for so doing, but simply to gratify some malicious purpose of his own.[3]

He would also be liable with his client where, knowing that the client was acting maliciously and without probable cause, he co-operated with or assisted him in the issuing or serving of process.[4]

VII.

LIABILITY OF CLIENT TO ATTORNEY.

1. *Attorney's Right to Reimbursement and Indemnity.*

§ 840. **Attorney entitled to Reimbursement and Indemnity.** Like other agents, the attorney is entitled to be reimbursed by his client for costs, charges and expenses which the attorney has fairly and in good faith incurred in the prosecution of his client's business, and which were not rendered necessary by the attorney's own negligence or default, or which were not incurred in violation of the express instructions of his client.[5] So if the attorney for his client's benefit and within the scope of his authority, has incurred a contingent liability, as by indemnifying an officer from the consequences of levying the client's process, he is entitled to be idemnified by his client.[6]

erty unlawfully seized should be released.

[1] Welsh *v.* Cochran, 63 N. Y. 181, 20 Am. Rep. 519; Averill *v.* Williams, 4 Denio (N. Y.) 295, 47 Am. Dec. 252; Vanderbilt *v.* Richmond Turnpike Co., 2 N. Y. 479, 51 Am. Dec. 315; Freeman *v.* Rosher, 13 Q. B. 780; Kirksey *v.* Jones, 7 Ala. 622; Pollock *v.* Gantt, 69 Ala. 373.

[2] See note 3 p. 706, *ante*.

[3] Burnap *v.* Marsh, 13 Ill. 535; Stockley *v.* Hornidge, 8 Car. & P. 16, 34 Eng. C. L. 276; Wood *v.* Weir, 5 B. Mon. (Ky.) 544; Warfield *v.* Campbell, 35 Ala. 349; Kirksey *v.* Jones, 7 Ala. 622.

[4] Burnap *v.* Marsh, *supra*; Peck *v.* Chouteau, 91 Mo. 140, 60 Am. Rep. 236.

[5] Clark *v.* Randall, 9 Wis. 135, 76 Am. Dec. 252; Champin *v.* King, 6 Jur. 35.

[6] Clark *v.* Randall, *supra*.

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2. *Attorney's Right to Compensation.*

§ 841. **Attorney entitled to Compensation.** An attorney at law is *prima facie* entitled to compensation for the services which he renders for his client. He may specially agree that he will serve gratuitously, or that he will make no charge unless successful, or unless his services are satisfactory to his client; and such agreements, when fairly made, will be enforced. But when an attorney is employed to render services in the course of his profession, the presumption is that the party who employs him expected to pay him,[1] and if such is not the case the burden of proving it is upon the client.[2]

The fact that the attorney was mayor of the city for which the services were rendered;[3] or was a stockholder in the corporation which employed him;[4] or was also employed to negotiate loans for the insurance company for which he rendered other professional services;[5] will not defeat his right to compensation.

§ 842. **Attorney may sue for Compensation.** Attorneys at law of all grades in the United States, though a different rule at one time prevailed, may maintain an action at law to recover their compensation.[6]

a. Where there was a special Contract.

§ 843. **Parties may agree upon Amount of Compensation.** It is entirely competent for the parties to agree, at the time of the employment of the attorney, not only upon the amount of his compensation, but also as to the time, manner and medium of its payment, and such an agreement is highly desirable, both to the client and the attorney, as obviating many of the unpleasant and unseemly controversies which sometimes occur when the amount is left unfixed until the termination of the employment. Where such a contract is fairly made it is conclusive upon both

[1] Hallett v. Oakes, 1 Cush. (Mass.) 296; Webb v. Browning, 14 Mo. 354; Smith v. Davis, 45 N. H. 566; Vilas v. Downer, 21 Vt. 419.

[2] Brady v. Mayor, 1 Sandf. (N. Y.) 569.

[3] Niles v. Muzzy, 33 Mich. 61, 20 Am. Rep. 670.

[4] Reynolds v. McMillan, 63 Ill. 46. See Ward v. Craig, 87 N. Y. 550.

[5] Insurance Co. v. Buchanan, 100 Ind. 63.

[6] Stanton v. Embrey, 93 U. S. 548; Wylie v. Coxe, 15 How. (U. S.) 415; Smith v. Davis, 45 N. H. 566; Nichols v. Scott, 12 Vt. 47; Eggleston v. Boardman, 37 Mich. 14; Miller v. Beal, 26 Ind. 234; Webb v. Browning, 14 Mo. 354; Foster v. Jack, 4 Watts. (Penn.) 334.

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parties, unless its provisions have been waived;[1] and where lawful conditions have been imposed, it is incumbent upon the attorney to show, either that he had fully performed the contract according to its terms,[2] or that such performance has been prevented by the client.[3]

§ 844. **Contracts for contingent Compensation.** A contract by which the attorney agrees to render professional services upon the condition that, if unsuccessful, he shall receive no, or little, compensation; while if successful, he shall receive a large, or increased, compensation, is valid.[4] And it is none the less valid that the attorney is to receive as his compensation a portion of the money or thing recovered.[5] Whatever may be thought of the moral or ethical effects of such contracts, it is quite generally held in modern times, that they are not invalid. Indeed it is urged, with much plausibility, that such contracts, under the peculiar and unequal conditions of many of the parties to modern litigation, are absolutely indispensable to the maintenance and administration of justice. Contracts of this nature, however, to be enforced, must appear not to be excessive or extortionate, and to have been fairly made, without undue advantage being taken of the ignorance or necessities of the client.[6]

§ 845. **What Contracts champertous.** In many cases it has

[1] Stanton *v.* Embrey, 93 U. S. 548; Planters' Bank *v.* Hornberger, 4 Cold. (Tenn.) 531; Bright *v.* Taylor, 4 Sneed. (Tenn.) 159; Tapley *v.* Coffin, 12 Gray (Mass.) 420; Yates *v.* Robertson, 80 Va. 475; Badger *v.* Gallagher, 113 Ill. 662; Ripley *v.* Bull, 19 Conn. 56; Walker *v.* Clay, 21 Ala. 797; Allard *v.* Lamirande, 29 Wis. 502; Hitchings *v.* VanBrunt, 38 N.Y. 335; Broadman *v.* Brown, 25 Iowa, 489.

[2] Moses *v.* Bagley, 55 Ga. 283.

[3] Myers *v.* Crockett, 14 Tex. 257; Kersey *v.* Garton, 77 Mo. 645; Bates *v.* Desenberg, 47 Mich. 643.

[4] Wylie *v.* Coxe, 15 How. (U. S.) 415; Wright *v.* Tebbitts, 91 U. S. 252; Stanton *v.* Embrey, 93 U. S. 548; Taylor *v.* Bemiss, 110 U. S. 42; Duke *v.* Harper, 66 Mo. 51, 27 Am. Rep. 314; Blaisdell *v.* Ahern, 144 Mass. 393, 59 Am. Rep. 99; Allard *v.* Lamirande, 27 Wis. 502; Kusterer *v.* City of Beaver Dam, 56 Wis. 471, 43 Am. 725; Perry *v.* Dicken, 105 Penn. St. 83, 51 Am. Rep. 181; Miles *v.* O'Hara, 1 S. &. R. (Penn.) 32; Boulden *v.* Hebel, 17 Id. 312; Strohecker *v.* Hoffman, 19 Penn. St. 223, 227; Dickerson *v.* Pyle, 4 Phila. 259; Chester County *v.* Barber, 97 Penn. St. 463; Stewart *v.* Houston, &c. Ry Co., 62 Tex. 246.

[5] Duke *v.* Harper, *supra*; *contra* Blaisdell *v.* Ahern, 144 Mass. 393, 59 Am. Rep. 99; *contra*, when for part of land recovered; Stanton *v.* Haskin, 1 McAr. (D. C.) 558, 29 Am. Rep. 612.

[6] See Taylor *v.* Bemiss, 110 U. S. 42; Wright *v.* Tebbetts, 91 U. S. 252.

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been considered that the mere agreement that the attorney should receive part of the money or thing recovered, rendered the contract champertous and void;[1] but it is now generally held that this alone is not enough, and that, to vitiate the contract on this account, it is essential that it should also appear that the attorney was to carry on the suit at his own expense;[2] although in some cases, however, it has been said that the attorney who furnished his services upon the contingency of success was, in a measure, sustaining the suit at his own expense.[3] In a recent case in

[1] See Thurston v. Percival, 1 Pick. (Mass.) 415; Brown v. Beauchamp, 5 T. B. Mon. (Ky.) 413, 417; Lathrop v. Amherst Bank, 9 Metc. (Mass.) 489; Scobey v. Ross, 13 Ind. 117; Rust v. Larue, 4 Litt. (Ky.) 419; Davis v. Sharron, 15 B. Mon. (Ky.) 64; Backus v. Byron, 4 Mich. 535.

In Ware's Adm. v. Russell, 70 Ala. 174, 45 Am. Rep. 82, BRICKELL, C. J., said: "Champerty, with us, is the unlawful maintenance of a suit in consideration of some bargain to have a part of the thing in dispute, or some profit out of it; and covers all transactions and contracts, whether by counsel or others, to have the whole or part of the thing or damages recovered; Poe v. Davis, 29 Ala. 683; Holloway v. Lowe, 7 Port. (Ala.) 488."

[2] Duke v. Harper, 66 Mo. 51, 27 Am. Rep. 314; Martin v. Clarke, 8 R. I. 389, 5 Am. Rep. 586; Moses v. Bagley, 55 Ga. 283; Arden v. Patterson, 5 Johns. (N. Y.) Ch. 44; Allard v. Lamirande, 29 Wis. 502; Bayard v. McLane, 3 Harr. (Del.) 212; Coleman v. Billings, 89 Ill. 183; Orr v. Tanner, 12 R. I. 94.

[3] In Backus v. Byron, 4 Mich. 535, an agreement by which the client was to pay the expenses and the attorney was to have part of the recovery was held void. Said GREEN, J.: "That champerty was regarded as *malum in se*, and an offense of a high grade at the common law, which rendered void all contracts tainted with it, cannot be questioned. Barratry and maintenance (of which latter champerty was regarded as the most odious species) were offenses of a kindred character, tending to strife, oppression and injustice, and the perpetrators thereof were visited with grievous punishments. Hawkins P. C., ch. 84; Coke's Inst. 368, b; 4 Bl. Com., 134; 2 Chitty's C. L., 234, note a; 4 K. Com., 6th ed., 449, note a. Our attention will first be directed to the inquiry what constitutes champerty at the common law. Hawkins defines it to be: 'The unlawful maintenance of a suit in consideration of an agreement to have part of the thing in dispute, or some profit out of it.' Hawkins P. C., ch. 84 § 1. Lord COKE says, it is 'to maintain to have part of the land, or part of the debt, or other thing in plea or suit.' Co. Lit., 368, b. Chitty defines it to be 'a bargain to divide the land (*campum partire*) or other subject in dispute, on condition of his carrying it on at his own expense,' and this is the definition given by Sir Wm. BLACKSTONE: 2 Chitty's Cr. L., 234, note a; 4 Bl. Com., 135. Sir Wm. GRANT, in 15 Vesey, 139, says: 'Champerty is the unlawful maintenance of a suit in consideration of a bargain for a part of the thing, or some profit out of it,' and this defini-

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Massachusetts, the contract is said to be champertous where the attorney agrees to look solely to the fund or thing recovered, with no personal claim against the client.[1]

tion is quoted by TINDALL, Ch. J., in Stanley *v.* Jones, 7 Bing., 369.

Mr. Bouvier, in his institutes of American law, vol. 4, p. 236, says: 'By champerty is meant a bargain with a plaintiff or defendant, *campum partire*, to divide the land or the thing sued for between them if they prevail at law, the champertor agreeing to carry on the suit at his own expense. It differs from maintenance in this that in the latter the person assisting the suitor receives no part of the benefit, while in the former he receives one-half, or other proportion of the thing sued for,' and Mr. Taylor, in his law glossary, defines it to be the purchasing of a right, or pretended right, under a condition that part, when obtained by suit, shall belong to the purchaser.

Although there is considerable diversity in the language used by these and other authors in describing this offense, yet I think that, upon examination, it will appear that they all agree in substance. When it is considered that champerty is a species of maintenance, it is clear that all these definitions import that the party bargaining for an interest in the thing in dispute, undertakes to aid in the prosecution of the suit for its recovery, and whether such aid is furnished in money by a layman, who pays the expenses of the suit, or by an attorney or solicitor, in services rendered in its prosecution, it is the same, and each alike in effect and in contemplation of law, is a maintainer of the suit, and prosecutes it in whole or in part, at his own expense. The consideration paid in the latter case would be equally as valuable as in the former, and the inducement to prosecute a doubtful or unconscionable claim would be the same, and the evil, if any, the same. It is equally champerty whether the contract be for one-half, one-quarter, or one-eighth of the thing in dispute; and it would be strange, indeed, if the validity or invalidity of the contract of this character were made to depend upon the amount of the consideration to be paid, or, in other words, upon the payment of a part or the whole of the expenses of the suit."

[1] Blaisdell *v.* Ahern, 144 Mass. 393, 59 Am. Rep. 99. In this case it was held that a contract by which an attorney depends on the contingency of success for payment for all services, and the client agrees to furnish evidence and pay all actual costs, and that the attorney shall be entitled to a large and liberal fees, not to exceed fifty per cent. of the amount collected, is not champertous nor void for maintenance.

W. ALLEN, J. says: "There was no agreement that the plaintiff should receive a share of the amount recovered as compensation for his services. It is immaterial that the avails of the suit were the means or the security on which he relied for payment, if it was to be payment of a debt due from the defendants. Thurston *v.* Percival, 1 Pick. 415; Lathrop *v.* Amherst Bank, 9 Metc. 489.

Ackert *v.* Barker, 131 Mass. 436, and Belding *v.* Smythe, 138 Mass. 530, are cases of champerty, where a part of the amount recovered was to be received in compensation for services, and there was to be no personal liability. Where the right to compensation is not confined to an interest in the

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In some of the States, statutes have been enacted leaving the client and his attorney free to make such contracts in reference to the latter's compensation as they deem best.[1]

§ 846. **Such Contracts do not prevent Settlement by Client.** A contract for a contingent compensation, in the absence of a statute, gives the attorney no such interest in the cause of action, before judgment, as will defeat a settlement made by the client with the opposite party in disregard of the attorney, although the opposite party had notice of the contract.[2] In order to protect the attorney before judgment there must be an assignment to him of an interest in the cause of action, of which notice must be given to the other party, and this method will avail only in those cases in which the cause of action is legally assignable.

§ 847. **But Attorney may recover from Client.** But the client will not be permitted, by settling with the adverse party, to deprive the attorney of his compensation; and if the client thus prevents the attorney from completing his contract by settling and dismissing the suit, the attorney will be entitled to recover from the client as if the contract had been fully performed, where there are any means of determining what full performance would have realized,[3] and, in any event, what the services rendered were reasonably worth.[4]

thing recovered, but gives a right of action against the party, though pledging the avails of the suit, or a part of them, as security for payment, the agreement is not champertous. Tapley v. Coffin, 12 Gray, 420; Scott v. Harmon, 109 Mass. 287; s.c., 12 Am. Rep. 685; McPherson v. Cox, 96 U. S. 404; Christie v. Sawyer, 44 N. H. 298; Anderson v. Radcliffe, E., B. & E. 806, 817."

[1] Thus in Michigan it is provided by How. Stats. § 9004 "That all existing laws, rules, and provisions of law, restricting or controlling the right of a party to agree with an attorney, solicitor, or counsel, for his compensation, are repealed, and hereafter the measure of such compensation shall be left to the agreement, express or implied, of the parties."

[2] Kusterer v. City of Beaver Dam, 56 Wis. 471, 43 Am. Rep. 725; Coughlin v. New York Central, &c. R. R. Co., 71 N. Y. 443, 27 Am. Rep. 75; Lamont v. Washington, &c. R. R. Co., 2 Mackey (D. C.) 502, 47 Am. Rep. 268; McBratney v. Railroad Co., 17 Hun (N. Y.) 385; Quincey v. Francis, 5 Abb. (N. Y.) N. C. 286; Sullivan v. O'Keefe, 53 How. Pr. 426; Swanston v. Mining Co., 13 Fed. Rep. 215; Pulver v. Harris, 62 Barb. (N. Y.) 500, affirmed, 52 N. Y. 73.

Even after verdict, if before judgment; Miller v. Newell, 20 S. C. 122, 47 Am. Rep. 833.

[3] Kersey v. Garton, 77 Mo. 645; Myers v. Crockett, 14 Tex. 257; Polsley v. Anderson, 7 W. Va. 202, 23 Am. Rep. 613.

[4] Quint v. Ophir Mining Co., 4 Nev. 305.

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b. Where there was no special Contract.

§ 848. **Attorney entitled to reasonable Value of his Services.** Where no express contract is made fixing the amount which the attorney is to receive from his client, he is entitled to recover the reasonable value of the services rendered.[1]

§ 849. **What Evidence admissible.** In determining what this reasonable value is, a variety of elements are to be taken into consideration. The nature of the controversy and the questions involved; the amount at issue; the skill and labor required; the responsibility imposed; the standing, experience, learning, reputation, tact, assiduity and integrity of the attorney; the success achieved; all of these are properly to be considered in determining the value of the service rendered.[2]

[1] Eggleston *v.* Boardman, 37 Mich. 14, and cases cited in following note.

[2] Eggleston *v.* Boardman, 37 Mich. 14; Bruce *v.* Dickey, 116 Ill. 527; Campbell *v.* Goddard, 17 Ill. App. 385; Smith *v.* Chicago, &c. Ry Co., 60 Iowa, 515; Phelps *v.* Hunt, 40 Conn. 97; People *v.* Bond Street Savings Bank, 10 Abb. N. Cas. 15; Vilas *v.* Downer, 21 Vt. 419; Kentucky Bank *v.* Combs, 7 Penn. St 543; Stanton *v.* Embrey, 93 U. S. 557.

In Eggleston *v.* Boardman, *supra*, the court said: "Counsel insist that, in the absence of a special contract, one day's work in an important cause is worth no more than the same services in a suit of less magnitude; that as well might any laborer or mechanic charge extra wages per day when fortunate enough to secure a large job; that where work requires a different kind of skill or workmanship, then, of course, such charge should be made as the skill required would command, but the same skill and workmanship upon an important piece of work, would bring no more per day then when it was applied to a lesser job; and that the same knowledge of practice and rules of law are required of the attorney or solicitor in one case as the other.

We cannot concur in this reasoning, the effect of which, if adopted, would be to establish a scale of compensation for professional services, when the amount to be paid was not specially agreed upon, dependent upon the skill and professional standing of the person employed, and the actual time by him devoted to the work, but without any reference to the real nature of the questions he was called upon to investigate, or the amount in controversy, and the increased care and responsibility arising therefrom.

Whenever an attorney or solicitor is retained in a cause, it becomes his implied duty to use and exercise reasonable skill, care, discretion and judgment in the conduct and management thereof. It would be very difficult to lay down any definite rule or principle, applicable alike to all cases, as to the care and skill required. Each case must be governed by its own peculiar facts and circumstances, and the amount in controversy must in every case play a very important part in the determination of this question. The lapidary who cuts,

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For the purpose of aiding the court or jury in arriving at the value, the testimony of attorneys or others having knowledge of it, as to what, in their opinion, the services were reasonably

polishes and engraves a precious stone of exceedingly great value, must exercise much more care, skill and judgment than would be required in the performance of like work upon one of but ordinary or little value, and he would be entitled to demand and receive a correspondingly increased compensation in the former case, than he would in the latter, although the time spent by him in each case was the same. The common carrier charges much more for carrying jewels, gold, bank-bills or valuable papers, than for more bulky and less valuable things, although the latter may be vastly more heavy, cumbersome, and in fact much more expensive to transport.

The right to increased compensation in these cases and in many others that might be mentioned, is universally recognized. No one questions such right, yet what causes the difference in compensation? Nothing but the increased responsibility dependent upon the value of the article, in the case of the carrier; in the other case, the same fact, coupled, perhaps, with the skill of the person who performs the work.

The artist who transfers to the canvas the living likeness, destined, perhaps, to become immortal as a work of art, is entitled to a vastly higher compensation than he would be for spending the same time in painting buildings, even although the quantum of work done in the latter case might be estimated by the square yard. The recompense to be paid the sculptor who conceives, molds and produces his masterpieces of form cannot be measured and fixed by a standard based alone upon the time he spent in their production. Nor in cases where they were merely executed under his direction, could his reward be fixed upon the same standard as of those who performed the manual labor under his personal supervision. The productions of the composer, the poet and the author, cannot be valued by the time apparently spent in their preparation. They are formed of a combination of ideas which may have cost their authors years of application to complete.

The lawyer, who in order to excel in his profession, has devoted years to preliminary studies and has spent much labor and money to thoroughly fit him for his calling, so that he might be able to act as an advocate in court, or as a counsellor to guide and direct others—to furnish them from his vast storehouse of knowledge, ripened and perfected from long experience, with such ideas and suggestions which, when carried out and followed up, would lead to success—how shall his services be estimated?

It is very evident that the responsibility, the care, anxiety and mental labor is much greater in a case where the amount in controversy is large than where it is insignificant, although, perhaps the same questions might be raised in each case, or the more difficult questions arise in the case where the amount was of but slight consequence. Nor is this responsibility, care and mental labor dependent alone upon the number of hours or days which may be given to the preparation and trial or argument of a case. This responsibility and

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worth under the circumstances, is properly admissible.[1] And so it is proper to receive evidence as to the price usually charged and received for similar services by other persons of the same profession, practicing in the same court.[2]

Where an attorney was employed in a number of cases involving a large amount, and a few only of these cases were selected and tried, as test cases, it was held that the entire amount involved was to be considered and not that alone which was represented by the test cases.[3]

§ 850. **What Evidence not admissible.** Evidence of the amount paid by the opposite party to his attorney is not admissible,[4] nor, in general, is the amount which one attorney receives, any criterion as to the value of the services of another attorney, in the absence of evidence that the services were similar, the skill, standing and experience equal, and the labor the same.[5]

mental anxiety is not so imaginative and shadowy that it should not be considered in arriving at a proper compensation to be allowed in fixing the value of the services rendered. Nor is the number of days which may be given to the preparation of a case alone, even if the exact time could be ascertained in any given case, a governing test. Twelve hours spent in the study of a novel will not usually be as exhausting as the same time devoted to the study of Coke upon Littleton would be, even although a great deal more ground might be gone over in the former, than would in all probability be in the latter case.

We can see no analogy between this kind or class of work and that performed by the ordinary laborer, nor can the creditable fact, that attorneys generally, where the amount in controversy is small, or their client is poor, charge and receive much less than their services may in fact have been worth, prevent their recovering a reasonable compensation in proportion to the magnitude of the interests committed to their care. In fact in all cases, the professional skill and standing of the person employed, his experience, the nature of the controversy, both in regard to the amount involved and the character and nature of the questions raised in the case, as well as the result, must all be taken into consideration in fixing the value of the services rendered."

[1] Thompson *v.* Boyle, 85 Penn. St. 477, Williams *v.* Brown, 28 Ohio St. 547; Covey *v.* Campbell, 52 Ind. 157; Hart *v.* Vidal, 6 Cal. 56; Lamoure *v.* Caryl, 4 Denio (N. Y.) 370.

See upon this subject the exhaustive discussions in Kelley *v.* Richardson, — Mich. —, 14 West. Rep. 416, and Turnbull *v.* Richardson, — Mich. —, 14 West. Rep. 444.

[2] Thompson *v.* Boyle, *supra*; Vilas *v.* Downer, 21 Vt. 419; Stanton *v.* Embrey, 93 U. S. 557.

[3] Bruce *v.* Dickey, 116 Ill. 527.

[4] Ottawa University *v.* Parkinson, 14 Kans. 159.

[5] Ottawa University *v.* Parkinson, 14 Kans. 159; Ottawa University *v.* Welsh, Id. 164.

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Local bar rules, prescribing rates of compensation, are not binding upon the client unless it be shown that he had such knowledge of them as to warrant the presumption that he employed the attorney with reference to them.[1]

§ 851. **Lack of Success no Defense.** It is no part of the implied contract of the attorney that he will be successful in everything which he undertakes. He *may* stipulate that unless successful he shall have no pay; but unless he does so, the fact that his efforts were unsuccessful will not deprive him of his compensation, if he brought to the task a reasonable degree of skill and learning, and performed the service with reasonable care and diligence.[2]

§ 852. **Negligence or bad Faith may be shown.** But the client may always show, either in bar or in mitigation of damages, that the attorney so negligently performed his undertaking, or so abused the confidence and trust which were imposed in him, that his services were of no, or little, value to his client.[3] This may be done whether the amount of the attorney's compensation were fixed by special contract or not.

The general rules, heretofore considered, which govern the recoupment of damages in other cases, are applicable here.[4]

§ 853. **Fees forfeited by Breach of Trust.**—An attorney who collects or receives money for his client, and neglects or refuses, without cause, to pay it to him, thereby compelling the client to resort to an action to recover it, will not be allowed fees for making the collection. If the client be compelled to employ and pay other attorneys and enter into litigation with an attorney to enforce performance of a duty which the latter should have performed voluntarily, it would be highly unjust that he should be obliged to pay the defaulting attorney also.[5]

§ 854. **How when Attorney abandons Service.** An attorney who is retained generally to conduct a legal proceeding, is pre-

[1] Boylan *v.* Holt, 45 Miss. 277.

[2] Bills *v.* Polk, 4 Lea (Tenn.) 494; Brackett *v.* Sears, 15 Mich. 244. Rush *v.* Cavenaugh, 2 Penn. St. 187.

[3] Chatfield *v.* Simonson, 92 N. Y. 209; Caverly *v.* McOwen, 126 Mass. 222; Pearson *v.* Darrington, 32 Ala. 227; Maynard *v.* Briggs, 26 Vt. 94; Nixon *v.* Phelps, 29 Vt. 198; Porter *v.* Ruckman, 38 N. Y. 210; Hopping *v.* Quin, 12 Wend. (N. Y.) 517; Brackett *v.* Norton, 4 Conn. 517.

[4] See *ante*, § 647.

[5] Gray *v.* Conyers, 70 Ga. 349; Large *v.* Coyle, Penn. 12 Atl. Rep. 343.

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sumed, in the absence of anything to indicate a contrary intent, to enter into an entire contract to conduct the proceeding to its termination; and he cannot lawfully abandon the service, before such termination, without justifiable cause and reasonable notice.[1]

If, therefore, an attorney, without just cause, abandons his client before the proceedings for which he was retained have been conducted to a termination, he will, in those jurisdictions where the stricter requirement of an entire performance prevails, forfeit all right of payment for any services which he has rendered.[2] Where, however, the more liberal rule of Britton *v.* Turner prevails, the attorney would undoubtedly be permitted to recover the reasonable value of the service rendered, less any damages which the client might have sustained by reason of the abandonment.[3]

But if the attorney has sufficient reason to justify his abandonment, he may in all cases recover what the services already rendered are reasonably worth,[4] and if the service had been undertaken for a fixed sum, it has been held that he may treat the cause for abandonment as a prevention of completion by the client, and recover the stipulated price.[5]

§ 855. **What will justify Abandonment.** No general rule can be laid down by which it can, in all cases, be determined what cause will be sufficient to justify an attorney in abandoning a case in which he has been retained. But if the client refuses to advance money to pay the expenses of the litigation, or if he unreasonably refuses to advance money, during the progress of a long litigation, to his attorney to apply upon his compensation, sufficient cause may be furnished to justify the attorney in withdrawing from the further service of the client.[6] So any con-

[1] Tenney *v.* Berger, 93 N. Y. 524, 45 Am. Rep. 263; Bathgate *v.* Haskin, 59 N. Y. 535; Davis *v.* Smith, 48 Vt. 54; Menzies *v.* Rodrigues, 1 Price Exch. 92; Stokes *v.* Trumper, 2 K. & J. 232; Cresswell *v.* Byron, 14 Vesey Jr. 272; Nicholls *v.* Wilson, 11 M. & W. 106; Eliot *v.* Lawton, 7 Allen (Mass.) 274, 83 Am. Dec. 683; Harris *v.* Osborn, 2 C. & M. 629.

[2] Tenney *v.* Berger, 93 N. Y. 524, 45 Am. Rep. 263.

[3] See *ante*, § 636, *et seq.*

[4] Tenney *v.* Berger, *supra;* Eliot *v.* Lawton, *supra.*

[5] See Kersey *v.* Garton, 77 Mo. 645, Baldwin *v.* Bennett, 4 Cal. 392; Hunt *v.* Test, 8 Ala, 713; Myers *v.* Crockett, 14 Tex. 257; McElhinney *v.* Kline, 6 Mo. App. 94; Polsley *v.* Anderson, 7 W. Va. 202, 23 Am. Rep. 613.

[6] Tenney *v.* Berger, 93 N. Y. 524, 45 Am. Rep. 263; Eliot *v.* Lawton,

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duct upon the part of the client during the progress of the litigation which would tend to degrade or humiliate the attorney, such as attempting to sustain his case by the subornation of witnesses, or any other unjustifiable means, would furnish sufficient cause.[1] So if the client demanded of the attorney the performance of an illegal or unprofessional act; or if the client were seeking to use the attorney as a tool to carry out the malicious or unlawful designs of the client, the attorney might lawfully abandon the service.[2] So if the client insists upon the employment of counsel with whom the attorney cannot cordially co-operate, the attorney will be justified in withdrawing from the case.[3]

§ 856. **When discharged by Client.** The client has undoubted power to discharge his attorney at any time and with or without cause. The general retainer of the attorney, as has been seen, implies an undertaking on his part to continue to act until the termination of the proceeding and he cannot abandon the service before that time without good cause and reasonable notice. But while the attorney is thus bound to entire performance, and the contract as to him is treated as entire, it is, as is said by Judge EARL, "a singular feature of the law that it should not be treated

7 Allen (Mass.) 274, 83 Am. Dec. 683.

[1] Tenney v. Berger, *supra*.

[2] See Burnap v. Marsh, 13 Ill. 535; Peck v. Chouteau, 91 Mo. 140, 60 Am. Rep. 236.

[3] Tenney v. Berger, *supra*. "The attorney" says EARL, J., in this case, "is always interested to know with whom he is to be associated in the trial of a cause. The counsel is supposed to be his superior, and is usually employed on account of his superior ability, experience, reputation or professional standing, and after an attorney has engaged in a cause, it would seem to be quite proper that he should be consulted as to the person who is to bear the important relation to him of counsel. The client would certainly have no right, against the protest of the attorney, to introduce as counsel in the case a person of bad character, or of much inferior standing and learning,—one not capable of giving discreet or able advice. It would humiliate an attorney to sit down to the trial of a cause, and to see his case ruined by the mismanagement of counsel. The relations between attorney and counsel, too, are of a delicate and confidential nature. They should have faith in each other, and their relations should be such that they can cordially co-operate. While a client has the undoubted right to employ any counsel he chooses, yet it is fair and proper, and professional etiquette requires, that he should consult the attorney and other counsel in the case, so that they can withdraw, if for any reason they do not desire to be associated with them."

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as an entire contract upon the other side."[1] Such, however, seems to be the law.[2]

The client, however, will not be permitted to discharge his attorney without cause, unless he first pays or secures the attorney's fees and charges, and the court will not enforce a substitution until this has been done.[3] The attorney's lien will also be protected,[4] and where an attorney who took the case upon a contingent fee, and has obtained judgment, is discharged without cause, the client will be required to preserve the attorney's lien upon the judgment.[5]

But although a general retainer does not, of itself, imply a promise on the part of the client to continue to employ the attorney until the termination of the proceedings, the client may, nevertheless, bind himself by contract to so employ him.

Where, therefore, the attorney is not employed for a definite period, he may be discharged by the client at any time, and if the discharge be for no fault of the attorney, he may recover from the client, the reasonable value of the service rendered.[6] So if the attorney is employed for a definite time and is discharged before that time without justifiable cause, he will be entitled to recover from the client the damages he may have sustained by reason of such discharge.[7] But if the attorney were discharged for a cause which justified it, he would, under the strict rules requiring a full performance as a condition precedent to the recovery of compensation, forfeit all right to pay for the services rendered;[8] but under the rule of Britton *v.* Turner, he could recover the reasonable value of his services, less any damages which the client had sustained by his default.[9]

[1] In Tenney *v.* Berger, 93 N.Y.524, 45 Am. Rep. 263.

[2] Tenney *v.* Berger, *supra*; Ogden *v.* Devlin, 45 N. Y. Super. Ct., 631; Trust *v.* Repoor, 15 How. Pr. 570; Gustine *v.* Stoddard, 23 Hun (N.Y.) 99.

[3] Ogden *v.* Devlin, *supra;* Supervisors *v.* Brodhead, 44 How. Pr. 411.

[4] Hazlett *v.* Gill, 5 Robt. (N. Y.) 611.

[5] Ronald *v.* Mutual Reserve Fund L. Ass'n, 80 Fed. Rep. 228.

[6] Tenney *v.* Berger, *supra*; Ogden *v.* Devlin, *supra.*

[7] Kersey *v.* Garton, 77 Mo. 645; Baldwin *v.* Bennett, 4 Cal. 392; Hunt *v.* Test, 8 Ala. 713; Myers *v.* Crockett, 14 Tex. 257; McElhinney *v.* Kline, 6 Mo. App. 94; Polsley *v.* Anderson, 7 W. Va. 202, 23 Am. Rep. 613.

[8] See *ante* §635. See Walsh *v.* Shumway, 65 Ill. 471 in following section, note 2.

[9] See *ante* § 636. Where the service is substantially completed, attorney entitled to *quantum meruit.* Whitner *v.* Sullivan, — S.C. — 2 S. E. Rep. 391.

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§ 857. **What will justify Discharge.** What conduct on the part of an attorney employed for a specific period will justify his discharge before that period has expired, is not easy of exact definition. The same general principles would govern here which apply to similar employments of other agents.[1] But certainly if the attorney should be disbarred from practice, or should prove treacherous to his client's interests, or should disregard the instructions or limitations which the latter had a right to make, the client might dismiss him. The same result would undoubtedly follow if the attorney failed to possess and exercise that reasonable degree of skill and knowledge which the nature of his undertaking implies, and so it has been held that if the attorney fails to use reasonable diligence in the performance of his duty, he may be discharged.[2]

[1] See *ante* §§ 615–619.

[2] Walsh *v.* Shumway, 65 Ill. 471. In this case Shumway had employed one Sloan, an attorney, to prosecute an action of ejectment, Sloan agreeing to take charge of the litigation, and was to receive as a fee one-fourth of the property recovered. After Sloan had been employed for about four years without accomplishing anything, Shumway took the case out of his hands and employed another attorney, who soon effected a favorable settlement. LAWRENCE, C. J., said: "Sloan had had the business in charge about four years, and had not progressed beyond the filing of a declaration in ejectment. Under such a contract as that existing between Shumway and Sloan, it is the duty of the attorney to exercise reasonable diligence in the prosecution of the suit, and if he fails to do so, the client must be at liberty to seek other aid. If compelled to do this, he can not be required to execute the original agreement.

While he cannot rescind the contract at discretion, it results, from its very nature, that he may do so if the attorney fails to use reasonable diligence in the performance of his part of the undertaking. Whether, in such event, the attorney would be entitled to any compensation for services rendered, has not been discussed in the present case; but, upon the well recognized principle governing analogous cases, we do not perceive how compensation can be given upon the principle of a *quantum meruit*. The contract is an entirety, and the attorney having failed to perform, there can be no apportionment of compensation. Of course it differs from a case where an attorney has been retained without a specific contract.

That there was a degree of negligence which justified Shumway in virtually rescinding his contract with Sloan, cannot be reasonably denied. The ejectment was commenced in December, 1866, and stood until the compromise was made, in May, 1870, without having been brought to trial. No satisfactory reason is shown. The adverse title depended upon the validity of a deed made under a power of attorney executed by Mr. and Mrs. Luff. When the deed was executed, they were residents of this state,

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§ 858. **When Attorney's Claim barred by Limitation.** The statute of limitations begins to run against the attorney from the time his right of action accrues, and his right of action accrues at the time his undertaking is completed. Under a general retainer, as has been seen, the contract of the attorney is considered to be an entire one to conduct the cause to its termination, and the statute would operate from the time of the entry of the judgment.[1] Where, however, the attorney was employed specially to render a particular service, as to argue a cause or prepare a brief, the right of action would accrue, and the statute begin to run, from the time the particular service was completed.

And so though the retainer be general, yet if the attorney be discharged by the client before the termination of the suit, or if, for sufficient reason, the attorney abandons the cause before its termination, his right of action would accrue at once, and the period of the statute begin to run.[2]

Upon contracts for payment at a particular time, as to pay when the judgment should be collected, the statute would operate only from the time when by the terms of the contract the attorney was entitled to demand his compensation.[3]

3. *Attorney's Right to Lien.*

§ 859. **Two Kinds of Lien.** The lien to which an attorney at law may be entitled is of two kinds: 1. The general or *retaining* lien, and 2. The special, particular or *charging* lien.

and the only question was, whether as the law then stood, a married woman, resident in this state, could convey her land by an attorney in fact. This being the nature of the case, we cannot accept any of the excuses offered for the delay as a reasonable explanation. The question in issue was merely one of law. The proof to be made, in order to present the question, was of the simplest character. The delay raises a presumption of extreme negligence on the part of Sloan, which has not been explained, and which justified Shumway in treating the contract as at an end."

[1] Whitehead *v.* Lord, 7 Ex. 691; Harris *v.* Osburn, 2 Cromp. & M. 629; Martindale *v.* Falkner, 2 Com. B. 706; Phillips *v.* Broadley, 9 Q. B. 744; Eliot *v.* Lawton, 7 Allen (Mass.) 274, 83 Am. Dec. 683; Walker *v.* Goodrich, 16 Ill. 341; Fenns *v.* English, 22 Ark. 170; Bathgate *v.* Haskin, 59 N. Y. 533, Davis *v.* Smith, 48 Vt. 52.

[2] Eliot *v.* Lawton, *supra*; Adams *v.* Fort Plain Bank, 36 N. Y. 255.

[3] Foster *v.* Jack, 4 Watts (Penn.) 334; Morgan *v.* Brown, 12 La. Ann. 159.

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1. *The General or Retaining Lien.*

§ 860. **General Nature of this Lien.** An attorney's general or retaining lien is a common law lien, to which the attorney at law is entitled to secure the payment of his costs and charges against his client. This lien is based upon possession, and is a mere right of *retaining* the property, money or papers, to which it adheres, until the costs and charges are paid. Like other possessory liens, this lien is purely passive, and cannot, in the absence of a statute permitting it, be enforced by a sale of the property which it covers.[1]

§ 861. **Declared by Statute in some States.** Not only has this lien, as will be seen in the following sections, been recognized and enforced by the courts, but in several of the States it has been declared, enlarged and protected by statutory enactments. The substance of these statutes will be found in the note.[2]

[1] *In re*, Wilson, 12 Fed. Rep. 235, 26 Alb. L. Jour. 271; Brown *v.* Bigley, 3 Tenn. Ch. 618; Bozon *v.* Bolland, 4 Myl. & Cr. 354.

[2] In Iowa by Rev. Code, § 215. "An attorney has a lien for a general balance of compensation upon:

1. Any papers belonging to his client, which have come into his hands in the course of his professional employment.

2. Money in his hands belonging to his client.

3. Money due his client in the hands of the adverse party, or attorney of such party, in an action or proceeding in which the attorney claiming the lien was employed, from the time of giving notice in writing to such adverse party, or attorney of such party, if the money is in the possession or under the control of such attorney, which notice shall state the amount claimed, and, in general terms, for what services.

4. After judgment in any court of record, such notice may be given and the lien made effective against the judgment debtor by entering the same in the judgment docket opposite the entry of the judgment."

In Dakota, by Code, ed. 1885, p. 347, § 9, the same provision is made as in Iowa.

In Minnesota, Stats. 1878, p. 866, § 16, the provision is substantially as in Iowa, except that the 4th subdivision gives a lien "upon a judgment, to the extent of the costs included therein, or, if there is a special agreement, to the extent of the compensation specially agreed on, from the time of giving notice to the party against whom the judgment is recovered. This lien is, however, subordinate to the rights existing between the parties to the action or proceeding." By § 284, p. 751, assignments of the judgment do not defeat this lien.

In Kentucky, Genl. Stats. 1873, p. 149, § 15, "Attorneys at law shall have a lien upon any choses in action, account, or other claim or demand put into his or their hands for suit or collection; and when he or they have been employed, by either plaintiff or defendant, in any action which is pro-

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§ 862. **What this Lien adheres to.** This lien of the attorney may attach to, (*a*) papers, (*b*) property, or, (*c*) money, of the client in the attorney's possession.

secuted by him or them to recovery, shall have a lien upon the judgment for money or property, either personal or real, which may be recovered in said action—legal costs excepted—for the amount of any fee which may have been agreed upon by the parties, or in the absence of such agreement, for a fair and reasonable fee for the services of such attorney."

In Colorado, Genl. Stats. 1883, § 85, "All attorneys and counselors at law shall have a lien upon any money or property in their hands, or upon any judgment they may have obtained, belonging to any client, for any fee or balance of fees due, or any professional services rendered by them in any court of this State, which said lien may be enforced by the proper civil action."

In Kansas, Comp. Laws, p. 114, §§ 468, 469, a lien is provided substantially as in Iowa.

In Nebraska, Comp. Stats. 1885, p. 82, § 8, and Wyoming, Rev. Stats. 1887, § 138, an attorney has a lien for a general balance of compensation upon the papers of his client which have come into his possession in the course of his employment, and upon money in his hands belonging to his client and upon money in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party.

In Georgia, Code 1882, § 1989, attorneys at law have a special lien on all papers and money of their clients in their possession, for services rendered. Their liens upon suits, judgments and decrees for money are superior to all liens, except for taxes, and no person may satisfy the suit, judgment or decree, until the lien or claim is fully paid. They have a lien also upon all suits, judgments or decrees for the recovery of real or personal property, as well as upon the property recovered, superior to all other liens except for taxes. The same liens are allowed defendant's attorneys where property is sued for and the defense is successful.

In Montana, R. S. 1879, p. 414, Ch. 8 § 54. All attorneys have a lien upon moneys in their hands, and upon judgments obtained for any client for any fees or balance of fees due or to become due, for any professional services rendered by them in any court or courts of the territory. Such lien is deemed to attach from the commencement of the action or the performance of such services; and extends to and includes reasonable fees therefor. Notice of the lien claimed upon any judgment must be filed in the office of the clerk of the court in which the judgment is obtained, or with the probate judge or justice of the peace rendering judgment, within three days after final judgment shall have been entered; and it is the duty of the clerk of the court, probate judge, or justice of the peace, with whom such notice may be filed, to indorse on such notice the date of filing, and to file the same with the papers pertaining to the cause. In case notice of the lien be not filed as provided, the lien does not attach to such judgment. See *post*, § 869.

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a. Upon Papers.

An attorney has a general lien upon all the papers, deeds, vouchers and other documents of his client, which come into the possession of the attorney while he is acting for his client in a professional capacity.[1] But in order to the creation of the lien, the papers must not only have come into the actual possession of the attorney, but they must have so come into his possession in his character as an attorney at law.[2] Thus he has no lien on papers which he receives as *prochien ami* of an infant,[3] or as a mortgagee[4] or trustee.[5] So as a lien does not attach to papers which he receives for a special purpose, this general lien will not attach,[6] unless the papers are voluntarily left in his possession after the special purpose has been accomplished.[7] So the lien does not attach to public records as to papers which constitute part of the files of a case.[8] So it has been held that it did not attach to his client's will.[9]

Letters written to the attorney by his client, and copies of the attorney's replies thereto, contained in his own letter-books, are the attorney's own property, and the client cannot insist upon their delivery to him on the termination of the relation.[10]

b. Upon Property.

The attorney's lien extends to articles of property belonging to the client which come into the attorney's possession while acting in a professional capacity, as upon articles which are delivered to him to be used as evidence in the cause.[11]

[1] Hooper *v.* Welch, 43 Vt. 171, 5 Am. Rep. 267; Bowling Green Savings Bank *v.* Todd, 52 N. Y. 489; Ward *v.* Craig, 87 N. Y. 550; *In re* Knapp, 85 N. Y 284; Hurlburt *v.* Brigham, 56 Vt. 368; Hutchinson *v.* Howard, 15 Vt.544; Patrick *v.*Hazen, 10 Vt. 183; Casey *v.* March, 30 Tex. 180; Wright *v.* Cobleigh, 21 N. H. 339; McPherson *v.* Cox, 96 U. S. 404; *In re* Wilson, 12 Fed. Rep.235; Weed *v.* Boutelle, 56 Vt. 570, 48 Am. Rep. 821; Stevenson *v.* Blakelock, 1 M. & S. 535; Howell *v.* Harding, 8 East. 362; Hollis *v.* Claridge, 4 Taunt 807.

[2] Stevenson *v.* Blakelock, 1 M. & S. 535; St. John *v.* Diefendorf, 12 Wend. N. Y. 261.

[3] Montague on Lien, 59.

[4] Pelly *v.* Wathen, 7 Hare's Ch. 351.

[5] *Ex parte* Newland, L. R. 4 Ch. D. 515.

[6] Balch *v.* Symes, 1 Turn. & R. 92; Lawson *v.* Dickenson, 8 Mod. 306.

[7] *Ex parte* Pemberton, 18 Ves. Jr. 282.

[8] Wright *v.* Cobleigh, 21 N. H. 339; Clifford *v.* Turrill, 2 DeG. & Sm. 1.

[9] Balch *v.* Symes, 1 Turn. & R. 92. Georges *v.* Georges, 18 Ves. Jr. 294.

[10] *In re* Wheatcroft, 6 Ch. Div. 97, 22 Eng Rep. 671.

[11] Friswell *v.* King, 15 Sim. 191.

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a. Upon Money.

An attorney at law has a lien also upon moneys collected by him for the client, while acting in a professional capacity.[1] The lien attaches whether the money be voluntarily paid by the debtor, as in payment or compromise of a demand entrusted to the attorney for collection, or paid or collected upon a judgment,[2] or award,[3] recovered by the attorney. This general or retaining lien does not attach until the money is collected,[4] and is not to be confounded with the attorney's special, particular or charging lien to be hereafter noticed.

The result of this lien is that the attorney may retain, from the fund in his possession, the amount for which his lien attaches, and such amount may be set-off against the client in an action brought by him against the attorney to recover the fund. Whether the attorney's claim upon the fund depends strictly upon the law of lien or upon that of set-off,[5] is a question upon which the courts are not all agreed, although agreeing upon the result. In a Pennsylvania case the court say that it is a right to defalcate rather than a right of lien.[6] This right of lien does not depend upon the question whether there was an express agreement as to the fact that compensation was to be paid, or as to its amount. It applies to a claim upon a *quantum meruit*, as well as where the compensation was agreed upon.[7] In settling with his client, and paying over the proceeds, the attorney has the right to ask for a final settlement, and to insist upon a receipt for the amount paid.[8]

And the attorney may not only retain his own fees and charges, but he may also retain, for payment to them, the fees and charges

[1] *In re* Paschal, 10 Wall (U. S.) 483; Casey *v.* March, 30 Tex. 180; Kinsey *v.* Stewart, 14 Tex. 457; Dowling *v.* Eggemann, 47 Mich. 171; Cooke *v.* Thresher, 51 Conn. 105; Diehl *v.* Friester, 37 Ohio St. 473; Read *v.* Bostick, 6 Humph. (Tenn.) 321; Hurlbert *v.* Brigham, 56 Vt. 368; Stewart *v.* Flowers, 44 Miss. 513; Lewis *v.* Kinealy, 2 Mo. App. 33; *In re* Knapp, 85 N.Y. 284, Dubois' Appeal, 38 Penn. St. 231, 80 Am. Dec. 478; Weed *v.* Boutelle, 56 Vt. 570, 48 Am. Rep. 821.

[2] Wells *v.* Hatch, 43 N. H. 246; Bowling Green Sav. Bank *v.* Todd, 52 N. Y. 489.

[3] Ormerod *v.* Tate, 1 East, 464.

[4] Casey *v.* March, 30 Tex. 180; St. John *v.* Diefendorf, 12 Wend. (N. Y.) 261.

[5] See Wells *v.* Hatch, 43 N. H. 246.

[6] Strong, J., in Dubois' Appeal, 38 Penn. St. 231, 80 Am. Dec. 478.

[7] *In re* Knapp, 85 N. Y. 284.

[8] Dowling *v.* Eggemann, 47 Mich. 171.

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of associate attorneys and counsel employed in the same case by the client, or by the attorney with the client's consent.[1]

§ 863. **What Charges the Lien secures.** No little conflict exists in the decisions as to the charges which are protected by the attorney's general lien. Many of the cases, particularly the earlier ones, confine it to those fees and charges which the attorney is authorized to tax as part of the costs in the cause, and deny it as to the general balance due to the attorney by reason of the express or implied agreements between himself and his client.[2] The strong tendency of the modern cases, however, is to extend this lien for the protection of the attorney's general balance of account, whether the costs and charges be those incurred in the particular cause in which the attorney acquired possession, or in other professional business and employment in other causes. And this may fairly be said to be the rule.[3]

§ 864. **Against what Parties Lien prevails.** The general lien of the attorney prevails not only against his client, but also against all persons who claim under the client. It is, therefore, valid against the client's assignment in bankruptcy or for the benefit of creditors,[4] and against sales, transfers or assignments by the client generally.[5] It prevails also against attachment or garnishment by the client's creditors.[6] In all of these cases, the possession by the attorney of the thing to which the lien attaches is notice of his rights,[7] and parties claiming through or under the client take only the client's claim subject to the attorney's lien. Neither the client nor his assignees can recover the subject-matter of the lien without first paying to the attorney, or permitting him to retain, the general balance due him from the client.[8]

[1] Jackson *v.* Clopton, 66 Ala. 29; Balsbaugh *v.* Frazer, 19 Penn. St. 95; Christy *v.* Douglass, Wright (Ohio) 485.

[2] See Waters *v.* Grace, 23 Ark. 118; McDonald *v.* Napier, 14 Ga. 89.

[3] Hurlbert *v.* Brigham, 56 Vt. 368; Cooke *v.* Thresher, 51 Conn. 105; Hooper *v.* Welch, 43 Vt. 171, 5 Am. Rep. 267; Bowling Green Savings Bank *v.* Todd, 52 N. Y. 489; *In re* Paschal, 10 Wall. (U. S.) 483, Weed *v.* Boutelle, 56 Vt. 570, 48 Am. Rep. 831.

[4] *Ex parte* Bush, 7 Vin. Abr. 74; *Ex parte* Sterling, 16 Ves. Jr. 258; Ward *v.* Craig, 87 N. Y. 550.

[5] Weed *v.* Boutelle, 56 Vt. 570, 48 Am. Rep. 821.

[6] Weed *v.* Boutelle, *supra*; Randolph *v.* Randolph, 34 Tex. 181.

[7] Hutchinson *v.* Howard, 15 Vt. 544; Weed *v.* Boutelle, *supra*.

[8] Weed *v.* Boutelle, *supra*. *Ex parte* Sterling, *supra*. *In re* Wilson, 12 Fed Rep. 235.

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So, as against the client or his creditor, the attorney may retain the entire stipulated price for services then in progress of performance, although not fully performed, if he in good faith intends to complete the performance.[1]

§ 865. **How Lien may be lost.** As the general or retaining lien of the attorney depends wholly upon possession, it necessarily follows that the lien will be lost if the possession be voluntarily surrendered.[2] It is not lost, however, if the possession be wrongfully or fraudulently obtained from him, and he may recover possession by a proper action.[3]

The lien is also incapable of being transferred to another, and such a transfer destroys it.[4] But personal possession by the attorney himself is not indispensable; possession by his servant or agent, which is in law his possession, is sufficient.

§ 866. **How Lien may be waived.** The attorney may, of course, voluntarily waive his lien if he sees fit, and such a waiver may be presumed from conduct on his part which is inconsistent with an intention to claim a lien. Thus if he takes security for the demand,[5] or agrees to give credit for a particular time,[6] or takes the note of the client or a third person in payment,[7] the lien would be waived, but the mere taking of the client's own note for the amount would not be deemed a waiver, unless it was taken as payment.[8]

§ 867. **Enforcement of Lien.** The general or retaining lien of the attorney upon his client's papers or property can not be enforced in the absence of a statute by any proceedings, either at law or in equity, to procure payment of the debt out of the articles so held.[9] The articles can not be sold nor applied to the

[1] Randolph *v.* Randolph, 34 Tex. 181.

[2] Dubois' Appeal, 38 Penn. St. 231, 80 Am. Dec. 478; Nichols *v.* Pool, 89 Ill, 491; *In re* Wilson, 12 Fed. Rep. 235; See Tucker *v.* Taylor, 58 Ind. 93; Nevan *v.* Roup, 8 Iowa, 207; Oakes *v.* Moore, 24 Me. 214; 41 Am. Dec. 379.

[3] Dicas *v.* Stockley, 7 C. & P. 587.

[4] *In re* Wilson, 12 Fed. Rep. 235. See Lovett *v.* Brown, 40 N. H. 511; Meany *v.* Head, 1 Mason (U. S. C. C.) 319.

[5] Cowell *v.* Simpson, 16 Ves. Jr. 275; Balch *v.* Symes, 1 T. & R. 87; Watson *v.* Lyon, 7 DeG. M. & G. 288.

[6] See Stoddard, &c, Mnfg Co. *v.* Huntley, 8 N. H. 441, 31 Am. Dec. 198.

[7] Cowell *v.* Simpson, 16 Ves. Jr. 275.

[8] Dennett *v.* Cutts, 11 N. H. 163; Stevenson *v.* Blakelock, 1 M. & S. 535.

[9] *In re* Wilson, 12 Fed Rep. 235,

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attorney's own use, by virtue of the lien, but can only be held until the debt be paid.[1] But the lien endures until the debt is paid, and is not defeated by the fact that the statute of limitations may have run against the debt.[2]

2. *The Special or Charging Lien.*

§ 868. **General Nature of this Lien.** The second kind of lien which an attorney has is that existing upon a judgment obtained by him, or moneys payable thereon, or some fund in court produced therefrom. Unlike the general or retaining lien, this is not a mere passive right of retainer of papers or moneys reduced to possession, for the attorney can have no possession of the judgment or of the moneys payable thereon, or of the fund in court; but it is rather an active right, enabling the attorney to take active steps to *charge* the judgment or fund with his claim, and to secure the aid of the court in his protection.[3]

This lien did not exist at common law and is said not to be of very ancient origin.[4] It had its source in the desire of the court, based upon principles of equity and justice, to protect the attorney, by whose efforts, and, in many instances, by whose expense, the judgment or fund had been recovered.[5]

This lien will be seen to be radically different in its nature from the general or retaining lien, from which it should be carefully distinguished.

§ 869. **In what States it exists.** This charging lien of the attorney has been adopted by statute, or enforced by the courts, in some form, in a majority of the United States, although it

26 Alb. L. Jour. 271; Terrell *v.* The B. F. Woolsey, 4 Fed. Rep. 552; Brown *v.* Bigley, 8 Tenn. Ch. 618; Thames Iron Works, *v.* Patent Derrick Co., 1 John. & H. 93; Bozon *v.* Bolland, 4 Myl. & C. 354; Heslop *v.* Metcalfe, 3 Id. 183.

[1] *In re* Wilson, and cases, *supra.*

[2] *In re* Murray, 3 W.N. (1867) 190; Higgins *v.* Scott, 2 B. & Ad. 413.

[3] Wilkins *v.* Carmichael, 1 Doug. 104; Welsh *v.* Hole, Id. 238; Schoole *v.* Noble, 1 H. Bl. 23; Barker *v.* St. Quintin, 12 Mees. & Wels. 441; Bozon *v.* Bolland, 4 Myl. & C. 354; Turwin *v.* Gibson, 8 Atk. 720; Read *v.* Dupper, 6 T. R. 361.

In re Wilson, 12 Fed Rep. 235; Weed *v.* Boutelle, 56 Vt. 570, 48 Am. Rep. 821.

[4] *In re* Wilson, *supra.* Wilkins *v.* Carmichael, *supra.*

[5] "The party" said Lord KENYON, "should not run away with the fruits of the cause without satisfying the legal demands of his attorney, by whose industry, and in many instances, at whose expense, those fruits are obtained." In Read *v.* Dupper, 6 T. R. 361.

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does not exist in all of them. These statutes are by no means uniform, nor are the decisions harmonious. Much confusion has arisen from a failure to discriminate between this lien and the retaining lien, and the variety of statutes and rules of practice, fixing the compensation of attorneys or leaving it to the parties to fix it for themselves, has increased the confusion.

It is not possible, within the limits of this work, to give a full or satisfactory exposition of the rules which prevail in each State, but a reference will be found in the note to the cases or statutes of the respective States which throw light upon it.[1]

[1] In Alabama attorney has a lien on judgment for his reasonable fees. Jackson *v.* Clopton, 66 Ala. 29; Moseley *v.* Norman, 74 Ala. 422; Warfield *v.* Campbell, 88 Ala. 527; Central R. R. Co. *v.* Pettus, 113 U. S. 116.

In Arkansas attorney has lien by statute upon judgment and property recovered for his reasonable fees. Gantt's Stats. §§ 3622, 3626. See Lane *v.* Hallum, 38 Ark. 385; Gist *v.* Hanly, 33 Ark. 233; McCain *v.* Portis, 42 Ark. 402; Porter *v.* Hanson, 36 Ark. 591.

In Connecticut attorney has a lien upon judgment. Andrews *v.* Morse, 12 Conn. 444, 31 Am. Dec. 752; Gager *v.* Watson, 11 Conn. 168; Benjamin *v.* Benjamin, 17 Conn. 110.

In California there seems to be none. *Ex parte*, Kyle, 1 Cal. 331; Mansfield *v.* Dorland, 2 Cal. 507; Russell *v.* Conway, 11 Cal. 93.

In Florida attorney has a lien upon a judgment obtained by him for his reasonable compensation. Carter *v.* Bennett, 6 Fla. 214; Carter *v.* Davis, 8 Fla. 183.

In Georgia attorneys have a lien on judgment and property. See *ante* § 861, note. See Jones *v.* Morgan, 39 Ga. 310, 99 Am. Dec. 458; Twiggs *v.* Chambers, 56 Ga. 279.

In Illinois attorney has no lien on judgment. Forsythe *v.* Beveridge, 52 Ill. 268; Nichols *v.* Pool, 89 Ill. 491; La Framboise *v.* Grow, 56 Ill. 197; Smith *v.* Young, 62 Ill. 210.

In Indiana attorney may secure lien by entering claim upon docket at time of rendition of judgment. Rev. Stats. 1881, § 5276. See Putnam *v.* Tennyson, 50 Ind. 456.

In Iowa attorney has lien for which see note to § 861, *ante*. See Smith *v.* Railroad Co., 56 Iowa 720; Phillips *v.* Germon, 43 Iowa 101; Myers *v.* McHugh, 16 Iowa 335; Fisher *v.* Oskaloosa, 28 Iowa 381; Brainard *v.* Elwood, 53 Iowa 30.

In Kansas attorney has a lien substantially as in Iowa, *supra*. See Kansas Pac. Ry Co. *v.* Thacher, 17 Kans. 92.

In Kentucky attorneys have a lien by statute for which see note to §861, *supra*. See Wood *v.* Anders, 5 Bush 601; Wilson *v.* House, 10 Bush 406; Stephens *v.* Farrar, 4 Bush 13; Robertson *v.* Shutt, 9 Bush 659.

In Louisiana attorneys have a lien by statute Rev. Laws, 1884, § 2897.

In Maine attorney has a lien upon judgment by statute. See Hobson *v.* Watson, 34 Me. 20, 56 Am. Dec. 632; Potter *v.* Mayo, 3 Greenl. 34, 14 Am. Dec. 211; Newbert *v.* Cunningham, 50 Me. 231, 79 Am. Dec. 612; Averill *v.* Longfellow, 66 Me. 238; Stratton *v.* Hussey, 62 Me. 286.

In Maryland there seems to be no

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§ 870. **What this Lien protects.** This lien being conferred in consideration of the services and expenses of the attorney in producing or securing the judgment or fund to which it applies, it protects only those costs and expenses which were incurred in

lien. See Marshall v. Cooper, 43 Md. 46.

In Massachusetts attorney has a lien upon the judgment for the amount of his taxable costs, fees and disbursements, if notice is given of his claim, P. S. 1882, p. 913; Baker v. Cook, 11 Mass. 236; Dunklee v. Locke, 13 Mass. 525; Ocean Ins. Co. v. Rider, 22 Pick. 210; Thayer v. Daniels, 118 Mass. 129; Simmons v. Almy, 103 Mass. 33.

In Michigan an attorney has a lien for his agreed compensation upon the judgment. Wells v. Elsam, 40 Mich. 218; Taylor v. Young, 56 Mich. 285; Kinney v. Robinson, — Mich.— 29 N. W. Rep. 86.

In Minnesota attorney has a lien by statute for which see note to § 861, *supra*. See Dodd v. Brott, 1 Minn. 270, 66 Am. Dec. 541; Forbush v. Leonard, 8 Minn. 303; Crowley v. LeDuc, 21 Minn. 412.

In Missouri attorneys seem to have no lien on judgment. Frissell v. Haile, 18 Mo. 18; Lewis v. Kinealy, 2 Mo. App. 33.

In Mississippi an attorney has a lien on the judgment. Stewart v. Flowers, 44 Miss. 513; Pope v. Armstrong, 3 Sm. & Mar. 214, but not on land recovered. Martin v. Harrington, 57 Miss. 208.

In Montana attorneys have lien by statute for which see note to § 861, *supra*.

In Nebraska attorneys have lien by statute for which see note to § 861, *supra*. See Patrick v. Leach, 12 Fed. Rep. 661.

In Nevada this lien does not seem to have been passed upon.

In New Hampshire the attorney has a lien for the amount of his taxable fees and disbursements. Wells v. Hatch, 43 N. H. 246; Young v. Dearborn, 27 N. H. 324.

In New Jersey an attorney has a lien upon the judgment for his fees and disbursements after notice. Braden v. Ward, 42 N. J. L. 518; Heister v. Mount, 17 N. J. L. 438; Barnes v. Taylor, 30 N. J. Eq. 467.

In New York from the commencement of an action or the service of an answer of counter claim, the attorney has a lien for his agreed or reasonable compensation upon client's cause of action or counter claim, which attaches to the judgment and its proceeds and cannot be affected by a settlement between the parties. Code Civ. Proc. 1879, § 66. See *In re* Knapp, 85 N. Y. 284; Wright v. Wright, 70 N. Y. 96; Zogbaum v. Parker, 55 N. Y. 120; Marshall v. Meech, 51 N. Y. 143; Coughlin v. New York Cent. R. R. Co., 71 N. Y. 444; Rooney v. Second Ave. R. R. Co., 18 N. Y. 368.

In Oregon the statute is the same as in Minnesota, for which see note to § 861, *supra*.

In North Carolina lien does not appear to have been passed upon.

In Ohio lien on judgment does not exist. Diehl v. Friester, 37 Ohio St. 473.

In Pennsylvania the lien does not appear to exist.

In Rhode Island attorney has a lien for his costs. Horton v. Champlin, 12 R. I. 550, 34 Am. Rep. 722.

In South Carolina an attorney has a

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the particular suit in which the judgment or fund was recovered, and does not secure the attorney's general balance of account, nor fees earned or expenses incurred in other suits.[1]

Originally this lien applied only to such costs and charges of the attorney as were legally taxable as part of the costs in the cause, and did not operate to secure to the attorney the payment of his reasonable or agreed charges and disbursements in the suit, and this rule still applies in several States.[2] When this rule had its origin, however, the costs and charges taxable, were the costs and charges as between the attorney and his client, and constituted the measure of his compensation and reimbursement, while the costs taxable under modern statutes are, as a rule, costs as between party and party, and belong to the prevailing party, and do not determine or constitute the measure of the latter's liability to his attorney.[3]

In view of this distinction, the tendency of modern cases has been to extend the charging line so as to cover and protect the

lien for his taxable costs. Scharlock v. Oland, 1 Rich. 207.

In Tennessee an attorney has a lien upon the judgment and the property recovered. See Hunt v. McClanahan, 1 Heisk. 503; Brown v. Bigley, 3 Tenn. Ch. 618; Garner v. Garner, 1 Lea, 29; Winchester v. Heiskell, 16 Lea, 556; Pierce v. Lawrence, 16 Lea 572.

In Texas an attorney has no lien upon the judgment. Casey v. March. 30 Tex. 180.

In Vermont an attorney has a lien for his reasonable fees and disbursements. Weed v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821.

In Virginia attorneys have a lien by statute for their agreed compensation. Code 1873, Ch. 160, § 11.

In West Virginia attorney has the same lien as in Virginia. Code 1868, Ch. 119, § 11. See Renick v. Ludington, 16 W. Va. 379.

In Wisconsin attorney has a lien only on clear balance of judgment after all equities between the parties to the action have been settled. Bosworth v. Tallman, 66 Wis. 22; Yorton v. Milwaukee, &c. Ry Co., 62 Wis. 367.

In Wyoming an attorney has a lien by statute, for which see note, § 861, *supra*.

[1] Stephens v. Weston, 3 B. & C. 538; Hodkinson v. Kelly, 1 Hogan, 388; Hall v. Laver, 1 Hare, 571; Lucas v. Peacock, 9 Beav. 177.

In re Wilson, 12 Fed. Rep. 235; Phillips v. Stagg, 2 Edw. (N. Y.) Ch. 108; St. John v. Diefendorf, 12 Wend. 261; Pope v. Armstrong, 3 Smed. & M. (Miss.) 214; Weed v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821; Williams v. Ingersoll, 89 N. Y. 508; Wright v. Cobleigh, 21 N. H. 341; McWilliams v. Jenkins, 72 Ala. 480; Forbush v. Leonard, 8 Minn. 303; Mosely v. Norman, 74 Ala. 422; Jackson v. Clopton, 66 Ala. 29. *Ex parte* Lehman, 59 Ala. 631.

[2] *Ex parte* Kyle, 1 Cal. 331; Mansfield v. Dorland, 2 Cal. 507; Russell v. Conway, 11 Cal. 103.

[3] See Weed v. Boutelle, *supra*.

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amount due from the client to the attorney for his services and disbursements in the suit, whether that amount be fixed by agreement between the parties or be determined by the *quantum meruit*, and such is now the prevailing doctrine.[1] The modern statutes, also, as a rule, give this protection.

§ 871. **When Lien attaches.** In the absence of a statute creating it, the attorney has no charging lien upon his client's cause of action. His right of lien arises from the fact, that his efforts and disbursements have led to the recovery of a judgment, and it is upon that judgment that his lien is to take effect. The rule is, therefore, well settled that, in the absence of a statute giving it earlier effect, the lien does not attach until the entry of the judgment in favor of his client, and that the mere rendition of a verdict is not enough.[2]

Prior to the entry of the judgment, therefore, the opposite party may, except where some statute gives the attorney protection, settle the clause with the client without reference to the attorney or liability for his fees,[3] and this is true although the

[1] Warfield *v.* Campbell, 38 Ala. 527; McDonald *v.* Napier, 14 Ga. 89; Carter *v.* Davis, 8 Fla. 183; Carter *v.* Bennett, 6 Fla. 214; Pope *v.* Armstrong, 5 S. & M. (Miss.) 214; Henchey *v.* Chicago, 41 Ill. 136; Humphrey *v.* Browning, 46 Ill. 476; Hill *v.* Brinckley, 10 Ind. 102; Andrews *v.* Morse, 12 Conn. 444; Jackson *v.* Clopton, 66 Ala. 29; Mosely *v.* Norman, 74 Ala. 422; Lehman, *Ex parte*, 59 Ala. 631; Kinney *v.* Robinson, — Mich. —, 29 N. W. Rep. 86; Wells *v.* Elsam, 40 Mich. 218.

[2] Coughlin *v.* New York Central R. R. Co., 71 N. Y. 443, 27 Am. Rep. 75; Kusterer *v.* City of Beaver Dam, 56 Wis. 471, 43 Am. Rep. 725; Lamont *v.* Washington, &c. R. R. Co., 2 Mackey (D. C.) 502, 47 Am. Rep. 268; Courtney *v.* McGavock, 23 Wis. 622; Pulver *v.* Harris, 62 Barb. 500, affirmed, 52 N. Y. 73; Getchell *v.* Clark, 5 Mass. 309; Hobson *v.* Watson, 34 Me. 20; Foot *v.* Tewksbury, 2 Vt. 97; Henchey *v.* City of Chicago, 41 Ill. 136; Mosely *v.* Norman, 74 Ala. 422; Jackson *v.* Clopton, 66 Ala. 29; *Ex parte*, Lehman, 59 Ala. 631; Warfield *v.* Campbell, 38 Ala. 527, 82 Am. Dec. 724; Rooney *v.* Second Ave. R. R. Co., 13 N. Y. 368; Marshall *v.* Meech, 51 N. Y. 140, 10 Am. Rep. 572; Shank *v.* Shoemaker, 18 N. Y. 489; Walker *v.* Sargeant, 14 Vt. 247; Hutchinson *v.* Howard, 15 Vt. 544; Hooper *v.* Welch, 43 Vt. 169, 5 Am. Rep. 267; Weed *v.* Boutelle, 56 N. H. 570, 48 Am. Rep. 821; Wells *v.* Hatch, 43 N. H. 246; Young *v.* Dearborn, 27 N. H. 324; Brown *v.* Bigley, 3 Tenn. Ch. 618; Potter *v.* Mayo, 3 Me. 34; Gammon *v.* Chandler, 30 Me. 152; Hobson *v.* Watson, 34 Me. 20, 56 Am. Dec. 632; Averill *v.* Longfellow, 66 Me. 237; Newbert *v.* Cunningham, 50 Me. 231, 79 Am. Dec. 612.

[3] See cases cited in the preceding note. There are some English cases in which it is held that a settlement *before* judgment will not defeat the attorney's lien for his costs and that

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opposite party knew that the attorney was employed for a compensation contingent upon the result.[1]

§ 872. **To what Lien attaches.** The lien of the attorney attaches to the judgment or decree only, and does not, in the absence of a statute to that effect, extend to the property of his client which was the subject-matter of the controversy,[2] nor does

he may prosecute the action for the recovery of his costs, notwithstanding the settlement. See Swain *v.* Senate, 5 Bos. & Pul. 99; Cole *v.* Bennett, 6 Price, 15; Morse *v.* Cooke, 13 Price 473. The English cases, however, stand upon peculiar ground as the attorney's costs and charges, *as against his client*, are subject of taxation. Some cases in the United States have followed these English cases, as Talcott *v.* Bronson, 4 Paige (N. Y.) 501; Rasquin *v.* Knickerbocker Stage Co., 12 Abb. Pr. 324, s. c. 21 How. Pr. (N. Y.) 293; Dietz *v.* McCallum, 44 How. Pr. (N. Y.) 493; Howard *v.* Osceola, 22 Wis. 453. In certain cases, this rule has been adhered to where the opposite party had been given notice of the attorney's claim, as in Owen *v.* Mason, 18 How. Pr. (N. Y.) 156; Jones *v.* Morgan, 39 Ga. 310. But in nearly, if not quite, all of these cases, the costs which were protected were those only which were legally taxable.

This rule has not, however, been generally followed, and it can not be sustained upon principle. EARL, J., of the New York Court of Appeals, says of it: "It is impossible to ascertain when this practice commenced, or how it originated or upon what principle it was based. It was not upon the principle of a lien, because an attorney has no lien upon the cause of action, before judgment, for his costs; nor was it upon the principle that his services had produced the money paid his client upon the settlement, because that could not be known, and, in fact, no money may have been paid upon the settlement. So far as I can perceive, it was based upon no principle. It was a mere arbitrary exercise of power by the courts; not arbitrary in the sense that it was unjust or improper, but in the sense that it was not based upon any right or principle recognized in other cases. The parties being in court and the suit commenced and pending, for the purpose of protecting attorneys who were their officers and subject to their control, the courts invented this practice and assumed this extraordinary power to defeat attempts to cheat the attorneys out of their costs. The attorneys' fees were fixed and definite sums, easily determined by taxation, and this power was exercised to secure them their fees." In Coughlin *v.* New York Central R. R. Co., 71 N. Y. 443, 27 Am. Rep. 75. See also Lamont *v.* Washington, &c. R. R. Co., 2 Mackey (D C.) 502, 47 Am. Rep. 268, where the question is fully considered. See also Parker *v.* Blighton, 32 Mich. 266; Wright *v.* Hake, 38 Mich. 525. In Wisconsin it is held that where the action is upon a written instrument in the attorney's possession, the lien attaches before judgment. Courtney *v.* McGavock, 23 Wis. 622.

[1] Coughlin *v.* New York Central R. R. Co., *supra*; Kusterer *v.* City of Beaver Dam, 56 Wis. 471, 43 Am. Rep. 725.

[2] McWilliams *v.* Jenkins, 72 Ala. 480.

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it attach to land which was recovered, or the title to which was established, by the judgment or decree.[1]

§ 873. **How Lien protected.** The lien of the attorney will be protected against all collusive dealings between the client and the party against whom the judgment or degree is rendered, but the lien, except where enlarged by statute, is generally held to be coextensive with the rights of the client only, and is subject to, and may be defeated by, the judgment debtor's right to set-off, against the client, debts or demands which existed and were matters of set-off when the judgment or decree was rendered.[2] It is, however, superior to a set-off acquired afterwards.[3] Where the judgment is for costs only, it has been said to be, of itself, notice to all the world of the attorney's lien thereon, and the opposite party pays the judgment to the client at his peril.[4] Where, however, the judgment or decree is for damages and costs, it is generally held that it is not such notice, but that the attorney, who would preserve his lien as against a settlement by the opposite party with the client, must give the opposite party notice of his intention to insist upon the lien.[5] The statutes in

[1] McCullough *v.* Flournoy, 69 Ala. 189; Martin *v.* Harrington, 57 Miss. 208; Hinson *v.* Gamble, 65 Ala. 605; Hanger *v.* Fowler, 20 Ark. 667; Cozzens *v.* Whitney, 3 R. I. 79; Smalley *v.* Clark, 22 Vt. 598; Humphrey *v.* Browning, 46 Ill. 476, 95 Am. Dec. 446.

Contra, in Tennessee, Hunt *v.* McClanahan, 1 Heisk. 503; Brown *v.* Bigley, 3 Tenn. Ch. 618; Pierce *v.* Lawrence, 16 Lea 572; Winchester *v.* Heiskell, Id. 556.

[2] Mosely *v.* Norman, 74 Ala. 422; Jackson *v.* Clopton, 66 Ala. 29; *Ex parte* Lehman, 59 Ala. 631; McDonald *v.* Smith, 57 Vt. 502; Winterset Bank *v.* Eyre, 3 McCrary (U. S. C. C.) 175, 8 Fed. Rep. 733; Keith *v.* Fitzhugh, 15 Lea. (Tenn.) 49; Mohawk Bank *v.* Burrows, 6 Johns. (N. Y.) Ch. 317; Porter *v.* Lane, 8 Johns. (N. Y.) 357; Nicoll *v.* Nicoll, 16 Wend. (N. Y.) 446; Hurst *v.* Sheets, 21 Iowa, 501; Wright *v.* Treadwell, 14 Tex. 255. Gager *v.* Watson, 11 Conn. 168; Bosworth *v.* Tallman, 66 Wis. 22, 29 N. W. Rep. 542; Justice *v.* Justice, — Ind. —, 14 West. Rep. 275.

Contra, Puett *v.* Beard, 86 Ind. 172, 44 Am. Rep. 280; Currier *v.* Railroad Co., 37 N. H. 223.

[3] Warfield *v.* Campbell, 38 Ala. 527, 82 Am. Dec. 724; Caudle *v.* Rice, — Ga. — 3 S. E. Rep. 7; Boyle *v.* Boyle, 106 N. Y. 654, 12 North E. Rep. 709; Pierce *v.* Lawrence, 16 Lea (Tenn.) 572.

[4] McGregor *v.* Comstock, 28 N. Y. 237; Marshall *v.* Meech, 51 N. Y. 140, 10 Am. Rep. 572; Haight *v.* Holcomb, 16 How. (N. Y.) Pr. 173.

[5] Marshall *v.* Meech, *supra*; Hurst *v.* Sheets, 21 Iowa, 501; Dodd *v.* Brott, 1 Minn. 270, 66 Am. Dec. 541; Welsh *v.* Hole, 1 Doug. 238; Read *v.* Dupper, 6 T. R. 361.

Notice not required in Maine under

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some of the States expressly require notice to be given, while in others it does not seem to be requisite to the protection of the statutory lien.[1]

§ 874. **How Lien enforced.** To the extent of his lien the attorney is regarded as an equitable assignee of the judgment,[2] and, after notice of his claim, where the judgment is not of itself notice, he may, where no other remedy is provided by law, recover of the opposite party in the same manner as any other assignee.[3] If the fund be in the hands of the sheriff or other officer of the court, the attorney may, upon proper motion, have an order from the court for payment to him out of the fund.[4] And the same practice prevails where one of several attorneys has obtained possession of the fund,—the others may have an order requiring him to pay them.[5] The lien may be enforced though the attorney's claim is barred by the statute of limitations.[6]

§ 875. **How Lien lost or waived.** The attorney's lien upon the judgment may be lost or waived in the same manner as his lien upon papers and money already considered.[7] An attorney who abandons the cause loses his lien, though he abandons it because the client did not furnish funds to carry it on, or by reason of any other difficulty.[8]

§ 876. **By what Law governed.** The lien of an attorney upon a judgment obtained by him is governed by the law of the State where the judgment was obtained and the lien attached, and not by the law of the State where the judgment is sought to be collected; and the courts of the latter State will protect and enforce it according to the law of the former.[9]

the statute of that State. Gammon *v.* Chandler, 80 Me. 152; Hobson *v.* Watson, 34 Me. 20, 56 Am. Dec. 632; Newbert *v.* Cunningham, 50 Me. 231, 79 Am. Dec. 612.

In Michigan, see Weeks *v.* Wayne Circuit Judges, — Mich. —, 41 N.W. Rep. 269.

[1] See *ante*, § 861, note.

[2] Mosely *v.* Norman, 74 Ala. 422; Jackson *v.* Clopton, 66 Ala. 29; *Ex parte* Lehman, 59 Ala. 631.

[3] Wood *v.* Verry, 4 Gray (Mass.) 357; Stratton *v.* Hussey, 62 Me. 283; Currier *v.* Boston, etc. R. R. Co. 37 N. H. 223; Marshall v. Meech, 51 N.Y. 140, 10 Am. Rep. 572. But see *contra*, Horton *v.* Champlin, 12 R. I. 550, 34 Am. Rep. 722, holding that attorney can not sue on the judgment without his client's authority.

[4] Walker *v.* Floyd, 30 Ga. 237.

[5] Smith *v.* Goode, 29 Ga. 185.

[6] Higgins *v.* Scott, 2 B. & Ad. 413.

[7] See *ante*, §§ 865, 866.

[8] Matter of H. 93 N. Y. 381.

[9] Citizens' National Bank *v.* Culver, 54 N. H. 327, 20 Am. Rep. 134.

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VIII.

DEALINGS BETWEEN ATTORNEY AND CLIENT.

§ 877. **In general—Good Faith and perfect Fairness required.** The relation of attorney and client is one of special trust and confidence. From the free and intimate disclosures required by the relation, the attorney acquires, not only a full knowledge of his client's business and affairs, but of his necessities and weaknesses as well. His position is that of a confidential adviser and he naturally has great influence over his client. To an unscrupulous man, the attorney's position, in many instances, offers great temptations to take advantage of the knowledge acquired to make gain for himself by preying upon his client's confidence or necessities. The law, therefore, very properly requires that all of the dealings between the attorney and his client shall be characterized by the utmost fairness and good faith, and it scrutinizes with great closeness all transactions had between them.[1]

§ 878. **Purchases from, and Sales to Client—Adverse Purchases.** It has been seen in an earlier portion of the work, that an agent authorized to sell property for his principal will not, without the latter's full and intelligent consent, be permitted to sell to himself; that an agent authorized to buy may not without like consent, buy of himself, and that an agent whose duty it is to buy for his principal will not be permitted to buy for himself.[2] These rules apply with particular force to the case of the attorney. Thus it is held that the attorney will not be permitted, without full knowedge and consent on the part of the client, to purchase property of his client sold for taxes or sold in the course of litigation in which he was retained,[3] nor to buy, in his own name or interest, property in which his client was seeking to obtain an interest.[4] In such cases the sale may, at the option

[1] Weeks on Attys, § 268; Gray v. Emmons, 7 Mich. 533; Jennings v. McConnell, 17 Ill. 148; Baker v. Humphrey, 101 U. S. 494.

[2] See *ante*, §§ 454–472.

[3] May not purchase at execution or other like sale of client's property. Pearce v. Gamble, 72 Ala. 341; Briggs v. Hodgdon, 78 Me. 514, 7 Atl. Rep. 387. See also Wright v. Walker, 30 Ark. 44.

Cannot purchase client's land at tax sale. Cunningham v. Jones, 37 Kans. 477, 1 Am. St. Rep. 257.

[4] Harper v. Perry, 28 Iowa, 58. In Baker v. Humphrey, 101 U. S. 494, it appeared that an attorney employed by both parties to draw an agreement for the purchase of land for the sum of

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of the client, be held void, or the attorney may be charged as a trustee of his client and be required to account as such.[1]

$8,000, upon discovering a defect in the title, concealed the fact from one of the parties, and in accordance with a secret agreement with the other procured a conveyance by quit claim for the sum of $25, to E, his own brother. *Held*, that his conduct was a gross breach of professional duty and that E should be decreed on receiving the purchase money, $25, to convey to the injured party the premises, with covenant against the title of E, and all others claiming under him.

Mr. Justice SWAYNE said: "The employment to draw the contract was sufficient alone to put the parties in this relation to each other. Galbraith *v.* Elder, 8 Watts (Pa.) 81; Smith *v.* Brotherline, 62 Pa. St. 461. But whether the relation subsisted previously or was created only for the purpose of the particular transaction in question, it carried with it the same consequences. Williamson *v.* Moriarity, 19 Weekly Reporter, 818.

It is the duty of the attorney to advise the client promptly whenever he has any information to give which it is important the client should receive. Hoopes *v.* Burnett, 26 Miss. 428; Jett *v.* Hempstead, 25 Ark. 462; Fox *v.* Cooper, 2 Q. B. 827.

In Taylor *v.* Blacklow, 3 Bing. (N. C.) 235; an attorney employed to raise money on a mortgage, learned the existence of certain defects in his client's title and disclosed them to another person. As a consequence his client was subjected to litigation and otherwise injured. It was held that an action would lie against the attorney, and that the client was entitled to recover.

In Com. Dig. tit. 'Action upon the case for a Deceit, A 5,' it is said that such an action lies 'if a man, being entrusted in his profession, deceive him who entrusted him; as if a man retained of counsel became afterwards of counsel with the other party in the same cause, or discover the evidence or secrets of the cause.

So if an attorney act deceptive to the prejudice of his client, as if by collusion with the demandant he make default in a real action, whereby the land is lost.' It has been held that if counsel be retained to defend a particular title to real estate he can never thereafter, unless his client consent, buy the opposing title without holding it in trust for those then having the title he was employed to sustain. Henry *v.* Raiman, 25 Pa. St. 354. Without expressing any opinion as to the soundness of this case with respect to the extent to which the principle of trusteeship is asserted, it may be laid down as a general rule that an attorney can in no case, without the client's consent, buy and hold, otherwise than in trust, any adverse title or interest touching the thing to which his employment relates. He cannot in such a way put himself in an adversary position without this result. The cases to this effect are very numerous and they are all in harmony. We refer to a few of them. Smith *v.* Brotherline, 62 Pa. St. 461; Davis *v.* Smith, 43 Vt. 269; Wheeler *v.* Willard, 44 Id. 641; Giddings *v.* Eastman, 5 Paige (N. Y.) 561 Moore, *et al. v.* Bracken, 27 Ill. 23; Harper *v.* Perry, 28 Iowa, 57; Hockenbury *v.* Carlisle, 5 Watts & S. (Pa.) 348; Habedy *v.* Peters, 6 Jurist, pt. 1, 1,794; Jett *v.* Humpstead, 25 Ark. 462; Case *v.* Carroll, 35 N. Y. 385; Lewis *v.* Hillman, 3 H. L. Cas 607."

[1] Henry *v.* Raiman, 25 Penn. St.

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Private purchases by the attorney of the client's property are regarded with still greater strictness. In many cases it has been held that all such transactions are voidable at the election of the client,[1] but it is believed that the better rule does not go so far. There is no necessary incapacity for dealing between the client and attorney, and, though transactions between them will be very closely scrutinized, yet those which are obviously fair and just will be upheld. But the burden of proof is upon the attorney, and if he cannot produce evidence which puts the transaction beyond reasonable controversy, it will be set aside, or he will be regarded as a trustee for his client.[2]

So to sustain a gift from a client to his attorney, the burden is upon the latter to show not only that it was voluntary, but that it was made with full knowledge of all material facts and without undue influence.[3]

§ 879. **Relation of Attorney and Client must exist.** But in order to give these rules effect, it is necessary that the relation of attorney and client should exist between the parties. The mere fact that the opposite party in a transaction was an attorney at law, or that he offered to and did draw the necessary writings, which passed between the parties, gratuitously, is not enough. He must then have been the attorney of the complaining party. If he was merely the adverse party, the fact that he was at the same time an attorney at law will not invalidate the transaction, nor does it raise the presumption of fraud or undue influence.[4]

354, 64 Am. Dec. 703; Zeigler v. Hughes, 55 Ill. 288; Harper v. Perry, 28 Iowa, 57; Wheeler v. Willard, 44 Vt. 640; Case v. Carroll, 35 N. Y. 385; Johnson v. Outlaw, 56 Miss. 541.

[1] See Lane v. Black, 21 W. Va. 617.

[2] Taylor v. Young, 56 Mich. 285; Gray v. Emmons, 7 Mich. 533; Laclede Bank v. Keeler, 109 Ill. 385; Wharton v. Hammond, 20 Fla. 934; Merryman v. Euler, 59 Ind. 588, 43 Am. Rep. 564; Gruby v. Smith, 13 Ill. App. 43; Yeamans v. James, 27 Kan. 195, Kisling v. Shaw, 33 Cal. 425, 91 Am. Dec. 644; Starr v. Vanderheyden, 9 Johns. (N. Y.) 253, 6 Am. Dec. 275; Miles v. Ervin, 1 McCord's (S. C.) Ch. 524, 16 Am. Dec. 623; Lecatt v. Sallee, 3 Port. (Ala.) 115, 29 Am. Dec. 249.

[3] Whipple v. Barton, 63 N. H. 613; Walmesley v. Booth, 2 Atk. 25, 27; Cray v. Mansfield, 1 Ves. Sr. 379; Harris v. Tremenheere, 15 Ves. Jr. 34.

[4] Stout v. Smith, 98 N. Y. 25, 50 Am. Rep. 632.

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IX.

PRIVILEGED COMMUNICATIONS.

§ 880. **Confidential Communications privileged.** The purposes and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosures to the attorney of the client's objects, motives and acts. This disclosure is made in the strictest confidence, relying upon the attorney's honor and fidelity. To permit the attorney to reveal to others what is so disclosed, would be not only a gross violation of a sacred trust upon his part, but it would utterly destroy and prevent the usefulness and benefits to be derived from professional assistance. Based upon considerations of public policy, therefore, the law wisely declares that all confidential communications and disclosures, made by a client to his legal adviser for the purpose of obtaining his professional aid or advice, shall be strictly privileged;—that the attorney shall not be permitted, without the consent of his client,—and much less will he be compelled—to reveal or disclose communications made to him, or papers delivered to him, or letters or entries made by him, under such circumstances.[1]

The privilege extends to information derived from the client,

[1] Greenleaf on Ev. §§ 237-246; Hatton v. Robinson, 14 Pick. (Mass.) 416, 25 Am. Dec. 415; Beltzhoover v. Blackstock, 8 Watts. (Penn.) 20, 27 Am. Dec. 330; Coveney v. Tannahill, 1 Hill (N. Y.) 33, 37 Am. Dec. 287; Crosby v. Berger, 11 Paige (N. Y.) 377, 42 Am. Dec. 117; Bank of Utica v. Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; Patten v. Moor, 29 N. H. 169; Williams v. Fitch, 18 N. Y. 551; Britton v. Lorenz, 45 N. Y. 51, 57; Hunter v. Watson, 12 Cal. 363, 73 Am. Dec. 543; Thompson v. Kilborne, 28 Vt. 750, 67 Am. Dec. 742.

The principle upon which this rule is founded is said by Chief Justice SHAW to be this: "That so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country and maintaining them most safely in courts, without publishing those facts which they have a right to keep secret, but which must be disclosed to a legal adviser and advocate to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence by requiring that on such facts the mouth of the attorney shall be forever sealed." In Hatton v. Robinson, 14 Pick. (Mass.) 416, 25 Am. Dec. 415.

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as such, either by oral communications, or from books or papers shown to him by his client or placed in his hands in his character of attorney or counsel.[1]

§ 881. **Under what Circumstances privileged.** It is not necessary that the communication should be made in reference to a suit in court then pending or thereafter to be commenced,[2] or that it should be made under any special injunction of secrecy,[3] or that the client should understand the extent of the privilege,[4] or that the disclosure should be one strictly necessary to be made.[5] If it be made with a view to professional employment, and in reference to such employment in legal proceedings, pending or contemplated, or in reference to any other legitimate professional services, wherein professional advice or aid is sought respecting the rights, duties or liabilities of the client, it will fall within the privilege.[6]

But it is necessary that the communication should have been a confidential one, and should be made in reference to, or in pursuance of, the matter in which the attorney is consulted or engaged. For if it be made for the express purpose of being communicated to the adverse party or others,[7] or if it be made, freely and openly, in the presence of third persons,[8] or if it be made in reference to some matter having no connection with the attorney's employment, it will not be privileged.[9]

So the interests or protection of the client will not be permit-

[1] Crosby v. Berger, 11 Paige (N. Y.) 377, 42 Am. Dec. 117.

[2] "If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous." Lord Chancellor BROUGHAM, in Greenough v. Gaskell, 1 M. & K. 98, 103. Same point: Beltzhoover v. Blackstock, 3 Watts (Penn.) 20, 27 Am. Dec. 330; McLellan v. Longfellow, 32 Me. 494, 54 Am. Dec. 599; Bolton v. Corporation of Liverpool, 1 My. & K. 88; Bank of Utica v. Mersereau, 3 Barb. Ch. (N. Y.) 529, 49 Am. Dec. 189; Moore v. Bray, 10 Penn St. 524.

[3] McLellan v. Longfellow, *supra*, Parker v. Carter, 4 Munf. (Va.) 273, 6 Am. Dec. 513.

[4] McLellan v. Longfellow, *supra*.

[5] Cleave v. Jones, 7 Exch. 421, 8 Eng. L. & Eq. 554.

[6] McLellan v. Longfellow, *supra*, Lengsfield v. Richardson, 52 Miss. 443.

[7] Henderson v. Terry, 62 Tex. 281.

[8] Mobile, etc., Ry Co. v. Yeates, 67 Ala. 164; House v. House, 61 Mich. 69, 1 Am. St. Rep. 570; Hartford Fire Ins. Co. v. Reynolds, 36 Mich. 502.

[9] State v. Mewherter, 46 Iowa. 88.

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ted to contravene the public necessities and good. Hence communications, made in consultations, while seeking advice in regard to a proposed violation of law will not be privileged.[1]

But communications respecting a past or completed offense will be privileged.[2] So communications made in reference to an act which, while it amounts to a fraud, is not a crime or *malum in se*, are privileged, although the communications are made before the commission of the act.[3] So communications to an attorney, employed to draw an assignment for the benefit of creditors which is afterwards assailed as fraudulent, are privileged.[4]

§ 882. **Same Subject.** The privilege does not apply to cases where the attorney acquired the information, not as an attorney but by observation, in the same manner that any other person might have acquired it;[5] nor where the information was obtained from a person other than the client;[6] nor to a fact within his own knowledge.[7] So the privilege does not apply to statements

[1] "Professional communications are not privileged when such communications are for an unlawful purpose, having for their object the commission of a crime. They then partake of the nature of a conspiracy, or attempted conspiracy, and it is not only lawful to divulge such communications, but under certain circumstances it might become the duty of the attorney to do so. The interests of public justice require that no such shield from merited exposure shall be interposed to protect a person who takes counsel how he can safely commit a crime. The relation of attorney and client cannot exist for the purpose of counsel in concocting crimes. The privilege does not exist in such cases." CHAMPLIN, J., in People v. Van Alstine, 57 Mich. 69. To same effect: Greenough v. Gaskell, 1 M. & K. 98; State v. McChesney, 16 Mo. App. 259; People v. Mahon, 1 Utah, 205; State v. Mewherter, 46 Iowa, 88; Bank v. Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; Coveney v. Tannahill, 1 Hill (N. Y.) 33, 37 Am. Dec. 287; People v. Blakely, 4 Park. Cr. 176.

[2] 1 Greenleaf's Ev. § 240.

[3] Bank v. Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; Maxham v. Place, 46 Vt. 434.

[4] Hollenback v. Todd, 119 Ill 543.

[5] Davies v. Waters, 9 M. & W. 611; Crosby v. Berger. 11 Paige (N. Y.) 377, 42 Am. Dec. 117; Brandt v. Klein, 17 Johns, (N. Y.) 335; Chillicothe Ferry &c. Co v. Jameson, 48 Ill. 281; Stoney v. McNeil, Harper's (S. C.) L. 557, 18 Am. Dec. 666.

[6] Crosby v. Berger, *supra*; Hunter v. Watson, 12 Cal. 363, 73 Am. Dec. 543; Gallagher v. Williamson, 23 Cal. 331, 83 Am. Dec. 114. Communications to an attorney, by one not interested in the suit, though a nominal party, are not privileged. Allen v. Harrison, 30 Vt. 219, 73 Am. Dec. 302.

[7] Gallagher v. Williamson, *supra*. Coveney v. Tannahill, 1 Hill (N. Y.) 33, 37 Am. Dec. 287.

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made, in the presence of the attorney, by the client to other persons, or by such other persons to the client, or by such other persons to each other.[1]

The privilege does not apply to third persons who were present at the time the communications were made,[2] nor to the adverse party,[3] nor to communications made in the presence of both parties.[4]

Neither does the privilege apply to collateral facts, involving no matter of confidence. Thus the attorney may be required to disclose the fact of his retainer,[5] the name[6] of his client, and in what capacity,[7] and at what time,[8] he employed him; to prove the identity of his client,[9] and to testify to the execution of a deed by the client,[10] which the attorney attested as a witness; to disclose whether or not he has in his possession a paper of his client's,[11] in order to let in secondary evidence of its contents, and to state the manner[12] and time[13] of his obtaining it, but he cannot be compelled to produce it or to state its contents or purport;[14] to state whether he has received money for his client

[1] Gallagher *v.* Williams, *supra;* Coveney *v.* Tannahill, *supra;* Rochester City Bank *v.* Suydam, 5 How. Pr. (N. Y.) 254; Hatton *v.* Robinson, 14 Pick. (Mass.) 416, 25 Am. Dec. 415; House *v.* House, 61 Mich. 69, 1 Am. St. Rep. 570; Hartford Fire Ins. Co. *v.* Reynolds, 36 Mich. 502.

[2] Jackson *v.* French, 3 Wend. (N. Y.) 337, 20 Am. Dec. 699; Goddard *v.* Gardner, 28 Conn. 172; Hoy *v.* Morris, 13 Gray (Mass.) 519.

[3] Goddard *v.* Gardner, 28 Conn. 172; Hoy *v.* Morris, 13 Gray (Mass.) 519.

[4] Britton *v.* Lorenz, 45 N. Y. 51. Whiting *v.* Barney, 30 N. Y. 330, 86 Am. Dec. 385.

Root *v.* Wright, 21 Hun 348, s. c. 84 N. Y. 76; Sherman *v.* Scott, 27 Hun 334; Rosenburg *v.* Rosenburg, 40 Hun 100.

[5] Chirac *v.* Reinicker, 11 Wheat. (U. S.) 280; Forshaw *v.* Lewis, 1 Jur. (N. S.) 263.

[6] Levy *v.* Pope, 1 M. & W. 410; Brown *v.* Payson, 6 N. H. 443; Fulton *v.* Maccracken, 18 Md. 528, 81 Am. Dec. 620.

[7] Beckwith *v.* Benner, 6 C. & P. 681.

[8] Wheatley *v.* Williams, 1 M. & W. 533; Brown *v.* Payson, 6 N. H. 443.

[9] Beckwith *v.* Benner, 6 C. & P. 681; Hurd *v.* Moring, 1 C. & P. 372.

[10] Doe *v.* Andrews, Cowp. 845; Robson *v.* Kemp, 4 Esp. 235; Coveney *v.* Tannahill, *post.*

[11] Coveney *v.* Tannahill, 1 Hill (N. Y.) 33, 37 Am. Dec. 287; Jackson *v.* McVey, 18 Johns. (N. Y.) 330; Brandt *v.* Klein, 17 Johns. (N. Y.) 335; Bevan *v.* Waters, 1 M. & M. 235.

But see in Georgia, Dover *v.* Harrell, 58 Ga. 572.

[12] Allen *v.* Root, 39 Tex. 589.

[13] Rundle *v.* Foster, 3 Tenn. Ch. 658.

[14] Coveney *v.* Tannahill, *supra;* Jackson *v.* McVey, *supra;* Brandt *v.* Klein, *supra;* Wright *v.* Mayer, 6 Ves. 280; Rex *v.* Dixon, 3 Burr. 1687; Dover *v.* Harrell, 58 Ga. 572.

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and where he has deposited it;[1] to prove the fact that he drew a deed for his client,[2] and the time[3] when he did so; to prove his client's handwriting, from his general knowledge of it;[4] and the fact that the client swore to a bill in chancery.[5]

§ 883. **Relation of Attorney and Client must exist.** In order that the communications be privileged, it is necessary that the relation of attorney and client should exist at the time they were made,[6] although it is not necessary that there should be a formal retainer,[7] or the payment of a fee.[8] If they were made before the relation began,[9] or after it had wholly ceased, although made in reference to a subject which had formerly been protected by the relation,[10] they are not privileged. So if they were made casually merely, or to the attorney as a friend and not as an attorney, they would not be protected.[11]

And the attorney must have been employed as an attorney. If he is employed as a mere scrivener or conveyancer, to put in writing a contract or other instrument already agreed upon, and his advice or counsel as an attorney is not sought, he will be at liberty to testify as to what came to his knowledge during the transaction.[12] But if he be employed to give advice or counsel, as an attorney, as to the best form of instrument to accomplish

[1] Jeanes *v.* Fridenberg, 3 Pa. L. J. R. 199; Williams *v.* Young, 46 Iowa, 140.

[2] Rundle *v.* Foster, 3 Tenn. Ch. 658.

[3] Rundle *v.* Foster, *supra.*

[4] Johnson *v.* Daverne, 19 Johns. (N. Y.) 134, 10 Am. Dec. 198; and see Hurd *v.* Moring, 1 C. & P. 372, where the attorney was required to prove the handwriting though his knowledge was acquired solely from seeing his client sign the bail bond.

[5] Buller's N. P. 284; Doe *v.* Andrews, Cowp. 846.

[6] Earl *v.* Grout, 46 Vt. 113; Randolph *v.* Quidnick Co. 23 Fed. Rep. 278; Romberg *v.* Hughes, 18 Neb. 579; Rochester City Bank *v.* Suydam, 5 How. Pr. (N. Y.) 254.

[7] Earl *v.* Grout, *supra.*

[8] Cross *v.* Riggins, 50 Mo. 335.

[9] 1 Greenleaf Ev. § 244; Stoney *v.* McNeil, Harper's (S. C.) L. 557, 18 Am. Dec. 666.

[10] Yordan *v.* Hess, 13 Johns. (N.Y.) 492; Mandeville *v.* Guernsey, 38 Barb. (N. Y.) 225.

[11] 1 Greenleaf Ev. § 244.

[12] Hatton *v.* Robinson, 14 Pick. (Mass.) 416, 25 Am. Dec. 415; DeWolf *v.* Strader, 26 Ill. 225, 79 Am. Dec. 372; Smith *v.* Long, 106 Ill. 488; Todd *v.* Munson, 53 Conn. 579; Hebbard *v.* Haughian, 70 N. Y. 54; Machette *v.* Wanless, 2 Colo. 169; Randel *v.* Yates, 48 Miss. 688; House *v.* House, 61 Mich. 69, 1 Am. St. Rep. 570. Goodwin's Appeal, 117 Pa. St. 514, 2 Am. St. Rep. 696.

Contra: Parker *v.* Carter, 4 Munf. (Va.) 273, 6 Am. Dec. 513; Bank of Utica *v.* Mersereau, 3 Barb. (N. Y.) Ch. 528; 49 Am. Dec. 189; Getzlaff *v.* Seliger, 43 Wis. 297.

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the purpose or to protect the interests of his client, or to give an opinion as to the force or effect of the instrument, communications made to him will be privileged although he also draws the instrument.[1]

Communications made to an attorney by the party under the impression that the attorney had consented to act, are privileged, although the attorney himself may not have so understood the arrangement.[2]

§ 884. **Communications must have been made to an Attorney.** So the communications must have been made to an attorney at law[3] or to his clerk, agent, interpreter, or other representative.[4] If made to a mere student in his office,[5] or if made to a person not an attorney, though the client supposed him to be one,[6] they are not privileged.

So where a license is required, it protects communications made to a licensed attorney only.[7]

§ 885. **Privilege is the Client's.** The privilege is the privilege of the client and not of the attorney. The seal placed by the law upon the lips of the attorney can be removed only by the client or those who represent him, and it is not within the power of the attorney alone to waive or remove it.[8]

The client may, however, waive it if he sees fit during his life-time,[9]

[1] House *v.* House, *supra*; Bank of Utica *v.* Mersereau, *supra*; Parker *v.* Carter, *supra*.

[2] Alderman *v.* People, 4 Mich. 414, 69 Am. Dec. 321.

[3] The rule applies only to attorneys at law and not to attorneys in fact. McLaughlin *v.* Gilmore, 1 Ill. App. 563; Holman *v.* Kimball, 22 Vt. 555.

[4] "It is confined strictly" says Chief Justice SHAW, "to communications to members of the legal profession, as barristers and counsellors, attorneys and solicitors, and those whose intervention is necessary to secure and facilitate the communication between attorney and client, as interpreters, agents and attorneys' clerks." Foster *v.* Hall, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; Barnes *v.* Harris, 7 Cush. (Mass.) 576, 54 Am. Dec. 734.

But communications made to one who, though not an attorney, was a regular practitioner in justices' courts were held privileged. Benedict *v.* State, 44 Ohio St. 679.

[5] Barnes *v.* Harris, *supra*.

[6] Sample *v.* Frost, 10 Iowa, 266; Barnes *v.* Harris, *supra*.

[7] McLaughlin *v.* Gilmore, 1 Ill. App. 563.

[8] Hatton *v.* Robinson, 14 Pick. (Mass.) 416, 25 Am. Dec. 415.

[9] Tate *v.* Tate, 75 Va. 522; Sleeper *v.* Abbott, 60 N. H. 162; Chase's Case, 1 Bland (Md.) Ch. 206, 17 Am. Dec. 277; Parker *v.* Carter, 4 Munf. (Va.) 273, 6 Am. Dec. 513; Foster *v.* Hall, 12 Pick. (Mass.) 82, 22 Am. Dec.

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or it may be waived by those who represent him after his death.[1]

The client does not waive the privilege by making the attorney a witness upon other matters than that privileged, but if he examines him upon such subjects he waives the privilege, and the other party may cross-examine him on the same subjects.[2] Where there were several clients, the consent or waiver of all of them is necessary to make the attorney a competent witness.[3]

§ 886. **How long it continues.** The operation of the privilege is perpetual and, unless duly waived, survives not only the termination of the relation of attorney and client, but the lives of the attorney and client as well.[4] The death of the client does not remove it,[5] nor will the executor or administrator of the attorney be permitted to reveal papers or information confided to the attorney, and which he himself would not have been permitted to reveal.[6] The fact that the information is asked for in a suit to which the client is not a party makes no difference.[7]

§ 887. **Attorney may disclose for his own Protection.** But the attorney may disclose information received from the client when it becomes necessary for his own protection, as if the client should bring an action against the attorney for negligence or misconduct, and it became necessary for the attorney to show what his instructions were, or what was the nature of the duty which the client expected him to perform.[8] So if it became necessary for the attorney to bring an action against the client, the client's

400. Benjamin *v.* Coventry, 19 Wend. (N. Y.) 353; Whiting *v.* Barney, 30 N. Y. 330, 86 Am. Dec. 385; Riddles *v.* Aikin, 29 Mo. 453; Fossler *v.* Schriber, 38 Ill. 172; Stanton *v.* Hart, 27 Mich. 539; Passmore *v.* Passmore, 50 Mich. 626, 45 Am. Rep. 62.

Client waives it when he turns State's evidence and swears to an offense in which he was a party. Hamilton *v.* People, 29 Mich. 173.

[1] See Fraser *v.* Jennison, 42 Mich. 206.

[2] Vaillant *v.* Dodemead, 2 Atk. 524; Waldron *v.* Ward, Style 449.

[3] But a communication made to an attorney by two defendants is not privileged in a subsequent suit between the two. Rice *v.* Rice, 14 B. Mon. (Ky.) 417.

[4] Hatton *v.* Robinson, 14 Pick. (Mass.) 416, 25 Am. Dec. 415; Wilson *v.* Rastall, 4 T. R. 759; Parker *v.* Yates, 12 Moore, 520.

[5] 1 Greenleaf on Ev. § 243.

[6] 1 Greenleaf on Ev. § 239.

[7] Phillips' Ev. (6th Ed.) 131, Foster *v.* Hall, 12 Pick. (Mass.) 89, 22 Am. Dec. 400.

[8] Rochester City Bank *v.* Suydam, 5 How. Pr. (N. Y.) 254; Mitchell *v.* Bromberger, 2 Nev. 345, 90 Am. Dec. 550.

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privilege could not prevent the attorney from disclosing what was essential as a means of obtaining or defending his own rights.[1]

X.

TERMINATION OF THE RELATION.

§ 888. **By Operation of Law.** The relation of attorney and client would, in general, be terminated by the same causes which, by operation of law, serve to terminate the relation of any other principal to his agent.[2] Thus the death of the client,[3] his insanity,[4] or his bankruptcy[5] would undoubtedly dissolve the relation. So the death of the attorney,[6] his insanity,[7] his disbarment,[8] or his removal from the State[9] would effect the same result. War between the country of the client and that of the attorney would suspend the relation.[10]

§ 889. **By Act of the Parties.** The relation may also be dissolved by the act of the parties. Under what circumstances this may be done and with what effect have already been considered.[11]

[1] Mitchell v. Bromberger, *supra*.

[2] See that subject discussed, *ante*, § 239 *et seq.*

[3] Adams v. Nellis, 59 How. Pr. (N. Y.) 385; Harness v. State, 57 Ind. 1; Clegg v. Baumberger, 110 Ind. 536, 9 North E. Rep. 700; Laraugh v. Wilson, 48 Hun (N. Y.) 619.

[4] See *ante*, § 254.

[5] See *ante*, § 263.

[6] See *ante*, § 249.

[7] See *ante*, § 259.

[8] This would seem to be a necessary consequence.

[9] This would seem to follow from Matter of Mosness, 39 Wis. 509, 20 Am. Rep. 55.

[10] See *ante* § 269. Blackwell v. Willard, 65 N. C. 555, 6 Am. Rep. 749.

[11] See *ante*, §§ 855-857.

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CHAPTER II.

OF AUCTIONEERS.

§ 890. Purposes of this Chapter.

1. Of the Auctioneer.

891. Definition.
892. Who may be.
893. Whose Agent he is.

2. How Authorized.

894. Like other Agents.

3. Auctioneer's Implied Powers.

895. To fix Terms of Sale.
896. To accept the Bid.
897. To receive the Price.
898. To sue in his own Name for the Price.
899. None—To delegate his Authority.
900. None—To sell on Credit.
901. None—To rescind Sale.
902. None—To sell at private Sale.
903. None—To bid himself.
904. None—To warrant Quality.

4. Auctioneer's Duties and Liabilities to Principal.

905. Bound for reasonable Skill and Diligence.
906. To obey Instructions.
907. To account for Proceeds.
908. To take Care of Goods.
909. To sell for Cash only.
910. To sell to third Parties only.
911. To sell in Person.
912. To disclose his Principal.

5. Auctioneer's Duties and Liabilities to Third Persons.

§ 913. Liable when he conceals Principal.
914. Liable when he exceeds his Authority.
915. Liability for selling Property of Stranger.
916. Not liable for not holding Auction as advertised.

6. Auctioneer's Rights against his Principal.

917. Compensation, Reimbursement, Indemnity.
918. Recoupment of Damages.
919. Auctioneer's Lien.
920. Can not dispute Principal's Title.

7. Auctioneer's Rights against Third Persons.

921. Right to sue Bidder.
922. Right to sue Wrong doer.

8. Principal's Rights against Third Persons.

923. To recover purchase Price.
924. Where Bidder refuses to complete Purchase.

9. Rights of Third Persons against Principal.

925. Principal's Liability for Auctioneer's Acts.
926. Liable for Breach of Contract.

§ 890. **Purpose of this Chapter.** It is not the purpose of this chapter to discuss the subject of auctions or auction sales. Only that portion of those topics which bears upon the question of the agency of the auctioneer, is within the scope of this treatise.

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1. *Of the Auctioneer.*

§ 891. **Definition.** An auctioneer has been defined in the opening chapter of the work to be one whose business it is to sell or dispose of property, rights or privileges at public competitive sale, to the persons offering or accepting the terms most favorable to the owner. Other definitions and distinctions have there been considered.

§ 892. **Who may be.** As a general rule any person who is competent to act as agent, in other departments of business, may act in this. On account of the nature of his functions, however, there will be found, in many of the States, statutory enactments prescribing who may act as auctioneer, and upon what terms and conditions. These statutes usually require that the auctioneer shall be licensed, and shall give a bond for the faithful performance of his duty, and prescribe what fees he may recover and by what means.[2] Auctioneers are also not unfrequently the subject of municipal regulations.

§ 893. **Whose Agent he is.** An auctioneer employed by the owner of real or personal property or of rights of any kind, to sell or dispose of the same at auction, is primarily the agent of the owner, and of him alone; and he remains his agent exclusively up to the moment when he accepts the bid of the purchaser and knocks down the property to him. Upon the acceptance of the bid, however, the auctioneer becomes the agent of the purchaser also, to the extent that it is necessary to enable the auctioneer to complete the purchase and he may, therefore, bind the purchaser by entering his name as such and by signing the

[1] See *ante*, § 12.

[2] These statutes are collected in the Appendix to Bateman on Auctions. It is not within the scope of this work to give them, but the following cases may be referred to as illustrating their interpretation and application: Carpenter *v.* Le Count, 93 N.Y. 562; Russell *v.* Miner, 25 Hun (N. Y.) 114; Deposit *v.* Pitts, 18 Id. 475; Fretwell *v.* Troy, 18 Kans. 271; Crandall *v.* State, 28 Ohio St. 479; Daly *v.* Commonwealth, 75 Penn. St. 331; Hunt *v.* Philadelphia, 35 Id. 277; State *v.* Rucker, 24 Mo. 557; Oskaloosa *v.* Tullis, 25 Iowa, 440; Decorah *v.* Dunstan, 38 Id. 96; Waterhouse *v.* Dorr, 4 Me. 333; State *v.* Conkling, 19 Cal. 501; State *v.* Poulterer, 16 Id. 515; Wiggins *v.* Chicago, 68 Ill. 372; Wright *v.* Atlanta, 54 Ga. 615; Sewall *v.* Jones, 9 Pick. (Mass.) 412; Jordan *v.* Smith, 19 Id. 287; Clark *v.* Cushman, 5 Mass. 505; Amite City *v.* Clementz, 24 La. Ann. 27; Florance *v.* Richardson, 2 Id. 663; Gunnaldson *v.* Nyhus, 27 Minn. 440; McMechen *v.* Baltimore, 3 Har. & J. (Md.) 534.

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memorandum of the sale.[1] Such a signing is sufficient to satisfy the statute of frauds.[2] But in order to so bind the purchaser, the entry of the name of the purchaser must be done by the auctioneer or his clerk immediately upon the acceptance of his bid and the striking down of the property; it must be done at the time and place of the sale, and can not be done after the sale is over.[3] The principle upon which this rule is founded, as is said by a learned judge, is "that the auctioneer *at the sale* is the

[1] Bent *v.* Cobb, 9 Gray (Mass.) 397, 69 Am. Dec. 295; Doty *v.* Wilder, 15 Ill. 407, 60 Am. Dec. 756; Thomas *v.* Kerr, 3 Bush (Ky.) 619, 96 Am. Dec. 262; Walker *v.* Herring, 21 Gratt. (Va.) 678, 8 Am. Rep. 616.

[2] Bent *v.* Cobb, *supra;* Sanborn *v.* Chamberlin, 101 Mass. 409; Craig *v.* Godfroy, 1 Cal. 415, 54 Am. Dec. 299; Thomas *v.* Kerr, *supra;* Harvey *v.* Stevens, 43 Vt. 655; Hart *v.* Woods, 7 Blackf. (Ind.) 568; Adams *v.* McMillan, 7 Port. (Ala.) 73; O'Donnell *v.* Leeman, 43 Me. 158; Linn Boyd Tobacco Co. *v.* Terrill, 13 Bush (Ky.) 463; Brent *v.* Green, 6 Leigh (Va.) 16; Pike *v.* Balch, 38 Me. 302; Pugh *v.* Chesseldine, 11 Ohio, 109, 37 Am. Dec. 414; Farebrother *v.* Simmons, 5 B. & Ald. 333; Simons *v.* Motivos, 3 Burr. 1921; Hinde *v.* Whitehouse, 7 East. 558; White *v.* Proctor, 4 Taunt. 209; Emmerson *v.* Heelis, 2 Taunt. 38. But where the auctioneer is a party in interest, his memorandum is not sufficient. Bent *v.* Cobb, *supra;* Tull *v.* David, 45 Mo. 446, 100 Am. Dec. 385; Johnson *v.* Buck, 35 N. J. L. 342.

[3] "It appears now to be settled, by the English authorities, * * * * that the auctioneer is a competent agent to sign for the purchaser either of lands or goods at auction; and the insertion of his name as the highest bidder in the *memorandum* of the sale by the auctioneer, immediately on receiving his bid, and striking down the hammer, is a signing within the statute, so as to bind the purchaser." Chancellor KENT, in McComb *v.* Wright, 4 Johns. (N. Y.) 659, 663.

"It is now well settled, by authorities, that a sale of real estate at auction, where the name of the bidder is entered by the auctioneer, or by his clerk, under his direction, on the spot, and such entry if so connected with the subject and terms of sale as to make a part of the memorandum, is a contract in writing, so as to take the case out of the statute of frauds." STORY, J., in Smith *v.* Arnold, 5 Mason (U. S. C. C.) 414, 419.

"The name of the bidder must be entered by the auctioneer, or by his clerk under his direction, on the spot." SHAW, J., in Gill *v.* Bicknell, 2 Cush. (Mass.) 355, 358.

"The law, therefore, when it allows him (the auctioneer) to act in the nearly unprecedented relation of agent for both parties, imposes a qualification not applied in the usual cases of agency, and requires that the single act for which almost from necessity, he is authorized to perform for the buyer, shall be done at the time of sale, and before the termination of the proceedings." KENT, J., in Horton *v.* McCarty, 53 Me., 394–398. To the same effect, see: Craig *v.* Godfroy, 1 Cal. 415, 54 Am. Dec. 299; where the entry was held too late, though made in the afternoon of the same day; Hicks *v.* Whitmore, 13 Wend. (N. Y.) 548, where one hour's delay was held fatal.

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agent; that the purchaser, by the act of bidding, calls on him or his clerk, to put down his name as the purchaser. The entry being made in his presence, is presumed to be made with his sanction, and to indicate his approval of the terms thus written down. In such case there is but little danger of mistake or fraud. But if a third person, not present, or even the auctioneers, may afterward add the name of another purchaser, they may strike out the name already inserted, and substitute that of a new and different purchaser. They may defeat rights already vested. They may impose liabilities never contracted. The party to be charged may thus be held liable by a writing he never saw, signed by an agent of whom he never heard."[1]

2. *How Authorized.*

§ 894. **Like other Agents.** Authority may be conferred upon an auctioneer in the same manner as upon any other agent; that is, it may be conferred by formal writing, or by parol, or its existence may be implied from conduct. No formal authorization is necessary. Even to sell real estate, parol authority in the auctioneer is sufficient, in the absence of a statute to the contrary.[2]

Power to sell property does not imply authority to sell it at auction, and the purchaser at such a sale, who has notice of the agent's powers or of facts sufficient to put him upon an inquiry which would have disclosed the extent of his power, gets no title to the property.[3]

Sending goods to an auction room will, in the absence of anything to indicate a contrary intent, be deemed evidence of authority to sell them at auction, so as to protect a purchaser of them who buys in good faith.[4]

[1] STAPLES, J., in Walker v. Herring, 21 Gratt. (Va.) 678, 8 Am. Rep. 616.

[2] Doty v. Wilder, 15 Ill. 407, 60 Am. Dec. 756; Yourt v. Hopkins, 24 Ill. 329; Cossitt v. Hobbs, 56 Ill. 238.

[3] Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195.

"A sale at auction," says EASTMAN, J., in this case, "implies a sale at any price that may be offered. It is ordinarily the last resort to reduce property into money, and we should be slow to ratify the doings of an agent, clothed with the usual powers to sell, who should pursue such a course."

[4] Pickering v. Busk, 15 East. 38; Morgan v. Darragh, 39 Tex. 171.

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3. *Auctioneer's Implied Powers.*

§ 895. **To fix Terms of Sale.** The owner of property which he proposes to sell at auction has the primary right to prescribe the manner, conditions and terms of the sale, and where these are reasonable and are made known to the buyer, or where,—the auctioneer being ordinarily a special agent,[1]—the purchaser is charged with notice of them, they are binding upon him, and he cannot acquire a title in opposition to them against the consent of the owner.[2]

Where no such terms and conditions are prescribed by the owner, the auctioneer has implied power to prescribe such as are reasonable and usual in like cases;[3] but he has no implied power to waive or ignore the terms and conditions fixed by the owner and publicly made known, or to adopt any rules of his own inconsistent with them.[4] Persons purchasing, however, in good faith relying upon reasonable and usual terms fixed by the auctioneer, the owner having prescribed no others, would acquire a good title.[5]

[1] Bush *v.* Cole, 28 N. Y. 161, 84 Am. Dec. 343; The Monte Allegre, 9 Wheat. (U. S.) 645.

[2] Farr *v.* John, 23 Iowa, 286, 92 Am. Dec. 426. In this case it was held, *inter alia*, to be competent for the owner to provide that no bid less than a certain sum should be received, and hence that a purchaser who bid less obtained no title. So it is competent for the owner to reserve to himself one bid or to employ another to bid for him, but he must give fair notice of the fact, so that no one may be misled or deceived in the sale. Miller *v.* Baynard, 2 Houst. (Del.) 559, 83 Am. Dec. 168.

[3] Bateman on Auctions, 114.

[4] "The printed conditions under which a sale by auction proceeds cannot be varied or contradicted by parol evidence of the verbal statements of the auctioneer made at the time of sale, without it be for the purpose of proving fraud. Powell *v.* Edmunds, 12 East. 7; Shelton *v.* Livius, 2 Cromp. & J. 411; Slark *v.* Highgate Archway Co., 5 Taunt, 792. But parol evidence that is not repugnant to the printed terms of sale, but is consistent with, and explanatory of them, is admissible; Cannon *v.* Mitchell, 2 Desaus, Eq. 321; Wainwright *v.* Read, 1 Id. 573; Lessee of Wright & Deklyne, 1 Pet. C. C. 204." WAGNER, J., in Chouteau *v.* Goddin, 89 Mo. 229, 90 Am. Dec. 462. So as between seller and purchaser, evidence is admissible that certain of the conditions were waived. Mitchell *v.* Zimmerman, 109 Penn. St. 183, 58 Am. Rep. 715. And see Rankin *v.* Matthews, 7 Ired. (N. C.) L. 286; Satterfield *v.* Smith, 11 Id. 60, where parol evidence of what the auctioneer said was held to be admissible to explain, add to or vary the written terms of sale.

[5] Bush *v.* Cole, 28 N. Y. 261, 84 Am. Dec. 343, where it is held that

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§ 896. **To accept the Bid.** The auctioneer has, of course, implied authority to accept the bid most favorable to the seller, where the sale is made without reserve, and to strike the property down to the purchaser, for this is the very purpose for which he was employed. The nature of an auction sale implies, where no other terms are prescribed, that the property is to be sold to the person making the most favorable offer, and the auctioneer cannot therefore, in general, refuse bids.[1] But he is not required to accept the bid of an irresponsible or insufficient bidder, or of a bidder who refuses or neglects to comply with the terms of the sale.[2] So he should refuse bids from persons laboring under a legal incapacity, as infants, lunatics and drunken persons, and persons standing in a fiduciary capacity to the property.

§ 897. **To receive the Price.** The auctioneer has implied authority, in the absence of a known limitation to the contrary, to receive so much of the purchase price of personal property sold by him as, by the terms of the sale, is to be paid down, although the name of the owner be disclosed.[4] But this power to receive payment is limited to that which is to be made at the time of the sale. So it is not exclusive, and a payment by the purchaser to the owner would be good. In the case of real estate, the auctioneer has no general authority to receive the purchase price, which is not usually paid until the execution and delivery of the deeds by the owner; but he may receive so much of the purchase price and such deposits as are, by the terms of the sale, to be paid down.[5] He has however no implied authority to receive anything but cash in payment. He cannot barter, trade or receive other property in payment; nor can he accept depreciated or worthless bills.[6] Neither may he, without express

auctioneers selling real estate for less than the price fixed by the principal, do not bind him.

[1] Bateman on Auctions, 122.

[2] Hobbs *v.* Beavers, 2 Ired. 142, 52 Am. Dec. 500; Den *v.* Zellers, 7 N. J. L. 153; Michel *v.* Kaiser, 25 La. Ann. 57; Murdock's Case, 2 Bland (Md.) Ch. 461, 20 Am. Dec. 381.

[3] Bateman on Auctions, 123; Kinney *v.* Showdy, 1 Hill (N. Y.) 544.

[4] Thompson *v.* Kelly, 101 Mass. 291, 3 Am. Rep. 353; Williams *v.* Millington, 1 H. Bl. 81; Coppin *v.* Walker, 7 Taunt. 237.

[5] Sykes *v.* Giles, 5 M. & W. 645; Thompson *v.* Kelly, *supra*; Johnson *v.* Buck, 35 N. J. L. 338, 10 Am. Rep. 243.

[6] This rule stands upon the same footing as that which governs agents generally who are authorized to sell

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authority, receive checks, notes or bills of exchange in payment.[1]

§ 898. **To sue in his own Name for the Price.** In the case of personal property, an auctioneer employed to sell may ordinarily maintain an action in his own name for the price, or for the recovery of the goods if the conditions of the sale be not complied with.[2] This doctrine, says Judge WELLS, stands upon the right of the auctioneer to receive, and his responsibility to the principal for the price of the property sold, and his lien thereon for his commissions, which give him a special property in the goods intrusted to him for sale, and an interest in the proceeds.

In case of real estate he can have no such special property, and would not ordinarily be entitled to receive the price. But when the terms of his employment, and the authorized sale contemplate the payment of a deposit into his hands at the time of the auction, and before the completion of the sale by the delivery of the deed, he stands, in relation to such deposit, in the same position as he does to the price of personal property sold and delivered by him. He may receive and receipt for the deposit; his lien for commissions will attach to it, and we see no reason why he may not sue for it in his own name, whenever an action for the deposit, separate from the other purchase-money, may become necessary.[3] The auctioneer's right to sue is subject to the same set-off which could be made if the action were brought by the owner.[4]

§ 899. **None—To delegate his Authority.** Like other agents in whom a personal trust and confidence are reposed, the auctioneer has no authority to delegate to another the sale of the property entrusted to him to sell.[5] But this rule does not require

or receive payment for their principals.

[1] Broughton *v.* Silloway, 114 Mass. 71, 19 Am. Rep. 312; Williams *v.* Evans, L. R. 1 Q. B. 352; Sykes *v.* Giles, 5 M. & W. 645; Taylor *v.* Wilson, 11 Metc. (Mass.) 44. May take check for deposit where that is the custom. Farrer *v.* Lacy, 25 Ch. Div. 636.

[2] Thompson *v.* Kelly, 101 Mass. 291. 3 Am. Rep. 353; Tyler *v.* Freeman, 3 Cush. (Mass.) 261; Hulse *v.* Young, 16 Johns. (N. Y.) 1; Beller *v.* Block, 19 Ark. 566; Minturn *v.* Main, 7 N. Y. 220; Flanigan *v.* Crull, 53 Ill. 352.

[3] WELLS, J., in Thompson *v.* Kelly, *supra*. See also Johnson *v.* Buck, 35 N. J. L. 338, 10 Am. Rep. 243.

[4] Coppin *v.* Craig, 7 Taunt. 243; Grice *v.* Kenrick, L. R. 5 Q. B. 340.

[5] Stone *v.* State, 12 Mo. 400; Commonwealth *v.* Harnden, 19 Pick. (Mass.) 482; Blore *v.* Sutton, 3 Mer

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him to perform, in person, all of the mechanical or ministerial duties connected with the sale, and he may lawfully employ another person to make the outcry or wield the hammer under his immediate direction and supervision.[1]

§ 900. **None—To sell on Credit.** Sales at auction are presumed to be for cash in hand at the completion of the sale, and an auctioneer has, therefore, in the absence of a custom to the contrary, no implied power to give to the purchaser a term of credit upon the property purchased by him.[2]

§ 901. **None—To rescind Sale.** The auctioneer's duty is to *sell* only, and upon the completion of the sale his authority ceases. A bidder who desires to withdraw his bid may do so by publicly announcing that fact at any time before it is accepted; but after it is accepted, he has no right to withdraw it without the consent of the owner, and the auctioneer has no implied authority to permit him to do so.[3]

§ 902. **None—To sell at private Sale.** An auctioneer employed to sell at auction has no implied authority to sell at private sale,[4] and it makes no difference that he acted in good faith and sold the property for more than the minimum price fixed by the owner.[5]

§ 903. **None—To bid himself.** In accordance with the well settled principle that an agent, authorized to sell for his principal, can not, without the principal's consent, sell to himself, it is clear that an auctioneer has no implied authority to bid for and purchase the property he is employed to sell, either for himself or any other person, nor can he authorize any other person to bid and purchase for him, either directly or indirectly. Such a purchase is, therefore, not binding upon the seller.[6] As is well said

237; Coles v. Trecothick, 9 Ves. Jr. 234; Wolf v. Van Metre, 27 Iowa, 348; Singer Mnfg Co. v. Chalmers, 2 Utah, 542.

[1] Commonwealth v. Harnden, *supra*; Poree v. Bonneval, 6 La. Ann. 886.

[2] Williams v. Millington, 1 H. Bl. 81; Williams v. Evans, L. R. 1 Q. B. 352; Sykes v. Giles, 5 M. &. W. 645; Townes v. Birchett, 12 Leigh (Va.) 173.

[3] Nelson v. Aldridge, 2 Stark. 435; Boinest v. Leignez, 2 Rich. (S. C.) L. 464.

[4] Wilkes v. Ellis, 2 H. Bl. 555; Marsh v. Jelf, 3 Fost. & F. 234; Daniel v. Adams, Amb. 495; Seton v. Slade, 7 Ves. Jr. 276.

See *e converso* Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195.

[5] Daniel v. Adams, *supra*.

[6] Brock v. Rice, 27 Gratt. (Va.) 812; Randall v. Lautenberger, — R. I. —,

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by STAPLES, J.: "It is impossible with good faith to combine the inconsistent capacities of seller and buyer, crier and bidder, in one and the same transaction. If the * * * auctioneer faithfully discharges his duties, he will, of course, honestly obtain the best price he can for the property. On the other hand, if he undertakes to become the purchaser for himself, or for another, his interest and his duty alike prompt him to obtain the property upon the most advantageous terms. There is an irreconcilable conflict between the two positions."[1]

§ 904. **None—To warrant Quality.** In the absence of a custom to give such a warranty, an auctioneer has no implied authority to warrant the quality of the property sold by him.[2] Custom may, however, confer such a power, and, in general, the same warranties will be implied as would be implied from a similar sale of the same property by the owner himself, as in the case of a sale by sample.

4. *Auctioneer's Duties and Liabilities to Principal.*

§ 905. **Bound for reasonable Skill and Diligence.** Like the attorney, an auctioneer holds himself out to the public as one qualified to perform the duties of the calling which he professes; and the measure of the undertaking in the two cases is substantially the same. The auctioneer, therefore, is bound to possess and exercise a reasonable degree of skill and diligence not only in obtaining advantageous bids, but in so conducting as to secure the benefit of them to his employer, and if he fails of this, he is liable to his employer for an injury occasioned thereby.[3] But, like the attorney, he is not charged with infallibility, nor held liable for a mistake in a case where a reasonable doubt may be entertained.[4]

18 Atl. Rep. 100, 5 New Eng. Rep. 779; Hood *v.* Adams, 128 Mass. 207. One who acts simply as auctioneer or crier for an officer at an auction sale under a writ, the officer being present, may bid upon the property. Swires *v.* Brotherline, 41 Penn. St. 135, 80 Am. Dec. 601.

[1] In Brock *v.* Rice, *supra*.

[2] Blood *v.* French, 9 Gray (Mass.) 197; The Monte Allegre, 9 Wheat. (U. S.) 647. See Dodd *v.* Farlow, 11 Allen (Mass.) 426, 87 Am. Dec. 726.

[3] Denew *v.* Daverell, 3 Camp. 451. It is the duty of the auctioneer to call for the name of the bidder and enter the necessary memorandum to complete the sale, and if he fails to do this and his employer loses the benefit of the bid, the auctioneer is liable for the loss. Townsend *v.* Van Tassel, 8 Daly (N. Y.) 261.

[4] An auctioneer was held not liable

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§ 906. **To obey Instructions.** It is the duty of the auctioneer to observe the reasonable instructions of the owner as to the time, manner and terms of sale, and if he sells in violation of these instructions, he is responsible to the owner for a loss resulting therefrom.[1] Thus it is entirely competent for the owner to fix the price below which the goods shall not be sold, and it is the duty of the auctioneer to observe this limit either by publicly reserving to himself one bid for the owner, or by stating the limitation and starting the bids at the price fixed. For a violation of this duty, the auctioneer is liable to the owner for a loss sustained.[2]

§ 907. **To account for Proceeds.** It is the duty of the auctioneer, like other agents, to account to his employer for the proceeds of the goods sold by him.[3] He has a lien upon, and may deduct from, the proceeds his commissions for making the sales, and his reasonable and proper costs and charges, as the expenses of advertising, storing, insuring and caring for the goods, where these expenses are not covered by his commission.[4]

§ 908. **To take Care of Goods.** An auctioneer is not an insurer of the safety of the goods entrusted to him for sale, but he is under obligation to keep them with ordinary and reasonable care.[5] In this respect he stands upon the same footing as any other bailee for hire.

§ 909. **To sell for Cash only.** As has been seen, an auctioneer has no implied authority to give credit or to receive anything but cash in payment for the property sold, and this limitation upon his authority correlatively defines his duty to his employer.[6]

for a loss occasioned by his failure to comply with the requirements of the statute which had but recently been passed and was of doubtful construction and had not received judicial interpretation. Hicks v. Minturn, 19 Wend. (N. Y.) 550.

[1] Guerreiro v. Peile, 3 B. & Ald. 616; Bexwell v. Christie, Cowp. 395; Russel v. Palmer, 2 Wils. 325; Wilkinson v. Campbell, 1 Bay. (S. C.) 169.

[2] Steele v. Ellmaker, 11 Serg. & R. (Penn.) 86; Wolfe v. Luyster, 1 Hall (N. Y.) 146; Williams v. Poor, 8 Cranch (U. S. C. C.) 251.

[3] Tripp v. Barton, 13 R. I. 130; Harington v. Hoggart, 1 B. & Ad. 577.

[4] Harlow v. Sparr, 15 Mo. 184; Russell v. Miner, 25 Hun (N. Y.) 114; Carpenter v. Le Count, 22 Id. 106.

[5] Davis v. Garrett, 6 Bing. 716; Maltby v. Christie, 1 Esp. 340. If he agrees to insure he must do so, in good companies, or give his principal reasonable notice of his failure, that he may insure it himself. Callander v. Oelrichs, 5 Bing. N. C. 58; Shoenfeld v. Fleisher, 73 Ill. 404.

[6] See *ante*, §§ 892 and 895.

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If, notwithstanding this duty, the auctioneer gives credit, or receives in payment that which is not cash in hand, and the employer thereby suffers loss, the auctioneer is responsible.[1]

§ 910. **To sell to third Parties only.** It is likewise the duty of the auctioneer to sell to third persons only, and not to buy for himself directly or indirectly.[2] Such a purchase, as has been seen, is not binding upon the owner, and he may recover from the auctioneer the property so misappropriated, or may hold him liable in trover or other proper action.[3]

§ 911. **To sell in Person.** As has been also seen, the auctioneer has no implied authority to delegate his powers, but should perform them in person, except so far as they involve purely ministerial or mechanical duties.[4] For injuries resulting from such an unlawful delegation, the auctioneer is legally responsible.

§ 912. **To disclose his Principal.** An auctioneer, like other agents, should disclose his principal and contract in his name.[5] So if, while a sale is going on of property as the property of one person, the property of another is also put up for sale, this fact should be announced by the auctioneer, as without it a sale of the property of the latter person would not be binding upon one who bought it supposing it to be the property of the former.[6]

5. *Auctioneer's Duties and Liabilities to Third Persons.*

§ 913. **Liable where he conceals Principal.** An auctioneer who, at the time of the sale, discloses the name of his principal, and sells as his agent, incurs, while keeping within the limits of his authority, no personal liability to the purchaser upon the contract of sale:[7] but, on the other hand, the rule is well settled that an auctioneer who sells without disclosing his principal's name is personally liable upon the contract, and the purchaser may hold him personally responsible for its completion.[8]

[1] Williams *v.* Millington, 1 H. Bl. 82.

[2] See *ante*, § 898.

[3] See *ante*, § 461.

[4] See *ante*, § 899.

[5] See following section.

[6] Thomas *v.* Kerr, 3 Bush (Ky.) 619, 96 Am. Dec 262; Bexwell *v.* Christie, 1 Cowp. 395; Hill *v.* Gray, 1 Stark, 434; Coppin *v.* Craig, 7 Taunt. 243.

[7] Hanson *v.* Roberdeau, Peake's, N. P. 120.

[8] Hanson *v.* Roberdeau, *supra;* Jones *v.* Littledale, 6 Ad. & El. 486; Franklyn *v.* Lamond, 4 C. B. 637; Mills *v.* Hunt, 20 Wend. (N. Y.) 431; Thomas *v.* Kerr, 3 Bush (Ky.) 619, 96

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Thus where auctioneers struck off property of an undisclosed principal for a less sum than they were authorized to sell it for, thereby failing to bind the principal, it was held that the purchaser could recover of the auctioneers the deposit he had made, and the auctioneers' fees, with interest; and that if they knew they were not authorized so to sell, the purchaser could recover also what the premises were worth over and above the price bid therefor.[1] So where an auctioneer acting for an undisclosed principal, advertised a sale to be "without reserve," but on the sale permitted the owner of the property to bid over the highest bid offered by other bidders, and struck the property off to him, it was held that the next highest bidder could maintain an action against the auctioneer, for a breach of his contract to sell "without reserve."[2]

So where an auctioneer sells property without disclosing the principal's name and the purchaser is afterwards divested by a superior title, he may recover the purchase money of the auctioneer.[3]

§ 914. **Liable where he exceeds his Authority.** An auctioneer, like any other agent, may make himself personally liable to third persons for injuries which they sustain by reason of his failure to possess the authority which he assumed to exercise. The general rules which govern this question have been previously considered and it is unnecessary to repeat them here.[4]

In pursuance of those rules, an auctioneer would be held to an implied warranty of his authority to sell as he does. If he sells the goods as the goods of a named principal, a warranty would be implied that the goods were those of the principal named and that the auctioneer was authorized by him to sell them. *A fortiori* is he liable where he makes an express warranty of his principal's title.[5]

That he is charged with the liability of a principal where he

Am. Dec. 262; Schell v. Stephens, 50 Mo. 375; Scemuller v. Fuchs, 64 Md. 217, 54 Am. Rep. 766; Bush v. Cole, 28 N. Y. 261, 84 Am. Dec. 343.

[1] Bush v. Cole, *supra*.

[2] Warlow v. Harrison, 1 Ellis & Ellis, 295, on appeal, Id. 309.

[3] Scemuller v. Fuchs, *supra*.

[4] See *ante*, 542, *et seq.* See also Warlow v. Harrison, 1 El. & El. 309, cited in note 3 to § 917, *post*.

[5] Dent v. McGrath, 3 Bush (Ky.) 174.

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sells without disclosing the real principal, has been seen in the preceding section.

§ 915. **Liability for selling Property of Stranger.** An auctioneer who receives and sells stolen property is liable to the true owner, as for a conversion, although he acted in good faith, and received the property in the usual course of trade.[1]

So an auctioneer would undoubtedly be liable as for a conversion who, having received property for sale from one not having authority to cause it to be sold, proceeded to sell it or to pay over the proceeds after notice of the rights of the true owner, and without his authority;[2] and it has been held that an auctioneer who in good faith received and sold property for one whom he supposed to have the right to direct the sale, but who in fact had no such right, was guilty of a conversion.[3] But it has also been held that an auctioneer who, in good faith, has advanced money upon goods received from one who had fraudulently purchased them, would be protected as against the owner,[4] and his creditors.[5]

§ 916. **Not liable for not holding Auction as advertised.** An auctioneer who has advertised that he will sell property at auction at a certain time and place, is not liable, in the absence of fraud, to those who may incur expense or put themselves to trouble to attend, for not offering to sell the property at auction in accordance with the advertisement, although no notice had been given that the property would be withdrawn.[6] No such notice is required.

[1] Rogers v. Huie, 1 Cal. 429, 54 Am. Dec. 300. (But see s. c. 2 Cal. 571) Hoffman v. Carow, 20 Wend. (N. Y.) 21, s. c. 22 Id. 285. See also Koch v. Branch, 44 Mo. 542; Morris v. Hall, 41 Ala. 511.

[2] Milliken v. Hathaway (Mass.) 19 N. E. Rep. 16.

[3] Farebrother v. Ansley, 1 Camp. 343; Adamson v. Jarvis, 4 Bing. 66. But see Roach v. Turk, 9 Heisk. (Tenn.) 708, 24 Am. Rep. 360.

[4] Higgins v. Lodge, 68 Md. 229, 6 Am. St. Rep. 437.

[5] Lewis v. Mason, 94 Mo. 551; Baugh v. Kirkpatrick, 54 Penn. St. 84; Montieth v. Printing Co., 16 Mo. App. 450.

[6] Harris v. Nickerson, L. R. 8 Q. B. 286, 5 Eng. Rep. (Moak) 238. "The plaintiff says," remarked BLACKBURN J. "inasmuch as I confided in the defendant's advertisement, and came down to the auction to buy the furniture (which it is found as a fact he was commissioned to buy) and have had no opportunity of buying, I am entitled to recover damages of the defendant on the ground that the advertisement amounted to a contract by the defendant with anybody

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6. *Auctioneer's Rights against his Principal.*

§ 917. **Compensation—Reimbursement—Indemnity.** An auctioneer has an undoubted right to recover compensation for his services, according to the rate fixed by statute, or the contract of the parties, or by custom, and, where none of these modes apply, by a *quantum meruit*.[1] He is also entitled to be reimbursed for his reasonable and proper costs and charges, incurred in the execution of the agency.[2] He is also entitled to be indemnified by the principal against losses sustained or liabilities incurred, in the course of the performance of his undertaking, while he was acting in good faith and without negligence.[3] These results grow out of well settled principles applicable to other agents, which have been previously considered.

who should act upon it, that all the things advertised would be actually put up for sale, and that he would have an opportunity of bidding for them and buying. This is certainly a startling proposition, and would be excessively inconvenient if carried out. It amounts to saying that any one who advertises a sale by publishing an advertisement becomes responsible to everybody who attends the sale for his cab hire or travelling expenses. As to the cases cited in the case of Warlow *v.* Harrison, 1 El. & El. 295, the opinion of the majority of the judges in the Exchequer Chamber appears to have been that an action would lie for not knocking down the lot to the highest *bona fide* bidder when the sale was advertised as without reserve; in such a case it may be that there is a contract to sell to the highest bidder, and that if the owner bids, there is a breach of the contract. * * * In the present case, unless every declaration of intention to do a thing creates a binding contract with those who act upon it, and in all cases after advertising a sale, the auctioneer must give notice of any articles that are withdrawn, or be liable to an action, we cannot hold the defendant liable."

[1] Harlow *v.* Sparr, 15 Mo. 184.

[2] Russell *v.* Miner, 25 Hun (N. Y.) 114; Carpenter *v.* Le Count, 22 Id. 106.

[3] Warlow *v.* Harrison, 1 El. & El. 309. In this case an auctioneer had advertised to sell "without reserve," but before the property was struck down, the owner interposed a bid and it was struck off to him. The auctioneer was held liable to the highest *bona fide* bidder as for a breach of his contract to sell "without reserve," but it was also held that he was entitled to indemnity from his principal. Said MARTIN, B. at p. 317: "We entertain no doubt that the owner may at any time before the contract is legally complete, interfere and revoke the auctioneer's authority; but he does so at his peril; and, if the auctioneer has contracted any liability in consequence of his employment and the subsequent revocation or conduct of the owner, he is entitled to be indemnified."

So if an auctioneer in good faith had sold property of a third person, supposing it to be his principal's who had

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§ 918. **Recoupment of Damages.** But the principal may, as in other cases, recoup, against the auctioneer's claim for compensation, such damages as he may have sustained by reason of the auctioneer's failure in the performance of his duty.[1]

§ 919. **Auctioneer's Lien.** An auctioneer has a special property in, and a lien upon, the goods of his principal in his possession, and upon the proceeds thereof when sold, for his commissions and charges.[2] He may retain his commissions and charges from the proceeds of the sale,[3] or he may maintain an action for them against the principal.[4]

§ 920. **Can not dispute Principal's Title.** An auctioneer, when sued for the price of goods entrusted to him to be sold, can not set up a title to the goods in himself where he made no such claim until called upon for the proceeds.[5]

7. *Auctioneer's Rights against Third Persons.*

§ 921. **Right to sue Bidder.** The auctioneer's right to sue for the purchase price, and to recover the possession of the goods when the conditions of sale have not been complied with, has been already considered under the head of the implied authority of the auctioneer.[6]

§ 922. **Right to sue Wrong doer.** The auctioneer has such a special property in the goods in his possession, as will entitle him to maintain an action for the recovery of the goods or their value against a wrong doer, who injures or converts them.[7] As against

directed the sale, and was made to respond in damage, he would be entitled to indemnity from the principal. Farebrother *v.* Ansley, 1 Camp. 343; Adamson *v.* Jarvis, 4 Bing. 66. See also Allaire *v.* Ouland, 2 Johns. (N. Y.) Cas. 52; Turner *v.* Jones, 1 Lans. (N. Y.) 147; Howe *v.* Buffalo, &c. R. R. Co., 38 Barb. (N. Y.) 124; Castle *v.* Noyes, 14 N. Y. 332; Dugdale *v.* Lovering, L. R. 10 C. P. 196, 12 Eng. Rep. 316.

[1] See *ante*, § 647.

[2] Robinson *v.* Rutter, 4 El. & B. 954; Webb *v.* Smith, 30 Ch. Div. 192. An auctioneer, to whom assignees for the benefit of creditors have entrusted property for sale, has no lien upon the proceeds against the assignor's general creditors, the assignment being declared to be void. Hone *v.* Henriquez, 13 Wend. (N. Y.) 240, 27 Am. Dec. 204.

[3] Harlow *v.* Sparr, 15 Mo. 184; Succession of Dowler, 29 La. Ann. 437.

[4] Robinson *v.* Green, 3 Metc. (Mass.) 159.

[5] Osgood *v.* Nichols, 5 Gray (Mass.) 420; Hutchinson *v.* Gordon, 2 Har. (Del.) 179.

[6] See *ante*, § 898.

[7] Robinson *v.* Webb, 11 Bush (Ky.)

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a mere stranger, he could recover the full value of the goods, but as against the owner or one claiming under him, he could recover only to the extent of his special interest.[1]

8. *Principal's Rights against Third Persons.*

§ 923. **To recover purchase Price.** The sale is made of the principal's property and for his benefit, and he has therefore the prior right to recover the price agreed upon.[2] Even though his name was not disclosed, he has the right, like other undisclosed principals, to interpose before payment to the auctioneer, and appropriate the proceeds to himself, subject to any off-set which the purchaser has in good faith acquired against the auctioneer, before the disclosure of his principal.[3]

But if, where goods are being sold as the goods of A, the goods of B are also put up for sale without notice of that fact to the auctioneer or the bidders, a person who buys the goods of B, supposing them to be goods of A, may on being apprised of that fact repudiate the sale and B can not thereafter recover the price bid.[4]

§ 924. **Where Bidder refuses to complete Purchase.** When the bidder to whom goods have been struck off, refuses to complete his purchase, the remedy of the seller is, usually, by a resale of the goods, and an action against the defaulting bidder for the deficiency and the costs of the resale.[5] But in such a case the resale must have been fairly conducted, upon proper notice, before

464; Fitzhugh *v.* Wiman, 9 N. Y. 559; Beyer *v.* Bush, 50 Ala. 19; Lewis *v.* Mason, — Mo. —, 14 West. Rep. 719.

[1] See *ante*, § 765. Where a sheriff in an attachment against the consignor had taken goods from the possession of the auctioneer, who thereupon replevied and sold them, it was held that the amount of the auctioneer's recovery should be measured by the sum total of his advancements, commissions and charges, and that the surplus should be returned to the sheriff. Lewis *v.* Mason, *supra*.

[2] See *ante*, §§ 897-898. See also § 772.

[3] The fact that one sells at auction is not notice that he is not selling his own goods. Schell *v.* Stephens, 50 Mo. 379. See *ante*, § 773.

[4] Thomas *v.* Kerr, 8 Bush (Ky.) 619, 96 Am. Dec. 262.

[5] Boinest *v.* Leignez, 2 Rich. (S. C.) L. 464; Robinson *v.* Garth, 6 Ala. 204, 41 Am. Dec. 47; Lamkin *v.* Crawford, 8 Ala. 153; Johns *v.* Trick, 22 Cal. 511; Humphrey *v.* McGill, 59 Ga. 649; Cooper *v.* Borrall, 10 Penn. St. 491; Forster *v.* Hayman, 26 Penn. St. 266; Kelly *v.* Creen, 63 Penn. St. 299; Wilson *v.* Loring, 7 Mass. 393; Pettillo. *Ex parte*, 80 N. C. 50.

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the bidders have departed, and upon conditions and terms the same as, or no more onerous than, those of the first sale.[1]

9. *Rights of Third Persons against Principal.*

§ 925. **Principal's Liability for Auctioneer's Acts.** The liability of the seller for the acts and representations of the auctioneer rests upon the ordinary principles of agency. The auctioneer is usually a special agent, whose general powers are clearly defined.[2] The seller may, if he sees fit, confer greater powers upon him, but where he does not do so, the auctioneer's authority is limited to the *sale* of the property for *cash*, and, where the sale is without reserve, to the *highest bidder*, and to the consummation of the sale by the proper entries and the receipt of the purchase price.[3]

Secret limitations upon these general powers can not affect a purchaser who acts in good faith and in ignorance of them, relying upon the appearance of the auctioneer's authority; neither can the unwarranted assumption by the auctioneer of greater powers affect the principal who has given them no color of authority.

§ 926. **Liable for Breach of Contract.** A purchaser who has complied with the terms of sale on his part, may recover of the seller who refuses to complete the contract, such damages as he has sustained by the refusal, together with the deposits paid, and interest thereon after a demand and refusal.[4]

[1] Riggs *v.* Pursell, 74 N. Y. 370; Barnard *v.* Duncan, 38 Mo. 170, 90 Am. Dec. 416; Adams *v.* McMillan, 7 Port. (Ala.) 73; Judge *v.* Booge, 47 Mo. 544; Jones *v.* Null, 9 Neb. 254; Hill *v.* Hill, 58 Ill. 239.

[2] Bush *v.* Cole, 28 N. Y. 261, 84 Am. Dec. 343; The Monte Allegre, 9 Wheat. (U. S.) 645.

[3] The auctioneer cannot bind his principal by selling for less than the price limited by the latter, but he will be liable to the purchaser for breach of his implied warranty of authority. Bush *v.* Cole, *supra*.

[4] Cockcroft *v.* Muller, 71 N. Y. 367.

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CHAPTER III.

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I.

DEFINITIONS AND DIVISIONS.

§ 927. **Brokers—In general.** A broker has been defined, in the opening chapter of the work, to be one whose occupation it is to bring parties together to bargain, or to bargain for them, in matters of trade, commerce or navigation. As has been there stated, he differs from an auctioneer in that he has no special property in the goods which he may be authorized to sell; that he must sell them in the name of the principal, and that his sales are private and not at auction. He ordinarily receives a compensation or commission, usually called brokerage, but he may also serve gratuitously. He differs from a factor, also, in that he does not ordinarily have the possession of the property which he may be employed to sell, and that his contracts are always made in the name of his employer. As will be seen, he is primarily the agent of the first person who employs him, and he can not without the full and free consent of both, be, throughout the transaction, the agent of both parties. Without such consent, he can only act as the agent of the other party when the terms of the contract are fully agreed upon between the principals, and he is instructed to close it up.[1]

§ 928. **Different Kinds of Brokers.** Brokers are of many kinds, according to the particular class of transaction in which they engage. Thus there are money-brokers, stock-brokers, ship-

[1] See *ante* § 13, where other definitions and distinctions are referred to.

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brokers, bill-brokers, insurance-brokers, real estate-brokers, pawnbrokers, and general merchandise brokers.[1]

§ 929. **Bill and Note-Brokers.** "Bill and note brokers negotiate the purchase and sale of bills of exchange and promissory notes."[2]

Such a broker, like others, who discloses his principal and contracts in his name incurs no personal liability, while acting within the limits of his authority.[3] Where such a broker, however, does not disclose his principal, he is himself liable as principal to those with whom he deals, and where, under such circumstances, he sells negotiable paper, he will be held to an implied warranty not only of his authority to sell it, but also that the signatures of all the prior parties to it are genuine,[4] although if he does not indorse it or otherwise assume responsibility for its payment, he does not warrant their solvency.[5]

§ 930. **Exchange-Brokers.** "Exchange brokers negotiate bills of exchange drawn on foreign countries, or on other places in this country."[6]

§ 931. **Insurance-Brokers.** "Insurance brokers procure insurance and negotiate between insurers and insured."[7] The insurance broker is ordinarily employed by the person seeking the insurance, that is by the insured, and when so employed is to be distinguished from the ordinary insurance agent, who is commissioned and employed by the insurance company to solicit and write insurance by and in the company. The former is the agent of the insured; the latter is the agent of the insurers.[8]

[1] See *ante*, § 18.

[2] Bouvier's Law Dictionary, Title "Brokers."

[3] Lyons v. Miller, 6 Gratt. (Va.) 427; 52 Am. Dec. 129.

[4] Thompson v. McCullough, 31 Mo. 224, 77 Am. Dec. 644; Smith v. McNair, 19 Kans. 330, 27 Am. Rep. 117; Challiss v. McCrum, 23 Kans. 157; Bankhead v. Owen, 60 Ala. 457; Snyder v. Reno, 38 Iowa 329; Swanzey v. Parker, 50 Penn. St. 441; Merriam v. Wolcott, 3 Allen (Mass.) 260, 80 Am. Dec. 69; Worthington v. Cowles, 112 Mass. 30; Terry v. Bissell, 26 Conn. 23; Dumont v. Williamson, 18 Ohio St. 515; Bell v. Cafferty, 21 Ind. 411.

Contra: Fisher v. Rieman, 12 Md. 497. Baxter v. Duren, 29 Me. 434, 50 Am. Dec. 602, *contra* is practically overruled by Hussey v. Sibley, 66 Me. 192, 22 Am. Rep. 557; Ellis v. Wild, 6 Mass. 321, *contra* is overruled by Merriam v. Wolcott, *supra*.

[5] Aldrich v. Jackson, 5 R. I. 218.

[6] Bouvier's Law Dictionary. Title "Brokers."

[7] Bouvier's Law Dictionary. Title "Brokers."

[8] Hartford Fire Ins. Co. v. Reynolds, 36 Mich. 502.

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1. *The insurance agent*, as thus distinguished from the broker, is ordinarily held to be a general agent of the company.[1] As such a general agent, it is held that he may waive forfeitures and conditions in the policy, notwithstanding a provision therein that no agent has such power;[2] that he may waive prepayment of the premium, although the policy provides that it shall not take effect until the premium is paid;[3] that notice to him or knowledge by him is notice to, and knowledge by the company, so as to prevent the latter from insisting upon a forfeiture for a breach of condition, of which breach the company thus had knowledge;[4] that if facts regarding the risk are correctly stated to the agent, but erroneously inserted by him in the application, the company, and not the insured, is chargeable with his mistake;[5] that he may consent to prior or subsequent insurance on

[1] Miller *v.* Phœnix Ins. Co. 27 Iowa 203, 1 Am. Rep. 262.

[2] Carrugi *v.* Atlantic Fire Ins. Co., 40 Ga. 135, 2 Am. Rep. 567; Commercial Ins. Co. *v.* Spankneble, 52 Ill. 53,4 Am. Rep. 582; May *v.* Buckeye Mut. Ins. Co., 25 Wis. 291, 3 Am. Rep. 76; Carson *v.* Jersey City F. Ins. Co. 14 Vroom. (N. J.) 300, 39 Am. Rep. 584; Piedmont &c. L. Ins. Co. *v.* Young, 58 Ala. 476, 29 Am. Rep. 770; Whited *v.* Germania F. Ins. Co. 76 N. Y. 415, 32 Am. Rep. 330; Little *v.* Phœnix Ins. Co., 123 Mass. 380, 25 Am. Rep. 96; Gans *v.* St. Paul F. & M. Ins. Co. 43 Wis. 108, 28 Am. Rep. 535; Kruger *v.* Western F. & M. Ins. Co. 72 Cal. 91, 1 Am. St. Rep. 42; Combs *v.* Hannibal Ins. Co. 43 Mo. 148, 97 Am. Dec. 383; Viele *v.* Germania Ins. Co. 26 Iowa 9, 96 Am. Dec. 83.

The authorities upon this question are very numerous and no attempt is made to give them all.

[3] Young *v.* Hartford F. Ins. Co. 45 Iowa 377, 24 Am. Rep. 784; Dayton Ins. Co. *v.* Kelly, 24 Ohio St. 345, 15 Am. Rep. 612; Sims. *v.* State Ins. Co. 47 Mo. 54, 4 Am. Rep. 311; Bodine *v.* Exchange F. Ins. Co. 51 N. Y. 117, 10 Am. Rep. 566; Joliffe *v.* Madison Mut. Ins. Co., 39 Wis. 111, 20 Am. Rep. 35; Wooddy *v.* Old Dominion Ins. Co., 31 Gratt. (Va.) 362, 31 Am. Rep. 732; Lebanon Mut. Ins. Co. *v.* Hoover, 113 Penn. St. 591, 57 Am. Rep. 511; Sheldon *v.* Atlantic F. & M. Ins. Co., 26 N. Y. 460, 84 Am. Dec. 213.

But an insurance agent authorized to receive applications and collect and remit premiums but not to issue policies, has no power to extend the time of payment. Critchett *v.* American Ins. Co., 53 Iowa 404, 36 Am. Rep. 230.

[4] May *v.* Buckeye Mut. Ins. Co., 25 Wis. 291, 3 Am. Rep. 76; Ætna &c. Ins. Co. *v.* Olmstead, 21 Mich. 246, 4 Am. Rep. 483; Amazon Ins. Co. *v.* Wall, 31 Ohio St. 628, 27 Am. Rep. 523; American Central Ins. Co. *v.* McCrea, 8 Lea (Tenn.) 513, 41 Am. Rep. 647; Carrigan *v.* Lycoming F. Ins. Co. 53 Vt. 418, 38 Am. Rep. 687; Gans *v.* St. Paul F. & M. Ins Co. 43 Wis. 108, 28 Am. Rep. 535; Manhattan Fire Ins. Co. *v.* Weill, 28 Gratt. (Va.) 389, 26 Am. Rep. 364.

[5] Insurance Co. *v.* Williams, 39 Ohio St. 584, 48 Am. Rep. 474;

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the property;[1] and that a provision in the application or policy making him the agent of the insured, and not of the company, can not change his legal status as agent of the latter.[2]

2. *An insurance broker*, however, employed by the insured to obtain insurance for him, is the agent of the latter.[3] He is ordinarily a special agent. His acts, statements and representations made or done within the scope of his authority are binding upon his employer,[4] but when he has obtained the insurance as directed, his authority ceases, and, except where he is generally employed to attend to keeping up his principal's insurance,[5] he has no implied authority to return a policy for cancellation or to substitute another in its place,[6] and subsequent notice to him of the termination of the insurance, is not notice to his principal.[7] A provision in the policy that such notice may be given to the broker does not change this rule, nor can it be altered by usage among insurance men.[8]

Planters' Ins. Co. v. Sorrels, 1 Baxt. (Tenn.) 352, 25 Am. Rep. 780; Planters' Ins. Co. v. Myers, 55 Miss. 479, 30 Am. Rep. 521; Lycoming Fire Ins. Co. v. Jackson, 83 Ill. 302, 25 Am. Rep. 386; Commercial Ins. Co. v. Spankneble, 52 Ill. 53, 4 Am. Rep. 582; Insurance Co. v. Mahone, 21 Wall (U. S.) 152; Insurance Co. v. Wilkinson, 13 Id. 222; Miner v. Phœnix Ins. Co., 27 Wis. 693, 9 Am. Rep. 479; Winans v. Allemania F. Ins. Co., 38 Wis. 342; Kausal v. Minnesota Farmers' Ins. Ass'n, 31 Minn. 17, 47 Am. Rep. 776.

But see Blooming Grove &c. Ins. Co. v. McAnerney, 102 Penn. St. 335, 48 Am. Rep. 209.

[1] Carrugi v. Atlantic Fire Ins. Co., 40 Ga. 135, 2 Am. Rep. 567; Kitchen v. Hartford F. Ins. Co., 57 Mich. 135, 58 Am. Rep. 344.

[2] Planters' Ins. Co. v. Myers, 55 Miss. 479, 30 Am. Rep. 521; Kausal v. Minnesota Farmers' Ins. Ass'n, 31 Minn. 17, 47 Am. Rep. 776; Grace v. American Cent. Ins. Co., 109 U. S. 278; Commercial Ins. Co. v. Ives, 56 Ill. 402; Columbia Ins. Co. v. Cooper, 50 Penn. St. 331.

But see Rohrbach v. Germania Fire Ins. Co., 62 N. Y. 47, 20 Am. Rep. 451.

[3] Hartford F. Ins. Co. v. Reynolds, 36 Mich. 502.

[4] Standard Oil Co. v. Triumph Ins. Co. 64 N. Y. 85.

[5] Standard Oil Co. v. Triumph Ins. Co. *supra*.

[6] Bennett v. City Ins. Co., 115 Mass. 241; Van Valkenburgh v. Lenox F. Ins. Co., 51 N. Y. 465.

[7] Grace v. American Central Ins. Co. 109 U. S. 278; Hermann v. Niagara F. Ins. Co. 100 N. Y. 411, 53 Am. Rep. 197. White v. Connecticut F. Ins. Co., 120 Mass. 330.

[8] Grace v. American Central Ins. Co., *supra;* Hermann v. Niagara Fire Ins. Co. *supra;* White v. Connecticut F. Ins. Co., *supra;* Adams v. Manufacturers' & Builders' Ins. Co., 17 Fed. Rep. 630; Sullivan v. Phœnix Ins. Co., 34 Kans. 70; Planters' Ins. Co. v. Myers, 55 Miss. 479, 30 Am. Rep. 521; Eilenberger v. Protective Mut.

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3. *His duties to his employer* are similar to those of any other broker. He is bound to exercise reasonable care and diligence in selecting none but reliable companies, and in securing proper and sufficient policies to cover the risks against which he was employed to insure;[1] but he will not be liable if, in the exercise of such diligence, he selects a company then in good standing though it subsequently becomes insolvent.[2]

4. *His right to sue* upon the policy has been already touched upon in another place.[3] As there seen, where the policy is in his name or the loss is made payable to him, he may maintain the action in his own name.[4] His right in this case, however, as in others, is subordinate to the principal's right to bring the action himself[5] subject to equities where he was not disclosed,[6] but not where the principal's name is disclosed, as by being stated in in the policy.[7]

5. *His right to a lien* is considered hereafter.[8]

§ 932. **Merchandise Brokers.** "Merchandise brokers negotiate the sale of merchandise without having possession or control of it, as factors have."[9] Merchandise brokers are a numerous class, dealing with reference to all the varieties of commercial commodities. They are governed by the general rules of agency, as will be seen in the following sections, but there has also grown

F. Ins. Co., 89 Penn. St. 464; Gans v. St. Paul F. & M. Ins. Co., 43 Wis. 108, 28 Am. Rep. 535; Von Wien v. Scottish Ins. Co. 52 N. Y. Super. Ct. 490, 32 Alb. L. Jour. 488.

[1] Gettins v. Scudder, 71 Ill. 86; Park v. Hammond, 6 Taunt. 495; Mayhew v. Forrester, 5 Id. 615; See *ante*, § 510.

[2] Gettins v. Scudder, *supra*. See *ante*, § 510.

[3] See *ante*, § 756.

[4] Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72; 22 Am. Dec. 567; Farrow v. Commonwealth Ins. Co., 18 Pick. (Mass.) 53, 29 Am. Dec. 564; Provincial Ins. Co. v. Leduc, L. R. 6 P. C. 224, 11 Eng. Rep. 84.

[5] Farrow v. Commonwealth Ins. Co. 18 Pick. (Mass.) 53, 29 Am. Dec. 564; Newson v. Douglass, 7 H. & J. (Md.) 417, 16 Am. Dec. 317; Lazarus v. Commonwealth Ins. Co., 5 Pick. (Mass.) 76; Sargent v. Morris, 3 Barn. & Ald. 281; Aldrich v. Equitable Safety Ins. Co., 1 Woodb. & M. (U. S. C. C.) 276; Williams v. Ocean Ins. Co., 2 Metc. (Mass.) 305; Somes v. Equitable Safety Ins. Co., 12 Gray (Mass.) 532; Browning v. Provincial Ins. Co. L. R. 5 P. C. 263, 8 Eng. Rep. 217.

[6] Browning v. Provincial Ins. Co., L. R. 5 P. C. 263, 8 Eng. Rep. 217.

[7] Braden v. Louisiana State Ins. Co., 1 La. 220, 20 Am. Dec. 277. See also Sweeting v. Pearce, 7 C. B. N. S. 449; Scott v. Irving, 1 B. & Ad. 605.

[8] See *post*, § 980.

[9] Bouvier's Law Dictionary. Title "Brokers."

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up around their transactions a body of usages which enter into their negotiations and which have been recognized and enforced by the courts.

When such a broker has succeeded in making a contract, says Mr. Benjamin in his work on Sales,[1] "he reduces it to writing, and delivers to each party a copy of the terms as reduced to writing by him. He also ought to enter them in his book, and sign the entry. What he delivers to the seller is called the sold note; to the buyer, the bought note. No particular form is required, and from the cases it seems that there are four varieties used in practice. The *first* is where on the face of the notes the broker professes to act for both the parties whose names are disclosed in the note. The sold note, then, in substance, says, 'Sold for A B to C D,' and sets out the terms of the bargain; the bought note begins, 'Bought for C D of A B' or equivalent language, and sets out the same terms as the sold note, and both are signed by the broker. The *second* form is where the broker does not disclose in the bought note the name of the vendor, nor in the sold note the name of the purchaser, but still shows that he is acting as broker, not principal. The form then is simply, 'Bought for C D' and 'Sold for A B.' The *third* form is where the broker, on the face of the note, appears to be the principal, though he is really only an agent. Instead of giving to the buyer a note, 'Bought for you by me,' he gives it in this form: 'Sold to you by me.' By so doing he assumes the obligation of a principal, and cannot escape responsibility by parol proof that he was only acting as broker for another, although the party to whom he gives such a note is at liberty to show that there was an unnamed principal, and to make this principal responsible. The *fourth* form is where the broker professes to sign as a broker but is really a principal, as in the cases of Sharman *v.* Brandt[2] and Mollett *v.* Robinson,[3] in which case his signature does not bind the other party, and he cannot sue on the contract.

According to either of the first two forms, the party who receives and keeps a note, in which the broker tells him in effect, 'I have bought for you, or I have sold for you,' plainly admits that the broker acted by his authority, and as his agent, and the signature of the broker is therefore the signature of the party

[1] § 276.
[2] L. R. 6 Q. B. 720.
[3] L. R. 7 H. L. 802, 14 Eng. Rep. 177.

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accepting and retaining such a note; but according to the third form, the broker says, in effect, 'I myself sell to you,' and the acceptance of a paper describing the broker as the principal who sells, plainly repels any inference that he is acting as agent for the party who buys, and, in the absence of other evidence, the broker's signature would not be that of an agent of the party retaining the note; and by the fourth form, the language of the written contract is at variance with the real truth of the matter."

As to the rules governing the bought and sold notes, Mr. Benjamin gives the following summary:[1]

"First—The broker's signed entry in his book constitutes the contract between the parties, and is binding on both.[2]

Secondly—The bought and sold notes do not *constitute* the contract.[3]

Thirdly—But the bought and sold notes, when they correspond and state all the terms of the bargain, are complete and sufficient evidence to satisfy the statute; even though there be no entry in the broker's book, or, what is equivalent, only an unsigned entry.[4]

Fourthly—Either the bought or sold note alone will satisfy the statute, provided no variance be shown between it and the other note, or between it and the signed entry in the book.[5]

[1] Benjamin on Sales, § 294.

[2] "This proposition rests on the authority of Lord ELLENBOROUGH in Heyman *v.* Neale, 2 Camp. 337, of PARKE B. in Thornton *v.* Charles, 9 M. & W. 802, and of Lord CAMPBELL, C. J., and WIGHTMAN and PATTESON, J. J., in Sievewright *v.* Archibald, 17 Q. B. 115, 20 L. J. Q. B. 529 (and of the court in Thompson *v.* Gardiner, 1 C. P. D. 777). GIBBS, C. J., in Cumming *v.* Roebuck; Holt, 172, ABBOTT, C. J., in Thornton *v.* Meux; M. & M. 43, DENMAN, C. J., in Townsend *v.* Drakeford, 1 Car. & K. 20, and Lord ABINGER in Thornton *v.* Charles, 9 M. & W. 802, are authorities to the contrary, but they seem to have been overruled in Sievewright *v.* Archibald, 17 Q. B. 115, 20 L. J. Q. B. 529."

[3] "This is the opinion of PARKE B. in Thornton *v.* Charles, 9 M. & W. 802, of Lord ELLENBOROUGH in Heyman *v.* Neale, 2 Camp. 337, and was the unanimous opinion of the four judges in Sievewright *v.* Archibald, 17 Q. B. 115. The decision to the contrary, in the *nisi prius* case of Thornton *v.* Meux, M. & M. 43 and the *dictum* Goom *v.* Aflalo, 6 B. & C. 117, and Trueman *v.* Loder, 11 Ad. & E. 589, are pointedly disapproved in the case of Sievewright *v.* Archibald, 17 Q. B. 115, 20 L. J. Q. B. 529."

[4] "This was first settled by Goom *v.* Aflalo, 6 B. & C. 117, and reluctantly admitted to be no longer questionable in Sievewright *v.* Archibald, 17 Q. B. 115, 20 L. J. Q. B. 529."

[5] "This was the decision in Hawes *v.* Forster, 1 Mood. & Rob. 368, of the common pleas in Parton *v.* Crofts, 16

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Fifthly—Where one note only is offered in evidence, the defendant has the right to offer the other note or the signed entry in the book to prove a variance.[1]

Sixthly—As to *variance*. This may occur between the bought and sold notes where there is a signed entry, or where there is none. It may also occur when the bought and sold notes correspond, but the signed entry differs from them. If there be a signed entry, it follows from the authorities under the *first* of these propositions that this entry will in general control the case, because it constitutes the contract of which the bought and sold notes are merely secondary evidence, and any variance between them could not affect the validity of the original written bargain. If, however, the bought and sold notes correspond, but there be a variance between them taken collectively and the entry in the book, it becomes a question of fact for the jury whether the acceptance by the parties of the bought and sold notes constitute evidence of a *new* contract modifying that which was entered in the book.[2]

Seventhly—If the bargain is made by correspondence, and there is a variance between the agreement thus concluded and the bought and sold notes, the principles are the same as those just stated which govern variance between a signed entry and the bought and sold notes.[3]

Eighthly—If the bought and sold notes vary, and there is no signed entry in the broker's book, nor other writing showing the terms of the bargain, there is no valid contract.[4]

C. B. N. S. 11, 33 L. J. C. P. 189 (and of the common pleas division in Thompson *v.* Gardiner, 1 C. P. D. 777)."

[1] "Hawes *v.* Forster, 1 Mood. & Rob. 368, is direct authority in relation to the entry in the book, and in all the cases on variance, particularly in Parton *v.* Crofts, *supra*, it is taken for granted that the defendant may produce his own bought or sold note to show that it does not correspond with the plaintiff's."

[2] "This is the point established by Hawes *v.* Forster, 1 Mood & R. 368, according to the explanation of that case first given by PARKE B. in Thornton *v.* Charles, 9 M. & W. 802, afterwards by Patteson, J., in Sievewright *v.* Archibald, 17 Q. B. 115, 20 L. J. Q. B. 529, and adopted by the other judges in this last named case."

[3] "As decided in Heyworth *v.* Knight, 17 C. B. N. S. 298, 33 L. J. C. P. 298.

[4] [1 Chitty Contr. (11th Am. ed.) 551; Suydam *v.* Clark, 5 Sandf. 133; Butters *v.* Glass, 31 U. C. Q. B. 379.] "This is settled by Thornton *v.* Kempster, 5 Taunt, 786; Cumming *v.* Roebuck, Holt, 172; Thornton *v.* Meux, 1 M. & M. 43; Grant *v.* Fletcher, 5 B. & C. 436; Gregson *v.* Rucks, 4 Q. B. 747, and Sievewright *v.*

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Lastly—If a sale be made by a broker on credit, and the name of the purchaser has not been previously communicated to the vendor, evidence of usage is admissible to show that the vendor is not finally bound to the bargain until he has had a reasonable time, after receiving the sold note, to inquire into the sufficiency of the purchaser, and to withdraw if he disapproves." [1]

§ 933. **Pawnbrokers.** "Pawnbrokers lend money in small sums, on the security of personal property, at usurious rates of interest. They are licensed by the authorities and excepted from the operation of usury laws." [2] In this view they are not properly to be regarded as brokers at all, as they are ordinarily the principals in their part of the transaction rather than agents. Their business is usually regulated by the State or lesser municipal authority.

§ 934. **Real Estate Brokers.** "Real estate brokers negotiate the sale or purchase of real property. They are a numerous class, and in addition to the above duty, sometimes procure loans on mortgage security, collect rents, and attend to the letting and leasing of houses and lands." [3]

The general nature of their rights and duties will be considered in a subsequent section, when dealing of the broker's right to compensation.[4]

§ 935. **Ship Brokers.** "Ship brokers negotiate the purchase and sale of ships and the business of freighting vessels." [5]

Archibald, 17 Q. B. 115, 20 L. J. Q. B. 529. The only opinion to the contrary is that of ERLE, J. in the last named case. In one case, however, at *nisi prius*; Rowe *v.* Osborne, 1 Stark, 140, Lord ELLENBOROUGH held the defendant bound by *his own signature* to a bought note delivered to the vendor, which did not correspond with the note signed by the broker and sent to the defendant."

[1] "This was decided in Hodgson *v.* Davies, 2 Camp. 531, and as the special jury spontaneously intervened in that case, and the usage was held good without proof of it, it is not improbable that the custom might now be considered as judicially recognized by that decision, and as requiring no proof. See Brandao *v.* Barnett, 3 C. B. 519, on appeal to H. of L., s. c. 12 Cl. & Fin. 787, as to the necessity for proving mercantile usages. Also, 1 Smith's L. C. 602, ed. 1879; but it would certainly be more prudent to offer evidence of the usage."

[2] Bouvier's Law Dictionary. Title "Brokers."

[3] Bouvier's Law Dictionary. Title "Brokers."

[4] See *post*, § 966.

[5] Bouvier's Law Dictionary. Title "Brokers."

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§ 936. **Stock Brokers.** "Stock brokers are employed to buy and sell shares of stock in incorporated companies and the indebtedness of governments."[1] The stock broker regularly is employed as a broker merely, buying or selling in the name of his principal to whom he stands purely in the relation of an agent. But in modern times he is frequently employed in transactions in which he assumes a different character. These transactions are those in which the broker acting upon the order of his principal, but with his own money, purchases or sells stocks or securities for the principal for purposes of speculation. The stock-broker in these, as in other cases, usually acts for a commission agreed upon or regulated by usage, and the business is ordinarily confined to those brokers who are members of the stock-exchange.

The law governing the transactions of stock brokers is too extensive to be given fully here, but the ordinary course of a transaction between such a broker and his client has been described in a leading case in New York[2] as follows:—

"The customer employs the broker, to buy certain stocks for his account, and to pay for them, and to hold them subject to his order as to the time of sale. The customer advances ten per cent. of their market value, and agrees to keep good such proportionate advance according to the fluctuations of the market.

The broker undertakes and agrees:—

1. At once to buy for the customer the stocks indicated.[3]

2. To advance all the money required for the purchase, beyond the ten per cent. furnished by the customer.

3. To carry or hold such stocks for the benefit of the customer so long as the margin of ten per cent. is kept good, or until notice is given by either party that the transaction must be closed.[4] An

[1] Bouvier's Law Dictionary. Title "Brokers."

[2] Markham v. Jaudon, 41 N. Y. 256.

[3] It is the broker's duty where the quantity or price is fixed by the principal to observe the directions. Taussig v. Hart, 58 N. Y. 428; Day v. Holmes, 103 Mass. 308.

Like other brokers, the stock broker can not, without his principal's knowledge and consent, buy of or sell to himself. Taussig v. Hart, *supra*; Levy v. Loeb, 85 N. Y. 365; Day v. Holmes, *supra;* Stokes v. Frazier, 72 Ill. 428; Richardson v. Mann, 30 La. Ann. 1060; Maryland Fire Ins. Co. v. Dalrymple, 25 Md. 242; Baltimore Marine Ins. Co. v. Dalrymple, Id. 269; Bryson v. Rayner, Id. 424; Martin v. Moulton, 8 N. H. 504; Marye v. Strouse, 5 Fed. Rep. 483; Bischoffsheim v. Baltzer, 20 Id. 890.

[4] The broker must not close out

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appreciation in the value of the stocks is the gain of the customer, and not of the broker.[1]

4. At all times to have in his name, or under his control, ready for delivery, the shares purchased, or an equal amount of other shares of the same stock.[2]

5. To deliver such shares to the customer when required by him, upon the receipt of the advances and commissions accruing to the broker; or

6. To sell such shares upon the order of the customer, upon payment of the like sums to him, and account to the customer for the proceeds of such sale.[3]

Under this contract, the customer undertakes,—

1. To pay a margin of ten per cent. on the current market value of the shares.

2. To keep good such margin according to the fluctuations of the market.

3. To take the shares so purchased on his order, whenever required by the broker, and to pay the difference between the percentage advanced by him and the amount paid therefor by the broker.

The position of the broker is twofold. Upon the order of the customer, he purchases the shares of stock desired by him.

the transaction without the principal's authority unless, after reasonable notice, the latter has failed to keep good the margin. If he does, the broker will forfeit his commission; Ball v. Clark, 28 Fed. Rep. 179; Larminie v. Carley, 114 Ill. 196; Perin v. Parker, 17 Ill. App. 169; Blakemore v. Heyman, 23 Fed. Rep. 648, and be liable for the damages; Denton v. Jackson, 106 Ill. 433; Baker v. Drake, 66 N. Y. 518, 23 Am. Rep. 80.

But if the principal fail after notice to put up the necessary margin, the broker may sell after the customary and usual notice of the time and place, unless such notice has been waived. Corbett v. Underwood, 83 Ill. 324. 25 Am. Rep. 392; Baker v. Drake, 66 N. Y. 518, 23 Am. Rep. 80; Markham v. Jaudon, 41 N. Y. 256; Gruman v. Smith, 81 N. Y. 25; Knowlton v. Fitch, 52 N. Y. 288; Stenton v. Jerome, 54 N. Y. 480.

[1] Profits belong to the principal; Gruman v. Smith, 81 N. Y. 25.

[2] It is not necessary that the broker should keep the identical stock purchased. An equal amount of other shares of the same kind is sufficient. Stewart v. Drake, 46 N. Y. 453; Price v. Gover, 40 Md. 112; Marston v. Gould, 69 N. Y. 226; Levy v. Loeb, 85 N. Y. 365. See also, Gregory v. Wendell, 40 Mich. 432.

[3] It is the broker's duty to follow the principal's instructions as to the price or time at which he shall sell. See nature and effect of "stop-order" explained in Porter v. Wormser, 94 N. Y. 431.

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This a clear act of agency. To complete the purchase, he advances from his own funds, for the benefit of the customer, ninety per cent. of the purchase money. Quite as clearly, he does not in this act as an agent, but assumes a new position. He also holds or carries the stock for the benefit of the purchaser, until a sale is made by the order of the purchaser, or upon his own action. In thus holding or carrying, he stands also upon a different ground from that of a broker or agent, whose office is simply to buy and sell. To advance money for the purchase, and to hold and carry stocks, is not the act of a broker as such. In so doing, he enters upon a new duty, obtains other rights, and is subject to additional responsibilities."

"In my judgment" proceeds the same judge, "the contract between the parties to this action, was in spirit and in effect, if not technically and in form, a contract of pledge. To authorize the defendants to sell the stock purchased they were bound first to call upon the plaintiff to make good his margin; and failing in that, he was entitled secondly to notice of the time and place where the stock would be sold: which time and place, thirdly, must be reasonable." [1]

II.

APPOINTMENT AND TERMINATION.

§ 937. **Appointed like other Agents.** The broker, like other agents, derives his authority from the appointment of his principal, and in order to obtain rights himself, or establish liabilities to others, against his principal, the fact of his appointment must be made to appear. No special method is requisite, however, except where a statute prescribes it, but, as in the case of other agents, the appointment may be made by an instrument in writing, or by mere spoken words, or it may be presumed from the conduct of the parties.[2] The principal cannot be bound by, or be made liable for, services rendered by a broker which are

[1] See also Baker v. Drake, 53 N. Y. 211, 13 Am. Rep. 507, s. c. 66 N. Y. 518, 23 Am. Rep. 80; Stenton v. Jerome, 54 N. Y. 480; Taussig v. Hart, 58 N. Y. 425; Gruman v. Smith, 81 N. Y. 25; Maryland Fire Ins. Co. v. Dalrymple, 25 Md. 242; Child v. Hugg, 41 Cal. 519; Thompson v. Toland, 48 Cal. 99.

[2] See Howe Machine Co. v. Clark, 15 Kan. 492; Fischer v. Bell, 91 Ind. 243; Brown v. Eaton, 21 Minn. 409; Dickerman v. Ashton, Id. 538; Thompson v. Gardiner, L. R. 1 C. P. Div. 777.

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purely voluntary on the part of the latter and performed without the express or implied consent of the principal;[1] but even in such cases the principal may, by availing himself of the benefits of the services, not only ratify and confirm the acts done, but render himself liable to the broker for their value.[2]

§ 938. **How Authority terminated.** The authority of the broker may be terminated by operation of law, or by the act of his principal. What will operate, as matter of law, to dissolve the relation of principal and agent, and under what circumstances it may be terminated by the act of parties, are matters which have been already considered,[3] and the rules there laid down are applicable to this relation.

III.

IMPLIED POWERS OF BROKERS.

§ 939. **In general.** The field of the broker's operations lies within comparatively narrow limits. He is essentially a middleman, making contracts for the parties in many cases, but, not infrequently, simply introducing or bringing them together, and then leaving them to make the contract for themselves. He has, ordinarily, no possession of the goods he sells, and, hence, no special property in them. His powers are limited by the duty he undertakes, by the instructions he receives, and by the general scope of that branch of the business which he pursues; and he certainly has no general capacity to make contracts for his principal, outside of those limits.

§ 940. **How affected by Usage.** The law governing the transactions of brokers is the outgrowth of commercial usage, and, in almost no other branch of business, are the powers and duties of those who engage in it, so largely determined by reference to such usage as in the case of brokers. Particularly is this true of stock brokers, concerning whose operations, as conducted in this country, there has been developed a code of rules, which is not only observed by the brokers themselves, but which has, in many cases, been engrafted upon the law by judicial recognition and adoption.

[1] Hinds *v.* Henry, 86 N. J. L. 328; Market Co. *v.* Jackson, 102 Penn. St. 269; Keys *v.* Johnson, 68 Penn. St. 42; Holley *v.* Townsend, 16 How. (N. Y.) Pr. 125.

[2] Sibbald *v.* Bethlehem Iron Co., 83 N. Y. 378, 38 Am. Rep. 441. See Chapter on Ratification.

[3] See *ante*, §§ 198-270.

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Usages will not be enforced which the law deems to be unreasonable,[1] nor can an usage be permitted to contravene express instructions to the contrary;[2] but where a principal employs a broker to act for him in a particular market, it will, in the absence of express instructions to the contrary, be presumed not only that he authorized him to deal according to the general custom of brokers, but also to follow and observe the usage which govern the transactions of such business in the market in question.[3] That the principal was not informed of the usages will ordinarily make no difference if the usage be a general and reasonable one and be one which regulates the mode of performance of the contract merely and does not change its intrinsic character. It is his duty, before dealing or employing others to deal in such a market, to inquire as to such usages if he wished to provide against them.[4] But unless it be shown that he had such knowledge of it that he must be presumed to have contracted in reference to it, the principal cannot be bound by an usage which changes the character of the broker or the nature of the dealing.[5] So an usage not known to the principal cannot operate to author-

[1] See *ante*, § 485.

[2] See *ante*, §§ 281, 485.

[3] See *ante*, §§ 281, 485.

[4] See *ante*, §§ 281, 485.

[5] In Irwin *v.* Williar, 110 U. S. at p. 513, Mr. Justice MATTHEWS says: "The relation between the parties to this litigation was that of principal and agent; and the defendants in error, acting as brokers, in executing the orders to sell, undertook to obtain, and, as they allege in their declaration, did obtain a responsible purchaser; so that the plaintiff in error would, upon the contract of sale against such purchaser when disclosed, have been entitled to maintain an action in case of default in his own name. Although the broker guaranteed the sale, it was not a sale to himself; for, being agent to sell, he could not make himself the purchaser. The precise effect, therefore, of the custom proved was, that at the time of settlement, in anticipation of the maturity of the contracts, the brokers, by an arrangement among themselves, by a process of mutual cancellation, reduced the settlement to a payment of differences, exchanging contracts, so as to substitute new purchasers and new sellers respectively for the balances. The question is not whether in a given case, without the assent, express or implied, of the principal, this change of his rights and obligations can be effected (for that proposition is not doubtful), but whether the fact of his transacting business through a member of the Exchange, without other knowledge of the custom, makes it part of his contract with the broker.

In Nickalls *v.* Merry, L. R. 7 H. L. 530, 13 Eng. Rep. 55, it was said by Lord CHELMSFORD, p. 548, that the contract 'having been made between a broker and a jobber, members of the Stock Exchange, the usage of that body enters into, and to

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ize the making of an invalid instead of a valid contract, or to bind him to take one thing when he has ordered another.[1]

a certain extent determines and governs, the nature and effect of the contract.' To what extent such a custom shall be allowed to operate, as between the broker and his principal, was very thoroughly considered and finally decided by the House of Lords in the case of Robinson *v.* Mollet, L. R. 7 H. L. 802, 14 Eng. Rep. 177, after much division of opinion among the judges. The custom questioned in that case was one established in the London tallow trade, according to which, brokers, when they received an order from a principal for the purchase of tallow, made a contract or contracts in their own names, without disclosing their principals, either for the specific quantity of tallow so ordered, or to include such order with others in a contract for the entire quantity, or in any quantities at their convenience, at the same time exchanging bought and sold notes with the selling brokers, and passing to their principals a bought note for the specific quantity ordered by them. When a broker so purchased in his own name, he was personally bound by the contract. On the usual settling days, the brokers balanced between themselves the purchases and sales made, and made or received deliveries to or from their principals, as the case might be, or if their principals refused to accept or deliver, then they sold or bought against them, and charged them with the loss, if any; or if delivery was not required on either side, then any difference arising from a rise or fall in the market was paid by one to the other. It was held that this custom did not bind a principal giving an order to a broker to purchase for him, being ignorant of its existence. It was admitted by Lord CHELMSFORD, p. 836, 'that if a person employs a broker to transact for him upon a market, with the usages of which the principal is unacquainted, he gives authority to the broker to make contracts upon the footing of such usages, provided they are such as regulate the mode of performing the contracts and do not change their intrinsic character;' and he added, 'of course, if the appellant knew of the existence of the usage, and chose to employ the respondents without any restriction upon them, he might be taken to have authorized them to act for him in conformity to such usage.'

Mr. Justice BRETT, in his opinion, p. 816, points out very clearly that the custom, if allowed to prevail, would work a change in the relation between the broker and his principal, by permitting the agent to buy, to convert himself into a principal to sell.

Mr. Baron CLEASBY, p. 828, said: 'The vice of the usage set up in the present case cannot be appreciated by examining its parts separately. It must be looked at as a whole, and its vice consists, I apprehend, in this, that the broker is to make the contract of purchase for another whose interest as buyer is to have the advantage of every turn of the market; but if the broker may eventually have to provide the goods as principal, then it becomes his interest, as seller, that the price which he is to receive should have been as much in favor of the seller as the state of the market would admit. Thus the two positions are opposed.'

The principle of this decision seems to us to be incontrovertible, and applies in the present case."

[1] Perry *v.* Barnett, 15 Q. B. Div. 388.

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§ 941. **Usual and necessary Powers.** A broker, like any other agent, is presumed in the absence of anything to indicate a contrary intent, to be invested also with those incidental powers which are reasonable and necessary for the accomplishment of the object of his agency, and which are usually and ordinarily exercised under like circumstances. Thus if he be directed to make a contract for his principal, he has undoubted authority to bind his principal by the usual and ordinary terms and agreements, and to sign the necessary evidence thereof.[1]

§ 942. **Effect of his Instructions.** Like other agents, he is also bound to obey the instructions of his principal, but he will be justified in departing from those instructions if an unforeseen emergency arises not occasioned by his fault or neglect, and he acts in good faith and for the obvious and certain advantage of his principal.[2]

§ 943. **Acting for both Parties.** A broker is, ordinarily, an agent in whom a special trust and confidence are reposed. His principal, unless he agrees to less, is entitled to the undivided benefit of the broker's skill, knowledge and experience. If his principal, with full knowledge of the facts, consents to the broker's also acting for the other party in the same transaction, there is no legal objection to such a course;[3] but, except with such consent, the broker will not be permitted to assume a double agency.[4]

[1] See *ante*, § 311.

[2] Judson *v.* Sturges, 5 Day (Conn.) 556; Drummond *v.* Wood, 2 Caines (N. Y.) 310; Liotard *v.* Graves, 3 Id. 226; Forrestier *v.* Bordman, 1 Story (U. S. C. C.) 43. And see Foster *v.* Smith, 2 Cold. (Tenn.) 474, 88 Am. Dec. 604; Stollenwerck *v.* Thacher, 115 Mass. 224.

[3] Adams Mining Co. *v.* Senter, 26 Mich. 73; Colwell *v.* Keystone Iron Co., 36 Mich. 58; Fitzsimmons *v.* Southern Express Co., 40 Ga. 330, 2 Am. Rep. 577; Rowe *v.* Stevens, 53 N. Y. 621; Joslin *v.* Cowee, 56 N. Y. 626; Rolling Stock Co. *v.* Railroad, 34 Ohio St. 450; Leekins *v.* Nordyke, 66 Iowa 471; Alexander *v.* Northwestern University, 57 Ind. 466, and cases in following note.

[4] Hinckley *v.* Arey, 27 Me. 362; Copeland *v.* Mercantile Ins. Co. 6 Pick. (Mass.) 197; New York Ins. Co. *v.* National Ins. Co., 14 N. Y. 85; Meyer *v.* Hanchett, 39 Wis. 419, s. c. 43 Wis. 246; Greenwood *v.* Spring, 54 Barb. (N. Y.) 375; Sumner *v.* Charlotte, &c. R. R. Co., 78 N. C. 289; Shirland *v.* Monitor Iron Works, 41 Wis. 162; Bray *v.* Morse, 41 Wis. 343; Rice *v.* Wood, 113 Mass. 133, 18 Am. Rep. 459; Bell *v.* McConnell, 37 Ohio St. 396, 41 Am. Rep. 528; Stewart *v.* Mather, 32 Wis. 344; Farnsworth *v.* Brunquest, 36 Wis. 202; Farnsworth *v.* Hemmer, 1 Allen (Mass.) 494, 79

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§ 944. **Can not delegate his Powers.** For similar reasons the broker has no implied power to delegate to another the powers and duties confided to him.[1] This rule is, however, subject to the same exceptions which apply to the delegation by other agents, and in actual practice, particularly upon the stock exchange, it is a recognized usage for many of the transactions of the broker to be carried on through a substitute.[2]

§ 945. **Usually must act in the Name of his Principal.** The business of the broker being primarily to make contracts between others, he usually contracts only in the name of his principal, and it is a general rule that he has no implied power to act in his own name.[3] But this rule also is subject to be controlled by usage, and it has been held that a stock broker violates no duty to his principal, where he takes, in his own name, the title of stocks which he was directed to purchase for his principal, it being shown that such was the custom of brokers at that time and place.[4]

§ 946. **Implied Power to fix the Price.** A broker, who is instructed to buy or sell property, with no limitations as to the price, would have implied authority to agree upon the price and to bind his principal by such agreement, where the broker acts honestly and in good faith, and the price fixed is the usual one, or, where there is no usual price, then a fair and reasonable and not an extraordinary one.[5] If there is a market price, that price should govern in the absence of anything indicating a contrary intent on the part of the principal.[6]

Am. Dec. 756; Walker *v.* Osgood, 98 Mass. 348, 93 Am. Dec. 168; Raisin *v.* Clark, 41 Md. 158, 20 Am. Rep. 66; Lynch *v.* Fallon, 11 R. I. 311, 23 Am. Rep. 458; Pugsley *v.* Murray, 4 E. D. Smith (N. Y.) 245; Everhart *v.* Searle, 71 Penn. St. 256; Scribner *v.* Collar, 40 Mich. 375, 29 Am. Rep. 241.

[1] See *ante*, §§ 184–197.

[2] Gheen *v.* Johnson, 90 Penn. St. 38; Gregory *v.* Wendell, 40 Mich. 432; Rosenstock *v.* Tormey, 32 Md. 169, 3 Am. Rep. 125.

[3] "He is a mere negotiator between other parties," says Chief Justice Breese, "and never acts in his own name, but in the name of those who employ him." In Saladin *v.* Mitchell, 45 Ill. 79, 83; same point Baring *v.* Corrie, 2 B. & Ald. 143.

[4] Horton *v.* Morgan, 19 N. Y. 170, 75 Am. Dec. 311; Markham *v.* Jaudon, 41 N. Y. 239.

[5] See *ante*, § 362. Daylight Burner Co. *v.* Odlin, 51 N. H. 56, 12 Am. Rep. 45; Putnam *v.* French, 58 Vt. 402, 38 Am. Rep. 682.

[6] Bigelow *v.* Walker, 24 Vt. 149, 58 Am. Dec. 156.

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§ 947. **May sell with Warranty—when.** A broker, employed to sell property, has no implied general authority to warrant the quality of the property sold; but if it be such as, at the time and place at which he is authorized to sell, is usually sold under like circumstances with a warranty of quality, a broker employed to sell such property, without restrictions as to warranty, may give such a warranty upon the sale as is usually given in such cases.[1] So where a broker is given general authority to sell goods of a kind usually sold by sample, he may bind his principal by a sale by sample with its consequent warranty.[2]

In Massachusetts, however, it is held that usage will not justify the assumption of a power to warrant the merchantable quality of goods by the broker.[3]

§ 948. **When may sell on Credit.** A broker who is employed to sell goods, without restrictions as to the terms, has implied

[1] Pickert v. Marston, 68 Wis. 465, 60 Am. Rep. 876; Smith v. Tracy, 36 N. Y. 82; Herring v. Skaggs, 62 Ala. 180, 34 Am. Rep. 4; Upton v. Suffolk County Mills, 11 Cush. (Mass.) 586, 59 Am. Dec. 163; Ahern v. Goodspeed, 72 N. Y. 108; Dingle v. Hare, 7 C. B. (N. S.) 145, 97 Eng. Com. L. 145; Graves v. Legg, 2 Hurl. and N. 210; Bayliffe v. Butterworth, 1 Exch. 425. See also § 349 and notes.

[2] Andrews v. Kneeland, 6 Cow. (N. Y.) 354.

[3] In Dodd v. Farlow, 11 Allen (Mass.) 426, 87 Am. Dec. 726, it is held that a merchandise broker has no implied authority to warrant goods sold by him to be of a merchantable quality; and that such a power can not be conferred by a usage of trade. This case is clearly opposed to the doctrine of the text, but it seems to be contrary to the principle of the cases cited in support of the text.

In this case BIGELOW, C. J., said: "It was contended on the part of the plaintiffs that an authority to make such warranty is derived from the usage of trade; and evidence was offered from which, under instructions from the court, the jury have found that an authority was implied in case of a sale by a broker of the kind of merchandise described in the memorandum to insert a warranty of their quality which would be binding on the vendor. But notwithstanding this finding, we are clearly of opinion that the plaintiffs are not entitled to recover, because the alleged usage, on which the jury have based their verdict, is unauthorized by law, and cannot be regarded as valid. It contravenes the principle, which has been sanctioned and adopted by this court upon full and deliberate consideration, that no usage will be held legal or binding on parties which not only relates to and regulates a particular course or mode of dealing, but which also ingrafts on a contract of sale a stipulation or obligation which is different from or inconsistent with the rule of the common law on the same subject. Dickinson v. Gay, 7 Allen 34, 37, 83 Am. Dec. 656." See also to same effect Boardman v. Spooner, 13 Allen (Mass.) 353, 90 Am. Dec. 196.

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power to fix the terms of sale, including the time, place and mode of delivery and the price of the goods, and the time and mode of payment, and may, therefore, sell upon a reasonable credit in the absence of an usage to the contrary.[1]

§ 949. **No Authority to receive Payment.** The broker being employed to make contracts between others only, and not being entrusted with the possession of the goods he sells, or authorized to deliver them, has no implied authority to collect or receive payment for goods sold by him;[2] nor, it is held, can such authority be conferred by a mere local usage.[3] A payment made to the broker is, therefore, at the payer's own risk, unless from other circumstances, authority to receive it can be inferred.[4]

§ 950. **No Authority to rescind or arbitrate.** A broker's authority to make contracts carries with it no implied power to rescind that contract when made, without his principal's consent,[5] or to bind his principal by an agreement to submit to arbitration, disputes arising from it.[6]

IV.

DUTIES AND LIABILITIES TO PRINCIPAL.

§ 951. **Reasonable Skill and Diligence required.** The broker carries on an independent calling, requiring not only a knowledge of the rules of law and usage which govern his transactions, but also the exercise of judgment, discretion and diligence. Important interests are entrusted to his care and constant demands are made upon him for prudence, watchfulness and

[1] Boorman v. Brown, 3 Q. B. 511; Wiltshire v. Sims, 1 Camp. 258; Daylight Burner Co. v. Odlin, 51 N. H. 56, 12 Am. Rep. 45; Riley v. Wheeler, 44 Vt. 189; Dresden School District v. Ætna Ins. Co., 62 Me. 330.

[2] Campbell v. Hassel, 1 Stark, 233; Graham v. Duckwall, 8 Bush (Ky.) 12; Saladin v. Mitchell, 45 Ill. 79; Baring v. Corrie, 2 B. and Ald. 137; Seipel v. Irwin, 30 Penn. St. 513; Higgins v. Moore, 34 N. Y. 417; Gallup v. Lederer, 3 Thom. and C. (N. Y.) 710, s. c. 1 Hun, 282; Bassett v. Lederer, 1 Hun, 274.

[3] Higgins v. Moore, 34 N. Y. 417.

[4] See cases cited under first note to this section.

[5] Saladin v. Mitchell, 45 Ill. 79; see also Stilwell v. Mutual Life Ins. Co., 72 N. Y. 385; Stoddart v. Warren, 7 Rep. 517.

[6] Ingraham v. Whitmore, 75 Ill. 24; see also Michigan Central R. R. Co. v. Gougar 55 Ill. 503; Huber v. Zimmerman, 21 Ala. 488; Scarborough v. Reynolds, 12 Ala. 252.

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sagacity. He holds himself out to the public as qualified to perform the duties of his office, and, while he does not warrant the success of his undertakings, the law requires of him, as of other persons pursuing similar vocations, that he shall possess and exercise a reasonable degree of skill and knowledge, and that he will perform his undertakings with reasonable diligence and care. If he fails to satisfy this requirement and his principal suffers loss thereby, he will be held responsible for it.[1] In this respect his liability is similar to that of the attorney.

§ 952. **Fidelity to his Principal.** Like other agents in whom trust and confidence are reposed, the broker owes to his principal the utmost good faith and loyalty to his interests. He must not assume or continue the relation, if his duty to his principal and his own interests will come in conflict.[2] It is his duty, therefore, to freely and fully disclose to his principal at all times, the fact of any interest of his own, or of another client, which may be antagonistic to the interests of his principal,[3] and he will not be permitted to take advantage of his situation to make gain for himself by forestalling or undermining his principal.[4]

If he be employed to buy or sell property for his principal, he will not, without the principal's full knowledge and consent, be permitted directly or indirectly to buy of, or sell to, himself;[5] and it will make no difference that his motive was honest, and that he did better for his principal than if he had bought or sold in the open market.[6] In any such case, the principal may repudiate the transaction and regain his money or recover his property.[7] And no usage of trade, unless it be shown that the principal had such knowledge of it that he must be presumed to have

[1] Myles *v.* Myles, 6 Bush (Ky.) 237; Kempker *v.* Roblyer, 29 Iowa, 274; Stevens *v.* Walker, 55 Ill. 151; Chandler *v.* Hogle, 58 Ill. 46; Todd *v.* Bourke, 27 La. Ann. 385.

[2] See *ante*, § 455.

[3] See *ante*, § 455; Farnsworth *v.* Hemmer, 1 Allen (Mass.) 494, 79 Am. Dec. 756.

[4] See Davis *v.* Hamlin, 108 Ill. 39, 48 Am. Rep. 541; Pegram *v.* Railroad Co., 84 N. C. 696, 37 Am. Rep. 639; Atlee *v.* Fink, 75 Mo. 100, 42 Am. Rep. 385.

[5] See *ante*, §§ 457–466. See also Taussig *v.* Hart, 58 N. Y. 425. Cannot sell to or buy from a firm or corporation of which he is a member. Francis *v.* Kerker, 85 Ill. 190; Solomons *v.* Pender, 3 H. & C. 639.

[6] Taussig *v.* Hart, 58 N. Y. 425.

[7] See *ante*, §§ 454–466; Taussig *v.* Hart, *supra*.

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employed the broker with reference to it, will justify the broker in dealing with himself.[1]

§ 953. **Same Subject—Acting for both Parties.** For similar reasons, as has been seen, the broker will not be permitted, without the full knowledge and consent of his principal, to represent the other party also in the same transaction.[2] If he were commissioned to sell, his duty to the seller requires that he shall obtain as large a price as possible, while if he were commissioned to buy, his duty to the buyer would be to buy at as low a price as possible. To undertake to perform both duties at the same time, involves a manifest incongruity, and one or both of his principals must suffer from the attempt. If, however, each having full knowledge of his relations to the other, sees fit to trust him to bargain for him, there is no legal objection to such a course, and neither principal could complain.[3] But if neither has such knowledge, and each relies upon the broker's undivided alleg-

[1] Robinson *v.* Mollett, L. R. 7 H. of L. 802, 14 Eng. Rep. (Moak) 177, reversing L. R. 5 C. P. 646, L. R. 7 C. P. 84, 1 Eng. Rep. (Moak) 835; Farnsworth *v.* Hemmer, 1 Allen (Mass.) 494, 79 Am. Dec. 758; Walker *v.* Osgood, 98 Mass. 348, 93 Am. Dec. 168; Commonwealth *v.* Cooper, 130 Mass. 288; Raisin *v.* Clark, 41 Md. 158, 20 Am. Rep. 66.

[2] Raisin *v.* Clark, 41 Md. 158, 20 Am. Rep. 66; Scribner *v.* Collar, 40 Mich. 375, 29 Am. Rep. 541; Rice *v.* Wood, 113 Mass. 133, 18 Am. Rep. 459; Lynch *v.* Fallon, 11 R. I. 311, 23 Am. Rep. 458; Bell *v.* McConnell, 37 Ohio St. 396, 41 Am. Rep. 528; Walker *v.* Osgood, 98 Mass. 348, 93 Am. Dec. 168; Lyon *v.* Mitchell, 36 N. Y. 235, 93 Am. Dec. 502; Farnsworth *v.* Hemmer, 1 Allen (Mass.) 494, 79 Am. Dec. 756; Rupp *v.* Sampson, 16 Gray (Mass.) 398, 77 Am. Dec. 416; Maryland Fire Ins. Co. *v.* Dalrymple, 25 Md. 242, 89 Am. Dec. 779; Barry *v.* Schmidt, 57 Wis. 172; Everhart *v.* Searle, 71 Penn. St. 256; Murray *v.* Beard, 102 N. Y. 505; Meyer *v.* Hanchett, 43 Wis. 246; Robbins *v.* Sears, 23 Fed. Rep. 874; Bates *v.* Copeland, 4 McArthur (D. C.) 50; Collins *v.* Fowler, 8 Mo. App. 588.

[3] Alexander *v.* Northwestern University, 57 Ind. 466; Rice *v.* Wood, *supra;* Scribner *v.* Collar, *supra*; Bell *v.* McConnell, *supra;* Rowe *v.* Stevens, 53 N. Y. 621; Joslin *v.* Cowee, 56 N. Y. 626; Rolling Stock Co. *v.* Railroad Co., 34 Ohio St. 450; Leekins *v.* Nordyke, 66 Iowa, 471.

It is held in some cases that although the party who last employed the broker knew of his previous employment by the other party, yet the contract between the broker and his second employer is void as against public policy. See Lynch *v.* Fallon, 11 R. I. 311, 23 Am. Rep. 458; Raisin *v.* Clark, 41 Md. 158, 20 Am. Rep. 66; Everhart *v.* Searle, 71 Penn. St. 256; Meyer *v.* Hanchett, 43 Wis. 246.

Such an engagement would of course be a fraud upon the broker's first employer who had no knowledge that his agent was entering into the service of the opposite party.

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iance, it is an obvious fraud upon both, which the law will not tolerate, for him to undertake to represent both parties. A contract made under such circumstances would be voidable at the option of either party,[1] and each would have a cause of action against the broker for the commission paid to him, and for such other damages as had been sustained, or might defend upon that ground an action brought by the broker.[2] Where, however, the broker acts as a middleman merely, bringing together parties who then deal with themselves and make their own bargains, relying upon their own judgment and skill, it has been held in some cases that there is no inconsistency in the broker's attitude to either, and that no reason for complaint arises although he was employed by each without the knowledge of the other.[3] It is believed, however, that,—unless in exceptional cases where the broker is employed to bring two specified persons together, and has no duty in negotiation and has not engaged his skill, knowledge or influence,—this distinction is not sound in principle and that the same temptation, which the law seeks to avoid, exists in this case, to lead the broker to bring together those only who employ him, to the exclusion of others who might make better terms.[4]

[1] Herman *v.* Martineau, 1 Wis. 151, 60 Am. Dec. 368; Wassell *v.* Reardon, 11 Ark. 705, 54 Am. Dec. 245; Hinckley *v.* Arey, 27 Me. 362; Greenwood *v.* Spring, 54 Barb. (N. Y.) 375; Harrison *v.* McHenry, 9 Ga. 164, 52 Am. Dec. 435; Switzer *v.* Skiles, 3 Gilm. (Ill.) 529, 44 Am. Dec. 723.

[2] See cases cited under note 2 p. 785.

[3] Herman *v.* Martineau, 1 Wis. 151, 60 Am. Dec. 368; Stewart *v.* Mather, 32 Wis. 344; Orton *v.* Scofield, 61 Wis. 382; Mullen *v.* Keetzleb, 7 Bush (Ky.) 253; Rupp *v.* Sampson, 16 Gray (Mass.) 398, 77 Am. Dec. 416; Siegel *v.* Gould, 7 Lans. (N. Y.) 177.

[4] "Even if he had no authority to bind his principal, and was intrusted with no discretion in fixing the terms of the exchange, *and his only service was to bring the parties together*, he was bound to perform that service in the interest of the party who employed him. Such employment is not like the offer of a reward for the performance of some act which another may undertake or forego as he shall please. Employment implies acceptance of the service. A broker thus employed does not act in good faith if he turn aside all proposals that are not accompanied with an additional retainer or commission. Yet such is the temptation upon him, if he may levy a fee from both parties. When he has secured the retainer of the other party he is interested, in order to win his double commission, to bring together these two to the exclusion of all others. The interests of his principal are in danger of prejudice from this counter-interest in the agent. And besides, the broker is ordinarily and almost inevitably

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§ 954. **Duty to obey Instructions.** It is the duty of the broker to obey the instructions of his principal in all matters which the principal has the right to control. If instructed to buy or sell, he should carefully observe the limits fixed by the principal as to the amount, time, place, price and other terms and conditions of the transaction, and if he fails to do so, without reasonable excuse, he will be liable to the principal for the loss that may occur.[1] If the principal's instructions be ambiguous and capable of two constructions, and the broker, acting with good faith and reasonable prudence, pursues one of them, he can not be held liable because the principal may have intended the other.[2] So if an unexpected emergency arises, without the bro-

intrusted, to a greater or less extent, with the confidence of his principal, and a knowledge of his views and purposes. This is incompatible with like relations to the other party. From the very nature and necessities of the case, such two-fold interests and relations of the broker are inconsistent with the interests of the principal and should not be maintained without his knowledge and consent." WELLS, J., in Walker *v.* Osgood, 98 Mass. 348, 93 Am. Dec. 168. And, speaking of Rupp *v.* Sampson, *supra*, the same judge continues: "The verdict for the plaintiff was sustained in that case; but it was upon the distinct ground that under the instructions given to the jury, they must be held to have found that the defendant's promise to pay was given, *not for services in their employ as a broker, but for the performance of a certain specific act*, namely, the introduction of Clew (the other party) to them. The court considered that, so far as the mere performance of such an act was concerned, it could make no difference to the defendants, whether the plaintiff was in the employ and pay of the other party or not; and it was not such a fraud upon the other party, though concealed from him, as to render his contract with the defendants void for illegality. How far the plaintiffs dealings with the defendants were inconsistent (short of such illegality) with his obligations to Clew, was not for determination in that suit."

"The opinion has been expressed," says Mr. Justice GRAVES, in Scribner *v.* Collar, 40 Mich. 375, 29 Am. Rep. 541, "that where the person is employed merely as a middleman to bring persons together, and has no duty in negotiation, and has not engaged his skill, his knowledge, or his influence, he may lawfully claim pay from both parties. Rupp *v.* Sampson, 16 Gray, 398; Siegel *v.* Gould, 7 Lans. 177. No doubt such cases may occur, but their exceptional character should appear clearly, before they should be exempted from the general principle."

[1] Taussig *v.* Hart, 58 N. Y. 425; Pulsifer *v.* Shepard, 36 Ill. 513; Jones *v.* Marks, 40 Ill. 313; Knowlton *v.* Fitch, 52 N. Y. 288; White *v.* Smith, 54 N. Y. 522; Scott *v.* Rogers, 31 N. Y. 676; Baker *v.* Drake, 53 N. Y. 211, 13 Am. Rep. 507; s. c. 66 N. Y. 518, 23 Am. Rep. 80.

[2] See *ante*, § 484.

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ker's fault, rendering a strict compliance with his instructions impossible, and he adopts the course dictated by reasonable prudence and foresight, he will not be liable.[1] But in other cases, the broker disregards his principal's instructions at the risk of being compelled to make good a loss which may ensue therefrom.

Thus if he is instructed to effect insurance, and he wholly omits to do so, or so negligently performs that the insurance is valueless, or, in case of inability to effect the insurance, fails to give his principal timely notice of that fact, the risk is his own;[2] if he is directed to sell property at a certain time, or when it reaches a certain price, and fails to do so, he must make good a deficiency occasioned by a depreciation in the value within a reasonable time after the time fixed;[3] if he is instructed to buy upon a given day, or when the property reaches a certain price, and omits to do so, he will be liable for profits lost if, within a reasonable time, the property increases in value;[4] if he is directed to make a certain disposition of stocks, or other property in his possession, and makes a different disposition, he may be held liable, as for a conversion;[5] or if he is instructed to buy at a given price and buys at a greater, or to sell at a given price, and sells at a less price, he will be liable for the resulting loss.[6]

§ 955. **Duty to keep and render Accounts and pay Proceeds.** It is the duty of the broker to keep and preserve true and accurate accounts and records of all of his proceedings and transactions on account of his principal; and to render such accounts to

[1] See *ante*, § 481.

[2] Park *v.* Hammond, 4 Camp. 344; Perkins *v.* Washington Ins. Co., 4 Cow. (N. Y.) 645; Thorne *v.* Deas, 4 Johns. (N. Y.) 84; Gray *v.* Murray, 3 Johns. (N. Y.) Ch. 167; DeTastett *v.* Crousillat, 2 Wash. (U. S. D. C.) 132; Callander *v.* Oelrichs, 5 Bing. N. C. 58; Shoenfeld *v.* Fleisher, 73 Ill. 404.

[3] Taussig *v.* Hart, 58 N. Y. 425; Pulsifer *v.* Shepard, 36 Ill. 513; Jones *v.* Marks, 40 Ill. 313; Baker *v.* Drake, 53 N. Y. 211, 13 Am. Rep. 507, s. c. 66 N. Y. 518, 23 Am. Rep. 80; Scott *v.* Rogers, 31 N. Y. 676; Davis *v.* Garrett, 6 Bing. 716; Farwell *v.* Price, 30 Mo. 587; Schmertz *v.* Dwyer, 53 Penn. St. 335; Eby *v.* Schumacher, 29 Penn. St. 40.

[4] Baker *v.* Drake, 53 N. Y. 211, 13 Am. Rep. 507, and cases cited in preceding note.

[5] Baker *v.* Drake, 53 N. Y. 211, 13 Am. Rep. 507; s. c. 66 N. Y. 518, 23 Am. Rep. 80; Scott *v.* Rogers, 31 N. Y. 676.

[6] Laverty *v.* Snethen, 53 How. Pr. 152, 68 N. Y. 522, 23 Am. Rep. 184; Dufresne *v.* Hutchinson, 3 Taunt. 117; Sarjeant *v.* Blunt, 16 Johns. (N. Y.) 74.

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the principal within a reasonable time.[1] It is also his duty to pay to his principal, after deducting his own charges and commissions, where such may lawfully be charged, all moneys which may come into his hands for his principal's account.[2] As in other cases, all profits and advantage made by the broker, while engaged in the performance of his undertaking whether they are the fruit of the performance or violation of his duty to his principal, belong to the principal, and the broker must account to the latter for them.[3]

V.

DUTIES AND LIABILITIES TO THIRD PERSONS.

§ 956. **Not liable when Principal disclosed.** A broker, like other agents,[4] who contracts for and in the name of a disclosed principal, cannot be held personally liable upon such contract, if it be one which he was authorized to make.[5]

§ 957. **Liable when Principal concealed.** But where the broker conceals either the fact of his agency, or the name of his principal, and contracts in his own name, he will be held personally liable, although the principal may be liable also when discovered.[6] It is not enough to relieve the broker that the other party knew that he acted as an agent if he did not know who the principal was.

And he must have actual knowledge. Information sufficient to create an inference, or to put him upon inquiry has been held to be not enough.[7]

[1] Payne *v.* Waterston, 16 La. Ann. 239; Haas *v.* Damon, 9 Iowa, 589; Williams *v.* White, 70 Me. 138.

[2] See *ante*, § 522, *et seq.*

[3] See *ante*, § 469.

[4] See *ante*, § 555.

[5] Ferris *v.* Kilmer, 48 N. Y. 300; Tiller *v.* Spradley, 39 Ga. 35.

[6] Cobb *v.* Knapp, 71 N. Y. 348, 27 Am. Rep. 51; Youghiogheny Iron Co. *v.* Smith, 66 Penn. St. 340; Jessup *v.* Steurer, 75 N. Y. 613; Button *v.* Winslow, 53 Vt. 430; Baldwin *v.* Leonard, 39 Vt. 266; 94 Am. Dec. 324; Gerrard *v.* Moody, 48 Ga. 96; Beymer *v.* Bonsall, 79 Penn. St. 298; Baltzen *v.* Nicolay, 53 N. Y. 470; York Co. Bank *v.* Stein, 24 Md. 447; Jones *v.* Ætna Ins. Co. 14 Conn. 501; Wheeler *v.* Reed, 36 Ill. 82; Poole *v.* Rice, 9 W. Va. 73.

Where a broker sold "for and on account of owner" who was not named, it was held that a custom to charge the broker as well as the principal, was not inconsistent with the contract, and was admissible. Pike *v.* Ongley, 18 Q. B. Div. 708. See also Barrow *v.* Dyster, 13 Id. 635; Hutcheson *v.* Eaton, Id. 861.

[7] Cobb *v.* Knapp, 71 N. Y. 348, 27 Am. Rep. 51; Raymond *v.* Crown &

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§ 958. **Liable when he expressly charges himself.** And so, though the principal be known, it is competent for the broker, if he so elect, to charge his own individual credit, and where he has done so, he is, of course, personally responsible.[1] Whether he has done so or not, is a question of fact to be determined from all the circumstances of the case, unless the contract be in writing, couched in unmistakable terms.[2] Where the principal is known, the presumption is that the broker intended to charge him rather than himself, and, therefore, the burden of proving a personal undertaking upon the part of the broker, rests upon the party who alleges it.[3] If knowing both the principal and the broker, and having the opportunity to choose between them, the other party sees fit to give exclusive credit to the broker, he can not hold the principal also.[4]

§ 959. **Liable when he acts without Authority.** A broker, like any other agent, may also render himself liable to third parties with whom he deals, for injuries which they may sustain by reason of his assuming to have and exercise an authority which he did not in fact possess, whether the defect was owing to a total absence of any authority, or to the fact that the authority he really possessed was insufficient for the purpose.[5]

§ 960. **Liability for Money received.** The liability of the broker to third persons for money received, either from them, but unlawfully, on the principal's account, or from the principal for them, depends upon the same considerations which determine the liability of other agents under like circumstances;—a subject which has already been discussed.[6]

§ 961. **When guilty of a Conversion.** A broker acting merely as such and contracting only for and in behalf of his principal, is not liable to the true owner as for a conversion where it appears that in the regular course of trade he has been employed

Eagle Mills, 2 Metc. (Mass.) 319; Falkenburg *v.* Clark, 11 R. I. 278; Royce *v.* Allen, 28 Vt. 234; Baldwin *v.* Leonard, 39 Vt. 260, 94 Am. Dec. 324; Wilder *v.* Cowles, 100 Mass. 487; Nixon *v.* Downey, 49 Iowa, 166.

But see, *contra*; Wright *v.* Cabot, 89 N. Y. 570; and see also Bliss *v.* Bliss, 7 Bosw. (N. Y.) 345; Lyon *v.* Williams, 5 Gray (Mass.) 557; Baxter *v.* Duren, 21 Me. 434.

[1] See *ante*, §§ 551, 252, 558.

[2] See *ante*, § 558.

[3] See *ante*, § 558.

[4] See *ante*, § 558.

[5] See *ante*, § 541–550. See also Firbank *v.* Humphreys, 18 Q. B. Div. 54

[6] See *ante*, § 566, *et seq.*

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by, and has sold goods for, one who, in good faith and in the exercise of reasonable prudence, he believed to be the owner.[1] But a broker who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them as being himself the principal or owner of them, is liable to the owner as for a conversion.[2]

Thus where B had fraudulently obtained cotton from F, and H, whose ordinary business was that of a cotton broker, and who was utterly ignorant of the fraud of B, purchased the cotton from B, in the belief and expectation that M, one of his ordinary clients, would accept it, and M did afterwards accept it, though H received from M a broker's commission only and not a trade profit on the sale, it was held that in this instance H had made himself a principal, and by transferring the cotton to M had committed an act of conversion, which made him liable in trover to F, the true owner of the cotton.[3]

VI.

RIGHTS OF BROKER AGAINST PRINCIPAL.

1. *Right to Compensation.*

§ 962. **Entitled to Compensation.** A broker, like any other agent, who performs his undertaking is entitled to compensation for his services. This compensation is usually a commission upon the price or value of the thing bought, sold or exchanged by means of his endeavors.

§ 963. **How Amount determined.** It is entirely competent for the parties to agree upon the amount of compensation to be paid, and the terms and conditions of its payment, and such agreements when fairly made will be enforced. Where no rate of compensation is agreed upon, it may be determined by reference to the usage, if any, prevailing at the same time and place in like cases;[4] but usage will not be permitted to contravene

[1] See Roach v. Turk, 9 Heisk, (Tenn.) 708, 24 Am. Rep. 360.

[2] Hollins v. Fowler, L. R. 7 H. L. 727, 14 Eng. Rep. 188.

[3] Hollins v. Fowler, *supra*. This case which occasioned much division of opinion among the judges of the various courts, contains interesting discussions of the broker's duties and liabilities.

[4] Morgan v. Mason, 4 E. D. Smith (N. Y.) 636

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the express agreement of the parties.[1] Where no agreement was made and no usage prevails, the broker will be entitled to a reasonable compensation.[2]

§ 964. **Broker must show Employment.** To entitle the broker to commissions for his services, he must make it appear that the services were rendered under an employment and retainer by the principal,[3] or that the latter accepted his agency and adopted his acts.[4] If he rendered the services as a mere volunteer, without any employment, express or implied, he cannot recover commissions.[5]

§ 965. **Broker must have performed Undertaking.** The broker must also show that he has completed his undertaking according to its terms, or that its completion was prevented without his fault, by his principal. What constitutes completion is, however, a question of no little difficulty in many cases, depending, as it

[1] Ware v. Hayward Rubber Co., 8 Allen (Mass.) 84; Illingsworth v. Slosson, 19 Ill. App. 612; Bower v. Jones, 8 Bing. 65; Collender v. Dinsmore, 55 N. Y. 200; Sanford v. Rawlings, 43 Ill. 92.

"It is almost needless to say" remarks Mr. Justice PAXSON, "that to establish such a custom, it must be reasonable, certain, uniform, continued, and moreover generally understood and acquiesced in by persons engaged in buying and selling. * * Where a custom exists, parties are presumed to deal in view of it, and where no agreement is made as to commissions, that they agree to pay the customary rate. In the absence of such custom, and of any agreement as to rate, the measure of compensation would be the value of the service rendered. This is always a safe standard and should never be set aside for a custom unless the latter is proved to be so well known and so long persisted in that the parties must be presumed to have known of it. A usage which is to govern a question of right, should be so certain, uniform and notorious as probably to be known to and understood by the parties as entering into their contract. United States v. Duval, Gilp. 356. And it cannot be proved by isolated instances. Dean v. Swoop, 2 Binn. 72; Cope v. Dodd, 1 Harris 33," in Potts v. Aechternacht, 93 Penn. St. 138, 141.

[2] Potts v. Aechternacht, 93 Penn. St. 138.

[3] Hinds v. Henry, 36 N. J. L. 328; Keys v. Johnson, 68 Penn. St. 42; Twelfth Street Market Co. v. Jackson, 102 Penn. St. 269; Coffin v. Linxweiler, 34 Minn. 320.

[4] Keys v. Johnson, *supra;* Twelfth Street Market Co. v. Jackson, *supra;* Atwater v. Lockwood, 39 Conn. 45; Hinds v. Henry, *supra;* Sibbald v. Bethlehem Iron Works, 83 N. Y. 378, 38 Am. Rep. 441.

[5] Hinds v. Henry, *supra;* Cook v. Welch, 9 Allen (Mass.) 350.

Thus where a broker whom the principal had refused to employ, having learned the price sent a person to him who bought the property, it was held that he was not entitled to a commission. Pierce v. Thomas, 4 E. D. Smith, (N. Y.) 354.

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does, upon vague and indefinite agreements between the parties. The parties are at liberty to make the payment of commissions dependent upon such lawful conditions and contingencies as please them, and, where no improper advantage is taken, their express stipulations must prevail, although the result be that the broker finds that he has risked his labor and expenses upon the mere caprice of his employer, as when he undertakes to find a purchaser of property upon terms *satisfactory* to the seller. For many cases no more satisfactory general rule can be laid down than to ascertain, 1. What did the broker undertake to do? 2. Has he completed that undertaking within the time and upon the terms stipulated? and 3, If not, is the default attributable to his own act or to the interference of the principal? If upon such an inquiry it be determined that the broker has performed within the time, and upon the terms, agreed upon, he is entitled to his commissions; if he has not, he is not so entitled, unless the performance was prevented by the principal under circumstances which gave him no right then and so to prevent it. It will be seen from this rule that where the time is limited, the performance must be within *that time;* and the broker will not be entitled to commissions because efforts begun within that time bear fruit after its expiration. So, if particular terms or conditions are stipulated for, the performance must be in accordance with *those terms;* and no performance upon other terms will suffice, unless accepted by the principal, although the other terms may be considered more favorable than those specified.

§ 966. **Same Subject—Real Estate Broker.** These principles have been most frequently applied in the case of brokers employed to sell real estate, and a consideration of their application here will throw light upon the whole subject. A broker employed to sell real estate may be authorized and required by the terms of his undertaking, not only to find the purchaser, but to procure from him a valid written agreement binding him to purchase upon the terms specified, and where this is his undertaking, unless the principal waives this condition by accepting the purchaser and selling to him, or otherwise, the broker has not earned his commissions until it is performed;[1] but the

[1] Hyams *v.* Miller, 71 Ga. 608; Gilchrist *v.* Clarke, — Tenn. — 8 S. W. Rep. 572; Tombs *v.* Alexander, 101 Mass. 255, 3 Am. Rep. 349; Cook *v.* Fiske, 12 Gray (Mass.) 491; Kerfoot *v.* Steele, 113 Ill. 610; Love *v.* Miller,

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authority and duty of the real estate broker, as ordinarily employed, do not go so far. As so employed, he has no implied authority to bind his principal by a written contract to sell the real estate,[1] and, unless he contracts for more, it is no part of his implied duty to complete a binding contract with the purchaser.[2] His duty is performed when he has found a purchaser who is ready, willing and able to purchase upon the terms specified,[3] or, if no particular terms were agreed upon, when he has produced a purchaser to whom the principal sells.[4]

It is not necessary that the broker should personally have conducted the negotiation between his principal and the purchaser,[5] or that he should have been present when the bargain was completed,[6] or even that the principal should, at the time, have known that the purchaser was one found by the broker.[7] It is indispen-

53 Ind. 294; Pearson *v.* Mason, 120 Mass. 53; Leete *v.* Norton, 43 Conn. 219.

[1] Ryon *v.* McGee, 2 Mackey (D. C.) 17; Duffy *v.* Hobson, 40 Cal. 240; Rutenberg *v.* Main, 47 Cal. 213.

[2] Desmond *v.* Stebbins, 140 Mass. 339; McCreery *v.* Green, 38 Mich 185.

[3] McGavock *v.* Woodlief, 20 How. (U. S.) 221; Hinds *v.* Henry, 36 N. J. L. 328; Frazer *v.* Wyckoff, 63 N. Y. 445; Livezy *v.* Miller, 61 Md. 336; Coleman *v.* Meade, 13 Bush (Ky.) 358; Burling *v.* Gunther, 12 Daly, (N. Y.) 6; Gaty *v.* Foster, 18 Mo. App. 639; Pratt *v.* Hotchkiss, 10 Ill. App. 603; Goss *v.* Stevens, 32 Minn. 472; Fischer *v.* Bell, 91 Ind. 243; Veazie *v.* Parker, 72 Me. 443; Watson *v.* Brooks, 8 Sawy. (U. S. C. C.) 316; Neilson *v.* Lee, 60 Cal. 555; Phelan *v.* Gardner, 43 Cal. 306; Bell *v.* Kaiser, 50 Mo. 150; Tyler *v.* Parr, 52 Mo. 249; Kock *v.* Emmerling, 22 How. (U. S.) 69: McCreery *v.* Green, 38 Mich. 172; Fox *v.* Rouse, 47 Mich. 558; Higgins *v.* Moore, 34 N. Y. 417; Barnard *v.* Monnot, 34 Barb. (N. Y.) 90; Duclos *v.* Cunningham, 102 N. Y. 678; McClane *v.* Paine, 49 N. Y. 561; Jones *v.* Alder, 34 Md. 440; Dolan *v.* Scanlan, 57 Cal. 261; Timberman *v.* Craddock, 70 Mo. 638.

[4] Cassady *v.* Seeley, 69 Iowa, 509; Iselin *v.* Griffith, 62 Iowa 668; Hanna *v.* Collins, 69 Iowa 51; Fisk *v.* Henarie, 13 Oregon, 156; Stewart *v.* Mather, 32 Wis. 344; Glenthworth *v.* Luther, 21 Barb. (N. Y.) 147; Sibbald *v.* Bethlehem Iron Works, 83 N. Y. 378, 38 Am. Rep. 441; Desmond *v.* Stebbins, 140 Mass. 339; Veazie *v.* Parker, 72 Me. 443; Sussdorff *v.* Schmidt, 55 N. Y. 319; Attrill *v.* Patterson, 58 Md. 226; Coleman *v.* Meade, 13 Bush (Ky.) 358; Rice *v.* Mayo, 107 Mass. 550.

[5] Royster *v.* Mageveney, 9 Lea (Tenn.) 148; Timberman *v* Craddock, 70 Mo. 638.

[6] Royster *v.* Mageveney, *supra;* Timberman *v.* Craddock, *supra;* Sibbald *v.* Bethlehem Iron Works, 83 N. Y. 378, 38 Am. Rep. 441; Dreisback *v.* Rollins, — Kans, — 18 Pac. Rep. 187.

[7] Goffe *v.* Gibson, 18 Mo. App. 1; Sussdorff *v.* Schmidt, 55 N. Y, 320: Wylie *v.* Marine Nat. Bank, 61 N.Y. 415.

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sable, but it is also sufficient, that his efforts were the procuring cause of the sale; that through his agency the purchaser was brought into communication with the seller, although the parties then negotiated in person.[1] His efforts may have been slight, but if they brought about the desired result, no more could be asked; and their operations may have been circuitous, but if the purchases was the natural and proximate result of his endeavors, it is sufficient.[2] The law prescribes no particular method of

[1] Timberman *v.* Craddock, 70 Mo. 638; Bell *v.* Kaiser, 50 Mo. 150; Tyler *v.* Parr, 52 Mo. 249; Royster *v.* Mageveney, 9 Lea (Tenn.) 148; Sussdorff *v.* Schmidt, *supra;* Veazie *v.* Parker, 72 Me. 443; Wyckoff *v.* Bliss, 12 Daly (N. Y.) 324; Attrill *v.* Patterson, 58 Md. 226.

[2] Lincoln *v.* McClatchie, 36 Conn. 136; Green *v.* Bartlett, 14 C. B. (N. S.) 681; Shepherd *v.* Hedden, 29 N. J. L. 334; Pope *v.* Beals, 108 Mass. 561.

Some illustrations of what has been deemed sufficient in such cases may be of use: Thus in Lincoln *v.* McClatchie, 36 Conn. 136, the defendant had put into the hands of the plaintiff, a real estate broker, a house on a certain street to sell for $6,500, instructing him not to advertise it, but to sell by private sale. Afterwards the plaintiff advertised in general terms that he had houses on that street to sell. One G, who lived on the street, who had been looking for a house on the same street for his friend B, saw the advertisement and went to plaintiff's office where he learned that defendant's house was for sale. Plaintiff, by mistake, had entered the price on his books at $6,000 and so informed G. G informed B that the house was for sale at $6,000 and advised him to buy it. B then examined the house and entered into negotiations with defendant, which resulted in B's purchase of the house with less than a hundred dollars' worth of personal property included, at $6,500. B never saw plaintiff in the transaction and was never in his office, and G's action was purely voluntary. It was held, however, that the plaintiff's efforts were the procuring cause, and that he was entitled to his commission.

The same result was reached in a very similar case in Nebraska. A employed broker B to sell his farm. B advertised the property in a newspaper. Farmer C saw the advertisement and told his neighbor D that A's farm was for sale. D went to A and bought the farm. Held that B was entitled to his commissions. Anderson *v.* Cox, 16 Neb. 10.

So in Green *v.* Bartlett, 14 C. B. (N. S.) 681, an auctioneer and broker had been employed to sell an estate. Having advertised it and made an unsuccessful effort to sell it by auction, he was asked by a person who had attended the sale, who the owner was, and he directed him to the principal. Ultimately this person purchased the estate of the principal, without any further intervention of the broker, but the court held that he was the procuring cause of the sale and entitled to his commission.

But the law regards only proximate, and not remote, causes; hence if after the broker's services have failed to accomplish a sale, and after the proposed purchaser has decided not to buy, other persons induce him to do so, the broker is not entitled to

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procedure, nor has it any other standard by which to measure exertion, in such a case, than the result attained.

It is also indispensable that the purchaser produced should be one ready, willing and able to purchase upon the terms specified, if any were fixed, for if he be willing to buy only on different terms or at a different price or upon other conditions, the broker will not be entitled to his commission,[1] unless the variance be waived by the principal.[2] So, it is indispensable that the purchaser should be found within the time limited, for if the broker's exertions do not produce the buyer until after that time has expired, it is not enough,[3] unless the principal has caused the

commissions, Earp v. Cummins, 54 Penn. St. 394, 93 Am. Dec. 718. So in Mansell v. Clements, L. R. 9 C. P. 139, 8 Eng. Rep. 449, defendant had placed a house in plaintiffs' hands to sell. A was looking for a house in that neighborhood and seeing a notice (not posted by nor referring to the plaintiffs) that this house was for sale, made some inquiries about it, but concluded that the house was too large. He afterwards called upon plaintiffs to see what houses they had, and received from them cards of admission and terms for several houses, among which was the one in question. He examined the house and finally purchased it through an other agent of defendant for a less sum than that named, the plaintiff having nothing to do with the whole transaction other than giving A the card and terms. A stated upon the trial that he thought he should not have purchased the house if he had not received from plaintiffs the card and terms. Held that they were entitled to their commissions.

[1] Hoyt v. Shipherd, 70 Ill. 309; Ward v. Lawrence, 79 Ill. 295; Rees v. Spruance, 45 Ill. 308; Hamlin v. Schulte, 31 Minn. 486, 17 Reporter 562; Clendenon v. Pancoast, 75 Penn. St. 213; Schwartze v. Yearly, 31 Md. 270; McGavock v. Woodlief, 20 How. (U. S.) 221; Wylie v. Marine Nat. Bank, 61 N. Y. 415; Williams v. McGraw, 52 Mich. 480; Hayden v. Grillo, 26 Mo. App. 289; Bradford v. Menard, 35 Minn. 197.

[2] Where the price was fixed a purchaser must be produced ready, willing and able to buy at that price, and if the purchaser offered will not buy at that price but only at a lower, the broker will not be entitled to commissions, unless there was collusion between the principal and purchaser. A sale to such a person is not a waiver of the terms fixed. The broker would be entitled to commissions, however, if the principal knowing that that the purchaser produced was ready, willing and able to buy at the price fixed, voluntarily sells to him at a less price. McArthur v. Slauson, 53 Wis. 41. Compare with Stewart v. Mather, 32 Wis. 344.

[3] Beauchamp v. Higgins, 20 Mo. App. 514; Fultz v. Wimer, 34 Kan. 576; Watson v. Brooks, 11 Ore. 271; McCarthy v. Cavers, 66 Iowa 342.

Where a broker was to have a commission, if he found a purchaser within a "short time," it was held that a performance within two weeks was sufficient. Smith v. Fairchild, 7 Col. 510. Broker has not performed who on last day produces a purchaser who will buy if he has time to inves-

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delay,[1] or unless he waives it.[2] But if the purchaser is found and negotiations are begun, within the time limited, it is immaterial that they were not fully consummated until afterwards.[3]

It is also incumbent upon the broker to show that the purchaser produced was ready or able pecuniarily to complete the purchase. Pecuniary responsibility may be implied in many cases, but in cases of this nature the broker must be prepared to prove, if necessary, that the purchaser found by him was pecuniarily able to pay the purchase price agreed upon, and he cannot satisfy his undertaking by the production of a mere "man of straw."[4]

If the broker abandons the undertaking before he has found the purchaser, he can claim no commissions for a subsequent sale, though made to a purchaser whom he had previously tried to reach.[5]

tigate title. Watson *v.* Brooks, *supra.*

[1] Beauchamp *v.* Higgins, *supra;* Fultz *v.* Wimer, *supra;* Watson *v.* Brooks, *supra.*

[2] If the principal without objection then deals with the purchaser so found he waives the delay. See cases cited in note 4, p. 794.

[3] Goffe *v.* Gibson, 18 Mo. App. 1.

[4] "We think" said BECK, J., "that in order to entitle plaintiffs to recover, something more than a mere offer to purchase should be shown by them. Such an offer could be made by one without means, and who is in no condition to comply with the terms of the sale, and against whom a claim for damages resulting from a failure to perform the contract of purchase could not be enforced. An offer from such an one ought not to be considered as constituting the performance of plaintiff's undertaking to negotiate the sale of the land. As the pecuniary responsibility of the purchaser was, or ought to have been, known to the plaintiffs, the burden rested upon them to show it." In Iselin *v.* Griffith, 62 Iowa 668, 17 Reporter 481; and to the same effect are: Coleman *v.* Meade, 13 Bush (Ky.) 358; Pratt *v.* Hotchkiss, 10 Ill. App. 603; McGavock *v.* Woodlief, 29 How. (U. S.) 221.

But on the other hand in Hart *v.* Hoffman, 44 How. Pr. 168, the Court of Appeals of New York held that no such proof is required, saying that solvency is presumed; and the same ruling was followed in Cook *v.* Kroemeke, 4 Daly, (N. Y.) 268; and Goss *v.* Broom, 31 Minn. 484.

See Duclos *v.* Cunningham, 102 N. Y. 678, 6 N. East. Rep. 790.

[5] Earp *v.* Cummins, 54 Penn. St. 394, 93 Am. Dec. 718; Wylie *v.* Marine Nat. Bank, 61 N. Y. 415; Holley *v.* Townsend, 2 Hilton (N. Y.) 34; Sibbald *v.* Bethlehem Iron Works, 83 N. Y. 378, 38 Am. Rep. 441.

So where a broker's efforts to sell the property had failed, and the principal had revoked his authority, it was held that the principal was not liable for commissions though he afterwards sold, through other brokers, to a person to whom the first broker had endeavored to sell, it appearing that the revocation was in good faith with no intention then of renewing the negotiations. Uphoff *v.* Ulrich, 2 Ill. App. p. 399.

So where all attempts by the bro-

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These agreements to pay a commission for finding a purchaser for real estate are not within the Statute of Frauds, and hence are valid though not in writing.[1]

§ 967. **Same Subject—Not defeated, how.** Unless the principal has expressly waived that right, he is at perfect liberty to sell the property by his own efforts, notwithstanding the employment of the broker, and, in case of such a sale, he will not be liable to the broker for commissions, if the broker's efforts were not, in fact, the procuring cause of the sale.[2]

ker to sell the property had ceased for more than six months, and the broker had moved away, it was held that the principal was not liable to him for commissions, although the principal finally sold to a person with whom the broker had previously negotiated but without success. Lipe *v.* Ludewick, 14 Ill. App. 372.

In Sibbald *v.* Bethlehem Iron works, 83 N.Y. 378, 38 Am. Rep. 441, FINCH, J., says: "It follows, as a necessary deduction from the established rule, that a broker is never entitled to commissions for unsuccessful efforts. The risk of a failure is wholly his. The reward comes only with his success. That is the plain contract and contemplation of the parties. The broker may devote his time and labor, and expend his money with ever so much of devotion to the interest of his employer, and yet if he fails, if without effecting an agreement or accomplishing a bargain, he abandons the effort, or his authority is fairly and in good faith terminated, he gains no right to commissions. He loses the labor and effort which was staked upon success. And in such event it matters not that after his failure, and the termination of his agency, what he has done proves of use and benefit to the principal. In a multitude of cases that must necessarily result. He may have introduced to each other, parties who otherwise would have never met; he may have created impressions, which under later and more favorable circumstances naturally lead to and materially assist in the consummation of a sale; he may have planted the very seed from which others reap the harvest; but all that gives him no claim. It was part of his risk that failing himself, not successful in fulfilling his obligation, others might be left to some extent to avail themselves of the fruit of his labors. As was said in Wylie *v.* Marine National Bank, 61 N. Y. 416, in such a case the principal violates no right of the broker by selling to the first party who offers the price asked, and it matters not that sale is to the very party with whom the broker had been negotiating. He failed to find or produce a purchaser upon the terms prescribed in his employment, and the principal was under no obligation to wait longer that he might make further efforts. The failure therefore, and its consequences, were the risk of the broker only."

[1] Waterman Real Estate Exchange *v.* Stephens, — Mich.—, 15 West. Rep. 193, 38 N. W. Rep. 685.

[2] Hungerford *v.* Hicks, 39 Conn. 259; Darrow *v.* Harlow, 21 Wis. 302, 94 Am. Dec. 541; Wylie *v.* Marine Nat. Bank, 61 N. Y. 415; McClave *v.* Paine, 49 N. Y. 561; Lloyd *v.* Matthews, 51 N. Y. 125; Keys *v.* Johnson,

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But the principal can not, when the broker's efforts have resulted in negotiations for a sale, step in and by taking the matter into his own hands and completing the sale, escape liability to the broker.[1] Nor if, within the time limited, the broker has produced a purchaser who is ready, willing and able to purchase upon the terms prescribed, can the principal evade the payment of the broker's commission by then refusing or neglecting to consummate the sale,[2] or by changing his terms,[3] or by selling the property to another,[4] or by so negligently dealing with the proposed purchaser as to lose the benefit of the sale.[5] So if the broker has fulfilled upon his part, he will be entitled to his commissions although the sale is not consummated because the principal's title proves to be defective;[6] or because the principal's wife refuses to join in the conveyance;[7] or because the purchaser refuses to complete the sale on account of false representations made by the principal.[8]

§ 968. **Same Subject—Revocation of Authority.** It is entirely competent for the principal to agree that the broker shall have a

68 Penn. St. 42; Doonan *v.* Ives, 78 Ga. 295; Dolan *v.* Scanlan, 57 Cal. 261.

[1] Keys *v.* Johnson, *supra;* Sibbald *v.* Bethlehem Iron Works, 83 N. Y. 378, 38 Am. Rep. 441; Butler *v.* Kennard, — Neb. —, 36 N. W. Rep. 579; Nicholas *v.* Jones, — Neb. —, 37 N. W. Rep. 679.

[2] Gaty *v.* Foster, 18 Mo. App. 639; Burling *v.* Gunther, 12 Daly (N. Y.) 6; Goss *v.* Stevens, 32 Minn. 472; Fischer *v.* Bell, 91 Ind. 243; Veazie *v.* Parker, 72 Me. 443; Watson *v.* Brooks, 8 Sawy. (U. S. C. C.) 316; Neilson *v.* Lee, 60 Cal. 555; Phelan *v.* Gardner, 43 Cal. 306; Bell *v.* Kaiser, 50 Mo. 150; Tyler *v.* Parr, 52 Mo. 249; Kock *v.* Emmerling, 22 How. (U. S.) 69; Moses *v.* Bierling, 31 N. Y. 462; Kelly *v.* Phelps, 57 Wis. 425; Love *v.* Miller, 53 Ind. 294; Bailey *v.* Chapman, 41 Mo. 536; Cook *v.* Fiske, 12 Gray (Mass.) 491; Gillett *v.* Corum, 7 Kans. 156; Sibbald *v.* Bethlehem Iron Works, 83 N. Y. 378, 38 Am. Rep. 441; Gorman *v.* Scholle, 13 Daly (N. Y.) 516.

[3] Bush *v.* Hill, 62 Ill. 216; Stewart *v.* Mather, 32 Wis. 344; Nesbitt *v.* Helser, 49 Mo. 383.

[4] Lane *v.* Albright, 49 Ind. 275; Reed's Ex'rs *v.* Reed, 82 Penn. St. 420; Fox *v.* Byrnes, 52 N. Y. Super. Ct. 150.

[5] Potvin *v.* Curran, 13 Neb. 302; Parker *v.* Walker, — Tenn. —, 8 S. W. Rep. 391.

[6] Hamlin *v.* Schulte, 34 Minn. 534; Roberts *v.* Kimmons, — Miss. —, 3 South. Rep. 736; Hannan *v.* Moran, — Mich. —, 15 West. Rep. 211; Goodridge *v.* Holladay, 18 Ill. App. 363; Gonzales *v.* Broad, 57 Cal. 224; Knapp *v.* Wallace, 41 N. Y. 477; Doty *v.* Miller, 43 Barb. (N. Y.) 529; Sibbald *v.* Bethlehem Iron Works, 83 N. Y. 378, 38 Am. Rep. 441. But see Rockwell *v.* Newton, 44 Conn. 333.

[7] Clapp *v.* Hughes, 1 Phila. 382.

[8] Glentworth *v.* Luther, 21 Barb. (N. Y.) 145.

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certain time within which to find a purchaser, and, where he does so, he will be liable to the broker for damages if, without the latter's fault or consent, he terminates his authority before the expiration of that period.[1] Such an agreement, however, is not to be implied from the mere fact that the time within which the broker is to perform is limited. Thus an agreement to pay a broker commissions if "within a month" he succeeds in finding a purchaser, does not amount to an agreement on the part of the principal that the broker will be allowed a month for the purpose, and the principal may, without liability for commissions, revoke the broker's authority before the purchaser is found, although the month has not expired.[2] Where no time is so agreed upon, the broker is entitled to a reasonable time in which to find a purchaser, after which, if he be unsuccessful, the principal may revoke the broker's authority, without liability, at any time, subject only to this exception, that it be not done for the purpose of avoiding the payment of commissions while availing himself of the benefits of the broker's efforts, by taking into his own hands the completion of negotiations then pending. Upon this subject, the language of Judge FINCH, of the New York Court of Appeals, is worthy of reproduction:— "Where no time for the continuance of the contract is fixed by its terms, either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith. Usually the broker is entitled to a fair and reasonable opportunity to perform his obligation, subject, of course, to the right of the seller to sell independently. But that having been granted him, the right of the principal to terminate his authority, is absolute and unrestricted, except only that he may not do it in bad faith, and as a mere device to escape the payment of the broker's commissions. Thus, if in the midst of negotiations instituted by the broker, and which were plainly and evidently approaching success, the seller should revoke the authority of the broker, with the view of concluding the bargain without his aid, and avoiding the payment of commissions about to be earned, it might well be said that the due performance of his obligation by the broker was purposely prevented by the principal. But if the latter acts in good faith, not seeking to escape the payment of commissions, but moved fairly by a view of his own interest, he has the absolute

[1] See *ante*, § 620 *et seq.*

[2] Brown v. Pforr, 88 Cal. 550.

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right, before a bargain is made, while negotiations remain unsuccessful, before commissions are earned, to revoke the broker's authority, and the latter cannot thereafter claim compensation for a sale made by the principal, even though it be to a customer with whom the broker unsuccessfully negotiated, and even though, to some extent, the seller might justly be said to have availed himself of the fruits of the broker's labor."[1]

§ 969. **Employment of two or more Brokers.** Unless he has expressly agreed to give one broker the exclusive authority to sell, the principal may employ several brokers to sell the same property.[2] Where several are so employed, the authority of each being limited to the particular transaction, the sale of the property, either by the principal in person or by any one of the brokers, operates at once to terminate the authority of all of the brokers, although they had no actual notice of the sale.[3] The principal may also revoke the authority of one or all of them, as in other cases,[4] but a notice to one broker that the principal had

[1] In Sibbald *v.* Bethlehem Iron Co. 83 N. Y. 378, 38 Am. Rep. 441.

[2] Tinges *v.* Moale, 25 Md. 480, 90 Am. Dec. 73; McClave *v.* Paine, 49 N. Y. 561, 10 Am. Rep. 431.

[3] Ahern *v.* Baker, 34 Minn. 98, 24 N. W. Rep. 341, 20 Reporter, 435. In this case VANDERBERGH, J. said: "The defendant, on the ninth day of September, specially authorized one Wheeler, as his agent, to sell the real property in controversy, and to execute a contract for the sale of the same. He in like manner on the same day empowered one Fairchild to sell the same land, the authority of the agent in each instance being limited to the particular transaction named. On the same day, Wheeler effected a sale of the land, which was consummated by a conveyance. Subsequently, on the tenth day of September, Fairchild, as agent for defendant, and having no notice of the previous sale made by Wheeler, also contracted to sell the same land to this plaintiff, who, upon defendant's refusal to perform on his part, brings this action for damages for breach of the contract.

This is a case of special agency, and there is nothing in the case going to show that the plaintiff (defendant?) would be estopped from setting up a revocation of the agency prior to the sale by Fairchild. A revocation may be shown by the death of the principal, the destruction of the subject-matter, or the determination of his estate by a sale, as well as by express notice. The plaintiff (defendant?) had a right to employ several agents, and the act of one in making a sale would preclude the others without any notice, unless the nature of his contract with them required it. In dealing with the agent the plaintiff took the risk of the revocation of his agency, 1 Pars. Cont. 71."

[4] See preceding section.

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decided not to sell would not affect others with whom the one notified had no connection.[1]

To determine which of the several brokers is entitled to the commissions, is a question, in many cases, of no little difficulty. Where neither broker had knowledge of the employment of the others, it would seem that the ordinary rule applicable to the case of the employment of a single broker, would apply, *i. e.*, that the broker who was the efficient cause of the sale is entitled to the commissions, and that this right can not be affected because the principal in person, or by another agent, takes into his own hands and completes the transaction which the broker has inaugurated.[2]

But where several brokers are openly employed, it is said that the entire duty of the principal is performed by remaining neutral between them, and that he has a right to sell to the buyer who is first produced by any of them, without being called upon to decide which of the several brokers was the primary cause of the sale.[3]

[1] Lloyd *v.* Matthews, 51 N. Y. 124.

[2] See Eggleston *v.* Austin, 27 Kan. 245; see also Vreeland *v.* Vetterlein, (33 N. J. L. 247) in following note.

"If he has several agents employed to sell the same land, and one has found a purchaser and has negotiated with him to sell the land at a certain stipulated price and on certain terms, different from those specified in the authority to sell, and when the sale was about to be consummated, another agent of the owner meets the same person, who talks to him about the offer of the first agent, and, with full knowledge of the negotiations of the first agent, the second agent sells to such person the same property for a less price, but on the same terms as to cash down and time in which to pay the deferred payments, and the owner is ignorant of the negotiations of the first agent with the purchaser, but ratifies the sale by the second agent, made on the terms proposed by the first, he is not liable to the second but to the first agent, and should pay him a reasonable compensation for procuring said sale." JOHNSON, J., in Reynolds *v.* Tompkins, 23 W. Va. 229, 235.

[3] "But it appears to be equally obvious," says Chief Justice BEASLEY, "that another principle must be applied to cases in which several agents are avowedly employed by the owner. Under such circumstances, it would be impracticable to resort to the same rule as when a monopoly to sell is given to one. In the latter case, the implied understanding is, that the seller will not take advantage of the endeavors of the agent, and that no other person is authorized to do so. But in the instance of a number of agents, the agreement of non-interference is not so wide, for it extends to the act of the seller only. Where the property is openly put in the hands of more than one broker, each of such agents is aware that he is subject to the arts and chances of competition. If he finds a person who is likely to buy, and quits him

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The same rule in regard to the abandonment of the effort, which has been already noticed, applies here also. Thus if one of several brokers gives notice to his principal that he can not effect a sale, he will not be entitled to commissions because another broker, who is informed by the first that the property is for sale, succeeds in finding a purchaser.[1] So, if two brokers are employed, and one of them enters into negotiations with a purchaser which fail and are abandoned, he will not be entitled to commissions because another broker subsequently succeeds, wholly through his own efforts, in making a sale to the same person, and upon substantially the same terms as those proposed by the first broker.[2]

without having effected a sale, he is aware that he runs the risk of such person falling under the influence of his competitor—and in such case, he may lose his labor. This is a part of the inevitable risk of the business he has undertaken. On the other hand, if fortune should be propitious, a bidder for the property on sale, who has been solicited by his rival, may come to him, and by his means effect the bargain. Now, in this competition, the vendor of the property is to remain neutral; he is interested only in the result. But when either of the agents thus employed, brings a purchaser to him, and a bargain is struck at the required price, on what ground can he refuse to complete the bargain? Can he say to the successful competitor, this purchaser was first approached by your rival, and you should have refused to treat with him on the subject? There is no legal principal upon which such a position could rest. It is contrary to the usages of every day commerce. Every advertisement of a stock of goods for sale, has a tendency to carry off the customers of rival dealers. And if, therefore, it should be known to the vendor of the property that the agent, who introduces a purchaser to him has, by the usual arts of competition, taken such purchaser out of the hands of his rival, I am not aware of anything in the law which would justify such vendor in a refusal to complete the contract. The task would be difficult and the risk great, if vendors were called upon to decide between the claims of contestants. How would it be possible for such vendor to say whose influence it was that produced the sale, where the purchaser has been solicited by both agents? It would be at variance with all practical rules, to require the party selling to pronounce, under the penalty of paying double commissions, upon the metaphysical question, which agent, under such circumstances, was the efficient cause of the sale. In the absence of all collusion on the part of the vendor, the agent, through whose instrumentality the sale is carried to completion, is entitled to the commissions. This rule, I think, will be found to be in accord with the cases heretofore decided." In Vreeland *v.* Vetterlein, 33 N. J. L. 247. To same effect, see Glenn *v.* Davidson, 37 Md. 365.

[1] Holley *v.* Townsend, 2 Hilton (N. Y.) 34.

[2] Livezy *v.* Miller, 61 Md. 343, 17 Reporter, 622.

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When one of several brokers has produced a purchaser it is his duty, if he intends to claim commissions, to report his name and offer to his principal, and if he fails to do so, he can not complain if the principal in good faith and without notice, pays the commissions to another broker who subsequently sells to the same purchaser at the same price.[1]

§ 970. **Broker to effect Loan.** The rights and duties of a broker employed to secure a loan depend upon the same principles which govern the broker who undertakes to find a purchaser of property. The loan broker is entitled to his commissions where he has procured a lender who is ready, willing and able to lend the money upon the terms proposed.[2] If he does less than that, he has not earned his commissions unless his employer waives the deficiencies; but if he has done that, he can not be deprived of his commissions because his employer neglects or refuses to obtain the loan, or changes his terms, or because the security offered proves, upon investigation, to be defective.[3]

§ 971. **Broker to effect Exchange.** And the same principles apply to the case of a broker employed to effect an exchange of property. He is entitled to his commissions when, and only when, he has within the time limited, if any, produced a party ready and able to exchange on the terms designated, or with whom the principal deals.[4] Neither can his right to compensation be defeated because the principal then refuses to exchange or is not able to make a good title, or takes the matter into his own hands.[5]

§ 972. **Cannot have Commissions from both Parties.** As has been seen, the broker will not ordinarily be permitted to undertake to represent both parties in the same transaction.[6] His duty to his principal and the policy of the law demand that, unless his principal has expressly stipulated for less, the broker shall give

[1] Tinges v. Moale, 25 Md. 480, 90 Am. Dec. 73.

[2] Vinton v. Baldwin, 88 Ind. 104, 45 Am. Rep. 447; Budd v. Zoller, 52 Mo. 238; Green v. Reed, 3 F. & F. 226; Green v. Lucas, 31 L. T. (N. S.) 731.

[3] Vinton v. Baldwin, *supra;* Green v. Lucas, *supra;* Corning v. Calvert 2 Hilt. (N. Y.) 56.

[4] Hewitt v. Brown, 21 Minn. 163; Redfield v. Tegg, 38 N. Y. 212; Little v. Rees, 34 Minn. 277, 26 N. W Rep. 7.

[5] Little v. Rees, *supra;* Rockwell v. Newton, 44 Conn. 333.

[6] See *ante*, § 903.

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to his principal his undivided efforts and allegiance. To be secretly in the service of the opposing party, while ostensibly acting for his principal only, is a fraud upon the latter and a breach of public morals which the law will not tolerate. If, therefore, each of the parties to the transaction was entirely ignorant of the broker's relations to the other, such double service on the part of the bro ker will defeat his right to recover commissions from either of them.[1] If one of the parties only was ignorant, he will certainly be absolved from the duty to pay commissions; and while the authorities are not all agreed as to the liability of the other party who has employed the broker, knowing of his relations to the first, it is held in many cases, and there are strong reasons of public policy which support the rule, that the broker should not be permitted to recover of him either.[2] A custom to charge commissions to both parties will not be enforced.[3]

If, however, both parties, having full knowledge of his relations to each of them, voluntarily see fit to entrust him with their business, there is no legal objection, and in such a case the broker may recover from each his stipulated compensation.[4]

[1] Bell *v.* McConnell, 37 Ohio St. 396, 41 Am. Rep. 528: Rice *v.* Wood, 113 Mass. 133, 18 Am. Rep. 459; Scribner *v.* Collar, 40 Mich. 375, 29 Am. Rep. 541; Lynch *v.* Fallon, 11 R. I. 311, 23 Am. Rep. 458; Meyer *v.* Hanchett, 39 Wis. 419, s. c. 43 Wis. 246; Raisin *v.* Clark, 41 Md. 158, 20 Am. Rep. 66; Walker *v.* Osgood, 98 Mass. 348, 93 Am. Dec. 168; DeSteiger, *v.* Hollington, 17 Mo. App. 382; Webb *v.* Paxton, 36 Minn. 532, 32 N. W. Rep. 749; Morison *v.* Thompson, L. R. 9 Q. B. 480, 10 Eng. Rep. 129; Robbins *v.* Sears, 23 Fed. Rep. 874; Bates *v.* Copeland, 4 McArth. (D. C.) 50; Collins *v.* Fowler, 8 Mo. App. 588.

[2] Bell *v.* McConnell, 37 Ohio St. 396, 41. Am. Rep. 528; Farnsworth *v.* Hemmer, 1 Allen (Mass.) 494, 79 Am. Dec. 756; Walker *v.* Osgood, 98 Mass. 348, 93 Am. Dec. 168; Smith *v.* Townsend, 109 Mass. 500; Rice *v.* Wood, 113 Mass. 133, 18 Am. Rep. 459; Bollman *v.* Loomis, 41 Conn. 581; Everhart *v.* Searle, 71 Penn. St. 256; Morison *v.* Thompson, L. R. 9 Q. B. 480, 10 Eng. Rep. 129; Lynch *v.* Fallon, 11 R. I. 311, 23 Am. Rep. 458; Raisin *v.* Clark, 41 Md. 158, 20 Am. Rep. 66.

[3] Walker *v.* Osgood, 98 Mass. 348, 93 Am. Dec. 168; Farnsworth *v.* Hemmer, 1 Allen (Mass.) 494, 79 Am. Dec. 756.

[4] Alexander *v.* Northwestern University, 57 Ind. 466; DeSteiger *v.* Hollington, 17 Mo. App. 382; Rowe *v.* Stevens, 53 N. Y. 621; Joslin *v.* Cowee, 56 N. Y. 626; Rolling Stock Co. *v.* Railroad, 34 Ohio St. 450; Leekins *v.* Nordyke, 66 Iowa, 471; Bell *v.* McConnell, 37 Ohio St. 396, 41 Am. Rep. 528; Rice *v.* Wood, 113 Mass. 133, 18 Am. Rep. 459; Scribner *v.* Collar, 40 Mich. 375, 29 Am. Rep. 541.

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§ 973. **How in Case of mere Middle-man.** Where, however, the agent stands in the situation of a mere middle-man, not having undertaken to act as agent for either party or to exercise for either his skill, knowledge or influence, but merely to bring the parties together to deal for themselves, and he himself stands entirely indifferent between them, it is held that he may recover from each although each was ignorant of his relations to the other.[1] Such cases may undoubtedly occur, but, as has been well said, "their exceptional character should appear clearly, before they should be exempted from the general principle."[2]

§ 974. **No Compensation when Undertaking illegal.** If the undertaking of the broker was to do something which was illegal, immoral, or opposed to public policy,[3] he can recover no commissions, although his undertaking be fully performed.[4] But he is not necessarily affected by the unlawful intentions of the parties whom he brings together, although the contract which they make would be void because of such intentions. Whether he is or not, depends upon the question whether he was privy to the unlawful intention. As is said by Mr. Justice MATTHEWS, in a leading case before the Supreme Court of the United States: "It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it which renders it void, and in such a case, being innocent of any violation

[1] Rupp *v.* Sampson, 16 Gray (Mass.) 398, 77 Am. Dec. 416; Siegel *v.* Gould, 7 Lans. (N. Y.) 177. In Rupp *v.* Sampson, BIGELOW, C. J. said: "The claim of the plaintiff would have stood on a very different ground if he had been employed as a broker to buy or sell goods. It would in such case have been a fraud for him to conceal his agency for one from the other. The interests of buyer and seller are necessarily adverse, and it would operate as a surprise on the confidence of both parties, and essentially affect their respective interests, if one person should, without their knowledge, act as the agent of both. Farebrother *v.* Simmons, 5 Barn. & Ald. 333; Story on Agency, sec. 31. But the plaintiff did not act in any such capacity. He was not an agent to buy or sell, but only acted as a middleman to bring the parties together, in order to enable them to make their own contracts. He stood entirely indifferent between them, and held no such relation in consequence of his agency as to render his action adverse to the interests of either party."

[2] See per GRAVES, J., in Scribner *v.* Collar, 40 Mich. 375, 29 Am. Rep. 541.

[3] See subject discussed, *ante*, § 20, *et seq.*

[4] Fareira *v.* Gabell, 89 Penn. St. 89; Irwin *v.* Williar, 110 U. S. 499; Lyon *v.* Mitchell, 36 N. Y. 235, 93 Am. Dec. 502.

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of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation and advances. But we are also of the opinion that when the broker is privy to the unlawful designs of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction."[1]

§ 975. **How affected by Misconduct.** The broker's duty to his principal to have and exercise reasonable skill, care and prudence has already been noticed, as has also his duty to obey the lawful instructions of his principal. For a breach of these, as has been seen, the principal may maintain an action against the broker, or, if he prefer, he may show the misconduct in bar or by way of recoupment, in an action brought by the broker for his compensation.[2]

§ 976. **How when not licensed.** Where a statute requires brokers to be licensed and imposes a penalty for exercising the vocation without a license, an unlicensed broker cannot recover, either upon the contract or upon a *quantum meruit*, for services rendered by him in that capacity.[3] The presumption is that the broker has complied with the law and is duly licensed, and the burden of proof is upon him who alleges the contrary.[4]

Such statutes, however, do not ordinarily apply to the case of a private individual not carrying on the business of a broker, and such an one may recover an agreed commission for a single sale though he had no license.[5]

2. *Right to Reimbursement.*

§ 977. **Entitled to Reimbursement.** The broker is entitled to be reimbursed for all costs and expenses, and to be indemnified against all losses and liabilities, which he has fairly and in

[1] In Irwin *v.* Williar, 110 U. S. 499, 510, cited with approval in Crawford *v.* Spencer, 92 Mo. 498, 1 Am. St. Rep. 745.

[2] Fisher *v.* Dynes, 62 Ind. 348; Dodge *v.* Tileston, 12 Pick. (Mass.) 328; Denew *v.* Daverell, 3 Camp. 451; Hamond *v.* Holiday, 1 C. & P. 384; White *v.* Chapman, 1 Stark. 113; Hurst *v.* Holding, 3 Taunt. 32.

[3] Johnson *v.* Hulings, 103 Penn. St. 498, 49 Am. Rep. 131; Holt *v.* Green, 78 Penn. St. 198, 13 Am. Rep. 737.

[4] Shipler *v.* Scott, 85 Penn. St. 329.

[5] Chadwick *v.* Collins, 26 Penn. St. 138.

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good faith incurred, by the authority and for the benefit of his principal, and which were not rendered necessary by his own misconduct or neglect.[1] Thus when a broker purchases or sells property without disclosing to the respective principals in the transaction the name of the party for whom he acts, he becomes, on the one side, liable personally for the purchase price of the property bought, and, on the other, is entitled to collect such price from the principal at whose instance the purchase was made. The vendee in such a case can relieve himself from liability to the broker only by showing payment of the contract price by him to the original vendor, or a release for a good and valuable consideration from the broker.[2]

So where a broker acting in good faith, but without disclosing his principal, sold repudiated bonds by the direction of his principal, it was held that he was entitled to recover from the latter the damages he had suffered by reason of making the sale.[3]

So a broker who at the direction of his principal, buys property for the principal to be held as an investment, is entitled to be reimbursed for the cost thereof,[4] or in case he is compelled to resell it at a depreciation in price, to recover the loss thereby occasioned.[5]

But if the expense or liability for which the broker seeks reimbursement or indemnity was unnecessarily incurred,[6] or was the result of the broker's own misconduct or neglect,[7] or of a violation of his principal's instructions,[8] or was incurred while the broker was acting in excess of his authority,[9] he cannot recover.

§ 978. **How when Undertaking not performed.** The right of the broker to reimbursement and indemnity when he fails to fully complete his undertaking, depends upon the nature of the undertaking and the reason of his failure. In this respect the question is analogous to that of his right to compensation. A

[1] Duncan *v.* Hill, L. R. 8 Exch. 242, 6 Eng. Rep. 303; Ruffner *v.* Hewitt, 7 W. Va. 585; Beach *v.* Branch, 57 Ga. 362; Searing *v.* Butler, 69 Ill. 575; Maitland *v.* Martin, 86 Penn. St. 120.

[2] Knapp *v.* Simon, 96 N. Y. 284.

[3] Maitland *v.* Martin, 86 Penn. St. 120.

[4] Bennett *v.* Covington, 22 Fed. Rep. 816.

[5] Bennett *v.* Covington, *supra*.

[6] Clegg *v.* Townshend, 16 L. T. R. N. S. 180.

[7] Duncan *v.* Hill, L. R. 8 Exch. 242, 6 Eng. Rep. 303.

[8] Story on Agency, § 341.

[9] Bowlby *v.* Bell, 3 C. B. 284; Fletcher *v.* Marshall, 15 M. & W. 755.

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broker who undertakes to sell property, for example, is ordinarily, as has been seen, entitled to no compensation unless he finds a purchaser who is ready, willing and able to buy upon the terms stipulated.[1] Unless there is an express contract to the contrary, he is understood as risking the chance of losing his labor if his efforts do not prove successful, and the same considerations apply to his right to recover for his expenses incurred. If being left at liberty to choose his own means and methods as to the accomplishment of the result, he incurs expenses in travelling, advertising and similar endeavors, he will not be entitled to reimbursement for these if, without the principal's fault, his efforts fail of success.[2] And even if successful, he would not, in the absence of a contract or custom to the contrary, be entitled to recover, as his commission is, in ordinary cases, supposed to cover these expenses.[3]

Where, however, the principal expressly directs that certain means or methods be adopted, the broker would be entitled to reimbursement for the expense thereby incurred.[4]

So where the broker is employed to perform a service which necessarily requires that he should incur certain expenses as inducive to the accomplishment of the object, and before a reasonable time has been allowed him in which to bring the undertaking to a termination, his authority is, without his fault, revoked by his principal, he would undoubtedly be entitled to be reimbursed for this outlay.[5]

3. *Right to a Lien.*

§ 979. **No general Lien.** Brokers do not usually possess the right of a general lien, though like other agents they may be in a situation to exercise the right of a particular lien. The reason of this is found in the distinguishing character of the broker, that, in general, he is not entrusted with the possession of the property respecting which he is employed to act. The right of lien, as has been seen, is a right in one person to retain that which is

[1] See *ante*, §§ 965, 966.

[2] Sibbald *v.* Bethlehem Iron Co., 83 N. Y. 378, 38 Am. Rep. 441.

[3] In this respect the broker stands in the attitude of one pursuing an independent calling, who having undertaken a certain duty is left at liberty to choose his own means and methods.

[4] See *ante*, § 652.

[5] Sibbald *v.* Bethlehem Iron Co., *supra*.

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in his possession belonging to another, until certain demands of the party in possession are satisfied, and it presupposes that the person claiming the lien has possession of the property. It is evident, however, from the nature of the broker's employment that he has not, under ordinary circumstances, any property of his principal in his possession upon which the lien could attach.[1]

§ 980. **Liens in special Cases—Insurance Brokers.** But a broker may be, and often is, intrusted with the possession of the property in respect to which he negotiates, thus combining, with his character as broker, certain also of the characteristics of the factor. Where such is the case, he may have a lien upon such property for his costs and charges in respect thereto.[2]

And from the general custom to intrust to them the possession of the policies of insurance effected by them, insurance brokers have a lien upon such policies and the proceeds of them, not only for their commissions and premiums paid by them upon those particular policies, but also for their general insurance balance against their principal.[3]

§ 981. **No Lien except for Debt due from Principal.** But even if the broker possessed a lien in any case, the debt in respect to which it is claimed must in general be due from the person whose property he seeks to retain, and therefore if he knows or has reason to believe that the person by whom he is employed is himself but the agent of another to whom the property belongs, he will not be allowed to retain it for a debt due from the agent only.[4]

But this rule does not conflict with that which permits a subagent to claim a lien against the real principal in the transaction, in accordance with rules heretofore considered,[5] because in these cases the debt is, in reality, the debt of the principal, either from the fact that he expressly or impliedly authorized it or that he has subsequently ratified and confirmed it.

[1] Barry v. Boninger, 46 Md. 59.

[2] Barry v. Boninger, 46 Md. 59.

[3] 2 Phillips on Ins., § 1909; Snook v. Davison, 2 Camp. 218; Fisher v. Smith, 4 App. Cas. 1, 38 Eng. Rep. 1; McKenzie v. Nevius, 22 Me. 138, 38 Am. Dec. 291; Spring v. Ins. Co., 8 Wheat. (U. S.) 268.

[4] Barry v. Boninger, 46 Md. 59.

[5] See *ante*, § 698.

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VII.

RIGHTS OF BROKER AGAINST THIRD PERSONS.

§ 982. **In general, no Right of Action on Contracts.** The broker, as has been seen, ordinarily contracts as such for a principal named, or acts merely as a middle-man to bring the parties together to contract for themselves. Where such is the mode of dealing the broker assumes no personal obligations and acquires no rights of action, the benefits and obligations attaching only to his principals.[1]

§ 983. **When he may sue.** It has been seen in an earlier portion of this work that an agent may maintain an action in his own name against third persons upon contracts made with them in the following cases: *a.* Where the agent has contracted personally; *b.* Where the agent was the real principal under certain circumstances; and, *c.* Where the agent has a special interest in the subject-matter of the contract.[2]

These rules apply in general to the case of brokers. The very fact that one deals as broker implies the existence of a principal for whom he acts;[3] but, notwithstanding this, he may so act as to make himself the party to the contract instead of his principal. Where this is the case, he may maintain an action upon the contract in his own name.[4] This right, however, is ordinarily subject to the prior right of the principal to intervene and claim performance to himself, the defendant being then entitled to be put in the same situation, at the time of the intervention of the principal, as if the agent had been the real contracting party.[5]

Where, however, the broker has contracted as such, the name of the principal on whose account he deals being disclosed, the right of action is in the principal only and the broker cannot sue.[6]

An exception to this rule exists in the case of the insurance broker. Policies not under seal are frequently issued payable to the broker for the benefit of a named principal, or "for the owners" or "for whom it may concern,"[7] and actions upon such

[1] Fairlie *v.* Fenton, L. R. 5 Ex. 169.

[2] See *ante*, §§ 754–756.

[3] Baxter *v.* Duren, 29 Me. 434, 50 Am. Dec. 602.

[4] See *ante*, § 755.

[5] See *ante*, § 773.

[6] Fairlie *v.* Fenton, L. R. 5 Ex. 169; Sharman *v.* Brandt, L. R. 6 Q. B. 720.

[7] "There are obvious reasons," says

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a policy may be brought either in the name of the broker to whom it was made payable,[1] or of the principal for whose benefit it was effected.[2]

VIII.

RIGHTS OF PRINCIPAL AGAINST THIRD PERSONS.

§ 984. **Same as in other Cases of Agency.** The question of the rights of the principal against third persons on contracts made by, or through the intervention of a broker, depends upon the same considerations which control in the case of similar contracts made by any other agent and which have already been discussed. In general terms, however, the principal is entitled to demand, receive and enforce the performance by the third persons, with whom the broker deals, of all contracts and obligations made in his name or in his behalf; and to have the same remedies for the protection of his interests and the recovery and preservation of his property which he would have if acting in his own proper person.[3] And, as will be seen in a following section, inasmuch as the broker deals ordinarily as agent only, and not as the ostensible principal, the principal's rights are not subject to any set-offs or equities existing against the broker.[4]

IX.

RIGHTS OF THIRD PERSONS AGAINST PRINCIPAL.

§ 985. **Same as in other Cases of Agency.** The rights of

PUTNAM, J., "for the introduction of the clause in question. The insurance brokers might desire to have the loss paid to them to indemnify them for any advances for premium or otherwise, which they might have against the owners; and the insurance company might desire to have that clause, to enable them to set off any legal claim which they might have against the insurance brokers." Farrow *v.* Commonwealth Ins. Co., 18 Pick. (Mass.) 53, 29 Am. Dec. 564. But insurance company cannot set off individual debt of agent against the principal. Braden *v.* Louisiana State Ins. Co., 1 La. 220, 20 Am. Dec. 277.

[1] Farrow *v.* Commonwealth, *supra;* Jefferson Ins. Co. *v.* Cotheal, 7 Wend. (N. Y.) 82, 22 Am. Dec. 567; Provincial Ins. Co. *v.* Leduc, L. R. 6 P. C. C. 222, 11 Eng. Rep. 84.

[2] Farrow *v.* Commonwealth Ins. Co., *supra;* Lazarus *v.* Commonwealth Ins. Co., 5 Pick. (Mass.) 76; Browning *v.* Provincial Ins. Co., L. R. 5 P. C. C. 263, 8 Eng. Rep. 217; Sargent *v.* Morris, 3 B. & Ald. 281.

[3] See *ante*, §§ 766–799.

[4] See *post*, § 986.

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third persons against the principal for the acts and contracts of the broker rest upon the same principles as in other cases of agency. Where the broker acting within the limits of his authority has bound his principal to third persons, they are entitled to the same rights and remedies against him as though the same act had been done by him in person.[1]

Where, on the other hand, the broker has exceeded his authority, his principal is not bound, nor can the broker bind him, in opposition to express instructions, by pursuing his usual course of dealing.[2]

§ 986. **No Set-off of Broker's Debts.** As has been seen, the broker has usually no possession of the property which he is employed to sell, and acts ordinarily only in the name of the principal. His character implies that he is acting for another, and whether the name of that other is disclosed or not, it is well settled that where the broker has not been permitted to appear as the principal, by being entrusted with the possession of the property or the usual indicia of ownership, the third persons with whom he deals cannot, when called upon for performance by the principal, set-off against the latter debts or obligations due to them from the broker.[3]

[1] See *ante*, §§ 694–752.

[2] "A broker is a special agent, and derives his power and authority to bind his principal from the instructions given to him by his principal: Code, secs. 2194, 2196, 2184; Story on Agency, 32; 1 Esp. 111, 113; 32 Md. 169; 60 Ill. 237. When definite instructions are given by the principal to the broker to sell goods for him at a certain specified price for a certain time and day only, this will not authorize the broker to contract and sell the same kind of goods for his principal at a different and subsequent time for the same price; his power is limited by and ceases with his instructions; and this is so, even though it had been usual in the course of dealings between the broker and his principal for the broker to continue to sell at the prices quoted last by the principal: 32 Md. 179, 180." Clark *v.* Cumming, 77 Ga. 64, 4 Am. St. Rep. 72.

[3] Baring *v.* Corrie, 2 B. & Ald. 137; Graham *v.* Duckwall, 8 Bush (Ky.) 12; Crosby *v.* Hill, 39 Ohio St. 100; Cooke *v.* Eshelby, 12 App. Cas. 271, 38 Eng. Rep. 372.

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CHAPTER IV.

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I.

DEFINITIONS AND DISTINCTIONS.

§ 986a. **Factors or Commission Merchants defined.** As has been stated in the opening chapter of the work, these terms are nearly or quite synonymous. The former is the more common in the language of the law, the latter in the language of commerce. A factor is one whose business it is to receive and sell goods for a commission. He differs from a broker in that he is entrusted with the possession of the goods to be sold and usually sells in his own name. He is invested by law with a special property in the goods to be sold and a general lien upon them, for his advances; and unless there be an agreement or usage to the contrary, he may sell upon a reasonable credit.[1]

Del Credere Commission. Where, in consideration of an increased commission, the factor guarantees the payment of debts arising through his agency, he is said to sell upon a *del credere* commission.[2]

[1] See *ante*, § 14.

[2] *Ante*, § 14.

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Supercargo. A factor is called a supercargo when authorized to sell a cargo which he accompanies on the voyage.[1]

Consignee. The principal in these transactions is also often called the consignor, and the factor the consignee.

No separate consideration of the rights, duties and liabilities of commission merchants or consignees is here intended, but the whole topic will be treated under the general title of factor.

II.

HOW APPOINTED.

§ 987. **Same as other Agents.** No formal mode of authorization is requisite in the employment of a factor. Like other agents, he may be, and usually is, authorized by parol; his appointment may be inferred from conduct; and his unauthorized acts may be ratified by the principal's subsequent acquiescence or adoption.[2]

III.

IMPLIED POWERS OF FACTORS.

§ 988. **In general.** A factor, like other agents, possesses those implied and incidental powers which are reasonably necessary and proper for the execution of his undertaking, and which are usually exercised by factors under like circumstances and which are not forbidden.[3]

§ 989. **How affected by Usage.** As in the case of brokers, the law regulating the transactions of factors is largely the outgrowth of commercial usage, and such usage is constantly appealed to in interpreting or defining their powers.[4] "A person who deals in a particular market," says SHELDON, J., "must be taken to deal according to the known, general and uniform custom of that market; and he who employs another to act for him at a particular place or market must be taken as intending that the business will

[1] *Ante*, § 14.

[2] See *ante*, §§ 79–108.

Factor's retainer may be proved by oral testimony in a suit against him to recover the proceeds of a sale, and it is immaterial whether a retainer is proved at all, when letters written by him show that he received and sold the property. Deshler *v.* Beers, 32 Ill. 368, 83 Am. Dec. 274.

[3] See *ante*, § 311.

[4] Phillips *v.* Moir, 69 Ill. 155; Owings *v.* Hull, 9 Peters (U. S.) 607.

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be done according to the usage or custom of that place or market, whether the principal in fact knew of the usage or custom or not." [1] How far this presumption of knowledge is conclusive, however, has been considered in an earlier section.[2]

Subject to certain limitations there referred to, it is clear that where there are no instructions to the contrary, not only does the principal intend, but it is the factor's duty to the latter, that the factor shall conform to the regular and established customs prevailing in reference to his undertaking at that time and place.[3] So, on the other hand, where no instructions to the contrary are given, and in the absence of unusual exigencies or contingencies, the factor has performed his duty to his principal when he has performed his undertaking in the usual and ordinary manner.[4]

§ 990. **To sell on Credit.** It was formerly considered that a factor had no implied power to sell upon credit,[5] but the rule is now well settled that, in the absence of instructions or an usage to the contrary, the factor, exercising reasonable care and prudence in the selection of a responsible purchaser, may sell the goods upon a reasonable term of credit.[6] Where, however, he is instructed to sell for cash only,[7] or where the custom is not to grant credit,[8] a factor has no implied power to sell upon credit. Upon a sale on credit, the factor may take negotiable paper in his own name in payment and may discount the same for his principal or surrender it up when paid.[9] But if he discounts it

[1] In Bailey *v.* Bensley, 87 Ill. 556, citing Story on Agency, §§ 60, 96, 199; 1 Chitty Cont. 11th Am. ed. 83; Sutton *v.* Tatham, 10 A. & E. 27; Bayliffe *v.* Butterworth, 1 W. H. & G. (Exch.) 428; Lyon *v.* Culbertson, 83 Ill. 33; United States L. Ins. Co. *v.* Advance Co., 80 Ill. 549.

[2] See *ante*, § 486.

[3] Phillips *v.* Moir, 69 Ill. 155.

[4] Phillips *v.* Moir, *supra;* Davis *v.* Kobe, 36 Minn. 214, 1 Am. St. Rep. 663.

[5] See Paley on Agency, 26; 2 Kent's Com. 622.

[6] McConnico *v.* Curzen, 2 Call (Va.) 358. 1 Am. Dec. 540; James *v.* McCredie, 1 Bay (S. C.) 294, 1 Am. Dec. 617; Goodenow *v.* Tyler, 7 Mass. 36, 5 Am. Dec. 22; Van Alen *v.* Vanderpool, 6 Johns. (N. Y.) 69, 5 Am. Dec. 192; Greely *v.* Bartlett, 1 Greenl. (Me.) 172, 10 Am. Dec. 54; Hapgood *v.* Batcheller, 4 Metc. (Mass.) 576; Robertson *v.* Livingston, 5 Cow. (N. Y.) 473; Leland *v.* Douglass, 1 Wend. (N. Y.) 490; Burton *v.* Goodspeed, 69 Ill. 238; Byrne *v.* Schwing, 6 B. Mon. (Ky.) 201; Given *v.* Lemoine, 35 Mo. 110; Daylight Burner Co. *v.* Odlin, 51 N. H. 56, 12 Am. Rep. 45; Houghton *v.* Matthews, 3 B. & P. 489; Pinkham *v.* Crocker, 77 Me. 563.

[7] Bliss *v.* Arnold, 8 Vt. 252, 30 Am. Dec. 467; Hall *v.* Storrs, 7 Wis. 253.

[8] Harbert *v.* Neill, 49 Tex. 143; Neill *v.* Billingsley, Id. 161; Kauffman *v.* Beasley, 54 Tex. 563.

[9] Goodenow *v.* Tyler, 7 Mass. 36, 5

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for his own accommodation, he makes the note his own, and will be liable though the maker fails.[1]

§ 991. **To sell in his own Name.** In the absence of instructions to the contrary, the factor has implied authority to sell the goods in his own name without disclosing that of his principal.[2]

§ 992. **To warrant Quality.** A factor, like other agents authorized to sell goods, has, unless otherwise limited, implied power to warrant the quality of the goods sold where such a warranty is usually given on similar sales at that time and place.[3]

§ 993. **To receive Payment.** Being intrusted with the possession of the goods which he is authorized to sell, and having implied power to sell in his own name, the factor may undoubtedly receive payment for the goods sold,[4] and give the necessary and proper receipts therefor.[5]

§ 994. **To pledge.** In the absence of a statute granting that authority, the rule is well established that a factor has no implied power to pledge the principal's goods for the factor's own debt.[6]

Am. Dec. 22; West Boylston Mnfg Co. *v.* Searle, 15 Pick. (Mass.) 225; Greely *v.* Bartlett, 1 Greenl. (Me.) 172, 10 Am. Dec. 54.

[1] Myers *v.* Entriken, 6 Watts & Serg. (Penn.) 44, 40 Am. Dec. 538.

[2] Baring *v.* Corrie, 2 B. & Ald. 137; Graham *v.* Duckwall, 8 Bush (Ky.) 12.

[3] Pickering *v.* Busk, 15 East. 38; Randall *v.* Kehlor, 60 Me. 37; Schuchardt *v.* Allens, 1 Wall. (U. S.) 359; Andrews *v.* Kneeland, 6 Cow. (N. Y.) 354. See also Pickert *v.* Marston, 68 Wis. 465, 60 Am. Rep. 876; Herring *v.* Skaggs, 68 Ala. 180, 34 Am. Rep. 4; Upton *v.* Suffolk Mills, 11 Cush. (Mass.) 586, 59 Am. Dec. 163; Smith *v.* Tracy, 36 N. Y. 82; Ahern *v.* Goodspeed, 72 N. Y. 108. But see Argersinger *v.* Macnaughton, 114 N. Y. 535.

[4] Drinkwater *v.* Goodwin, Cowp. 256; Rice *v.* Groffmann, 56 Mo. 434.

[5] Corlies *v.* Cumming, 6 Cow. (N. Y.) 181; VanStaphorst *v.* Pearce, 4 Mass. 258.

[6] McCombie *v.* Davies, 6 East. 538; Pickering *v.* Busk, 15 East. 38; Phillips *v.* Huth, 6 M. & W. 572; Cole *v.* Northwestern Bank, L. R. 10 C. P. 354, 12 Eng. Rep. 418; Wright *v.* Solomon, 19 Cal. 64, 79 Am. Dec. 196; Kinder *v.* Shaw, 2 Mass. 397; Warner *v.* Martin, 11 How. (U. S.) 204; Hoffman *v.* Noble, 6 Metc. (Mass.) 68, 39 Am. Dec. 711; Thurston *v.* Blanchard, 22 Pick. (Mass.) 20, 33 Am. Dec. 700; Bott *v.* McCoy, 20 Ala. 578, 56 Am. Dec. 223; Kennedy *v.* Strong, 14 Johns. (N. Y.) 128; Rodriguez *v.* Heffernan, 5 Johns. Ch. (N. Y.) 417; First National Bank *v.* Nelson, 38 Ga. 391, 95 Am. Dec. 400; Newbold *v.* Wright, 4 Rawle (Penn.) 195; Merchants' National Bank *v.* Trenholm, 12 Heisk. (Tenn.) 520; Gray *v.* Agnew, 95 Ill. 315; First National Bank *v.* Boyce, 85 Ky. 42, 39 Am. Rep. 198; McCreary *v.* Gaines, 55 Tex. 485, 40 Am. Rep. 818; Stetson *v.* Gurney, 17 La. 166; Hadwin *v.* Fisk, 1 La. Ann. 48; Miller *v.*

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This doctrine results from the fact that the factor is but an agent, and as such can bind his principal only when his acts are within the scope of his authority. A power to sell for the benefit of his principal can in no way be stretched into a power to pledge for his own benefit. Nor does it make any difference that the pledgee was ignorant of the extent of the factor's authority, or supposed him to be the real owner of the goods.[1] As in the case of other agents, the person dealing with the factor must ascertain the extent of his authority, and omits to do so at his peril.

This rule operates to prevent a transfer or indorsement of the bill of lading by way of security for the factor's debt, as well as the actual delivery of the goods themselves in pledge.[2] Nor can the power arise from usage.[3]

But it has been held that a factor may pledge the goods for the payment of charges against the goods themselves, as for duties levied upon them,[4] or to meet a draft drawn by the principal against the proceeds before the goods were sold.[5] So it has been held that, though a pledge by the factor was unauthorized, a *bona fide* pledgee will be protected to the extent of the factor's charge against the principal.[6]

Like other unauthorized acts of an agent, however, a pledge by the factor may be ratified by the principal, and if he is content with it, no one else has a right to complain.[7] The factor

Schneider, 19 La. Ann. 300, 92 Am. Dec. 535; Young *v.* Scott, 25 La. Ann. 318; Insurance Co. *v.* Kiger, 103 U. S. 352; Horr *v.* Barker, 11 Cal. 393, 70 Am. Dec. 791; Benny *v.* Rhodes, 18 Mo. 147, 59 Am. Dec. 298; Benny *v.* Pegram, 18 Mo. 191, 59 Am. Dec. 298; Bowie *v.* Napier, 1 McCord. (S. Car., 1, 10 Am. Dec. 641; Allen *v.* St. Louis Bank, 120 U. S. 20.

[1] Wright *v.* Solomon, 19 Cal. 64, 79 Am. Dec. 196.

[2] Newsom *v.* Thornton, 6 East. 17; Phillips *v.* Huth, 6 M. & W. 572; Rice *v.* Cutler, 17 Wis. 351; Hirschorn *v.* Canney, 98 Mass. 149; Erie, &c. Co. *v.* St. Louis Co., 6 Mo. App. 172; Fourth Nat. Bank *v.* St. Louis Co., 11 Mo. App. 333; Allen *v.* St. Louis Bank, 120 U. S. 20.

[3] Newbold *v.* Wright, 4 Rawle (Penn.) 195.

[4] Evans *v.* Potter, 2 Gall. (U. S. C. C.) 12.

[5] Boyce *v.* Commerce Bank, 22 Fed. Rep. 53. But see Graham *v.* Dyster, 2 Stark. N. P. 23.

[6] First National Bank *v.* Boyce, 85 Ky. 42, 39 Am. Rep. 198; Warner *v.* Martin, 11 How. (U. S.) 209, *contra*, Merchants' Bank *v.* Trenholm, 12 Heisk. (Tenn.) 520. See also Walther *v.* Wetmore, 1 E. D. Smith (N. Y.) 7; Bonito *v.* Mosquera, 2 Bosw. (N. Y.) 401.

[7] Bott *v.* McCoy, 20 Ala. 578, 56 Am. Dec. 223; Meyer *v.* Morgan, 51 Miss. 21, 24 Am. Rep. 617.

As in other cases, however, the principal will not be deemed to have

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himself, therefore, can not allege his own tortious act to sustain an action in his own name against the pledgee for the recovery of the goods or their value.[1]

§ 995. **To pledge—Under Factor's Acts.** This rule which declares invalid the unauthorized pledge by the factor, confessedly works great hardships to innocent parties who have, in good faith, relied upon the possession and apparent ownership of the factor, and courts have frequently, while declaring that the rule was too well settled to be shaken, expressed the opinion that it might better originally have been settled the other way.

To remedy this hardship, the legislatures of several of the States have passed what are ordinarily known as Factors' Acts, for the protection of those who in good faith have dealt with the factor in the belief that he was the true owner of the goods.[2]

ratified unless he had knowledge that the agent had exceeded his authority. Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96.

[1] Bott v. McCoy, 20 Ala. 578, 56 Am. Dec. 223.

[2] The Factors' Act of New York after which many of those of the other states have been modeled, provides:

"§ 3. Every factor or other agent, entrusted with the possession of any bill of lading, custom-house permit, or warehouse-keeper's receipt for the delivery of any such merchandise, and every such factor or agent not having the documentary evidence of title, who shall be entrusted with the possession of any merchandise for the purpose of sale, or as a security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person, for the sale or disposition of the whole or any part of such merchandise, for any money advanced, or negotiable instrument or other obligation in writing, given by such other person upon the faith thereof.

"§ 4. Every person who shall hereafter accept or take any such merchandise in deposit from any such agent, as a security for any antecedent debt or demand, shall not acquire thereby, or enforce any right or interest in or to such merchandise or document, other than possessed or might have been enforced by such agent at the time of such deposit.

"§ 5. Nothing contained in the two last preceding sections of this act, shall be construed to prevent the true owner of any merchandise so deposited, from demanding or receiving the same, upon repayment of the money advanced, or on restoration of the security given, on the deposit of such merchandise, and upon satisfying such lien as may exist thereon in favor of the agent who may have deposited the same; nor from recovering any balance which may remain in the hands of the person with whom such merchandise shall have been deposited as the produce of the sale thereof, after satisfying the amount justly due to such person by reason of such deposit."

Statutes of this nature are found in Maine, Rev. Stats. 1883, Chap. 81,

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While these Acts vary in their provisions, they are in general designed for the protection of those who in good faith, and in ignorance of any defect of title in the pledgor, or of the claims of others to it, advance money or incur liability upon the faith of the merchandise and ownership thereof by the pledgor, as evidenced by the possession of the property, or the documentary evidence of title with which he has been intrusted by the owner. It is the act of the owner in intrusting the factor with the possession of the goods, or the documentary evidence of ownership, —the apparent ownership and right of disposal,—in connection with the fact that innocent third persons deal with him upon the faith of such apparent ownership, that estops the owner from following his property into the hands of *bona fide* vendees or

§ 1; Massachusetts, Pub. Stats. 1882, Chap. 71; Rhode Island, Pub. Stats. 1882, p. 332; Pennsylvania, Brightley's Purdon's Digest, p. 773; Ohio, Rev. Stats. 1886, § 3216; Maryland, Rev. Code, 1878, p. 292; Kentucky, Laws of 1880, May 5, §§ 1 & 6; Missouri, Laws of 1869, p. 91.

Mr. Stimson in his excellent compilation of American Statute Law gives the following summary of these acts, §4381: "In many states every factor, agent (or other person in Maryland), intrusted with the bill of lading, custom-house permit, or warehouseman's receipt, or (in Massachusetts, Maine, Rhode Island, New York, Pennsylvania, Ohio, Wisconsin, and Kentucky) who has possession of any merchandise for the purpose of sale, or (in New York, Ohio or Wisconsin) as a security for advances to be made or obtained thereon, without documentary evidence of title, is deemed the true owner thereof so far as to give validity to any contract made by him with any third person for the sale, pledge (except in Massachusetts, Maine and Kentucky), or disposition of such merchandise, or for any money advanced or negotiable instrument, or other written obligation, given by such person upon the faith thereof, and notwithstanding (except in Maine, Rhode Island, New York, Pennsylvania, Ohio, Maryland, and Kentucky) that such person has notice that the consignee is an agent or factor. * * * *

But such loan or advance must be made in good faith, and (1) with probable cause to believe that the agent had authority to make such loan or pledge, and was not acting fraudulently against the owner: Mass.; (2) with no notice that such agent &c. was not the owner: R. I. * * * And in two states, any person may contract with any agent or factor intrusted with the goods, or the consignee, for the purchase thereof, and may receive the same, and pay for them; and such contract or payment shall be good against the owner, if made in the usual course of business, and the person had no notice that the agent was not authorized to sell the goods and receive the purchase money, notwithstanding he had notice that the other was an agent or factor. R. I., Md."

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pledgees, and gives the latter a better title than their vendor or pledgor had.[1]

§ 996. **To pay his own Debts.** For reasons similar to those which deny his power to pledge, the factor, except where the statute is broad enough to authorize it,[2] cannot confer title, even upon a *bona fide* holder, by turning out the principal's goods in payment of his own debts,[3] even though the accounts

[1] Howland v. Woodruff, 60 N. Y. 73; Stevens v. Wilson, 6 Hill (N. Y.) 512, s. c. in error, 3 Denio (N. Y.) 472.

In New York, in order to estop the owner where the factor has not the documentary evidence of title, actual possession of the goods is required, and constructive possession will not suffice. Howland v. Woodruff, *supra;* Bonita v. Mosquera, 2 Bosw. (N. Y.) 401; Stevens v. Wilson, *supra.* See also Brooks v. Hanover Bank, 26 Fed. Rep. 801; Covell v. Hill, 6 N. Y. 374; Dows v. Greene, 24 N. Y. 638; Cartwright v. Wilmerding, 24 N. Y. 521; First National Bank v. Shaw, 61 N. Y. 283.

In Missouri, see Erie &c. Co. v. St. Louis Co., 6 Mo. App. 172; Fourth Nat. Bank v. St. Louis Co. 11 Mo. App. 333; Allen v. St. Louis Bank, 120 U. S. 20.

In California see Wisp v. Hazzard, 66 Cal. 459.

In Pennsylvania see Mackey v. Dillenger, 73 Penn. St. 85.

In Georgia, see National Exchange Bank v. Graniteville Mnfg Co.—Ga.—8 South E. Rep. 411.

In Wisconsin, see Price v. Wisconsin Ins. Co., 43 Wis. 267; Victor Sewing Machine Co. v. Heller, 44 Wis. 265.

[2] That the ordinary Factor's Acts are not broad enough to justify this, see Warner v. Martin, 11 How. (U. S.) 209; Victor Sewing Machine Co. v. Heller, 44 Wis. 265.

But in California see Davis v. Russell, 52 Cal 611.

[3] Benny v. Rodes, 18 Mo. 147, 59 Am. Dec. 293; Benny v. Pegram, 18 Mo. 191; 59 Am. Dec. 298; Holton v. Smith, 7 N. H. 446; Warner v. Martin, 11 How. (U. S.) 209.

It is no answer to this rule to say that the factor might have sold the goods, and received and squandered the money, thus passing the title and leaving the principal with no remedy, except against the factor. "It has been supposed," says Mr. Justice WAYNE of the Supreme Court of the United States, "that the right of a factor to sell the merchandise of his principal to his own creditor, in payment of an antecedent debt, finds its sanction in the fact of the creditor's belief that his debtor is the owner of the merchandise, and his ignorance that it belongs to another, and if in the last, he has been deceived, that the person by whom the delinquent factor has been trusted shall be the loser. The principle does not cover the case. When a contract is proposed between factors, or between a factor and any other creditor, to pass property for an antecedent debt, it is not a sale in the legal sense of that word or in any sense in which it is used in reference to the commission which a factor has to sell. Williamson v. Berry, 8 How. 495. It is not according to the usage of trade. It is a naked transfer of property in payment of a debt. Money, it is true, is the consideration of such a transfer, but no money passes between the contracting parties. The creditor pays none, and when the

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between the principal and the factor may be in the factor's favor.[1]

§ 997. **To barter or exchange.** A factor is, ordinarily, employed to *sell* goods, and like other agents similarly empowered, he has no implied authority to barter or exchange them, and such a transaction does not divest the principal of his title.[2]

§ 998. **To delegate his Authority.** A factor is employed because trust and confidence are reposed in his ability and integrity, and the execution of this trust and confidence can not, in general, be delegated to another.[3] Exceptions to this rule exist, as in other cases of agency, where the employment of a subagent is justified by a usage of trade,[4] or an established course of

debtor has given to him the property of another in release of his obligation, their relation has only been changed by his violation of an agency which society, in its business relations, cannot do without, which every man has a right to use, and which every person undertaking it promises to discharge with unbroken fidelity. When such a transfer of property is made by a factor for his debt, it is a departure from the usage of trade, known as well by the creditor as it is by the factor. It is more; it is the violation of all that a factor contracts to do with the property of his principal. It has been given to him to sell. He may sell for cash, or he may do so upon credit, as may be the usage of trade. A transfer for an antecedent debt is not doing one thing or the other. Both creditor and debtor know it to be neither. That their dealing for such a purpose will be a transaction out of the usage of the business of a factor. It does not matter that the creditor may not know, when he takes the property, that the factor's principal owns it; that he believed it to be the factor's in good faith." In Warner *v.* Martin, 11 How. (U. S.) 209.

[1] Benny *v.* Pegram, 18 Mo. 191. 59 Am. Dec. 298.

[2] Gurreiro *v.* Peile, 3 B. & Ald. 616. See also Trudo *v.* Anderson, 10 Mich. 357, 81 Am. Dec. 795; Kent *v.* Bornstein, 12 Allen (Mass.) 342; Lumpkin *v.* Wilson, 5 Heisk. (Tenn.) 555; Wheeler & Wilson Mnfg Co. *v.* Givan, 65 Mo. 89; Wing *v.* Neal, — Me. —, 2 Atl. Rep. 881.

As to power of factor to barter under Factor's Acts, see Victor Sewing Machine Co. *v.* Heller, 44 Wis. 265.

[3] Warner *v.* Martin, 11 How. (U. S.) 209; Catlin *v.* Bell, 4 Camp. 183; Cockran *v.* Irlam, 2 M. & S. 301; Solly *v.* Rathbone, Id. 298; Schmaling *v.* Thomlinson, 6 Taunt. 147; Loomis *v.* Simpson, 13 Iowa, 532; Campbell *v.* Reeves, 3 Head. (Tenn.) 226; Merchants' Nat. Bank *v.* Trenholm, 12 Heisk. (Tenn.) 520; Smith *v.* Sublett, 28 Tex. 163; Connor *v.* Parker, 114 Mass. 331; Furnas *v.* Frankman, 6 Neb. 429; Gillis *v.* Bailey, 21 N. H. 149; Locke's Appeal, 72 Penn. St. 491; Harralson *v.* Stein, 50 Ala. 347.

[4] Trueman *v.* Loder, 11 Ad. & El. 589; Warner *v.* Martin, 11 How. (U. S.) 209.

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dealing,[1] or where it is required by the necessities of the transaction.[2]

§ 999. To compromise the Debt. So a factor who has sold goods for his principal has no implied authority to compromise or compound the claim for the purchase price, or to discharge the debt upon the receipt of a part only.[3]

§ 1000. To submit to Arbitration. So a factor has no implied authority to submit to arbitration a dispute arising out of the transaction, as a claim for damages on account of an alleged breach of an implied warranty of the quality of the goods sold.[4]

§ 1001. To rescind Sale. A factor who has completed a sale for his principal has, thereafter, no implied power to rescind the sale, or discharge the purchaser from its obligations.[5]

§ 1002. To extend Time of Payment. So having sold the goods upon a credit, his undertaking is executed, and he has ordinarily no implied authority to extend the time of payment.[6]

§ 1003. To receive anything but Money in Payment. Nor has the factor implied authority to receive in payment anything but money, and the money must be that which is then circulating at par.[7] He cannot receive payment in goods or depreciated bills or in any other unusual or irregular manner.[8]

§ 1004. To make negotiable Paper. Nor has the factor implied authority to bind his principal by making, accepting or indorsing negotiable paper.[9]

§ 1005. To insure Property. A factor having goods of his principal in his possession may insure them, but he is not bound to do so in the absence of instructions to insure, or of an usage

[1] Blore *v.* Sutton, 3 Meriv. 237; Combes' Case, 9 Coke, 75; Warner *v.* Martin, *supra*.

[2] See McMorris *v.* Simpson, 21 Wend. (N. Y.) 610. See also Johnson *v.* Cunningham, 1 Ala. 249; Dorchester, &c. Bank *v.* New England Bank, 1 Cush. (Mass.) 177; Planters', &c. Bank *v.* First Nat. Bank, 75 N. C. 534.

[3] Russell, Merc. Ag. 48. See *ante*, § 876.

[4] Carnochan *v.* Gould, 1 Bailey (S. Car.) L. 179, 19 Am. Dec. 668.

[5] Smith *v.* Rice, 1 Bailey (S. C.) 648.

[6] Douglass *v.* Bernard, Anthon's N. P. 278.

[7] See *ante*, § 875.

[8] Underwood *v.* Nicholls, 17 C. B. 239; Sangston *v.* Maitland, 11 Gill & J. (Md.) 286.

[9] Hogg *v.* Snaith, 1 Taunt. 347; Murray *v.* East India Co., 5 B. & Ald. 204; Emerson *v.* Providence Mnfg. Co., 12 Mass. 237, 7 Am. Dec. 66.

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to that effect, or unless the habit and course of dealing between himself and his principal imposes the duty upon him.[1] He may effect the insurance in his own name,[2] and to the full value of the goods.[3]

IV.

DUTIES AND LIABILITIES TO PRINCIPAL.

§ 1006. **To use reasonable Care and Prudence.** Like other persons who hold themselves out to the public as specialists in any department of business, the factor is bound to possess a reasonable degree of skill and knowledge, and to exercise that skill and knowledge with reasonable care and prudence. In this respect his undertaking is similar to that of the attorney. The factor does not undertake for infallibility, or the highest degree of judgment, discretion, skill or diligence, but he does undertake for that degree which an ordinarily discreet, prudent and diligent man would exercise in his own business under like circumstances. Exercising that, he is not liable, unless he has expressly contracted for more; but if he exercises less than that, and loss ensues therefrom, he will be liable for it.[4]

§ 1007. **To act in good Faith.** Like other agents in whom trust and confidence are reposed, the factor owes to his principal a high degree of fidelity and good faith. Unless the principal expressly consents to receive less, he has a right to demand from the factor an undivided allegiance to his interests, and the factor will not be permitted to put himself in such a position that his

[1] Lucena *v.* Craufurd, 2 B. & P. N. R. 269; De Forest *v.* Fulton Fire Ins. Co., 1 Hall (N. Y.) 84; Waters *v.* Monarch, &c. Ins. Co., 5 El. & Bl. 870; Brisban *v.* Boyd, 4 Paige (N. Y.) 17; Schaeffer *v.* Kirk, 49 Ill. 251; Shoenfeld *v.* Fleisher, 73 Ill. 404; Area *v.* Milliken, 35 La. Ann. 1150.

[2] Brisban *v.* Boyd, *supra*.

[3] Brisban *v.* Boyd, *supra*.

[4] Van Alen *v.* Vanderpool, 6 Johns. (N. Y.) 69, 5 Am. Dec. 192; Greely *v.* Bartlett, 1 Greenl. (Me.) 172, 10 Am. Dec. 54; Folsom *v.* Mussey, 8 Greenl. (Me.) 400, 23 Am. Dec. 522; Phillips *v.* Moir, 69 Ill. 155; Chandler *v.* Hogle, 58 Ill. 46; Deshler *v.* Beers, 32 Ill. 368, 83 Am. Dec. 274; Ernest *v.* Stoller, 5 Dill. (U. S. C. C.) 438; Atkinson *v.* Burton, 4 Bush (Ky.) 299; McCants *v.* Wells, 3 S. C. 569.

In Foster *v.* Waller, 75 Ill. 464, it is said that a factor is bound to exercise a "high degree of diligence" in ascertaining the pecuniary responsibility of a customer to whom he makes a sale on change.

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own interests, or those of another client, will come in conflict with those of his principal.[1]

Without the principal's full knowledge and consent, therefore, the factor can not represent both parties in the same transaction,[2] nor can he be himself the other party as by buying of, or selling to, himself.[3] If, however, the principal consents, no other person has occasion to complain, and such consent may be evidenced as well by a subsequent ratification as by a prior authorization.[4]

§ 1008. **To obey Instructions.** It is, in general, the duty of the factor to obey the instructions of his principal. To the latter belong the goods, and the profits and advantages to be derived from their sale, and in him, therefore, is vested the power to direct and control the time, manner and terms of their sale. Exceptions to this general rule exist where the factor, by making advances on them, has acquired a special property in the goods,[5] and also, as in other cases, where a sudden emergency requires a deviation from the course prescribed.[6] But where no one of these exceptions exists, the factor disregards his instructions at his peril, and if a loss ensues, he is liable for it.[7] That he acted in good faith and with an intention to benefit his principal, or that he pursued the customary course in such cases, will not excuse a violation of express instructions.[8]

But here, too, as in other cases, the principal who wishes his instructions obeyed must couch them in unambiguous terms, for if they are capable of two constructions and the factor in good

[1] Clarke *v.* Tipping, 9 Beav. 284; Evans *v.* Potter, 2 Gall. (U. S. C. C.) 13; Babcock *v.* Orbison, 25 Ind. 75; Keighler *v.* Savage Mnfg Co., 12 Md. 383, 71 Am. Dec. 600.

[2] Bensley *v.* Moon, 7 Ill. App. 415.

[3] Keighler *v.* Savage Mnfg Co., 12 Md. 383, 71 Am. Dec. 600.

[4] Thus the principal may elect to treat the sale to the factor as valid and maintain an action against him for the purchase price. Wadsworth *v.* Gay, 118 Mass. 44.

[5] See following section.

[6] See *ante*, § 481.

[7] Rundle *v.* Moore, 3 Johns. (N. Y.) Cas. 36; Parkist *v.* Alexander, 1 Johns. (N. Y.) Ch. 394; Courcier *v.* Ritter, 4 Wash. (U. S. C. C.) 549; Bell *v.* Palmer, 6 Cow. (N. Y.) 128; Evans *v.* Root, 7 N. Y. 186, 57 Am. Dec. 512; Williams *v.* Littlefield, 12 Wend. (N. Y.) 362; Scott *v.* Rogers, 31 N. Y. 676; Weed *v.* Adams, 37 Conn. 378; Johnson *v.* Wade, 2 Baxt. (Tenn.) 480; Strong *v.* Stewart, 9 Heisk. (Tenn.) 137; Day *v.* Crawford, 13 Ga. 508; De Tastett *v.* Crousillat, 2 Wash. (U. S. C. C.) 132; Shoenfeld *v.* Fleisher, 73 Ill. 404; Blot *v.* Boiceau, 3 N. Y. 78, 51 Am. Dec. 345; Housel *v.* Thrall, 18 Neb. 484.

[8] Hatcher *v.* Comer, 73 Ga. 418.

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faith and in the exercise of reasonable care and prudence selects and follows one, he can not be held liable because the principal, in fact, intended that the other should be pursued.[1]

Where goods are consigned to a factor to be sold upon certain terms, his acceptance of the consignment without dissent is sufficient evidence of his consent to be bound by the instructions given.

A violation of instructions, however, may in this as in other cases be ratified by the principal, and the factor be thus relieved from liability.[2]

The damages for which the factor, who has disobeyed instructions, would be responsible, must be such as are the natural and proximate result of his disobedience. Thus where cotton, which had been consigned to factors with general instructions to sell, was destroyed by an accidental fire within a reasonable time after the receipt of the instructions, the factors' delay was held not to be the proximate cause of the loss.[3]

§ 1009. **Same Subject—Instructions to sell.** These principles are of frequent application to questions arising from a violation of instructions as to the time or price at which the goods shall be sold. These instructions it is the factor's general duty to obey, and if a loss occurs because of his unjustifiable violation of them, he will be liable for it. Thus if the factor be instructed to sell the goods at a certain time, as upon arrival,[4] or immediately,[5] or when they reach a certain price, he violates the instructions at his peril,[6] and neither usage, nor a *bona fide* intention to benefit his

[1] See *ante*, § 484.

[2] Rice *v.* Brook, 20 Fed. Rep. 611; Faries *v.* Ranger, 35 La. Ann. 102.

[3] Lehman *v.* Pritchett, — Ala. —, 27 Cent. L. Jour. 380, 4 South. Rep. 601.

[4] An instruction accompanying the bill of lading to "please sell on arrival" is an explicit instruction, and if the factor disregards it he is liable for a loss sustained through a fall in prices. Evans *v.* Root, 7 N. Y. 186, 57 Am. Dec. 512.

[5] Weed *v.* Adams, 37 Conn. 378; Howland *v.* Davis, 40 Mich. 545.

A factor who has been instructed to sell and who has not sold within a reasonable time, is not liable for the value of the goods which are destroyed by an accidental fire. His default is not the natural and proximate cause of the loss. Lehman *v.* Pritchett, — Ala. —, 4 South. Rep. 601, 27 Cent. L. J. 380.

[6] Casson *v.* Field, 52 N. Y. Super. Ct. 196.

A factor who is instructed to sell the whole shipment at a certain rate is not authorized to sell parts only, either at or above that rate. His duty is to sell in one lot, or at least so as to realize the price fixed, for the

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principal, will excuse him.[1] So if he is directed not to sell below a given price, and, without sufficient reason, sells for less than the price limited, he will be liable for the loss incurred.[2]

Factor's right to sell to reimburse himself. The fact that the factor has made advances upon the goods will not alone warrant him in selling below the stipulated price,[3] but where such advances have been made, the principal cannot, by imposing an arbitrary price, deprive the factor of his protection, and if the principal neglect or refuse to repay the factor within a reasonable time after a demand upon him for repayment, the factor may sell sufficient of the goods to reimburse himself, even though it be for less than the price fixed,[4] or before the time limited.[5] But having sold enough to protect himself, he is bound, as to the residue, to observe the instructions of his principal.[6]

So if, after the factor has made advances upon the goods, he is directed to sell at a price or at a time which will manifestly, or in reasonable probability, operate to deprive him of his security, as if a sale at the price or time fixed will yield less than the amount of his advances, the factor, acting in good faith and with reasonable prudence, may refuse to obey the instructions to sell, without liability.[7]

whole lot. Levison v. Balfour, 34 Fed. Rep. 882.

[1] Hatcher v. Comer, 73 Ga. 418.

[2] Blot v. Boiceau, 3 N. Y. 78, 51 Am. Dec. 345; Dalby v. Stearns, 132 Mass. 230; Weed v. Adams, 37 Conn. 378; Casson v. Field, 52 N. Y. Super. Ct. 196; Frothingham v. Everton, 12 N. H. 239; George v. McNeill, 7 La. 124, 26 Am. Dec. 498.

[3] Blot v. Boiceau, 3 N. Y. 78, 51 Am. Dec. 345; George v. McNeill, 7 La. 124, 26 Am. Dec. 498.

[4] Marfield v. Goodhue, 3 N. Y. 62; Hilton v. Vanderbilt, 82 N. Y. 591; Frothingham v. Everton, 12 N. H. 239; Brown v. McGran, 14 Pet. (U. S.) 479; Parker v. Brancker, 22 Pick. (Mass.) 40; Dalby v. Stearns, 132 Mass. 230; Butterfield v. Stephens, 59 Iowa, 596; Mooney v. Musser, 45 Ind. 115.

[5] Davis v. Kobe, 36 Minn. 214, 1 Am. St. Rep. 663, 30 N. W. Rep. 662.

[6] Weed v. Adams, 37 Conn. 378.

"There can be no doubt of the proposition that in a case where the protection of the factor himself against loss becomes necessary, his discretion as to the time, price and place of sale would be complete and unlimited even by positive instructions." Phillips v. Scott, 43 Mo. 86, 97 Am. Dec. 369. See also Beadles v. Hartmus, 7 Baxt. (Tenn.) 476; Nelson v. Chicago, &c. R. R. Co., 2 Ill. App. 180.

[7] Weed v. Adams, *supra*; Butterfield v. Stephens, 59 Iowa, 596; Howland v. Davis, 40 Mich. 545; Blair v. Childs, 10 Heisk. (Tenn.) 199; Brown v. McGran, 14 Pet. (U. S.) 479; Feild v. Farrington, 10 Wall. (U. S.) 141; Lockett v. Baxter, — Wash. Ter. —, 19 Pac. Rep. 23.

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But this right of the factor to sell for his own reimbursement may be waived, and it will not exist in contravention of an express agreement to the contrary; as where, at the time the advances are made, the factor agrees, or receives the goods subject to express instructions, to sell only at a certain time, or at a fixed price.[1]

The measure of damages to be recovered of, or recouped

[1] In Brown v. McGran, 14 Pet. (U. S.) 479, Judge STORY says: "We understand the true doctrine on this subject to be this: Wherever a consignment is made to a factor for sale, the consignor has a right, generally, to control the sale thereof, according to his own pleasure, from time to time, if no advances have been made or liabilities incurred on account thereof; and the factor is bound to obey his orders. This arises from the ordinary relation of principal and agent. If, however, the factor makes advances, or incurs liabilities on account of the consignment, by which he acquires a special property therein, then the factor has a right to sell so much of the consignment as may be necessary to reimburse such advances or meet such liabilities; unless there is some existing agreement between himself and the consignor, which controls or varies this right. Thus, for example, if, contemporaneous with the consignment and advances or liabilities, there are orders given by the consignor which are assented to by the factor, that the goods shall not be sold until a fixed time, in such a case, the consignment is presumed to be received by the factor subject to such orders; and he is not at liberty to sell the goods to reimburse his advances or liabilities, until after that time has elapsed. The same rule will apply to orders not to sell below a fixed price; unless, indeed, the consignors shall, after due notice and request, refuse to provide any other means to reimburse the factors. And in no case will the factor be at liberty to sell the consignment contrary to the orders of the consignors, although he has made advances or incurred liabilities thereon, if the consignor stands ready and offers to reimburse and discharge such advances and liabilities.

On the other hand, where the consignment is made generally, without any specific orders as to the time or mode of sale, and the factor makes advances or incurs liabilities on the footing of such consignment, there the legal presumption is that the factor is intended to be clothed with the ordinary rights of factors to sell in the exercise of a sound discretion, at such time and in such mode as the usage of trade and his general duty require; and to reimburse himself for his advances and liabilities out of the proceeds of the sale; and the consignor has no right, by any subsequent orders, given after advances have been made or liabilities incurred by the factor, to suspend or control this right of sale, except so far as respects the surplus of the consignment, not necessary for the reimbursement of such advances or liabilities. Of course, this right of the factor to sell to reimburse himself for his advances and liabilities, applies with stronger force to cases where the consignor is insolvent, and where, therefore, the consignment constitutes the only fund for indemnity."

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against, the factor, for an unlawful violation of his instructions as to sale, is the amount of the injury actually sustained by the principal, if any; otherwise nominal damages only are recoverable.[1] Thus if, notwithstanding the factor sold for less than the

[1] Dalby v. Stearns, 132 Mass. 230; Frothingham v. Everton, 12 N. H. 239; Blot v. Boiceau, 3 N. Y. 78, 51 Am. Dec. 345; Johnson v. Wade, 2 Baxt. (Tenn.) 480; Hornsby v. Fielding, 10 Heisk. (Tenn.) 367; Courcier v. Ritter, 4 Wash. (U. S. C. C.) 549.

In Dalby v. Stearns, *supra*, ENDICOTT, J., says: "In the case at bar the plaintiff consigned goods to the defendants for sale at a limited price. The defendants made advances, and afterwards sold the goods, without sufficient notice to the plaintiff that they intended to sell them, to pay the advances. It is expressly found, however, that the goods were sold in good faith, for the best price that could be obtained for them at the time of the sale, and that from that time to the date of the writ, their market value was not greater than the price for which they sold.

The only question before us is as to the rule of damages. The plaintiff contended that he was entitled to recover the invoice price of the goods, less the amount of advances, returns, discounts and commissions due the defendants under the consignment. But the presiding judge ruled that the plaintiff was entitled to recover the difference between the market value of the goods when sold and the prices for which they were sold by the defendants, less the amount of advances, returns, discounts and commissions to which the defendants were entitled. We are of opinion that this ruling was right. The plaintiff is entitled only to indemnity, and the fact that he limited the price cannot in itself increase his damages.

In Frothingham v. Everton, 12 N. H. 239, it was held that, if a factor sells at a price below the limit without notice, the consignor may have an action on the case to recover damages, or may have the amount of damages allowed in a suit by the factor to recover his advances; and the measure of damages in such case is the amount of the injury sustained by the sale, contrary to the orders of the principal. That case closely resembles the case at bar, and is directly in point. It was said by Chief Justice PARKER in delivering the opinion: 'Had these goods been destroyed by the negligence of the plaintiffs, they would have been answerable for the value, and the damages could not have been extended beyond that, merely because the defendant had ordered them to sell at a certain price, and not for less. If, instead of a loss by negligence, the loss be by a disobedience of orders, without fraud, the result must be the same.' 12 N. H. 243. In either case the damages cannot exceed the amount of injury sustained by the consignor. The case of Frothingham v. Everton is cited in Blot v. Boiceau, 3 Comst. 78, with approval, as laying down the sound and proper rule upon this subject. It was there held that where a factor sells below the price named in his instructions, the measure of damages is only the amount of injury actually sustained by the consignor; and that it was competent to show, in reduction of damages, that the goods were sold at their full market value. 'If the market price of such goods had risen after the sale made by the defendants,

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price fixed, he yet received all that the goods were worth, the principal would, ordinarily, be limited to nominal damages only.[1] If, however, within a reasonable time after the unauthorized sale, the value of the property increased, the difference between the price received and that which might have been realized would furnish the measure of damages.

The period during which the principal may thus have the benefit of fluctuations in the market, has been the subject of much controversy. In some cases it has been held that the highest market price, which was reached at any time after the sale down to the day of trial, was the proper standard.[2] But this rule is so obviously unjust, giving to the principal not only the whole period allowed by statutes of limitation for the commencement of the suit, but as much more time afterward as the trial could be delayed,—a period far beyond any originally contemplated by the parties,—that it has been quite generally disapproved and overruled, and the true rule declared to be that the principal is entitled to the highest market price reached between the time of the unauthorized sale and a reasonable time thereafter in which to begin the action.[3] This rule necessarily limits the range of prices to a period prior to the commencement of the action, if brought within a reasonable time; and, if unreasonably delayed, then to the period within which it should have been brought, and, in either case, it excludes prices prevailing

they would have been liable to pay according to such increased value. A factor thus selling goods in violation of his instructions takes upon himself the hazard of loss from the fluctuations in the market without the possibility of gain; and this is practically a sufficient security against the disobedience of his principal's order. There is no need of subjecting him to a higher penalty.' 3 Comst. 85."

[1] A factor with orders not to sell below a certain price is not liable for a sale at a lower price, where a higher price than that at which the sale was made could not have been obtained at any time between the time of sale and the commencement of the suit. George v. McNeill, 7 La. 124, 26 Am. Dec. 498. Where there is evidence of the value of the goods at the date of shipment and of a subsequent sale at that rate, it will be presumed, in the absence of evidence to the contrary, that the same price could have been obtained in the interval. Howland v. Davis, 40 Mich. 545.

[2] Markham v. Jaudon, 41 N. Y. 235; Romaine v. VanAllen, 26 N. Y. 309; Burt v. Dutcher, 34 N. Y. 493.

[3] Baker v. Drake, 53 N. Y. 211, 13 Am. Rep. 507; Maynard v. Pease, 99 Mass. 555; Sturges v. Keith, 57 Ill. 451, 11 Am. Rep. 28; Whelan v. Lynch, 60 N. Y. 469, 19 Am. Rep. 202; Galigher v. Jones, 129 U. S. 192.

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after the commencement of the action.[1] If he is directed to sell upon a certain day, he will be liable, in case of a neglect to sell, for the difference between the price on that day and the price realized.[2]

§ 1010. **Same Subject—Instructions to sell for Cash.** So if the factor is instructed to sell for cash only, he sells upon credit at the peril of paying for the goods himself.[3] A sale for cash means cash upon the delivery of the goods and a sale upon a short credit cannot be justified by usage.[4]

§ 1011. **Same Subject—Instructions to insure.** As has been seen, a factor, in the absence of a custom, promise or instruction to insure, is not bound to insure the goods of his principal in the factor's possession.[5]

But where the factor is instructed or has agreed, to insure, and neglects to do so, or does so so defectively that the insurance is of no avail, he is liable as an insurer. By neglecting to place the risk elsewhere or to promptly notify the principal of his inability to insure, so as to give him an opportunity to do so, the factor assumes the risk himself.[6] And so where it is the custom to insure under like circumstances, the factor must pursue the custom or bear the loss.[7]

[1] Baker *v.* Drake, *supra.*

[2] Fordyce *v.* Peper, 16 Fed. Rep. 516.

[3] Bliss *v.* Arnold, 8 Vt. 252, 30 Am. Dec. 467; Hall *v.* Storrs, 7 Wis. 253.

[4] Bliss *v.* Arnold, *supra;* Hall *v.* Storrs, *supra;* Barksdale *v.* Brown, 1 Nott. & McC. (S. C.) 517, 9 Am. Dec. 720; *Contra*, Clark *v.* Van Northwick, 1 Pick. (Mass.) 343.

[5] See *ante*, § 1005.

[6] Gordon *v.* Wright, 29 La. Ann. 812; Shoenfeld *v.* Fleisher, 73 Ill. 404; De Tastett *v.* Crousillat, 2 Wash. (U. S. C. C.) 132; Parkins *v.* Washington Ins. Co., 4 Cow. (N. Y.) 645; Thorne *v.* Deas, 4 Johns. (N. Y.) 84; Gray *v.* Murray, 3 Johns. (N. Y.) Ch. 167; Park *v.* Hamond, 4 Camp. 344; Callander *v.* Oelrichs, 5 Bing. N. C. 58.

A letter issued by factors inviting consignments and stating that goods "will be covered by insurance as soon as received in store," does not import that they are to be personally liable as insurers, and their duty is performed if they obtain reasonable and proper insurance. Johnson *v.* Campbell, 120 Mass. 449.

[7] A factor who has been in the habit of insuring his principal's goods, will be liable for omitting to do so, without giving the principal notice of the omission. Area *v.* Milliken, 35 La. Ann. 1150.

Where consignees had been accustomed to insure the property of the consignor only when ordered to do so by letter, a promise by an agent of the consignees to write to them to obtain insurance, which he failed to do, does not render the consignees liable for not insuring. Randolph *v.* Ware, 3 Cranch. (U. S.) 503.

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§ 1012. **Duty to inform Principal.** It is the duty of the factor to inform his principal of every fact in relation to his agency which comes to his knowledge, and which it may be important for the principal to know in order to the protection or promotion of his interests, and a factor who negligently omits to give such information will be liable for a resulting loss.[1]

Thus if he has been instructed to insure his principal's goods and is unable to do so, he should at once give his principal notice of this fact that the latter may effect the insurance;[2] if he has been in the habit of insuring and determines no longer to do so, he should advise his principal of his determination;[3] if the goods of his principal in his possession are seized by attachment or otherwise, he should give his principal notice of this fact;[4] if having sold goods upon credit, the purchaser does not pay when due, the factor must inform his principal within a reasonable time or he will be held to have assumed the debt.[5] These and many other cases afford illustrations of the scope of this duty.

§ 1013. **Duty to sell only to responsible Purchaser.** It is the duty of the factor, even in the absence of any instructions, to exercise reasonable care and prudence in selling only to responsible parties, and, if he neglects to do so, he will be liable for a loss that may ensue; but he is not ordinarily a guarantor of payments, and if, having exercised due diligence, a loss occurs, the principal must bear it, and not the factor.[6] He may, however,

[1] Harvey *v.* Turner, 4 Rawle (Penn.) 223; Arrott *v.* Brown, 6 Whart. (Penn.) 9; Devall *v.* Burbridge, 4 Watts & Serg. (Penn.) 305; Moore *v.* Thompson, 9 Phila. 164; Howe *v.* Sutherland, 89 Iowa 484; Greely *v.* Bartlett, 1 Greenl. (Me.) 172, 10 Am. Dec. 54; Railey *v.* Porter, 32 Mo. 471, 82 Am. Dec. 141. A factor who sells goods to parties who were creating and running a "corner" in such goods, which to be successful must be maintained for at least thirty-two days, without requiring a margin, and without informing his principal of the parties to whom he sold, or of what they were doing, or of his right to demand a margin, is negligent. Howe *v.* Sutherland, *supra.*

[2] Callander *v.* Oelrichs, 5 Bing. N. C. 58; Smith *v.* Lascelles, 2 T. R. 187.

[3] Area *v.* Milliken, 35 La. Ann. 1150.

[4] Moore *v.* Thompson, *supra;* Devall *v.* Burbridge, *supra.*

[5] Harvey *v.* Turner, *supra;* Arrott *v.* Brown, *supra.*

[6] The rule upon this subject is well stated by MELLEN, C. J., as follows: "By the law-merchant, a factor may sell the goods of his principal on a reasonable credit, unless he is restrained from so doing, either by his instructions or by the usage of the trade to which the transaction relates. A sale made under such circumstances is at the risk of the principal, and if a loss happens, he must bear it.

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make himself a guarantor by an express agreement. One form of such an undertaking is that of the factor who sells upon a *del credere* commission.[1] Another is that, now common, of a factor who is authorized to sell on credit, but who agrees, or is instructed, that he will sell only to persons of known responsibility, or only upon securities of undoubted collectibility. The extent of the undertaking in these cases depends, of course, upon the language used in each particular case, but under such instructions or agreements as those named, the factor stands ordinarily in the position of a guarantor.[2]

§ 1014. **Same Subject—Del Credere Commission.** A factor is said to act under a *del credere* commission when, in consideration of an additional commission, he guarantees the payment to the principal of debts that become due through his agency. The nature and extent of his obligation have been much disputed, the later English[3] and some American[4] cases holding that he is liable

But he is not authorized to give credit, except to such persons as prudent people would trust with their own property. He may receive securities in his own name for goods sold, without subjecting himself to liability merely by so doing. But he must deliver such securities to his principal, if he demand them, or, in case of loss, he will be answerable as for a breach of trust, though in such case the principal should pay him his usual commissions.

If through carelessness or want of proper examination and inquiry, he give credit to a man who is insolvent, should a loss happen, he must indemnify the principal. And if a debt be lost by the inattention of the factor in omitting to collect it when in his power to do so, he will be liable for it. He must be honest and faithful, and must give his principal all necessary or useful information respecting the concerns of his agency." In Greely *v.* Bartlett, 1 Greenl. (Me.) 172, 10 Am. Dec. 54.

In Housel *v.* Thrall, 18 Neb. 484, an instruction to a jury "that a factor or commission man, while he cannot be held as a guarantor of the responsibility of the persons to whom he sells in the ordinary course of business, and in accordance with the usages of the market where the sale takes place, must, nevertheless, use all reasonable effort and resort to all reasonably available sources of information, to learn the pecuniary liability of the purchaser, and if he does not do so, and any loss occurs by reason thereof, he will be liable for such loss," was held to be a correct statement of the rule. See also Foster *v.* Waller, 75 Ill. 464; Pinkham *v.* Crocker, 77 Me. 563.

[1] See following section.

[2] Clark *v.* Roberts, 26 Mich. 506.

[3] Morris *v.* Cleasby, 4 M. & S. 566; Hornby *v.* Lacy, 6 M. & S. 166; Couturier *v.* Hastie, 8 Exch. 40.

The earlier cases were *contra;* Grove *v.* Dubois, 1 T. R. 112; Bize *v.* Dickason, Id. 285.

[4] Thompson *v.* Perkins, 3 Mason (U. S. C. C.) 232.

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as a surety merely; but the weight of authority in the United States is undoubtedly in support of the rule that a factor who sells under a *del credere* commission is liable absolutely as a principal, and that if the debt be not paid when due, *indebitatus assumpsit* will lie against him at once for the amount.[1] As such principal debtor, his contract is not within the statute of frauds as a promise to answer for the debt, default or miscarriage of another.[2] But where the goods are sold upon an authorized credit, the factor cannot be required, because of a *del credere* commission, to account to the principal before the expiration of the credit given to the buyer.[3]

A factor, acting *del credere*, is not on that account relieved from any of the duties which attach to other factors, nor is he clothed with any greater powers.[4]

[1] Wolff *v.* Koppel, 2 Denio (N. Y.) 368, 43 Am. Dec. 751; Swan *v.* Nesmith, 7 Pick. (Mass.) 220, 19 Am. Dec. 282; Lewis *v.* Brehme, 33 Md. 412, 3 Am. Rep. 190; Sherwood *v.* Stone, 14 N. Y., 267; Blakely *v.* Jacobson, 9 Bosw. (N. Y.) 140; Cartwright *v.* Greene, 47 Barb. (N. Y.) 9; Leverick *v.* Meigs, 1 Cow. (N. Y.) 645.

[2] Wolff *v.* Koppel, *supra;* Swan *v.* Nesmith, *supra;* Sherwood *v.* Stone, *supra.*

[3] Lewis *v.* Brehme, *supra.* In this it appeared that a *del credere* agent collected a bill of goods due his principal from a customer, and placed the amount to his own account with his bankers, and purchased of them a gold draft, which he caused to be made payable to his own order without reference to his character as agent, and, after indorsing it to his principals or their order, transmitted it to them in payment not only for the price of the goods sold to the customer, but also of a balance due from himself. The draft was dishonored and returned to the agent, who treated the loss as his own, and promised to send another draft, and in the meantime unsuccessfully solicited payment of the draft from the drawers to himself and then caused himself to be made a preferred creditor of the drawers, who had failed. In an action by the principals against the agent, to recover the amount of the draft, *held,*

1. That the contract resulting from the *del credere* character of the agent was not entirely discharged in the payment of the money by the customer to the agent.

2. That the agent was further liable, after the receipt of the money, either by virture of the *del credere* commission, or by his indorsement of the draft, although he had used ordinary diligence in transmitting the money.

3. That the promise of the agent to assume the debt, after the dishonor of the draft was not valid unless he had full knowledge of the neglect of his principals in making demand, and in giving notice of the dishonor of the draft.

4. That the relation of a *del credere* agent to his principal, is that of debtor and creditor, and he is bound absolutely to see that his principal is paid.

[4] Morris *v.* Cleasby, 4 M. & S. 566;

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§ 1015. **Factor's Duty to care for Property.** It is the privilege of the principal or consignor, to give such reasonable directions in regard to the manner and place in which his property shall be stored and cared for, as he deems desirable, and it is the duty of the factor, consignee or commission merchant if he accepts the consignment, to follow these directions, unless prevented by sufficient excuse.[1] If he fails to do this, and the property is lost or destroyed, the factor will be responsible, and he cannot exempt himself by showing a local custom among factors to store or care for property differently.[2]

Where no instructions or directions are so given, it is still the factor's duty to exercise reasonable care, prudence and diligence in storing and caring for the property consigned to him; and for a breach of this duty, he will be liable for the resulting loss.[3] In such cases, if he pursues the usual and regular course which custom and experience have adopted as proper and prudent under like circumstances, he could not, in the absence of some exceptional circumstance reasonably exempting that case from the general rule, be deemed negligent.[4]

So though the factor may properly be held responsible for a neglect to provide against the risks or perils to which the property

Thompson *v.* Perkins, 3 Mason, 232; Graham *v.* Ackroyd, 10 Hare 192.

[1] Vincent *v.* Rather, 81 Tex. 77, 98 Am. Dec. 516.

[2] Vincent *v.* Rather, *supra.*

[3] Vincent *v.* Rather, *supra.* Commission merchants who advertise that goods consigned to them will be stored in a fire-proof house are liable if they store them in a wooden house which is less safe, and afterwards burned, even though the goods were first shipped to and stored in the warehouse of the wrong consignee, if, after the discovery of the mistake by the real consignees, they allow the goods to remain in such warehouse. *Idem.*

[4] Davis *v.* Kobe, 36 Minn. 214, 1 Am. St. Rep. 663, 30 N. W. Rep. 662; Phillips *v.* Moir, 69 Ill. 155. Factor to whom wheat is consigned may, in the absence of instructions to the contrary, store it in mass with other of the same kind and grade, that being the customary course. Davis *v.* Kobe, *supra.*

Sewing machines, shipped under a contract to be sold on commission, were destroyed by fire without the consignee's fault, and after he had given reasonable notice to the shippers to take them back. The contract did not make him the agent of the shippers for any definite time, and did not transfer to him the title to the machines. Held that after he had given reasonable notice to remove them he would be liable only for gross negligence, and that hence the shippers could not recover for the loss. Barrows *v.* Cushway, 37 Mich. 481.

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entrusted to his care may, in the ordinary course of business, be exposed, he cannot be held liable for not anticipating a danger altogether out of the ordinary course of business or of natural events.[1] And even though his authority be otherwise limited, the factor may, in the event of some unforeseen contingency or some extraordinary peril, be justified in assuming extraordinary powers, if he acts with the view of benefiting the principal and of protecting his property from ruin, and goes no further than reasonable prudence and good judgment would sanction as necessary and proper under the circumstances.[2]

§ 1016. **General Duty as to Sales.** Where goods are consigned to a factor for sale, but with no instructions as to the time, price or manner of sale, he is bound, and bound only, to the exercise of a fair and reasonable discretion under the circumstances. By consigning them without instructions, the principal is presumed to be willing to rely upon the sound discretion of the factor, and if this is exercised, fairly and in good faith, the factor discharges his duty.[3] *A fortiori* is this so where the factor is instructed to deal with the goods as with his own.[4]

Following this general duty into details as to time, place and price, we have:—

§ 1017. **Duty as to Place of Sale.** Where no instructions are given to the contrary, it is presumed that a principal, who consigns goods for sale, to a factor residing at a certain place, intends that the goods shall be sold at that place, and the factor has no implied authority to ship them elsewhere to be sold.[5] Any usage to the contrary should be so general and well established as to warrant the presumption that the consignment was

[1] Johnson *v.* Martin, 11 La. Ann. 27, 66 Am. Dec. 193.

[2] Foster *v.* Smith, 2 Cold. (Tenn.) 474, 88 Am. Dec. 604; Durant *v.* Fish, 40 Iowa 559; Joslin *v.* Cowee, 52 N. Y. 90; Drummond *v.* Wood, 2 Caines (N. Y.) 310; Judson *v.* Sturges, 5 Day (Conn.) 556; Jervis *v.* Hoyt, 5 Thom. & C. (N. Y.) 199.

[3] Liotard *v.* Graves, 3 Caines (N. Y.) 226; Marfield *v.* Goodhue, 3 N. Y. 72; Milbank *v.* Dennistoun, 1 Bosw. (N. Y.) 246; Conway *v.* Lewis, 120 Penn. St. 215, 6 Am. St. Rep. 700. Fact that he had written for instructions but sold before they were received does not deprive him of his right to sell according to sound discretion. *Idem.*

[4] Adams *v.* Capron, 21 Md. 186, 83 Am. Dec. 566.

[5] Phillips *v.* Scott, 43 Mo. 86, 97 Am. Dec. 369; Kauffman *v.* Beasley, 54 Tex. 563; Wallace *v.* Bradshaw, 6 Dana (Ky.) 382; Phy *v.* Clark, 35 Ill. 377.

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made in reference to it, or the principal must be shown to have had knowledge of it.[1]

§ 1018. **Duty as to Time of Sale.** A factor to whom goods are consigned for sale, with no instructions as to the time at which they shall be sold, is bound to exercise reasonable discretion and judgment in reference to their sale. If, for example, he delays the sale for an unreasonable time and the goods depreciate in value, he is liable for the loss;[2] but on the other hand, if he sells within a reasonable time and in the exercise of a sound discretion he could not be held liable because, if he had held the goods longer, he might have realized more;[3] nor is he liable because the goods are lost by an accidental fire, where he has not delayed the sale for an unreasonable time.[4]

§ 1019. **Duty as to Price.** In the absence of special instructions as to the price, it is the duty of the factor to sell for the fair value or market price,[5] and if, in disregard of this duty and without sufficient excuse, he sells at an underprice, or if he falsely accounts for them at an underprice, he is liable for the difference.[6]

§ 1020. **Duty in collecting Price.** A factor who has made an authorized sale upon credit, and has expressly or impliedly undertaken the collection of the price, is bound to the exercise of reasonable care and diligence in such undertaking. If he has done so, and the debt remains uncollected, he is not, except where he sells *del credere*, liable for debt, but if, by the exercise of such care and diligence, the debt might have been collected and is not, the factor must respond.[7] He should not, under ordinary circumstances, sue for the debt upon his principal's account without the latter's instructions, where there is no reasonable probability of benefiting the principal.[8]

§ 1021 **Factor's Duty in keeping Accounts.** It is the duty

[1] Phillips *v.* Scott, *supra*.

[2] Atkinson *v.* Burton, 4 Bush (Ky.) 299.

[3] See Given *v.* Lemoine, 35 Mo. 110.

[4] Lehman *v.* Pritchett, — Ala. —, 27 Cent. L. Jour. 380.

[5] Bigelow *v.* Walker, 24 Vt. 149, 58 Am. Dec. 156; Smith's Com. Law, 105; Paley on Agency, 26.

[6] Bigelow *v.* Walker, *supra*.

[7] Folsom *v.* Mussey, 8 Greenl. (Me.) 400, 23 Am. Dec. 522; Greely *v.* Bartlett, 1 Greenl. (Me.) 172, 10 Am. Dec. 54, McConnico *v.* Curzen, 2 Call. (Va.) 358, 1 Am. Dec. 540.

[8] Forrestier *v.* Bordman, 1 Story (U. S. C. C.) 43.

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of the factor to keep and preserve true and regular accounts and records of all of his receipts, disbursements and other transactions for and on account of his principal, and to render the same to him within a reasonable time.[1] Where the factor represents several principals, the accounts of each should in general be kept separate.[2]

Though the factor may, as has been seen, take from a purchaser to whom he sells upon credit the latter's note payable to the factor,[3] he should not take one note for the goods sold for different principals.[4] And where a factor procured a note so taken to be discounted, it was held that he had made it his own, and was liable to the principal, although the maker had failed.[5]

§ 1022. **Not obliged to keep Funds separate.** It has been seen to be the general duty of an agent to keep his principal's funds separate from his own. In the case of the factor, however, custom seems to have established a different rule. Thus in a leading case upon this subject, it is said: "In the usual and ordinary course of business, a factor does not and is not required to keep the money received upon the sale of goods of different consignors in separate and distinct parcels, but mingles all in a common mass, and with the like funds of his own, from whatever source derived. In such cases, he becomes at once a debtor to his principal and is liable to an action for the balance shown to be due by his account of sales, immediately after its rendition and without any previous demand." [6]

§ 1023. **Factor's Duty to account for Money and Property.** It is also the duty of the factor to account to his principal for all goods, property and money of the principal, which come into his hands as factor, after deducting his own proper advances and commissions.[7] If, by the terms of his employment, any time has been fixed for this accounting, the factor should account at that

[1] Story on Agency, § 203; Haas *v.* Damon, 9 Iowa 589; Keighler *v.* Savage Mnfg Co., 12 Md. 383, 71 Am. Dec. 600.

[2] Story on Agency, § 204 a.

[3] See *ante*, § 993.

[4] See Story on Agency, § 204a. Corlies *v.* Widdifield, 6 Cow. (N. Y.) 181, to the contrary has not been generally approved. See Story on Agency, § 179, note. See also Jackson *v.* Baker, 1 Wash. (U. S. C. C.) 395.

[5] Johnson *v.* O'Hara, 5 Leigh (Va.) 456; Myers *v.* Entriken, 6 W. & S. (Penn.) 44, 40 Am. Dec. 538.

[6] Vail *v.* Durant, 7 Allen (Mass.) 408, 83 Am. Dec. 695; citing Clark *v.* Moody, 17 Mass. 145.

[7] Terwilliger *v.* Beals, 6 Lans. (N. Y.) 403; Keighler *v.* Savage Mnfg Co. 12

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time;[1] where no such period has been fixed, it is the duty of the factor to account within a reasonable time, and in all events upon a reasonable demand.[2] Where from the circumstances of the case, a demand is impracticable or highly inconvenient, it is the duty of the factor to account within a reasonable time without a demand.[3] The fact that the transaction was illegal, furnishes no excuse to the factor for not accounting.[4]

The duty of the factor to account covers not only the profits made by the factor in the pursuit of his duty, but those made by him while exceeding or violating his authority.[5] He cannot, without his principal's consent, purchase any of the goods which he is employed to sell, and if he does, the principal may, at his election, disaffirm the sale and recover the goods,[6] or he may affirm the sale and recover the price from the factor.[7] He will not be permitted to make any secret or hidden profit for himself out of the transaction, but will be compelled to account for all such to his principal.[8] Neither will he be permitted, when called upon by his principal for an accounting, to dispute his principal's title to the goods.[9] The factor may, however, show that he has been divested of the goods by a superior title.[10]

Acceptance of the factor's final account by the principal without objection will, in general, relieve the factor from further liability for the proceeds of goods sold by him on credit, but not yet paid for.[11]

§ 1024. **Duty in remitting Money.** A factor who has received the proceeds of goods sold by him and has notified the principal of that fact, may, unless a different course has been established

Md. 383, 71 Am. Dec. 600; Curtis v. Gibney, 59 Md. 131; Warriner v. People, 74 Ill. 346.

[1] Leake v. Sutherland, 25 Ark. 219.

[2] See Cooley v. Betts, 24 Wend. (N. Y.) 203; Topham v. Braddick, 1 Taunt. 572; Burns v. Pillsbury, 17 N. H. 66; Wright v. People, 61 Ill. 382.

[3] Eaton v. Welton, 32 N. H. 352; Lyle v. Murray, 4 Sandf. (N. Y.) 590.

[4] Baldwin v. Potter, 46 Vt. 403.

[5] See *ante*, § 469, *et seq.*

[6] Keighler v. Savage Mnfg Co., 12 Md. 383, 71 Am. Dec. 600; Wadsworth v. Gay, 118 Mass. 44.

[7] Wadsworth v. Gay, *supra*.

[8] Hidden v. Waldo, 55 N. Y. 294; Payne v. Waterston, 16 La. Ann. 239.

[9] Marvin v. Ellwood, 11 Paige, (N. Y.) 365; Barnard v. Kobbe, 54 N. Y. 516; Bain v. Clarke, 39 Mo. 262.

[10] Bain v. Clark, *supra*.

[11] Rion v. Gilly, 6 Mart. (La.) 417, 12 Am. Dec. 483; Keighler v. Savage Mnfg Co., *supra*.

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by instructions or usage, await the principal's instructions as to the mode of remitting the money.[1] If he remits without instructions, it is ordinarily at his own risk.[2] Having received instructions, the factor should pursue them, for if he remits in a different manner and the money is lost, the loss will fall upon the factor.[3] If, however, the principal's instructions are so uncertain and ambiguous as to be fairly open to two constructions, and the factor, in good faith and with reasonable care adopts one, he can not be held liable because the principal intended that the other should be pursued.[4]

§ 1025. **When Principal may sue Factor.** No action can be maintained by the principal against the factor, to recover the proceeds of goods sold by the latter, until after a demand has been made upon the factor for payment, or until he has been instructed to remit, and has failed or refuse to comply.[5]

So a factor is not, in general, liable for interest upon the proceeds in his hands, until after a demand made upon him for payment or he has been instructed to remit, unless he has unreasonably failed to render his account of it, or unless, after an account stated and settled, he retains the money in his own hands, or unless the payment of interest is required by usage.[6]

§ 1026. **Liability for Acts of Subagent.** It has been seen to be the general rule that the factor has no implied power to delegate his authority to another.[7] Where such is the case, if the factor employs a subagent to assist him, he is liable to the prin-

[1] Ferris *v.* Paris, 10 Johns. (N. Y.) 285; Halden *v.* Crafts, 4 E. D. Smith (N. Y.) 490; Cooley *v.* Betts, 24 Wend. N. Y. 203; Brink *v.* Dolsen, 8 Barb. (N. Y.) 337; Greentree *v.* Rosenstock, 61 N. Y. 583.

[2] Clark *v.* Moody, 17 Mass. 145.

[3] Foster *v.* Preston, 8 Cow. (N. Y.) 198; Kerr *v.* Cotton, 23 Tex. 411. See *ante*, § 512.

[4] See *ante*, § 485. Hays *v.* Warren, 46 Mo. 189.

A factor had two principals of the same name. He supposed both to be one. He sent money due one to the other which was lost on the way. Held that the latter principal could recover of the factor. Yon *v.* Blanchard, 75 Ga. 519.

[5] Cooley *v.* Betts, 24 Wend. (N. Y.) 203; Topham *v.* Braddick, 1 Taunt. 572; Burns *v.* Pillsbury, 17 N. H. 66; Ferris *v.* Paris, 10 Johns. (N. Y.) 285; Halden *v.* Crafts, 4 E. D. Smith, (N. Y.) 490; Brink *v.* Dolsen, 8 Barb. (N. Y.) 337. *Contra* see Clark *v.* Moody, 17 Mass, 145; Dodge *v.* Perkins, 9 Pick. (Mass.) 368. See these cases criticised in Cooley *v.* Betts, *supra*.

[6] Tyree *v.* Parham, 66 Ala. 424; Sentell *v.* Kennedy, 29 La. Ann. 679.

[7] See *ante* § 998.

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cipal for the subagent's acts.[1] Where however the factor is expressly or impliedly authorized to appoint a subagent, and uses due care in his selection he is not so liable.[2]

V.

RIGHTS OF FACTOR AGAINST PRINCIPAL.

a. Commissions.

§ 1027. **Factor entitled to Compensation.** Like the broker, the factor, who has performed his undertaking, is entitled to compensation for his services. This compensation is usually a commission upon the price of the goods sold, which commission is either fixed by the agreement between the parties or by the usages of trade, or upon a *quantum meruit*.[3]

The general rules governing the right of the broker to compensation where the undertaking is only partly completed, whether by the act of the principal or the broker, apply to the case of the factor under like circumstances.

But a factor who is guilty of fraud or gross negligence in his dealings with his principal;[4] or who knowingly renders false and fraudulent accounts;[5] or who neglects to keep true and correct books and accounts of his transactions;[6] or who, having sold the goods, converts the money to his own use;[7] or who violates his instructions in regard to the sale,[8] may forfeit his commissions and be held liable to compensate his principal for the loss and injury sustained.[9]

So if the principal, in order to secure his claims against the factor is compelled to resort to litigation, the factor will not be allowed commissions.[10]

[1] See *ante* § 197.

[2] McCants *v.* Wells, 3 S. C. 569.

[3] Story on Agency, § 326.

[4] Norman *v.* Peper, 24 Fed. Rep. 403; Fordyce *v.* Peper, 16 Fed. Rep. 516.

[5] Smith *v.* Crews, 2 Mo. App. 269; Talcott *v.* Chew, 27 Fed. Rep. 273.

[6] Smith *v.* Crews, *supra*.

[7] Brannan *v.* Strauss, 75 Ill. 234.

[8] Zurn *v.* Noedel, 113 Penn. St. 336; Larminie *v.* Carley, 114 Ill. 196.

[9] The neglect of the factor may be shown in mitigation or bar of his claim to commissions. Dodge *v.* Tileston, 12 Pick. (Mass.) 328. Long and unexcused delay in informing principal of sale or in paying him the proceeds will forfeit commissions. Segar *v.* Parrish, 20 Gratt. (Va.) 672.

[10] Vennum *v.* Gregory, 21 Iowa 326.

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So a factor is not entitled to compensation where its payment would reduce the amount of the proceeds below the sum guaranteed by the factor to the principal.[1]

§ 1028. **When Factor may have Commissions from both Parties.** Like the broker,[2] the factor can recover commissions from both parties to the transaction only when his double agency was fully understood and assented to by each.[3]

b. Reimbursement.

§ 1029. **Factor entitled to Reimbursement.** The factor is also entitled to be reimbursed by his principal for all advances and disbursements made to the principal, or on his account, in the due and proper performance of the agency.[4] As will be seen, the factor has a lien upon the goods for these advances,[5] but unless he has agreed to look to the goods alone, such lien does not deprive the factor of his personal claim against the principal.[6] Nor, unless he has agreed to do so, is he obliged to wait until the goods are sold, but if they are not sold within a reasonable time, he may demand and recover reimbursement for his advances.[7]

So if, after the sale of the goods, a deficit remains without the fault or neglect of the factor, he may recover it of the principal.[8]

That the factor acts under a *del credere* commission does not affect his right to reimbursement or defeat his personal claim against the principal, except that, where such a factor has sold the goods, he cannot sue the principal for advances which are covered by the price of the goods, that price being warranted

[1] Dalton *v.* Goddard, 104 Mass. 497, where the factor guaranteed the principal eighty per cent. of the invoice and sold the goods for a sum which would not pay the eighty per cent. and the factor's commissions.

[2] See *ante*, § 972.

[3] Talcott *v.* Chew, 27 Fed. Rep. 270.

[4] Corlies *v.* Cumming, 6 Cow. (N. Y.) 181; Beckwith *v.* Sibley, 11 Pick. (Mass.) 482; Upham *v.* Lafavour, 11 Metc. (Mass.) 174; Dolan *v.* Thompson, 126 Mass. 183.

[5] See second section following.

[6] Martin *v.* Pope, 6 Ala. 532, 41 Am. Dec. 66; Burrill *v.* Phillips, 1 Gall. (U. S. C. C.) 360; Peisch *v.* Dickson, 1 Mason (U. S. C. C.) 9.

[7] Beckwith *v.* Sibley, 11 Pick. 482; Upham *v.* Lafavour, 11 Metc. (Mass.) 174; Dolan *v.* Thompson, 126 Mass. 183. There is a statement to the contrary in Corlies *v.* Cumming, 6 Cow. (N. Y.) 181. See also Gihon *v.* Stanton, 9 N. Y. 476.

[8] Strong *v.* Stewart, 9 Heisk. (Tenn.) 137.

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to the principal by the guarantee arising from the *del credere* commission.[1]

§ 1030. **Same Subject—Conclusiveness of Accounts.** Whether the account as rendered by the factor is conclusive, depends upon the intention of the parties. Where such an account was expressly made final, and the factor had charged himself with the price, not yet paid, of goods sold, it was held that he was bound, though the purchaser failed to pay.[2] But the mere giving credit to the principal for debts not yet due, or giving notes payable out of the proceeds of the goods, is not a conclusive assumption of the debts by the factor, and he may charge back against the principal the debts that are not paid, or defeat a recovery by the principal upon notes so given.[3]

c. Indemnity.

§ 1031. **Factor entitled to Indemnity against Losses.** So if the factor in the due and proper discharge of his duty and without fault of his own, sustains loss or incurs liabilities to third persons,[4] on his principal's account, he is entitled to be indemnified by his principal. Thus if the factor, by direction of his principal, incurs obligations to a third person on the principal's account, which the latter neglects or refuses to meet, and the factor is compelled to do so, he may recover of the principal;[5] if, by the principal's instructions, he sells goods with a warranty which fails, he may claim indemnity from the principal;[6] if, at the principal's request, he sells goods as the property of the principal, and is obliged to respond to the purchaser who is divested by a title superior to that of the principal, or if he sells as sound

[1] Graham *v.* Ackroyd, 10 Hare 192, 19 Eng. L. & Eq. 659.

[2] Oakley *v.* Crenshaw, 4 Cow. (N. Y.) 250.

[3] Robertson *v.* Livingston, 5 Cow. (N. Y.) 473; Hapgood *v.* Batcheller, 4 Metc. (Mass.) 573.

[4] Ramsay *v.* Gardner, 11 Johns. (N. Y.) 439; Powell *v.* Trustees of Newburgh, 19 Id. 284; Stocking *v.* Sage, 1 Conn. 522, Hill *v.* Packard, 5 Wend. (N. Y.) 375; Rogers *v.* Kneeland, 10 Id. 219.

[5] As where the factor by the principal's directions, sold wheat for future delivery and, the wheat having advanced, the principal refused to stand by the contract, leaving the factor to settle with the purchaser. Searing *v.* Butler, 69 Ill. 575.

[6] As where the factor was obliged to make good, losses occasioned by defective packing. Beach *v.* Branch, 57 Ga. 362.

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or valid, goods or securities which prove to be otherwise, and is compelled to make good the loss, the principal must indemnify him.[1]

d. Lien.

§ 1032. **Factor entitled to Lien.** By the common law, a factor has a general lien upon all of the goods of his principal in his possession, and upon the price of such as are lawfully sold by him and upon the securities taken therefor, to secure the payment of the general balance of the accounts between himself and his principal, as well as for the advances, charges and disbursements made upon or in reference to those particular goods.[2] This lien secures not only payments, advances and disbursements actually made, but those also which have been lawfully incurred, as where the factor has accepted drafts drawn in anticipation of the proceeds of the goods.[3] It also secures the factor for obligations which he has incurred either upon the strength of the consignment or as the result of the agency, as surety for his principal.[4] But it does not protect independent debts contracted before and without reference to the agency.[5]

[1] As where a factor innocently sold repudiated securities. Maitland *v.* Martin, 86 Penn. St. 120.

[2] Story on Agency, § 376; McGraft *v.* Rugee, 60 Wis. 406, 50 Am. Rep. 378; Gage *v.* Allison, 1 Brev. (S. C.) 495. 2 Am. Dec. 682; Hodgson *v.* Payson, 3 H. & J. (Md.) 339, 5 Am. Dec. 439; Patterson *v.* McGahey, 8 Mart. (La.) 486, 13 Am. Dec. 298; McKenzie *v.* Nevius, 22 Me. 138, 38 Am. Dec. 291; Lambeth *v.* Turnbull, 5 Rob. (La.) 264, 39 Am. Dec. 536; Winter *v.* Coit, 7 N. Y. 288, 57 Am. Dec. 522; Knapp *v.* Alvord, 10 Paige (N. Y.) 205, 40 Am. Dec. 241; Martin *v.* Pope, 6 Ala. 532, 41 Am. Dec. 66; Vail *v.* Durant, 7 Allen (Mass.) 408, 83 Am. Dec. 695; Weed *v.* Adams, 37 Conn. 378; Matthews *v.* Menedger, 2 McLean (U. S. C. C.) 145; Gibson *v.* Stevens, 8 How. (U. S.) 384; Peisch *v.* Dickson, 1 Mason (U. S. C. C.) 9; Burrill *v.* Phillips, 1 Gall. (U. S. C. C.) 360; Winne *v.* Hammond, 37 Ill. 99; Eaton *v.* Truesdail, 52 Ill. 307; Brown *v.* Combs, 63 N. Y. 598; Quitman *v.* Packard, 22 La. Ann. 70; Schiffer *v.* Feagin, 51 Ala. 335; Sawyer *v.* Lorillard, 48 Ala. 332; Jordan *v.* James, 5 Ohio, 88.

This lien attaches to insurance payable upon goods lost. Johnson *v.* Campbell, 120 Mass. 449.

[3] Lambeth *v.* Turnbull, 5 Rob. (La.) 264, 39 Am. Dec. 536; Eaton *v.* Truesdail, 52 Ill. 307; Vail *v.* Durant, 7 Allen (Mass.) 408, 83 Am. Dec. 695.

[4] Story on Agency, § 376; Drinkwater *v.* Goodwin, Cowp. 251; Hidden *v.* Waldo, 55 N. Y. 294; Stevens *v.* Robins, 12 Mass. 182.

The fact that the factor was paid a commission for his indorsement does not deprive him of his lien. Hodgson *v.* Payson, 3 H. & J. (Md.) 339, 5 Am. Dec. 439.

[5] Story on Agency, § 376; Drink-

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Statutes have been enacted in several of the States declaring or extending this lien, and providing means for its enforcement.

§ 1033. **When Lien does not exist.** This lien being given to secure the factor for the balance due him, the factor can have no lien when the balance of account is against him and in the principal's favor. In such a case the factor's advances will be presumed to have been made in liquidation of such balance.[1] Neither can a factor, who is indebted to his principal on account of previous sales, acquire a particular lien upon goods subsequently sent to him for sale, for expenses incurred on account of them, unless such expenses exceed the amount of his indebtedness, and then only for the balance.[2] The lien of the factor for specific expenses, does not exist where the general balance of account is against him.[3]

So the lien will not attach if it would be in violation of the agreement of the parties, as where it is expressly stipulated that it shall not exist, or where the factor agrees, or accepts the goods subject to an instruction, to make an application of the proceeds inconsistent with the existence of a lien.[4]

§ 1034. **Nature of the Lien.** The lien of the factor is but a special interest, and does not amount to a general ownership of the goods, even though he has made advances equal to or exceeding their value. The principal does not lose his ownership by committing the custody of the goods to the factor and receiving advances upon them. He may at any time, before the factor has sold the goods, reclaim them upon paying the advances made, with interest and expenses; and he is still entitled to the proceeds of any sale made by the factor, subject only to the latter's charge upon them.[5]

water *v.* Goodwin, *supra*; Houghton *v.* Matthews, 3 Bos. & Pul. 485; Stevens *v.* Robins, 12 Mass. 182; Olive *v.* Smith, 5 Taunt. 56.

[1] McGraft *v.* Rugee, 60 Wis. 406, 50 Am. Rep. 378; Godfrey *v.* Furzo, 3 P. Wms. 185; Zinck *v.* Walker, 2 W. Bl. 1154; Hollingworth *v.* Tooke, 2 H. Bl. 501; Walker *v.* Birch, 6 T. R. 258; Weed *v.* Adams, 37 Conn. 378; Jordan *v.* James, 5 Ohio, 99; Enoch *v.* Wehrkamp, 8 Bosw. (N.Y.) 398; Beebe *v.* Mead, 33 N. Y. 587.

[2] McGraft *v.* Rugee, *supra;* Edwards, Factors, § 72; Enoch *v.* Wehrkamp, *supra.*

[3] Idem.

[4] Schiffer *v.* Feagin, 51 Ala. 335.

[5] United States *v.* Villalonga, 23 Wall. (U. S.) 35; Heard *v.* Brewer, 4 Daly (N. Y.) 136; Williams *v.* Tilt, 36 N. Y. 319; Jordan *v.* James, 5 Ohio, 88; Hall *v.* Hinks, 21 Md. 406.

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The lien of the factor is a privilege personal to himself, and can not be set up by a third person as a defense to an action by the principal.[1] So it can not be transferred, and no question can arise in reference to it except between the factor and his principal.[2]

§ 1035. **When Lien attaches.** The lien of the factor will not attach until the goods are in his possession[3] and lawfully. He has no lien on goods the possession of which he acquired by an illegal act or in bad faith.[4] Actual possession is of course sufficient,[5] and delivery to the factor's own servant or agent will suffice.[6] So putting the goods upon the factor's dray to be drawn to his warehouse, is a sufficient delivery.[7]

Where, however, before the goods have come actually into his possession, the factor has made advances upon them, or incurred liabilities in respect to them, it becomes an important question to determine what constructive possession is sufficient to sustain his lien against purchasers from, or creditors of, the principal. Upon this question the authorities are not in harmony, certain cases holding that his lien will not attach until the goods are actually in his possession,[8] while others maintain the doctrine that where advances have been previously made in reliance upon

[1] Holly v. Huggeford, 8 Pick. (Mass.) 73, 19 Am. Dec. 303; Jones v. Sinclair, 2 N. H. 321, 9 Am. Dec. 75; Daubigny v. Duval, 5 T. R. 606.

[2] Ames v. Palmer, 42 Me. 197, 66 Am. Dec. 271.

[3] Winter v. Coit, 7 N. Y. 288, 57 Am. Dec. 522; Strahorn v. Union Stock Yards Co., 43 Ill. 424, 92 Am. Dec. 142; Valle v. Cerre, 36 Mo. 575, 88 Am. Dec. 161; Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 290; Marine Bank v. Wright, 48 N. Y. 1; Ryberg v. Snell, 2 Wash. (U. S. C. C.) 403; Hamilton v. Campbell, 9 La. Ann. 531; Brown v. Wiggin, 16 N. H. 312; Elliot v. Bradley, 23 Vt. 217; Byers v. Danley, 27 Ark. 77; Rice v. Austin, 17 Mass. 197; Allen v. Williams, 12 Pick. (Mass.) 297; Baker v. Fuller, 21 Pick. (Mass.) 318; Oliver v. Moore, 12 Heisk. (Tenn.) 482; Woodruff v. Nashville, &c. R. R. Co., 2 Head. (Tenn.) 87.

[4] Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 290; Taylor v. Robinson, 8 Taunt. 648; Kinloch v. Craig, 3 T. R. 119.

[5] A factor who has accepted a draft drawn upon goods in his possession has a lien superior to the claims of subsequent purchasers or creditors. Eaton v. Truesdail, 52 Ill. 307.

[6] Bonner v. Marsh, 10 S. & M. (Miss.) 376, 48 Am. Dec. 754.

[7] Burrus v. Kyle, 56 Ga. 24, citing Elliott v. Cox, 48 Ga. 39; Hardeman v. DeVaughn, 49 Ga. 596; Clark v. Dobbins, 52 Ga. 656.

[8] Saunders v. Bartlett, 12 Heisk. (Tenn.) 316; Oliver v. Moore, Id. 482; Woodruff v. Nashville, &c. R. R. Co., 2 Head. (Tenn.) 87.

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a promise to subsequently consign goods, a delivery to a common carrier consigned to the factor is sufficient.[1] In reference to this latter doctrine, it is said by a learned judge,[2] that "The mere agreement to ship goods in satisfaction of antecedent advances, will not, in general, give the factor or consignee a lien upon them for his general balance, until they come to his actual possession; but if there is a specific pledge or appropriation of certain ascertained goods, accompanied with the intention that they shall be a security, or the proceeds as a payment, and they are deposited with a bailee, then the property is changed, and vests in the individual to whom they are to be delivered by the depositary."

In still other cases it is held that, in order to the attaching of the lien, it is necessary that the advances should be made in reliance upon this particular consignment. In a Vermont case often cited upon this subject, Judge REDFIELD lays down the rule "that to give a factor a lien upon goods consigned but not actually received, these incidents must concur: 1. The consignment must be in terms to the factor. * * * 2. To the conclusiveness of such a contract against creditors and subsequent purchasers, it is requisite that the consignee should have made advances or acceptances upon the faith of these particular consignments."[3] In this case there was, in addition to the incidents mentioned, the further fact that the consignors had delivered to the factor the carrier's receipt or bill of lading, but the court did not consider this essential and approved of Holbrook *v.* Wight,[4] where this fact did not exist.

In a leading case in Missouri,[5] it is said "Where acceptances have actually been given upon the faith of a consignment by bill of lading, there can be no doubt that the consignee acquires such a lien or property in the goods as no subsequent act of conveyance can divest; such an acceptance is held to be an advance upon the particular shipment.

[1] Elliott *v.* Cox, 48 Ga. 89; Hardeman *v.* DeVaughn, 49 Ga. 596; Wade *v.* Hamilton, 30 Ga. 450; Nelson *v.* Chicago, &c. R. R. Co., 2 Ill. App. 180.

[2] GOLDTHWAITE, J., in Desha *v.* Pope, 6 Ala. 690, 41 Am. Dec. 76.

[3] Davis *v.* Bradley, 28 Vt. 118, 65 Am. Dec. 226.

[4] Holbrook *v.* Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607.

[5] Valle *v.* Cerre, 36 Mo. 575, 88 Am. Dec. 161.

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Where there has been no advance or acceptance expressly made upon the particular consignment, and the question is only of a general balance of account for previous advances, the case differs not so much in principle as in the evidence required to establish the lien. It matters not whether the lien for a balance of account arises by operation of law from the usage of trade, or from the positive and special agreement and understanding of the parties;[1] and it may extend to all sums for which a factor has become liable as surety or otherwise for his principal, whenever the suretyship has resulted from the nature of the agency, or the express arrangement of the parties, or it has been undertaken upon the footing of such a lien.[2] Whether or not the given consignment is to be considered as made to cover a general balance of account, will depend upon the special arrangements, agreement, and understanding of the parties; but where such an arrangement exists, and the consignment is made in pursuance of it, and there is nothing else in the case which is inconsistent with the hypothesis, the case would be governed by the same principle, and a delivery to the carrier will be considered as a constructive delivery to the consignee.[3] In such case the shipment and delivery of the goods to the carrier, under the bill of lading, amounts to a specific appropriation of the property with an intention that it shall be a security or a payment to the consignee for the advances he has made."

In an Illinois case it was held that a consignor who had put goods into the possession of a common carrier to be carried and delivered to a factor in pursuance of a preceding arrangement and to apply on prior advances, and had taken a bill of lading in the factor's name, had, before the shipment of the goods and before the delivery of the bill of lading to the factor, the right to change the destination of the goods and that the carrier was bound to obey such directions.[4]

§ 1036. **Who may confer Lien.** As has been seen in an earlier portion of the work, the possession upon which a lien is

[1] Citing Story on Agency, § 375.
[2] *Idem.*
[3] Citing Russell on Factors, 203; Clark *v.* Mauran, 3 Paige (N. Y.) 373; Bryans *v.* Nix, 4 Mees. & W. 791; De ha *v.* Pope, 6 Ala. 690, 41 Am. Dec. 76; 3 Parsons on Contracts, 261, note w.
[4] Lewis *v.* Galena, &c. R. R., 40 Ill. 281; same point: Strahorn *v.* Union Stock Yard Co., 43 Ill. 424, 92 Am. Dec. 142.

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based must have been acquired from one having a lawful right to confer it. Hence if the factor acquired possession from one who had no power to create a lien, or who was a mere wrong-doer, or who exceeded his authority, or whose possession was tortious, he can in general acquire no right of lien.[1]

But to prevent hardship in the case of factors who have received goods, in good faith and in the usual course of business, from one, who the factor had no notice was not the true owner thereof, and in whose name the goods were shipped, it is provided, in several of the States, that the person in whose name the goods are consigned shall be deemed to be the owner so as to entitle the consignee thereof to a lien.[2]

These acts, however, apply only where a shipment of property has been made with the consent of the real owner in the name of another, thus conferring upon the latter the apparent ownership and right of control, and where innocent parties on the faith of the evidence thus furnished have made advances on the property.[3]

§ 1037. **How Lien may be lost.** When the lien of the factor has once attached, it can, like other liens, only be lost or destroyed by some act of the factor. It is superior to the claims of subsequent purchasers, and cannot be defeated by a levy of an

[1] Fitch *v.* Newberry, 1 Doug. (Mich.) 1, 40 Am. Dec. 33; Robinson *v.* Baker, 5 Cush. (Mass.) 137, 51 Am. Dec. 54.

[2] Thus the statute of New York provides as follows:—

"§ 1. After this act shall take effect, every person in whose name any merchandise shall be shipped, shall be deemed the true owner thereof, so far as to entitle the consignee of such merchandise to a lien thereon.

1. For any money advanced, or negotiable security given by such consignee, to or for the use of the person in whose name such shipment shall have been made; and,

2. For any money or negotiable security received by the person in whose name such shipment shall have been made, to or for the use of such consignee.

§ 2. The lien provided for in the preceding section, shall not exist where such consignee shall have notice, by the bill of lading or otherwise, at or before the advancing of any money or security by him, or at or before the receiving of such money or security by the person in whose name the shipment shall have been made, that such person is not the actual and *bona fide* owner thereof." Rev. Stat. 1882, p. 2257.

[3] Kinsey *v.* Leggett, 71 N. Y. 387; Merchants', &c. Bank *v.* Farmers', &c. Bank, 60 N. Y. 43; Newland *v.* Woodruff, 60 N. Y. 73.

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attachment or execution against the principal, or by summoning the factor in garnishment.[1]

The factor may waive his lien by voluntarily parting with the possession of the goods, but a temporary change of custody for a special purpose,—the factor still retaining his control over them,—will not amount to a waiver.[2] If he is wrongfully deprived of the goods, he has such an interest as will entitle him to recover them.[3]

If the factor wrongfully sells, pledges or disposes of the property or suffers it to be taken for his debt, he loses his lien,[4] and it will be deemed to be waived if, when called upon for the property, he bases his right of detention upon other grounds.[5]

§ 1038. **How Lien enforced.** As has been seen in an earlier section a factor, who has made advances upon his principal's goods, may, if the principal neglect to repay the same within a reasonable time after a demand for repayment, sell enough of the goods to satisfy his claim, even though such sale be in contravention of his principal's instructions.[6]

[1] Eaton *v.* Truesdail, 52 Ill. 307; Muller *v.* Pondir, 55 N. Y. 325; Bard *v.* Stewart, 3 T. B. Mon. (Ky.) 72; White Mountain Bank *v.* West, 46 Me. 15; Barnett *v.* Warren, 82 Ala. 557.

Factor who has made advances to his principal may proceed to sell notwithstanding the service of an attachment sued out by a creditor of the principal. The attaching creditor cannot arrest a sale without tendering to the factor the amount of his advances. Baugh *v.* Kirkpatrick, 54 Penn. St. 84, 93 Am. Dec. 675.

[2] Matthews *v.* Menedger, 2 McLean (U. S. C. C.) 145; Winne *v.* Hammond, 37 Ill. 99; Cator *v.* Merrill, 16 La. Ann. 137; Gragg *v.* Brown, 44 Me. 157; Baker *v.* Fuller, 21 Pick. (Mass.) 318; Archer *v.* McMechan, 21 Mo. 43; Bull *v.* Sigerson, 24 Mo. 53; Jordan *v.* James, 5 Ohio, 88.

[3] Holbrook *v.* Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607.

[4] Jarvis *v.* Rogers, 15 Mass. 389; Holly *v.* Huggeford, 8 Pick. (Mass.) 73, 19 Am. Dec. 303.

[5] McPherson *v.* Neuffer, 11 Rich. (S. C.) L. 267; Holbrook *v.* Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607; Winter *v.* Coit, 7 N. Y. 288, 57 Am. Dec. 522.

The factor's statutory lien is not waived by taking a note for the advances. Story *v.* Flournoy, 55 Ga. 56. A factor does not waive his lien by holding out his principal as the owner of the goods. Seymour *v.* Hoadley, 9 Conn. 418, nor where his advances exceed the value does he lose his lien by certifying, in good faith, in attachment proceedings against his principal, that he holds no goods for the benefit of the latter. Bank *v.* Sturgis, 9 Bosw. (N. Y.) 660.

But taking a judgment note has been held to be a waiver of the lien. Darlington *v.* Chamberlain, 20 Ill. App. 443.

[6] See *ante*, § 1009.

Where an agent acting under a

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VI.

RIGHTS OF FACTOR AGAINST THIRD PERSONS.

a. In Contract.

§ 1039. **May sue for Price of Goods sold.** A factor who has sold goods for his principal, may maintain an action in his own name to recover the price.[1] So if he has, upon the sale, taken the note or other obligation of the purchaser payable to himself, he may recover upon it in his own name.[2]

This right of the factor to sue for the price is, in general, subordinate to the principal's right to interpose and recover the price himself.[3] But where the factor has a lien upon the goods or their proceeds, equal to or greater than their value, the principal can not cut off the factor's right to sue.[4]

So, as has been seen,[5] the factor has a lien not only upon the goods, but upon their proceeds, and if, before the purchaser has paid the principal, the factor gives notice of his lien to the purchaser, no subsequent payment by the purchaser to the principal will prevent the factor from recovering to the extent of his lien from the purchaser.[6] It has been considered that the factor

del credere commission has a lien upon goods exceeding their value, a bill of sale of the goods made to him by his insolvent principal, though perhaps unlawful, will be sustained as a foreclosure of the lien. Fourth Nat. Bank *v.* American Mills Co., 29 Fed. Rep. 611.

[1] Graham *v.* Duckwall, 8 Bush (Ky.) 12; Ilsley *v.* Merriam, 7 Cush. (Mass.) 242, 54 Am. Dec. 721; Toland *v.* Murray, 18 Johns. (N. Y.) 24; Ladd *v.* Arkell, 37 N. Y. Super. Ct. 35; White *v.* Chouteau, 10 Barb. (N. Y.) 202; Miller *v.* Lea, 35 Md. 396, 6 Am. Rep. 417.

[2] Van Staphorst *v.* Pearce, 4 Mass. 258.

[3] See *post*, § 1042.

[4] Hudson *v.* Granger, 5 B. & Ald. 27. In this case the owner of the goods being indebted to the factor in an amount exceeding their value, consigned them to him for sale. The factor who was also indebted to the defendant sold the goods to him. The factor became bankrupt and on a settlement of accounts between defendant and the factor's assignees, the defendant allowed credit for the price of the goods and proved his claim for the balance against the factor's estate. The plaintiffs, who were the original owners of the goods, brought suit against the defendant for the price; but the court held that as the factor had a lien on the whole price of the goods, the settlement between defendant and the assignees was a bar to the action.

[5] *Ante*, § 1032.

[6] Drinkwater *v.* Goodwin, Cowp. 251; Paley's Agency, 365, 6.

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must, in such a case, indemnify, or offer to indemnify, the purchaser against an adverse suit by the principal. "Whether such indemnity, however, is essential, is," says Mr. WHARTON, "a matter of dispute. Lord MANSFIELD'S authority, in the case last cited, is to the affirmative, and such is the view of Mr. PALEY.[1] On the other hand Mr. RUSSELL[2] says: 'It appears to be taken for granted that in such cases third persons are entitled to an offer of indemnity from the factor; and it is believed that in practice such indemnity is usually offered; although whether this be absolutely essential in order to the security of the factor's rights may admit of question.' And Judge STORY[3] speaks even more doubtfully: 'It seems at least a questionable point whether there is any principal of law which positively requires such indemnity or offer of indemnity.'"[4]

Where the action is brought by the factor in his own name, the defendant may avail himself—

1. Of any defenses which he has against the factor who is the plaintiff in the suit;[5] and

2. Of any defenses which he has against the principal,[6] except that such defenses can not defeat the factor's action to the extent of his lien.[7]

§ 1040. **May sue on Contracts made in his Name.** So where the factor has entered into contracts with third persons in his own name in reference to the goods, he may sue upon the same. Thus cotton factors, who have sold goods consigned to them, may, in their own names, recover the damages resulting from a breach of the contract by the buyer, although they may be bound to pay such damages when recovered to the consignor. They have a special property in the cotton, and a lien upon it for their commissions which attaches on the very damages recovered and would be increased thereby.[8] So a factor may sue a third person for the breach of a contract of storage.[9]

[1] Paley's Agency, 365, 6.
[2] Factors & Brokers, 247.
[3] Agency, § 409.
[4] Wharton on Agents, § 777.
[5] Ewell's Evans on Agency, 387; Gibson v. Winter, 5 B. & Ad. 96; Bauerman v. Radenius, 7 T. R. 659.
[6] Atkyns v. Amber, 2 Esp. 493; Grice v. Kenrick, L. R. 5 Q. B. 344.
[7] Drinkwater v. Goodwin, Cowp. 251.
[8] Groover v. Warfield, 50 Ga. 644.
[9] Allen v. Steers, 39 La. Ann. 586.

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b. In Tort.

§ 1041. **May maintain Trespass, Replevin or Trover.** The factor has such a special interest in the goods that he may maintain trespass or trover against one who injures them, or deprives him of their possession.[1] As against a mere stranger he could recover the full value of the goods;[2] but as against the principal or one claiming under him, he can recover only to the extent of his interest.[3]

So a factor under a *del credere* commission, having a lien for advances made by him upon goods consigned to him and delivered to another to hold for him, may maintain replevin against the bailee for their non-delivery.[4]

VII.

RIGHTS OF PRINCIPAL AGAINST THIRD PERSONS.

a. In Contract.

§ 1042. **May sue for Price of Goods sold.** Except in those cases in which the factor has a lien equal to or exceeding the value of the goods,[5] the principal may sue for and recover in his own name the price of the goods sold for him by the factor, even though the principal was not disclosed and the factor acted as the ostensible principal.[6] Where the factor, having a lien upon the proceeds, has given notice to the purchaser not to pay the amount of it to the principal, the latter may recover the surplus; or, by satisfying the factor's claim, can recover the whole.[7] In other cases, the right of the principal to sue is precedent to that

[1] See *ante*, § 765; Fitzhugh *v.* Wiman, 9 (N. Y.) 559; Beyer *v.* Bush, 50 Ala. 19; Robinson *v.* Webb, 11 Bush (Ky.) 464; Gorum *v.* Carey, 1 Abb. (N. Y.) Pr. 285.

[2] See *ante*, § 765.

[3] Heard *v.* Brewer, 4 Daly, (N. Y.) 136.

[4] Holbrook *v.* Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607.

[5] Hudson *v.* Granger, 5 B. & Ald. 27.

[6] Roosevelt *v.* Doherty, 129 Mass. 301, 37 Am. Rep. 356; Lerned *v.* Johns. 9 Allen (Mass.) 419; Ilsley *v.* Merriam, 7 Cush. (Mass.) 242, 54 Am. Dec. 721; Girard *v.* Taggart, 5 S. & R. (Penn.) 19; Graham *v.* Duckwall, 8 Bush (Ky.) 12; Miller *v.* Lea, 35 Md. 396, 6 Am. Rep. 417; Huntington *v.* Knox, 7 Cush. (Mass.) 371; Locke *v.* Lewis, 124 Mass. 1; 26 Am. Rep. 631; Ladd. *v.* Arkell, 40 N. Y. Super Ct. 150; Stewart *v.* Woodward, 50 Vt. 78; 28 Am. Rep. 488; Brewster *v.* Saul, 8 La. 296.

[7] Story on Agency.

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of the factor, and the principal, although previously undisclosed, may intervene at any time before the payment to the factor and, by notice to the purchaser, require payment to himself.[1] The fact that the factor has taken a note payable to himself, will not defeat the principal's right of action, except where the note constitutes payment or has been negotiated.[2] But where the factor, in selling the goods of several principals, takes a note payable to himself for the entire price, no one of the principals can sue for his proportion of the price, nor can he, though no note was given, sue for his proportion, where the goods of himself and other principals, or of himself and the factor personally, were sold for a gross price.[3]

§ 1043. **Same Subject—What Defenses Principal subject to.** Where the purchaser knew,[4] or had reasonable grounds to believe,[5] that the factor was acting as agent for a principal, he will not be permitted to avail himself, in an action brought by the principal, of set-offs or other defenses which he may have against the agent. But mere knowledge that the seller was a factor is not enough, as he may sell his own goods.[6]

Where, however, the principal has permitted the factor to sell as the apparent principal in the transaction, the real principal, if he intervenes, must take the contract subject to such defenses as the purchaser, who did not know or have reason to believe that the factor was but an agent, and who has acted in good faith, has acquired up to the time when the principal intervenes and demands performance to himself.[7]

[1] Kelley *v.* Munson, 7 Mass. 319, 5 Am. Dec. 47; Golden *v.* Levy, 1 Car. L. Repos. 527; 6 Am. Dec. 555.

[2] See *ante*, § 772, See Roosevelt *v.* Doherty, 129 Mass. 301, 37 Am. Rep. 356.

[3] Roosevelt *v.* Doherty, *supra*.

[4] Darlington *v.* Chamberlin, 120 Ill. 585, 12 North E. Rep. 78; St. Louis Bank *v.* Ross, 9 Mo. App. 399; Miller *v.* Lea, *infra;* Catterall *v.* Hindle, L. R.,1 C. P. 186; Dresser *v.* Norwood, 17 C. B. (N. S.) 466. Guy *v.* Oakley, 13 Johns. (N.Y.) 331.

[5] Miller *v.* Lea, 35 Md. 396, 6 Am. Rep. 417; Ladd *v.* Arkell, 40 N. Y. Super. 150; Stewart *v.* Woodward, 50 Vt. 78; 28 Am. Rep. 488.

[6] Schell *v.* Stephens, 50 Mo. 379; Graham *v.* Duckwall, 8 Bush (Ky.) 12.

[7] Roosevelt *v.* Doherty, 129 Mass. 301, 37 Am. Rep. 356; Locke *v.* Lewis, 124 Mass. 1; 26 Am. Rep. 633; Huntington *v.* Knox, 7 Cush. (Mass.) 371; Barry *v.* Page, 10 Gray, (Mass.) 398; Hogan *v.* Shorb, 24 Wend. (N. Y.) 458; Merrick's Estate, 5 W. & S. (Penn.) 9.

A foreign factor sold merchandise to the defendant in his own name and without disclosing his principal

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§ 1044. **Right to follow Property.** Notwithstanding the consignment to the factor or his advances upon them, the goods still remain the property of the principal, and so continue until lawfully sold by the factor. They cannot be taken for the factor's debts,[1] nor appropriated by him to their payment,[2] nor, except by virtue of a statute, can they be pledged as security for his private demands.[3] Neither, as in other like cases, can the factor, without his principal's consent, be permitted to sell to himself, or to a third person in trust for himself.[4] Property so disposed of, or its value, may be recovered by the principal.

So the factor stands in the situation of a trustee for his principal, and if the principal can trace his property, whether it be the identical article which first came into the factor's possession, or other property purchased for the principal by the factor with the proceeds; or if, upon the sale, the factor has taken notes or other securities for the price, the principal may follow and recover the property or its proceeds either in the hands of the factor or of his legal representatives, or of his assignee if he should become insolvent or bankrupt, or in the hands of a third person who has taken it with notice of the trust or without consideration.[5]

and received his own check in part payment therefor. Held in an action by the principal to recover the price of the merchandise thus sold, that, in the absence of proof that the defendant knew of the representative character of the factor, the principal could not recover. Traub *v.* Milliken, 57 Me. 63, 2 Am. Rep. 14.

[1] Loomis *v.* Barker, 69 Ill. 360; Holly *v.* Huggeford, 8 Pick. (Mass.) 73, 19 Am. Dec. 303; Blood *v.* Palmer, 11 Me. 414, 26 Am. Dec. 547; Moore *v.* Hillabrand, 16 Abb. N. Cas. (N. Y.) 477; Ellsner *v.* Radcliff, 21 Ill. App. 195.

[2] Stewart *v.* Woodward, 50 Vt. 78, 28 Am. Rep. 488; Benny *v.* Rhodes, 18 Mo. 147, 59 Am. Dec. 298; Benny *v.* Pegram, 18 Mo. 191, 59 Am. Dec. 298.

[3] See *ante*, § 994.

[4] See *ante*, § 1007.

[5] Veil *v.* Mitchel, 4 Wash. (U. S. C. C.) 105; Fahnestock *v.* Bailey, 3 Metc. (Ky.) 48, 77 Am. Dec. 161; Price *v.* Ralston, 2 Dall. (Penn.) 60, 1 Am. Dec. 260; Thompson *v.* Perkins, 3 Mason (U. S. C. C.) 232; Chesterfield Mnfg Co. *v.* Dehon, 5 Pick. (Mass.) 7, 16 Am. Dec. 367; Sheffer Montgomery, 65 Penn. St. 329; Farmers' &c. Bank *v.* King, 57 Penn. St. 202, 98 Am. Dec. 215; Holly *v.* Huggeford, 8 Pick. (Mass.) 73, 19 Am. Dec. 303; Kelly *v.* Munson, 7 Mass. 319; Blackman *v.* Green, 24 Vt. 17; Potter *v.* Dennison, 10 Ill. 590; Tooke *v.* Hollingworth, 5 T. R. 215; Scott *v.* Surman, Willes 400; Bryson *v.* Wylie, 1 Bos. & Pul. 83, foot note; Horn *v.* Baker, 9 East. 215; Hamilton *v.* Bell, 10 Ex. 545; Whitfield *v.* Brand, 16 Mees. & W. 282; St. Louis Bank *v.* Ross, 9 Mo. App. 399.

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Where, however, the factor sells the goods for cash and mixes it indiscriminately with his own, there cannot ordinarily be any subsequent specific appropriation of it.[1] And money cannot be followed which is paid away in due course of business without any notice of the trust.[2]

A factor, however, who has sold goods, has no implied authority to sell a debt existing in the form of an open account and arising out of the sale, so as to transfer the title to the debt, where the principal was not in default, and had not been called upon to repay the factor his advances.[3]

But if the factor, having sold the goods, lends the money to a third person, who knows that it belongs to the principal, the principal may recover it of the borrower.[4] Where, however, the factor loans the money of his principal to one having no knowledge that it did not belong to the factor, the borrower may apply it to a debt owing to him by the factor and the principal can not recover it.[5]

b. In Tort.

§ 1045. **For Injuries to or Conversions of the Goods.** For all injuries to, or conversions of the goods, which affect the title to them, the principal, notwithstanding the consignment to the factor or his lien upon them, may maintain such appropriate actions against third persons as are based upon the general ownership of the goods.[6]

[1] Price *v.* Ralston, 3 Dall. (Penn.) 60, 1 Am. Dec. 260. But see *ante*, § 534.

[2] Price *v.* Ralston, *supra*; Veil *v.* Mitchel, 4 Wash. (U. S. C. C.) 105; Fahnestock *v.* Bailey, 3 Metc. (Ky.) 48, 77 Am. Dec. 161.

An insolvent firm of factors opened an account in a bank in their name as "agents" in order to protect their principal, which purpose the bank knew. The factors deposited the proceeds of their principal's goods in this account and on settlement gave him a check to balance. Held that the bank might not charge to that account a debt of the agents, even with their consent. Baker *v.* New York National Bank, 100 N. Y. 31, 53 Am. Rep. 150.

Where the proceeds are so deposited in a separate account the fact that the account also includes the factors' commissions will not prevent the principal from following it, nor enable the factors' creditors to reach it. Richardson *v.* St. Louis Nat. Bank, 10 Mo. App. 246.

[3] Commercial National Bank *v.* Heilbronner, 108 N. Y. 439, 15 North E. Rep. 701.

[4] Sheffer *v.* Montgomery, 65 Penn. St. 329.

[5] Lime Rock Bank *v.* Plimpton, 17 Pick. (Mass.) 159, 28 Am. Dec. 286. See Thacher *v.* Pray, 113 Mass. 291, 18 Am. Rep. 480.

[6] See *ante*, § 792; Holly *v.* Huggeford, 8 Pick. (Mass.) 73, 19 Am. Dec. 308.

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VIII.

RIGHTS OF THIRD PERSONS AGAINST PRINCIPAL.

§ 1046. **Same as in other Cases.** The factor is ordinarily a general agent, pursuing a vocation to which, in the absence of known limitations, certain implied powers are incidental. What these powers are have already been seen. The principal may, however, extend the scope of these powers, either by express authority, or by holding the factor out as possessing the extended power. Wherever, therefore, the factor, acting within the scope of his authority, has incurred obligations on the part of his principal to third persons, the principal is liable as in other cases, although the factor may have violated his instructions.[1]

§ 1047. **How when Principal undisclosed.** Even although the principal was, at the time of making the contract, undisclosed, he may yet be held liable upon it when discovered.[2] This general doctrine, with its application and limitations, has already been considered.[3]

§ 1048. **How when exclusive Credit given to the Factor.** But where the other party, knowing the principal, has seen fit to give exclusive credit to the factor, he cannot afterwards resort to the principal, even though the factor becomes insolvent.[4]

IX.

RIGHTS OF THIRD PERSONS AGAINST FACTOR.

§ 1049. **Same as in other Cases.** The liability of the factor to the other party rests upon the same principles as in other cases. Thus if the factor conceals his principal,[5] or pledges his

[1] Lobdell *v.* Baker, 1 Metc. (Mass.) 193, 35 Am. Dec. 358; Daylight Burner Co. *v.* Odlin, 51 N. H. 56, 12 Am. Rep. 45; Dias *v.* Chickering, 64 Md. 348, 54 Am. Rep. 770; Higgins *v.* McCrea, 116 U. S. 671.

[2] Taintor *v.* Prendergast, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; Pentz *v.* Stanton, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558; Raymond *v.* Crown, &c. Mills, 2 Metc. (Mass.) 319.

[3] See *ante*, § 695, *et seq.*

[4] Paige *v.* Stone, 10 Metc. (Mass.) 160, 43 Am. Dec. 420; McCullough *v.* Thompson, 45 N. Y. Super. Ct. 449; Chapman *v.* Durant, 10 Mass. 47; Tudor *v.* Whiting, 12 Mass. 212; French *v.* Price, 24 Pick. (Mass.) 13; James *v.* Bixby, 11 Mass. 34. See *ante*, § 698.

[5] Cobb *v.* Knapp, 71 N. Y. 348, 27 Am. Rep. 51; Raymond *v.* Crown,

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own personal credit,[1] or violates his implied warranty of authority,[2] he is liable as in the case of any other agent.

§ 1050. **When liable for Conversion.** A factor who has received goods from one not the owner, or from one having no authority to dispose of them, and who, after notice of his consignor's lack of authority and without the authority of the true owner, proceeds to sell the goods, or refuses to recognize the owner's title to them or their proceeds, or who sells them as the principal, may be held liable to the owner as for a conversion of them;[3] but where the factor, acting in good faith and in the regular course of business, has sold the goods as agent merely, and has paid over the proceeds to his consignor without notice that he was not the owner, he can not subsequently be held liable to the owner for a conversion.[4]

§ 1051. **How in Case of Foreign Factor.** It was formerly held that where the factor acts for a foreign principal, he is personally liable upon all contracts made by him for such principal, and this without any distinction whether the factor describes himself in the contract as agent or not. This rule rested upon the presumption that credit was given to the factor personally.[5]

In modern cases, however, this arbitrary presumption does not prevail, and while the fact that the principal is a foreigner may properly be taken into consideration, the true rule seems to be that it is in all cases a question of fact, to be determined from

&c. Mills, 2 Metc. (Mass.) 319; Nixon v. Downey, 49 Iowa, 166; Baldwin v. Leonard, 39 Vt. 260, 94 Am. Dec. 324.

[1] McCullough v. Thompson, 45 N. Y Super 449; Nixon v. Downey, *supra*.

A draft by the principal on the factor for sum payable to third person out of proceeds of goods when the same should be sold, is a specific appropriation to the use of the latter, and binds the factor to retain so much of the proceeds as is necessary to meet the draft; and the obligation of the factor to the payee is not discharged by the failure of the payee to present the draft for payment for several months, and an agreement in the meantime between the principal and factor for a new appropriation of the fund for the benefit of the latter. Lowery v. Steward, 25 N. Y. 239, 82 Am. Dec. 346.

[2] See *ante*, §§ 541–550.

[3] See Roach v. Turk, 9 Heisk. (Tenn.) 708, 24 Am. Rep. 360; Saltus v. Everett, 20 Wend. (N. Y.) 263, 32 Am. Dec. 541; Hollins v. Fowler, L. R. 7 H. L. 757, 14 Eng. Rep. 138.

[4] Roach v. Turk, 9 Heisk. (Tenn.) 708, 24 Am. Rep. 360, overruling Taylor v. Pope, 5 Cold. (Tenn.) 413.

[5] See Story on Agency, § 268, and cases cited.

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the terms of the particular contract and the surrounding circumstances of the case, whether the credit was given to the factor personally or not.[1]

A principal residing in another of the United States than that in which the factor resides, is not a foreign principal in contemplation of this rule.[2]

X.

HOW RELATION TERMINATED.

§ 1052. **As in other Cases of Agency.** The authority of the factor to sell the goods may be revoked, like that of any other agent, if no advances have been made upon them, at any time before the sale is made.[3] Where, however, the factor has made advances or incurred liabilities in respect of the goods, the principal can not, as has been seen, deprive the factor of his right to sell enough to reimburse himself, without first paying or tendering to the factor the amount due to him.[4]

The factor's power to sell for his own reimbursement is a power coupled with an interest, and is therefore not revoked by the principal's death or other disability.[5]

So the factor being under no obligation to accept the agency, is under no obligation to continue it, and may in general renounce the agency at any time.[6] But this right must be exercised with due regard to the interests of the principal, and the factor having accepted the goods can not arbitrarily and summarily relieve himself of the responsibility for their custody and care. If he desires to terminate the agency he must give to the principal reasonable notice to that effect, and must afford to the

[1] Maury v. Ranger, 38 La. Ann. 485, 58 Am. Rep. 197; Bray v. Ketell, 1 Allen (Mass.) 80; Goldsmith v. Manheim, 109 Mass. 187; Rogers v. March, 33 Me. 106; Oelricks v. Ford, 23 How. (U. S.) 49; Kaulback v. Churchill, 59 N. H. 296.

[2] Vawter v. Baker, 23 Ind. 63.

[3] Farmer v. Robinson, 2 Camp. 339, note; Scott v. Rogers, 31 N. Y. 676.

[4] See *ante*, § 1009.

[5] Knapp v. Alvord, 10 Paige (N.Y.) 205, 40 Am. Dec. 241; Bergen v. Bennett, 1 Cairnes Cas. (N. Y.) 1, 2 Am. Dec. 281; Raymond v. Squire, 11 Johns. (N. Y.) 47; Hunt v. Rousmanier, 8 Wheat. (U. S.) 174. Where the lien of the factor attaches before the principal's death, that event does not defeat it. Hammonds v. Barclay, 2 East. 227.

[6] DuPeirat v. Wolfe, 29 N. Y. 436.

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latter reasonable time and opportunity to resume possession or to make other arrangements.[1]

The factor's special interest in the goods by reason of his advances upon them is not terminated by his death or disability,[2] although his general authority, as in other cases, would be.[3]

A factor's authority, like that of other agents, is terminated by the completion of his undertaking, or by the expiration of the time, if any, fixed for its continuance.[4]

[1] Edwards on Factors & Brokers, § 90.

[2] Hammonds v. Barclay, 2 East. 227.

[3] See *ante*, § 249. A factor who receives goods, and, in his own name, ships them to another market to be sold by a subagent, cannot collect the proceeds against the will of the owner. After the sale, the subagent is the debtor and not the trustee of the principal. In such a case the death of the factor is a revocation of his authority; and if his administrator receives the fund from the subagent, he receives it as the agent of the principal. Jackson Ins. Co. v. Partee, 9 Heisk. (Tenn.) 296.

[4] See *ante*, §§ 200–202.

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APPENDIX.

STATUTORY PROVISIONS.

In several of the States, the law of agency has been, to a greater or less extent, made the subject of statutory enactment. The most important of these provisions are here appended.

DAKOTA AND CALIFORNIA.

The provisions of Dakota code are copied from those of California. The Dakota sections are here given, followed respectively by the corresponding section number of the California code.

ARTICLE I. DEFINITION OF AGENCY.

§ 1337. **Agency defined.** An agent is one who represents another called the principal, in dealings with third persons. Such representation is called agency.
Cal. 2295.

§ 1338. **Qualifications.** Any person, having capacity to contract, may appoint an agent; and any person may be an agent.
Cal. 2296.

§ 1339. **Special and general.** An agent for a particular act or transaction is called a special agent. All others are general agents.
Cal. 2297.

§ 1340. **Classified.** An agency is either actual or ostensible.
Cal. 2298.

§ 1341. **Actual agency.** An agency is actual when the agent is really employed by the principal.
Cal. 2299.

§ 1342. **Ostensible.** An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him.
Cal. 2300.

ARTICLE II. AUTHORITY OF AGENTS.

§ 1343. **What powers.** An agent may be authorized to do any acts which the principal might do, except those to which the latter is bound to give his personal attention.
Cal. 2304.

§ 1344. **Any lawful act.** Every act which, according to this Code, may be done by or to any person, may be done by or to the agent of such person for that purpose, unless a contrary intention clearly appears.
Cal. 2305.

§ 1345. **Not to defraud principal.** An agent can never have authority, either actual or ostensible, to do an act which is, and is known or suspected by the person with whom he deals to be, a fraud upon the principal.
Cal. 2306.

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§ 1346. **How authorized.** An agency may be created, and an authority may be conferred, by a precedent authorization or a subsequent ratification.
Cal. 2307.

§ 1347. **No consideration.** A consideration is not necessary to make an authority, whether precedent or subsequent, binding upon the principal.
Cal. 2308.

§ 1348. **Form of authority.** An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing.
Cal. 2309.

§ 1349. **Form of ratification.** A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or, where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof.
Cal 2310.

§ 1350. **Part includes whole.** Ratification of part of an indivisible transaction is a ratification of the whole.
Cal. 2311.

§ 1351. **When void.** A ratification is not valid unless, at the time of ratifying the act done, the principal has power to confer authority for such an act.
Cal. 2312.

§ 1352. **Retroactive, limited.** No [un]authorized act can be made valid, retroactively, to the prejudice of third persons, without their consent.
Cal. 2313.

§ 1353. **Rescission of ratification.** A ratification may be rescinded when made without such consent as is required in a contract, or with an imperfect knowledge of the material facts of the transaction ratified, but not otherwise.
Cal. 2314.

§ 1354. **Authority.** An agent has such authority as the principal, actually or ostensibly, confers upon him.
Cal. 2315.

§ 1355. **Actual.** Actual authority is such as a principal intentionally confers upon the agent, or intentionally or by want of ordinary care allows the agent to believe himself to possess.
Cal. 2316.

§ 1356. **Ostensible.** Ostensible authority is such as a principal intentionally, or by want of ordinary care, causes or allows a third person to believe the agent to possess.
Cal. 2317.

§ 1357. **Legal construction.** Every agent has actually such authority as is defined by this title, unless specially deprived thereof by his principal, and has even then such authority ostensibly, except as to persons who have actual or constructive notice of the restriction upon his authority.
Cal. 2318.

§ 1358. **Necessary authority.** An agent has authority:
1. To do everything necessary or proper and usual in the ordinary course of business for effecting the purpose of his agency; and,
2. To make a representation respecting any matter of fact not including the terms of his authority, but upon which his right to use his authority depends, and the truth of which cannot be determined by the use of reasonable diligence on the part of the person to whom the representation is made.
Cal. 2319.

§ 1359. **May disobey.** An agent has power to disobey instructions in dealing with the subject of the agency in cases where it is clearly for the interest of his principal that he should do so, and there is not time to communicate with the principal.
Cal. 2320.

§ 1360. **Construction.** When an authority is given partly in general and partly in specific terms, the general authority gives no higher powers than those specifically mentioned.
Cal. 2321.

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§ 1361. **Exceptions to general power.** An authority expressed in general terms, however broad, does not authorize an agent:

1. To act in his own name, unless it is the usual course of business to do so;

2. To define the scope of his agency; or,

3. To do any act which a trustee is forbidden to do by article two of chapter one of the last article.

Cal. 2322.

§ 1362. **Implied authority.** An authority to sell personal property includes authority to warrant the title of the principal, and the quality and quantity of the property.

Cal. 2323.

§ 1363. **Same as to realty.** An authority to sell and convey real property includes authority to give the usual covenants of warranty.

Cal. 2324.

§ 1364. **Receive price.** A general agent to sell, who is intrusted by the principal with the possession of the things sold, has authority to receive the price.

Cal. 2325.

§ 1365. **Limited.** A special agent to sell has authority to receive the price on delivery of the things sold, but not afterwards.

Cal. 2326.

ARTICLE III. MUTUAL OBLIGATIONS OF PRINCIPALS AND THIRD PERSONS.

§ 1366. **Principal affected by agent.** An agent represents his principal for all purposes within the scope of his actual or ostensible authority and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal.

Cal. 2330.

§ 1367. **Incomplete execution.** A principal is bound by an incomplete execution of an authority when it is consistent with the whole purpose and scope thereof, but not otherwise.

Cal. 2331.

§ 1368. **Notice to both presumed.** As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other.

Cal. 2332.

§ 1369. **Exceeded authority.** When an agent exceeds his authority his principal is bound by his authorized acts so far only as they can be plainly separated from those which are unauthorized.

Cal. 2333.

§ 1370. **Bound by certain acts.** A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith and without ordinary negligence, incurred a liability, or parted with value, upon the faith thereof.

Cal. 2334.

§ 1371. **Principal exonerated.** If exclusive credit is given to an agent by the person dealing with him, his principal is exonerated by payment or other satisfaction made by him to his agent, in good faith, before receiving notice of the creditor's election to hold him responsible.

Cal. 2335.

§ 1372. **Set-offs against.** One who deals with an agent, without knowing or having reason to believe that the agent acts as such in the transaction, may set off, against any claim of the principal arising out of the same, all claims which he might have set off against the agent before notice of the agency.

Cal. 2336.

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§ 1373. **Construction of contract.** Any instrument within the scope of his authority, by which an agent intends to bind his principal, does bind him, if such intent is plainly inferable from the instrument itself.
Cal. 2337.

§ 1374. **Agent's negligence.** Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal.
Cal. 2338.

§ 1375. **For other wrongs.** A principal is responsible for no other wrongs committed by his agent than those mentioned in the last section, unless he has authorized or ratified them, even though they are committed while the agent is engaged in his service.
Cal. 2339.

Article IV. Obligations of Agents to Third Persons.

§ 1376. **Warranty of authority.** One who assumes to act as an agent, thereby warrants, to all who deal with him in that capacity, that he has the authority which he assumes.
Cal. 2342.

§ 1377. **Agent to third persons.** One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others:
1. When, with his consent, credit is given to him personally in a transaction;
2. When he enters into a written contract in the name of his principal, without believing, in good faith, that he has authority to do so; or,
3. When his acts are wrongful in their nature.
Cal. 2343.

§ 1378. **Surrender to third party.** If an agent receives anything for the benefit of his principal, to the possession of which another person is entitled, he must, on demand, surrender it to such person, or so much of it as he has under his control at the time of demand, on being indemnified for any advance which he has made to his principal in good faith, on account of the same; and is responsible therefor, if, after notice from the owner, he delivers it to his principal.
Cal. 2344.

§ 1379. **Incapacity to contract.** The provisions of this article are subject to the provisions of part one of the first division of this Code.
Cal. 2345.

Article V.—Delegation of Agency.

§ 1380. **When authorized.** An agent, unless specially prohibited by his principal to do so, can delegate his powers to another person in any of the following cases, and in no others:
1. When the act to be done is purely mechanical;
2. When it is such as the agent cannot himself, and the subagent can, lawfully perform;
3. When it is the usage of the place to delegate such powers; or,
4. When such delegation is specially authorized by the principal.
Cal. 2349.

§ 1381. **Agent is principal.** If an agent employs a subagent without authority, the former is a principal and the latter his agent, and the principal of the former has no connection with the latter.
Cal. 2350.

1382. **Rightful subagent.** A subagent, lawfully appointed, represents the principal in like manner with the original agent; and the original agent is not responsible to third persons for the acts of the subagent.
Cal. 2351.

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ARTICLE VI.—TERMINATION OF AGENCY.

§ 1383. **Classified causes.** An agency is terminated, as to every person having notice thereof, by;

1. The expiration of its term;
2. The extinction of its subject;
3. The death of the agent;
4. His renunciation of the agency; or,
5. The incapacity of the agent to act as such.

Cal. 2355.

§ 1384. **Other causes.** Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated as to every person having notice thereof, by:

1. Its revocation by the principal;
2. His death; or,
3. His incapacity to contract.

Cal. 2356.

PARTICULAR AGENCIES.

ARTICLE I. AUCTIONEERS.

§ 1385. **From seller, limited.** An auctioneer, in the absence of special authorization or usage to the contrary, has authority from the seller only as follows:

1. To sell by public auction to the highest bidder;
2. To sell for cash only, except such articles as are usually sold on credit at auction;
3. To warrant in like manner with other agents to sell, according to section one thousand three hundred and sixty-two;
4. To prescribe reasonable rules and terms of sale;
5. To deliver the thing sold upon payment of the price;
6. To collect the price; and,
7. To do whatsoever else is necessary, or proper and usual, in the ordinary course of business for effecting these purposes.

Cal. 2362.

§ 1386. **To bind both parties.** An auctioneer has authority from a bidder at the auction, as well as from the seller, to bind both by a memorandum of the contract as prescribed in the title on sale.

Cal. 2363.

ARTICLE II. FACTORS.

§ 1387. **Defined.** A factor is an agent who is employed to buy or sell property in his own name, and who is intrusted by his principal with the possession thereof, as defined in section one thousand one hundred and sixty-eight.

Cal. 2367.

§ 1388. **Power beyond agent.** In addition to the authority of agents in general, a factor has actual authority from his principal, unless specially restricted:

1. To insure property consigned to him uninsured;
2. To sell, on credit, anything intrusted to him for sale, except such things as it is contrary to usage to sell on credit; but not to pledge, mortgage, or barter the same; and,
3. To delegate his authority to his partner or servant, but not to any person in an independent employment.

Cal. 2368.

§ 1389. **Ostensible authority.** A factor has ostensible authority to deal with the property of his principal as his own, in transactions with persons not having notice of the actual ownership.

Cal. 2369.

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GEORGIA.

The first section numbers are those of the Codes of 1882 and 1873. Those in parentheses are respectively those of the Codes of 1868 and 1863.

Article I. Relation of Principal and Agent among Themselves.

§ 2178. (2152.) (3157.) **How it arises.** The relation of principal and agent arises wherever one person, expressly or by implication, authorizes another to act for him, or subsequently ratifies the acts of another in his behalf.

§ 2179. (2153.) (2158.) **What may be done by agent.** Whatever one may do himself may be done by an agent, except such personal trusts in which special confidence is placed on the skill, discretion, or judgment of the person called in to act; so an agent may not delegate his authority to another unless specially empowered to do so.

§ 2180. (2154.) [**Executors, etc., may convey by attorney in fact.** Executors, administrators, guardians and trustees are authorized to sell and convey property, by attorneys in fact, in all cases where they may lawfully sell and convey in person.]

§ 2181. (2155.) (2159.) **Who may be agent.** Any person may be appointed an agent who is of sound mind; so a principal is bound by the acts of his infant agent, but a *feme covert* cannot be an agent for another than her husband except by his consent, in which case he is bound by her acts.

§ 2182. (2156.) (2160.) **Agency created, how—agents of corporations.** The act creating the agency must be executed with the same formality (and need have no more) as the law prescribes for the execution of the act for which the agency is created. A corporation may create an agent in its usual mode of transacting business, and without its corporate seal.

§ 2183. (2157.) (2161.) **Revocation.** Generally, an agency is revocable at the will of the principal. The appointment of a new agent for the performance of the same act, or the death of either principal or agent revokes the power. If, however, the power is coupled with an interest in the agent himself it is not revocable at will; and in all cases the agent might recover from the principal for an unreasonable revocation, any damages he may have suffered by reason thereof.

§ 2184. (2158.) (2162.) **Agent limited by his authority.** The agent must act within the authority granted to him, reasonably interpreted; if he exceeds or violates his instructions, he does it at his own risk, the principal having the privilege of affirming or dissenting, as his interest may dictate. In cases where the power is coupled with an interest in the agent, unreasonable instructions, detrimental to the agent's interest, may be disregarded.

§ 2185. (2159.) (2163.) **Diligence of an agent.** An agent for hire is bound to exercise, about the business of his principal, that ordinary care, skill and diligence required of a bailee for hire. A voluntary agent, without hire or reward, is liable only for gross neglect.

§ 2186. (2160.) (2164.) **Agent cannot buy or sell for himself.** Without the express consent of the principal, after a full knowledge of all the facts, an agent employed to sell, cannot be himself the purchaser; and an agent to buy, cannot be himself the seller.

§ 2187. (2161.) (2165.) **Personal profit.** The agent must not make a personal profit from his principal's property; for all such he is bound to account.

§ 2188. (2162.) (2166.) **Estoppel.** An agent cannot dispute his principal's title, except in such cases where legal proceedings, at the instances of others, have been commenced against him.

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§ 2189. ((2163.) (2167.) **Agent of several.** Where several persons appoint an agent to do an act for their joint benefit, the instructions of one, not inconsistent with the general directions, shall protect the agent in his act.

§ 2190. (2164.) (2168.) **Commission and expenses.** An agent who has discharged his duty is entitled to his commission and all necessary expenses incurred about the business of his principal. If he has violated his engagement, he is entitled to no commission.

§ 2191. (2165.) (2169.) **Illegal purpose.** No rights can arise to either party out of an agency created for an illegal purpose.

§ 2192. (2166.) (2170.) **Effect of ratification.** A ratification by the principal relates back to the act ratified, and takes effect as if originally authorized. A ratification may be express, or implied from the acts or silence of the principal. A ratification once made cannot be revoked.

§ 2193. (2167.) (2171.) **Of mingling goods.** An agent, by willfully mingling his own goods with those of his principal, does not create a tenancy in common, but if incapable of separation the whole belongs to the principal.

Article II. Rights and Liabilities of Principal as to Third Persons.

§ 2194. (2168.) (2172.) **Principal, how far bound.** The principal is bound by all the acts of his agent within the scope of his authority; if the agent exceeds his authority the principal cannot ratify in part and repudiate in part; he must adopt either the whole or none.

§ 2195. (2169.) (2173.) **Forms immaterial.** The form in which the agent acts is immaterial; if the principal's name is disclosed, and the agent professes to act for him, it would be held to be the act of the principal.

§ 2196. (2170.) (2174.) **Extent of authority.** The agent's authority will be constructed to include all necessary and usual means for effectually executing it. Private instructions or limitations not known to persons dealing with a general agent cannot affect them. In special agencies for a particular purpose, persons dealing with the agent should examine his authority.

§ 2197. (2171.) (2175.) **Failing to disclose principal.** If an agent fails to disclose his principal, yet, when discovered, the person dealing with the agent may go directly upon the principal, under the contract, unless the principal shall have previously accounted and settled with the agent.

§ 2198 (2172.) (2176.) **Credit given to agent.** If the credit is given to the agent by the choice of the seller, he cannot afterward demand payment of the principal.

§ 2199. (2173.) (2177.) **Representations by agent.** The principal is bound by all representations made by his agent in the business of his agency, and also by his willful concealment of material facts, although they are unknown to the principal, and known only by the agent.

§ 2200. (2174.) (2178.) **Notice to.** Notice to the agent of any matter connected with his agency is notice to the principal.

§ 2201. (2175.) (2179.) **Principal bound for neglect and fraud.** The principal is bound for the care, diligence and fidelity of his agent in his business, and hence he is bound for the neglect and fraud of his agent in the transaction of such business.

§ 2202. (2176.) (2180.) **Injuries by another agent.** The principal is not liable to one agent for injuries arising from the negligence or misconduct of other agents about the same business; the exception in case of railroads has been previously stated.

§ 2203. (2177.) (2181.) **Trespass of agent.** The principal is not liable for the willful trespass of his agent, unless done by his command or assented to by him.

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§ 2204. (2178.) (2182.) **Benefit of contract to principal.** The principal shall have advantage of his agent's contracts in the same manner as he is bound by them, so far as they come within the scope of his agency. If, however, the agency has been concealed, the party dealing with him may set up any defense against the principal which he has against the agent.

§ 2205. (2179.) (2183.) **Money illegally paid, etc.** The principal may recover back money paid illegally, or by mistake of his agent or goods wrongfully transferred by the agent, the party receiving the goods having notice of the agent's want of authority or willful misconduct.

§ 2206. (2180.) (2184.) **Agent is a competent witness.** The agent is a competent witness either for or against his principal. His interest goes to his credit. The declarations of the agent as to the business transacted by him are not admissible against his principal, unless they were a part of the negotiation, and constituting the *res gestæ*, or else the agent be dead.

ARTICLE III. RIGHTS AND LIABILITIES OF AGENT AS TO THIRD PERSONS.

§ 2207. (2181.) (2185.) **Agent may act under this Code for principal.** Any act authorized or required to be done under this Code by any person in the prosecution of his legal remedies, may be done by his agents; and for this purpose he is authorized to make an affidavit and execute any bond required, though his agency be created by parol. In all such cases, if the principal repudiate the act of the agent, the agent shall be personally bound, together with his sureties.

§ 2208. (2182.) (2186.) **Money paid by mistake may be recovered.** If money be paid to an agent by mistake, and he in good faith pays it over to his principal, he shall not thereafter be personally liable therefor. In all other cases, he is liable for its repayment. If money be paid by an agent by mistake, he may recover it back in his own name.

§ 2209. (2183.) (2187.) **When he has a right of action.** Generally an agent has no right of action on contracts made for his principal. The following are exceptions:

1. A factor contracting on his own credit.
2. Where promissory notes or other evidences of debt are made payable to an agent of a corporation or joint stock company.
3. In all cases where the contract is made with the agent in his individual name, though his agency be known.
4. Auctioneers may sue in their own name for goods sold by them.
5. In cases of agency coupled with an interest in the agent known to the party contracting with him. In all these cases, payment to the principal before notice of the agent's claim is a good defense.

§ 2210. (2184.) (2188.) **For interference with his possession.** An agent having possession, actual or constructive, of the property of his principal, has a right of action for any interference with that possession by third persons.

§ 2211. (2185.) (2189.) **When responsible for credit given.** Where the agency is known, and the credit is not expressly given to the agent, he is not personally responsible upon the contract. The question to whom the credit is given is a question of fact to be decided by the jury under the circumstances of each case.

§ 2212. (2186.) (2190.) **Public agents.** Public agents contracting in behalf of the public, are not individually liable on such contracts.

§ 2213. (2187.) (2191.) **Liability for excess of authority.** All agents, by an express undertaking to that effect, may render themselves individually liable. And every agent exceeding the scope of his authority is individually liable to the person with whom he deals; so, also, for his own tortious act, whether acting by command of his principal or not, he is responsible; for the negligence of his under-servant, employed by him in behalf of his principal, he is not responsible.

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§ 2214. (2188.) (2192.) **Where agent exceeds authority.** When the agent exceeds his authority, so that the principal is not bound, the agent cannot enforce the contract in his own name against the person with whom he deals, unless the contract has been fully executed upon the part of the agent, or the credit was originally given to the agent.

LOUISIANA.

The references are to the Code of 1875.

CHAPTER I.

ART. 2985.—A *mandate, procuration* or *letter of attorney* is an act by which one person gives power to another to transact for him and in his name, one or several affairs.

ART. 2986.—The mandate may take place in five different manners: for the interest of the person granting it alone; for the joint interest of both parties; for the interest of a third person; for the interest of such third person and that of the party granting it; and finally, for the interest of the mandatary and a third person.

ART. 2987.—The object of the mandate must be lawful, and the power conferred must be one which the principal himself has a right to exercise.

ART. 2988.—The contract of mandate is completed only by the acceptance of the mandatary.

ART. 2989.—A power of attorney may be accepted expressly in the act itself, or by a posterior act.

It may also be accepted tacitly; and this tacit acceptance is inferred, either from the mandatary acting under it, or from his keeping silence when the act containing his appointment is transmitted to him.

ART. 2990.—If the proxy or attorney in fact pleads that he has not accepted or acted under the power, it is incumbent on the principal to prove he has.

ART. 2991.—The procuration is gratuitous unless there has been a contrary agreement.

ART. 2992.—A power of attorney may be given, either by a public act or by a writing under private signature, even by letter.

It may also be given verbally, but of this testimonial proof is admitted only conformably to the title: *Of Conventional Obligations.*

ART. 2993.—A blank may be left for the name of the attorney in fact in the letter of attorney.

In that case, the bearer of it is deemed the person empowered.

ART. 2994.—It may be either general for all affairs, or special for one affair only.

ART. 2995.—It may vest an indefinite power to do whatever may appear conducive to the interest of the principal, or it may restrict the power given to the doing of what is specified in the procuration.

ART. 2996.—A mandate conceived in general terms, confers only a power of administration.

If it be necessary to alienate or give a mortgage, or do any other act of ownership, the power must be express.

ART. 2997.—Thus the power must be express and special for the following purposes:

To sell or to buy.

To incumber or hypothecate.

To accept or reject a succession.

To contract a loan or acknowledge a debt.

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To draw or indorse bills of exchange or promissory notes.

To compromise or refer a matter to arbitration.

To make a transaction in matters of litigation; and in general where things to be done are not merely acts of administration, or such as facilitate such acts.

ART. 2998.—A power to compromise on a matter in litigation does not include that of submitting or referring to arbitrators.

ART. 2999.—A power to receive includes that of giving a receipt in acquittance.

ART. 3000.—Powers granted to persons, who exercise a profession, or fulfil certain functions, of doing any business in the ordinary course of affairs to which they are devoted, need not be specified, but are inferred from the functions which these mandataries exercise.

ART. 3001.—Women and emancipated minors may be appointed attorneys; but, in the case of a minor, the person appointing him has no action against him, except according to the general rules relative to the obligations of minors; and in the case of a married woman, who has accepted the power without authority from her husband, she can only be sued in the manner specified under the title: *Of Marriage Contract, and the Respective Rights of the Parties in Relation to their Property.*

CHAPTER II.—OF THE OBLIGATIONS OF A PERSON ACTING UNDER A POWER OF ATTORNEY.

ART. 3002.—The attorney in fact is bound to discharge the functions of the procuration, as long as he continues to hold it, and is responsible to his principal for the damages that may result from the non-performance of his duty.

He is bound even to complete a thing which had been commenced at the time of the principal's death, if any danger result from delay.

ART. 3003.—The attorney is responsible, not only for unfaithfulness in his management, but also for his fault or neglect.

Nevertheless, the responsibility with respect to faults, is enforced less rigorously against the mandatary acting gratuitously, than against him who receives a reward.

ART. 3004.—He is obliged to render an account of his management, unless this obligation has been expressly dispensed with in his favor.

ART. 3005.—He is bound to restore to his principal whatever he has received by virtue of his procuration, even should he have received it unduly.

ART. 3006.—In case of an indefinite power, the attorney can not be sued for what he has done with good intention.

The judge must have regard to the nature of the affair, and the difficulty of communication between the principal and the attorney.

ART. 3007.—The attorney is answerable for the person substituted by him to manage in his stead, if the procuration did not empower him to substitute.

ART. 3008.—He is also answerable for his substitute, if, having the power to appoint one, and the person to be appointed not being named in the procuration, he has appointed for his substitute a person notoriously incapable, or of suspicious character.

ART. 3009.—Even where the attorney is answerable for his substitute, the principal may, if he thinks proper, act directly against the substitute.

ART. 3010.—The attorney can not go beyond the limits of his procuration; whatever he does exceeding his power is null and void with regard to the principal, unless ratified by the latter, and the attorney is alone bound by it in his individual capacity.

ART. 3011.—The mandatary is not considered to have exceeded his authority, when he has fulfilled the trust confided to him, in a manner more advantageous to the principal, than that expressed in his appointment.

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ART. 3012.—The mandatary, who has communicated his authority to a person with whom he contracts in that capacity, is not answerable to the latter for anything done beyond it, unless he has entered into a personal guarantee.

ART. 3013.—The mandatary is responsible to those with whom he contracts, only when he has bound himself personally or when he has exceeded his authority without having exhibited his powers.

ART. 3014.—When there are several attorneys in fact empowered by the same act, they are not responsible *in solido* for the acts of each, unless such responsibility be expressed in the procuration.

ART. 3015.—The attorney is answerable for the interest of any sum of money he has employed to his own use, from the time he has so employed it; and for that of any sum remaining in his hands from the day he becomes a defaulter by delaying to pay it over.

CHAPTER III. OF THE MANDATARY OR AGENT OF BOTH PARTIES.

ART. 3016.—The *broker* or *intermediary* is he who is employed to negotiate a matter between two parties, and who, for that reason, is considered as the mandatary of both.

ART. 3017.—The obligations of a broker are similar to those of an ordinary mandatary, with this difference, that his engagement is double, and requires that he should observe the same fidelity towards all parties, and not favor one more than another.

ART. 3018.—Brokers are not responsible for events which arise in the affairs in which they are employed; they are only, as other agents, answerable for frauds or faults.

ART. 3019.—Brokers, except in case of fraud, are not answerable for the insolvency of those to whom they procure sales or loans, although they receive a reward for their agency and speak in favor of him who buys or borrows.

ART. 3020.—Commercial and money brokers, besides the obligations which they incur in common with other agents, have their duties prescribed by the laws regulating commerce.

CHAPTER IV. OF THE OBLIGATIONS OF THE PRINCIPAL WHO ACTS BY HIS ATTORNEY IN FACT.

ART. 3021.—The principal is bound to execute the engagements contracted by the attorney, conformably to the power confided in him.

For anything further he is not bound, except in so far as he has expressly ratified it.

ART. 3022.—The principal ought to reimburse the expenses and charges which the agent has incurred in the execution of the mandate, and pay his commission where one has been stipulated.

If there be no fault imputable to the agent, the principal can not dispense with this reimbursement and payment, even if the affair has not succeeded; nor can he reduce the amount of reimbursement, under pretense that the charges and expenses ought to have been less.

ART. 3023.—The mandatary has a right to retain out of the property of the principal in his hands, a sufficient amount to satisfy his expenses and costs.

He may even retain, by way of offset, what the principal owes him, provided the debt be liquidated.

ART. 3024.—The attorney must also be compensated for such losses as he has sustained on occasion of the management of his principal's affairs, when he can not be reproached with imprudence.

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ART. 3025.—If the attorney has advanced any sum of money for the affairs of the principal, the latter owes the interest of it, from the day on which the advance is proved to have been made.

ART. 3026.—If the attorney has been empowered by several persons for an affair common to them, every one of these persons shall be bound *in solido* to him for all the effects of the procuration.

CHAPTER V. HOW THE PROCURATION EXPIRES.

ART. 3027.—The procuration expires:
By the revocation of the attorney.
By the attorney's renunciation of the power.
By the change of condition of the principal.
By the death, seclusion, interdiction or failure of the agent or principal.

ART. 3028.—The principal may revoke his power of attorney whenever he thinks proper, and, if necessary, compel the agent to deliver up the written instrument containing it, if it be an act under private signature.

ART. 3029.—If the principal only notifies his revocation to the attorney, and not to the persons with whom he has empowered the attorney to transact for him, such persons shall always have the right of action against the principal to compel him to execute or ratify what has been done by the attorney; the principal has, however, a right of action against the attorney.

ART. 3030.—The appointment of a new attorney to transact the same business produces the same effect as a revocation of the first, from the day such appointment is notified to the first attorney.

ART. 3031.—The attorney may renounce his power of attorney by notifying to the principal his renunciation.

Nevertheless, if this renunciation be prejudicial to the principal, he ought to be indemnified by the agent, unless the latter should be so situated that he can not continue the agency without considerable injury.

ART. 3032.—If the attorney, being ignorant of the death or of the cessation of the rights of his principal, should continue under his power of attorney, the transactions done by him, during this state of ignorance, are considered as valid.

ART. 3033.—In the cases above enumerated, the engagements of the agent are carried into effect in favor of third persons acting in good faith.

ART. 3034.—In case of the death of the attorney, his heir ought to inform the principal of it, and in the meantime, attend to what may be requisite for the interest of the principal.

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