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CASES

ON

THE LAW OF AGENCY

To accompany this volume:

ELEMENTS OF THE LAW OF AGENCY. By ERNEST W. HUFFCUT.

CASES

ON

THE LAW OF AGENCY

EDITED BY

ERNEST W. HUFFCUT

PROFESSOR OF LAW IN CORNELL UNIVERSITY SCHOOL OF LAW

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NOTE.

The cases which follow are arranged in accordance with the analysis of the editor's work on the Law of Agency in this series. The section number printed before the title of a case refers to the section of the text-book where the point involved in the case is discussed. This arrangement has rendered unnecessary any annotation of the cases themselves.

Statements of fact have often been rewritten and abridged. Portions of opinions irrelevant to the point under discussion are omitted, but such omissions are always indicated.

No head-notes have been used: but the cases are grouped under topics in such a manner that the student will know what he has to search for in the case without knowing what the result of his search is to be.

E. W. H.

CORNELL UNIVERSITY SCHOOL OF LAW,
December, 1895

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CASES ON AGENCY.

INTRODUCTION.

CHAPTER I.

PRELIMINARY TOPICS.

1. Distinction between agent and servant.

§§ 4–6.] FLESH *v.* LINDSAY.

115 Missouri, 1. — 1893.

Action against Jane Lindsay and her husband for damages caused to plaintiffs' building by the negligence of Jane Lindsay in the repair of her adjoining building, whereby a party wall collapsed and fell. The court instructed the jury that if they found that F. & Co. were the agents of Jane Lindsay for the purpose of causing alterations in her building, then their act is her act, and she is responsible for the alterations and changes, without the intervention of an agent. Verdict and judgment for plaintiffs against Jane Lindsay.

Burgess, J. . . . It is also contended by defendant that a married woman can have no agent unless she is possessed of a separate estate, and such seems to be the law as announced in the case of *Wilcox* v. *Todd*, 64 Mo. 390; *Hall* v. *Callahan*, 66 Mo. 316; *Hord* v. *Taubman*, 79 Mo. 101; *Henry* v. *Sneed*, 99 Mo. 407. But may she not have a servant to repair her property and preserve it from decay and destruction? An agent is defined to be a person duly authorized to act on behalf of another, or one whose unauthorized act has been duly ratified. 1 American and

English Encyclopedia of Law, p. 333; Evans on Agency [Ewell's Ed.] sec. 1; 1 Sweet's Law Dictionary. Servant is defined by Mr. Webster as follows: "One who serves or does service voluntarily or involuntarily; a person who is employed by another for menial offices or for other labor, and is subject to his command; a person who labors or exerts himself for the benefit of another, his master or employer; a subordinate helper." We take it then that the persons engaged in or about the repairing, changing, and remodelling the building of Mrs. Lindsay were her servants, even if she could not have an agent in regard to her fee-simple property.

Section 6868, Revised Statutes, 1889, *supra*, provides, that the annual products of the wife's realty may be attached or levied upon, for any debt or liability created . . . for the cultivation and improvement of such real estate. By this it is clearly implied that the wife's realty may be improved, and who is to do it if she does not? The very fact that she is permitted by law to hold property in fee, implies that she may improve, repair and remodel it as the exigencies of the case and the advance of the times may require, and that for that purpose she may employ servants, for whose carelessness and negligence in the manner of its doing she and her husband should be held jointly liable. As was said in the case of *Merrill* v. *St. Louis*, 83 Mo. 244, "The law imposes upon every owner of property the duty of so using it as not to injure the property or the persons of others." Should a married woman who owns property worth thousands of dollars, and who may have an impecunious and insolvent husband, be permitted to so use her property as to destroy that of others, and there be no redress therefor? If she is not in such case answerable for negligence to any one who has been injured by its improper management, who is so answerable? A vast amount of property is now held by married women in this State, as it is held in the case at bar, and the policy of the law is that those who thus own it beneficially should answer for the tortious or negligent management of it.

We hold that both at common-law and under the statute the defendant and her husband are jointly liable for the damages which accrued to plaintiffs in this case by reason of the carelessness and negligence of defendant's servants (if such was the case) in remodelling and changing the building.

As Mrs. Lindsay could have no agent in regard to her property as held by this court, the court committed error in instructing the jury that "If Farrar & Co., or Charles Farrar, were the agents of Jane Lindsay for the purpose of causing the alterations and changes in question to be made, their act was her act, and she is responsible for the alterations and changes in her said building as if she had made the contract for such alterations and changes in person, without the intervention of an agent." . . .

In no event is Mrs. Lindsay *alone* to be held liable for the damages sued for, but she is liable in conjunction with her husband.

For the error of the court in giving instructions for plaintiff as herein indicated, and in rendering judgment against Mrs. Lindsay and not against her husband, the cause will be reversed and remanded to be proceeded with in accordance with the views herein expressed.

Reversed and remanded.

2. Construction of words descriptive of service in statutes.

§§ 4–6.] HAND *v.* COLE.

88 Tennessee, 400.—1890.

Action against stockholders for individual liability imposed by statute. Defence, that plaintiff is not within the contemplation of the statute. Judgment for plaintiff. Defendants appeal.

Folkes, J. This is an action at law to recover of the defendants, individually, the wages claimed to be due plaintiff by the Nashville Plow Company, an insolvent manufacturing corporation, chartered under Section 11 of the General Incorporation Act of 1875.

Under the case as made in the record, the only question presented is, whether the plaintiff, who was a travelling salesman or drummer in the employ of the company, can claim the benefit of said Act, as being one of the persons in favor of whom the Legislature has given an individual right of recourse over upon the stockholder.

Section 11 of said Act provides for the creation of mining, quarrying, and manufacturing companies, and contains this clause: "The stockholders are jointly and severally liable, individually, at all times, for all moneys due and owing to the laborers, servants, clerks, and operatives of the company, in case the corporation becomes insolvent."

The proof shows that for a salary of $100 per month, payable as wanted, the plaintiff had been on the road for about twenty-three weeks, and at the factory fourteen or fifteen weeks, during the time of his employment, being out and in alternately, and for varying periods, as directed and required by the company; that while on the road he sold goods by sample or photograph, made collections, settled claims, and generally did any and every thing which is understood to be within the duties of a drummer working on a salary, subject to the direction and control of the general manager of the company. When not on the road he worked in the stock, shipping and receiving goods, moving and handling stock, etc. He also made sales in the city and collected bills, when so instructed. There is due him salary for five and four-fifths months, during which time he was on the road and at the factory about half each.

Does this character of employment and service bring him within the benefit of the clause of the Act above quoted? While there is no doubt of the power of the Legislature to impose this increased liability upon the stockholder, where it

is done in the Act creating the corporation, yet, being in derogation of the common law, such statutes, so far as concerns such liability, are to be strictly construed. "They are a wide departure from established rules, and though founded on considerations of public policy and general convenience, are not to be extended beyond the plain intent of the words of the statute," as said by Mr. Cook in his work on Stock and Stockholders, sec. 214.

Again, this author says, in speaking of the statutory liability of stockholders for debts of the corporation due its servants or laborers: "There has been great difficulty in determining what persons are to be classed under these terms, but the courts are not inclined to give a broad application to the words."

It must also be borne in mind that while the Legislature has in such Acts manifested a purpose to guard and protect the wages of a certain class, it does not follow that the class should be extended by any liberality of construction so as to include persons not named. The courts should be slow to enlarge the class by any latitudinous construction, not only upon the considerations above stated, but for the further reason that the Legislature is not to be presumed to place unnecessary burdens upon the corporations of its creation. They serve a most valuable purpose in developing and building up the resources of the State. By means of the aggregation of capital they are able to accomplish great, and much to be desired, benefits to the public, which individual means and effort would be unable to achieve.

With these general principles to direct us, we are to ascertain, as each case arises, what employé is or is not within the language of the Act. In arriving at a satisfactory conclusion we find but little aid and comfort from the adjudged cases from the courts of other States, the same language receiving very different construction at the hands of different courts of equally high authority, as a citation of some of them will show. The following persons have been held not to fall within the terms "servants or laborers:" The secretary of

a manufacturing company, 37 N. Y. 640; a civil engineer, 84 Pa. St. 168; a consulting engineer, 38 Barb. 390; an assistant engineer, 39 Mich. 47; an overseer on a plantation, 84 N. C. 340; a bookkeeper and general manager, 90 N. Y. 213. These cases seem to rest upon the idea that the terms named have reference only to persons who perform menial or manual labor, or, rather, to persons whose chief employment is to perform such labor, and not to embrace the higher class named in the authorities just cited, although each of the persons named did perform more or less of manual labor as incident to their employment.

On the other hand, a master mechanic or machinist employed by the year was held to be embraced under a statute protecting "clerks, servants, or laborers," 67 Wis. 590.

But, without further naming the cases, we refer the curious to note 1, sec. 215, Cook on Stock, where a number of cases are to be found.

The statute under consideration, as we have seen, uses the words "laborers, servants, clerks, and operatives." We do not deem it necessary to define the terms "laborer" or "operative," as it may be said to be clear, under the principles of construction that are to govern us, that they do not include the travelling salesman on a salary of $100 per month. Whether he would be embraced under the term "servants" it would be difficult to say. He would be, if we were at liberty to accept the term in its broadest sense, as defined by Mr. Wood in his work on Master and Servant, viz.: "The word servant, 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 and control of another in any department of labor or business. Indeed, it may in most cases be said to be synonymous with employé." That it is, however, not used in that sense in the statute is shown by the fact that other terms are used which would be altogether unnecessary and idle if it were meant to be synonymous with employé. We would have no room for the words "laborers," "clerks," or "operatives."

We are of opinion, and so decide, that the plaintiff is embraced within the term "clerk" as used in the statute. Webster defines clerk as, "An assistant in a shop or store, who sells goods or keeps accounts." Bouvier says he is, "A person in the employ of a merchant, who attends to only part of his business, while the merchant himself superintends the whole; or, a person employed in an office to keep accounts or records." Rapalje says, in Business Law: "An assistant, employed to aid in any business, mercantile or otherwise, subject to the advice and direction of his employer."

That "clerk" embraces and includes "salesman" seems beyond all doubt. If the term includes the salesman who remains in the shop or store, we can see no reason why it does not include the salesman on the road, under like terms of employment. Each makes sales, collects accounts, handles goods, and acts under the instructions of the employer.

It is worthy of note that the Act of 1875, ch. 142, "To provide for the organization of corporations," creates an individual liability upon the stockholder to employés in different companies in different language, and some of the corporations created are left without any provision at all on the subject. Thus, "cotton compress and warehouse," Section 12, has same provision as we have been considering for mining and manufacturing, viz., "laborers, servants, clerks, and operatives;" Section 18, as to hotel companies, the terms are "laborers, servants, and clerks;" Section 21, as to printing and publishing companies, the language is, "journeyman for wages due, and all other servants and employés;" Section 22, as to transfer and omnibus companies, "to servants and agents;" Section 24, as to steamboat and packet companies, "to hands and other employés;" while there is no provision at all on the subject as to railway, turnpike, telegraph, cemetery, insurance, street railway, building associations, pawnbroker, levee, banks, nor immigration and real estate companies.

Whatever may have been the purpose of the Legislature in

making these distinctions, they do not materially help us to a decision of the case in hand, and we have referred to it merely as a matter of interest in connection with the subject of statutory liability of stockholders so far as concerns employés.

There was no error in the action of the circuit judge, and his judgment in favor of the plaintiff for the full amount of the wages or salary shown to be due by the corporation, will be affirmed against the stockholders sued herein, with interest and costs.

§§ 4–6.] JONES *v.* AVERY.

50 MICHIGAN, 326. — 1883.

ASSUMPSIT against defendant as stockholder to recover under a statute making stockholders personally liable "for all labor performed" for corporations. Judgment for defendant.

GRAVES, C. J. The plaintiff, claiming to be a judgment creditor of the "Condensed Oil Manufacturing Company" for services rendered to the company, and that collection by execution had failed, prosecuted this action against the defendant as a stockholder to compel him to make payment. The trial judge ordered a verdict against the plaintiff. The alleged judgment against the corporation was before a justice, and was given on a confession made by the president and without a showing of authority from the directors. Whether this confession was sufficient to confer jurisdiction may be open to some discussion, but the point is now waived.

The circuit judge was of opinion that the plaintiff's debt was not a labor debt within the meaning of the provisions on which the plaintiff relies, — Const., article 15, § 7; Comp. L. § 2852 — and hence that the defendant was not liable for it.

We think this view is correct. The plaintiff's connection with the company and the nature of his occupation were fully explained by him as a witness. He said: "The kind of labor I rendered to the said company was that of travelling salesman or agent, selling their goods. My duties consisted in soliciting orders for the sale of the company's goods from customers, who were using those or similar goods in different towns through the country. I carried samples with me always; I carried this assortment of samples with me to each customer or man I solicited. I was to receive a salary or compensation at the rate of $1,000 per year; that was my agreement."

From this it seems evident to the court that he was not a labor-performer for the corporation in the sense contemplated in the provisions for holding stockholders liable. He had no part in carrying on the establishment, nor in the manufacture. He was a mere outside agent or representative of the company to bring business to it, upon a salary. As regards the present question, his position was nearer the position of an officer of the corporation than that of a laborer.

The judgment is affirmed with costs.

3. Combination of functions of agent and servant in the same representative.

§§ 4–6.] SINGER MANUFACTURING CO. *v.* RAHN.

132 United States, 518.—1889.

Action for damages for personal injury. Verdict and judgment for plaintiff. Writ of error by defendant.

The complaint alleged that the driver of the wagon which caused the injury was a servant of defendant company. Defendant denied this, and on the trial put in evidence the contract between itself and the driver. The terms of this contract appear in the opinion.

GRAY, J. The general rules that must govern this case are undisputed, and the only controversy is as to their application to the contract between the defendant company and Corbett, the driver, by whose negligence the plaintiff was injured.

A master is liable to third persons injured by negligent acts done by his servant in the course of his employment, although the master did not authorize or know of the servant's act or neglect, or even if he disapproved or forbade it. *Philadelphia & Reading Railroad* v. *Derby*, 14 How. (U.S.) 468, 486. And the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, "not only what shall be done, but how it shall be done." *Railroad Co.* v. *Hanning*, 15 Wall. (U. S.) 649, 656.

The contract between the defendant and Corbett, upon the construction and effect of which this case turns, is entitled, "Canvasser's Salary and Commission Contract." The compensation to be paid by the company to Corbett, for selling its machines, consisting of "a selling commission" on the price of machines sold by him, and "a collecting commission" on the sums collected of the purchasers, is uniformly and repeatedly spoken of as made for his "services." The company may discharge him by terminating the contract at any time, whereas he can terminate it only upon ten days' notice. The company is to furnish him with a wagon; and the horse and harness to be furnished by him are "to be used exclusively in canvassing for the sale of said machines and the general prosecution of said business."

But what is more significant, Corbett "agrees to give his exclusive time and best energies to said business," and is to forfeit all his commissions under the contract, if, while it is in force, he sells any machines other than those furnished to him by the company; and he "farther agrees to employ himself under the direction of the said Singer Manufacturing Company, and under such rules and instructions as it or its manager at Minneapolis shall prescribe."

In short, Corbett, for the commissions to be paid him, agrees to give his whole time and services to the business of the company; and the company reserves to itself the right of prescribing and regulating not only what business he shall do, but the manner in which he shall do it; and might, if it saw fit, instruct him what route to take, or even at what speed to drive.

The provision of the contract, that Corbett shall not use the name of the company in any manner whereby the public or any individual may be led to believe that it is responsible for his actions, does not and cannot affect its responsibility to third persons injured by his negligence in the course of his employment.

The circuit court therefore rightly held that Corbett was the defendant's servant, for whose negligence in the course of his employment, the defendant was responsible to the plaintiff. *Railroad Co.* v. *Hanning*, above cited; *Linnehan* v. *Rollins*, 137 Mass. 123; *Regina* v. *Turner*, 11 Cox Crim. Cas. 551.

Affirmed.

PART I.

FORMATION OF THE RELATION OF PRINCIPAL AND AGENT.

CHAPTER II.

FORMATION OF THE RELATION BY AGREEMENT.

1. Agreement by contract or conduct necessary to establish agency.

§ 11. CENTRAL TRUST COMPANY OF NEW YORK *v.* BRIDGES.

16 United States Appeals, 115. — 1893.

Bill in Equity for a receiver and intervening petitions to determine the priority of lien claimants and mortgagees. Decree for lien claimants.

The lien claimants contracted with one Eager, who had taken a contract to construct the railway against which the liens were filed. The trial court found that the lien claimants had no contract directly with the railway; that nothing was due Eager from the railway; but that Eager was the principal stockholder and the company merely another name under which he did business, and that therefore the lien claimants in contracting with Eager had contracted with the railway.

Taft, Circuit Judge (after stating the facts and the provisions of the statute of Tennessee relating to liens). Under this law, the contractor must deal directly with the company to secure a lien for his work or material, or, if a sub-contractor, then he can have no lien on the railroad unless at the time that or after he serves notice of his claims upon

the company, the company shall owe money to his principal on the contract which his sub-contract has helped to perform; and his lien is limited to the amount so due and owing to his principal. In other words, the security of the sub-contractor is the balance due the principal contractor from the company when the company receives notice of the sub-contractor's claim, and after notice is given the lien of the sub-contractor is transferred from the balance due on the contract to the corpus of the railroad, *pro tanto*. But if there is no balance due at the time of service of the notice, there can be no lien.

In the consideration of the liens adjudicated below, two questions, therefore, arise. First, did the lien claimant deal directly with the company, as principal contractor? Second, if the lien claimants were sub-contractors under Eager as principal contractor, was there any sum due Eager as such principal contractor from the Knoxville Southern Railroad Company after the company was notified by the sub-contractors of their intention to claim liens?

First. The theory upon which the master and the learned court below held that all the intervening petitioners dealt directly with the Knoxville Southern Railroad Company as principal contractors, was that Eager was an agent of the railroad company in making the contracts. One may be liable for the acts of another as his agent on one of two grounds: first, because by his conduct or statements he has held the other out as his agent; or, second, because he has actually conferred authority on the other to act as such. The master reported to the court below that in no case did Eager, under or in the name of the Knoxville Southern Railroad Company, make any contract with any one doing work or furnishing material for the road; that the men who contracted with Eager knew very little of Eager, saw him only occasionally, made no inquiry into the real relation of Eager to the company, what interest he had in it, or how he obtained money to carry on the work.

In substance, the master reported that the intervening

petitioners believed that they were dealing with Eager as principal contractor. The proof fully sustains this conclusion. All the estimates introduced in evidence upon which payments were made bear the name of Eager as principal contractor, and every circumstance in the case rebuts the idea that the intervening petitioners either believed or had reason to believe that they were doing their work for, or furnishing their material to, the company instead of to Eager. The most conclusive evidence on this point is that nearly every one of the intervening petitioners subsequently brought suit and recovered judgment on his claim in the State court, against Eager as principal contractor and against the company as garnishee. It is said that this does not estop the lienholders from showing that Eager was actually the agent of the company, because Eager and the company had fraudulently misled them into thinking that there was no such relation of agency between him and the company. Conceding that no estoppel arises from the judgments, they have great probative force in establishing that neither Eager nor the company did anything or said anything from which the petitioners could infer the existence of the agency. Indeed, the very argument upon which the effect of the judgments as an estoppel against the present contention of the petitioners that Eager was the agent of the company is sought to be explained away, has for its premise that the petitioners had no reason to suppose that Eager was anything but the principal contractor, and were led to believe, both by him and the company, that no such agency existed.

It follows necessarily that Eager was not the agent of the company in contracting with the petitioners for the construction of the road, unless the company had in fact conferred authority upon him to act as its agent in the matter. An agency is created — authority is actually conferred — very much as a contract is made, *i. e.* by an agreement between the principal and agent that such a relation shall exist. The minds of the parties must meet in establishing the agency. The principal must intend that the agent shall act for him,

and the agent must intend to accept the authority and act on it, and the intention of the parties must find expression either in words or conduct between them.

Now, did the relation in fact exist? There certainly was a contract between Eager as an individual and the Knoxville Southern Railroad Company as a corporation, entered into before May, 1890, and probably much earlier, — certainly before any of the construction, lien claims for which are here involved, was contracted for, — in which Eager agreed to construct the road at a price of $20,000 in bonds and $20,000 in stock per mile, and other considerations. It is said that this contract was a sham and a fraud, dated back nearly three years to save the bondholders of the Marietta and North Georgia Railway Company, and to cheat the petitioners out of their claims. The fact that the contract was signed by Arthur as vice-president shows that it must have been executed some months after its date, because the date is August 20, 1887, and Arthur was not elected vice-president until 1888. Moreover, it was during 1888 that the president reported to the stockholders that the work was progressing under the North Georgia Construction Company as contractor, instead of Eager. But the contract was spread on the minutes of the company in May, 1890, so that it must have been executed before that time. The evidence of one or two witnesses points to its existence before March or April of that year. All of the work and labor sued for below was contracted for by Eager after March and substantially after May, 1890. Even if the reduction of the contract to writing was delayed until 1890, this by no means shows that there had not been before that time a verbal contract, the terms of which had been fully understood between the parties. All the circumstances point to the existence of such a contract. Eager was principal stockholder and president of the North Georgia Construction Company, which was referred to on the company's minutes as contractor in 1888, and Eager says that this company transferred its contract liabilities and rights to him. This is entirely consistent with the probabili-

ties, and there is nothing in conflict with it. Now, whether the contract of the company was originally made with the North Georgia Construction Company or with Eager is immaterial in this discussion, if neither was the agent of the company but was an independent contractor. The delay in the execution of the formal contract with Eager was doubtless due to the fact that, in the minds of the individuals whose duty it was to attend to it, the Marietta and North Georgia Railway Company and the Knoxville Southern Railroad Company were the same enterprise, and Eager's contract with the former was supposed to cover his work on the latter road, just as the bonds and mortgage of the former were evidently supposed to be in effect the bonds and mortgage of the latter. There is not, however, anywhere in the proof a single circumstance or statement that either the company or its directors intended, or that Eager intended, his relation to the company in constructing the road to be anything other than what he always said it was, and what the petitioners understood it to be, — that of principal contractor.

The proof is undisputed that Eager received the bonds at the rate of $20,000 per mile of completed road from the trust company, as contractor, and that he sold them as contractor, and this during the years from 1887 to 1890. He never accounted to either railroad company for the proceeds of the bonds. Neither company ever demanded such an account from him. He took them as his property, — as his compensation under a contract for work done. Such conduct is not to be reconciled with his being an agent either in the work or in the negotiation of bonds.

We are clearly of the opinion, therefore, that the contract of August, 1887, whenever executed, correctly represents Eager's actual relation to the company in constructing its road. The contract was one out of which Eager hoped to make profit for himself. . . .

The reasoning by which the master, and presumably the court below, reached the conclusion that Eager was the agent of the company, may be seen from the following passage in his report: —

"Above it was said that the Knoxville Southern Railroad Company had only a formal existence, because of Eager's ownership and control and direction of all its affairs and its officers and agents. This is true; but still in trying to discover and enforce the rights of the parties who may have dealt with said company and with Eager, it is impossible to ignore the legal existence of said company. Eager's omnipotence was exercised through formal legal methods, and his power was derived from and based upon the large stock he held in the company, which he received as part pay for the building of the road. But this interest of Eager in the road, and his control of the company and all its officers and agents, made him its general agent, — its plenipotentiary; and whatsoever he did in the building of the road, whatever contracts he made, or were made by agents of his, for material or work, for and upon said road, must be regarded as acts and contracts of the company itself, and binding upon it. He could not, by hiding his true relation to the company, shield the company from liability to those he dealt with; as soon as the facts were known that liability might be asserted."

We are wholly unable to concur with the foregoing. Whether Eager hid his true relation to the company depends on whether he was its contractor or its agent. He said he was its contractor, and nothing stated by the master shows otherwise. The corporation was a legal entity different from Eager, having its existence under the statutes of Tennessee, and governed by its directors in accordance with the law of its creation. Its directors made a contract with Eager. They intended that to be a binding contract on the company. Eager intended it to be. The company through its legal and authorized governors and agents, therefore, made a contract with Eager.

There is no law which makes it impossible for a majority stockholder to enter into a contract with his company. *Wright* v. *Kentucky & Great Eastern Railway Company*, 117 U. S. 72, 95.

As already explained, the company may appeal to a court of equity to set such contract aside, if it is unfair or unconscionable, for fraud or undue influence, but until this is done

the contract expresses the true relation between the parties. The fact that a man has controlling influence with another does not make him that other's agent, unless the other intends such relation to exist, or so acts as to lead third persons to believe that it exists. What is true between individuals is true between an individual and a corporation. In the case at bar, the master fully admits that there was no holding out of agency in Eager by the company. His finding that an agency in fact existed rests simply on the influence which Eager had over the company, and not in any intention of either that Eager should act as its agent in the construction of the road, and his conclusion is reached in the face of the fact, which he fully admits, that they both intended Eager to be an independent contractor. The master's conclusion cannot be supported.[1]

(The court then decides that on the second question, whether anything was owing Eager from the company, the case must go back for a rehearing.)

Decree reversed.

2. Consideration necessary as between principal and agent.

§ 13.] ALLEN *v.* BRYSON.

67 Iowa, 591. — 1885.

[Reported herein at p. 154.]

3. Competency of parties.

a. Infant principals.

§ 15.] PHILPOT *v.* BINGHAM.

55 Alabama, 435. — 1876.

Action to recover an undivided half interest in land. Judgment for defendant.

[1] On this point of "one-man companies," see *Broderip* v. *Salomon*, 1895, 2 Ch. 323.

Plaintiff, a minor, and his older brother, executed a power of attorney to their father, authorizing him to sell and convey the land in controversy. Under this power the land was conveyed to one Stringfellow, who conveyed to defendant. Defendant was ignorant of plaintiff's infancy. The trial court charged that the power of attorney and the deed executed under it were voidable and not void.

STONE, J. Ever since the leading case of *Zouch* v. *Parsons*, 3 Burr. 1794, there has been a growing disposition to treat almost all contracts made by infants as voidable rather than void. The principles of that decision have received a very steady and cheerful support on this side of the Atlantic. The declared rule is, that contracts of an infant, caused by his necessities, or manifestly for his advantage, are valid and binding, while those manifestly to his hurt are void. Contracts falling between these classes are voidable. Relaxation of ancient rigor has had the effect of placing many transactions, formerly adjudged void, in the more conservative category of voidable. See 3 Washb. Real Prop. 559 *et seq.*; 2 Kent's Com. 234, in margin; 1 Amer. Leading Cases, 5th ed. 242 *et seq.*, in margin; 2 Greenl. Ev. § 365 *et seq.*; Tyler on Infancy, 41; *Tucker* v. *Moreland*, 10 Pet. 58, 65; *Boody* v. *McKenney*, (10 Shep.) 23 Maine, 517. This question has been several times before this court, and we have uniformly followed the modern rule above expressed. *Fant* v. *Cathcart*, 8 Ala. 725; *Elliott* v. *Horn*, 10 Ala. 348; *Thomasson* v. *Boyd*, 13 Ala. 419; *West* v. *Penny*, 16 Ala. 186; *Weaver* v. *Jones*, 24 Ala. 420; *Manning* v. *Johnson*, 26 Ala. 446; *Freeman* v. *Bradford*, 5 Por. 270; *Slaughter* v. *Cunningham*, 24 Ala. 260; *Derrick* v. *Kennedy*, 4 Por. 41; *Clark* v. *Goddard*, 39 Ala. 164.

It is declared in the adjudged cases, and in the elementary books, that a power of attorney to sell lands, a warrant of attorney, or any other creation of an attorney, by an infant, is absolutely void. *Lawrence* v. *McArter*, 10 Ohio, 38, 42; *Pyle* v. *Cravens*, 4 Littell, 17, 21; *Bennett* v. *Davis*, 6 Cow. 393; *Fonda* v. *Van Horne*, 15 Wend. 631;

Knox v. *Flack*, 22 Penn. 337; Tyler on Infancy, 46–47; 1 Amer. Leading Cases, 5th ed. 247, in margin; *Saunderson* v. *Marr*, 1 H. Bla. 75; *Tucker* v. *Moreland*, 10 Pet. 58, 68; 2 Kent's Com., n. p. 235. So, in Alabama, it has been said, "an infant cannot appoint an agent." *Ware* v. *Cartledge*, 24 Ala. 622. In *Weaver* v. *Jones*, 24 Ala. 420, C. J. Chilton said, "The better opinion, as maintained by the modern decisions, is, that an infant's contracts are none of them (with, perhaps, one exception) absolutely void by reason of non-age; that is to say, the infant may ratify them, after he arrives at the age of legal majority." C. J. Chilton refers to Parsons on Contracts in support of this proposition. Looking into that work, *244, it is clear that he means to except from the operation of the general rule, laid down by him, those contracts of an infant by which he attempts to create an attorney or agency.

From such an array of authorities, sanctioned as the principle has been by this court, we do not feel at liberty to depart, although the argument in favor of the exception is rather specious than solid. We therefore hold, that the power of attorney, under which the plaintiff's land was sold, made, as it appears to have been, while he was an infant, was and is what the law denominates void. If void, then no title, even inchoate, passed thereby; and the defence to the action must rest entirely on grounds other than and independent of the power of attorney and deed. Thus circumscribed, the defendant (appellee here) has failed to show any defence to the plaintiff's claim to an undivided half interest in the land sued for. See *Boody* v. *McKenney*, 23 Maine, 517; *Hovey* v. *Hobson*, 53 Maine, 451; *Cresinger* v. *Welch*, 15 Ohio, 156.

(The court then decides that defendant is holding adversely to plaintiff's interest.)

Judgment reversed.

§ 15.] PATTERSON *v.* LIPPINCOTT.

47 New Jersey Law, 457.—1885.

Action of debt. Judgment of non-suit against plaintiff. Defendant appeals. The opinion states the facts.

Scudder, J. An action of debt was brought in the court for the trial of small causes by Jacob M. Patterson against Barclay Lippincott, to recover the balance, $75, claimed under a contract in writing for the sale of the exclusive right to use, manufacture and sell the plaintiff's patent "air-heating attachment," in Atlantic County, New Jersey. The writing was signed "Geo. P. Lippincott, per Barclay Lippincott," on the part of the purchaser. The state of demand avers that by virtue of this agreement the plaintiff did in due form convey said patent right to said George P. Lippincott, that said George and Barclay, on request, have refused to pay said balance, and that, since payment became due, the plaintiff has found out and charges that said George is under the age of twenty-one years. He further avers that he never had any contract or negotiations with George, and that Barclay's warranty of authority to act for his minor son is broken, whereby an action has accrued to the plaintiff against the defendant.

The averment that the plaintiff never had any contract or negotiations with George, is not sustained by the proof, for the testimony of Joseph N. Risley, the agent who made the sale, which is the only evidence on this point that appears in the case, is, that the defendant told him he was going out of business and intended to transfer it to George; requested him to see George; he did so, talked with him; he looked at the patent; was satisfied with it, and talked with his father about buying it. The deed for the patent-right in Atlantic County was drawn to George P. Lippincott. It is proved by the admission of the defendant, Barclay Lippincott, that at the time of such sale and transfer his son George was

a minor. This admission is competent testimony in this suit against him.

A verdict of the jury was given for the plaintiff against the defendant in the court for the trial of small causes; and on the trial of the appeal in the court of common pleas there was a judgment of non-suit against the plaintiff. The reason for the non-suit does not appear on the record, but the counsel have argued the cause before us on the case presented by the pleadings and proofs, the contention being here, as it was below, that the plaintiff could not aver and show the infancy of George P. Lippincott, and bring this action against Barclay Lippincott, as principal in the contract, in contradiction of its express terms.

On the face of the written agreement George P. Lippincott is the principal, and Barclay Lippincott the agent. The suit on the contract should therefore be against the principal named, and not against the agent, unless there be some legal cause shown to change the responsibility. The cause assigned by the plaintiff is the infancy of George at the time the agreement was made in his name by his father. The authority on which he bases his right of action is *Bay* v. *Cook*, 2 Zab. (N. J.) 343, which follows and quotes *Mott* v. *Hicks*, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550, to the effect that if a person undertakes to contract as agent for an individual or corporation, and contracts in a manner which is not legally binding upon his principal, he is personally responsible; and the agent, when sued on such contract, can exonerate himself from the personal responsibility only by showing his authority to bind those for whom he has undertaken to act. *Bay* v. *Cook* was an action against an overseer who had employed a physician to attend a sick pauper, without an order for relief under the provisions of the Act concerning the poor. As his parol contract with the physician was entirely without authority to bind the township, it was said that he had only bound himself to pay for the services rendered at his request.

Later cases have held that an agent is not directly liable on

an instrument he executes, without authority, in another's name; that the remedy in such case is not on the contract, but that he may be sued either for breach of warranty or for deceit, according to the facts of the case. *Jenkins* v. *Hutchinson*, 13 Q. B. 744; *Lewis* v. *Nicholson*, 18 Q. B. 503; *Baltzen* v. *Nicolay*, 53 N. Y. 467; *White* v. *Madison*, 26 N. Y. 117, and many other cases collected in the notes in Wharton on Agency, §§ 524, 532, and notes to *Thomson* v. *Davenport*, 9 B. & C. 78, in 2 Smith's Leading Cases, 377 (Am. ed). Andrews, J., in *Baltzen* v. *Nicolay*, *supra*, says: "The ground and form of the agent's liability in such a case has 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 that the remedy is by an action for its breach."

Although the state of demand in the present case is uniformly drawn, there is in the last sentence a charge that the defendant's warranty of authority, in pretending to act for said minor, is broken, whereby an action has accrued. This alleged breach of an implied warranty is founded on the assumption that the son could not confer any authority during his minority to his father to act for him in the purchase of this patent-right. There are two answers to this position. The act of an infant in making such a contract as this, which may be for his benefit in transacting business, either directly or through the agency of another, is voidable only, and not absolutely void, and therefore there is no breach of the implied warranty unless there be proof showing that the act of the agent was entirely without the infant's knowledge or consent. The mere fact of the infancy of the principal will not constitute such breach.

It was argued in *Whitney* v. *Dutch*, 14 Mass. 457, 7 Am. Dec. 229, that a promissory note signed by Dutch for his partner Green, who was a minor, was void as to Green, because he was not capable of communicating authority to

Dutch to contract for him, and that being void, it was not the subject of a subsequent ratification. But the court held that it was voidable only, and having been ratified by the minor after he came of age, it was good against him. See Tyler, Inf. Ch. III. §§ 14, 18.

Another answer is that the defence of infancy to this contract with the plaintiff can only be set up by the infant himself or those who legally represent him. Infancy is a personal privilege of which no one can take advantage but himself. *Voorhees* v. *Wait*, 3 Green (N. J.), 343; Tyler, Inf. Ch. IV. § 19; Bingham, Inf. 49.

In this case the plaintiff seeks to disaffirm the infant's contract with him, in his own behalf, and sue a third party on the contract, whose authority to bind him the infant has not denied. The privilege of affirming or disaffirming the contract belongs to the infant alone, and the plaintiff cannot exercise it for him. The mere refusal to pay, charged in the demand and proved, is not a denial of the defendant's authority to bind the infant; for it may be based on the failure of consideration, the invalidity of the patent, fraudulent representations, or other causes.

The judgment of non-suit entered in the Court of Common Pleas will be affirmed.

b. Insane principal.

§ 16.] DREW *v.* NUNN.

L. R. 4 Queen's Bench Division (C. A.), 661. — 1879.

Action to recover for goods supplied defendant's wife upon her order while defendant was insane. Verdict and judgment for plaintiff. Defendant appeals. The opinion states the facts.

Brett, L. J. This appeal has stood over for a long time, principally on my account, in order to ascertain whether it can be determined upon some clear principle. I have found,

however, that the law upon this subject stands upon a very unsatisfactory footing.

The action was tried before Mellor, J., and was brought to recover the price of boots and shoes supplied by the plaintiff to the defendant's wife whilst the defendant was insane. It is beyond dispute that the defendant, when sane, had given his wife absolute authority to act for him, and held her out to the plaintiff as clothed with that authority. Afterwards the defendant became insane so as to be unable to act upon his own behalf, and his insanity was such as to be apparent to any one with whom he might attempt to enter into a contract. Whilst he was in this state of mental derangement, his wife ordered the goods from the plaintiff, who had no notice of the defendant's insanity, and was supplied with them by him. The defendant was for some time confined in a lunatic asylum; but he afterwards recovered his reason, and he has defended the action upon the ground that by his insanity the authority which he gave to his wife was terminated, and that he is not liable for the price of the goods supplied pursuant to her order. Mellor, J., left no question to the jury as to the extent of the defendant's insanity, but in effect directed them as matter of law that the plaintiff was entitled to recover. I think it must be taken that the defendant's insanity existed to the extent which I have indicated.

Upon this state of facts, two questions arise. Does insanity put an end to the authority of the agent? One would expect to find that this question had been long decided on clear principles; but on looking into Story on Agency, Scotch authorities, Pothier, and other French authorities, I find that no satisfactory conclusion has been arrived at. If such insanity as existed here did not put an end to the agent's authority, it would be clear that the plaintiff is entitled to succeed; but in my opinion insanity of this kind does put an end to the agent's authority. It cannot be disputed that some cases of change of status in the principal put an end to the authority of the agent: thus,

the bankruptcy and death of the principal, the marriage of a female principal, all put an end to the authority of the agent. It may be argued that this result follows from the circumstance that a different principal is created. Upon bankruptcy, the trustee becomes the principal; upon death, the heir or devisee as to realty, the executor or administrator as to personalty; and upon the marriage of a female principal her husband takes her place. And it has been argued that by analogy the lunatic continues liable until a fresh principal, namely, his committee, is appointed. But I cannot think that this is the true ground, for executors are, at least in some instances, bound to carry out the contracts entered into by their testators. I think that the satisfactory principle to be adopted is, that where such a change occurs as to the principal that he can no longer act for himself, the agent whom he has appointed can no longer act for him. In the present case a great change had occurred in the condition of the principal: he was so far afflicted with insanity as to be disabled from acting for himself; therefore his wife, who was his agent, could no longer act for him. Upon the ground which I have pointed out, I think that her authority was terminated. It seems to me that an agent is liable to be sued by a third person, if he assumes to act on his principal's behalf after he has knowledge of his principal's incompetency to act. In a case of this kind he is acting wrongfully. The defendant's wife must be taken to have been aware of her husband's lunacy; and if she had assumed to act on his behalf with any one to whom he himself had not held her out as his agent, she would have been acting wrongfully, and, but for the circumstance that she is married, would have been liable in an action to compensate the person with whom she assumed to act on her husband's behalf. In my opinion, if a person who has not been held out as agent assumes to act on behalf of a lunatic, the contract is void against the supposed principal, and the pretended agent is liable to an action for misleading an innocent person.

The second question then arises, what is the consequence

where a principal, who has held out another as his agent, subsequently becomes insane, and a third person deals with the agent without notice that the principal is a lunatic? Authority may be given to an agent in two ways. First, it may be given by some instrument, which of itself asserts that the authority is thereby created, such as a power of attorney; it is of itself an assertion by the principal that the agent may act for him. Secondly, an authority may also be created from the principal holding out the agent as entitled to act generally for him. The agency in the present case was created in the manner last-mentioned. As between the defendant and his wife, the agency expired upon his becoming to her knowledge insane; but it seems to me that the person dealing with the agent without knowledge of the principal's insanity has a right to enter into a contract with him, and the principal, although a lunatic, is bound so that he cannot repudiate the contract assumed to be made upon his behalf. It is difficult to assign the ground upon which this doctrine, which, however, seems to me to be the true principle, exists. It is said that the right to hold the insane principal liable depends upon contract. I have a difficulty in assenting to this. It has been said also that the right depends upon estoppel. I cannot see that an estoppel is created. But it has been said also that the right depends upon representations made by the principal and entitling third persons to act upon them, until they hear that those representations are withdrawn. The authorities collected in Story on Agency, ch. xviii. § 481, p. 610 (7th ed.), seem to base the right upon the ground of public policy: it is there said in effect that the existence of the right goes in aid of public business. It is, however, a better way of stating the rule to say that the holding out of another person as agent is a representation upon which, at the time when it was made, third parties had a right to act, and if no insanity had supervened would still have had a right to act. In this case the wife was held out as agent, and the plaintiff acted upon the defendant's representation as to her authority without notice that it had been

withdrawn. The defendant cannot escape from the consequences of the representation which he has made; he cannot withdraw the agent's authority as to third persons without giving them notice of the withdrawal. The principal is bound, although he retracts the agent's authority, if he has not given notice and the latter wrongfully enters into a contract upon his behalf. The defendant became insane, and was unable to withdraw the authority which he had conferred upon his wife: he may be an innocent sufferer by her conduct, but the plaintiff, who dealt with her *bonâ fide*, is also innocent, and where one of two persons both innocent must suffer by the wrongful act of a third person, that person making the representation which, as between the two, was the original cause of the mischief, must be the sufferer and must bear the loss. Here it does not lie in the defendant's mouth to say that the plaintiff shall be the sufferer.

A difficulty may arise in the application of a general principle such as this is. Suppose that a person makes a representation which after his death is acted upon by another in ignorance that his death has happened: in my view the estate of the deceased will be bound to make good any loss which may have occurred through acting upon that representation. It is, however, unnecessary to decide this point to-day.

Upon the grounds above stated I am of opinion that, although the authority of the defendant's wife was put an end to by his insanity, and although she had no authority to deal with the plaintiff, nevertheless the latter is entitled to recover, because the defendant, whilst he was sane, made representations to the plaintiff, upon which he was entitled to act until he had notice of the defendant's insanity, and he had no notice of the insanity until after he had supplied the goods for the price of which he now sues. The direction of Mellor, J., was right.

Bramwell, L. J., also read for affirmance.

Brett, L. J. I am requested by Cotton, L. J., to state that he agrees with the conclusion at which we have arrived,

but that he does not wish to decide whether the authority of the defendant's wife was terminated, or whether the liability of a contractor lasts until a committee has been appointed. He bases his decision simply upon the ground that the defendant, by holding out his wife as agent, entered into a contract with the plaintiff that she had authority to act upon his behalf, and that, until the plaintiff had notice that this authority was revoked, he was entitled to act upon the defendant's representations.

I wish to add that if there had been any real question as to the extent of the defendant's insanity, it ought to have been left to the jury; and that as no question was asked of the jury, I must assume that the defendant was insane to the extent which I have mentioned. I may remark that from the mere fact of mental derangement it ought not to be assumed that a person is incompetent to contract; mere weakness of mind or partial derangement is insufficient to exempt a person from responsibility upon the engagements into which he has entered. Appeal dismissed.

c. *Married women as principals.*

§ **17.**] FLESH *v.* LINDSAY.

115 Missouri, 1. — 1892.

[Reported herein at page 1.]

d. *Unincorporated societies as principals.*

§ **20.**] WILLCOX et al. *v.* ARNOLD et al.

162 Massachusetts, 577. — 1895.

Contract for work done and materials furnished. Judgment for plaintiffs against all the defendants except Gifford. Defendants allege exceptions.

The class of 1893 of Tufts College, at a class meeting duly

called, voted to publish a volume to be entitled, "The Brown and Blue," and elected Arnold as business manager of the publication, and certain other of the defendants as editors. Defendant Arnold made a contract with plaintiffs for the printing of the volume, upon which a balance remained unpaid. All the defendants except Gifford were present at the class meeting at which Arnold was elected business manager.

FIELD, C. J. The evidence was sufficient to warrant the finding of the court. It was competent for the court to infer from all the evidence that the defendants who were present at the class meeting at which it was voted to publish a volume to be called, "The Brown and Blue," either voted to publish the volume or assented to the vote. This is also true of the vote by which Arnold was elected "business manager of the publication." The contract made by Arnold was apparently within the scope of his employment, at least the court could so find. *Newell* v. *Borden*, 128 Mass. 31; *Ray* v. *Powers*, 134 Mass. 22. Exceptions overruled.

e. Capacity of agents.

§ 23.] LYON & CO. *v.* KENT, PAYNE & CO.

45 ALABAMA, 656. — 1871.

ACTION of detinue for the recovery of a quantity of cotton. Judgment for plaintiffs. Defendants appeal.

Kent, Payne & Co., citizens of Virginia, had, during the civil war, a quantity of cotton in Alabama, in the custody of their agent, Browder. They gave to Singleton, a citizen of Illinois, an order upon Browder for the cotton. Singleton took possession of it, and subsequently sold it to Guy. Guy deposited it for storage in the warehouse of Lyon & Co. There was a conflict of evidence as to whether Singleton was given authority to sell the cotton, or any title passed to him.

PETERS, J. (after deciding that a sale to Singleton would have been void as a commercial transaction between citizens

of hostile portions of the country.) Yet, though the order of itself was not evidence of a sale to Singleton, or a power to sell, it shows that the owners of the cotton had authorized him to *take possession* of it. This he could do as the agent of the owners. This was not forbidden to him or to them by law, or the policy of the government. They could change the agency of the custody of their cotton from one person to another; and they could make any person, capable of acting as an agent, such agent to take possession of their property for them, and keep it for them. They could transfer its custody from Browder to Singleton without a violation of law. The objection which might be supposed to exist to such an agency during the war ceased as soon as the war was ended; and its purpose being then legal, it might be legally consummated. Any one, except a lunatic, imbecile, or child of tender years, may be an agent for another. It is said by an eminent author and jurist, that "it is by no means necessary for a person to be *sui juris*, or capable of acting in his or her own right, in order to qualify himself or herself to act for others. Thus, for example, monks, infants, *femes covert*, persons attainted, outlawed, or excommunicated, villains and aliens, may be agents for others." Story's Agency, §§ 6, 7, 9. So, a slave, who is *homo non civilis*, a person who is but little above a mere brute in legal rights, may act as the agent of his owner or his hirer. *Powell* v. *The State*, 27 Ala. 51; *Stanley* v. *Nelson*, 28 Ala. 514. It was, then, certainly not unlawful, or against the public policy of the nation, for Kent, Payne & Co. to keep their cotton, and keep it safely, during the late rebellion. It is the undoubted law of agency, that a person may do through another what he could do himself in reference to his own business and his own property; because the agent is but the principal acting in another name. The thing done by the agent is, in law, done by the principal. This is axiomatic and fundamental. It needs no authorities to support it. *Qui facit per alium, facit per se.* Broom's Max., margin; 1 Parsons on Cont. 5th ed. p. 39 *et seq.;* Story's Agency, § 440. And to this it may

be added that an agent, in dealing with the property of his principal, must confine his acts to the limit of his powers; otherwise the principal will not be bound. 1 Parsons on Cont. 41, 42, 5th ed.; *Powell* v. *Henry*, 27 Ala. 612; *Bott* v. *McCoy et al.*, 20 Ala. 578; *Allen* v. *Ogden*, 1 W. C. C. 174. And it is also the duty of one dealing with an agent to know what his powers are, and the extent of his authority. *Van Eppes* v. *Smith*, 21 Ala. 317; *Owings* v. *Hull*, 9 Pet. 607. Then, the agency to receive the delivery of cotton from Browder, in compliance with the order, was not illegal. If it went beyond that it was void. And those who dealt with Singleton were bound to know this, as they were bound to know the law. 9 Peters, 607, *supra*.

There was conflict in the testimony before the jury as to the extent and character of the agency of Singleton. There was a wide difference between his statement and that of Kent, with whom he transacted the business about the cotton, as to the purpose and scope of the agency intended to be established. It is not to be presumed that the parties intended to violate the law. But whether they did or not, and what were the powers intended to be conferred upon the agent, are questions for the jury. This is the effect of the charge. It was pertinent to the testimony, and does not misstate the law. Such a charge is not error.

(The court then decides that there was no error in refusing certain charges asked for by the defendants.)

Judgment affirmed.

4. Form of contract.

a. Under the Statute of Frauds.

§ 26.] JOHNSON *v.* DODGE.

17 Illinois, 433. — 1856.

Suit for specific performance. Bill dismissed. Complainant brings writ of error.

SKINNER, J. This was a bill in equity, for the specific performance of a contract for the sale of land.

The bill and proofs show that one Iglehart, a general land agent, executed a contract in writing in the name of Dodge, the respondent, for the sale of certain land belonging to Dodge, to one Walters, and received a portion of the purchase money: that Walters afterwards assigned the contract to Johnson, the complainant; a tender of performance on the part of Walters, and on the part of Johnson, and a refusal of Dodge to perform the contract. The answer of Dodge, not under oath, denies the contract and sets up the Statute of Frauds as a defence to any contract to be proved. The evidence, to our minds, establishes a parol authority from Dodge to Iglehart to sell the land, substantially according to the term of the writing. It is urged against the relief prayed, that Iglehart, upon a parol authority to sell, could not make for Dodge a binding contract of sale under the Statute of Frauds; that the proofs do not show an authority to Iglehart to sign the name of Dodge to the contract, and therefore that the writing is not the contract of Dodge; that the writing not being signed by the vendee is void for want of mutuality; that no sufficient tender of performance on the part of complainant is proved, and that the proof shows that the authority conferred was not pursued by the agent. Equity will not decree specific performance of a contract founded in fraud; but where the contract is for the sale of land, and the proof shows a fair transaction, and the case alleged is clearly established, it will decree such performance.

In this case, the contract, if Iglehart had authority to make it, is the contract of Dodge and in writing; and it is the settled construction of the Statute of Frauds, that the authority to the agent need not be in writing, and by this construction we feel bound. 1 Parsons on Cont. 42, and cases cited; *Doty* v. *Wilder*, 15 Ill. 407; 2 Parsons on Cont. 292, 293, and cases cited; Saunders' Pl. and Ev. 541, 542, and 551; Story on Agency, 50; 2 Kent's Com. 614. Authority from Dodge to Iglehart to sell the land included

the necessary and usual means to make a binding contract in the name of the principal. If the authority to sell may be created by parol, from this authority may be implied the power to use the ordinary and usual means of effecting a valid sale; and to make such sale it was necessary to make a writing evidencing the same. If a party is present at the execution of a contract or deed, to bind him as a party to it, when his signature is affixed by another, it is necessary that the person so signing for him should have direct authority to do the particular thing, and then the signing is deemed his personal act. Story on Agency, 51. In such case the party acts without the intervention of an agent, and uses the third person only as an instrument to perform the act of signing. This is not such a case. The agent was authorized to negotiate and conclude the sale, and, for that purpose, authority was implied to do for his principal what would have been incumbent on the principal to do to accomplish the same thing in person. *Hawkins* v. *Chace*, 19 Pick. 502; 2 Parsons on Cont. 291; Story on Agency, Chap. 6; *Hunt* v. *Gregg*, 8 Blackford, 105; *Lawrence* v. *Taylor*, 5 Hill, 107, 15 Ill. 411; *Vanada* v. *Hopkins*, 1 J. J. Marsh. 285; *Yerby* v. *Grigsby*, 9 Leigh, 387.

The mode here adopted was to sign the name of Dodge, "by" Iglehart, "his agent," and it is the usual and proper mode in carrying out an authority to contract conferred on an agent. But if the signing the name of the principal was not authorized by the authority to sell, yet the signature of the agent is a sufficient signing under the statute. The language of the statute is, "signed by party to be charged therewith, or some other person thereto by him lawfully authorized." If Iglehart had authority to sign Dodge's name, then the contract is to be treated as signed by Dodge; and if Iglehart had authority to sell, in any view, his signature to the contract is a signing by "some other person thereto by him lawfully authorized," within the statute. *Trueman* v. *Loder*, 11 Ad. and El. 589; 2 Parsons on Cont. 291. It is true that authority to convey must be in writing

and by deed; for land can only be conveyed by deed, and the power must be of as high dignity as the act to be performed under it. It was not necessary to the obligation of the contract that it should have been signed by the vendee. His acceptance and possession of the contract and payment of money under it are unequivocal evidences of his concurrence, and constitute him a party as fully and irrevocably as his signing the contract could. 2 Parsons on Cont. 290; *McCrea* v. *Purmort*, 16 Wend. 460; *Shirley* v. *Shirley*, 7 Blackford, 452.

We cannot question the sufficiency of the tender in equity to entitle the complainant to specific performance. *Webster et al.* v. *French et al.*, 11 Ill. 254. Nor do we find any substantial departure in the contract from the authority proved. While we hold that the authority to the agent who for his principal contracts for the sale of land need not be in writing, yet we should feel bound to refuse a specific performance of a contract made with an agent upon parol authority, without full and satisfactory proof of the authority, or where it should seem at all doubtful whether the authority was not assumed and the transaction fraudulent.

Decree reversed and cause remanded.

Decree reversed.

b. In the execution of sealed instruments.

§ 26.] GORDON *v.* BULKELEY.

14 Sergeant & Rawle (Pa.), 331. — 1826.

Action of debt upon a bond. Plea, *non est factum.* Judgment for plaintiff. The bond was signed and sealed by John Gordon, for himself and Groves Gordon, in the absence of the latter, but under a parol authority.

Rogers, J. The single question in this case is, whether a bond can be executed in the absence of one of the obligors,

by the other signing the name of the absent obligee, and affixing his seal, having but a parol authority to do so?

Public convenience requires, that one man should have power to authorize another to execute a contract for him, as the business may be frequently as well performed by attorney as in person. But it is a general rule, that such delegation or authority must be by deed, that it may appear that the attorney or substitute had a commission or power to represent the party; and, further, that it may appear that the authority was well pursued. 1 Bac. Ab. 199; Co. Litt. 48 b.

But this is said to be different from a letter of attorney, and, in some respects, it may be distinguished from the cases cited; but there is no difference in principle. Great abuse might arise, if one man, and particularly an insolvent debtor, should have it in his power to bind another in *his absence* by so solemn an instrument as a deed, with a mere parol authority; in such a case, society would be too much exposed to the designs of the artful and unprincipled, supported, as they would frequently be, by the testimony of confederated and perjured witnesses. The distinction has been taken between a sealed and an unsealed instrument, between a bond and a promissory note. No man can bind another by deed, unless he has been authorized by deed to do it; and if a person, however authorized, if not by an instrument under seal, make and execute a deed, expressed to be in behalf of his principal, the principal is not bound by the deed, although he who made it is bound. *Banorgee* v. *Hovey et al.*, 5 Mass. Rep. 11; *Hatch* v. *Smith*, 5 Mass. Rep. 42.

A written or parol authority is sufficient to authorize a person to make a simple contract, as agent or attorney, and to bind his principal to the performance of it, without a formal letter of attorney under seal. *Stackpole* v. *Arnold*, 11 Mass. Rep. 27; *Long* v. *Colburn*, 11 Mass. Rep. 97; *The President, &c., of Northampton Bank* v. *Pepoon*, 11 Mass. Rep. 288.

The distinction then appears to be clearly taken between a contract under seal and a simple contract, and I feel no

disposition to extend the law, believing that public policy requires that the operation of a parol authority should be rather restricted than enlarged. The case we have now under consideration is an exceedingly strong one: an insolvent debtor, attempting to bind another as his surety, by bond, in the absence of the surety, and with but mere parol authority to do so. As then Groves Gordon was not *present* when the bond was executed, and John Gordon had no written authority to execute the bond, I am of opinion that, although it is the bond of John Gordon, yet it is not the bond of Groves Gordon, the surety. 9 Johns. 285.

Judgment reversed, and a *venire facias de novo* awarded.

§ 26.] GARDNER v. GARDNER.

5 Cushing (Mass.), 483. — 1850.

Writ of Entry to foreclose a mortgage. Conditional judgment for demandant, subject to the opinion of the court as to whether the mortgage deed was properly executed. The grantor's name was signed in her presence by her daughter, acting under parol authority.

Shaw, C. J. The only question is upon the sufficiency of the execution of a mortgage deed, as a good and valid deed of Polly Gwinn. The execution of the deed is objected to, on the ground that when a deed is executed by an agent or attorney, the authority to do so must be an authority of as high a nature, derived from an instrument under the seal of the grantor. This is a good rule of law, but it does not apply to the present case. The name being written by another hand, in the presence of the grantor, and at her request, is her act. The disposing capacity, the act of mind, which are the essential and efficient ingredients of the deed, are hers, and she merely uses the hand of another, through incapacity or weakness, instead of her own, to do the physical act of making a written sign. Whereas, in executing a

deed by attorney, the disposing power, though delegated, is with the attorney, aud the deed takes effect from his act; and therefore the power is to be strictly examined and construed, and the instrument conferring it is to be proved by evidence of as high a nature as the deed itself. To hold otherwise would be to decide that a person having a clear mind and full capacity, but through physical inability incapable of making a mark, could never make a conveyance or execute a deed; for the same incapacity to sign and seal the principal deed would prevent him from executing the letter of attorney under seal.

It appears to us that the distinction between writing one's name in his presence and at his request, and executing a deed by attorney, is obvious, well founded, stands on satisfactory reasons, and is well sustained by authorities. *Ball* v. *Dunsterville*, 4 T. R. 313; *The King* v. *Longnor*, 1 Nev. and M. 576, S. C. 4 Barn. and Adol. 647; 2 Greenl. Ev. sec. 295. We think the deed was well executed by Polly Gwinn; and the judgment must therefore stand for the demandant.

CHAPTER III.

FORMATION OF THE RELATION BY RATIFICATION.

1. Act must be performed in behalf of existing person.

§ 32.] IN RE NORTHUMBERLAND AVENUE HOTEL COMPANY.

L. R. 33 CHANCERY DIVISION (C. A.), 16. — 1886.

APPLICATION by Sully, as trustee of Wallis, to be admitted as a creditor in the winding up of the hotel company. Application denied. Applicant appeals.

Wallis leased grounds to one Doyle, "as trustee for and on behalf of an intended company, to be called the Northumberland Avenue Hotel Company." The company was incorporated, accepted Doyle's contract, took possession of the premises, and paid rent to Wallis. This proceeding is for damages for breach of the contract entered into between Wallis and Doyle.

COTTON, L. J. This is an appeal from a decision of Mr. Justice Chitty in what, although in form it was a summons from chambers in a winding-up, was in substance an action for damages for breach of an agreement alleged to have been entered into between Mr. Wallis, whom the claimant represents, and the company. The first thing, therefore, that we have to see is whether in fact there was any contract between them. I am not referring to the question whether a contract was made which, in consequence of the provisions of some Act of Parliament, was incapable of being enforced, but to the question whether in fact there was any agreement between these two parties.

The company was incorporated on the 25th of July, 1882, and before that date, viz., on the 24th of July, a contract in

writing was entered into between a gentleman acting as agent for and on behalf of Mr. Wallis, and another gentleman, who described himself as a trustee for the company, the company, in fact, having no existence at the time. That was a contract which was binding as between Mr. Wallis and the other gentleman whom I have mentioned, and was a contract which provided that certain things should be done by the company. That contract in no way bound the company, because the company at that time was not formed. In fact it was not in terms a contract with the company, although it was a contract by a person who purported to act for the company that certain things should be done by the company. It is not contended that this contract was in any way binding on the company, nor is it disputed that the company after it was formed could not ratify the authority of the gentleman who purported to act as their trustee before they were incorporated, and who therefore could not have any authority to do so.

But it is said that we ought to hold that there was a contract entered into between the company and Wallis on the same terms (except so far as they were subsequently modified) as those contained in the contract of the 24th of July, 1882. In my opinion that will not hold. It is very true that there were transactions between Wallis and the company, in which the company acted on the terms of that contract entered into with Wallis by the person who said he was trustee for them. But why did the company do so? The company seem to have considered, or rather its directors seem to have considered, that the contract was a contract binding on the company. But the erroneous opinion that a contract entered into before the company came into existence was binding on the company, and the acting on that erroneous opinion, does not make a good contract between the company and Mr. Wallis; and all the acts which occurred subsequently to the existence of the company were acts proceeding on the erroneous assumption that the contract of the 24th of July was binding on the company. In my opinion that ex-

plains the whole of these transactions. The case is entirely different from those cases which have been referred to where the court, finding a person in possession of land of a corporation, and paying rent, has held that there was a contract of tenancy. There was no mode of explaining why the occupier was there, except a tenancy, unless he was to be treated as a trespasser. The receipt of rent by the corporation negatived his being a trespasser, and it was therefore held that there was a tenancy. Here we can account, and in my opinion we ought to account, for the possession by the company, and for what it has done, by reference to the agreement of the 24th of July, which the directors erroneously and wrongly assumed to be binding upon them. We are not therefore authorized to infer a contract as it was inferred in those cases where there was no other explanation of the conduct of the parties.

In my opinion the decision of Mr. Justice Chitty was right, and the appeal must therefore fail.

Lindley, L. J. I am of the same opinion. The more closely the case is investigated, the more plainly does it appear that there never was any contract between the company and Wallis. The more closely the facts are looked into, the more plain is it that everything which the company did, from the taking possession down to the very last moment, was referable to the agreement of the 24th of July, 1882, which the directors erroneously supposed to be binding on the company. I therefore cannot come to any other conclusion than the conclusion at which Mr. Justice Chitty arrived.

Lopes, L. J. I am entirely of the same opinion.

The question is whether there was a contract between Wallis and the company. There no doubt was an agreement between a man called Nunneley, who was agent for Wallis, and a man named Doyle, who described himself as trustee for the company. But at that time the company was not incorporated, and therefore it is perfectly clear that the agreement was inoperative as against the company. It is also equally clear that the company, after it came into existence,

could not ratify that contract, because the company was not in existence at the time the contract was made. No doubt the company, after it came into existence, might have entered into a new contract upon the same terms as the agreement of the 24th of July, 1882; and we are asked to infer such a contract from the conduct and transactions of the company after they came into existence. It seems to me impossible to infer such a contract, for it is clear to my mind that the company never intended to make any new contract, because they firmly believed that the contract of the 24th of July was in existence, and was a binding, valid contract. Everything that was done by them after their incorporation appears to me to be based upon the assumption that the contract of the 24th of July, 1882, was an existing and binding contract. I think, therefore, that the appeal ought to be dismissed.

§ 32.] McARTHUR *v.* TIMES PRINTING CO.

48 MINNESOTA, 319. — 1892.

ACTION for damages for breach of contract. Verdict for plaintiff. Motion for new trial denied. Defendant appeals.

MITCHELL, J. The complaint alleges that about October 1, 1889, the defendant contracted with plaintiff for his services as advertising solicitor for one year; that in April, 1890, it discharged him, in violation of the contract. The action is to recover damages for the breach of the contract. The answer sets up two defences: (1) That plaintiff's employment was not for any stated time, but only from week to week; (2) that he was discharged for good cause. Upon the trial there was evidence reasonably tending to prove that in September, 1889, one C. A. Nimocks and others were engaged as promoters in procuring the organization of the defendant company to publish a newspaper; that, about September 12th, Nimocks, as such promoter, made a contract with plaintiff,

in behalf of the contemplated company, for his services as advertising solicitor for the period of one year from and after October 1st, — the date at which it was expected that the company would be organized; that the corporation was not, in fact, organized until October 16th, but that the publication of the paper was commenced by the promoters October 1st, at which date plaintiff, in pursuance of his arrangement with Nimocks, entered upon the discharge of his duties as advertising solicitor for the paper; that after the organization of the company he continued in its employment in the same capacity until discharged, the following April; that defendant's board of directors never took any formal action with reference to the contract made in its behalf by Nimocks, but all of the stockholders, directors, and officers of the corporation knew of this contract at the time of its organization, or were informed of it soon afterwards, and none of them objected to or repudiated it, but, on the contrary, retained plaintiff in the employment of the company without any other or new contract as to his services.

There is a line of cases which hold that where a contract is made in behalf of, and for the benefit of, a projected corporation, the corporation, after its organization, cannot become a party to the contract, either by adoption or ratification of it. *Abbott* v. *Hapgood*, 150 Mass. 248 (22 N. E. Rep. 907); Beach, Corp. § 198. This, however, seems to be more a question of name than of substance; that is, whether the liability of the corporation, in such cases, is to be placed on the grounds of its adoption of the contract of its promoters, or upon some other ground, such as equitable estoppel. This court, in accordance with what we deem sound reason, as well as the weight of authority, has held that, while a corporation is not bound by engagements made on its behalf by its promoters before its organization, it may, after its organization, make such engagements its own contracts. And this it may do precisely as it might make similar original contracts; formal action of its board of directors being necessary only where it would be necessary in the case of a similar original

contract. That it is not requisite that such adoption or acceptance be expressed, but it may be inferred from acts or acquiescence on part of the corporation, or its authorized agents, as any similar original contract might be shown. *Battelle* v. *Northwestern Cement & Concrete Pavement Co.*, 37 Minn. 89 (33 N. W. Rep. 327); see, also, Mor. Corp. § 548. The right of the corporate agents to adopt an agreement originally made by promoters depends upon the purposes of the corporation and the nature of the agreement. Of course, the agreement must be one which the corporation itself could make, and one which the usual agents of the company have express or implied authority to make. That the contract in this case was of that kind is very clear; and the acts and acquiescence of the corporate officers, after the organization of the company, fully justified the jury in finding that it had adopted it as its own.

The defendant, however, claims that the contract was void under the Statute of Frauds, because, "by its terms, not to be performed within one year from the making thereof," which counsel assumes to be September 12th, — the date of the agreement between plaintiff and the promoter. This proceeds upon the erroneous theory that the act of the corporation, in such cases, is a ratification which relates back to the date of the contract with the promoter, under the familiar maxim that "a subsequent ratification has a retroactive effect, and is equivalent to a prior command." But the liability of the corporation, under such circumstances, does not rest upon any principle of the law of agency, but upon the immediate and voluntary act of the company. Although the acts of a corporation with reference to the contracts made by promoters in its behalf before its organization are frequently loosely termed "ratification," yet a "ratification," properly so called, implies an existing person, on whose behalf the contract might have been made at the time. There cannot, in law, be a ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in exist-

ence. *In re Empress Engineering Co.*, 16 Ch. Div. 125; *Melhado* v. *Porto Alegre, N. H. & B. Ry. Co.*, L. R. 9 C. P. 503; *Kelner* v. *Baxter*, L. R. 2 C. P. 174. What is called "adoption," in such cases, is, in legal effect, the making of a contract of the date of the adoption, and not as of some former date. The contract in this case was, therefore, not within the Statute of Frauds. The trial court fairly submitted to the jury all the issues of fact in this case, accompanied by instructions as to the law which were exactly in the line of the views we have expressed; and the evidence justified the verdict.

The point is made that plaintiff should have alleged that the contract was made with Nimocks, and subsequently adopted by the defendant. If we are correct in what we have said as to the legal effect of the adoption by the corporation of a contract made by a promoter in its behalf before its organization, the plaintiff properly pleaded the contract as having been made with the defendant. But we do not find that the evidence was objected to on the ground of variance between it and the complaint. The assignments of error are very numerous, but what has been already said covers all that are entitled to any special notice.

Order affirmed.

§ 32.] WESTERN PUBLISHING HOUSE *v.* DISTRICT TOWNSHIP OF ROCK.

84 Iowa, 101. — 1891.

Action upon contract for purchase of books. Demurrer sustained. Plaintiff appeals.

The petition set up that certain members of the board of directors of the defendant district signed a contract to purchase the books in question; that later the board of directors formally ratified the purchase; that later still the board of directors repealed the resolution ratifying the purchase.

Beck, C. J. (after setting out the petition). A consideration of the agreement upon which the plaintiff bases its right to recover, discloses the fact that it does not purport to be the contract of the defendant, the school district, and that there is not one word in it indicating the purpose of the directors to bind the district, or the intention of the plaintiff to require it to be bound by the agreement. The obligors in the instrument describe themselves as directors of the school district; but it does not appear that the goods sold were bought for the use of the defendant, or pursuant to its authority or order. It is stipulated in the contract that the goods shall be shipped to the directors, not to the defendant or its officers. On the face of the instrument, it is plainly shown that the persons who signed the instrument, and who are designated therein as "directors," are alone bound by it as obligors. The plaintiff agrees in the instrument to accept in payment an order or warrant issued by the defendant; but this stipulation does not bind it to look to the defendant for payment, or make the instrument its contract. Upon the face of the instrument the defendant is not bound, and the intention clearly appears to bind the signers individually. The petition does not allege or show that the defendant is bound by the contract, or was intended by the parties to be bound. It specifically alleges that the "members [of the board of directors] agree to pay for the books." It alleges that the books were "ordered by said members of said board of directors for the use and benefit of defendant in its schools." It is not alleged that the contract was made pursuant to any prior order, request, or authority of the defendant; and it is averred that the books "are now" in the express office, thus showing and averring, negatively, that the goods have never come into possession of the defendant, and have never been used in its schools.

The plaintiff, while inferentially conceding that the contract was made without authority, insists that it was afterwards ratified. But as the contract did not purport to bind the defendant, it could not ratify it. There is no such thing

as the ratification of a contract by an obligor made by another, when it does not purport to bind him, but binds the other. In such a case the obligor cannot become bound by a ratification. He can only become bound by a new contract assuming or adopting the obligation of the prior one. If it be assumed that the defendant did adopt the contract (which is not alleged in the petition) it must appear what the terms of the contract adopting it are, and that they have been performed. But no such showing is made in the petition.

If the action of the board of directors of March 11th be regarded as the adoption of the individual contract of the directors, it does not appear that the plaintiff assented to or accepted it at any time. Nor is it shown that the defendant acquired the right under such adoption, by the assent of the plaintiff, to take the property. It is not shown that the plaintiff in any way accepted such adoption of the contract so as to bind the defendant. Until that was done, it could withdraw its adoption of the contract, which it did do by the resolution and action of its board of directors in their meeting of March 18, 1889.

We reach the conclusion that the contract was not intended to bind the defendant, and therefore was not ratified by it, and that, if the act claimed to be a ratification may be regarded as a contract of adoption, it was rescinded before it was accepted, and before the plaintiff acquired thereby any rights by reason of such adoption. These considerations lead us to the conclusion that the judgment of the district court ought to be Affirmed.

2. Assent may be express or implied.

§ 34.] STRASSER *v.* CONKLIN.

54 Wisconsin, 102. — 1882.

Action for balance of mortgage debt. Judgment for defendant. Plaintiff appeals.

Plaintiff's assignor sold to defendant's grantor certain hotel premises, and took the latter's notes and mortgage, at the same time assigning to the latter two policies of insurance on the hotel furniture, but payable to him as his interest should appear. Defendant, after purchasing the property, had a policy renewed which contained a like clause in favor of plaintiff's assignor, but without defendant's knowledge. The property burned, and plaintiff, as assignee of the mortgage, claimed the insurance money. Plaintiff gave one Erb a power of attorney to collect the insurance money. Erb agreed with defendant to accept a certain portion of the insurance money and a reconveyance of the premises in satisfaction of the mortgage. Plaintiff accepted the money, but refused to accept the conveyance, repudiating Erb's authority to make such an agreement.

Lyon, J. There was a controversy between the parties as to whether the defendant, when he purchased the hotel property, agreed with Craney to pay the notes given by Craney to Fisher, and assigned by the latter to the plaintiff, and also as to whether the insurance money belonged to the plaintiff or to the defendant. These controversies were settled by the defendant and Mr. Erb, the latter assuming to act for the plaintiff. By the terms of the settlement the plaintiff was to receive $653.77 of the insurance money, and a conveyance of the premises, mortgaged by Craney to Fisher to secure the payment of the notes, and to release the defendant from all claim on the mortgage. This was declared to be a full settlement of all matters between the parties. The plaintiff afterwards received the insurance money thus stipulated to him. He did so with full knowledge that Erb had assumed to act as his agent in negotiating the settlement with the defendant, and with full knowledge of the terms of the settlement. The evidence of this is undisputed and conclusive. True, at the same time the plaintiff refused to accept the deed of the mortgaged premises, and denied that Erb had authority to make the settlement. But he received and retained the fruits of the settlement, — the insurance money.

No rule of law is more firmly established than the rule that if one, with full knowledge of the facts, accepts the avails of an unauthorized treaty made in his behalf by another, he thereby ratifies such treaty, and is bound by its terms and stipulations as fully as he would be had he negotiated it himself. Also, a ratification of part of an unauthorized transaction of an agent is a confirmation of the whole. If authorities are desired to propositions so plain as these, they abound in the decisions of this court, many of which are cited in the briefs of counsel. Under the above rules it is entirely immaterial whether Erb was or was not authorized to make the settlement with the defendant. If not authorized, the plaintiff, by receiving the money with full knowledge of the terms of settlement, ratified and confirmed what he did, and cannot now be heard to allege his agent's want of authority.

It will not do to say that the plaintiff was entitled to the money he received, and might receive and retain it as his own without regard to the settlement. That was the very point of the controversy between the parties. Manifestly each claimed the money in good faith, and we cannot determine from the record before us which was entitled to it; and it is immaterial whether one or the other was so entitled, there being a real controversy between them on that question. It was therefore a very proper case for negotiation and compromise between them, and under the circumstances they must both be held bound by the settlement. The evidence of ratification is conclusive, and there was nothing for the jury to determine in that behalf. Hence, the court properly directed the jury to find for the defendant.

The foregoing views dispose of the case, and render it unnecessary to determine the question, which was very ably argued by counsel, whether a parol agreement by the defendant to pay the mortgage debt (if he so agreed) is within the Statute of Frauds, and therefore invalid. We leave the question undetermined.

BY THE COURT. The judgment of the circuit court is affirmed.

§ 34.] WHEELER AND WILSON MFG. CO. *v.* AUGHEY.

144 PENNSYLVANIA STATE, 398. — 1891.

ACTION on judgment notes. Judgment for defendant. Plaintiff appeals. Defendant gave evidence to prove that plaintiff's agent obtained the notes from defendant upon the false representation that he was not indebted to plaintiff, but wanted the notes as collateral security for machines to be furnished the agent by plaintiff, while in fact the machines were not furnished and the notes were used to secure a prior indebtedness of the agent. Plaintiff gave evidence to prove that defendant made the notes to secure the agent's past indebtedness.

Plaintiff asked a charge that it was not affected by the misrepresentation of the agent, which was denied.

MR. JUSTICE GREEN. The learned court below distinctly charged the jury that, if the notes in suit were given for a past indebtedness of Landis to the plaintiff, their verdict should be in favor of the plaintiff; but if they found that they were given for machines to be furnished thereafter, and the machines were not delivered, the verdict should be for the defendant. The jury found for the defendant, and thereby determined that the notes were given for machines to be furnished in the future. There was abundant testimony in support of the defendant's contention, and we must therefore regard it as an established fact that the notes were given in consideration that machines should be delivered to Landis by the plaintiff subsequently to the execution and delivery of the notes in question. It is beyond all question that Landis obtained the signature of the defendant to the notes, and that he delivered the notes so signed to the plaintiffs, who received and kept them, and affirmed their title to them by bringing suit upon them against the defendant. For the purpose of obtaining the notes, Landis most certainly acted as the repre-

sentative of the plaintiffs, and they conclusively accepted the fruits of his act. That they cannot do this without being subject to the conditions upon which he obtained the notes, whether he had authority or not to make or agree to those conditions, is too well settled to admit of any doubt.

The whole doctrine was well expressed by Sharswood, J., in the case of *Mundorff* v. *Wickersham*, 63 Pa. 87: —

"If an agent obtains possession of the property of another, by making a stipulation or condition which he was not authorized to make, the principal must either return the property, or, if he receives it, it must be subject to the condition upon which it was parted with by the former owner. This proposition is founded upon a principle which pervades the law in all its branches: *Qui sentit commodum sentire debet et onus.* The books are full of striking illustrations of it, and more especially in cases growing out of the relation of principal and agent. Thus, where a party adopts a contract which was entered into without his authority, he must adopt it altogether. He cannot ratify that part which is beneficial to himself, and reject the remainder; he must take the benefit to be derived from the transaction *cum onere.*"

This doctrine is so reasonable and so entirely just and right in every aspect in which it may be considered, and it has been enforced by the courts with such frequency and in such a great variety of circumstances, that its legal soundness cannot for a moment be called in question.

It is of no avail to raise or discuss the question of the means of proof of the agent's authority. The very essence of the rule is, that the agent had no authority to make the representation, condition, or stipulation, by means of which he obtained the property, or right of action, of which the principal seeks to avail himself. It is not because he had specific authority to bind his principal for the purpose in question that the principal is bound, but notwithstanding the fact that he had no such authority. It is the enjoyment of the fruits of the agent's action which charges the principal with responsibility for his act. It is useless, therefore, to inquire whether

there is the same degree of technical proof of the authority of the agent, in the matter under consideration, as is required in ordinary cases where an affirmative liability is set up against a principal by the act of one who assumes to be his agent. There the question is as to the power of the assumed agent to impose a legal liability upon another person; and, in all that class of cases, it is entirely proper to hold that the mere declarations of the agent are not sufficient. But in this class of cases the question is entirely different. Here the basis of liability for the act or declaration of the agent, is the fact that the principal has accepted the benefits of the agent's act or declaration. Where that basis is made to appear by testimony, the legal consequence is established. Mr. Justice Sharswood, in the case above cited, after enumerating many instances in which the doctrine was enforced, sums up the subject thus: "Many of these cases are put upon an implied authority, but the more reasonable ground, as it seems to me, is that the party having enjoyed a benefit must take it *cum onere*."

We are of opinion that the learned court below was entirely right in the treatment of this case.

Judgment affirmed in each of these cases.

On February 8, 1892, a motion for re-argument was refused.

§ 34.] HYATT *v.* CLARK.

118 New York, 563. — 1890.

Cross actions between the same parties. Clark's action was for specific performance of a clause in a lease providing for a renewal. Mrs. Hyatt's action was for the cancellation of the lease, upon the ground that her agent exceeded his authority in making it. The trial court found for Mrs. Hyatt, but the general term reversed the judgment. She appealed to the Court of Appeals.

In 1880, Mrs. Hyatt, while in England, appointed one Lake, by written power of attorney, her agent to manage her business in the United States, to sell and convey her property, to receive and recover all moneys due her, and to execute all instruments necessary to these ends. Lake leased premises to Clark; but both had doubts whether the power of attorney authorized a lease, and the lease was accepted subject to Mrs. Hyatt's approval. Mrs. Hyatt refused to approve, and cancelled the power of attorney. Clark, however, refused to cancel the lease, and went into possession. Mrs. Hyatt did not know that Clark first received the lease conditionally, but was informed by Lake that the lease was valid and could not be cancelled. She therefore received the rent from Clark for the term fixed in the lease, but refused to renew it for another term as provided for in the renewal clause.

VANN, J. We do not deem it important to decide whether the power of attorney authorized Mr. Lake to execute the lease in question or not, because, in either event, the same result must follow, under the circumstances of this case.

If, on the one hand, he acted without adequate authority in giving the lease, both the lessor and the lessee knew it, for both knew the facts, and both are presumed to have known the law, and the former, at least, had an absolute right to disaffirm the contract. As she knew the contents of the power of attorney and the lease, and that the latter was executed by her agent in her name, it was not necessary that she should be informed of the legal effect of those facts. *Kelley* v. *Newburyport & Amesbury Horse R. R. Co.*, 141 Mass. 496; *Phosphate Lime Co.* v. *Green*, L. R. (7 C. P.) 43; Mechem on Agency, sec. 129.

Whether influenced by caprice or reason, if she had promptly notified the lessee that she repudiated the lease because her agent had no power to execute it, their rights would have been forthwith terminated, and they would have had no lease. The right to disaffirm on one tenable ground would, if acted upon, have been as effective as

the right to disaffirm upon all possible grounds. Under the condition supposed, the law gave her the same right to disaffirm without any agreement to that effect, that she would have had if her agent, being duly authorized to lease, had expressly provided, in the written instrument, that she could disaffirm if she chose to do so. Therefore, by accepting the rent of the demised premises for more than four years, without protest or objection, she ratified the lease as completely as she could have, if she had known of two grounds upon which to disaffirm, instead of only one. Two grounds could not make the right any more effectual than one. If she had the right at all, the number of grounds upon which she could justify its exercise is unimportant. Her ratification was none the less complete, because, being unwilling to run the risk of a doubtful question of law, she did not at once act as she would have acted if she had known all of the facts. As said by the court, in *Adams* v. *Mills*, 60 N. Y. 533, "the law holds that she was bound to know what authority her agent actually had." Having executed the power of attorney, she is conclusively presumed to have known what it meant and the extent of the authority that it conferred. (Best on Evidence, 123; Wharton on Evi. § 1241.)

If the lease was *ultra vires*, therefore, by ratifying it, she in legal effect executed and delivered it herself, and whatever was said between Lake and Clark, became immaterial. Even if they agreed that she should have the right to disapprove, it is of no importance, because she had that right without any such agreement. If her agent had no power to execute the lease, the delivery thereof, whether absolute or conditional, could not affect her rights. If she was dissatisfied with it, she could have been relieved of all responsibility thereunder by promptly saying to the lessee: "This contract was not authorized by the agency I created, and I refuse to be bound by it." After that there would have been no lease. If the action of her agent was unauthorized, it did not bind her, until by some act of ratification she bound herself. By ratifying, she waived any right to disaffirm upon any ground,

known or unknown, because the lease did not exist, as a lease, by the act of her agent, but by her own act of confirmation.

If, on the other hand, Mr. Lake was duly authorized to give the lease, certain presumptions of controlling importance spring from that fact. He is presumed to have disclosed to his principal, within a reasonable time, all of the material facts that came to his knowledge while acting within the scope of his authority.

It is laid down in Story on Agency (sec. 140), that "notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from or is at the time connected with the subject-matter of his agency, for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal, and if he has not, still the principal, having intrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal."

In other words, she was chargeable with all the knowledge that her agent had in the transaction of the business he had in charge. *Ingalls* v. *Morgan*, 10 N. Y. 178; *Adams* v. *Mills*, *supra; Myers* v. *Mutual Life Ins. Co.*, 99 N. Y. 1, 11; *Bank of U. S.* v. *Davis*, 2 Hill, 451; *Higgins* v. *Armstrong*, 9 Col. 38.

It was his duty to keep her informed of his acts, and to give her timely notice of all facts and circumstances which would have enabled her to take any step that she deemed essential to her interests.

She does not question the good faith of Mr. Lake, and there is no proof of fraudulent collusion between him and Mr. Clark, who, while under no obligation to inform Mrs. Hyatt of the facts, had the right to assume that her agent had done so. *Ingalls* v. *Morgan*, *supra; Meehan* v. *Forrester*, 52 N. Y. 277; *Scott* v. *Middletown, U. & W. G. R. R. Co.*, 86 Id. 200.

It was her duty to protect her interests by selecting an agent of adequate judgment, experience, and integrity, and

if she failed to do so, she must bear the loss resulting from his inexperience, negligence, or mistaken zeal. After the lapse of sufficient time, therefore, she is presumed to have acted with knowledge of all the acts of her agent, in the line of his agency.

By accepting and retaining the rent, which was the fruit of her agent's act, for nearly five years without objection, she is presumed to have ratified that act. *Hoyt* v. *Thompson*, 19 N. Y. 207; *Alexander* v. *Jones*, 64 Iowa, 207; *Heyn* v. *O'Hagen*, 60 Mich. 150; 2 Greenl. on Ev. §§ 66, 67. Without expressing any dissatisfaction to the lessees, she received eighteen quarterly payments of rent before electing to avoid the lease. She made no offer to return any part of the rent so paid, although she tendered back the amount deposited to her credit for the nineteenth quarter at the time that she demanded possession of the premises.

Independent of what she is presumed to have known through the information of her agent, she in fact knew the terms of the lease, and that it was executed by Mr. Lake in her name.

Upon her arrival in this country in September, 1880, she visited the premises and saw the additions and improvements that the tenants were making thereto, and at that time, as well as subsequently, rent was paid to her in person. Apparently she had all the knowledge that she cared to have, for she made no inquiry of her agent until about six months previous to the expiration of the first term of five years, and not until after the lessees had given notice of their election to continue the lease for a second term. Thinking that the rent was low, she then tried to find out something from her agent that would enable her to avoid the lease, and, as a result of her efforts in this direction, ascertained the fact upon which she based her right to succeed in this litigation. But it was then too late for her to disaffirm, because her long silence, and many acts of ratification, had been relied upon by the tenants, who had expended a large sum of money in making permanent improvements on the

property. Having received the benefits of the contract, she could not, after years of acquiescence, suddenly invoke the aid of the courts to relieve her of any further obligation, because she had but recently discovered a fact that she should have ascertained, and which the law presumes she did ascertain, long before. 1 Am. & Eng. Encyc. of Law, 429.

We think that after ample opportunity for election and action, she ratified the lease, and that her ratification was irrevocable.

In each action the order appealed from should be affirmed, and judgment directed upon the stipulation in favor of the respondent, with costs of appeal to this court in one action only.

3. Silence may amount to ratification.

§ 35.] PHILADELPHIA, W. & B. RAILROAD CO. *v.* COWELL.

28 Pennsylvania State, 329. — 1857.

Action by Cowell to recover the sum of $1,700 dividends on stock. Defence, the authorized application of the dividends to the payment of additional stock subscription. Verdict and judgment for plaintiff. Defendant appeals.

The subscription for additional stock was made in plaintiff's behalf by one Fisher, who promptly informed plaintiff of what he had done. Plaintiff remained silent for about seven years after receiving this information. Fisher had previously corresponded with plaintiff as to the condition of the company, and had consulted with plaintiff's friends in this country, but he had no authority to act for plaintiff. The court rejected the evidence offered to prove these facts.

Woodward, J. The question presented by the first error assigned, is not whether the evidence offered and rejected

proved the plaintiff's ratification of Fisher's subscription; but whether it tended to prove it.

Suppose the court had admitted the evidence, and the jury had found the plaintiff's assent and ratification, could he have expected us to reverse the judgment on the ground that a question of fact had been submitted and found without *any* evidence?

Could it have been said that the facts set down in the bill of exception, fully proved, were *no* evidence of ratification; that they were so entirely irrelevant as to be unworthy of consideration by rational minds in connection with such a question; that that question stood just as far from demonstration after such evidence as before?

Unless this could have been said, and must have been said in the event supposed, the judgment now before us must be reversed; for the question here is, in essence and substance, exactly the same as it would have been then.

If this evidence might have satisfied the jury; that is, if it were of a quality to persuade reasonable men that Cowell did assent to Fisher's assumed agency after he had full knowledge of what had been done, it should have been admitted. The question in the cause was for the jury, and not the court. But the fact to be inquired for, like all mental conditions and operations, could be established only inferentially. We judge of the mind and will of a party only from his conduct, and if he have done or omitted nothing which may fairly be interpreted as indicative of the mental purpose, there is indeed no evidence of it for either court or jury; but if his conduct, in given circumstances, affords any ground for presumption in respect to the mental purpose, it is for a jury to define, limit, and apply the presumption.

The most material circumstance in the offer was the silence of Mr. Cowell. Fully informed about the last of the year 1848 as to what had been done in his name, and the motives and reasons for doing it, he did not condescend to reply for nearly seven years. It is insisted that this fact, even when

taken in connection with the other circumstances in the offer, was no evidence of his intention to assent to the new subscription.

The argument admits that where the relation of principal and agent has once existed, or where the property of a principal has with his consent come into the hands and possession of a third party, the principal is bound to give notice that he will not sanction the unauthorized acts of the agent, performed in good faith and for his benefit; but it is said, and truly, that Mr. Fisher had never been an authorized agent of the plaintiff for any purpose, and that the plaintiff's property had never been intrusted to him. It is on this distinction that the learned counsel sets aside the case of the *Kentucky Bank* v. *Combs*, 7 Barr, 543, and indeed all of the authorities relied on by the defendant.

I do not understand counsel to mean that there can be no valid ratification unless one 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.

In *Wilson* v. *Tumman*, 6 M. & G. 236, C. J. Tindall, on the authority of several old cases, considered that the effect of a ratification was dependent on the question whether the person assuming to act had acted for another and not for himself. The act, it would seem, cannot be ratified unless it were done in the name of the person ratifying. *Ratum quis habere non potest, quod ipsius nomine non est gestum.* And the general rule is thus expressed in the Digest, 50: *Si quis ratum habuerit quod gestum est, obstringitur mandati actione.*

If, then, the principle of law be that I can ratify that only which is done in my name, but when I have ratified what-

ever 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 had been accustomed to contract through the agency of the individual assuming to act for him, or had intrusted property to 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 a mere impertinent interference — would be a 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. *Semper, qui non prohibet pro se intervenire, mandare creditur:* Story's Agency, § 89.

We do not apply the full strength of this principle when we rule that the plaintiff's silence, in connection with the circumstances offered, was evidence fit for the consideration of a jury on the question of ratification. 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; and if the power to ratify be conceded to him, the fact of ratification must be provable by the ordinary means.

For these reasons, the distinction on which the argument for the defendant in error rests seems to us to be too narrow.

The prior relations of the parties lend great importance to the fact of silence; but it is a mistake to make the *competency* of the fact dependent on those relations. I am aware that Livermore cites with approbation, p. 50, the opinion of civil law writers, that where a volunteer has officiously interfered in the affairs of another person, and made a contract for him without any color of authority, such other person is not bound to answer a letter from the intermeddler, informing him of the contract made in his name, nor is his silence to be construed into ratification. But it is to be remembered that such writers are not laying down a rule of evidence to govern trials by jury, but are declaring rather the effect upon the judicial mind of the party's silence. It is one thing to say that the law will not imply a ratification from silence, and a very different thing to say that silence is a circumstance from which, with others, a jury may imply it. Because evidence does not raise a presumption so violent as to force itself upon the judge as a conclusion of law, is the evidence therefore incompetent to go to a jury as ground for a conclusion of fact? No writer, with a common law jury before his eyes, has ever maintained the affirmative of this proposition. If it could be established it would abolish that institution entirely, and refer every question and all evidence to the judicial conscience.

But it is time now to remark that this case is far from being that of a mere volunteer or intermeddler. True it is that Mr. Fisher had not any proper authority to make the new subscription, but Messrs. Binney and Biddle, the friends and correspondents of the plaintiff, had consulted him in reference to the plaintiff's interests in this railroad company, and as a

director of the company he stood in some sort as a representative and trustee of the plaintiff, who was in a foreign country, and without any authorized agent here. The proposition that every stockholder should subscribe new stock to the extent of ten per cent. was designed, and as the event proved, was well designed, to retrieve the fortunes of the company; but it was necessary to its success that every stockholder should come into the arrangement. The emergency was pressing, and Mr. Fisher, manifestly acting in perfect good faith, made the subscription for the plaintiff, which he believed the plaintiff would not hesitate to make if personally present.

When the plaintiff was fully informed that a sagacious financier, to whom his chosen friends and correspondents had referred his interests, and who stood in the fiduciary relation of a director, had pledged him for a new subscription, which circumstances seemed to justify and demand, I say not that he was bound by it, nor even that he was bound to repudiate it, but that his delay for near seven years, either to approve or repudiate, was a fact fit to be considered by a jury on the question of ratification. The subscription was made in the plaintiff's name, and accepted by the company as his; and it does not appear that they knew Fisher was acting without authority. The offer was to show that it was highly beneficial to the plaintiff. It was, then, such an act as is capable in law of being ratified. The plaintiff might make it his own by adoption. Did he adopt it? He did, if he ever gave it mental assent. How could the company show assent by anything short of a written agreement, if not by evidence of the nature of that in the bill of exception? The medium of proof, where a mental purpose is the object of inquiry, must conform to the mode of manifestation. To say that you may prove assent, but may not give the circumstances in evidence from which it is to be implied, is to say nothing.

Strongly persuasive as we consider the offered evidence, we do not put our judgment so much upon the strength as upon the nature of it. We think it was calculated to con-

vince a jury that the plaintiff did indeed assent to and approve of what Mr. Fisher had done in his behalf, and therefore it should have been received and submitted.

If they should find from it the assent and ratification of the plaintiff, the subscription became, as between him and the company, a valid contract, and on his failure to pay the instalments, the company had a right to apply thereto the accruing dividends on his old stock.

When he pays what remains unpaid on the instalments, he will be entitled to his certificates of stock.

The defence under the Statute of Limitations was not well taken. It may be well doubted whether, under our Acts of Assembly, any incorporated company can set up the Statute of Limitations against a stockholder's dividends. It certainly cannot be done until after a demand and refusal, or notice to a shareholder that his right to dividends is denied. But here, so far from such notice having been given, the company recognize the plaintiff's right to the dividends, and claim to have applied them to his use. The statute can have no place in such a defence.

The judgment is reversed and a *venire de novo* awarded.

4. Assent must be in toto and unconditional.

§ 36.] EBERTS *v.* SELOVER.

44 Michigan, 519. — 1880.

Assumpsit to recover ten dollars as subscription price of a book. Defendant tenders $4.27. Judgment for defendant. Plaintiffs bring error.

Cooley, J. This is an action brought to recover the subscription price of a local history. The subscription was obtained by an agent of the plaintiffs, and defendant signed his name to a promise to pay ten dollars on the delivery of the book. This promise was printed in a little book,

made use of for the purpose of obtaining such subscriptions, and on the opposite page, in sight of one signing, was a reference to "rules to agents," printed on the first page of the book. One of these rules was that "no promise or statement made by an agent which interferes with the intent of printed contract shall be valid," and patrons were warned under no circumstances to permit themselves to be persuaded into signing the subscription unless they expected to pay the price charged. From the evidence, it appears that when Schenck, the agent, solicited his subscription, the defendant was not inclined to give it, but finally told the agent he would take it provided his fees in the office of justice, then held by him, which should accrue from that time to the time of delivery of the book should be received as an equivalent. The agent assented, and defendant signed the subscription, receiving at the same time from the agent the following paper: —

COLDWATER, April 29, 1878.

Mr. Isaac M. Selover gives his order for one copy of our history, for which he agrees to pay on delivery all the proceeds of his office as justice from now till the delivery of said history.

EBERTS & ABBOTT, per Schenck.

The plaintiffs claim that the history was duly delivered, and they demand the subscription price, repudiating the undertaking of the agent to receive anything else, as being in excess of his authority, and void. The defendant relies on that undertaking, and has brought into court $4.27 as the amount of his fees as justice for the period named. This statement of facts presents the questions at issue so far as they concern the merits.

It may be perfectly true, as the plaintiffs insist, that this undertaking of the agent was in excess of his authority; that the defendant was fairly notified by the entries in the book of that fact, and that consequently the plaintiffs were not bound by it, unless they subsequently ratified it. Unfortunately for their case, the determination that the act of the

agent in giving this paper was void does not by any means settle the fact of defendant's liability upon the subscription.

The plaintiffs' case requires that they shall make out a contract for the purchase of their book. To do this, it is essential that they show that the minds of the parties met on some distinct and definite terms. The subscription standing alone shows this, for it shows, apparently, that defendant agreed to take the book and pay therefor on delivery the sum of ten dollars. But the contemporaneous paper given back by the agent constitutes a part of the same contract, and the two must be taken and considered together. *Bronson* v. *Green*, Walk. Ch. 56; *Dudgeon* v. *Haggart*, 17 Mich. 273. Taking the two together it appears that the defendant never assented to any purchase except upon the terms that the plaintiffs should accept his justice's fees for the period named in full payment for the book. If this part of the agreement is void, the whole falls to the ground, for defendant has assented to none of which this is not a part. When plaintiffs discovered what their agent had done, two courses were open to them: to ratify his contract, or to repudiate it. If they ratified it, they must accept what he agreed to take. If they repudiated it, they must decline to deliver the book under it. But they cannot ratify so far as it favors them, and repudiate so far as it does not accord with their interests. They must deal with the defendant's undertaking as a whole, and cannot make a new contract by a selection of stipulations to which separately he has never assented.

The judgment must be affirmed with costs.[1]

[1] See also *Wheeler & Wilson Mfg. Co.* v. *Aughey, ante*, p. 50.

5. Assent must be free from mistake or fraud.

§ 37.] TRUSTEES, &c., OF EASTHAMPTON v. BOWMAN.

136 NEW YORK, 521. — 1893.

ACTION to set aside a deed purporting to be given by the Trustees, &c., of Easthampton, through one Dominy, to the defendant. Judgment for plaintiff. Defendant appeals.

EARL, J. (after deciding that the deed was unauthorized). But the main defence relied upon by the defendant at the trial, and now relied upon, grows out of the facts now to be stated. The defendant paid Dominy for the land $200, which he kept and appropriated to his own use. In August, 1884, the trustees of the town then in office commenced a suit against the persons who were trustees during the year in which the deed to the defendant was given, to compel them to account for and pay over certain moneys belonging to the town, and in that action, among other claims made against Dominy as a defendant therein, the plaintiff claimed to recover the $200, paid to him by the defendant. That action was tried and proceeded to judgment, and the plaintiff, among other things, recovered judgment against Dominy for that $200, and execution upon that judgment was issued against him and returned unsatisfied. Thus the town has failed to collect or receive the money paid to Dominy by the defendant for the land. The claim on the part of the defendant is that the plaintiff in that action proceeded to judgment and execution, knowing that the deed was executed without authority, and that the money was received by Dominy without authority, and that thus it ratified Dominy's unauthorized act, and became bound thereby. It is quite true that the trustees acting for the town, and clothed with authority to convey these lands, could ratify the unauthorized conveyance which had already been made to the defendant, and that the town could be bound by their ratification. But before a prin-

cipal can be held to have ratified the unauthorized act of an assumed agent he must have full knowledge of the facts, so that it can be said that he intended to ratify the act. If his knowledge is partial or imperfect he will not be held to have ratified the unauthorized act, and the proof of adequate knowledge of the facts should be reasonably clear and certain, particularly in a case like this, where, so far as the record discloses, no substantial harm has come to the defendant from the delay or the acts of the principal. In this case it is found, and appears from the evidence clearly, that the trustees who brought the action against Dominy and others for the accounting, had at and before the commencement of the action no knowledge whatever of the fraud perpetrated upon the town by the unauthorized execution of the deed. During the progress of the trial of that action, however, there was some evidence tending to show the unauthorized execution of the deed by Dominy; but the proof was given by the defendants, who were resisting payment to the plaintiff in that action, and, as the trial judge found, the trustees of the town did not believe that evidence thus given by the parties sued in their defence to that action, and it is found that they proceeded to judgment and execution in ignorance of the fraud which had been perpetrated by Dominy upon the town. We do not, therefore, think that the ratification on the part of the town by its trustees was so clearly and unequivocally established that we would be authorized to reverse this judgment. Before a municipal corporation can be held to have ratified the unauthorized act of its officers or assumed agents, the rule should be strictly enforced that the facts constituting the ratification should be fully and clearly proved, so that it can fairly be said that there was an intention to confirm the unauthorized act and receive the fruits thereof. Here there is no conclusive proof to that effect.

But as the plaintiff now holds a judgment against Dominy in which the $200 paid to him by the defendant is included, we think that as a condition of relief in this action it should be required to assign so much of that judgment as relates to the $200 to the defendant.

Our conclusion, therefore, is that the judgment entered at the Special Term should be so far modified as to require the plaintiff to assign to the defendant so much of the judgment recovered by it against Dominy as represents the $200 paid by the defendant to him, and as thus modified it should be affirmed, with costs.

All concur. Judgment accordingly.[1]

§ 37.] COMBS *v.* SCOTT ET AL.

12 ALLEN (Mass.), 493. — 1866.

CONTRACT, for compensation agreed to be paid plaintiff for his services in procuring two recruits as a part of the quota of the town of Hawley. Verdict for plaintiff. Defendants allege exceptions.

The court charged that, as to ratification, "if there was a material mistake, it makes no difference how it arose, or whether defendants might have ascertained the contrary to be true, *unless it arose from the negligence of the defendants.*"

BIGELOW, C. J. (after deciding that the services were not illegal). But, upon another point, we are of opinion that the exceptions of the defendants are well taken. In instructing the jury on the question of ratification by the defendants of the contract alleged to have been made by their agent in excess of the authority granted to him, the judge in effect told the jury that such ratification would be binding on the defendants, though made under a material misapprehension of facts, if such misapprehension arose from the negligence or omission of the defendants to make inquiries relative to the subject-matter. In the broad and general form in which this instruction was given, we are of opinion that it did not correctly state the rule of law, and that the jury may have been misled by it in the consideration of this part of the case.

[1] Compare *Hyatt* v. *Clark*, 118 N. Y. 563, *ante*, p. 52.

The general rule is perfectly well settled, that a ratification of the unauthorized acts of an agent, in order to be effectual and binding on the principal, must have been made with a full knowledge of all material facts, and that ignorance, mistake or misapprehension of any of the essential circumstances relating to the particular transaction alleged to have been ratified, will absolve the principal from all liability by reason of any supposed adoption of or assent to the previously unauthorized acts of an agent. We know of no qualification of this rule such as was engrafted upon it in the instructions given to the jury in the present case. Nor, after considerable research, have we been able to find that such qualification has ever been recognized in any approved text-writer or adjudicated case. And, upon consideration, it seems to us to be inconsistent with sound principle.

Ratification of a past and completed transaction, into which an agent has entered without authority, is a purely voluntary act on the part of a principal. No legal obligation rests upon him to sanction or adopt it. No duty requires him to make inquiries concerning it. Where there is no legal obligation or duty to do an act, there can be no negligence in an omission to perform it. The true doctrine is well stated by a learned text-writer: "If I make a contract in the name of a person who has not given me an authority, he will be under no obligation to ratify it, nor will he be bound to the performance of it." 1 Livermore on Agency, 44; see also Paley on Agency, 171, note *o*. Whoever, therefore, seeks to procure and rely on a ratification is bound to show that it was made under such circumstances as in law to be binding on the principal, especially to see to it that all material facts were made known to him. The burden of making inquiries and of ascertaining the truth is not cast on him who is under no legal obligation to assume a responsibility, but rests on the party who is endeavoring to obtain a benefit or advantage for himself. This is not only just, but it is practicable. The needful information or knowledge is always within the reach of him who is either party or privy to a transaction which he

seeks to have ratified, rather than of him who did not authorize it, and to the details of which he may be a stranger.

We do not mean to say that a person can be wilfully ignorant, or purposely shut his eyes to means of information within his own possession and control, and thereby escape the consequences of a ratification of unauthorized acts into which he has deliberately entered; but, our opinion is, that ratification of an antecedent act of an agent which was unauthorized cannot be held valid and binding, where the person sought to be charged has misapprehended or mistaken material facts, although he may have wholly omitted to make inquiries of other persons concerning them, and his ignorance and misapprehension might have been enlightened and corrected by the use of diligence on his part to ascertain them. The mistake at the trial consisted in the assumption that any such diligence was required of the defendants. On this point, the instructions were stated in a manner which may have led the jury to misunderstand the rights and obligations of the parties. Exceptions sustained.

§ 37.] KELLEY *v.* NEWBURYPORT HORSE RAILROAD CO.

141 MASSACHUSETTS, 496. — 1886.

CONTRACT, upon certain promissory notes alleged to have been made by defendant corporation to K. and B., or order, and indorsed to plaintiff. Verdict for plaintiff. Defendant alleges exceptions.

C. ALLEN, J. (after disposing of another point). The defendant then contends that the notes in suit cannot be enforced, because they were given to its own directors in payment for the construction of the road by them, and are now held by the plaintiff subject to all defences which might have been made to a suit upon them by the payees. Upon this point, the only question properly before us is, whether there

was sufficient evidence to warrant the jury in finding a ratification of the notes by the corporation. The presiding judge assumed that the notes were originally void, and submitted to the jury the single question of ratification. Being of opinion that there was sufficient evidence to warrant the verdict on the question of ratification, we have no occasion to consider whether it might not also have been proper to submit to the jury, under proper instructions, the question of the original validity of the notes.

The first request for instructions was properly refused. It seems to refer to a supposed theory of the plaintiff that the notes might be ratified by the directors, whereas the sole question submitted to the jury was whether they had been ratified by the stockholders, that is, by the corporation itself.

The third request is open to the same objection.

The second request sought to incorporate into the doctrine of ratification a new element, namely, that, in order to make a valid ratification, the principal must have known, not only all the facts, but also the legal effect of the facts, and then, with a knowledge both of the law and facts, have ratified the contracts by some independent and substantive act. This request also was properly refused. It is sufficient if a ratification is made with a full knowledge of all the material facts. Indeed, a rule somewhat less stringent than this may properly be laid down, when 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. *Combs* v. *Scott*, 12 Allen, 493, 497; *Phosphate of Lime Co.* v. *Green*, L. R. 7 C. P. 43, 57.

The fourth and fifth requests were both to the effect that, on all the evidence, the jury would not be warranted in finding a ratification. The circumstances of the case were such as to render the inference of ratification natural and easy, especially in view of the lapse of time since the notes were given. There was uncontradicted evidence tending to show that the directors made a contract with one Gowan for building the road for a certain price in money and stock, and that

he gave to the company a bond, with Kelley and Binney as sureties, for the faithful performance of his contract. Gowan failing to perform his contract, the board of directors called on the sureties, who themselves were directors, to perform it, with notice that they would be held liable to the company for all damages that might accrue to the company by their default. Thereupon the sureties proceeded to finish the road, according to the contract, in which originally they had no interest. The price was fair and reasonable; the road as completed by them was a well-built road; the advancements made by them were in consequence of the notice given to them by the directors, and not with any fraudulent design to obtain any pecuniary benefit for themselves from said contract. The settlement was made with them by the directors, under authority of a general vote of the stockholders authorizing them to make any settlement, and the notes in suit were given.

As a general rule, a contract between a corporation and its directors is not absolutely void, but voidable at the election of the corporation. Such a contract does not necessarily require any independent and substantive act of ratification, but it may become finally established as a valid contract by acquiescence. The right to avoid it may be waived. *Union Pacific Railroad* v. *Credit Mobilier,* 135 Mass. 367, 376; *Twin-Lick Oil Co.* v. *Marbury,* 91 U. S. 587; *Hotel Co* v. *Wade,* 97 U. S. 13; *Ashhurst's Appeal,* 60 Penn. St. 290. In the present case, such ratification or waiver might well be inferred, and indeed we do not see how any other inference could fairly be drawn, from the act of the company in holding and operating the road for so many years without taking any steps to repudiate the notes, from the payment of interest, from the acceptance of the report of the treasurer on October 6, 1875, and October 2, 1878, in which these notes were referred to as outstanding obligations, and from the acceptance of the Statute of 1884, *c.* 159, authorizing the company to issue bonds to an amount not exceeding $30,000, for the purpose of extinguishing its floating debt.

Exceptions overruled.

6. Right of other party to recede before ratification.

§ 38.] WALTER v. JAMES.

L. R. 6 Exchequer, 124.—1871.

Action on an attorney's bill to recover £63 17*s*. 3*d*. Defendant paid into court £3 17*s*. 3*d*., and to the residue pleaded payment. Verdict for defendant, with leave to plaintiff to move to enter the verdict for him, the court to have power to draw inferences of fact. Rule obtained accordingly.

Plaintiff had a claim against defendant. One Southall, after his authority had been revoked, paid plaintiff £60 in satisfaction of the claim. Subsequently, by agreement between Southall and plaintiff, the money was returned to Southall. No evidence of defendant's ratification before plea in this action was given. The trial court ruled that defendant could take advantage of Southall's payment.

Kelley, C. B. Southall, in paying the debt, appeared to act as the defendant's agent; but it turned out afterwards that, although he had originally been authorized by the defendant to come to an arrangement with the plaintiff, and to make this payment, that authority had been revoked before the payment was made. He did not, however, communicate to the plaintiff that he had no authority; on the contrary, he professed to act for the defendant, and the plaintiff believed him to be so acting, and received the sum paid in full satisfaction of his debt. But when the plaintiff found that the money had been paid without the defendant's authority, he returned the money to Southall. And now the question is, whether the defendant can by his plea of payment adopt and ratify the act of Southall, although before action that act had, by arrangement between the plaintiff and Southall, been undone.

Now, the law is clear, that where one makes a payment in the name and on behalf of another without authority, it is competent for the debtor to ratify the payment; and there

seems to be no doubt on the authorities that he can ratify after action by placing the plea of payment on the record. *Primâ facie*, therefore, we have here a ratification of the payment by the defendant's plea; but whether the payment was then capable of ratification depends on whether previously it was competent to the plaintiff and Southall, apart from the defendant, to cancel what had taken place between them. I am of opinion that it was competent to them to undo what they had done. The evidence shows that the plaintiff received the money in satisfaction under the mistaken idea that Southall had authority from the defendant to pay him. This was a mistake in fact, on discovering which he was, I think, entitled to return the money, and apply to his debtor for payment. If he had insisted on keeping it, the defendant might at any moment have repudiated the act of Southall, and Southall would then have been able to recover it from the plaintiff as money received for Southall's use. I am, therefore, of opinion that the plaintiff, who originally accepted this money under an entire misapprehension, was justified in returning it, the position of the parties not having been in the meantime in any way altered, and that the defendant's plea of payment fails. The rule must accordingly be made absolute.

MARTIN, B. I am of the same opinion. The rule which I conceive to be the correct one may be stated as follows: When a payment is not made by way of gift for the benefit of the debtor, but by an agent who intended that he should be reimbursed by the debtor, but who had not the debtor's authority to pay, it is competent for the creditor and the person paying to rescind the transaction at any time before the debtor has affirmed the payment, and repay the money, and thereupon the payment is at an end, and the debtor again responsible. This being, in my judgment, the true rule, the plaintiff in this case was entitled to recover.

KELLEY, C. B. My Brother Cleasby concurs in the judgment of the court. Rule absolute.

§ 38.] BOLTON PARTNERS *v.* LAMBERT.

L. R. 41 Chancery Division (C. A.), 295. — 1889.

Action for specific performance of an agreement to take a lease. Decree for plaintiff. Defendant appeals.

Defendant made to an agent of plaintiff an offer to take a lease of plaintiff's premises. The agent, without authority, accepted the offer in behalf of the company. Later, defendant withdrew his offer, and, later still, the board of directors of the plaintiff company ratified the agent's agreement.

Lindley, L. J. . . . The question is, what is the consequence of the withdrawal of the offer after acceptance by the assumed agent, but before the authority of the agent has been ratified? Is the withdrawal in time? It is said on the one hand that the ordinary principle of law applies, viz., that an offer may be withdrawn before acceptance. That proposition is of course true. But the question is, acceptance by whom? It is not a question whether a mere offer can be withdrawn, but the question is whether, when there has been in fact an acceptance which is in form an acceptance by a principal through his agent, though the person assuming to act as agent has not then been so authorized, there can or cannot be a withdrawal of the offer before the ratification of the acceptance? I can find no authority in the books to warrant the contention that an offer made, and in fact accepted by a principal through an agent or otherwise, can be withdrawn. The true view, on the contrary, appears to be that the doctrine as to the retrospective action of ratification is applicable.

If we look at Mr. Brice's argument closely, it will be found to turn on this, — that the acceptance was a nullity, and unless we are prepared to say that the acceptance of the agent was absolutely a nullity, Mr. Brice's contention cannot be accepted. That the acceptance by the assumed agent cannot be treated as going for nothing is apparent from the case of *Walter* v. *James*, Law Rep. 6 Ex. 124. I see no reason

to take this case out of the application of the general principle as to ratification. The appeal therefore fails on all points.

Cotton, L. J. . . . But then it is said that on the 13th of January, 1887, the defendant entirely withdrew the offer he had made. Of course the withdrawal could not be effective, if it were made after the contract had become complete. As soon as the offer has been accepted the contract is complete. But it is said that there could be a withdrawal by the defendant on the 13th of January on this ground, that the offer of the defendant had been accepted by Scratchley, a director of the plaintiff company, who was not authorized to bind the company by acceptance of the offer, and therefore that until the company ratified Scratchley's act there was no acceptance on behalf of the company binding on the company, and therefore the defendant could withdraw his offer. Is that so? The rule as to ratification by a principal of acts done by an assumed agent is that the ratification is thrown back to the date of the act done, and that the agent is put in the same position as if he had had authority to do the act at the time the act was done by him. Various cases have been referred to as laying down this principle, but there is no case exactly like the present one. The case of *Hagedorn* v. *Oliverson*, 2 M. & S. 485, is a strong case of the application of the principle. It was there pointed out how favorable the rule was to the principal, because till ratification he was not bound, and he had an option to adopt or not to adopt what had been done. In that case the plaintiff had effected an insurance on a ship in which another person was interested, and it was held that long after the ship had been lost the other person might adopt the act of the plaintiff, though done without authority, so as to enable the plaintiff to sue upon the policy. Again, in *Ancona* v. *Marks*, 7 H. & N. 686, where a bill was indorsed to and sued on in the name of Ancona, who had given no authority for that purpose, yet it was held that Ancona could, after the action had been brought, ratify what had been done, and that the subsequent ratification was equivalent to a prior authority so as to entitle Ancona to sue

upon the bill. It was said by Mr. Brice that in that case there was a previously existing liability of the defendant toward some person; but the liability of the defendant to Ancona was established by Ancona's authorizing and ratifying the act of the agent, and a previously existing liability to others did not affect the principle laid down.

The rule as to ratification is of course subject to some exceptions. An estate once vested cannot be divested, nor can an act lawful at the time of its performance be rendered unlawful by the application of the doctrine of ratification. The case of *Walter* v. *James*, Law Rep. 6 Ex. 124, was relied on by the appellant, but in that case there was an agreement between the assumed agent of the defendant and the plaintiff to cancel what had been done before any ratification by the defendant; in the present case there was no agreement made between Scratchley and the defendant that what had been done by Scratchley should be considered as null and void.

The case of *Bird* v. *Brown*, 4 Ex. 786, which was also relied on by the appellant, is distinguishable from this case. There it was held that the ratification could not operate to divest the ownership which had previously vested in the purchaser by the delivery of the goods before the ratification of the alleged *stoppage in transitu.* So also in *Lyell* v. *Kennedy*, 18 Q. B. D. 796, the plaintiff, who represented the lawful heir, desired, after the defendant Kennedy had acquired a title to the estate by means of the Statute of Limitations, and after the title of the heir was gone, to ratify the act of Kennedy as to the receipt of rents, so as to make the estate vest in the heir. In my opinion, none of these cases support the appellant's contention.

I think the proper view is that the acceptance by Scratchley did constitute a contract, subject to its being shown that Scratchley had authority to bind the company. If that were not shown, there would be no contract on the part of the company, but when and as soon as authority was given to Scratchley to bind the company, the authority was thrown back to the time when the act was done by Scratchley, and

prevented the defendant withdrawing his offer, because it was then no longer an offer, but a binding contract.

This point therefore must also be decided against the appellant. Another point was raised as to misrepresentation, but, having regard to the evidence, in my opinion that has not been made out. The appeal therefore fails.

LOPES, L. J., also delivered a concurring opinion.

Appeal dismissed.

§ 38.] McCLINTOCK *v.* SOUTH PENN OIL CO.

146 PENNSYLVANIA STATE, 144. — 1892.

ASSUMPSIT for breach of contract to purchase by assignment a land contract existing between plaintiff and one Donaldson. Judgment for plaintiff. Defendant appeals.

Plaintiff's agent made the sale without having written authority, and indorsed a memorandum of it upon the Donaldson contract. Subsequently plaintiff ratified the act in writing by making, signing, and acknowledging upon the Donaldson contract a written transfer of her interest in it. Defendant refused to accept this transfer or to pay the purchase price. Plaintiff, relying on the assignment, did not perform the conditions of the Donaldson contract, nor did defendant, and it was forfeited.

MR. JUSTICE MITCHELL. The receipt by plaintiff's husband expressed the fact of a sale, by the acknowledgment of receipt of part of the purchase money, and fixed the time and amount of the remaining payment. All the other terms of the contract, including the identification of the subject-matter, were shown by the original agreement of Donaldson, on which the receipt was indorsed. The two papers thus constituted one instrument, which, so far as appears on its face, was a sufficient memorandum in writing to satisfy the Statute of Frauds. Its defect in that regard was *dehors* the instrument itself, and lay in the want of written authority in the hus-

band to act as agent for his wife. Had his authority been in writing at that time, even though on a separate paper, no question of the validity and binding force of the contract could have arisen. His action as agent was, however, formally ratified and adopted by the wife, in writing, before any rescission or change of position in any way by the defendant.

The exact question before us, therefore, is whether such ratification by the wife, of its own force, perfected and validated the agent's original contract, or whether it still required acceptance by the grantee.

No case precisely in point has been found, and we are left to determine the question on general principles. It is conceded that a deed tendered by the vendor, but refused by the vendee, will not validate a parol contract, and it is argued that the present case stands upon the same footing. But I apprehend that the rule in question results from the common-law requirement that every writing must be accepted before it becomes a contract. It is sometimes said, however, that the reason a deed tendered is ineffectual under the statute, is that until such tender the vendor was not bound; the vendee could not have held him, and, there being therefore a want of mutuality in the agreement, equity will not specially enforce it. Whether the equitable doctrine of mutuality has any proper place in cases arising under the Statute of Frauds, is a vexed question on which our decisions are not in harmony, and are badly in need of review and authoritative settlement. See *Tripp* v. *Bishop*, 56 Pa. 424; *Meason* v. *Kaine*, 63 Pa. 335; *Sands* v. *Arthur*, 84 Pa. 479, and the comment upon them by Judge Reed in his treatise on the Statute of Frauds, § 367. But whatever the foundation of the rule, it is doubtful if the case of ratification of an agent's act comes fairly within it. If the agent had been properly authorized, the contract would have bound both parties in the first instance; and the settled rule is that ratification is equivalent in every way to plenary prior authority. The objection of want of mutuality is not good in many cases of dealing with an agent, for if he exceeds his authority, actual

and apparent, his principal will not be bound, yet may ratify, and then the other party will be bound from the inception of the agreement. The *aggregatio mentium* of the parties need not commence simultaneously. It must co-exist; but there must be a period when the question of contract or no contract rests on the will of one party to accept or reject a proposition made, and this interval may be long or short. The offer, of course, may be revoked or withdrawn at any time prior to acceptance, but after acceptance it is too late. The contract is complete. If, in the present case, the defendants had written a letter to plaintiff, stating that they had made the agreement with her husband as agent, but that, his authority not being in writing, they requested her to send them a written ratification, and thereupon she had written and mailed an acceptance and ratification of her agent's act, there could be no question of the contract. *Hamilton* v. *Insurance Co.*, 5 Pa. 339, and cases cited in 3 Am. & Eng. Encyc. of Law, 856, tit. Contract; and 13 Am. & Eng. Encyc. of Law, 233, tit. Mail. And, in effect, that is just what the defendant did here. It made the original agreement with the husband, evidenced by his indorsement on the Donaldson contract, which was delivered into its possession. On the day that payment was called for by the indorsed agreement, the defendant further indorsed on the contract an assignment by husband and wife, which would be a written ratification of the most formal kind, of the husband's previous act, and, as the jury have found, delivered it to the husband unconditionally, for execution and acknowledgment. The defendant's consent to the contract sued upon was thus manifested; and upon acceptance by plaintiff, the contract became binding as a common-law contract of both parties, and upon her signature it became a contract in writing within all the requirements of the statute. The objects of the act, certainty of subject-matter, precision of terms, reliability of evidence, and clearness of intent of the landowner are all secured, and we see no particular in which either the letter or the policy of the statute has been violated.

The cases cited by appellee, though not decisions on the precise point, tend to sustain the conclusion here reached. *Maclean* v. *Dunn*, 4 Bing. 722, was under the English statute, which requires only that the agent should be "lawfully authorized;" but the opinion of Lord Chief Justice Best illustrates the effectiveness of ratification as equivalent to antecedent authority. In our own case of *McDowell* v. *Simpson*, 3 W. 129, the opinion of Kennedy, J., is clearly expressed that a lease by an agent in excess of any authority, either parol or written, may be ratified, but the ratification, to create a valid term for seven years, must be in writing. So far as the case goes, it is directly in line with our present conclusion, and it has never been questioned, but, on the contrary, is cited with approval in *Dumn* v. *Rothermel*, 112 Pa. 272.

This disposes of the main question in the case, and with it the exceptions relating to the measure of damages fall. The plaintiff recovered only the contract price to which she was entitled. . . . Judgment affirmed.

§ 38.] DODGE *v.* HOPKINS.

14 Wisconsin, 630. — 1861.

Action to recover instalments alleged to be due upon a land contract. Verdict and judgment for plaintiff. Defendant appeals.

Plaintiff's agent sold the lands without authority. The question arises as to the effect of plaintiff's ratification.

Dixon, C. J. (after deciding that the agent's acts were unauthorized). 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 plaintiff, by his sole act of ratification, make the contract obligatory upon him? We answer both these questions in the negative. The covenants were mutual, — those of the defendant for the payment of the 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. (N.Y.) 435; and *Townsend* v. *Hubbard,* 4 Hill (N.Y.), 351, 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 applica-

tion 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 validity 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 (N. Y.), 107, 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. (N. Y.) 587 (67 Am. Dec. 87), the court say: "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 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 Reimsdyk*, 9 Cranch, 153; *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.

(The court then considers the effect of the unauthorized contract under the Statute of Frauds.)

No original authority to the agent making the contract having been shown, and no evidence offered on the trial of such ratification as bound the defendant, it follows that the judgment must be reversed, and a new trial awarded.

Ordered accordingly.[1]

7. Competency of principal.

§ 15.] PHILPOT *v.* BINGHAM.

55 Alabama, 435. — 1876.

[Reported herein at p. 18.]

[1] The doctrine of this case is approved and applied in *Atlee* v. *Bartholomew*, 69 Wis. 43 (1887).

8. Form of ratification.

§ 40.] HEATH *v.* NUTTER ET AL.

50 MAINE, 378. — 1862.

WRIT OF ENTRY. Defendants claim under a deed from one Robbins, by his attorney Rich, and, in case the power of attorney to Rich should be insufficient, offered to show a ratification of the conveyance by Robbins, by receiving the consideration and by oral statements. This testimony was excluded, and the power held insufficient. Plaintiff claims under a quit-claim deed from Robbins.

APPLETON, C. J. The power of attorney to Rich did not empower him to convey the demanded premises to the inhabitants of Tremont. The authority "to grant any and all *discharges* by deed or otherwise, both personal and real," as fully as the principal might do, cannot be fairly construed as enabling the agent to convey by bill of sale, or by deed of warranty, all the personal and real estate of his principal. Nor can the authority to convey by deed be found elsewhere.

Whenever any act of agency is required to be done in the name of the principal under seal, the authority to do the act must be conferred by an instrument under seal. A power to convey lands must possess the same requisites, and observe the same solemnities as are necessary in a deed directly conveying the land. *Gage* v. *Gage*, 30 N. H. 420; Story on Agency, §§ 49, 50; *Montgomery* v. *Dorion*, 6 N. H. 250. So the ratification of an unauthorized conveyance by deed must be by an instrument under seal. Story on Agency, § 252. A parol ratification is not sufficient. *Stetson* v. *Patten*, 2 Greenl. 359; *Paine* v. *Tucker*, 21 Me. 138; *Hanford* v. *McNair*, 9 Wend. 54; *Despatch Line Co.* v. *Bellamy Manuf. Co.*, 12 N. H. 205.

The plaintiff received his conveyance with a full knowledge of the equitable rights of the tenants. The remedial processes of a court of equity may perhaps afford protection to the defendants. At common law their defence fails.

Defendants defaulted.

§ 40.] McINTYRE *v.* PARK.

11 GRAY (Mass.), 102. — 1858.

CONTRACT, for the non-performance of an indenture whereby defendants agreed to purchase a parcel of land of plaintiff. Verdict for plaintiff. Defendant alleges exceptions.

The contract was signed by a co-purchaser in Park's name without Park's authority. The judge ruled that evidence was competent to show Park's adoption or ratification of this unauthorized execution of the instrument.

METCALF, J. We express no opinion on the question whether the sum of five hundred dollars, mentioned in the agreement upon which this action is brought, is a penalty or liquidated damages. That point was ruled in the defendant's favor, and the plaintiff has not excepted to the ruling.

The evidence of the defendant's ratification or adoption of the agreement executed in his name was rightly admitted; and he, by such ratification or adoption, became answerable for a breach of that agreement. *Merrifield* v. *Parritt*, 11 Cush. (Mass.) 590. In that case the agreement was not under seal; and the defendant contends that a sealed instrument, executed without previous authority, can be ratified only by an instrument under seal. However this may be elsewhere, by the law of Massachusetts such instrument may be ratified by parol. *Cady* v. *Shepherd*, 11 Pick. (Mass.) 400; *Swan* v. *Stedman*, 4 Met. (Mass.) 548; see also 1 Am. Leading Cases, 4th ed. 450; Collyer on Part. 3d Am. ed. sec. 467; Story on Agency, 5th ed. secs. 49, 51, 242, and notes; *McDonald* v. *Eggleston*, 26 Vt. 154. The cases in which this doctrine has been adjudged were those in which one partner, without the previous authority of his co-partners, executed a deed in the name of the firm. But we do not perceive any reason for confining the doctrine to that class of cases. . . .

All the other rulings and instructions to which exceptions have been alleged we think were correct; and we deem it unnecessary to do more than simply to affirm them.

Exceptions overruled.

§ 40.] KOZEL *v.* DEARLOVE.

144 Illinois, 23. — 1892.

Action in the nature of an action for specific performance. The contract was signed by an agent of the vendor upon terms differing from those fixed by the agent's written authority. The vendor orally assented to the terms as changed. Petition dismissed. Petitioner brings writ ot error.

Bailey, C. J. . . . The only question presented by the record which we need consider is, whether Clark was authorized to sign the contract sought to be enforced, or a note or memorandum thereof, by any written instrument signed by Dearlove, as required by the second section of the Statute of Frauds. That he had competent written authority to sell the lots in question at certain specified prices, and upon certain prescribed terms, is not disputed. But the written instrument gave him no authority to sell at lower prices or upon different terms. No one, we presume, would claim that, if he had undertaken to do so without consulting his principal, his act would have had any legal validity, or have been enforceable against the principal. The agent was just as powerless to make such sale as he would have been if no written authority had existed. To sell upon different terms required a new and further authority, and such new authority, to be valid under the Statute of Frauds, must itself have been in writing, and signed by the principal.

It is of no avail to show that the modified terms were communicated to Dearlove, and were assented to by him, and that he directed the execution of the contract on those

terms. The authority thus given to the agent was not in writing, and so was not a compliance with the requirements of the statute. We think the petition was properly dismissed, and the decree will therefore be affirmed.

Decree affirmed.

9. Legality of act ratified.

§ 43.] MILFORD BOROUGH *v.* MILFORD WATER CO.

124 PENNSYLVANIA STATE, 610. — 1889.

ASSUMPSIT by the water company against the borough upon a contract for the supply of water during the year 1884–1885. Judgment for plaintiff. The borough appeals. When the agreement was made in 1875, the chief burgess and two of the councilmen were officers, and another of the councilmen was a stockholder, in the plaintiff company. Only two members of the council were not interested in the company. In subsequent years the number of town officers interested in the water company was less, and in some years no officer was so interested. During those years the borough used and paid for the water. During 1884–1885 no member of the borough council was interested in the water company, but the borough refused to pay for the water.

MR. CHIEF JUSTICE PAXSON (after deciding that the contract of 1875 was void under the provisions of a statute which made it a misdemeanor, punishable by fine and forfeiture of office, for a burgess or councilman to be interested in a contract for supplies for the borough). It appeared, however, upon the trial below, that the borough had been using and paying for this water for several years; that upon some occasions when the bills were passed there was less than a majority of councils who were members of the water company, and some years in which there were no members of councils who were also members of said company. From

this it was urged that there was a ratification of the contract by councils. The learned judge below adopted this view, and entered judgment *non obstante* on the verdict in favor of the water company. This will not do.

There was no ratification of the contract because there was no contract to ratify. The water company never contracted with the borough. They contracted with themselves to supply the latter with water; to that agreement the borough was not a party in a legal sense. It is true, the borough might, after its councils had become purged of the members of the water company, have passed an ordinance similar to ordinance No. 2, and thus have entered into a new contract. But no such ordinance was passed, and neither councils nor the officers of the municipality can contract in any other way. It is one of the safeguards of municipal corporations that they can only be bound by a contract authorized by an ordinance duly passed. The Act of 1860 is another and a valuable safeguard thrown around municipalities. It was passed to protect the people from the frauds of their own servants and agents. It may be there was no fraud, actual or intended, in the present case, but we will not allow it to be made an entering wedge to destroy the Act of 1860. Of what possible use would that Act be if its violations are condoned, and its prohibited, criminally-condemned contracts allowed to be enforced under the guise of an implied ratification? It is too plain for argument that the payment by councils for some years for water actually furnished, created no contract to accept and pay for it in the future. Nor was this suit brought upon any such implied contract. On the contrary it was brought upon the contract authorized by ordinance No. 2; it has nothing else to rest upon, and with the destruction of its foundation the superstructure crumbles.

The judgment is reversed, and judgment is now entered for the defendant below *non obstante veredicto.*

§ 44.] WORKMAN *v.* WRIGHT.

33 OHIO STATE, 405. — 1878.

ACTION upon a promissory note payable to Workman, and signed with the name of Wright and one Edington. Wright denied the execution of the note on his part. Workman set up that Wright had ratified his signature and promised to pay the note. Judgment for defendant. Plaintiff brings error.

WRIGHT, J. Under the pleadings and findings of the court below, it may be assumed that the name of Calvin Wright was a forgery, as there was evidence tending to show the fact; and we cannot say that the conclusion reached, in this respect, was clearly against the testimony. It is claimed, however, that his admissions, and promises to pay the note, ratified the unauthorized signature.

Had Workman, the owner of the note, taken it upon the faith of these admissions, or had he at all changed his status by reason thereof, such facts would create an estoppel, which would preclude Wright now from his defence. This appears from most of the authorities cited in the case. But no foundation for an estoppel exists. All these statements of Wright, whatever they were, were made after Workman became the owner of the paper. Workman did not act upon them at all; he was in no way prejudiced by them, nor did they induce him to do, or omit to do, anything whatever to his disadvantage. But it is maintained that, without regard to the principle of estoppel, these admissions and promises are a ratification of the previously unauthorized act, upon the well-known maxim, *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.*

It is said that a distinction exists between the classes of cases to which this principle applies. Where the original act was one merely voidable in its nature, the principal may ratify the act of his agent, although it was unauthorized. But where the act was void, as in case of forgery, it is said

no ratification can be made, independent of the principle of estoppel, to which we have alluded. Most of the authorities cited by counsel for plaintiff in error are of the first class, where the act was only voidable.

Bank v. *Warren*, 15 N. Y. 577, was where one partner, without authority, and for his own exclusive benefit, indorsed his own note in the firm name, his co-partner was held bound by subsequent promise to pay it, without any independent consideration.

In *Crout* v. *De Wolf*, 1 R. I. 393, the third clause of the head note is, "Where the person whose signature is forged, promises the forger to pay the note, this amounts to ratification of the signature, and binds him." But an examination of the case shows that evidence was offered to prove that plaintiff had bought the paper in consequence of what defendant said to him, and the court charged that if, before purchasing the note, plaintiff asked defendant if he should buy, and he was told he might, defendant could not excuse himself on the ground of forgery. So that the case may be put upon the ground of estoppel, without relying upon the ground stated in the head note quoted.

Harper v. *Devene*, 10 La. An. 724, was where a clerk of a house signed the name of the house by himself as agent. Defendant, a member of the house, afterward took the note, corrected its date, and promised to pay it; and this was held a ratification to make him liable. In this case, and many like it, it may be remarked that the agent assumed to have authority, and does the act under that belief; but in case of a forgery, there is no such authority and no such belief.

The case of *Forsyth* v. *Day*, 46 Me. 177, involves the principle of estoppel.

The cases of *Bank* v. *Crafts*, 4 Allen, 447, and *Howard* v. *Duncan*, 3 Lansing, 175, sustain the views of plaintiff in error, holding that a forgery may be ratified, independently of the principle of estoppel, and in the absence of any new consideration for the ratifying promise, — a conclusion, however, to which we cannot agree.

The case in 3 Lansing is criticised in 3 Albany Law Journal, 331.

Upon the other hand, there are authorities holding that a forgery cannot be ratified. There is a fully considered case in the English Exchequer: *Brooke* v. *Hook*, 3 Albany Law Journal, 255; 24 Law Times, 34. This was a case where defendant's name was forged, and he had given a written memorandum, that he would be responsible for the bill. Chief Baron Kelly places his opinion upon the grounds: (1) That defendant's agreement to treat the note as his own, was in consideration that plaintiff would not prosecute the forger; and, (2) that there was no ratification, as to the act done, — the signature to the note was illegal and void. And though a voidable act may be ratified, it is otherwise when the act is originally, and in its inception, void. The opinion fully recognizes the proposition, that where acts or admissions alter the condition of the holder of the paper the party is estopped, but it is necessary that such a case should be made. It is further held, that cases of ratification are those where the act was pretended to have been done for, or under the authority of, the party sought to be charged, which cannot be in case of a forgery. A distinction is also made between civil acts, which may be made good by subsequent recognition, and a criminal offence, which is not capable of ratification. Baron Martin did not concur. In *Woodruff & Robinson* v. *Munroe*, 33 Md. 147, this is held: "If, in an action against an indorser of a promissory note by the *bona fide* holders thereof, it be shown that the indorsement was not genuine, and the defendant did not ratify or sanction it prior to the maturity of the note and its transfer to plaintiff, he is not liable. But if he adopted the note prior to its maturity, and by such adoption assisted in its negotiations, he would be estopped from setting up the forgery in a suit by a *bona fide* holder. But any admissions, by the defendant, made subsequently to the maturity of the note, would not be evidence that he had authorized the indorsement of his name thereon." See also *Williams* v. *Bayley*, L. R. 1 Appeals, H. L. 200.

In *McHugh* v. *County of Schuylkill*, 67 Pa. St. 391, the defence to a bond was forgery. The court below charged that if the obligor subsequently approved and acquiesced in the forgery or ratified it, the bond was binding on him. It was held that, there being no new consideration, the instruction was error; also, that a contract infected with fraud was void, not merely voidable, and confirmation without a new consideration was *nudum pactum*. See also *Negley* v. *Lindsay*, 67 Pa. St. 217. Daniel recognizes this proposition. 2 Daniel, Neg. Inst. § 1352.

Upon principle we cannot see how a mere promise to pay a forged note can lay the foundation for liability of the maker so promising, when the promise was made, as it was, under the circumstances set forth in the record. In addition to the fact that there are no circumstances to create an estoppel, there was no consideration for the promise. Wright received nothing, and it is a simple *nudum pactum*. The consideration for a promise may be either an advantage to the promisor or a detriment to the promisee, but here neither exists. Wright had signed a note, and when the one in suit was shown him, said he would pay it, supposing it to be the one he had signed. He was an ignorant man who could not read writing, though he could sign his name, and when he saw the paper, seeing that the signature spelled his name, and being unable to read the body of the instrument, he said it was all right, and he would pay it. But the promise was without that consideration which would make it a binding contract. Judgment affirmed.

§ 44.] WELLINGTON *v.* JACKSON.

121 Massachusetts, 157. — 1876.

Contract against the maker of a promissory note. Defence, that defendant never made the note. Judgment for plaintiff, on the ground that defendant had acknowledged the signature. Defendant alleges exceptions.

GRAY, C. J. Although the signature of Edward H. Jackson was forged, yet if, knowing all the circumstances as to that signature, and intending to be bound by it, he acknowledged the signature, and thus assumed the note as his own, it would bind him, just as if it had been originally signed by his authority, even if it did not amount to an estoppel *in pais*. *Greenfield Bank* v. *Crafts*, 4 Allen, 447; *Bartlett* v. *Tucker*, 104 Mass. 336, 341. The answer of the jury to the question of the court shows that they found for the plaintiffs upon this ground, and renders immaterial the instructions given or requested upon the subject of estoppel. . . . Exceptions overruled.

10. Legal effects of ratification.

§ 46.] DEMPSEY *v.* CHAMBERS.

154 MASSACHUSETTS, 330. — 1891.

TORT, to recover for the breaking of a plate-glass window in plaintiff's building by the negligence of one McCullock. Judgment for plaintiff.

Plaintiff ordered coal of defendant. McCullock, without authority, delivered the coal in behalf of defendant, and in so doing carelessly broke the window. Defendant, with full knowledge of McCullock's act, presented a bill for the coal to plaintiff and demanded payment.

HOLMES, J. This is an action of tort to recover damages for the breaking of a plate-glass window. The glass was broken by the negligence of one McCullock, while delivering some coal which had been ordered of the defendant by the plaintiff. It is found as a fact that McCullock was not the defendant's servant when he broke the window, but that the "delivery of the coal by McCullock was ratified by the defendant, and that such ratification made McCullock in law the agent and servant of the defendant in the delivery of the

coal." On this finding, the court ruled, "that the defendant, by his ratification of the delivery of the coal by McCullock, became responsible for his negligence in the delivery of the coal." The defendant excepted to this ruling, and to nothing else. We must assume that the finding was warranted by the evidence, a majority of the court being of opinion that the bill of exceptions does not purport to set forth all the evidence on which the finding was made. Therefore, the only question before us is as to the correctness of the ruling just stated.

If we were contriving a new code to-day, we might hesitate to say that a man could make himself a party to a bare tort, in any case, merely by assenting to it after it had been committed. But we are not at liberty to refuse to carry out to its consequences any principle which we believe to have been part of the common law, simply because the grounds of policy on which it must be justified seem to us to be hard to find, and probably to have belonged to a different state of society.

It is hard to explain why a master is liable to the extent that he is for the negligent acts of one who at the time really is his servant, acting within the general scope of his employment. Probably master and servant are "fained to be all one person," by a fiction which is an echo of the *patria potestas* and of the English frankpledge. *Byington* v. *Simpson*, 134 Mass. 169, 170. Fitz. Abr. Corone, pl. 428. Possibly the doctrine of ratification is another aspect of the same tradition. The requirement that the act should be done in the name of the ratifying party looks that way. *New England Dredging Co.* v. *Rockport Granite Co.*, 149 Mass. 381, 382; *Fuller & Trimwell's case*, 2 Leon. 215, 216; Sext. Dec. 5, 12, De Reg. Jur., Reg. 9; D. 43, 26, 13; D. 43, 16, 1, § 14, gloss. See also cases next cited.

The earliest instances of liability by way of ratification in the English law, so far as we have noticed, were where a man retained property acquired through the wrongful act of another. Y. B. 30 Ed. I. 128 (Rolls ed.); 38 Lib. Ass. 223,

pl. 9; S. C. 38 Ed. III. 18, Engettement de Garde. See Plowd. 8, *ad fin.*, 27, 31; Bract. fol. 158 b, 159 a, 171 b; 12 Ed. IV. 9, pl. 23. But in these cases the defendant's assent was treated as relating back to the original act, and at an early date the doctrine of relation was carried so far as to hold that, where a trespass would have been justified if it had been done by the authority by which it purported to have been done, a subsequent ratification might justify it also. Y. B. 7 Hen. IV. 34, pl. 1. This decision is qualified in Fitz. Abr. Bayllye, pl. 4, and doubted in Bro. Abr. Trespass, pl. 86; but it has been followed or approved so continuously, and in so many later cases, that it would be hard to deny that the common law was as there stated by Chief Justice Gascoigne. Godbolt, 109, 110, pl. 129; S. C. 2 Leon. 196, pl. 246; *Hull* v. *Pickersgill*, 1 Brod. & Bing. 282; *Muskett* v. *Drummond*, 10 B. & C. 153, 157; *Buron* v. *Denman*, 2 Exch. 167, 188; *Secretary of State in Council of India* v. *Kamachee Boye Sahaba*, 13 Moore, P. C. 22, 86; *Cheetham* v. *Mayor of Manchester*, L. R. 10 C. P. 249; *Wiggins* v. *United States*, 3 Ct. of Cl. 412.

If we assume that an alleged principal, by adopting an act which was unlawful when done, can make it lawful, it follows that he adopts it at his peril, and is liable if it should turn out that his previous command would not have justified the act. It never has been doubted that a man's subsequent agreement to a trespass done in his name and for his benefit amounts to a command, so far as to make him answerable. The *ratihabitio mandato comparatur* of the Roman lawyers, and the earlier cases (D. 46, 3, 12, § 4; D. 43, 16, 1, § 14; Y. B. 30 Ed. I. 128) has been changed to the dogma *æquiparatur* ever since the days of Lord Coke. 4 Inst. 317. See Bro. Abr. Trepass, pl. 113; Co. Lit. 207 a; Wingate's Maxims, 124; Com. Dig. Trespass, C, 1; *Eastern Counties Railway* v. *Broom*, 6 Exch. 314, 326, 327; and cases hereafter cited.

Doubts have been expressed, which we need not consider, whether this doctrine applied to the case of a bare personal

tort. *Adams* v. *Freeman*, 9 Johns. 117, 118; Anderson and Warberton, JJ., in *Bishop* v. *Montague*, Cro. Eliz. 824. If a man assaulted another in the street out of his own head, it would seem rather strong to say that, if he merely called himself my servant, and I afterwards assented, without more, our mere words would make me a party to the assault, although in such cases the canon law excommunicated the principal if the assault was upon a clerk. Sext. Dec. 5, 11, 23. Perhaps the application of the doctrine would be avoided on the ground that the facts did not show an act done for the defendant's benefit. *Wilson* v. *Barker*, 1 Nev. & Man. 409; S. C. 4 B. & Ad. 614, *et seq.; Smith* v. *Lozo*, 42 Mich. 6. As in other cases it has been on the ground that they did not amount to such a ratification as was necessary. *Tucker* v. *Jerris*, 75 Me. 184; *Hyde* v. *Cooper*, 26 Vt. 552.

But the language generally used by judges and text-writers, and such decisions as we have been able to find, is broad enough to cover a case like the present when the ratification is established. *Perley* v. *Georgetown*, 7 Gray, 464; *Bishop* v. *Montague*, Cro. Eliz. 824; *Saunderson* v. *Baker*, 2 Bl. 832; S. C. 3 Wils. 309; *Barker* v. *Braham*, 2 Bl. 866, 868; S. C. 3 Wils. 368; *Badkin* v. *Powell*, Cowper, 476, 479; *Wilson* v. *Tumman*, 6 Man. & G. 236, 242; *Lewis* v. *Read*, 13 M. & W. 834; *Buron* v. *Denman*, 2 Exch. 167, 188; *Bird* v. *Brown*, 4 Exch. 786, 799; *Eastern Counties Railway* v. *Broom*, 6 Exch. 314, 326, 327; *Roe* v. *Birkenhead, Lancashire, & Cheshire Junction Railway*, 7 Exch. 36, 41; *Ancona* v. *Marks*, 7 H. & N. 686, 695; *Condit* v. *Baldwin*, 21 N. Y. 219, 225; *Exum* v. *Brister*, 35 Miss. 391; *Galveston, Harrisburg, & San Antonio Railway* v. *Donahoe*, 56 Texas, 162; *Murray* v. *Lovejoy*, 2 Cliff. 191, 195; see *Lovejoy* v. *Murray*, 3 Wall. 1, 9; Story on Agency, §§ 455, 456.

The question remains whether the ratification is established. As we understand the bill of exceptions, McCullock took on himself to deliver the defendant's coal for his benefit

and as his servant, and the defendant afterwards assented to McCullock's assumption. The ratification was not directed specifically to McCullock's trespass, and that act was not for the defendant's benefit if taken by itself, but it was so connected with McCullock's employment that the defendant would have been liable as master if McCullock really had been his servant when delivering the coal. We have found hardly anything in the books dealing with the precise case, but we are of opinion that consistency with the whole course of authority requires us to hold that the defendant's ratification of the employment established the relation of master and servant from the beginning, with all its incidents, including the anomalous liability for his negligent acts. See *Coomes* v. *Houghton*, 102 Mass. 211, 213, 214; Cooley, Torts, 128, 129. The ratification goes to the relation, and establishes it *ab initio*. The relation existing, the master is answerable for torts which he has not ratified specifically, just as he is for those which he has not commanded, and as he may be for those which he has expressly forbidden. In *Gibson's case*, Lane, 90, it was agreed that, if strangers as servants to Gibson, but without his precedent appointment, had seized goods by color of his office, and afterwards had misused the goods, and Gibson ratified the seizure, he thereby became a trespasser *ab initio*, although not privy to the misusing which made him so. And this proposition is stated as law in Com. Dig. Trespass, C., 1; *Elder* v. *Bemis*, 2 Met. 599, 605. In *Coomes* v. *Houghton*, 102 Mass. 211, the alleged servant did not profess to act as servant to the defendant, and the decision was that a subsequent payment for his work by the defendant would not make him one. For these reasons, in the opinion of a majority of the court, the exceptions must be overruled.

Exceptions overruled.

§ 48.] GELATT *v.* RIDGE.

117 Missouri, 553. — 1893.

Action to recover compensation for services as a real-estate agent. Judgment for plaintiff. Defendant appeals.

Plaintiff was authorized to sell defendant's land upon prescribed terms. He sold with some variation from those terms. Defendant at first refused to carry out the sale as made, but later did so upon the purchaser's making some slight concessions.

Macfarlane, J. (omitting other matters). It is next contended that there can be no recovery, for the reason that the contract made by the agent varied from the terms of his authority, and that this would be the case though the terms of the sale made were more advantageous to the principal than was required under the letter of authority. There is no doubt, as a general principle of law, that an agent must act within the terms of his authority, and a substantial variance therefrom would defeat his right to compensation, though such variance may have been advantageous to his principal. *Nesbitt* v. *Helser*, 49 Mo. 383. Yet it is equally well settled that if the principal ratify the contract made by the agent, the substituted terms become a part of the original agreement and can be enforced as such. *Woods* v. *Stephens*, 46 Mo. 555, and cases cited.

The evidence tends to prove — indeed it is very conclusive — that defendant did fully approve and ratify the terms of sale as made by plaintiff, and under the instructions the jury must have so found.

The suit was not upon a *quantum meruit*, as claimed by defendant, but was upon the original contract as made and supplemented by the ratification and acceptance of defendant. If, as before stated, the departure, by the agent, from the terms of the authority given him, became, upon approval

and ratification by the principal, a part of the original contract, the compensation, if fixed therein, should be measured thereunder. *Nesbitt* v. *Helser*, *supra*. . . .

Judgment affirmed.

§ 48.] BRAY *v.* GUNN.

53 Georgia, 144. — 1874.

Action against defendant, as agent, for damages resulting from his violation of instructions. Judgment for defendant.

Plaintiffs sent defendant a draft for collection with instructions. Defendant collected, but did not obey instructions as to the currency in which payment should be received. Defendant informed plaintiffs of what he had done, and plaintiffs did not dissent.

McCay, J. If an agent, acting in good faith, disobey the instructions of his principal, and promptly informs the principal of what he has done, it is the duty of the principal, at the earliest opportunity, to repudiate the act if he disapprove. Silence in such a case is a ratification. See the case of *McLendon* v. *Wilson & Callaway*, 52 Ga. 41, from Troup County. Taking this correspondence altogether, we think the jury had a right to find that the plaintiffs were satisfied with the act of Gunn in taking the money in the Kimball funds, and that their dissatisfaction is an afterthought in consequence of the failure of Kimball. The evidence is convincing that if they had promptly notified Gunn of their dissatisfaction, he could have saved himself. Both the parties here were commercial men, and the rule is a fair and reasonable one that it is the duty of the principal promptly to answer the letters of his agent, and if he do not do so he is presumed to acquiesce in what the agent informs him he has done or proposes to do.

Judgment affirmed.

CHAPTER IV.

FORMATION OF THE RELATION BY ESTOPPEL.

§ 52.] BRONSON'S EXECUTOR *v.* CHAPPELL.

12 Wallace (U. S.), 681. — 1870.

Bill to foreclose a mortgage. Defence, payment to complainant's agent. Bill dismissed. Complainant appeals.

Mr. Justice Swayne delivered the opinion of the court.

But a single question has been argued in this court, and that is one arising upon the facts as developed in the record. This opinion will be confined to that subject.

William C. Bostwick, acting for Frederick Bronson, negotiated the sale of a tract of land in Wisconsin to the defendants. According to his custom in such cases, Bronson forwarded to Bostwick the draft of a contract to be executed by the buyers. At the foot of the draft was a note in these words: —

"William C. Bostwick, Esq., of Galena, is authorized to receive and receipt for the first payment on this contract. All subsequent payments to be made to F. Bronson, in the city of New York."

The defendants expressed to Bostwick a preference to receive a deed and give a mortgage. This was communicated to Bronson, who acceded to the proposition, and forwarded to Bostwick a deed and the draft of a bond and mortgage. On the 25th of March, 1865, the defendants paid to Bostwick $1500 of the purchase money, and executed the bond and mortgage to secure the payment of the balance. According to the condition of the bond it was to be paid to the obligee in the city of New York, in instalments, as follows: $781.20 on the 13th of November, 1865, and the

remaining sum of $4562.40 in seven equal annual payments, from the 12th of February, 1865, with interest thereon at the rate of 7 per cent. per annum. The contract was erroneously construed by Bronson as requiring the interest on all the instalments to be paid with each one as it fell due. The other parties seem to have acquiesced in this construction. On the 4th of December, 1865, the defendants paid to Bostwick, as the agent of Bronson, $825.36, in discharge of the amount claimed to be due on the 30th of November, 1865, and took his receipt accordingly. On the 28th of February, 1866, they paid Bostwick $980 to meet the second instalment and interest, as claimed, with exchange, and took his receipt as before. Bostwick failed in December, 1866. These moneys were never paid over to Bronson. He denied the authority of Bostwick to receive them, and demanded payment from the defendants. They refused, and Bronson thereupon filed this bill to foreclose the mortgage. The validity of these payments is the question presented for our determination.

Agents are special, general, or universal. Where written evidence of their appointment is not required, it may be implied from circumstances. These circumstances are the acts of the agent and their recognition, or acquiescence by the principal. The same considerations fix the category of the agency and the limits of the authority conferred. Where one, without objection, suffers another to do acts which proceed upon the ground of authority from him, or by his conduct adopts and sanctions such acts after they are done, he will be bound, although no previous authority exist, in all respects as if the requisite power had been given in the most formal manner. If he has justified the belief of a third party that the person assuming to be his agent was authorized to do what was done, it is no answer for him to say that no authority had been given, or that it did not reach so far, and that the third party had acted upon a mistaken conclusion. He is estopped to take refuge in such a defence. If a loss is to be borne, the author of the error must bear it. If

business has been transacted in certain cases, it is implied that the like business may be transacted in others. The inference to be drawn is, that everything fairly within the scope of the powers exercised in the past may be done in the future, until notice of revocation or disclaimer is brought home to those whose interests are concerned. Under such circumstances the presence or absence of authority in point of fact, is immaterial to the rights of third persons whose interests are involved. The seeming and reality are followed by the same consequences. In either case the legal result is the same.

(After giving the correspondence between Bronson and Bostwick.) This correspondence suggests several remarks:

Bostwick speaks of his employment as having been, and then being, an "agency" for Bronson. He inquires whether it was contemplated by Bronson to revoke it. Bronson does not deny or revoke it. He says the object of the memorandum was to repel the construction that the receipt of "the first *or other payments by the agent*" was "an implied waiver of the claim for exchange," and which was the same thing in effect, — a waiver of the stipulation in the contract that the money was to be paid to him "in the city of New York." It recognizes the authority of the agent to receive the subsequent payments as well as the first one, provided exchange were paid upon the former by the debtor.

The language employed by Bronson will admit of no other construction. It applies with full force to the bond of these defendants. They paid exchange as well as the principal and interest of the instalments in question. There is no evidence in the record that the authority thus admitted to exist was ever withdrawn. It must be presumed to have continued until the relations of the parties were terminated by Bostwick's failure and insolvency. Bostwick says in his deposition: "I advertised myself as the agent of the Bronson lands, which advertising was continued for a period of twelve or fourteen years." His testimony upon this subject is uncontradicted.

There are found in the record thirty-four letters from Bronson to Bostwick, all relating to business connected with the Bronson lands. The first letter bears date on the 12th of December, 1855, the last one on the 27th of November, 1865. They are in all respects such as would naturally be addressed by a principal to an agent in whose judgment, integrity, and diligence he had the fullest confidence. They refer to sales, to the delivery of deeds and contracts, the payment and collection of taxes, and a variety of other matters in the same connection. Ten of the letters authorize the delivery of contracts on the receipt of the first payment by Bostwick. Fourteen of them authorize the collection, or acknowledge the transmission, of other moneys. Bronson was absent in Europe from the 9th of October, 1861, until about the middle of December, 1864. During that time his business was attended to by his attorney, E. S. Smith, Esq., of the city of New York. There are in the record twenty-one letters from him to Bostwick. They are of the same character with those from Bronson. Twelve of them acknowledge the collection and transmission of moneys for Bostwick. It is not stated whether they were the first or later payments. But the circumstances show clearly that they were in most, if not in all instances, of the latter character. All collections were made, and all business relating to the lands was transacted through Bostwick. In one of these letters, Smith says: —

"P. S. — Mr. Bronson, in a letter received, writes: 'I am willing to sell lands through Mr. Bostwick upon an advance of price equal to the depreciation of paper money at the time of sale,'" &c.

A further analysis of the letters of these parties would develop a large array of additional facts bearing in the same direction and hardly less cogent than those to which we have adverted. There is no intimation in any of them that Bostwick was regarded as the agent of the buyers, that he was not regarded as the agent of Bronson, or that he had in any instance exceeded his authority. It is unnecessary to pursue

the subject further. Viewed in the light of the law, we think the evidence abundantly establishes two propositions: —

1. That Bostwick was the agent of Bronson, and as such authorized to receive the payments in question.

2. If this were not so, that the conduct of Bronson — numerous transactions between him and Bostwick, and the course of business by the latter, authorized or known to and acquiesced in by the former — justified the belief by the defendants that Bostwick had such authority and that Bronson was bound accordingly.

Decree affirmed.

§ 52.] JOHNSON v. HURLEY. Cf. H's Agency 67.

115 Missouri, 513. — 1893.

Ejectment. Equitable defence, which was tried as a suit for specific performance. Decree for defendant.

Macfarlane, J. The suit is ejectment to recover possession of the northwest quarter, section 5, township 53, range 7, in Ralls County. The answer set up an equitable defence to the effect that defendant had purchased the land from the duly authorized agent of the plaintiffs, had received from said agent deeds purporting to be duly executed and acknowledged by plaintiffs and purporting to convey to him said lands; that he had paid to said agent the entire purchase price for the land, to wit, $1,650, its fair value, and had been put in possession under his said purchase; that he had in good faith fenced said land and erected thereon a dwelling-house and other valuable and permanent buildings and improvements, and prayed specific performance. The reply denied the new matter of the answer.

The cause was tried as a suit in equity for specific performance of a contract for the conveyance of land, and a decree entered for defendant according to the prayer of the answer, and plaintiffs appealed.

The evidence showed that . . . Finlay A. Johnson, assuming to act as the agent of plaintiffs and their sister Phœbe, sold to defendant the east half of said northwest quarter for the sum of $800, and afterwards, on January 10, 1882, he sold him the west half of said quarter for the sum of $850; that defendant paid the purchase money to the said Finlay A. Johnson at the respective dates of sale, and received from him deeds purporting to be signed and acknowledged by plaintiffs and said Phœbe. Under these purchases defendant went into possession of the land, which was then unimproved, fenced it, built a dwelling-house and other buildings thereon, and reduced it to cultivation.

The evidence further showed that the deeds and the acknowledgments were forged by the said Finlay A., and that plaintiffs never knew that contracts or deeds had been made, or that money had been paid their agent, until 1884, after he had absconded.

The question is whether these sales made by their agent were binding on plaintiffs.

I. The evidence leaves no doubt that plaintiffs' agent made the contracts with defendant for the sale of the land, assuming to act for them; that he received the purchase money, delivered a deed to which their names were signed, and to which an acknowledgment, certified in due form by the said agent as notary public, was attached; and that under said transaction, and relying on it, defendant in good faith went into the possession and made valuable and lasting improvements. Under these circumstances, if said agent was authorized to make the sale, it would be the grossest injustice and fraud on defendant to deny him the benefit of the contract for the reason that it was not in writing as required by the Statute of Frauds. To prevent such injustice courts of equity have uniformly held that such part performance relieves the contract of the infirmity created by the statute, and specific performance will not be denied. *Emmel* v. *Hayes*, 102 Mo. 186; *Bowles* v. *Wathan*, 54 Mo. 261.

II. The question then is, whether Finlay A. Johnson had authority from plaintiffs to make a sale of these lands.

It may be stated, in the first place, as a general rule, that an agent can only act within the circumscribed authority given him by his principal; and one who deals with him is put upon his guard by the very fact that he is dealing with an agent, and he must ascertain for himself the nature and extent of his authority. The burden is, therefore, always cast upon one claiming the benefit of a contract made with another who assumes to act as the agent of a third person, to establish by satisfactory evidence that the contract relied upon was within the scope of the agent's authority. Mechem on Agency, secs. 276–289, and cases cited.

III. The evidence, we think, fails to establish an express authority from the plaintiffs to the said Finlay A. Johnson to conclude contracts for the sale of these Missouri lands, or to make the particular contract in question. Both of them in testifying in the case very emphatically deny such authority, and no evidence was introduced by defendant showing directly that any was given. The authority, then, if any existed, must be implied or presumed from the conduct of the parties.

The general rule, which accords with the decisions in this State, is given by Mechem in his work on Agency, as follows: "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." *Rice* v. *Groffmann*, 56 Mo. 434; *Summerville* v. *Railroad*, 62 Mo. 391.

We are of the opinion that authority to make these sales is clearly implied from the conduct of the parties. One of the owners of the land, a preacher, lived in the State of Illinois; the other two, unmarried ladies, lived in the State of New Jersey. So far as appears, no one of them ever visited the land or gave any personal attention to it. From 1868 to 1883 it was in the hands of agents for sale. For most of this time the said Finlay A. Johnson, a son of one of the owners and a nephew of the other two, a lawyer, a notary public and judge of a court, who lived in the State of New Jersey, was one of the agents. The acknowledgment of deeds was made before him; he paid taxes; he delivered deeds to purchasers; he collected purchase money; took notes and deeds of trust in his own name for deferred payments; he removed other local agents, and made settlements with them; he was, in fact, for years the medium through whom all the business was transacted.

. . . .

The manner in which this business was transacted through this agent for ten or more years was known in the community and to defendant. All inquiries in regard to the land were made of this agent; prices were given by him; purchase money paid to and deeds received from him; lands leased and rents collected by him, — and all under express authority. There was also evidence that a former agent, the one removed by Finlay A., made sales and executed contracts upon which plaintiffs afterwards made deeds. That agent was removed for withholding money, and Finlay A. was appointed, with express authority to collect purchase money. Why this agent, with all these express powers, should have been restricted only in the matter of making sales, is not explained by the evidence.

We think the conduct of plaintiffs in the transaction of this

business such as would reasonably have induced defendant to believe that the agent with whom he dealt had authority to make the sales; and after having acted upon that belief, paid the purchase price, and expended large sums in improvements, plaintiffs will not now be heard to dispute the authority.

We are well satisfied with the conclusions reached by the circuit judge, and affirm the judgment. All concur, except Barclay, J., who is absent.

§ 52.] BRADISH *v.* BELKNAP ET AL.

41 VERMONT, 172. — 1868.

[Reported herein at p. 135.]

§ 52.] DREW *v.* NUNN.

L. R. 4 QUEEN'S BENCH DIVISION (C. A.), 661. — 1879.

[Reported herein at p. 24.]

CHAPTER V.

FORMATION OF THE RELATION BY NECESSITY.

§ 55.] BENJAMIN *v.* DOCKHAM.

134 MASSACHUSETTS, 418. — 1883.

HOLMES, J. The plaintiff's declaration was for milk delivered to the defendant by the plaintiff at the defendant's request. His proof was of a delivery to the defendant's wife, who was living apart from her husband, without means of support, by reason of his cruelty. The only ground of exception which we are asked to consider is, that there was a variance between the declaration and proof. If there were such a variance, as the case has been tried on its merits, and it appears from the statement of the defendant's counsel himself that there can have been no surprise, an amendment would be allowed. *Peck* v. *Waters*, 104 Mass. 345, 351; *Cleaves* v. *Lord*, 3 Gray, 66. But we think no amendment is necessary. The allegation of delivery to the defendant would seem to be sufficient in a common court, even when the delivery was to a third person at the defendant's request. *Bull* v. *Sibbs*, 8 T. R. 327, 328; 2 Chitty Pl. (7th ed.) 47, n. *l;* (6th ed.) 56, n. *w.* *A fortiori* when it was to the defendant's wife, who at common law is one person with her husband. *Ross* v. *Noel*, Bull. N. P. 136; *Ramsden* v. *Ambrose*, 1 Stra. 127. And 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.

Exceptions overruled.

§ 59.] TERRE HAUTE AND INDIANAPOLIS RAILROAD CO. *v.* McMURRAY.

98 INDIANA, 358. — 1884.

ACTION for compensation for services as surgeon. Judgment for plaintiff. Defendant appeals.

ELLIOTT, J. The facts in this case are simple, and lie within a narrow compass, but the questions of law are important and difficult.

Frankfort is a way station on the line of appellant's road, distant many miles from the principal offices of the company and from the residences of its chief officers. At this station, at one o'clock of the morning of July 2, 1881, Thomas Coon, a brakeman in the service of the appellant, had his foot crushed between the wheel of a car of the train on which he was employed as a brakeman, and the rail of the track. The injury was such as demanded immediate surgical attention. The conductor of the train requested the appellee, who was a surgeon, residing in the town of Frankfort, to render the injured man professional aid, and informed the appellee that the company would pay him for such services. At the time the accident happened, and at the time the surgeon was employed, there was no officer superior to the conductor at the town of Frankfort. There was at the station a resident agent who had full knowledge of the injury to Coon, and of appellee's employment. This agent was in telegraphic communication with the principal officers of the company, but did not communicate with them. The trial court held the appellant liable for the reasonable value of the services rendered by the appellee, and awarded him $100.

In ordinary cases, a conductor or other subordinate agent has no authority to employ surgical assistance for a servant of the corporation who receives an injury or becomes ill. We do not doubt that the general rule is that a conductor has no authority to make contracts with surgeons, and if this principle governs all cases the discussion is at an end; but

we do not think it does rule every case, for there may be cases so strongly marked as to constitute a class in themselves and one governed by a different rule.

The authority of an agent is to be determined from the facts of the particular case. Facts may exist which will greatly broaden or greatly lessen an agent's authority. A conductor's authority in the presence of a superior agent, may dwindle into insignificance; while in the absence of a superior it may become broad and comprehensive. An emergency may arise which will require the corporation to act instantly, and if the conductor is the only agent present, and the emergency is urgent, he must act for the corporation, and if he acts at all, his acts are of just as much force as those of the highest officer of the corporation. In this instance the conductor was the highest officer on the ground; he was the sole representative of the corporation; he it was upon whom devolved the duty of representing the corporation in matters connected within the general line of his duty in the sudden emergency which arose out of the injury to the fellow-servant immediately under his control; either he, as the superior agent of the company, must, in such cases, be its representative, or it has none. There are cases where the conductor is the only representative of the corporation that in the emergency it can possibly have. There are cases, where the train is distant from the supervision of superior officers, where the conductor must act, and act for the company, and where, for the time, and under the exigencies of the occasion, he is its sole representative, and if he be its only representative, he must, for the time and the exigency, be its highest representative. Simple examples will prove this to be true. Suppose, for illustration, that a train is brought to a halt by the breaking of a bolt, and that near by is a mechanic who can repair the broken bolt and enable the train to proceed on its way, may not the conductor employ the mechanic? Again, suppose a bridge is discovered to be unsafe, and that there are timbers at a neighboring mill which will make it safe, may not the conductor, in behalf of his principal, em-

ploy men to haul the timber to the bridge? Once more, suppose the engineer of a locomotive to be disabled, and that it is necessary to at once move the train to avoid danger, and there is near by a competent engineer, may not the conductor employ him to take the train out of danger? In these examples we mean to include, as a silent factor, the fact that there is an emergency, allowing no time for communicating with superior officers, and requiring immediate action. If it be true that there are cases of pressing emergency where the conductor is on the special occasion the highest representative of the company, then it must be true that he may do, in the emergency, what the chief officer, if present, might do. If the conductor is the only agent who can represent the company, then it is inconceivable that he should, for the purposes of the emergency, and during its existence, be other than the highest officer. The position arises with the emergency, and ends with it. The authority incident to the position is such, and such only, as the emergency imperatively creates.

Assuming, as we may justly do, that there are occasions when the exigency is so great, and the necessity so pressing, that the conductor stands temporarily as the representative of the company, with authority adequate to the urgent and immediate demands of the occasion, we inquire what is such an emergency as will clothe him with this authority and put him in the position designated. Suppose that a locomotive is overturned upon its engineer, and he is in immediate danger of great bodily harm, would it not be competent for the conductor to hire a derrick, or a lifting apparatus, if one were near at hand, to lift the locomotive from the body of the engineer? Surely some one owes a duty to a man, imperilled as an engineer would be in the case supposed, to release him from peril; and is there any one upon whom this duty can be so justly put as upon his employer? The man must, in the case supposed, have assistance, and do not the plainest principles of justice require that the primary duty of yielding assistance should devolve upon the employer rather than on

strangers? An employer does not stand to his servants as a stranger; he owes them a duty. The cases all agree that some duty is owing from the master to the servant, but no case that we have been able to find defines the limits of this duty. Granting the existence of this general duty, and no one will deny that such a duty does exist, the inquiry is as to its character and extent. Suppose the axle of a car to break because of a defect, and a brakeman's leg to be mangled by the derailment consequent upon the breaking of the axle, and that he is in immediate danger of bleeding to death unless surgical aid is summoned at once, and suppose the accident to occur at a point where there is no station and when no officer superior to the conductor is present, would not the conductor have authority to call a surgeon? Is there not a duty to the mangled man that some one must discharge? and if there be such a duty, who owes it, the employer or a stranger? Humanity and justice unite in affirming that some one owes him this duty, since to assert the contrary is to affirm that upon no one rests the duty of calling aid that may save life. If we concede the existence of this general duty, then the further search is for the one who in justice owes the duty, and surely, where the question comes between the employer and a stranger, the just rule must be that it rests upon the former.

(After discussing various authorities,[1] the court proceeds.) If we are right in our conclusion that an emergency may arise which will constitute a conductor, for the time and the emergency, the chief officer of the corporation present, then these cases are strongly in support of our position that he may, in cases of urgent necessity, bind the corporation by contracting with a surgeon. For, once it is conceded that

[1] *Marquette, &c. R.* v. *Taft*, 28 Mich. 289; *Northern Central Ry.* v. *State*, 29 Md. 420; *Walker* v. *Great Western Ry.*, L. R. 2 Exch. 228; *Swazey* v. *Union Mfg. Co.*, 42 Conn. 556; *Atlantic, &c. R.* v. *Reisner*, 18 Kans. 458; *Atchison, &c. R.* v. *Reecher*, 24 Kans. 228; *Toledo, &c. Ry.* v *Rodrigues*, 47 Ill. 188; *Toledo, &c. Ry.* v. *Prince*, 50 Ill. 26; *Indianapolis, &c. R.* v. *Morris*, 67 Ill. 295; *Cairo, &c. R.* v. *Mahoney*, 82 Ill. 73.

the officer having a right to represent the company is the company, it inevitably follows that his contract is that of the corporation. These cases do deny, however, in general terms, the authority of a station agent or conductor to employ a surgeon, but they affirm that if the superintendent has notice of the services rendered by the surgeon, and does not disavow the agent's acts, the company will be bound. It is to be noted that in all of these cases the company was held liable on the ground of ratification by the superintendent, and there was really no decision of any other question than that a failure of the superintendent to disavow the contract of the conductor or station agent rendered the company liable. There was no discussion of the authority of a conductor in cases of immediate and urgent necessity. The reasoning of the court in these cases strongly indicates that the act of the superior officer, whoever he may be, on the occasion and under the emergency, would be deemed the act of the corporation which he assumes to represent. In the last of these cases it is said: "While a railroad company is under no legal obligation to furnish an employé, who may receive injuries while in the service of the company, with medical attendance, yet, where a day laborer has, by an unforeseen accident, been rendered helpless when laboring to advance the prosperity and the success of the company, honesty and fair dealing would seem to demand that it should furnish medical assistance." If it be conceded that honesty and fair dealing require that medical assistance should be furnished, then the law requires it, for the law always demands honesty and fair dealing. It would be a cruel reproach to the law, and one not merited, to declare that it denied to an injured man what honesty and "fair dealing require."

If it should appear that a man had been denied what honesty and fair dealing require of his master, and death should result, it would seem clear, on every principle of justice, that the master would be responsible for the servant's death. Of course this duty should not rest upon the master in ordinary cases, but should rest upon him in extraordinary

cases, where immediate medical assistance is imperatively demanded. The case of *Tucker* v. *St. Louis*, *&c.*, *R. W. Co.*, 54 Mo. 177, does decide that a station agent has no authority to employ a surgeon, but no element of pressing necessity entered into the case. There is no authority cited in support of the opinion, nor is there any reasoning. All that is said is: "It is only shown that they" (the station agent and the conductor) "were agents of defendant in conducting its railroad business, which of itself could certainly give them no authority to employ physicians, for the defendant, to attend to, and treat, persons accidentally injured on the roads." It may be that this statement is true in ordinary cases, but when we add the element of immediate and pressing necessity, a new and potent factor is introduced into the case. A brief opinion was rendered in *Brown* v. *Missouri*, *&c.*, *R. W. Co.*, 67 Mo. 122, declaring that the superintendent of the company could not bind the company for "a small bill of drugs furnished a woman who had been hurt by the locomotive or cars of the defendant." It may be said of the last cited case that it presented no feature of emergency requiring prompt action, and for aught that appears in the meagre opinion of a very few lines, there may have been no necessity for action. But it is further to be said of it, that if it is to be deemed as going to the extent of denying the right of one of the principal officers to contract for medicine in a case of urgency, it finds no support from any adjudged case. The case of *Mayberry* v. *Chicago*, *&c.*, *R. R. Co.*, 75 Mo. 492, is not in point, for there a physician employed to render medical aid, and employed for no other purpose, undertook to contract for boarding for an injured man.

The learned counsel for appellant says, in his argument: "In several of these cases the court takes occasion to say that humanity, if not strict justice, requires a railroad company to care for an employé who is injured without fault on his part in endeavoring to promote the interests of the company. Whilst this may be true, I think that humanity and

strict justice, too, would at least permit the company to adopt the proper means for exercising the required care, and of determining the cases wherein it ought to be exercised."

It seems to us that while the concession of the counsel is required by principle and authority, his answer is far from satisfactory. Can a man be permitted to die while waiting for the company to determine when and how it shall do what humanity and strict justice require? Must there not be some representative of the company present, in cases of dire necessity, to act for it? The position of counsel will meet ordinary cases, but it falls far short of meeting cases where there is no time for deliberation, and where humanity and justice demand instant action. From whatever point of view we look at the subject, we shall find that the highest principles of justice demand that a subordinate agent may, in the company's behalf, call surgical aid, when the emergencies of the occasion demand it, and when he is the sole agent of the company in whose power it is to summon assistance to the injured and suffering servant. Humanity and justice are, for the most part, inseparable, for all law is for the ultimate benefit of man. The highest purpose the law can accomplish is the good of society and its members; and it is seldom, indeed, that the law refuses what humanity suggests. Before this broad principle bare pecuniary considerations become as things of little weight. There may be cases in which a denial of the right of the conductor to summon medical assistance to one of his train men would result in suffering and death; while, on the other hand, the assertion of the right can, at most, never do more than entail upon the corporation pecuniary loss. It may not do even that, for prompt medical assistance may, in many cases, lessen the loss to the company by preventing loss of life or limb.

The authority of a conductor of a train in its general scope is known to all intelligent men, and the court that professes itself ignorant of this matter of general notoriety avows a lack of knowledge that no citizen who has the

slightest acquaintance with railroad affairs would be willing to confess. It is true that the exact limits of his authority cannot be inferred from evidence that he is the conductor in charge of the train, but the general duty and authority may be. This general authority gives him control of the train men and of the train, and devolves upon him the duty of using reasonable care and diligence for the safety of his subordinates. The authority of the conductor may be inferred, as held in *Columbus, &c., R. W. Co.* v. *Powell*, 40 Ind. 37, from his acting as such in the control of the train, but this inference only embraces the ordinary duties of such an agent. Many cases declare that the conductor, in the management of the train and matters connected with it, represents the company. It is true that the agency is a subordinate one, confined to the subject-matter of the safety of the train and its crew, and the due management of matters connected with it; but although the conductor is a subordinate agent, he yet has broad authority over the special subject committed to his charge. It was said in *Jeffersonville Ass'n* v. *Fisher*, 7 Ind. 699, that "It is not the name given to the agent, but the acts which he is authorized to do, which must determine whether they are valid or not, when done." In another case it was said: "The authority of an agent being limited to a particular business does not make it special; it may be as general in regard to that, as though its range were unlimited." *Cruzan* v. *Smith*, 41 Ind. 288. This subject was discussed in *Toledo, &c., R. W. Co.* v. *Owen*, 43 Ind. 405, where it was said: "A general agent is one authorized to transact all his principal's business, or all of his principal's business of some particular kind. A special agent is one who is authorized to do one or more special things, and is usually confined to one or more particular transactions, such as the sale of a tract of land, to settle and adjust a certain account, or the like. That the authority of an agent is limited to a particular kind of business does not make him a special agent. Few, if any, agents of a railroad company do, or can attend to, every kind of business of the company, but to each

one is assigned duties of a particular kind, or relating to a particular branch or department of the business." Wharton says: "A general agent is one who is authorized by his principal to take charge of his business in a particular line." Wharton on Agency, 117. It results from these familiar principles, that the conductor of a train, so far as concerns the direct and immediate management of the train when it is out on the road, is, in the absence of some superior officer, the general agent of the company; but even general agents do not have universal powers, and the authority of such agents is to be deduced from the facts surrounding the particular transaction. 2 Greenl. Ev. secs. 64–64a. In some instances, then, the conductor is the general agent of the company; and we think it clear, upon principle and authority, that he is such an agent for the purpose of employing surgical assistance where the brakeman of his train is injured while the train is out on the road, and where there is no superior officer present, and there is an immediate necessity for surgical treatment. A conductor cannot be regarded as having authority to employ a surgeon when the train is not on the road under his control, or where there is one higher in authority on the ground, or where there is no immediate necessity for the services of a surgeon.

. . . .

Judgment affirmed.

ZOLLARS, C. J., dissents on the ground that it is not sufficiently shown that the conductor had authority to bind the company by his contract with appellee.

ON PETITION FOR A REHEARING.

ELLIOTT, J. Counsel for the appellant misconceive the drift of the reasoning in our former opinion, as well as the conclusion announced. We did not decide that a corporation was responsible generally for medical or surgical attention given to a sick or wounded servant; on the contrary, we were careful to limit our decision to surgical services ren-

dered upon an urgent exigency, where immediate attention was demanded to save life or prevent great injury. We held that the liability arose with the emergency, and with it expired.

We did hold that where the conductor was the highest representative of the corporation on the ground, and there was an emergency requiring immediate action, he was authorized to employ a surgeon to give such attention as the exigency of the occasion made imperiously necessary; but we did not hold that the conductor had a general authority to employ a surgeon where there was no emergency, or where there was a superior agent on the ground. We think our decision was well sustained by the authorities there cited, and that it is further supported by the reasoning in *Chicago, &c., R. W. Co.* v. *Ross*, 31 Albany L. J. 8, 112 U. S. 377, and *Pennsylvania Company* v. *Gallagher*, 40 Ohio St. 637; S. C. 48 Am. R. 689.

If the conductor, who is the superior agent of the company on the ground, cannot represent the principal so far as to employ a surgeon to render professional services to an injured servant, and prevent the loss of life or great bodily harm, then it must be said, as it was said by the Supreme Court of the United States in *Chicago, &c., R. W. Co.* v. *Ross, supra*, that "If such conductor does not represent the company, then the train is operated without any representative of its owner."

The decision in *Louisville, &c., R. R. Co.* v. *McVay*, 98 Ind. 391, is not in conflict with our conclusion in the present case. There the road-master was not the superior agent within reach, and there was no emergency demanding immediate action. These are features which very essentially distinguish the two cases. We held in this case a doctrine held in the case cited, namely, that the conductor, or other subordinate agent, has no general authority to employ a surgeon for a sick or wounded servant of the company; but we also held that where the conductor, in control of the company's train and its brakeman, is the highest agent on

the ground, he does possess an authority commensurate with an existing and pressing emergency. It seems clear to us, upon principles of fair justice and ordinary humanity, that some one must possess authority to meet an urgent exigency by employing surgical aid to save from death or great and permanent injury a servant under his control. As the reasoning in the *McVay* case clearly shows, there is still another material difference between the two cases, and that is this: There the road-master appeared to only have authority over the repairs of the road; while here it appears that the conductor had charge of the injured servant, and was the highest officer of the corporation capable of acting as its representative in the emergency which had so suddenly arisen.

So far as concerns the general principle involved, there is no conflict, but rather harmony, for the *McVay* case clearly recognizes the doctrine that the highest agent capable of acting for the company may employ surgical aid in the proper case. Petition overruled.

§ 59.] GWILLIAM *v.* TWIST ET AL.

1895. 1 QUEEN'S BENCH DIVISION, 557.

64 LAW JOURNAL REPORTS, QUEEN'S BENCH DIVISION (C. A.), 474 (1895).

ACTION for damages for injuries received through the careless management of defendants' omnibus. Judgment for plaintiff. Defendants appeal.

Defendants' servant Harrison, to whom had been intrusted the driving of the omnibus, was stopped by a police officer for intoxication, and forbidden to drive the omnibus further. One Veares volunteered to drive the omnibus to defendants' yard, which was distant about a quarter of a mile. Harrison and the conductor acquiesced, and both remained in the omnibus, Harrison shouting directions to Veares to drive

carefully at the corners. Veares drove negligently and injured plaintiff. The county court judge (Judge Chalmers) found for the plaintiff. An appeal was taken to the Queen's Bench Division.

[1895, 1 Q. B. D. 557.]

LAWRANCE, J. The question is whether Harrison and the conductor, by acquiescing in Veares driving the omnibus, constituted Veares the servant of the defendants, so as to render the defendants liable for the accident which happened while he was so driving. The judge held that, if they had the power to do so, they must be taken to have authorized Veares to drive on the defendants' behalf. Then, had they the power to do so? In the absence of an express authority in that behalf, is an authority to employ Veares to be implied? I think that, having regard to the necessity which the judge apparently found as a fact to have arisen, such an authority must be implied. The judgment must therefore be affirmed.

WRIGHT, J. This case raises a very serious question of law, upon which, so far as I am aware, there is little or no authority. The view, however, which I take upon the matter is this. I think that in cases of sudden emergency a servant has an implied authority from his employer to act in good faith according to the best of his judgment for that employer's interests, subject to this, that in so doing he must violate no express limitation of his authority, and must not act in a manner which is plainly unreasonable. And in cases to which this doctrine applies I think the servant must be regarded as not the less acting within the scope of his employment because his judgment happens to be mistaken and wrong. Of course a servant cannot have any implied authority to do on behalf of his master any act which it would be illegal for the master to do himself; for instance, if there had been a statute or by-law applying to those omnibuses, making it illegal to employ an unlicensed person to drive them, I think the defendants' servants would not, how-

ever great the emergency was, have been acting within the scope of their employment in authorizing such a person as Veares to drive on their employers' behalf. But no such illegality was shown here. Such, then, being my view of the legal doctrine applicable to the facts of this case, I cannot say that there was not some evidence on which the county court judge might find that such an emergency existed as would bring the case within the limits of that doctrine. Whether upon the question of fact I should have arrived at the same conclusion is another matter; but I am of opinion that we cannot upon the question of law say that the judgment was wrong. Appeal dismissed.

The defendants then appealed to the Court of Appeal.

[64 L. J. Q. B. 474.]

LORD ESHER, M. R. This case raises a question of great importance, which, however, it does not seem to me, we have now to decide. That question is whether, where it may become necessary for a servant who is intrusted with a particular duty to delegate that duty to some one else, that delegation makes that person to whom the duty has been so delegated the servant of the master so as to render the master liable for his wrongful acts. This proposition, however, is clear, — namely, that a servant employed for a particular purpose can have no authority to delegate that duty to any one else, unless there is a necessity that he should do so. The servant cannot delegate unless there is a necessity to do so. The question here is whether there was any evidence upon which the county court judge could reasonably find that there was a necessity for the driver of the defendants' omnibus to delegate his duty to Veares. First of all, I do not think that the county court judge did find, as a fact, that there was any such necessity; but afterwards, when he delivered judgment, he did seem to assume that, upon the facts of the case, such a necessity did arise. The question, therefore, is whether the servant had any right to delegate his duty without first

consulting his master, for, if he had an opportunity to do so, no question of necessity could arise. Here the driver became incapable of driving the omnibus; such incapacity being the result of an order given by the police forbidding him to drive it. It is obvious that the omnibus, which was only about a quarter of a mile from the defendants' yard, might have been left standing in reasonable safety where it was, and the horses might have been watched, while the defendants' servants communicated with their masters for directions as to what was to be done. The moment that was clear, the county court judge would have been bound to tell the jury that no case of necessity had been made out for the driver delegating his duty without first communicating with his masters. There was no evidence upon which he could reasonably say that there was any necessity on the part of the driver to delegate his duty to Veares so as to make the defendants liable by reason of Veares being their servant for this purpose. I agree with the remarks of Mr. Baron Parke in *Hawtayne* v. *Bourne*, 7 M. & W. 595, and of Chief Justice Eyre in *Nicholson* v. *Chapman*, 2 H. Black. 254, that the delegation of duty by reason of necessity is confined to certain well-known cases — as, for instance, in the cases of the master of a ship, or of an acceptor of a bill of exchange for the honor of the drawer, or of salvage; but those are cases which are excepted, some by the law of nations, and some by the law of this country. The appeal must therefore be allowed.

SMITH, L. J. I am of the same opinion. . . . It is, however, said that such circumstances may arise that the coachman is constituted an agent of his master by necessity. That may be so, but the agent must be placed in such a position that he has to act upon his own responsibility and common sense when he is not able to communicate with his principal. A *résumé* of the cases which show what constitutes an agent of necessity in the case of goods carried on board ship, will be found in Carver's Carriage by Sea, where it is said, in section 299, that, "If there is a fair expectation of

obtaining directions, either from the owners of the goods or from agents known by the master to have authority to deal with the goods, within such a time as would not be imprudent, the master must make every reasonable endeavor to get those directions; and his authority to sell does not arise until he has failed to get them," — that is to say, that until he has made that endeavor and failed, he does not become an agent of necessity. I adopt the words of the passage which I have read. It is true that when the county court judge gave his findings here on the questions of fact in the first instance, he did not deal with the question whether a case of necessity arose; but when he delivered judgment, after further consideration, he said that it was clearly necessary that some one should drive the omnibus home. It appears to me, however, that that did not make Harrison an agent of necessity within the law applicable to such a question. It is impossible, upon the admitted facts of the case, to say that there was evidence that Harrison was, under the circumstances of the case, an agent of necessity. The omnibus was within a quarter of a mile of his masters' yard, and it is obvious that he had an opportunity of communicating with them. Upon these grounds, I think that Harrison was not acting within the scope of his authority when he permitted Veares to drive the omnibus home, and consequently the defendants are not liable for the injuries caused by Veares' negligence.

Rigby, L. J. I am of the same opinion. The county court judge here found certain facts, and reserved the question of law. I should be inclined to say that in his judgment he assumes there was a necessity from the facts found. I think there was no evidence here of such a necessity as is required by law to justify Harrison in placing Veares in the position of driver, and by so doing make the defendants liable for his negligence. I do not think any of the cases even point to such a liability unless there be such a necessity; and, for the reasons that have been given, I do not think there is any evidence of such necessity in this case.

Appeal allowed.

CHAPTER VI.

TERMINATION OF THE AGENCY.

1. By accomplishment of purpose.

§ 61.] ROWE, TRUSTEE *v.* RAND, RECEIVER.

111 INDIANA, 206. — 1887.

INTERVENING petition by Rowe, designating himself "trustee," against Rand, as receiver of the Indiana Banking Co., praying that an allowance be made in his favor for funds deposited in the bank by him as "trustee." Defence: (1) denial; (2) payment; (3) release. Judgment for defendant. Petitioner appeals.

Rowe was intrusted with certain property belonging jointly to the First N. B. (No. 55) and the Indiana Banking Co., with instructions to sell it and divide the proceeds between the two companies in a given proportion. Rowe sold the property and, with the consent of both companies, deposited the proceeds to his own credit, under the name of "William Rowe, trustee," in the bank of the Indiana Banking Co. He used this designation because he already had accounts there in his individual name, in his name as "agent," and in his name as "receiver." Later the First N. B. (No. 55) was replaced by a new organization known as the First N. B. (No. 2556) which succeeded to the assets and business of the former bank. Later still the Indiana Banking Co. became insolvent, and defendant Rand was appointed receiver. The insolvent company owed the two national bank organizations a large sum of money, and there was an additional claim which was contested. The representatives of the three organizations met, before the appointment of the receiver, adjusted their claims and signed mutual releases.

Notwithstanding this settlement Rowe claimed the right to recover the amount deposited by him in his name as trustee.

NIBLACK, J. A trustee is one to whom an estate has been conveyed in trust, and, consequently, the holding of property in trust constitutes a person a trustee. An agent is one who acts for, or in place of, another, denominated the principal, in virtue of power or authority conferred by the latter, to whom an account must be rendered. In the case of an ordinary agency for the sale or disposition of property, the title to the property, as well as to the proceeds, remains in the principal. Such an agency may be revoked at any time, in the discretion of the principal. It may, also, be in like manner terminated by the renunciation of the agent, he being liable only for the damages which may result to the principal. An agency may also be, and is, revoked by operation of law in certain cases, among which are the bankruptcy of the principal, the extinction of the subject-matter of the agency, the loss of the principal's power over such subject-matter, or the complete execution of the business for which the agency was created; also, where the changed condition becomes such as to produce an incapacity in either party to proceed with the business of the agency. Where a power or authority to act as agents is conferred on two persons, the death of one of them terminates the agency. So, where two persons are jointly appointed agents to take charge of a particular business for a specified term or purpose, and one of them becomes incapacitated before the term is completed or the purpose is accomplished, the other cannot proceed alone without the consent of the principal, and hence the agency is thereby in effect revoked. Abbott's and Bouvier's Law Dictionaries, titles "Agent," and "Agency;" 1 Wait, Actions and Defences, 289; 1 Parsons on Cont. 39, *et seq.;* Story on Agency, secs. 38, 42, 474, 499.

The inevitable inference from these legal propositions is, that when two principals jointly appoint an agent to take charge of some matter in which they are jointly interested, and a severance of their joint interest afterwards occurs, the severance revokes the agency.

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.

Applying the general principles thus announced to the facts herein above stated, our conclusions are, that Rowe became an agent only, and hence not a trustee, for the sale of the property left with him by the banks; that he acquired no lien either upon the property or its proceeds which would have prevented the national banks, or either one of them, as the situation might have authorized at the time, from revoking Rowe's authority as their agent, and demanding an accounting from the banking company as to the money deposited with it by him, or from demanding such an accounting without revoking Rowe's agency; that, consequently, the money so deposited constituted a fund upon which the national banks might have based a claim against the banking company when the agreement was mutually entered into on the tenth day of August, 1883, and that, if, in fact, all claim against that fund was released by the agreement of that date, the agency of Rowe in all matters concerning the fund was thereby revoked, leaving him in a position to demand only an accounting for his services and expenses.

(The court further holds that the mutual releases must be construed to include all claims of every kind held by the national banks against the banking company.)

Judgment affirmed.

§ 61.] AHERN *v.* BAKER.

34 MINNESOTA, 98. — 1885.

ACTION for damages for refusal to perform a contract to sell land. Answer, revocation of authority of agent who concluded the sale. Demurrer to answer overruled.

VANDERBURGH, J. The defendant, on the ninth day of September, 1884, 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 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 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 Parsons on Cont. 71.

Order affirmed, and case remanded.

§ 61.] SHORT *v.* MILLARD.

68 ILLINOIS, 292. — 1873.

[Reported herein at p. 166.]

2. By revocation.

§ 65.] BROOKSHIRE *v.* BROOKSHIRE.

8 IREDELL'S LAW (N. C.), 74. — 1847.

ASSUMPSIT to recover expenses and commissions as agent. Judgment for plaintiff for expenses only. Both parties appeal.

Plaintiff's authority was by deed. Defendant revoked the authority by parol. The expenses were incurred in part after such parol revocation. The court charged that, if there was a parol revocation, plaintiff could recover for expenses and services up to the time of the revocation, but not after. The verdict was for expenses up to the time of the revocation.

NASH, J. It is not denied by the plaintiff, that, in this case, it was within the power of the defendant to put an end to his agency, by revoking his authority. Indeed, this is a doctrine, so consonant with justice and common sense, that it requires no reasoning to prove it. But he contends, that it is a maxim of the common law, that every instrument must be revoked by one of equal dignity. It is true an instrument under seal cannot be released or discharged by an instrument not under seal or by parol; but we do not consider the rule as applicable to the revocation of powers of attorney, especially to such an one as we are now considering. The authority of an agent is conferred at the mere will of his principal, and is to be executed for his benefit; the principal, therefore, has the right to put an end to the agency whenever he pleases, and the agent has no right to insist upon acting, when the confidence at first reposed in him is withdrawn. In this case, it was not necessary to enable the

plaintiff to execute his agency, that his power should be under seal; one by parol, or by writing of any kind, would have been sufficient; it certainly cannot require more form to revoke the power than to create it. Mr. Story, in his treatise on Agency, page 606, lays it down that the revocation of a power may be, by a direct and formal declaration publicly made known, or by an informal writing, or by parol; or it may be implied from circumstances, and he nowhere intimates, nor do any of the authorities we have looked into, that when the power is created by deed, it must be revoked by deed. And, as was before remarked, the nature of the connection between the principal and the agent seems to be at war with such a principle. It is stated, by Mr. Story, in the same page, that an agency may be revoked by implication, and all the text-writers lay down the same doctrine. Thus, if another agent is appointed to execute powers, previously intrusted to some other person, it is a revocation, in general, of the power of the latter. For this proposition, Mr. Story cites, *Copeland* v. *The Mercantile Insurance Company,* 6 Pick. 198. In that case, it was decided that a power, given to one Pedrick to sell the interest of his principal in a vessel, was revoked by a subsequent letter of instruction to him and the master, to sell. As then, an agent may be appointed by parol, and as the appointment of a subsequent agent supersedes and revokes the powers previously granted to another, it follows, that the power of the latter, though created by deed, may be revoked by the principal, by parol. But the case in Pickering goes further. The case does not state, in so many words, that the power granted to Pedrick was under seal, but the facts set forth in the case show that was the fact, and, if so, it is a direct authority in this case. This is the only point raised, in the plaintiff's bill of exceptions, as to the judge's charge.

(The court then decides against the defendant upon his appeal on a question of costs and of practice.)

Per Curiam. Judgment affirmed, on each appeal, and each appellant must pay the costs of his appeal.

§ 65.] HARTLEY AND MINOR'S APPEAL.

53 PENNSYLVANIA STATE, 212. — 1866.

PETITION to Orphans' Court. Petition denied. Petitioners appeal.

An heir of the estate of one Douglas gave to petitioners a power of attorney to collect all money and property coming to her from the estate of Douglas, with power to convey her interest in the real estate, the said Hartley and Minor to receive as compensation for their services one-half of the net proceeds so recovered. Later she gave a like power to one Howland, and in it revoked that to Hartley and Minor. The latter now petition the court, as attorneys for the heir, for a settlement of the administrator's accounts. Objected to because of power of attorney to Howland.

THOMPSON, J. There was no error committed by the court below in holding the power of attorney of Hannah Gallion to the appellants to be revocable. It was an ordinary agency, constituted by letter of attorney, to act for her to enforce a settlement of his accounts by the administrator of her father's estate, in which she was interested, and to collect any moneys or property that might belong or be coming to her. For these services the attorneys were to have one-half of the net proceeds of what they might receive or recover for her. The plaintiffs in error suppose that this clause rendered the power irrevocable by their principal, under the idea that it was a power coupled with an interest. This was a mistake, as all the authorities show. To impart an irrevocable quality to a power of attorney in the absence of any express stipulation, and as the result of legal principles alone, there must co-exist with the power an interest in the thing or estate to be disposed of or managed under the power. An instance of frequent occurrence in practice may be given of the assignment of vessels at sea, with a power to sell for the benefit of the holder of the power, or of anybody else who may have

advanced money and who it was agreed should be secured in that way. So where securities have been transferred with a power to sell, and generally, I presume, in all cases of property pledged for the security of money where there is an accompanying authority to sell to reimburse the lender or creditor. In *Hunt* v. *Rousmanier*, 8 Wheat. 174, this doctrine is clearly and fully elucidated in the opinion of Marshall, C. J. In *Bancroft* v. *Ashhurst*, 2 Grant, 513, a case tried at Nisi Prius before me, at which my brethren sat as assessors, there is a pretty full examination of the question herein involved, and all the authorities referred to, and the conclusion is fully in accordance with *Hunt* v. *Rousmanier*, and sustains the above view of a power coupled with an interest.

In the case in hand, the power and the interest could not co-exist. The interest the appellants would have would be in the net proceeds collected under the power, and the exercise of the power to collect the proceeds would *ipso facto* extinguish it entirely, or so far as exercised. Hence the appellants' interest would properly begin when the power ended. This distinction is noticed in *Hunt* v. *Rousmanier;* but neither by this test, nor by any other, was the power of attorney in question irrevocable, and this judgment must be affirmed.

Judgment affirmed.

§ 65.] BLACKSTONE *v.* BUTTERMORE.

53 Pennsylvania State, 266. — 1866.

Ejectment. Verdict and judgment for defendant. Plaintiff appeals.

Buttermore gave to one Davidson a power of attorney to sell the land in question, such instrument declaring that "this authority is irrevocable before the first day of May next." In April, Davidson sold the land to plaintiff, but defendant refused to perform. There was evidence that defendant had revoked the power before the sale to plaintiff,

and that plaintiff had notice of the revocation. The court charged that the power was revocable, and that if it was revoked and plaintiff had notice of it, he could not recover.

AGNEW, J. We have decided the substantial point in this case at the present term upon the appeal of Hartley and Minor from the Orphans' Court of Greene County, opinion by Thompson, J., 53 Pa. St. 212.

A power of attorney constituting a mere agency is always revocable. It is only when coupled with an interest in the thing itself, or the estate which is the subject of the power, it is deemed to be irrevocable, as where it is a security for money advanced or is to be used as a means of effectuating a purpose necessary to protect the rights of the agent or others. A mere power like a will is in its very nature revocable when it concerns the interest of the principal alone, and in such case even an express declaration of irrevocability will not prevent revocation. An interest in the proceeds to arise as mere compensation for the service of executing the power will not make the power irrevocable. Therefore, it has been held that a mere employment to transact the business of the principal is not irrevocable without an express covenant founded on sufficient consideration, notwithstanding the compensation of the agent is to result from the business to be performed and to be measured by its extent. *Coffin* v. *Landis*, 10 Wright, 426. In order to make an agreement for irrevocability contained in a power to transact business for the benefit of the principal binding on him, there must be a consideration for it independent of the compensation to be rendered for the services to be performed. In this case, the object of the principal was to make sale solely for his own benefit. The agreement to give his agent a certain sum and a portion of the proceeds, was merely to carry out his purpose to sell. But what obligation was there upon him to sell, or what other interest beside his own was to be secured by the sale? Surely his determination to sell for his own ends alone was revocable. If the reasons for making a sale had ceased to exist, or he should find a sale injurious to

his interests, who had a right to say he should not change his mind? The interest of the agent was only in his compensation for selling, and without a sale this is not earned. A revocation could not injure him. If he had expended money, time, or labor, or all, upon the business intrusted to him, the power itself was a request to do so, and on a revocation would leave the principal liable to him on his implied assumpsit. But it would be the height of injustice if the power should be held to be irrevocable merely to secure the agent for his outlay or his services rendered before a sale. The following authorities are referred to: *Hunt* v. *Rousmanier*, 8 Wheat. 174; Story on Agency, §§ 463, 464, 465, 468, 476, 477; Paley on Agency, 155; 1 Parsons on Cont. 59; *Irwin* v. *Workman*, 3 Watts, 357; *Smyth* v. *Craig*, 3 W. & S. 14.

The judgment is therefore affirmed.

§ 66.] BRADISH *v.* BELKNAP ET AL.

41 VERMONT, 172. — 1868.

ACTION on book account. Judgment for plaintiff on the special report of the auditor. Exceptions by defendants.

PIERPONT, C. J. The report in this case shows that, for a long period prior and up to 1863, one Brockway was the agent of the defendants in taking stoves about the country, and selling them as he could find purchasers. This fact was generally known, and was well known to the plaintiff. In 1863 Brockway and the defendants changed their arrangement, and Brockway ceased to be their agent in fact; but he continued the business of selling stoves, which he took of the defendants as before. It does not appear that this new arrangement was known to any one except Brockway and the defendants. No public notice was given of the fact. Brockway continued to hold himself out to the world as the agent of the defendants in the business, and was in the

habit of taking notes for stoves sold, payable to the defendants; and this was known to the defendants.

While the business was being so conducted, the plaintiff, believing Brockway to be the agent of the defendants, proposed to Brockway to buy a stove of him and pay in pine lumber. Brockway said he was selling the stoves for the defendants, and, if they wanted the lumber, he would take it and let him have the stove. Afterward Edson, one of the defendants, went to the plaintiff's, looked at the lumber, ascertained the price, and said it would answer their purpose. Afterward Edson went to the plaintiff's, and measured out a part of the lumber, and laid it by itself, and the plaintiff and Brockway subsequently measured out the remainder of the lumber charged, and the defendants and Brockway drew it away, and the defendants converted it to their own use. The plaintiff charged the lumber to the defendants, and took the stove, giving the defendants credit for it against the lumber.

Brockway during all this time was perfectly poor and irresponsible, and this fact was known by both parties. Brockway represented himself as the agent of the defendants, and the conduct of the defendants was such as to justify the plaintiff in regarding them as the principals; and we can hardly conceive it possible under the circumstances, that the defendants did not understand that the plaintiff so regarded them. And to allow them now to deny the agency and thus defeat the plaintiff's right to recover for the balance of the lumber, would be permitting them to perpetrate a palpable fraud on the plaintiff.

Judgment of the county court is affirmed.

3. By change affecting subject-matter.

§ 70.] TURNER *v.* GOLDSMITH.

1891. 1 QUEEN'S BENCH (C. A.), 544.

ACTION for damages for breach of contract of employment. Defence, destruction of defendant's manufactory by fire. Judgment for defendant. Plaintiff appeals.

LINDLEY, L. J. This is an action for breach of contract in not employing the plaintiff for the period of five years. The contract turns upon the construction of the agreement entered into by the parties, and the application of it in the events which have happened. The plaintiff wished to act as traveller to the defendant, and the defendant wished to engage him in that capacity. An agreement, dated January 31, 1887, was entered into between them, which contained this recital: —

"Whereas, in consideration of the agreement of the said A. S. Turner, the said company" (*i. e.,* Mr. Goldsmith, and any partner he might have) "agree to employ the said A. S. Turner as their agent, canvasser, and traveller, upon the terms and subject to the stipulations and conditions hereinafter contained; and in consideration of the premises the said A. S. Turner hereby agrees with the said company that he, the said A. S. Turner, shall and will diligently, faithfully, and honestly serve the said company as their agent, canvasser, and traveller, upon the terms and subject to the stipulations and conditions hereinafter contained."

Stopping there, we have a clear agreement by the company to employ the plaintiff, and by the plaintiff to serve the company — and on what terms? (1) That the agency shall commence as from January 31, 1887, and shall be determinable either by the company or Turner at the end of five years from the date of the agreement upon giving such notice as therein mentioned. (2) "The said A. S. Turner shall do his utmost to obtain orders for and sell the various goods manufactured or sold by the said company as shall be from

time to time forwarded or submitted by sample or pattern to him, at list price, to good and substantial customers." Clause 5 is only material because it repeats the words "manufactured or sold by the said company." The 8th clause provides for the plaintiff's remuneration by a commission on the goods sold by him. The other clauses are not material as regards the question before us.

It was contended by the defendant that the agreement did not contain any stipulation that the company should furnish the plaintiff with any samples, and that there was, therefore, no agreement to do what was necessary to enable him to earn commission. The answer to that is, that the company would not be employing the plaintiff within the meaning of the agreement unless they supplied him with samples to a reasonable extent. Then it was said that there is no undertaking by the company to go on manufacturing. It is true that there is no express, nor, so far as I see, any implied undertaking by the company to manufacture even a single shirt; they might buy the articles in the market. The defendant's place of business was burned down; the defendant has given up business, and has made no effort to resume it. The plaintiff then says, "I am entitled to damages for your breach of the agreement to employ me for five years." The defendant pleads that the agreement was conditional on the continued existence of his business. On the face of the agreement there is no reference to the place of business, and no condition as to the defendant's continuing to manufacture or sell. How, then, can such a condition as the defendant contends for be implied?

It was contended that the point was settled by authority. I will refer to three cases on the subject. In *Rhodes* v. *Forwood*, 1 App. Cas. 256, it was held that an action very similar to the present was not maintainable. But that case went on the ground that, there not being any express contract to employ the agent, such a contract could not be implied. In the present case we find an express contract to employ him.

In *Cowasjee Nanabhoy* v. *Lallbhoy Vullubhoy*, Law Rep. 3 Ind. App. 200, there was a contract in a partnership deed to employ one of the partners during his life as sole agent to effect purchases and sales on behalf of the partnership at a commission upon his sales. The partnership was dissolved by decree of the High Court of Bombay on the ground that the business could not be carried on at a profit. It was held that the employment was to sell on behalf of the partnership; that, the partnership having come to an end, the employment ceased, and that the partner could not claim any compensation, for that a contract to carry on the partnership during the claimant's life under all circumstances could not be implied.

Taylor v. *Caldwell*, 3 B. & S. 826, 833, contains some observations which are very much in point. Blackburn, J., there says: "There seems no doubt that where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible. . . . But this rule is only applicable when the contract is positive and absolute, and not subject to any condition, either express or implied, and there are authorities which we think establish the principle that where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled, unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continuing existence as the foundation of what was to be done, then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case before breach performance becomes impossible from the perishing of the thing without default of the contractor." The substance of that is that the contract will be treated as sub-

ject to an implied condition that it is to be in force only so long as a certain state of things continues, in those cases only where the parties must have contemplated the continuing of that state of things as the foundation of what was to be done. Here the parties cannot be taken to have contemplated the continuance of the defendant's manufactory as the foundation of what was to be done; for, as I have already observed, the plaintiff's employment was not confined to articles manufactured by the defendant. The action therefore, in my opinion, is maintainable.

The plaintiff then is entitled to damages, and in my opinion not merely to nominal damages; for, if I am right in my construction of the agreement, he has suffered substantial loss. We think, however, that £125 is too much, and the plaintiff's counsel having agreed to take our assessment of damages rather than be sent to a new trial, we assess them at £50, and direct judgment to be entered for the plaintiff for that amount.

Kay, L. J. The Lord Justice Lopes desires me to say that he concurs in our decision. If it had been shown that not only the manufactory but the business of the defendant had been destroyed by *vis major*, without any default of the defendant, I think that the plaintiff could not recover. But there is no proof that it is impossible for the defendant to carry on business in articles of the nature mentioned in the agreement. The contract is peculiar; it is to employ the plaintiff for five years certain, with power to either party to determine the employment at the end of that time by notice. The defendant has ceased to employ the plaintiff within the five years, and contends that a condition is to be implied that the manufactory must continue to exist. The plaintiff is not seeking to import anything into the contract; the defendant seeks to import the implied condition which I have mentioned. I cannot import any such condition. If it had been proved that the defendant's power to carry on business had been taken away by something for which he was not responsible, I should say that there was no breach of the

agreement; but here it was not taken away, and our decision is quite consistent with the class of cases where the parties have been excused from the performance of a contract, because it was considered to be subject to an implied condition.

Appeal allowed.[1]

4. By death.

§ **71.**] LONG *v.* THAYER.

150 UNITED STATES, 520. — 1893.

BILL in equity filed by Thayer to enjoin enforcement of a judgment of ejectment obtained by Long against one Smith, a tenant under Thayer. Judgment for Thayer, upon condition that he pay into court $126.25, with interest, and decree that Long deposit quit-claim deed, etc. Long appeals.

Thayer bought the lot in question of Skiles and Western under a contract made with their agent Kinney, by which upon non-payment of future instalments (amounting to $252.50), Thayer was to forfeit the contract. Western died soon after. The instalments were paid by Thayer to Kinney after Western's death, one being paid before he knew of Western's death and one after he knew of it. Long is the grantee from Western's heirs, who had by partition proceedings succeeded to Skiles' interest also.

MR. JUSTICE BROWN (after stating the case) delivered the opinion of the court.

This case turns largely upon the legal effect to be given to the death of Western, which took place a few days after the contract for the sale of the land was made, and before the first note became due. Had Western not died, there can be no question that the payments to Kinney would have been good, and that Thayer would have been entitled to a deed.

Western's death undoubtedly operated as a revocation of Kinney's authority to act for him or his estate. The pay-

[1] Compare *Stewart* v. *Stone*, 127 N. Y. 500, where it was held that defendant was excused from his contract to manufacture and sell cheese from milk furnished by plaintiff, by the destruction of defendant's factory.

ments made to Kinney as his agent would not be sufficient to discharge Thayer's obligation to his estate, even if such payments were made by him in actual ignorance of Western's death. *Michigan Insurance Co.* v. *Leavenworth*, 30 Vermont, 11; *Davis* v. *Windsor Savings Bank*, 46 Vermont, 728; *Jenkins* v. *Atkins*, 1 Humphrey (Tenn.), 294; *Clayton* v. *Merrett*, 52 Mississippi, 353; *Lewis* v. *Kerr*, 17 Iowa, 73. Indeed it was said by this court in *Galt* v. *Galloway*, 4 Pet. 332, 344, that "no principle is better settled, than that the powers of an agent cease on the death of his principal. If an act of agency be done, subsequent to the decease of the principal, though his death be unknown to the agent, the act is void."

Whether Western's death also operated as a revocation of the verbal authority given by Skiles may admit of some doubt, although the weight of authority is that the death of one partner or joint owner operates, in the case of a partnership, to dissolve the partnership, and in the case of a joint tenancy to sever the joint interest; and the authority of an agent appointed by a firm or joint owners thereupon ceases, where such authority is not coupled with an interest. *McNaughton* v. *Moore*, 1 Haywood (N. C.), 189; *Rowe* v. *Rand*, 111 Indiana, 206.

But even if it did operate as a technical revocation of Kinney's authority to act for Skiles, the presumption is, from Skiles' long silence, in the absence of proof to the contrary, that Kinney accounted to him for his proportion of the money collected. The court below evidently proceeded upon this theory, and required Thayer, as a condition for calling upon Long for a deed, to repay one-half of the amount of the two notes with the stipulated interest at 10 per cent. These were certainly as favorable terms as Long could expect. Thayer had paid the money to Kinney, with whom the contract was made, — the first payment in actual ignorance of Western's death, and the second doubtless under the supposition, which a person unlearned in the law might reasonably entertain, that payment to the person with whom the contract was made

was sufficient, and that Kinney would account to the proper representatives of Western, and procure him a deed. All the equities of the case were in Thayer's favor, and justice demanded that Long should be required to convey, upon being paid Western's share of the consideration with interest.

There is another view of the case which does not seem to have been presented to the court below, and which indicates that Long received even more than he was really entitled to. The second note of $150, which is produced, appears upon its face to have been payable to "J. F. Kinney or *bearer*," and while the first note is not produced, Kinney swears that this was also payable in the same manner. The probabilities are that it was, both from the fact that the second note was payable to bearer and from the further fact that Kinney claimed that Western was largely indebted to him. If such were the case (and Kinney's authority to take these notes is not disputed), it is difficult to see why the payments to Kinney, who himself held the notes, were not valid payments, which entitled Thayer to a deed to the land. So long as these notes were outstanding, he could not safely pay to anyone else, and if he paid the holder, he did just what the contract required him to do.

Long clearly was not an innocent purchaser of the land in question. Not only had Thayer been in the open, notorious, and unequivocal possession of the land and its improvement, renting the premises and paying the taxes, but Long's marriage into the Western family, his taking a deed from the heirs through Mr. Meriwether, the husband of one of the heirs, who acted as attorney both for Long and for the heirs, and the giving of a promissory note unsecured by mortgage upon the land, — a note which the heirs apparently never saw, — indicate very clearly that he could not have been ignorant of the true situation.

The decree of the court below was clearly right, and must be Affirmed.

Farmers' Loan & Trust Co. *v.* Wilson, 139 N. Y. 284 (1893): An agent after the death of his principal collected rents. The plaintiff, as trustee, recovered judgment from the defendant for the rents so paid. Neither the agent nor the defendant knew of the death of the principal when the rent was paid. *Held* (by O'Brien, J.): That the agency was revoked by the death of the principal and that the payments to the agent after the death of the principal did not bind the estate. The court says: "The rule seems to have originated in the presumption that those who deal with an agent knowingly assume the risk that his authority may be terminated by death without notice to them. The case of an agency coupled with an interest is an exception to the rule. . . . The common-law rule has become too firmly established in this State to be disturbed by judicial action, though a change by the law-making power would be in harmony with more enlightened views and would promote the interests of justice."

5. By insanity.

§ 71.] DREW *v.* NUNN.

L. R. 4 Queen's Bench Division (C. A.), 661. — 1879.

[Reported herein at p. 24.]

6. Irrevocable agencies.

§ 72.] ROLAND, Administrator, *v.* COLEMAN AND COMPANY.

76 Georgia, 652. — 1886.

Bill for an injunction to enjoin a sale about to be made under a power of sale contained in a written instrument made by the intestate to the defendants. Injunction refused. Complainant appeals.

Jackson, C. J. This is a bill brought by Roland, administrator, &c., *v.* S. T. Coleman & Company to enjoin that firm from selling certain lands conveyed to them to secure a debt. The chancellor refused the writ, and the complainant excepted.

Is the paper a mortgage, or is it a deed which passes the title absolutely to Coleman & Company to secure certain indebtedness, with power to sell in order to pay the debt?

(The court then decides that the instrument is a deed.)

This conveyance also has a power to sell, coupled with a big interest in the property, even the title to it to secure the debt, and therefore the power is irrevocable, and does not die with the grantor. *Woodson* v. *Veal*, 60 Ga. 562; *Calloway* v. *The People's Bank of Bellefontaine et al.*, 54 Ga. 441.

Lathrop & Co. v. *Brown*, *ex'r*, *et al.*, 65 Ga. 312, was a mere mortgage with power to sell, which was revocable, and died with the mortgagor, the mortgagees having no interest in the thing, but only in the proceeds. And such is the fact also in *Miller*, *trustee*, v. *McDonald et al.*, 72 Ga. 20; *Wofford* v. *Wyly et al.*, Id. 863, is also clearly distinguishable, as no time was fixed for the payment of the money, and there was a written obligation to reconvey and no power to sell, but nothing ruled there conflicts with aught said here. There were mortgages with power to sell without regular foreclosure, but with no pretence that the title passed. In the case at bar, the title did pass, and this great interest in the land itself made the power here irrevocable after the grantor's death.

. . . .

Judgment affirmed.

§ 72.] HUNT *v.* ROUSMANIER'S ADMINISTRATORS.

8 WHEATON (U. S.), 174. — 1823.

BILL IN EQUITY to compel defendants, as administrators, to join in the sale of the intestate's interest in two vessels. Demurrer to the bill sustained and the bill dismissed. Plaintiff appeals.

Rousmanier executed to Hunt a power of attorney authorizing Hunt to sell and convey Rousmanier's interest in the two vessels, and after paying two notes owing from Rousmanier to Hunt, to return the residue to Rousmanier. Rousmanier died before the payment in full of the two notes. Hunt took possession of the vessels and was proceeding to sell them when defendants forbade the sale.

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the court.

The counsel for the appellant objects to the decree of the circuit court on two grounds. He contends, —

1. That this power of attorney does, by its own operation, entitle the plaintiff, for the satisfaction of his debt, to the interest of Rousmanier in the Nereus and the Industry.

2. Or, if this be not so, that a court of chancery will, the conveyance being defective, lend its aid to carry the contract into execution, according to the intention of the parties.

We will consider, 1. The effect of the power of attorney.

This instrument contains no words of conveyance or of assignment, but is a simple power to sell and convey. As the power of one man to act for another depends on the will and license of that other, the power ceases when the will, or this permission, is withdrawn. The general rule, therefore, is, that a letter of attorney may, at any time, be revoked by the party who makes it, and is revoked by his death. But this general rule, which results from the nature of the act, has sustained some modification. Where a letter of attorney forms a part of a contract, and is a security for money, or

for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, or if not so, is deemed irrevocable in law. 2 Esp. N. P. Rep. 565. Although a letter of attorney depends, from its nature, on the will of the person making it, and may, in general, be recalled at his will, yet if he binds himself for a consideration, in terms, or by the nature of his contract, not to change his will, the law will not permit him to change it. Rousmanier, therefore, could not, during his life, by any act of his own, have revoked this letter of attorney. But does it retain its efficacy after his death? We think it does not. We think it well settled, that a power of attorney, though irrevocable during the life of the party, becomes extinct by his death.

This principle is asserted in Littleton (sec. 66), by Lord Coke, in his commentary on that section (52 b), and in Willes' Reports (105, note, and 565). The legal reason of the rule is a plain one. It seems founded on the presumption, that the substitute acts by virtue of the authority of his principal, existing at the time the act is performed; and on the manner in which he must execute his authority, as stated in Coombes' case, 9 Co. 766. In that case it was resolved, that "when any has authority as attorney to do any act, he ought to do it in his name who gave the authority." The reason of this resolution is obvious. The title can, regularly, pass out of the person in whom it is vested, only by a conveyance in his own name; and this cannot be executed by another for him, when it could not, in law, be executed by himself. A conveyance in the name of a person who was dead at the time would be a manifest absurdity.

This general doctrine, that a power must be executed in the name of a person who gives it, a doctrine founded on the nature of the transaction, is most usually engrafted in the power itself. Its usual language is, that the substitute shall do that which he is empowered to do in the name of his principal. He is put in the place and stead of his principal, and is to act in his name. This accustomed form is observed in the instrument under consideration. Hunt is constituted

the attorney, and is authorized to make and execute a regular bill of sale in the name of Rousmanier. Now, as an authority must be pursued in order to make the act of the substitute the act of the principal, it is necessary that this bill of sale should be in the name of Rousmanier; and it would be a gross absurdity that a deed should purport to be executed by him, even by attorney, after his death; for the attorney is in the place of the principal, capable of doing that alone which the principal might do.

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 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 principal, to be legally effectual must be in his name, 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 a 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 is a principal acting in his own name, in pursuance of powers which limit his estate. The legal reason which limits a power to the life of the person giving it exists no longer, and the rule ceases with the reason on which it is founded. The intention of the instrument may be effected without violating any legal principle.

This idea may be in some degree illustrated by the examples of cases in which the law is clear, and which are incompatible with any other exposition of the term, "power coupled with an interest." If the word "interest" thus used indicated a title to the proceeds of the sale, and not a title to the thing to be sold, then a power to A. to sell for his own benefit, would be a power coupled with an interest; but a power to A. to sell for the benefit of B. would be a naked power, which could be executed only in the life of the person who gave it. Yet, for this distinction, no legal reason can be assigned. Nor is there any reason for it in justice; for a power to A. to sell for the benefit of B. may be as much a part of the contract on which B. advances his money as if the power had been made to himself. If this were the true exposition of the term, then a power to A. to sell for the use of B., inserted in a conveyance to A., of the thing to be sold, would not be a power coupled with an interest, and consequently could not be exercised after the death of the person making it; while a power to A. to sell and pay a debt to himself, though not accompanied with any conveyance which might vest the title in him, would enable him to make the conveyance, and to pass a title not in

him, even after the vivifying principle of the power had become extinct. But every day's experience teaches us that the law is not as the first case put would suppose. We know that a power to A. to sell for the benefit of B., engrafted on an estate conveyed to A., may be exercised at any time, and is not affected by the death of the person who created it. It is, then, a power coupled with an interest, although the person to whom it is given has no interest in its exercise. His power is coupled with an interest in the thing which enables him to execute it in his own name, and is, therefore, not dependent on the life of the person who created it.

The general rule, that a power of attorney, though irrevocable by the party during his life, is extinguished by his death, is not affected by the circumstance that testamentary powers are executed after the death of the testator. The law, in allowing a testamentary disposition of property, not only permits a will to be considered as a conveyance, but gives it an operation which is not allowed to deeds which have their effect during the life of the person who executes them. An estate given by will may take effect at a future time or on a future contingency, and in the meantime descends to the heir. The power is necessarily to be executed after the death of the person who makes it, and cannot exist during his life. It is the intention that it shall be executed after his death. The conveyance made by the person to whom it is given takes effect by virtue of the will, and the purchaser holds his title under it. Every case of a power given in a will is considered in a court of chancery as a trust for the benefit of the person for whose use the power is made, and as a devise or bequest to that person.

It is, then, deemed perfectly clear that the power given in this case is a naked power, not coupled with an interest, which, though irrevocable by Rousmanier himself, expired on his death.

(The court then decides that upon the facts alleged in the bill a court of equity may give relief as for mistake and subject the vessels to an equitable lien in favor of the appellant. Upon this ground the decree was) Reversed.

PART II.

LEGAL EFFECT OF THE RELATION AS BETWEEN PRINCIPAL AND AGENT.

CHAPTER VII.

OBLIGATIONS OF PRINCIPAL TO AGENT.

1. Compensation for authorized act.

§ **75.**] McCRARY, Surviving Partner, etc. *v.* RUDDICK et al.

33 Iowa, 521. — 1871.

Action to recover for professional services rendered to defendants by Rankin & McCrary, attorneys at law. Judgment for plaintiff.

The plaintiff firm was retained by one Galland, who had a special contract with defendants to conduct the suit in which the services were rendered. Plaintiff firm had no knowledge of this special contract. The court charged that if defendants knew that the plaintiff firm was managing the suit, there would arise an implied promise to pay what the services were reasonably worth, even though Galland had agreed with defendants to pay for such services himself, unless the plaintiff firm knew of this special contract between defendants and Galland. The court refused to charge that if defendants never employed the plaintiff firm, and had reason to believe that the firm was acting for Galland, they would not be liable.

Miller, J. . . . We are of opinion that there was no error in the ruling of the court.

It will not be questioned that, if the defendants had requested Rankin & McCrary to perform the services, without more being said, they would have been liable to pay what their services were reasonably worth. Nor will it be doubted that, if there had been no special contract between Galland and the other defendants, and the services had been rendered with the knowledge of defendants, they would be liable to pay for them. The firm of Rankin & McCrary performed the services for the defendants with their knowledge. They knew that these attorneys were appearing and defending the action in their behalf and for their benefit, and, although they had not requested Rankin & McCrary to render the services, yet, by their silence, they assented that they should do so, and thereby rendered a previous request unnecessary.

If the defendants did not intend that Rankin & McCrary should look to them for payment for the services they were rendering, they should have objected, or informed them of the special contract; but by the silence of the defendants, with full knowledge of what was being done by Rankin & McCrary, and by receiving and enjoying the benefit of the services rendered, a promise to pay will be implied. 2 Parsons on Cont. (5th ed.) 58; 3 Bl. Com. 161. See also 2 Parsons on Cont. 46; *Phillips* v. *Jones*, 1 Adol. & Ell. 333; *Peacock* v. *Peacock*, 2 Camp. 45; *Scully* v. *Scully*, 28 Iowa, 548; *Waterman* v. *Gilson*, 5 La. An. 672; *Lucas* v. *Godwin*, 3 Bing. (N. C.) 737; *James* v. *Bixby*, 11 Mass. 34; *Farmington Academy* v. *Allen*, 14 Id. 172.

It would have been otherwise had Rankin & McCrary been informed of the special agreement, or had the circumstances been such as to raise a presumption that they had such information. But they entered upon the services at the request of one who was himself a defendant, and they performed the services with the knowledge and implied assent and for the benefit of all the defendants, without notice of any special agreement in regard to the defence of the case. Rankin & McCrary had a right to rely on the promise which,

under the circumstances, the law implied, unless they were informed of the special agreement. This information they did not possess, but the defendants did, and it was their fault that it was not communicated.

The judgment of the district court is Affirmed.

2. Compensation for unauthorized act.

§ 77.] WILSON *v.* DAME.

58 New Hampshire, 392. — 1878.

Assumpsit, on the common counts, to recover a reward for the apprehension of a criminal. The referee found for the plaintiff. Defendant appeals.

Bingham, J. The facts reported by the referee establish, (1) that the defendant, city marshal of Portsmouth, desired to arrest Walters; (2) that the plaintiff rendered necessary and valuable services in accomplishing it, as the defendant's servant or agent, expecting to be paid for them; (3) that the defendant, knowing these facts, accepted the services, intending to pay for them, and afterwards, on receiving the reward, promised the warder that he would do so.

If a person acts as an agent, without authority, and the principal, after full knowledge of the transaction, ratifies it, it will be his act, the same as if he had originally given the authority; and the agent will be entitled to the same rights and remedies, and to the same compensations, as if he had acted within the scope of an acknowledged original authority. Story on Agency, § 244.

If the case does not show an original employment of the plaintiff, or a request to assist in the arrest and return of the convict, it clearly shows that the defendant accepted and ratified whatever the plaintiff did, and that the defendant is liable to pay a reasonable compensation for the same. *Hatch* v. *Taylor*, 10 N. H. 538; *Low* v. *Railroad*, 45 N. H. 370; S. C. 46 N. H. 284. Judgment on the report.[1]

[1] See also *Gelatt* v. *Ridge*, *ante*, p. 99.

3. Compensation for gratuitous service.

§ 77.] ALLEN *v.* BRYSON.

67 IOWA, 591. — 1885.

ACTION to recover compensation for professional services. Judgment for plaintiff. Defendant appeals.

SEEVERS, J. . . . The defendant pleaded that he and the plaintiff were brothers-in-law, and, in substance, that each of them was engaged in the practice of the law, and had been in the habit of assisting each other as a matter of mutual accommodation, and that "all and each of the professional services for which plaintiff seeks to recover in this action were rendered by him as matter of mutual accommodation and interchange of courtesies, and without charge or expectation of payment or reward, by one as against the other." The court instructed the jury: "If, however, such services were rendered by the plaintiff without expectation of reward, or intention on his part to charge therefor, or by any agreement or understanding that the services were to be gratuitous, the plaintiff cannot recover unless, after such services were rendered, and in consideration thereof, defendant agreed with or promised plaintiff to pay for the same. In the latter case the valuable character of the service, and the moral obligation to pay for the same, would be a sufficient consideration to support the promise, and enable the plaintiff to recover the reasonable value of such service." We understand this instruction to mean that where one person renders services for another gratuitously, and with no expectation of being paid therefor, a moral obligation is incurred by the latter which will support a subsequent promise to pay. In our opinion, this is not the law. If the services are gratuitous, no obligation, either moral or legal, is incurred by the recipient. No one is bound to pay for that which is a gratuity. No moral obligation is assumed by a person who receives a gift. Suppose the plaintiff had given the defendant

a horse, was he morally bound to pay what the horse was reasonably worth? We think not. In such case there never was any liability to pay, and therefore a subsequent promise would be without any consideration to support it. That there are cases which hold that where a liability to pay at one time existed, which, because of the lapse of time, or for other reasons, cannot be enforced, the moral obligation is sufficient to support a subsequent promise, will be conceded.

These cases are distinguishable, because the instructions contemplate a case where an obligation to pay never existed until the promise was made. We do not believe a case can be found where a moral obligation alone has been held to be a sufficient consideration for a subsequent promise. To our minds, however, it is difficult to find a moral obligation to pay anything, in the case contemplated in the instructions, prior to the promise. The following cases support the view above expressed. *Cook* v. *Bradley*, 7 Conn. 57; *Williams* v. *Hathaway*, 19 Pick. 387; *Dawson* v. *Dawson*, 12 Iowa, 512; *McCarty* v. *Hampton Building Ass'n*, 61 Id. 287.

. . . .

Reversed.

4. Compensation after revocation of agency.

§ 79.] CUTTER *v.* GILLETTE.

163 MASSACHUSETTS, — . — 1895.

39 NORTHEASTERN REPORTER, 1010.

ACTION to recover damages for breach of a contract of employment. Judgment for plaintiff. Defendant alleges exceptions.

The contract was for five years, but defendant discharged plaintiff after three months' service. The court allowed damages to be assessed to the time of the trial, and from the trial to the expiration of the five years. Plaintiff had tried

to carry on carriage manufacturing on his own account after the breach, but had failed. Defendant sought to show that plaintiff's reputation was such that he could not get credit, but this evidence was excluded.

BARKER, J. The evidence offered and excluded from the cross-examination of the plaintiff was, in effect, that his personal reputation as to credit among dealers was so poor that he could not get credit to carry on the business in which he attempted to work after his wrongful discharge from the defendant's service. Assuming that the defendant was entitled to show that the plaintiff might have earned more money than he did between the time of his discharge and the time of trial, evidence of the plaintiff's poor reputation for credit among dealers did not tend to show that he could have succeeded in the business, and it was rightly excluded, as it might have had a tendency to prejudice the jury against the plaintiff. If it did not have that effect, its only tendency would seem to be to enhance the plaintiff's damages. We do not see how the defendant was harmed by the exclusion of the evidence.

The exception to the refusal to instruct the jury to the effect that if the plaintiff, after his discharge, began to do business on his own account, he could not recover damages relating to the period of time after he so entered into business, was waived at the argument.

The remaining question is whether or not the jury should have been allowed to assess damages for the period of time subsequent to the trial. The plaintiff was hired for five years from April 25, 1892, and was discharged about the middle of July, 1892. He brought suit on November 10, 1892, and the verdict was rendered on March 14, 1894. The verdict assessed at the sum of $3,180.95, the plaintiff's whole damages for breach of the contract for hiring, and stated that of the amount $1,392.95 was the damage to the time of trial. The defendant concedes that the plaintiff is entitled to recover damages for an entire breach, so far as such damages can be ascertained, but contends that, as the trial occurred before

the expiration of the contract period, it was impossible for the jury to ascertain or assess the damage for the unexpired portion of the contract period subsequent to the time of trial. In support of this contention the defendant cites the cases of *Colburn* v. *Woodworth*, 31 Barb. 381; *Fowler* v. *Armour*, 24 Ala. 194; *Litchenstein* v. *Brooks*, 75 Tex. 196, 12 S. W. 975; and *Gordon* v. *Brewster*, 7 Wis. 355, — in which cases it seems to have been held that, if the suit is begun before the expiration of the contract period, damages can only be allowed to the time of the trial. He asserts that in the case of *Howard* v. *Daly*, 61 N. Y. 362, in which full damages were given, the writ was brought after the expiration of the contract period. On the other hand, it has been held in Vermont that, if there has been such a breach as to authorize the plaintiff to treat it as entirely putting an end to the contract, he may recover damages for an entire non-fulfilment, and is not limited to what he has actually sustained at the time of his bringing suit or the time of trial. *Remelee* v. *Hall*, 31 Vt. 582. And in Maine, in an action for breach of a contract for hiring, brought before the expiration of the contract period, it was held that the just recompense for the actual injury sustained by the illegal discharge was the stipulated wages, less whatever sum the plaintiff actually earned, or might have earned by the use of reasonable diligence. *Sutherland* v. *Wyer*, 67 Me. 64. Such would seem to be the rule in Pennsylvania. See *King* v. *Steiren*, 44 Pa. St. 99; *Chamberlin* v. *Morgan*, 68 Pa. St. 168. And the defendant concedes that such is the rule in England. We do not go into an exhaustive consideration of the decisions upon the question, as we consider it to have been settled in favor of the ruling given at the trial, by our decisions. *Paige* v. *Barrett*, 151 Mass. 67, 23 N. E. 725; *Blair* v. *Laflin*, 127 Mass. 518; *Dennis* v. *Maxfield*, 10 Allen, 138; *Jewett* v. *Brooks*, 134 Mass. 505. See also *Parker* v. *Russell*, 133 Mass. 74; *Amos* v. *Oakley*, 131 Mass. 413; *Warner* v. *Bacon*, 8 Gray, 397, 408; *Drummond* v. *Crane*, 159 Mass. 577, 581, 35 N. E. 90. The plaintiff's cause of action accrued

when he was wrongfully discharged. His suit is not for wages, but for damages for the breach of his contract by the defendant. For this breach he can have but one action. In estimating his damages the jury have the right to consider the wages which he would have earned under the contract, the probability whether his life and that of the defendant would continue to the end of the contract period, whether the plaintiff's working ability would continue, and any other uncertainties growing out of the terms of contract, as well as the likelihood that the plaintiff would be able to earn money in other work during the time. But it is not the law that damages, which may be larger or smaller because of such uncertainties, are not recoverable. The same kind of difficulty is encountered in the assessment of damages for personal injuries. All the elements which bear upon the matters involved in the prognostication are to be considered by the jury, and from the evidence in each case they are to form an opinion upon which all can agree, and to which, unless it is set aside by the court, the parties must submit. The liability to have the damages which he inflicts by breaking his contract so assessed is one which the defendant must be taken to have understood when he wrongfully discharged the plaintiff, and, if he did not wish to be subjected to it, he should have kept his agreement. Exceptions overruled.

§ 79.] SUTHERLAND *v.* WYER.

67 MAINE, 64. — 1877.

ASSUMPSIT to recover damages for breach of contract of employment for thirty-six weeks at $35 a week, from September 6, 1875. Plaintiff was discharged January 8, 1876, and paid in full to that date. The action was begun January 11, 1876. Plaintiff afterward found like employment, but left it voluntarily before the expiration of the thirty-six weeks

from September 6th. Verdict for plaintiff for full amount of salary after January 8th, less what he had actually earned in other employment. Defendants appeal.

VIRGIN, J. (after deciding that the action was not prematurely brought). There are several classes of cases founded both in tort and in contract, wherein the plaintiff is entitled to recover, not only the damages actually sustained when the action was commenced, or at the time of the trial, but also whatever the evidence proves he will be likely to suffer thereafter from the same cause. Among the torts coming within this rule, are personal injuries caused by the wrongful acts or negligence of others. The injury continuing beyond the time of trial, the future as well as the past is to be considered, since no other action can be maintained. So in cases of contract, the performance of which is to extend through a period of time which has not elapsed when the breach is made and the action brought therefor and the trial had. *Remelee* v. *Hall*, 31 Vt. 582. Among these are actions on bonds or unsealed contracts stipulating for the support of persons during their natural life. *Sibley* v. *Rider*, 54 Me. 463; *Philbrook* v. *Burgess*, 52 Me. 271.

The contract in controversy falls within the same rule. Although, as practically construed by the parties, the salary was payable weekly, still, when the plaintiff was peremptorily discharged from all further service during the remainder of the season, such discharge conferred upon him the right to treat the contract as entirely at an end, and to bring his action to recover damages for the breach. In such action he is entitled to a just recompense for the actual injury sustained by the illegal discharge. *Prima facie*, such recompense would be the stipulated wages for the remaining eighteen weeks. This, however, would not necessarily be the sum which he would be entitled to; for in cases of contract as well as of tort, it is generally incumbent upon an injured party to do whatever he reasonably can, and to improve all reasonable and proper opportunities to lessen the injury. *Miller* v. *Mariners' Church*, 7 Me. 51, 56;

Jones v. *Jones*, 4 Md. 609, 2 Greenl. Ev. § 261, and notes; *Chamberlin* v. *Morgan*, 68 Pa. St. 168; Sedg. on Dam. (6th ed.) 416, 417, cases *supra*. The plaintiff could not be justified in lying idle after the breach; but he was bound to use ordinary diligence in securing employment elsewhere, during the remainder of the term; and whatever sum he actually earned or might have earned by the use of reasonable diligence, should be deducted from the amount of the unpaid stipulated wages. And this balance, with interest thereon, should be the amount of the verdict. Applying the rule mentioned, the verdict will be found too large.

By the plaintiff's own testimony, he received only $60 from all sources after his discharge, — $25 in February, and $35 from the 10th to the 20th of April, at Booth's. His last engagement was for eight weeks, commencing April 10th, which he abandoned on the 20th, thus voluntarily omitting an opportunity to earn $57, prior to the expiration of his engagement with the defendants, when the law required him to improve such an opportunity, if reasonable and proper. We think he should have continued the last engagement until May 6th, instead of abandoning it and urging a trial in April, especially inasmuch as he could have obtained a trial in May, just as well. The instructions taken together were as favorable to the defendants as they were entitled to.

If, therefore, the plaintiff will remit $57, he may have judgment for the balance of the verdict; otherwise the entry must be Verdict set aside and new trial granted.

5. Compensation after renunciation of agency.

§ 81.] TIMBERLAKE *v.* THAYER.

71 MISSISSIPPI, 279. — 1893.

ACTION against indorser of a promissory note. Defence, payment by maker, and release by act of plaintiff in agreeing

with the maker that the latter should perform services for the former in payment of the note. The court charged that if the maker agreed to serve plaintiff for a year, but abandoned the contract before the end of the year, he could recover nothing for the services performed. The court refused to charge that such a contract would release defendant. Judgment for plaintiff.

Cooper, J. If we were authorized to make the law, instead of announcing it as it is already made, we would unhesitatingly hold that one contracting to render personal service to another for a specified time, could, upon breach of the contract by himself, recover from that other for the value of the service rendered by him and received by that other, subject to a diminution of his demand to the extent of the damage flowing from his breach of contract. In *Britton* v. *Turner*, 6 N. H. 481, Judge Parker demonstrates, in an admirable and powerful opinion, the equity of such a rule; and it was held in that case that such was the rule of the common law. The courts of some of the States have followed or been influenced by that opinion, and have overturned or mitigated the rigorous rule of the common law. *Pixler* v. *Nichols*, 8 Iowa, 106 (74 Am. Dec. 298); *Coe* v. *Smith*, 4 Ind. 79 (58 Am. Dec. 618); *Riggs* v. *Horde*, 25 Tex. Supp. 456 (78 Am. Dec. 584); *Chamblee* v. *Baker*, 95 N. C. 98; *Parcell* v. *McComber*, 11 Neb. 209. But the decided weight of authority is to the contrary. Lawson on Contracts, § 470, n. 4, and authorities there cited. And it was decided at an early day in this State that an entire contract of this character could not be apportioned, and that under the circumstances named no recovery could be had by the party guilty of the breach of contract; that he could not recover on the special contract because he himself had not performed, nor upon *quantum meruit* because of the existence of the special contract. *Wooten* v. *Read*, 2 Smed. & M. 585. In *Hariston* v. *Sale*, 6 Smed. & M. 634, and *Robinson* v. *Sanders*, 24 Miss. 391, it was held that an overseer's contract with his employer, though

made for a definite time, was not an entire contract, and recoveries were allowed on the common counts.

The cases relied on to support the rule announced in these decisions were *Byrd* v. *Boyd*, 2 McCord (So. Car.), 246; *Eaken* v. *Harrison*, Id. 249; *McClure* v. *Pyatt*, Id. 26. Of these, the leading case is *Byrd* v. *Boyd;* the others simply follow it. In *Byrd* v. *Boyd*, the court evidently legislates the exception into the law, and so, in effect, declared, for, after referring to the rule of the common law, the court proceeds to say: "There is, however, a third class of cases for which it is necessary to provide," and then declares that these cases for which it is necessary for the court "to provide" are "those where the employer reaps the full benefit of the services which have been rendered, but some circumstance occurs which renders his discharging the *overseer* necessary and justifiable, and that, perhaps, not immediately connected with the contract, as in the present case."

The South Carolina court put its decision expressly upon the ground of expediency, and confined its effect, by necessary implication, to the particular sort of contract under consideration. Since the abolition of slavery we have no such contracts, *stricte*, as those which formerly existed between employer and overseer, and the decisions in *Wooten* v. *Read*, and *Hariston* v. *Sale* have no field of operation. The instructions for the plaintiff were properly given.

(The court then decides that the trial judge erred in refusing the instruction as to the effect of such a contract in working a release of the surety, and on this ground reversed the judgment.)

§ 81.] DAVIS *v.* MAXWELL.

12 Metcalf (Mass.) 286. — 1847.

Assumpsit to recover for three months and one day's service at twelve dollars a month. Defence, an entire contract for seven months and breach by plaintiff. Judgment for defendant.

Hubbard, J. . . . In regard to the contract itself, which was an agreement to work for the defendant seven months, at twelve dollars per month, we are of opinion that it was an entire one, and that the plaintiff, having left the defendant's service before the time expired, cannot recover for the partial service performed; and that it differs not in principle from the adjudged cases of *Stark* v. *Parker*, 2 Pick. 267; *Olmstead* v. *Beale*, 19 Pick. 528; and *Thayer* v. *Wadsworth*, 19 Pick. 349; which we are unwilling to disturb, upon mere verbal differences between the contracts in those cases and in this, which do not affect its spirit.

The plaintiff has argued that it was a contract for seven months, at twelve dollars per month, to be paid at the end of each month. But however reasonable such a contract might be, it is not, we think, the contract which is proved. There is no time fixed for the payment, and the law therefore fixes the time; and that is, in a case like this, the period when the service is performed. It is one bargain; performance on one part and payment on the other; and not part performance and full payment for the part performed. The rate per month is stated, as is common in such contracts, as fixing the rate of payment, in case the contract should be given up by consent, or death or other casualty should determine it before its expiration, without affecting the right of the party. Such contracts for hire, for definite periods of time, are reasonable and convenient, are founded in practical wisdom, and have long received the sanction of the law. It is our duty to sustain them, when clearly proved.

The rulings and directions of the learned judge, we think, were correct, and the exceptions are overruled.

6. Compensation where agent acts for both parties.

§ 82.] CANNELL *v.* SMITH.

142 Pennsylvania State, 25. — 1891.

Action to recover back $5,000 paid by plaintiff to defendant as a commission for effecting a sale of real estate. Judgment for plaintiff. Defendant appeals.

Defendant was employed by one Massey, who represented a prospective purchaser of plaintiff's property, to interview plaintiff as to the terms on which she would sell, Massey agreeing to pay defendant a commission. Defendant represented to plaintiff that he would act for her upon her agreement to pay him one-half of all the property sold for over and above $80,000. Defendant negotiated a sale to Massey's principal for $92,000, and accepted $5,000 as his commission. Massey's principal demanded that defendant should account to her for the commission received from plaintiff, on the ground that defendant was her agent. Defendant thereupon compromised by paying $2,600 of his commission to Massey's principal.

The court excluded the testimony of one Shallcross offered to prove that plaintiff's property sold for from $10,000 to $15,000 more than it was worth, and charged the jury that it was immaterial whether plaintiff lost anything by the fact that defendant represented both parties, and that if defendant represented both sides without the knowledge of plaintiff, she could recover back the money paid to him.

Per Curiam. The defendant was a real-estate broker and attempted to serve two masters. There is high authority for saying that this cannot be done. Matt. vi. 24. The plaintiff paid him a commission of $5,000 for effecting a sale of certain real estate, in ignorance of the fact that he was also the broker or agent of the purchaser. When she discovered that he was acting in this dual character, she brought this suit in the court below to recover back the money so

paid, and succeeded. We have no doubt of the right to recover money paid under such circumstances. It is against public policy and sound morality for a man to act as broker for both parties, unless that fact is fully communicated to them. The right to recover being established, this judgment must stand unless some error was committed on the trial below by which the defendant was prejudiced.

A careful examination of the record fails to disclose any such error. The court was not asked to direct a verdict in favor of the defendant, and could not properly have done so in view of the evidence. This disposes of the first assignment. The second is without merit. The payment of the $2,600 to the Drexels was a fact in the case. The defendant's belief as to his moral or legal liability to pay this money was not important; nor was it material that he had never made any admissions "to the Masseys, or any one else," upon this subject. The testimony of the witness Shallcross was properly rejected. The plaintiff's right to recover did not depend upon the character of the sale, whether advantageous or otherwise; it rested upon the higher ground of public policy: *Everhart* v. *Searle*, 71 Pa. 256. The instructions complained of in the fourth and fifth assignments are free from error. The learned judge fairly submitted to the jury the question of plaintiff's knowledge of the defendant's dual character. There was abundant evidence of her ignorance upon this point to go to the jury. She testified distinctly that the defendant told her that he was acting for her, and for her alone. The defendant did not deny that he had been employed by the purchasers. His contention was that he had ceased to act for them before he entered the service of the plaintiff. This was a question of fact for the jury, and unfortunately for the defendant they did not take his view of it.

Judgment affirmed.

§ 82.] SHORT *v.* MILLARD. p77.

68 ILLINOIS, 292. — 1873.

THIS was an action brought by Mortimer Millard against John Short, to recover for services as agent, in the city court of East St. Louis. The plaintiff recovered judgment, and the defendant appealed to the circuit court, where the plaintiff again recovered judgment for $500 and costs. From this judgment the defendant appealed to this court.

MR. JUSTICE WALKER delivered the opinion of the court.

Appellee sued appellant to recover for services as agent in selling a tract of land. It appears that appellant agreed that if appellee would find him a purchaser for a piece of land, he would pay him $500. The evidence shows that he procured a purchaser at the price fixed by appellant, and the sale was consummated. But it is urged that appellee was acting as the agent of both appellant and Lovingston, the purchaser, without having notified appellant. An examination of the evidence shows that the defence is not established. The only evidence we find in support of the defence is what was said by Lovingston when the sale was closed. He at that time proposed that appellee should prepare the deed, as he was acting for both parties; but the proposition was declined, appellant at the time saying another attorney did his business; and it appears that appellee was present when the papers were executed. He was there at the instance of Lovingston.

There is no doubt that appellee was the agent of appellant in procuring a purchaser, and the evidence shows that he obtained one at the full price fixed by appellant; and when he had fully performed the agency, and it was at an end, he then received a retainer from the purchaser to see that the papers were properly prepared and executed. In this we perceive nothing wrong or inconsistent. It is true, his retainer by Lovingston grew out of his former agency, but not till after that relation had terminated. When he found

the purchaser he was no longer the agent of appellant, and was free to take the retainer from Lovingston. There was, then, nothing improper or inconsistent in his thus acting. The evidence sustains the finding of the jury.

No question has been raised as to the jurisdiction of the city court to try the case, and the judgment of the court below is affirmed. Judgment affirmed.

§ 82.] MONTROSS v. EDDY ET AL.

94 MICHIGAN, 100.—1892.

ACTION to recover for services rendered defendants in negotiating a sale of their lands. Judgment for plaintiff. Defendants appeal.

Defendants promised plaintiff that if he found a purchaser for the lands at $90,000 they would pay him for his services. Plaintiff at that time was representing a prospective purchaser, to whom subsequently he introduced defendants, and who purchased the lands of defendants at $90,000. The purchaser paid plaintiff $500 as compensation. Defendants paid plaintiff $250, and he brought this action for additional compensation, and recovered a verdict for $250.

DURAND, J. . . . As to whether the payment by Pitts & Cranage to the plaintiff of $500 was a present, or was paid under an agreement made by them for his services, we deem it immaterial. If the defendants are liable at all, it is upon their agreement to pay the plaintiff for his services if he made a sale of this land at $90,000. Nothing was left to his discretion. He had nothing to do with the price. He had simply to find a purchaser willing to give the price asked; and it can be of no importance whatever to the defendants whether or not those purchasers also paid the plaintiff for any services he may have rendered them. As was said in *Ranney* v. *Donovan*, 78 Mich. 318:—

"A broker who simply brings the parties together, and has no hand in the negotiations between them, they making their

own bargain without his aid or interference, can legally receive compensation from both of them, although each was ignorant of his employment by the other."

All that the plaintiff was to do was to find a purchaser at a certain sum fixed and agreed upon. Neither his efforts nor judgment were to be employed to get a greater price. When he did this, and the sale brought about by him as middleman was consummated, he was entitled to a reasonable compensation for his services, if the jury believed his version of what the contract was, as they evidently did do. If the plaintiff made any misstatements to Pitts & Cranage in reference to the amount of pine on the land, or to its quality, and thereby induced them to pay the sum asked for it by the defendants, certainly the defendants cannot complain; nor can they be heard to say that, because Pitts & Cranage paid or gave plaintiff $500 for services performed by him in bringing about the purchase, therefore they are relieved from paying him, if they agreed to do so. He was simply acting as a go-between to bring the buyers and sellers together, to make their own bargain. This is all he did do; and either or both parties in such a case would be legally bound to pay such sum as was agreed upon for the services rendered.

We do not find any prejudicial error in the case.

The judgment will be affirmed, with costs of this court to the plaintiff.

The other justices concurred.

§ 82.] TERRY *v.* BIRMINGHAM NATIONAL BANK.[1]

99 ALABAMA, 566. — 1892.

ACTION of assumpsit by the bank to recover against Terry upon a promissory note. Plea of set-off. Judgment for plaintiff. Defendant appeals.

[1] For former appeal see 93 Ala. 599.

The note in question was secured by certain stocks deposited with the bank as collateral security. Defendant gave the president of the bank a power of attorney to sell the stock on the Stock Exchange. The president employed one Lightfoot to sell it. Lightfoot was also employed by one Rucker to buy similar stock. Lightfoot procured one Bradfield, also a member of the exchange, to bid for Rucker. Lightfoot offered the stock on the exchange, and it was bid in by Bradfield for Lightfoot's principal, Rucker. The amount was credited on the note, and this action is for the balance due over and above this credit and other credits. The defendant seeks to set off the value of the stock above what it brought on this sale.

Coleman, J. . . . The principle of law that the same person cannot be both buyer and seller has no application to the facts of the case. R. D. Johnston employed Lightfoot, a member of the Stock Exchange, to sell this stock. One E. W. Rucker, the purchaser, employed Lightfoot to purchase on the exchange, at a limited price, stock of the character offered by Johnston. Johnston knew nothing of Rucker's engagement or intentions. In accordance with the rules of the exchange, Lightfoot secured the services of Bradfield, another member of the exchange, to bid the price fixed by Rucker. Lightfoot knew the instructions of both Johnston and Rucker, but neither Johnston nor Rucker had any knowledge of each other's intentions, or their instructions to Lightfoot. And, as we have stated, there is no evidence to show that the rules of the Stock Exchange, which were known to Terry, were not observed, or that the stock did not bring its fair market value, which was credited upon the note of the defendant.

Under any view we take of the case, the plaintiff was entitled to the general charge upon all the evidence, and it is unnecessary to consider special exceptions to the rulings of the court.

Affirmed.

7. Reimbursement and indemnity.

§§ **84, 85.**] MOORE *v.* APPLETON.

26 ALABAMA, 633. — 1855.

TRESPASS on the case to recover indemnity for damages paid by plaintiff as a result of a suit against him by one Quinby for acts done by plaintiff as defendant's agent. Demurrer to complaint overruled. Verdict and judgment for plaintiff. Defendant appeals.

Plaintiff by direction of defendant took goods out of the possession of Quinby, which defendant claimed were his. Quinby brought an action of trespass against plaintiff and had judgment, which was paid.

RICE, J. Every man who employs another to do an act which the employer appears to have a right to authorize him to do, undertakes to indemnify him for all such acts as the agent does not know to be unlawful, and as would be lawful if the employer had the authority he pretends to have. *Adamson* v. *Jarvis*, 4 Bing. 66; Story on Agency, § 339.

Where two persons are claiming title to personal property adversely to each other, and one of these claimants calls upon another person to take it, and the latter has reasonable ground to believe that his employer is the owner of the property, and therefore takes it, without knowing at the time that such taking is a trespass or tort, a promise of indemnity will be implied to such person, although it subsequently turns out that the title of the employer was not good, and the act of taking a trespass. *Avery* v. *Halsey*, 14 Pick. 174.

In all such cases, a promise of indemnity is implied, upon the plain dictates of reason and natural justice. *Gower* v. *Emery*, 18 Maine R. 79; Parsons on Cont. 36, n. *x*.

The promise thus implied extends only to such losses and damages as are direct and immediate, and naturally flow from the execution of the agency. In other words, the

agency must be the cause, and not merely the occasion of the losses or damages, to found a just right to reimbursement. Story on Agency, § 341; Story on Contracts, § 176.

Assumpsit lies upon such implied promises. An action on the case is equally maintainable, and it is said to be the more appropriate remedy. *Myers* v. *Gilbert*, 18 Ala. 467; *Adamson* v. *Jarvis*, and other cases cited *supra*. But whether the action be assumpsit or case, the declaration is bad, on demurrer, if no breach is stated in it. 1 Chitty's Pl. 337.

When the declaration is in case, as it is here, and shows that the losses for which the agent is seeking indemnity from the principal, are certain damages recovered against the agent for taking property by the direction of the principal, in an action of trespass brought against the agent by the true owner of the property, the declaration is defective, if it omits to state that the taking by the agent was without knowledge on his part, at the time of the taking, that it was a trespass. The agent must, in his declaration, negative the existence of such knowledge on his part, although the *onus* of proving the existence of such knowledge may be on the principal; for the rule, that the *allegata* and *probata* must correspond, is not of universal application. *Carpenter* v. *Devon*, 6 Ala. 718.

Each count of this declaration is bad, for the omission of a breach, and also for failing to aver that the agent, at the time of the taking, did not know that it was a trespass or tort.

An averment that the principal had notice of the losses and damages sustained by the agent set forth in the declaration, and failed to pay the same, would be a good breach in such a case as this.

We admit the rule, that the law will not enforce contribution nor indemnity between wrong-doers. But that rule does not apply to any case where the act of the agent was not manifestly illegal in itself, and was done *bona fide* in the execution of his agency, and without knowledge (either actual,

or implied by law) that it was illegal. Parsons on Cont. p. 36, note *x*.

That rule is applicable, whenever it appears that the act of the agent was manifestly illegal in itself. For example, if A. employs B. to assault C., and B. thereupon does assault C., and is subjected to damages therefor, B. cannot recover such damages from A.: the act of B. being clearly illegal in itself, the law implies that he knew it to be so, and therefore will not enforce his claim to indemnity.

The rule also applies, whenever it appears that, although the act of the agent was not manifestly illegal in itself, yet, in fact, he knew it to be unlawful at the time he did it. For example, if Appleton, at the time he took the property claimed by Moore, knew that Moore had no just nor lawful right to it, and that Moore's claim was groundless and iniquitous, and that it really belonged to some other person, such knowledge on the part of Appleton at the time of the taking would defeat any recovery by him for any loss resulting from such taking, although he took it as the agent of Moore, and by Moore's direction. *Chappell* v. *Wysham*, 4 Harris & Johns. 560.

For the error of the court below in overruling the demurrers to the several counts of the declaration, its judgment is reversed, and the cause remanded.

§§ 84, 85.] D'ARCY *v.* LYLE.

5 Binney (Pa.), 441. — 1813.

Action of *indebitatus assumpsit* for money paid out and expended, and services rendered. Verdict for plaintiff. Motion for new trial.

D'Arcy in 1804 received from Lyle a power of attorney to settle the latter's accounts with Suckley & Co. in Hayti. On his way to Hayti he was chased by a French privateer and

threw overboard, among other papers, this power of attorney. Suckley & Co. consented to deliver Lyle's goods to D'Arcy if the latter would pay a balance due them from Lyle. This was agreed to, but before the goods were completely delivered they were attached by one Richardson for debts due his principals from Suckley & Co. The courts awarded the goods to D'Arcy for Lyle conditioned upon his giving a bond to procure an authentic power of attorney, or pay to Richardson the invoice value of the goods. The power of attorney was afterward received and duly noted, and the bond satisfied. D'Arcy sold the goods and rendered an account to Lyle.

Three years later, upon a change in the government of Hayti, Richardson brought suit against D'Arcy to recover the value of these goods. The courts decided for D'Arcy on the ground that his bond had been satisfied; but the president, Christophe, issued an arbitrary order that D'Arcy and Richardson should fight each other, and that the victor should have judgment in the suit. D'Arcy protested, but finally consented to the wager of battle. The result was uncertain, and Christophe issued an order that they should fight again. D'Arcy sought to flee the country, but was intercepted. After an interview with the president, he consented to pay Richardson the $3,000 claimed, and the judgment of the court was entered to that effect. D'Arcy paid the $3,000, and brings this action to recover it from Lyle.

Tilghman, C. J. This is one of those extraordinary cases arising out of the extraordinary situation into which the world has been thrown by the French revolution.

If the confession of judgment by the plaintiff had been voluntary, it would have lain on him to show that the $3,000 were justly due from the defendant to Richardson, or the persons for whom he acted, or that they had a lien on the goods of the defendant to that amount. But the confession of judgment was beyond all doubt extorted from the plaintiff by duress, and he did not yield to fears of which a man of reasonable firmness need be ashamed. The material fact on which this case turns is, whether the trans-

actions between the plaintiff and Richardson were on any private account of the plaintiff, or solely on account of the defendant. That was submitted to the jury, and we must now take for granted that the proceedings at the Cape against the plaintiff were in consequence of his having received possession of the defendant's goods from Suckley & Co. I take the law to be as laid down by Heineccius, Turnbull's Heinec. c. 13, pp. 269, 270, and by Erskine in his Institutes, 2 Ersk. Inst. 534, that damages incurred by the agent in the course of the management of the principal's affairs, or in consequence of such management, are to be borne by the principal. It is objected that at the time when judgment was rendered against the plaintiff, he was no longer an agent, having long before made up his accounts, and transmitted the balance to the defendant. But this objection has no weight if the judgment was but the consummation of the proceedings which were commenced during the agency. As such I view them, and I make no doubt but they were so considered by the jury. It is objected again, that no man is safe if he is to be responsible to an unknown amount, for any sums which his agent may consent to pay, in consequence of threats of unprincipled tyrants in foreign countries. Extreme cases may be supposed, which it will be time enough to decide when they occur. I beg it to be understood, that I give no opinion on a case where an agent should consent to pay a sum far exceeding the amount of the property in his hands. That is not the present case, for the property of the defendant, in the hands of the plaintiff in 1804, was estimated at $3,000. The cases cited by the defendant show, that if the agent, on a journey on business of his principal, is robbed of his own money, the principal is not answerable. I agree to it, because the carrying of his own money was not necessarily connected with the business of his principal. So if he receives a wound, the principal is not bound to pay the expenses of his cure, because it is a personal risk which the agent takes upon himself. One of the defendant's cases was, that where the agent's horse was

taken lame, the principal was not answerable. That I think would depend upon the agreement of the parties. If A. undertakes for a certain sum to carry a letter for B. to a certain place, A. must find his own horse, and B. is not answerable for any injury which may befall the horse in the course of the journey. But if B. is to find the horse, he is responsible for the damage. In the case before us, the plaintiff has suffered damage without his own fault, on account of his agency, and the jury have indemnified him to an amount very little, if at all, exceeding the property in his hands, with interest and costs. I am of opinion that the verdict should not be set aside.

YEATES, J. . . . I see no reason whatever for retracting the opinion I had formed on the trial, that where a factor has acted faithfully and prudently within the scope of his authority, he is entitled to protection from his constituent, and compensation for compulsory payments exacted against him under the form of law, for the transactions of his agency. The flagitious conduct of Christophe, President of Hayti, compelled the litigant parties under his savage power into a trial by battle, in order to decide their civil rights. He influenced the civil tribunal of the first district of the province of the North, sitting at the Cape, " to set aside a former judgment rendered by the tribunal of commerce, and of their own court, and to condemn D'Arcy," according to the language of the sentence, " to pay to Thomas Richardson $3,000, for so much he had engaged to him to pay for Suckley & Co. for merchandise, which the latter had delivered to him as belonging to James Lyle, whom the said D'Arcy represented, for which the tribunal do reserve to D'Arcy his rights, that he may prosecute the same, if he thinks proper, against the said Lyle or Suckley," etc.

The defendant appointed the plaintiff his attorney, to settle and collect a debt in a barbarous foreign country. The plaintiff has transacted that business with fidelity and care, and remitted the proceeds to his principal. He risked his life in defence of the interests of his constituent, under the

imperious mandate of a capricious tyrant, holding the reins of government. He has since been compelled, by a mockery of justice, to pay his own moneys for acts lawfully done in the faithful discharge of his duties as an agent; and I have no difficulty in saying, that of two innocent persons, the principal, and not the agent, should sustain the loss.

In *Leate* v. *Turkey Company Merchants*, Toth. 105, it was decreed, that if a consul beyond sea hath power, and do levy goods upon a private merchant, the company must bear the loss, if the factor could not prevent the act of the consul. The decree is founded in the highest justice, and its reason peculiarly applies to the present case. D'Arcy was doomed by the cruel order of an inexorable tyrant, either to pay the $3,000, or in his hated presence to fight his antagonist until one of them should fall.

Upon the whole, I am of opinion that the motion for the new trial be denied.

BRACKENRIDGE, J., delivered a dissenting opinion.

New trial refused.

CHAPTER VIII.

OBLIGATIONS OF AGENT TO PRINCIPAL.

1. Obedience.

§ 88.] WHITNEY ET AL. *v.* MERCHANTS' UNION EXPRESS CO.

104 MASSACHUSETTS, 152. — 1870.

CONTRACT, with alternative count in tort, for negligence of defendants in the matter of the collection of a draft drawn by plaintiffs, at Boston, upon Plummer & Co., at Providence. Plaintiffs instructed defendants to return the draft at once if it was not paid. Plummer & Co. objected to the draft as being $1.20 in excess of their debt, and offered to write to plaintiffs for an explanation. Defendants held the draft; Plummer & Co. wrote to plaintiffs and received a satisfactory explanation; defendants did not again present the draft, and two days after Plummer & Co. were ready to pay it the firm failed, and paid but 50 per cent of its liabilities. This action is to recover the balance, by way of damages, from defendants. It was agreed that if, upon the facts, the jury would be warranted in finding a verdict for the plaintiffs, a judgment should be entered for the plaintiffs for $1,233.21 and interest.

COLT, J. Under the instructions given to the defendants at the time they received this draft for collection, it was their duty to collect it, or to return it at once to the plaintiffs if not paid. It was duly presented by the defendants' messenger for payment on the 14th of October, and payment refused. Instead of returning the draft at once, they retained possession of it, in order to enable the drawees to obtain, by correspondence, some explanation from the plaintiffs as to the

amount for which it was drawn. Satisfactory explanations were received in due course of mail, and Plummer & Co., the drawees, were ready on the morning of the 16th of the same month to pay the full amount. But the draft was not again presented, and on the 19th they failed and have since been unable to pay.

It is the first duty of an agent, 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. And we are of opinion that there is evidence of neglect in this case, upon which the jury would have been warranted in finding a verdict for the plaintiffs.

The defendants would clearly have avoided all liability by returning the draft at once, upon the refusal to pay. It is urged that the defendants had done all they were bound to do, when they had presented the draft and caused the plaintiffs to be notified of its non-payment; that the notice which was immediately communicated by the letter of Plummer & Co., asking explanation, was equivalent to a return of the draft; that this notice was given by the procurement or assent of the defendants, as early as they would be required to give it if they had themselves done it instead of intrusting it to Plummer & Co.; and that, after the receipt of it, it was the duty of the plaintiffs to give new instructions if they desired the draft presented for payment a second time.

There would be force in these considerations if the letter of Plummer & Co. was only a simple notice of non-payment, with no suggestion of further action in regard to it. It expresses and implies much more. The reason for the refusal to pay is stated, and the plaintiffs are told that the defendants will hold the draft until they, Plummer & Co., hear from them. Plainly, if the defendants avail themselves of the letter as a performance of their obligation to give notice, they must abide by the whole of its contents. They make Plummer & Co. their agents in writing it, and authorize the plaintiffs to rely on the assurance which substantially it contains, that

upon the receipt by Plummer & Co. of their explanation the draft would be paid or returned, or notice of its non-payment given. There is no suggestion in it that the defendants were awaiting further instructions from the plaintiffs, or needed or expected them. It clearly implies that the defendants had only suspended, at the suggestion of Plummer & Co., and for their accommodation, the further performance of the duty they had undertaken, until an answer and explanation could be returned to Plummer & Co. The plaintiffs had no new instructions to give, nor had the defendants any right to expect them. They trusted to others, instead of corresponding themselves with the plaintiffs, who in this matter are in no respect chargeable with neglect. The loss is wholly due to the neglect of the defendants, and must be borne by them. According to the agreement of the parties, the entry must be Judgment for the plaintiffs.

§ 88.] BRAY *v.* GUNN.

53 Georgia, 144. — 1874.

[Reported herein at p. 100.]

2. Prudence.

§ 89.] HEINEMANN *v.* HEARD.

50 New York, 27. — 1872.

Action for damages for breach of duty. Non-suit, and judgment for defendants. Plaintiffs appeal.

Defendants were plaintiffs' agents, residing in China. Plaintiffs sent to defendants £15,000 for the purchase of teas and silks, with instructions as to amounts and prices. Defendants neglected to purchase as instructed. It appeared that the defendants could not have procured the tea at the price fixed, but they could have procured the silk. They waited,

however, in the expectation that they could procure it at a lower price, but it suddenly advanced beyond the price fixed by plaintiffs.

RAPALLO, J. (after deciding that no recovery could be had for the failure to purchase the tea, and after discussing the evidence as to the possibility of purchasing the silk). The question in the case was one of due diligence, and we think that there was sufficient evidence to go to the jury on that point. The position cannot be maintained that fraud on the part of the agent is necessary to subject him to an action for neglecting to perform a duty which he has undertaken. An agent is bound not only to good faith but to reasonable diligence, and to such skill as is ordinarily possessed by persons of common capacity engaged in the same business. Story on Agency, §§ 183, 186. Whether or not he has exercised such skill and diligence is usually a question of fact; but its omission is equally a breach of his obligation and injurious to his principal, whether it be the result of inattention or incapacity, or of an intent to defraud. In the case of *Entwisle* v. *Dent* (1 Exch. 812) there was an element of fraud as well as breach of duty; but the judgment of the court was not founded upon the fraud, nor could it be, as the action was for breach of the implied contract of the defendant to act according to instructions.

As an independent ground for sustaining the non-suit, it is claimed, on the part of the defendants, that the order to purchase silk was discretionary, and that for that reason they are not responsible in damages for their failure to execute it.

By reference to the letter of December 23, 1864, it will be seen that no discretion was given whether or not to purchase. The order to invest £5,000 in silk of one or other of the particular descriptions mentioned, and at the prices named, was absolute. The only matter left to the discretion of the defendants was the selection of the silks as well as the teas. They were instructed to purchase either Cumchuck at 18*s*., or No. 1 Loo Kong, or Kow Kong, at 16*s*., and were

requested to obtain all white if possible; otherwise, to separate the white from the yellow. No other matters were left to their discretion. It was their duty to select some of these descriptions, if they were to be obtained, and to use reasonable diligence in obtaining the required quantity in time to ship under the letter of credit. It is argued that as they had discretion in the selection of the silks, and had to determine whether it was possible to obtain all white, no period can be fixed as the time when they were bound to decide these matters and make the purchase. This argument is not satisfactory. The necessity of making a selection may have justified them in not accepting the first offer which they may have met with, and in looking further for the purpose of complying with the wishes of their correspondents; but it would not justify them in allowing all opportunities to pass, and the time to elapse within which they could purchase under the letter of credit. They were bound to make a selection within a reasonable time, and, at all events, before the time for shipping, under the credit, expired. The prices appear to have continued below their limit from the early part of June until the first term of the letter of credit had run out; yet they allowed all that time to elapse without making any selection. Such delay was certainly evidence of want of due skill and diligence, if attributable merely to a failure to come to a decision.

But the defendants do not, in their correspondence, take any such ground, or claim that they regarded themselves as having any discretion as to purchasing the silks and tea. On the contrary, in their letter of February 27, 1866, they say: "We were bound to follow your instructions for the investment of £15,000 credit first sent, and have already explained to you our reasons for not having purchased silk;" referring to their letter of December 14, 1865. They rest their justification wholly upon the ground that while the silks were below the plaintiffs' limits they held off in the attempt to obtain them at still lower prices. They were scarcely justified, however, in persisting in this attempt until it became too

late to ship under the letter of credit as originally drawn or as extended.

(The court then discusses the question of damages and concludes): It is enough, at the present stage of the case, to say that the evidence on the subject of damages was received without objection, and that the non-suit was not moved for, or granted on the ground of any defect of proof in this respect, but on the sole ground that the plaintiffs had not given any evidence of their alleged cause of action sufficient to go to the jury. We think they have shown enough in respect to the silk to put the defendants to their defence, and that the judgment should therefore be reversed and a new trial granted, with costs to abide the event.

All concur. Judgment reversed.

3. Good faith.

§ 90.] GEISINGER *v.* BEYL.

80 WISCONSIN, 443. — 1891.

ACTION of ejectment. Judgment for plaintiff. Defendant appeals.

Defendant relied for title upon certain tax deeds issued to himself and to one Steinke in his behalf and upon a quitclaim deed from Steinke. The jury found specially that the defendant was the agent of plaintiff for the sale or care of the land when the tax deeds were executed, and that (except as to these tax deeds) plaintiff was the owner of the lands.

LYON, J. The learned counsel for defendant earnestly contended in his argument that there is no testimony to support the finding of the jury that when the tax deeds were executed defendant was the agent of the plaintiff for "selling or caring for the plaintiff's interest in the land in question." We do not agree with counsel in this view of the testimony.

Plaintiff resided at Rochester, in Minnesota, and the defendant resided in Barron County, in this State, near the

land. The parties had considerable correspondence in 1869, 1870, and 1871, concerning the land. Some of the letters which passed between them are in evidence, and the contents of others, which had been lost or destroyed, were testified to on the trial. This testimony will not be repeated here. It is sufficient to say of it that, if true, it proves that the defendant was, at the times mentioned, the agent of the plaintiff, not only to look after and care for the land, but to sell it. In either case it was a violation of his duty to take a tax deed of the land to himself or another, for it was his duty to protect and preserve plaintiff's interest therein. Hence the tax deeds were a fraud upon the plaintiff, and vested in defendant no title to the land. At most, the purchase of the tax certificates by the defendant was a redemption of the land from the tax sales thereof. . . .

We conclude, therefore, that the finding on the subject of defendant's agency is supported by the testimony, and demonstrates that the defendant took no title to the land under any of the tax deeds. . . . Judgment affirmed.

§ 90.] CONKEY *v.* BOND.

36 New York, 427. — 1867.

Action to rescind a sale of stock made by defendant to plaintiff, and to recover the amount paid therefor, and certain payments made by plaintiff as stockholder. Judgment for defendant. Reversed at General Term. Defendant appeals from the order of the General Term.

Defendant, as agent, undertook to purchase stock for plaintiff, and, without plaintiff's knowledge, transferred ten shares of his own stock to plaintiff.

Porter, J. The fact that the defendant volunteered his agency did not absolve him from the duty of fidelity in the relation of trust and confidence which he sought and assumed. The plaintiff was induced to purchase at an extrava-

gant premium, stock of the value of which he was ignorant, on the mistaken representations of the defendant, who professed to have none which he was willing to sell. This assurance very naturally disarmed the vigilance of the respondent, and he availed himself of the defendant's offer by authorizing him to buy at the price he named.

The defendant did not buy, but sent him a certificate for the amount required, concealing the fact that he had not acted under the authority, and that the stock transferred was his own.

There is no view of the facts in which the transaction can be upheld. He stood in a relation to his principal which disabled him from concluding a contract with himself, without the knowledge or assent of the party he assumed to represent. He undertook to act at once as seller and as purchaser. He bought as agent, and sold as owner. The *ex parte* bargain, thus concluded, proved advantageous to him and very unfortunate for his principal. It was the right of the latter to rescind it, on discovery of the breach of confidence. It is not material to inquire whether the defendant had any actual fraudulent purpose. The making of a purchase from himself, without authority from the plaintiff, was a constructive fraud, in view of the fiduciary relation which existed between the parties. In such a case, the law delivers the agent from temptation by a *presumptio juris et de jure*, which good intentions are unavailing to repel. It is unnecessary to state our views more fully on this question, as it is fully and ably discussed in the opinion delivered by Judge Bacon in the court below, and his conclusions are abundantly fortified by authority. 34 Barb. 276; *Gillett* v. *Peppercorne*, 3 Beavan, 78; Story on Agency, § 214; *Michoud* v. *Girod*, 4 How. U. S. 503; *Davone* v. *Fanning*, 2 Johns. Ch. 252, 270; *Moore* v. *Moore*, 1 Seld. 256; *N. Y. Central Ins. Co.* v. *Protection Ins. Co.*, 14 N. Y. 85; *Gardner* v. *Ogden*, 22 Id. 325.

The objection, that this theory is inconsistent with that stated in the complaint, is not sustained by the record. The

essential facts are alleged, and the appropriate relief is demanded. The fact that the complaint alleged other matters which the plaintiff failed to establish, impairs neither his right nor his remedy. *Utile per inutile non vitiatur.*

The order of the Supreme Court should be affirmed, with judgment absolute for the respondent.

All the judges concurring. Judgment accordingly.

§ 90.] BUNKER *v.* MILES.

30 Maine, 431. — 1849.

Assumpsit for money had and received. Judgment for plaintiff.

Defendant bought a horse of one Seaver for $65, and agreed that if the horse sold for more than $65, he would divide the profit with Seaver. Defendant then had $80 of plaintiff's money with which to buy that horse, and was to buy it as cheaply as possible and receive one dollar for his services. Defendant told Seaver he had sold the horse for $80, and gave Seaver $7.50, keeping $7.50 for himself. Judgment for $6.50 and interest.

Tenney, J. The case was put to the jury upon evidence introduced by the plaintiff alone. It appeared that he placed in the hands of the defendant the sum of $80, and requested him to obtain a certain horse. The defendant was restricted, in the price to be paid, to that sum, and was to procure the horse at a less price, if he should be able to do so, it being agreed that the defendant should receive the sum of $1 for his services in purchasing the horse. He obtained the horse and delivered him to the plaintiff, who received him and disposed of him the same day. The defendant represented to the plaintiff, that he had saved nothing for himself. It appears by other testimony that the price paid for the horse by the defendant did not exceed the sum of $72.50.

If the defendant made a valid contract with the plaintiff, to

do the service requested as an agent, and did do it as was agreed, he was not at liberty to make a profit to himself in the transaction, in which he was acting as the agent; and whatever sum remained in his hands, after paying the price of the horse, deducting the compensation to be made to him, was the money of the plaintiff, for which the equitable action of money had and received could be maintained. The instructions to the jury were consistent with these principles, and a verdict was rendered for the plaintiff.

Exceptions overruled.

§ 90.] HEGENMYER *v.* MARKS.

37 MINNESOTA, 6. — 1887.

[Reported herein at p. 339.]

4. Accounting.

§ 91.] BALDWIN BROS. *v.* POTTER.

46 VERMONT, 402. — 1874.

ASSUMPSIT. Judgment for plaintiffs. Defendant appeals. Defendant, as plaintiffs' agent, sold prize packages of candies and collected the price. Defendant refused to account for the moneys or for samples of the prizes intrusted to him, and defended upon the ground of the illegality of the transaction.

PIERPOINT, C. J. We do not find it necessary in this case to consider the question as to whether the contract for the sale of the property referred to, by the plaintiffs, to the several persons who purchased it, were contracts made in violation of law, and therefore void, or not. This action is not between the parties to those contracts; neither is it founded upon, or brought to enforce them. If those contracts were illegal, the law will not aid either party in respect to them; it will not

allow the seller to sue for and recover the price of the property sold, if it has not been paid; if it has been paid, the purchaser cannot sue for and recover it back. The facts in this case show that the purchasers paid the money to the plaintiffs, not to the plaintiffs personally, but to the defendant as the agent of the plaintiffs, authorized to receive it. When the money was so paid it became the plaintiffs' money, and when it was received by the defendant as such agent, the law, in consideration thereof, implies a promise, on the part of the defendant, to pay it over to his principals, the plaintiffs; it is this obligation that the present action is brought to enforce: no illegality attaches to this contract. But the defendant insists that, inasmuch as the plaintiffs could not have enforced the contracts of sale as between themselves and the purchaser, therefore, as the purchaser has performed the contracts by paying the money to the plaintiffs through me, as their agent, I can now set up the illegality of the contract of sale to defeat an action brought to enforce a contract on my part to pay the money, that I as agent receive, over to my principal. In other words, because my principal did not receive the money on a legal contract, I am at liberty to steal the money, appropriate it to my own use, and set my principal at defiance. We think the law is well settled otherwise, and the fact that the defendant acted as the agent of the plaintiffs in obtaining orders for the goods does not vary the case. *Tenant* v. *Elliot*, 1 B. & P. 3; *Armstrong* v. *Toler*, 11 Wheat. 258; *Evans* v. *City of Trenton*, 4 Zab. (N. J.) 764.

We think the certificate granted by the county court was properly granted. It has been urged in behalf of the defendant, that the zeal with which he has defended this case shows that he intended no wrong; but we think the man who receives money in a fiduciary capacity, and refuses to pay it over, does not improve his condition by the tenacity with which he holds on to it.

Judgment of the county court affirmed.

§ 91.] BAKER *v.* NEW YORK NATIONAL EXCHANGE BANK.

100 NEW YORK, 31.—1885.

[Reported herein at p. 341.]

§ 91.] RIEHL *v.* EVANSVILLE FOUNDRY ASSOCIATION.

104 INDIANA, 70.—1885.

[Reported herein at p. 344.]

5. Appoinment of sub-agents.

§ 93.] COMMERCIAL BANK OF LAKE ERIE *v.* NORTON ET AL.

1 HILL (N. Y.), 501.—1841.

ASSUMPSIT by plaintiffs as indorsees against defendants as acceptors of two bills of exchange. Verdict for plaintiffs. Defendants move for a new trial.

E. Norton & Co., the defendants, authorized H. Norton, their general agent, to accept bills. H. Norton directed Cochrane, a book-keeper, to accept these bills, which he did by writing across the bills, "E. Norton & Co.—per A. G. Cochrane." Cochrane had no authority from E. Norton & Co. to accept bills.

By the Court, COWEN, J. (after deciding that there was evidence to go to the jury that H. Norton had authority to accept the bills). But it is said he could not delegate the power to accept. This is not denied, nor did he do so. The bills came for acceptance; and having as agent made up his mind that they should be accepted, he directed Cochrane,

the book-keeper, to do the mechanical part, — write the acceptance across the bills. He was the mere amanuensis. Had anything like the trust which is in its nature personal to an agent, — a discretion for instance to accept what bills he pleased, — been confided to Cochrane, his act would have been void. But to question it here would be to deny that the general agent of a mercantile firm could retain a carpenter to make a box, or a cooper to make a cask. The books go on the question whether the delegation be of a discretion. Such is the very latest case cited by the defendants' counsel (*Emerson* v. *The Prov. Hat Manuf. Co.*, 12 Mass. Rep. 237, 241, 2); and the latest book (2 Kent's Com. 633, 4th ed.). *Blore* v. *Sutton* (3 Meriv. 237) is among the strictest cases I have seen. There the clerk of the agent put his own initials to the memorandum, by direction of the agent; and held, insufficient. *Henderson* v. *Barnewall* (1 Young & Jerv. 387) followed it. Both were cases arising under the Statute of Frauds, which requires that the memorandum should be signed by the principal or his agent; and, I admit, it is very difficult to distinguish the manner of the signatures there from that now in question, by Cochrane. Everything there seems to have been mechanical merely, as here; and there may be some doubt, I should think, whether such cases can be sustained. At any rate, in our attempt to apply them, we are met with a case as widely the other way; *Ex parte Sutton*, 2 Cox, 84. The rule as there laid down is, that "an authority given to A. to draw bills in the name of B. may be exercised by the clerks of A." Such is the marginal note, and it is entirely borne out by the case itself. Peter Marshall wrote to Lewis & Potter authorizing them "to make use of his name by procuration or otherwise to draw bills on G. & J." The clerk of Lewis & Potter drew the bill, signing thus: "By procuration of Peter Marshall, Robert Edgecumbe." The Lord Chancellor put it on the ground that the signature of the clerk would have bound Lewis & Potter, had he signed their name under the general authority which he had.

We thus make very little progress one way or the other on direct English authority. Left to go on the principle of any other English case I have seen, and there are many, all we have to say is, I think, that the agent shall not delegate his discretion; but may at least do any mechanical act by deputy. I do not know that the language of Lord Ellenborough in *Mason* v. *Joseph* (1 Smith's Rep. 406) has been anywhere directly carried into an adjudication. But it sounds so much like all the cases professing to go on principle, that I can scarcely doubt its being law. His lordship said, "It is true an attorney appointed by deed cannot delegate his authority to a third person. He must exercise his own judgment on the principal subject for the purpose of which he is appointed; but as to any mere *ministerial* act, it is not necessary that he should do it in person, if he direct it to be done, or upon a full knowledge of it adopt it. Suppose for instance he had got the gout in his hands, and could not actually sign himself, he might have authorized another to sign for him."

. . . .

New trial denied.

§ 93.] WRIGHT *v.* BOYNTON.

37 NEW HAMPSHIRE, 9.—1858.

ACTION against defendant, as a partner in the firm of William Hayward & Co., upon promissory notes signed in the firm name by the hand of Willard Russell. Verdict for defendant.

BELL, J. . . . The defendant, Boynton, executed to Russell a power of attorney, by which he appointed him his agent, and authorized him to purchase and sell certain kinds of goods, in his name, and to transact business of that kind with capital furnished by him, and to use his name generally in the business. Russell, in the name of Boynton, entered

into partnership with Hayward, the other party named in the writ, in a business of that kind. The court held that the power of attorney did not give to Russell the power to make Boynton a partner with Hayward, and we think rightly.

One who has a bare power or 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. Story on Agency, secs. 13, 14; 2 Kent's Com. 633; Paley on Agency, 175; Broom's Maxims, 665; *Bank* v. *Norton*, 1 Hill, 501; *Cockran* v. *Irlam*, 2 M. & S. 301.

Now each partner possesses an equal and general power and authority, independently of articles, or express stipulations regulating their powers, in behalf of the firm, to transfer, pledge, exchange, or apply, or otherwise dispose of the partnership property and effects, for any and all purposes, within the scope and objects of the partnership, and in the course of its trade or business. Story on Part. 144. He may pledge the credit of his partners to any amount, and in all simple contract dealings, relating to the partnership business, he is, in his own person, the representative of the firm, and the act of one partner is the act of all. Cary on Part. 29, 30; 3 Kent's Com. 41, 43. Powers thus broad cannot be conferred by a mere agent on a stranger, without express authority.

. . . .

Judgment on the verdict.

§ 95.] POWER ET AL. v. FIRST NATIONAL BANK.

6 MONTANA, 251. — 1887.

ACTION to recover the amount of a draft deposited by plaintiffs with defendant for collection. Defendant sent the draft to its correspondent at the place of payment. The correspondent collected the draft, but failed to remit, and subsequently became insolvent. Judgment for defendant. Plaintiffs appeal.

MCLEARY, J. . . . The question of how far a bank is liable for the default of a correspondent or collecting agent in regard to a collection is one which has been solved in at least three different ways by the many courts of last resort in the United States which have at different times had the matter under consideration. One class of cases maintains the absolute liability of a bank for any default of its correspondent or collecting agent, in the same manner as it would be for the default of its own employés, on the principle that the bank, by undertaking the collection, obligated itself to see that every proper measure was taken, and regarding the collector as the agent of the bank, and not as the agent of the owner of the commercial paper. A second class of cases holds that the bank is liable only for the exercise of due care and diligence in selecting a trustworthy agent or correspondent, and that there is in the deposit for collection the implied authority to employ a sub-agent, and that such sub-agent becomes, when chosen, the agent of the holder, and not of the bank which selected him. The third class of cases draws a distinction between the cases in which the payer resides where the bank is situated, and the cases where he resides at a distance: in the first place making the bank liable absolutely for any default or wrongful act, and in the second place only making the bank liable for the proper selection of a competent and reliable agent, with proper instruction. 1 Daniel, Neg. Inst. § 341.

The cases of the first class are found principally in the decisions of the courts of the United States and the States of New York, New Jersey, Pennsylvania, Ohio, and Indiana. The cases of the second class are found chiefly in the reports of Massachusetts, Connecticut, Maryland, Mississippi, Missouri, and Iowa. The third class of cases is made up of those decided by the courts of Illinois, Tennessee, Wisconsin, and Louisiana.

Inasmuch as there is such a variety of opinions to be found among the highest courts on this important question, it is proposed to examine at some length such of them as are accessible to us, and thence deduce what we consider to be the true rule governing such cases.

There has never been any adjudication on a question similar to this in this court; and so far as concerns this territory, this is a case of first impression.

(The court then makes an exhaustive review of the authorities, which is too extended to reprint here.)

The foundation for all the differences of opinion among the learned judges who have had the matter under consideration appears clearly to rest in the interpretation of the implied contract between the depositor and the bank at the time the negotiable paper is deposited for collection. Where there is an express contract, it must, of course, be followed, and there is no room for a difference of opinion; and all of the decisions herein styled cases of the second and third classes are founded on the idea that the course of business or the customs of bankers, or the necessities of the case, or the peculiar circumstances, raise some other presumption than the one that the bank receiving the deposit for collection undertakes to collect it, and assumes all the risks from the negligence or default of the agents which it employs. We do not believe that any other contract can be inferred from the mere tender and acceptance of negotiable paper for collection. No matter where the debtor may reside, nor what agencies it is necessary to employ in the collection, the depositor is not supposed to be acquainted with the methods

to be employed by the bank in collecting its paper, or the carefulness, skill, solvency, or honesty of the agents whom it may be necessary to employ in such collections. Besides, it is the universal custom of banks, on receiving collections, to pass them to the credit of the owner, and to indorse and transmit them to their correspondents, where they are in like manner passed to the credit of the indorser, and so on until collection; and, if the collection fails on account of the insolvency of the debtor, and through no fault of any intermediate bank or agent, the paper is returned, and charged back, until it reaches the original depositor and indorser, who is called upon to make it good. Such was the course pursued in the case at bar, and the defendant is clearly liable for the amount collected.

On mature consideration of the authorities, supporting all shades of opinion on this subject, we fully agree with the views expressed in 1 Daniel, Neg. Inst. § 342, and hold that, in the absence of a special contract, a bank is absolutely liable for any laches, negligence, or default of its correspondent whereby the holder of negotiable paper suffers loss. By such a rule alone can the depositor who intrusts his business to a bank be secure against carelessness or dishonesty on the part of collecting agencies employed by banks to carry out their contracts. Banks can easily avoid the effects of this stringent rule by making special contracts in special cases, or declining to undertake collections at points where they have any fears as to the reliability or solvency of the agents whom they will be obliged to employ; but when they undertake collections, either at their own location, or at distant points, without a special contract limiting their liability, they must be held to do so for a sufficient consideration, and to be responsible absolutely to the owner of negotiable paper for the payment of all money collected thereon, and for all losses occurring through the negligence of the agent, resulting in a failure to make such collection.

In accordance with these views, the judgment is hereby reversed, and the case remanded for a new trial.

Judgment reversed.

§ 95.] GUELICH *v.* NATIONAL STATE BANK.

56 Iowa, 434. — 1881.

Action to recover the amount of a bill of exchange deposited with defendant for collection by plaintiff's testator, which defendant failed to present for payment to the drawee or to protest for non-payment, whereby the other parties to the paper were discharged. There was a trial by the court without a jury and judgment for plaintiff; defendant appeals. The facts of the case appear in the opinion.

Beck, J. I. The paper in question in this suit was a foreign bill drawn in Munich, Westphalia, upon New York, and was deposited with defendant for collection. In the usual course of business of the bank, it was sent by defendant to its correspondent, the Metropolitan Bank of New York. It may be conceded, in the view we take of the case, that, for the reason the paper was not presented for payment and protested for non-payment by the New York bank within the time required by law, the drawers and indorsers of the bill were discharged. Counsel for defendant insist that for the reason the paper was over due when received by defendant no liability attaches for failure to protest it for non-payment. They also argue that defendant as a national bank is not liable for the default charged in the petition. These and other questions discussed by counsel we need not consider, as the decision of the case turns upon another point arising upon facts we have just stated.

II. The question which, in our opinion, is decisive of the case, is this: Is defendant liable for the default of its correspondent, the New York Bank, in failing to present and protest the bill in due time?

The paper was deposited with defendant for collection; it was payable in New York. 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 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 sub-agent 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 sub-agent 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 sub-agent and the principal, who must, therefore, seek a remedy directly against the sub-agent for his negligence or misconduct. Story on Agency, secs. 217 and 313. These familiar rules of the law, applied to the case, relieve it of all doubt when considered in the light of legal principles.

III. But there is conflict in the adjudged cases upon the question of the direct liability of the bank employed as a sub-agent to the holder of the paper, for negligence or default in its collection. The preponderance of the authorities strongly supports the conclusion we have just reached in this case. The following cases are to this effect: *Dorchester & Milton Bank* v. *New England Bank*, 1 Cush. 177; *Fabens* v. *Mercantile Bank*, 23 Pick. 330; *Lawrence* v. *Stonington Bank*, 6 Conn. 521; *East Haddam Bank* v. *Scovil*, 12 Conn. 303; *Hyde et al.* v. *Planters' Bank*, 17 La. Ann. 560; *Baldwin* v.

Bank of Louisiana, 1 La. Ann. 13; *Ætna Insurance Co.* v. *Alton City Bank*, 25 Ill. 221; *Stacy* v. *Dane County Bank*, 12 Wis. 629; *Tiernan* v. *Commercial Bank*, 7 How. (Miss.) 648; *Agricultural Bank* v. *Commercial Bank*, 7 Sm. & M. 592; *Bowling* v. *Arthur*, 34 Miss. 41; *Jackson* v. *Union Bank*, 6 Har. & J. 146; *Citizens' Bank* v. *Howell*, 8 Md. 530; *Bank of Washington* v. *Triplett*, 1 Pet. 25; *Mechanics' Bank* v. *Earp*, 4 Rawle, 384; *Bellemire* v. *The U. S. Bank*, 1 Miles, 173; S. C. 4 Wheat. 105; *Daly* v. *Butchers' & Drovers' Bank*, 56 Mo. 94; *Smedes* v. *The Bank of Utica*, 20 Johns. 372.

IV. The following cases hold that the bank to whom a bill or note is sent for collection by another bank is not the agent of the owner of the paper: *Allen* v. *Merchants' Bank*, 22 Wend. 215; *Downer* v. *Madison Co. Bank*, 6 Hill, 648; *Montgomery Co. Bank* v. *Albany City Bank*, 3 Seld. 459; *Commercial Bank* v. *Union Bank*, 1 Kern. 203; S. C. 19 Barb. 391; *Ayrault* v. *Pacific Bank*, 47 N. Y. 570; *Indig* v. *Brooklyn City Bank*, 16 Hun, 200; *Reeves* v. *St. Bank of Ohio*, 8 Ohio St. 465.

V. *Bradstreet* v. *Everson*, 72 Pa. St. 124; *Lewis & Wallace* v. *Peck & Clark*, 10 Ala. 142, and *Pollard* v. *Rowland*, 2 Blackford, 22, are sometimes quoted as according with the cases last cited. We think they are distinguished from all the conflicting cases above referred to, by the fact that the parties receiving the paper, being collecting agents only, became bound, either by express or implied contracts, to make the collections themselves. In the other cases there was no such contract shown, but on the contrary it appears that banks in their usual course of business make collections of notes and bills at distant places through their correspondents, with the implied assent of the parties depositing such paper with them. The collecting bank thus becomes the sub-agent of, and is responsible to, the owners of the paper. See Story on Agency, sec. 217 a, and cases cited.

The decision in *Bank of Washington* v. *Triplett*, 1 Pet

25, and *Mechanics' Bank* v. *Earp,* 4 Rawle, 384, are based upon the ground that the paper in each case was deposited for transmission, and not for collection, that is, the receiving bank undertook to transmit the paper to its correspondent and not to collect it. This very element, in our opinion, is in all the cases cited to support our position, and in the case before us. Under the usage of banks, paper received for collection at the places other than the town or city where the receiving bank is located, is received under the implied contract that it is accepted for transmission to correspondents at the place where it is payable. These cases, we think, are in accord with the other decisions we have cited in support of our views.

Mackersy v. *Ramsays,* 9 Clark & F. 818, is not in conflict with the doctrine we adopt. In that case the receiving bank expressly undertook to forward the paper, and, upon its payment, to place the amount thereof to the credit of the depositor, and for the performance of its undertaking it was to receive a commission. The paper was collected by its correspondent, who failed soon after, and the bank receiving the paper from its customer, never received the funds. Surely under this contract to credit its customers with the amount of the paper upon payment, the bank would be bound to give him credit when it was paid to its correspondent, and thus become directly liable for the money to the customer.

Allen v. *The Merchants' Bank*, 22 Wend. 215, which established the doctrine afterwards followed in New York, was announced by a divided court, fourteen senators concurring in the decision, and ten, with Chancellor Walworth, dissenting. The case, however, has been uniformly followed in New York.

(The court then distinguishes the case of *Hoover* v. *Wise*, 91 U. S. 308, which is superseded as an authority on this point by *Exchange Nat. Bank* v. *Third Nat. Bank*, 112 U. S. 276, decided in 1884.)

In many of the cases above cited banks were held not to

be liable for the negligence of notaries to whom paper was delivered for protest. Undoubtedly the doctrines which would relieve a bank from liability for the negligence of a notary would protect it when charged with liability for the negligent act of a correspondent.

It may be remarked that while a bank is not responsible for the defaults of proper and competent sub-agents, it becomes liable if negligent in selecting incompetent and improper agents to whom it intrusts paper for collection.

We are of the opinion that the district court erred in rendering a judgment against defendant upon the facts before it.

Reversed.

6. Obligations of gratuitous agents.

§ 97.] DELANO *v.* CASE.

121 ILLINOIS, 247. — 1887.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the court.

This was case, in the circuit court of Macoupin County, by a general depositor in a bank, against directors of the bank, for negligence in permitting it to be held out to the public as solvent, when in fact it was, at the time, insolvent. Judgment was rendered for the plaintiff in that court, and that judgment was affirmed, on appeal to the Appellate Court for the Third District, and this appeal is from that judgment.

The Appellate Court, in its opinion filed on rendering that judgment, holds, first, that the directors of a bank are trustees for depositors as well as for stockholders; second, that they are bound to the observance of ordinary care and diligence, and are hence liable for injuries resulting from their non-observance; and third, that the present appellants did not observe that degree of care and diligence, and, in consequence thereof, appellee sustained the damages for

which the judgment was rendered. *Delano et al.* v. *Case*, 17 Bradw. 531.

The last proposition we are relieved from inquiring into, since there was evidence tending (though, it may be, but slightly) to sustain it.

The propositions of law, as above stated, are, in our opinions, free of objection and sustained by authority. *Percy et al.* v. *Millandon*, 3 La. 568; *United Society of Shakers* v. *Underwood*, 9 Bush, 609; Morse on Banks and Banking (2d ed.), 133; Thompson on Liability of Officers and Agents, 395; *Shea* v. *Mabry*, 1 Lea (Tenn.), 319; *Hodges* v. *New England Screw Co.*, 1 R. I. 312; Wharton on Negligence, sec. 510.

The judgment is affirmed.

Judgment affirmed.

97.] ISHAM, TRUSTEE, *v.* POST, ADMINISTRATRIX.

141 NEW YORK, 100. — 1894.

ACTION to recover $25,000 placed in defendant's hands by plaintiff to be loaned. Judgment for plaintiff. Defendant appeals.

FINCH, J. The relation between the parties to this controversy must be regarded as that of principal and agent. Post was a banker, — not a member of the Stock Exchange, and so bound by its rules, but familiar with its customs and usages, and controlled by them to some extent whenever dealing with stocks in the Wall Street market. He held himself out to the business world in that character. By his circulars he advertised himself as dealing in "choice stocks," and promised his customers "careful attention" in all their financial transactions. Those who dealt with him contracted for, and had a right to expect, a degree of care commensurate with the importance and risks of the business to be done, and a skill and capacity adequate to its performance. That care

and skill is such as should characterize a banker operating for others in a financial center, and different in kind from the ordinary diligence and capacity of the ordinary citizen. The banker is employed exactly for that reason. Without it there might cease to be motives for employing him at all.

Isham was the trustee of an express trust, but in this dispute must be regarded simply as an individual, and without reference to his trust character; for the trial court has found as a fact that, in employing the banker to loan for him $25,000, he gave no notice of the trust character attaching to the money, contracted apparently for himself, and left Post to believe, and be justified in believing, that the money was his own. The evidence on the subject admits of some difference of opinion, but on this appeal the finding must control.

In the same way the question whether Post's services in making the loan were or were not to be gratuitous must be deemed settled. The finding is that those services were to be without compensation; and on that ground the appellant claims that Post was a gratuitous mandatary, and liable only for gross negligence. But, while no compensation as such was to be paid, it does not follow that the banker was freed from the obligation of such diligence as he had promised to those who dealt with him, or was at liberty to withhold from his agency the exercise of the skill and knowledge which he held himself out to possess. Nothing in general is more unsatisfactory than attempts to define and formulate the different degrees of negligence; but even where the neglect which charges the mandatary is described as "gross," it is still true that if his situation or employment implies ordinary skill or knowledge adequate to the undertaking, he will be responsible for any losses or injuries resulting from the want of the exercise of such skill or knowledge. Story on Bailments, § 182a; *Shiells* v. *Blackburne*, 1 H. Black. 158; *Foster* v. *Essex Bank*, 17 Mass. 479; *First Nat. Bank* v. *Ocean Nat. Bank*, 60 N.Y. 278. In the latter case it was said that ordinary care as well as gross negligence, the one being in contrast with the other, must be graded by the nature and

value of the property, and the risks to which it is exposed. Post, therefore, was required to exercise the skill and knowledge of a banker engaged in loaning money for himself and for his customers, because of the peculiar character and scope of his agency, because of his promise of careful attention, and because the contract was made in reliance upon his business character and skill.

We should next consider upon whom rested the burden of proof. The plaintiff alleged and proved that he put into Post's hands, as his banker and agent, to be loaned upon demand at the high rates of interest prevailing, and in the mode approved by custom and usage, the sum of $25,000, which sum Post had not returned, but refused to return upon proper demand, and so had converted the same to his own use. That made out plaintiff's case. Judgment for him must necessarily follow, unless Post, in answer, has established an affirmative defence. That which he pleaded and sought to prove was that the money was lost without his fault and through an event for which he was altogether blameless. In other words, he was bound to show that he did his duty fully and faithfully, and without negligence or misconduct, so that the resultant loss was not his, but must justly fall upon the plaintiff. *Marvin* v. *Brooks*, 94 N. Y. 71; *Ouderkirk* v. *C. N. Bank*, 119 Id. 263. With that burden resting upon him, we must examine his defence and the evidence given in its support, and determine whether or not it is our duty to sustain the adverse conclusion, to reverse which he brings this appeal.

(The court then decides that the trial court erred in excluding certain evidence offered by the defendant, and on this ground reverses the judgment.)

Judgment reversed.

PART III.

LEGAL EFFECT OF THE RELATION AS BETWEEN THE PRINCIPAL AND THIRD PARTIES.

CHAPTER IX.

CONTRACT OF AGENT IN BEHALF OF A DISCLOSED PRINCIPAL.

1. Contracts apparently authorized.

§ **103.**] HUNTLEY *v.* MATHIAS ET AL.

90 North Carolina, 101. — 1884.

Action for damages to a horse. Judgment for plaintiff. Defendant corporation appeals.

Mathias was the agent of defendant corporation. As such agent he was engaged in travelling about the country selling steam-engines. While so engaged he hired a horse of plaintiff, and overdrove and injured it. Defendant corporation contends that there was no proof that Mathias had authority from it to hire the horse.

Merrimon, J. In the absence of any written instrument, agencies in many cases arise from verbal authorizations, from implications, from the nature of the business to be done, or from the general usage of trade and commerce.

It is a general principle, applicable in all such cases, whether the agency be general or special, unless the inference is expressly negatived by some fact or circumstance, that it includes the authority to employ all the usual modes and means of accomplishing the purposes and ends of the agency, and a slight deviation by the agent from the course of his

duty will not vitiate his act, if this be immaterial or circumstantial only, and does not, in substance, exceed his power and duty. Such an agency carries with and includes in it, as an incident, all the powers which are necessary, proper, usual, and reasonable, as means to effectuate the purposes for which it was created, and it makes no difference, whether the authority is general or special, expressed or implied, it embraces all the appropriate means to accomplish the end to be attained.

The nature and extent of the incidental authority, in such cases, turn oftentimes upon very nice considerations of actual usage, or implications of law, and it is sometimes difficult to apply the true rule. Incidental powers are generally derived from the nature and purposes of the particular agency, or from the particular business or employment, or from the character of the agent himself. Sometimes the powers are determined by mere inference of law; in other cases by matters of fact; in others by inference of fact; and in others still, to determine them becomes a question of mixed law and fact. Story on Agency, §§ 85, 97, 100; *Gilbraith* v. *Lineberger*, 69 N. C. 145; *Katzenstein* v. *Railroad*, 84 N. C. 688; *Bank* v. *Bank*, 75 N. C. 534; *Williams* v. *Windley,* 86 N. C. 107; 1 Wait, Act. & Def. 221, 230.

In the case before us the allegations of the complaint are very general and the evidence is meagre, but applying the rules of law above stated to the whole case, we think the court properly held that there was evidence to go to the jury in respect to the authority of the agent to hire the horse.

It is alleged in the complaint that Mathias was the agent of the defendant corporation, and this is admitted in the answer, and the evidence went to show that the object of the agency was, that the agent should travel about the country from place to place, and sell steam-engines for his principal. Now, common experience and observation show that, generally, a man, whether as principal or agent, going about the country from place to place, and in various directions, to sell steam-engines, or merchandise of any kind that people generally purchase, does not go on foot, but on railroads when he

can, on horseback, or in light, convenient vehicles. This is done almost uniformly, with a view to expedition as well as the reasonable comfort of the person travelling. In the general order of things this is done, and it is reasonable and proper that it should be. And ordinarily, where an agent is sent out on such service, his principal furnishes the means of transportation. This is not perhaps uniformly, but it is generally so, and if there is not a legal presumption of authority in the agent to hire a horse or vehicle for the purpose of getting from place to place, the fact certainly raises the ground for an inference of the fact to that effect, to be drawn by the jury. The nature of the agency in this case rendered it necessary that the agent should, from time to time, have a horse to enable him to get from one place to another, and this gives rise to the inference that his employer gave him authority to hire one.

The corporation defendant sent its agent out to travel from place to place to sell its goods, and it gave him credit as a trustworthy man in and about the business of the agency. In view of the habits of men, the customary course of business, especially the custom in such agencies as that under consideration, there arose the ground for an inference that the jury might properly draw, not conclusive in itself, but to be made and weighed by the jury, to the effect that the agent Mathias had authority to hire the horse for the purpose of his agency. *Katzenstein* v. *Railroad, supra ; Bank* v. *Bank, supra ; Bentley* v. *Doggett*, 51 Wis. 224 ; 37 Am. Rep. 827.

That the principal is liable to third persons for torts, deceits, frauds, malfeasance and nonfeasance, and omissions of duty of his agent in the course of his employment, cannot be questioned, even though the principal did not authorize, justify, or participate in, or know of such misconduct. Story on Agency, 452 *et seq. ; Jones* v. *Glass*, 13 Ired. 305 ; *Cox* v. *Hoffman*, 4 Dev. & Bat. 180.

The evidence in this case tended to show, and the jury found, that the agent hired the horse in the course of the business of his agency, and for the benefit of his principal, and while he had possession of, and used the horse, in the

course of his business, he negligently and carelessly drove him too rapidly, or otherwise maltreated him, whereby he was seriously injured, to the damage of the plaintiff. The court fairly left the question of authority in the agent to hire the horse, and the character and extent of the injury to him, to the jury, and we cannot see that the defendant has any just ground of complaint.

There is no error, and the judgment must be affirmed.

Affirmed.

§ 103.] BRONSON'S EXECUTOR *v.* CHAPPELL.

12 WALLACE (U. S.), 681. — 1870.

[Reported herein at p. 101.]

§ 103.] JOHNSON *v.* HURLEY.

115 MISSOURI, 513. — 1893.

[Reported herein at p. 105.]

§ 104.] HOWELL ET AL. *v.* GRAFF ET AL.

25 NEBRASKA, 130. — 1888.

MAXWELL, J. On the thirtieth day of September, 1886, the plaintiffs filed a petition in the district court of Douglas County against the defendants, to recover the sum of $1,419.30, with interest, for breach of contract, for that on the fourth day of August, 1886, the defendants entered into a written contract of sale with plaintiffs, and on that day sold to the plaintiffs a certain lot of dimension timber for immediate shipment, delivered at Atchison, Kansas, all white pine, at $16.50 per M., terms 90 days. The contract of sale was in writing.

The defendants failed to deliver any part of the lumber, and this suit was brought to recover the difference between the contract price, to wit, $16.50 per M., and the market price, the difference being $1,419.30.

The defendants, in their answer, set up that their agent Fyfe, who made this contract, was, on the fourth day of August, 1886, employed by the defendants to solicit orders for certain kinds of lumber, certain specified kinds and grades only, and that he had special and specific orders and instructions not to solicit orders for lumber of any kind or grade from plaintiffs, or to have any dealings with them whatsoever, and that he had no authority to receive or accept orders from plaintiffs, or to enter into any contract with them, and setting out that the prices in said contract were below the market prices and values of lumber at the time, and also below the prices at which Fyfe was instructed to take and solicit orders; and further alleging that the contract was made by mistake, and that after it was made said agent notified the plaintiffs, and that the same was cancelled and annulled.

On the trial of the cause in the court below a jury was waived, and the cause submitted to the court, which found for the defendants, and dismissed the action.

The principal question in the case is the apparent authority of the agent, Mr. Fyfe, to make the contract sued on. The testimony fails to show such apparent authority, while it does tend to show that orders were taken subject to approval by his principal. It appears that on the fifth day of August, 1886, the order was taken, Fyfe estimating the weight per 1,000 feet of green pine lumber at 2,800 lbs. In the evening, however, in revising his figures, he discovered that he had made a mistake of 1,000 lbs., the estimate should have been 3,800 lbs. He then telegraphed his principal to know if they would fill an order of the kind specified at $16.50 per M., to which they answered, in substance, no, but at $19.50 per M. Fyfe claims to have notified the plaintiffs on the next day of this refusal. This the plaintiffs deny. There is considerable dispute in the testimony as to what took place between

the parties afterwards, but that matter does not seem to be material in the case. The whole question turns upon the apparent authority of Fyfe to make an absolute contract and gives credit for 90 days, and the testimony fails to clearly establish such apparent authority. The rule is, that if a special agent exercise the power exhibited to the public, the principal will be bound, even if the agent has received private instructions which limit his special authority. *Wilson* v. *Beardsley*, 20 Neb. 449. The proof, however, fails to show that Fyfe had apparent authority from his principal to make an absolute sale upon the terms proposed.

Some objection is made to proof of usage, but both parties resorted to this proof to sustain the issues on their respective parts, and cannot now complain.

There is no error apparent in the record, and the judgment is affirmed.

Judgment affirmed.

§§ 106, 111.] DAYLIGHT BURNER CO. *v.* ODLIN.

51 New Hampshire, 56. — 1871.

Assumpsit against Odlin as a common carrier for delivering goods marked "C. O. D." without receiving the price. Verdict for defendant, and plaintiff moved to set it aside.

The goods were addressed to one Berry, to whom they had been sold by Moore, an agent of plaintiff. Berry refused to pay for the goods on the ground that he had purchased them of Moore on credit. Defendant refused to deliver them, but subsequently Berry presented an order from Moore to defendant directing defendant to deliver them "without C. O. D.," and thereupon defendant delivered them without receiving payment.

Moore travelled to sell his own goods, but incidentally sold goods for plaintiff. He had no actual authority to sell on credit.

BELLOWS, C. J. From the uncontradicted testimony of the plaintiff and the finding of the jury, it may be assumed that Moore was clothed by the plaintiff with an apparent authority, like that of a factor, to sell all the goods of the plaintiff he could sell within his business circuit, on a commission of ten per cent.

As incident to that general authority, he had 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.

There is some conflict in the adjudged cases upon the question of the authority of a factor to sell on credit, but we think the weight of modern authority is in favor of the position that he may sell on credit, unless a contrary usage is shown. *Goodenow* v. *Tyler*, 7 Mass. 36; *Hapgood* v. *Batcheller*, 4 Met. 573; *Greely* v. *Bartlett*, 1 Greenl. 172; *Van Alen* v. *Vanderpool*, 6 Johns. 70; *Robertson* v. *Livingston*, 5 Cow. 473; *Leland* v. *Douglass*, 1 Wend. 490; and see 1 Am. Leading Cases, 4th ed., 662, note, where it is said that it is universally established as the law-merchant that a factor may sell on credit. So in *Laussatt* v. *Lippincott*, 6 S. & R. 386, and *May* v. *Mitchell*, 5 Humph. 365, and Story on Agency, sec. 209.

The same views are recognized in *Scott* v. *Surman*, Willes, 406; *Russell* v. *Hankey*, 6 T. R. 12; *Haughton* v. *Mathews*, 3 B. & P. 489, per Chambre, J.; 3 Selw. N. P. 719.

In the case before us, Moore stands much on the same footing as a factor. The most marked distinction is that he is a travelling merchant, and did not apparently have his principal's goods with him; but this, we think, cannot affect the rule.

The reason of that rule in the case of factors is that it is found, by experience and repeated proofs in courts of justice, that it is ordinarily the usage of factors to sell on credit; and the same reason will apply in this case.

We have a case, then, where the agent was apparently clothed with the authority to sell the plaintiff's goods, without limitation as to the quantity, and on commission, for cash or on credit as he might think proper; and this being so, Moore must be regarded, in respect to third persons, as the plaintiff's general agent, whose authority would not be limited by instructions not brought to the notice of such third persons. *Backman* v. *Charlestown*, 42 N. H. 125, and cases cited.

As Moore, then, in respect to third persons, had the power to sell on credit, the authority to control the delivery of the goods so sold and sent to his order, for the purpose of making it conform to the contract of sale, would necessarily come within the scope of his agency; and we think his order to the defendant would justify a delivery of the goods without payment, unless he had notice of the agent's want of authority. As to him the agent's apparent authority was real authority.

The marking of the package by another agent of the plaintiff, to the effect that cash was required on delivery, was not in law notice of such want of authority, although it might be sufficient to put the defendant upon inquiry. That, however, was properly left to the jury, and they have found it not to be sufficient for that purpose. The marking of the package in that way does not necessarily imply that the agent had no authority to sell on credit, but it might indicate merely that the person so marking it supposed the sale to be for cash. And it might well be considered to come within the scope of Moore's agency to make the delivery conform to the contract of sale.

As the defendant, therefore, is found to have had no notice of any want of authority in Moore, and was not put upon inquiry, there must be Judgment on the verdict.

§ 106.] BYRNE *v.* MASSASOIT PACKING CO.

137 MASSACHUSETTS, 313. — 1884.

CONTRACT, for breach of written agreement. Verdict for plaintiff. Defendant alleged exceptions.

Defendant's agent sold plaintiff 3,000 barrels of mackerel. Defendant refused to deliver on the ground that the agent agreed to sell at not less than market price and to responsible parties alone, whereas this sale was at less than market price and to an irresponsible party. Defendant offered to prove that plaintiff was an irresponsible party, and also offered to prove a custom among Boston fish-dealers to accept or reject contracts of agents. Both offers were rejected and the evidence excluded.

W. ALLEN, J. The authority of Brookman as selling agent of the defendant was not limited by the provisions in the contract between them, by which he guaranteed that his sales should not be less than $200,000, and that all sales should be to good and responsible parties, and at not less than market prices. This was an arrangement between the principal and agent which could not affect, and plainly was not intended to affect, third parties. The evidence offered to prove that the agent had violated his agreements to sell to good and responsible parties, in making the sale to the plaintiff, was therefore immaterial, and was properly excluded, even if it was competent evidence to prove the fact for which it was offered.

The evidence to prove a custom among the fish-dealers in Boston to accept or reject contracts of selling agents, not known to the plaintiff, nor in New Orleans, where the contract was made, was properly excluded.

Exceptions overruled.

§ 106.] BENTLEY *v.* DOGGETT ET AL.

51 WISCONSIN, 224. — 1881.

ACTION to recover for livery furnished by plaintiff to one Otis, an agent of defendants. Judgment for plaintiff. Defendants appeal.

Defendants offered to prove that they had furnished Otis with money to cover all expenses, that he had no authority to pledge their credit, that they had subsequently settled with Otis and allowed him the amount of plaintiff's bill, and that there was a general custom in Chicago (where defendants did business) to furnish travelling salesmen with money for all expenses, and to give such salesmen no authority to pledge the credit of their principals. This evidence was excluded.

TAYLOR, J. It is clearly shown by the evidence that it was not only convenient but necessary for the agent, Otis, to have the use of horses and carriages in order to transact the business he was employed to transact; and the only question is, whether he could bind his principals by hiring them upon their credit. Otis was the agent of the defendants for the purpose of travelling about the country with samples of their merchandise, contained in trunks, which rendered it necessary to have a team and carriage to transport him and his samples from place to place, with full authority to sell their merchandise by sample to customers, and direct the same to be delivered according to his orders. The defendants not having furnished their agent the necessary teams and carriages for transportation, he clearly had the right to hire the same and pay their hire out of the funds in his hands belonging to them. This is admitted by all parties. The real question is, can the agent, having the money of his principals in his possession for the purpose of paying such hire, by neglecting to pay for it, charge them with the payment to the party furnishing the same, such party being ignorant at the

time of furnishing the same that the agent was furnished by his principals with money and forbidden to pledge their credit for the same?

There can be no question that, from the nature of the business required to be done by their agent, the defendants held out to those who might have occasion to deal with him, that he had the right to contract for the use of teams and carriages necessary and convenient for doing such business, in the name of his principals, if he saw fit, in the way such service is usually contracted for; and we may, perhaps, take judicial notice that such service is usually contracted for, payment to be made after the service is performed. It would seem to follow that, as the agent had the power to bind his principals by a contract for such service, to be paid for in the usual way, if he neglects or refuses to pay for the same after the service is performed, the principals must pay. The fault of the agent in not paying out of the money of his principals in his hands cannot deprive the party furnishing the service of the right to enforce the contract against them, he being ignorant of the restricted authority of the agent. If the party furnishing the service knew that the agent had been furnished by his principal with the money to pay for the service, and had been forbidden to pledge the credit of his principals for such service, he would be in a different position. Under such circumstances, if he furnished the service to the agent, he would be held to have furnished it upon the sole credit of the agent, and he would be compelled to look to the agent alone for his pay. We think the rule above stated as governing the case is fully sustained by the fundamental principles of law which govern and limit the powers of agents to bind their principals when dealing with third persons. Judge Story, in his work on Agency, § 127, says: "The principal is bound by all acts of his agent within the scope of the authority which he holds him out to the world to possess, although he may have given him more limited private instructions unknown to the persons dealing with him." In section 133, he says: "So far as an agent, whether he is a general or special agent, is in

any case held out to the public at large, or to third persons dealing with him, as competent to contract for and bind the principal, the latter will be bound by the acts of the agent, notwithstanding he may have deviated from his secret instructions." And again, in section 73, in speaking of the power of an agent acting under a written authority, he says: "In each case the agent is apparently clothed with full authority to use all such usual and appropriate means, unless upon the face of the instrument a more restrictive authority is given, or must be inferred to exist. In each case, therefore, as to third persons innocently dealing with his agent, the principal ought equally to be bound by acts of the agent executing such authority by any of those means, although he may have given to the agent separate private and secret instructions of a more limited nature, or the agent may be secretly acting in violation of his duty." In the case of *Pickering* v. *Busk*, 15 East, 38–43, Lord Ellenborough, speaking of the power of an agent to bind his principal, says: "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." These general principles have been illustrated and applied by this and other courts in the following cases: *Young* v. *Wright*, 4 Wis. 144; *Whitney* v. *State Bank*, 7 Wis. 620; *Long* v. *Fuller*, 21 Wis. 121; *Houghton* v. *Bank*, 26 Wis. 663; *Kasson* v. *Noltner*, 43 Wis. 646; *Smith* v. *Tracy*, 36 N. Y. 79; *Andrews* v. *Kneeland*, 6 Cow. 354.

In this view of the case it was immaterial what the orders of the principal were to the agent, or that he furnished him money to pay these charges, so long as the person furnishing the service was in ignorance of such facts. In order to relieve himself from liability, the principal was bound to show that the plaintiff had knowledge of the restrictions placed upon his agent, or that the custom to limit the powers of agents of this kind was so universal that the plaintiff must be presumed to have knowledge of such custom. Under the

decisions of this court, the custom offered to be proved was not sufficiently universal to charge the plaintiff with notice thereof. See *Scott* v. *Whitney*, 41 Wis. 504, and the cases cited in the decision, and *Hinton* v. *Coleman*, 45 Wis. 165. And there being no proof of actual notice to the plaintiff, the only issue left in the case, which was not clearly disposed of in favor of the plaintiff by the evidence, was submitted to the jury, viz., whether the credit was, in fact, given by the plaintiff to the agent or to the firm. The jury found against the defendants upon this issue. From reading the evidence in the record, I should have been better pleased with a different verdict upon this issue; but as there is some evidence to support the verdict, and as this court has held substantially in *Champion* v. *Doty*, 31 Wis. 190, that charging the service in the plaintiff's books to the agent is not conclusive that the credit was given to him, but might be explained, it was the province of the jury to say whether the explanation given by the plaintiff was reasonable and satisfactory. We cannot, therefore, set aside the verdict as against the evidence.

By the Court. The judgment of the court is affirmed.

§ 106, 107, 112.] HIGGINS *v.* MOORE.

34 New York, 417. — 1866.

Action for the price of a cargo of rye sold and delivered by plaintiffs to defendant. Defence, payment to plaintiffs' agent through whom defendant purchased. Judgment for defendant. Plaintiffs appeal.

The sale was negotiated by a broker in New York, plaintiffs residing in Albany. Defendant, before the delivery of the grain, knew that plaintiffs were the principals. The broker never had possession of the grain. The defendant relied upon a usage of trade in New York which allowed such payments to a broker when the seller resided out of the city of New York.

PECKHAM, J. The judgment was sustained in the superior court mainly on the ground that a grain broker, who had never had possession of the rye sold, but was only authorized to contract for its sale, had thereby an implied authority to receive the purchase price. The court was not satisfied with the finding of the fact by the referee as to the usage of trade which allowed a payment to a broker, but did not set it aside. I agree that the evidence is entirely unsatisfactory to establish any such usage. To my mind, it is utterly insufficient. This court, however, has no authority to interfere with this judgment on that ground. The fact, as found, is conclusive here.

The first question arising here is, had the broker, merely as such, authority to receive payment? I think he had not. In *Baring* v. *Corrie* (2 B. & Ald. 137), Holroyd, J., said, "A factor who has the possession of goods differs materially from a broker. The former is one to whom goods are sent or consigned. He not only has the possession, but generally a special property in them; but the broker has not the possession, and so the vendee cannot be deceived by that; besides employing a broker to sell goods does not authorize him to sell in his own name."

In that case it was held that the purchaser from a broker had no authority to set off a debt against the broker, on the ground that the broker had no authority to sell in his own name. Brokers are defined to be "those who make contracts between merchants and tradesmen, in matters of money and merchandise, for which they have a fee." 1 Liv. on Agency, 73, ed. of 1818.

It has been questioned among civilians, says Livermore, whether an authority to sell or let includes an authority to receive the price or not, and that Pothier says this power is not generally included. Id. p. 74; Pothier's Traité des Obligations, 477. But, that in some cases it will be presumed, as if goods are put into the hands of public brokers to be sold, and they are in the habit of receiving the price. Putting the goods in their hands implies an authority to

receive payment (2 Liv. 284, 285), as it does to receive payment on securities. 3 Chit. Com. Law, 207, 208.

The general doctrine is, that a broker employed to sell has no authority as such to receive payment. Russell on Factors and Brokers, 48 Law Lib. 68–110; *Mynn* v. *Joliffe*, 1 Wood & Rob. 326; *Baring* v. *Corrie*, 2 B. & Ald. 137. Exception is made to this general rule in some cases where the principal is not disclosed. Smith's Mer. L. 129, by Hol. & Gholson; see also, as throwing light upon this question, though not directly in point, *Whitbeck* v. *Waltham*, 1 Sol. 157; *Morris* v. *Cleasby*, 1 M. & S. 576. Story says, an agent to conclude a contract is not, of course, authorized to receive payment thereunder. Story on Agency, § 98, and cases there cited.

Where the person contracting for the sale has the property in his possession, and delivers it, he is clothed with the *indicia* of authority to receive payment, especially when the owner is not known. Such are the cases referred to by the court below. He is then clothed with apparent authority, and that, as to third persons, is the real authority. *Capel* v. *Thornton*, 3 Car. & P. 352; *Pickering* v. *Busk*, 15 East, 38. In the latter case the property had been put into the possession of the broker and the title in his name. "The sale was made by a person who had all the *indicia* of property." *Ireland* v. *Thomson*, 4 Com. Bench R. 149.

Cross v. *Hasking*, 13 Vt. 536. In this case, in the facts as stated, it does not distinctly appear; but it was so stated in the syllabus of the case by the reporter. *Hackney* v. *Jones*, 3 Humph. 612.

In the case at bar, however, the broker never had possession of the rye, and never delivered it; but the plaintiffs retained possession till they delivered to the defendant, and they were well known to the defendant; one of them had taken part in the negotiation for the sale, as owner, in the city of New York. The broker was simply authorized to make a contract for the sale. This was the whole of his authority in reality, and he had no other or further apparent authority.

Irrespective of the usage found by the referee, therefore, the defendant was not discharged by a payment to the broker.

Does that usage discharge him? In other words, did the usage give the broker an authority to receive payment which otherwise did not belong to him? There is no authority in this State on this point, and none in principle, I think, that sustains the affirmative of such a position.

Mr. Justice Story, after referring to various cases of authority in agents to receive payment on bonds, etc., and whether before due or not, and to other cases, adds: "But if there be 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, that may well be held to give full validity to the act. Story on Agency, § 98. In another section he says: "Payments made to agents are good in all cases where the agent is authorized to receive them, either by express authority or by that resulting from the usage of trade, or from the particular dealings between the parties." Id. § 249. The authorities referred to are, 2 B. & Ald. 137; 1 East, 36; and 1 M. & Sel. 576, 579, besides writers on agency.

Baring v. *Corrie* (2 B. & Ald. 137) simply holds, that where the broker sells without disclosing his principal, he acts beyond his authority, and the buyer cannot set off a debt against the broker in answer to an action for the goods.

In *Foveus* v. *Bennet* (11 Cow. 86), it is true that Lord Ellenborough referred the case to a jury to find whether a payment made to a broker had been made according to the usage of trade. They found it had been. It was also referred to the jury to find what the words (in the bought and sold note given to each party) meant of "payment in a month, money." They found those words meant "payment at any time within a month."

In that case the brokers were entitled to receive payment, as they themselves made the delivery of the property, and were, therefore, intrusted with its possession. That con-

fessedly gave them the right to receive payment. They were then factors. The question litigated there was, whether the broker had the right to receive the payment before the expiration of the month, not whether they had the right to receive it at all. The interpretation of the words in the notes settled that, — a very proper office of usage. *Morris* v. *Cleasby* (1 M. & S. 576) simply decides that, after the principal is disclosed, a purchaser has no right to pay a factor for the goods.

We are referred, by the counsel for the respondent, to *Campbell* v. *Hassell* (1 Stark. 233), where no question of usage of trade arose, except when the defendant offered to show "that, by usage of the trade, a bill at two months, with a discount, might be submitted for the original terms of a bill at four months." But Lord Ellenborough refused to hear any evidence to this effect, observing that it would be productive of intolerable mischief to permit brokers to deviate from the original terms of the contracts; and the payment there made to the broker was held unauthorized, and no defence to the purchaser.

In *Stewart* v. *Aberdeen* (4 Mees. & Wels. 211), the insurance company had paid the agent, and it was held valid, on the ground that the prior dealings between the parties had authorized it.

In *Greaves* v. *Legg* (11 Exch. 642), a broker at Liverpool had purchased a quantity of wool for merchants in London, and the vendors gave to the broker notice of the vessels in which they would ship it to the purchasers. It was proved to have been the universal usage at Liverpool to give such notice to the broker, and that it was his duty to communicate it to the purchaser; held, a valid performance by the sellers; that the notice thus given according to the usage of trade was sufficient.

Authority to receive such a notice is of a very different character and responsibility from an authority in a broker to receive payment for goods.

Russell on Factors and Agents, 48 Law Lib. 68, while he

denies the authority of a broker as such to receive payment, adds that he may, "if the custom of trade or the usual course of dealing between himself and his principal warrant it;" and he cites *Baring* v. *Corrie*, 2 B. & Ald. 137, before referred to, when the only point decided, as we have seen, was that a broker had no right to sell in his own name, and, of course, no right to receive payment. The duties and rights of the broker to contract for the sale of the grain were as clear and well defined in this case, as the duties and rights of a pledgee of stock, or of choses in action. The law defined them. It was no part of his duty to receive payment when the principal was known, and he never had possession of the rye. That was no part or branch of his assumed duty, which was simply to contract for a sale. There was nothing uncertain or obscure in the broker's legal duty that required or justified proof of usage to make certain or plain. It gave an addition, — a clear addition to, not an explanation of, his authority.

No usage is admissible to control the rules of law. In *Wheeler* and *Newbold*, 16 N. Y. 392, this court held that proof of usage of brokers in New York city to sell choses in action pledged to them in a mode unauthorized by law, was inadmissible. And so it has been held of stock pledged to brokers. *Allen* v. *Dykers*, 7 Hill, 497; and see *Bowen* v. *Newell*, 4 Seld. 190; *Merchants' Bank* v. *Woodruff*, 6 Hill, 174. So usage is not admissible to contradict the contract. *Clark* v. *Baker*, 11 Met. 186; *Blackett* v. *Assurance Co.*, 2 Tyrw. 266. In this case the law defined the rights and duties of this broker as clearly as it did those of the pledgee of stock in *Allen* v. *Dykers*, or of choses in action in *Bowen* v. *Newell*, and they could no more be controlled by usage.

Usages of merchants have been sparingly adopted by courts in this State, and in my opinion properly, too. Mr. Justice Story says they are often founded in mere mistake, and more often in want of enlarged views of the full bearing of principles. *Donnell* v. *Col. Ins. Co.*, 2 Sum. 377. The

usage, as found, seems to me entirely unreasonable, and to uphold it would be fraught with mischief. Brokers are thereby allowed to receive payment for principals living out of the city, and by implication, not for those residing in the city. Sound reason would seem to call for an opposite rule, as city dealers might well be supposed to be well acquainted with the brokers, and to know who were worthy of trust; while country dealers would be very likely to share the fate of these plaintiffs, — a grain broker, as the evidence shows, being quite likely to be without pecuniary responsibility. The purchaser need never incur risk, as he may learn the name of the principal and always pay him with safety.

In this case it would seem from the defendant's testimony, that this money was obtained from him, not under any usage, but the false pretence of the broker that the plaintiffs had drawn upon him for the proceeds of the rye, and thereby impliedly authorized him to collect.

The judgment, I think, should be reversed, and a new trial ordered, costs to abide the event.

Wright, J., also read for the reversal.

Judgment reversed.

§ 107.] TALMAGE *v.* BIERHAUSE.

103 Indiana, 270. — 1885.

Action for the price of goods. Defence, off-set for breach of warranty of quality of goods under a prior contract. Judgment for defendants. The sale was made by a travelling salesman, who gave the warranty.

Mitchell, C. J. . . . It is next contended that the evidence fails to show that the salesman had authority to make the guaranty which the defendants claimed was made.

The inference to be drawn from the argument of counsel is, that it was incumbent on the defendants to prove affirmatively, either that express authority to that end had been conferred, or that such sales are usually attended with

warranties. It may be said that the position contended for has the support of authority, but the authorities supporting it are, in the main, cases which involved an agency to do a single act, as the sale of some article by an agent in whose hands the particular article was placed for sale. *Andrews* v. *Kneeland,* 6 Cow. 354; *Smith* v. *Tracy,* 36 N. Y. 79; *Cooley* v. *Perrine,* 41 N. J. L. 322; *Brady* v. *Todd,* 9 C. B. (N. S.) 592.

We think the rule generally prevailing is, that an agent upon whom general authority to sell is conferred will be presumed to have authority to warrant, unless the contrary appears. Authority to sell generally, without any restrictions, carries with it *prima facie* authority to do any act or make any declaration in regard to the subject-matter of the sale necessary to consummate the contract, and usually incident thereto, and until the contrary is made to appear, it will be presumed that a warranty is not an unusual incident to a sale by an agent for a dealer in a commodity or article, where the thing sold is not present and subject to the inspection of the purchaser. *Ahern* v. *Goodspeed,* 72 N. Y. 108; *Sturgis* v. *N. J. Steamboat Co.,* 62 N. Y. 625; *Nelson* v. *Cowing,* 6 Hill, 336; *Schuchardt* v. *Allens,* 1 Wall. 359; *Boothby* v. *Scales,* 21 Wis. 626; *Howard* v. *Sheward,* L. R. 2 C. P. 148; *Deming* v. *Chase,* 48 Vt. 382.

In all such cases, even though the authority of the agent is restricted by instructions from his principal, he will be bound by a warranty attending a sale made by the agent, unless the purchaser knew of the restriction. *Murray* v. *Brooks,* 41 Iowa, 45. . . .

Judgment affirmed.

2. Factors.

§ 111.] PICKERING *v.* BUSK.

15 East (K. B.), 38. — 1812.

Trover for hemp. Verdict for defendants. Rule to set aside verdict.

One Swallow, a factor or broker, purchased for plaintiff a quantity of hemp which, by desire of plaintiff, was transferred in the wharfinger's book to the name of Swallow. Later Swallow purchased more hemp for plaintiff, which was transferred to the name of Pickering *or* Swallow. Swallow, as factor or broker, sold hemp to defendants' assignors, and transferred to them plaintiff's hemp.

Lord Ellenborough, C. J. It cannot fairly be questioned in this case but that Swallow had an implied authority to sell. 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 of 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 to such a place as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser safe. The case of a factor not being able to pledge the goods of his principal confided to him for sale, though clothed with an apparent ownership, has been pressed upon us in the argument, and considerably distressed our decision. The court, however, will decide that question when it arises, consistently with the principle on which the present decision is founded. It was a hard doctrine when the pawnee was told that the pledger of the goods had no authority to pledge them, being a mere factor for sale; and yet since the case of *Paterson* v. *Tash*, that doctrine has never been overturned. I remember Mr. Wallace arguing, in *Campbell* v. *Wright*, 4 Burr. 2046, that the bills of lading ought to designate the consignee as factor, otherwise it was but just that the consignors should abide by the consequence of having misled the pawnees. The present case, however, is not the case of a pawn, but that of a sale by a broker having the possession for the purpose of sale. The sale was made by a person who had all the *indicia* of property: the hemp could only have been transferred into his name for the purpose of sale; and the party who has so transferred it cannot now rescind the contract. If the plaintiff had intended to retain the dominion over the hemp, he should have placed it in the wharfinger's books in his own name.

Grose, J. The question, whether the plaintiff is bound by the act of Swallow, depends upon the authority which Swallow had. This being a mercantile transaction, the jury was most competent to decide it; and if I had entertained any doubt, I should rather have referred the question to them for their determination: but I am perfectly satisfied; I think Swallow had a power to sell.

Le Blanc, J. The law is clearly laid down, that the mere possession of personal property does not convey a title to dispose of it; and, which is equally clear, that the possession

of a factor or broker does not authorize him to pledge. But this is a case of sale. The question then is whether Swallow had an authority to sell. To decide this let us look at the situation of the parties. Swallow was a general seller of hemp: the hemp in question was left in the custody of the wharfingers, part in the name of Swallow, and part in the name of plaintiff *or* Swallow, which is the same thing. Now for what purpose could the plaintiff leave it in the name of Swallow, but that Swallow might dispose of it in his ordinary business as broker; if so, the broker having sold the hemp, the principal is bound. This is distinguishable from all the cases where goods are left in the custody of persons, whose proper business it is not to sell.

BAYLEY, J. It may be admitted that the plaintiff did not give Swallow any express authority to sell; but an implied authority may be given: and if a person put goods into the custody of another whose common business it is to sell, without limiting his authority, he thereby confers an implied authority upon him to sell them. Swallow was in the habit of buying and selling hemp for others, concealing their names. And now the plaintiff claims a liberty to rescind the contract, because no express authority was given to Swallow to sell. But is it competent to him so to do? If the servant of a horse-dealer, with express directions not to warrant, do warrant, the master is bound; because the servant, having a general authority to sell, is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed. This case does not proceed on the ground of a sale in market overt, but it proceeds on the principle, that the plaintiff having given Swallow an authority to sell, he is not at liberty afterwards, when there has been a sale, to deny the authority.

Rule discharged.[1]

[1] See also Daylight Burner Co. *v.* Odlin, 51 N. H 56, *ante*, p. 208.

3. **Brokers.**

§ **112.**] HIGGINS *v.* MOORE.

34 New York, 417. — 1866.

[Reported herein at p. 215.]

4. **Auctioneers.**

§ **113.**] BROUGHTON *v.* SILLOWAY.

114 Massachusetts, 71. — 1873.

Contract for refusal of defendant to convey to plaintiff certain lands offered for sale by defendant at public auction, at which plaintiff was the highest bidder. Verdict for plaintiff. Defendant alleges exceptions.

The contract of sale provided that $500 should be paid at the time of the sale. Plaintiff gave his check for $500 to the auctioneer, but had no funds to meet the check. Two days later defendant learned that the auctioneer had received the check, and that the drawer had no funds to meet it, and immediately revoked the agency and refused to be bound by the sale. Later in the same day the check was paid to the auctioneer. No notice was given plaintiff of the defendant's repudiation of the transaction until after the check was paid.

The defendant asked the court to charge that the auctioneer had no authority to receive a check drawn on a bank in which plaintiff had no funds. The court declined so to charge, and instructed the jury in effect that the defendant had a right to repudiate the contract, but if the check was paid before notice of revocation to the plaintiff, then the contract was binding.

Gray, C. J. The terms of the contract of sale requiring $500 to be paid down, the auctioneer had no right, by virtue

of his employment as such, and without express authority, to bind the defendant by accepting as cash a check drawn against a bank in which the drawer had at the time no funds. *Sykes* v. *Giles,* 5 M. & W. 645; *Williams* v. *Evans,* L. R. 1 Q. B. 352; *Taylor* v. *Wilson,* 11 Met. 44; Story on Agency, § 209.

There was no evidence in the case that the drawer had funds in the bank when the check was drawn, or that the defendant knew that the auctioneer had taken a check until the second day afterwards, or even assented to or ratified the taking of the check. The act of the auctioneer in taking the check being unauthorized, it was not necessary for the defendant to repudiate it.

It follows that the defendant was entitled to the first instruction requested, and that the instructions given did not meet the requirements of the case.

Exceptions sustained.

§ **113.**] WOOLFE *v.* HORNE.

L. R. 2 QUEEN'S BENCH DIVISION, 355. — 1877.

[Reported herein at p. 383.]

5. Attorneys-at-law.

§ **114.**] MOULTON *v.* BOWKER.

115 MASSACHUSETTS, 36. — 1874.

WRIT of entry to recover the undivided half of certain premises. Verdict directed for tenant.

Demandants claimed under a sheriff's deed executed upon a sale of the premises after attachment on mesne process followed by judgment on execution. The tenant claimed under deed from the owner against whom the attachment was

issued, and offered in evidence a certified copy of a discharge of the attachment signed by one Searle, who was demandants' attorney of record in the attachment proceedings. Demandants objected to the admission of the paper, and offered to prove that Searle acted without authority and in fraud of their rights. The court ruled that the discharge by Searle enabled the owner to give a valid title to the tenant who, it was admitted, was cognizant of no fraud.

Gray, C. J. An attorney-at-law has authority, by virtue of his employment as such, to do in behalf of his client all acts, in or out of court, necessary or incidental to the prosecution and management of the suit, and which affect the remedy only, and not the cause of action; and we can have no doubt that this includes the power to release an attachment, at least before judgment, which is all that this case requires us to consider. *Lewis* v. *Sumner*, 13 Met. 269; *Shores* v. *Caswell*, Id. 413; *Wieland* v. *White*, 109 Mass. 392; *Jenney* v. *Delesdernier*, 20 Me. 183; *Rice* v. *Wilkins*, 21 Me. 558; *Pierce* v. *Strickland*, 2 Story, 292; *Levi* v. *Abbott*, 4 Exch. 588.

The act of the demandants' attorney was therefore within his professional authority, and bound his clients; and if it was fraudulent, their remedy must be sought against him, it being agreed that the other party was not cognizant of any fraud. Judgment on the verdict for the tenant.

6. Bank cashiers.

§ 115.] MERCHANTS' BANK *v.* STATE BANK.

10 Wallace (U. S.), 604.—1870.

Action on three checks drawn by M. W. & Co. upon defendant bank, and certified as "good" by its cashier. Judgment directed for defendant. Plaintiff brings error.

M. W. & Co. negotiated with plaintiff for the purchase of gold. A representative of M. W. & Co., and the cashier of defendant bank, went to plaintiff bank, counted the gold certificates, and gave plaintiff a check, which defendant's cashier then certified as "good." It did not appear whether defendant was interested in the gold purchase, and the action may here be treated as upon the certification of the checks. Evidence was introduced that tended to show that over twenty bank cashiers in Boston had never certified checks except by express authority. Defendant denies that its cashier had authority to certify checks.

MR. JUSTICE SWAYNE. . . . But it is strenuously denied that the cashier had authority to certify the checks in question. . . .

The power of the bank to certify checks has been sufficiently examined. The question we are now considering is the authority of the cashier. It is his duty to receive all the funds which come into the bank, and to enter them upon its books. The authority to receive implies and carries with it authority to give certificates of deposit and other proper vouchers. Where the money is in the bank, he has the same authority to certify a check to be good, charge the amount to the drawer, appropriate it to the payment of the check, and make the proper entry on the books of the bank. This he is authorized to do *virtute officii*. The power is inherent in the office. *Wild* v. *The Bank of Passamaquoddy*, 3 Mason, 506; *Burnham* v. *Webster*, 19 Me. 232; *Elliot* v. *Abbot*, 12 N. H. 549; *Bank of Vergennes* v. *Warren*, 7 Hill, 91; *Lloyd* v. *The West Branch Bank*, 15 Pa. St. 172; *Badger* v. *The Bank of Cumberland*, 26 Me. 428; *Bank of Kentucky* v. *The Schuylkill Bank*, 1 Parsons's Select Cases, 182; *Fleckner* v. *Bank of the United States*, 8 Wheat. 338.

The cashier is the executive officer, through whom the whole financial operations of the bank are conducted. He receives and pays out its moneys, collects and pays its debts, and receives and transfers its commercial securities. Tellers and other subordinate officers may be appointed, but they

are under his direction, and are, as it were, the arms by which designated portions of his various functions are discharged. A teller may be clothed with the power to certify checks, but this in itself would not affect the right of the cashier to do the same thing. The directors may limit his authority as they deem proper, but this would not affect those to whom the limitation was unknown. *Commercial Bank of Lake Erie* v. *Norton et al.*, 1 Hill, 501; *Bank of Vergennes* v. *Warren*, 7 Id. 91; *Beers* v. *The Phœnix Glass Co.*, 14 Barb. 358; *Farmers' & Mechanics' Bank* v. *Butchers' & Drovers' Bank*, 14 N. Y. 624; *North River Bank* v. *Aymar*, 3 Hill, 262, 268; *Barnes* v. *Ontario Bank*, 19 N. Y. 152, 166.

The foundation upon which this liability rests was considered in an earlier part of this opinion. Those dealing with a bank in good faith have a right to presume integrity on the part of its officers, when acting within the apparent sphere of their duties, and the bank is bound accordingly.

In *Barnes* v. *The Ontario Bank*, 19 N. Y. 152, the cashier had issued a false certificate of deposit. In the *Farmers' & Mechanics' Bank* v. *The Butchers' & Drovers' Bank*, 14 N. Y. 624; S. C. 16 N. Y. 133, and in *Meads* v. *The Merchants' Bank of Albany*, 25 N. Y. 143, the teller had fraudulently certified a check to be good. In each case the bank was held liable to an innocent holder.

It is objected that the checks were not certified by the cashier at his banking-house. The provision of the Act of Congress as to the place of business of the banks created under it must be construed reasonably. The business of every bank away from its office — frequently large and important — is unavoidably done at the proper place by the cashier in person, or by correspondents, or other agents. In the case before us, the gold must necessarily have been bought, if at all, at the buying or the selling bank, or at some third locality. The power to pay was vital to the power to buy, and inseparable from it. There is no force

in this objection. *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Pendleton* v. *Bank of Kentucky*, 1 T. B. Munroe, 171. . . .

Judgment reversed, and a *venire de novo* awarded.

Mr. Justice Clifford (with whom concurred Mr. Justice Davis) read a dissenting opinion.

CHAPTER X.

CONTRACT OF AGENT IN BEHALF OF UNDISCLOSED PRINCIPAL.

1. Liability of undisclosed principal: general rule.

§ **124.**] KAYTON *v.* BARNETT.

116 New York, 625. — 1889.

Action to recover a balance of purchase price due for property sold and delivered to one Bishop, ostensibly for himself, but secretly purchased by him for defendants. Plaintiffs non-suited, and judgment for defendants. Plaintiffs appeal.

Follett, C. J. When goods are sold on credit to a person whom the vendor believes to be the purchaser, and he afterwards discovers that the person credited bought as agent for another, the vendor has a cause of action against the principal for the purchase price. The defendants concede the existence of this general rule, but assert that it is not applicable to this case, because, while Bishop and the plaintiffs were negotiating, they stated they would not sell the property to the defendants, and Bishop assured them he was buying for himself, and not for them. It appears, by evidence which is wholly uncontradicted, that the defendants directed every step taken by Bishop in his negotiations with plaintiffs; that the property was purchased for and delivered to the defendants, who have ever since retained it; that they paid the $3,000 towards the purchase price, and agreed with Bishop, after the notes had been delivered, to hold him harmless from them. Notwithstanding the assertion of the plaintiffs that they would not sell to the defendants, they, through the circumvention of Bishop and the defendants, did sell the property to the defendants, who

have had the benefit of it, and have never paid the remainder of the purchase price pursuant to their agreement. Bishop was the defendants' agent. Bishop's mind was, in this transaction, the defendants' mind, and so the minds of the parties met, and the defendants having, through their own and their agent's deception, acquired the plaintiffs' property by purchase, cannot successfully assert that they are not liable for the remainder of the purchase price because they, through their agent, succeeded in inducing the defendants to do that which they did not intend to do, and, perhaps, would not have done had the defendants not dealt disingenuously.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur, except Haight, J., not sitting.

Judgment reversed.

§ 124.] HUBBARD *v.* TENBROOK.

124 Pennsylvania State, 291. — 1889.

Assumpsit for goods sold and delivered to one Sides, doing business in his own name, but secretly for defendants. Judgment for plaintiff upon the pleadings. Defendants bring error.

Mr. Justice Mitchell. This case affords one among many examples of the failure of the so-called reformed procedure to accomplish anything towards the brevity, the clearness, the accuracy, or the convenience of legal forms. So long as the fundamental principle of our remedial jurisprudence shall be, that upon conflicting evidence the jury shall ascertain the facts, and upon ascertained facts the judges shall pronounce the law, so long will it be a cardinal rule of pleading, by whatever name pleading shall be called, that the line of distinction between facts and the evidence to prove them shall be kept clear and well-defined. The notion of the reforming enthusiast that the average litigant or his average lawyer can make a

shorter, clearer, or less redundant statement of his case if left to his own head, than if directed and restrained by the settled forms, sifted, tested, and condensed as they have been by generations of the acutest intellects ever devoted to a logical profession, is as vain as that of any other compounder of panaceas.

The plaintiff's statement is at least three times as long as a declaration in the established forms need have been, and about half of it is occupied, not with the averment of facts, but with a recital of evidence. Indeed, the strongest argument for the defendants is that the statement fails to aver two essential facts, to wit, the delivery of the goods to Sides, and the agency of Sides for the defendants as his undisclosed principals.

Fortunately for the plaintiff, his statement is helped out as to the first fact by the bill of particulars, which, being sworn to be a copy of his book of original entry, imports delivery as well as sale. The agency, though stated in the objectionable form of an inference from the previously recited evidence, is clearly intended to be averred, and may fairly be so treated.

Taking the statement, therefore, in its plain intent, it sets out that plaintiff sold and delivered a quantity of hams to one Sides, who was conducting a grocery business in his own name, but with the property and as the agent of defendants. The defendants filed an affidavit of defence, and a supplementary one, the substance of which is that "Sides was not the agent of defendants to purchase from plaintiff or any one else," and that he "was employed as salesman only, by said defendants, without any authority whatever to act for or bind defendants for the purchase of any goods or merchandise upon credit of the said defendants." We have thus the question presented whether an agent may be put forward to conduct a separate business in his own name, and the principal escape liability by a secret limitation on the agent's authority to purchase.

The answer is not at all doubtful. A man conducting an apparently prosperous and profitable business obtains credit

thereby, and his creditors have a right to suppose that his profits go into his assets for their protection in case of a pinch or an unfavorable turn in the business. To allow an undisclosed principal to absorb the profits, and then when the pinch comes to escape responsibility on the ground of orders to his agent not to buy on credit, would be a plain fraud on the public.

No exact precedent has been cited; none is needed. The rule so vigorously contended for by the plaintiff in error, that those dealing with an agent are bound to look to his authority, is freely conceded; but this case falls within the equally established rule that those clothing an agent with apparent authority are, as to parties dealing on the faith of such authority, conclusively estopped from denying it.

The affidavits set up no available defence, and the judgment is

Affirmed.

§ 124.] WATTEAU *v.* FENWICK.

1893, 1 Queen's Bench Division, 346.

Action for goods sold and delivered to one Humble, doing business in his own name, but secretly for defendants. Judgment for plaintiff. Defendants appeal.

Lord Coleridge, C. J. The judgment which I am about to read has been written by my Brother Wills, and I entirely concur in it.

Wills, J. The plaintiff sues the defendants for price of cigars supplied to the Victoria Hotel, Stockton-upon-Tees. The house was kept, not by the defendants, but by a person named Humble, whose name was over the door. The plaintiff gave credit to Humble, and to him alone, and had never heard of the defendants. The business, however, was really the defendants', and they had put Humble into it to manage it for them, and had forbidden him to buy cigars on credit.

The cigars, however, were such as would usually be supplied to and dealt in at such an establishment. The learned county court judge held that the defendants were liable. I am of opinion that he was right.

There seems to be less of direct authority on the subject than one would expect. But I think that the Lord Chief Justice during the argument laid down the correct principle, viz., once it is established that the defendant was the real principal, the ordinary doctrine as to principal and agent applies, — that the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority. It is said that it is only so where there has been a holding out of authority, which cannot be said of a case where the person supplying the goods knew nothing of the existence of a principal. But I do not think so. Otherwise, in every case of undisclosed principal, or at least in every case where the fact of there being a principal was undisclosed, the secret limitation of authority would prevail and defeat the action of the person dealing with the agent and then discovering that he was an agent and had a principal.

But in the case of a dormant partner, it is clear law that no limitation of authority as between the dormant and active partner will avail the dormant partner as to things within the ordinary authority of a partner. The law of partnership is, on such a question, nothing but a branch of the general law of principal and agent, and it appears to me to be undisputed and conclusive on the point now under discussion.

The principle laid down by the Lord Chief Justice, and acted upon by the learned county court judge, appears to be identical with that enunciated in the judgments of Cockburn, C. J., and Mellor, J., in *Edmunds* v. *Bushell*, Law Rep. 1 Q. B. 97, the circumstances of which case, though not identical with those of the present, come very near to them. There was no holding out, as the plaintiff knew nothing of

the defendant. I appreciate the distinction drawn by Mr. Finlay in his argument, but the principle laid down in the judgments referred to, if correct, abundantly covers the present case. I cannot find that any doubt has ever been expressed that it is correct, and I think it is right, and that very mischievous consequences would often result if that principle were not upheld.

In my opinion this appeal ought to be dismissed with costs. Appeal dismissed.

2. Same: exception as to state of accounts.

§ 125.] IRVINE v. WATSON.

LAW REPORTS, 5 QUEEN'S BENCH DIVISION, 414. — 1880.

ACTION to recover the price of certain casks of oil. Judgment for plaintiffs. Defendants appeal.

BRAMWELL, L. J. I am of opinion that the judgment must be affirmed. The facts of the case are shortly these: The plaintiffs sold certain casks of oil, and on the face of the contract of sale Conning appeared as the purchaser. But the plaintiffs knew that he was only an agent buying for principals, for he told them so at the time of the sale, therefore they knew that they had a right against somebody besides Conning. On the other hand, the defendants knew that somebody or other had a remedy against them, for they had authorized Conning, who was an ordinary broker, to pledge their credit, and the invoice specified the goods to have been bought "per John Conning." Then, that being so, the defendants paid the broker; and the question is whether such payment discharged them from their liability to the plaintiffs. I think it is impossible to say that it discharged them, unless they were misled by some conduct of the plaintiffs into the belief that the broker had already settled with the plaintiffs, and made such payment in consequence of such belief. But it is

contended that the plaintiffs here did mislead the defendants into such belief, by parting with the possession of the oil to Conning without getting the money. The terms of the contract were "cash on or before delivery," and it is said that the defendants had a right to suppose that the sellers would not deliver unless they received payment of the price at the time of delivery. I do not think, however, that that is a correct view of the case. The plaintiffs had a perfect right to part with the oil to the broker without insisting strictly upon their right to prepayment, and there is, in my opinion, nothing in the facts of the case to justify the defendants in believing that they would so insist. No doubt, if there was an invariable custom in the trade to insist on prepayment where the terms of the contract entitled the seller to it, that might alter the matter; and in such case non-insistence on prepayment might discharge the buyer if he paid the broker on the faith of the seller already having been paid. But that is not the case here; the evidence before Bowen, J., shows that there is no invariable custom to that effect.

Apart from all authorities, then, I am of opinion that the defendants' contention is wrong, and upon looking at the authorities, I do not think that any of them are in direct conflict with that opinion. It is true that in *Thomson* v. *Davenport*, 9 B. & C. 78, both Lord Tenterden and Bayley, J., suggest in the widest terms that a seller is not entitled to sue the undisclosed principal on discovering him, if in the meantime the state of account between the principal and the agent has been altered to the prejudice of the principal. But it is impossible to construe the *dicta* of those learned judges in that case literally; it would operate most unjustly to the vendor if we did. I think the judges who uttered them did not intend a strictly literal interpretation to be put on their words. But whether they did or no, the opinion of Park, B., in *Heald* v. *Kenworthy*, 10 Exch. 739; 24 L. J. (Exch.) 76, seems to me preferable; it is this, that "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." That is in my judgment a much more accurate statement of the law. But then the defendants rely on the case of *Armstrong* v. *Stokes*, Law Rep. 7 Q. B. 598. Now that is a very remarkable case; it seems to have turned in some measure upon the peculiar character filled by Messrs. Ryder as commission merchants. The court seems to have thought it would be unreasonable to hold that Messrs. Ryder had not authority to receive the money. I think upon the facts of that case that the agents would have been entitled to maintain an action for the money against the defendant, for as commission merchants they were not mere agents of the buyer. Moreover the present is a case which Blackburn, J., there expressly declines to decide. He expressly draws a distinction between a case in which, as in *Armstrong* v. *Stokes*, the seller at the time of the sale supposes the agent to be himself a principal, and gives credit to him alone, and one in which, as here, he knows that the person with whom he is dealing has a principal behind, though he does not know who that principal is.

It is to my mind certainly difficult to understand that distinction, or to see how the mere fact of the vendor knowing or not knowing that the agent has a principal behind 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. But it is sufficient here that the defendants did know that the sellers had a claim against them, unless the broker had already paid for the goods.

In this view of the case it is unnecessary to consider the further question raised by Mr. Kennedy, as to whether a payment on a general running account, as distinguished from a payment specifically appropriated to the particular

purchase, would be sufficient to bring the case within Lord Tenterden's qualification of the general rule.

(BAGGALLAY and BRETT, L. JJ., also delivered opinions to the same effect.) Appeal dismissed.

§ 125.] FRADLEY *v.* HYLAND.

37 FEDERAL REPORTER, 49. — 1888.

[*Circuit Court, S. D., New York.*]

LIBEL in admiralty for supplies furnished one Gibson, ostensibly for himself, but for the benefit of defendant whose boat Gibson was managing. Defendant had supplied Gibson with funds and instructed him not to purchase on credit. Defendant had settled with Gibson, and allowed him for these supplies. Decree for libellant. Respondent appeals.

WALLACE, J. . . . As to the first cause of action no question is made by the appellant that it is not of admiralty cognizance, but he insists that he is not liable as a principal for the supplies sold to his agent by the libellant, under the circumstances of the case. The general rule is familiar that, when goods are bought by an agent who does not at the time disclose that he is acting as agent, the seller, although he has relied solely upon the agent's credit, may, upon discovering the principal, resort to the latter for payment. But the rule which allows the seller to have recourse against an undisclosed principal is subject to the qualification stated by Lord Mansfield in *Railton* v. *Hodgson*, 4 Taunt. 576, and by Tenterden, C. J., and Bayley, J., in *Thomson* v. *Davenport*, 9 B. & C. 78. As stated by Mr. Justice Bayley, it is "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 here 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 has looked to the responsibility of the agent." The principal must respond to, and may avail himself of, a contract made with another by an undisclosed agent. When he seeks to enforce a bargain or purchase made by his agent, the rule of law is that, if the agent contracted as for himself, the principal can only claim subject to all equities of the seller against the agent. In the language of Parke, B.: "He must take the contract subject to all equities, in the same way as if the agent were the sole principal" (*Beckham* v. *Drake*, 9 M. & W. 79), and accordingly subject to any right of set-off on the part of the seller (*Borries* v. *Bank*, 29 L. T. N. S. 689). Thus the rights of the principal to enforce, and his liability upon, a contract of sale or purchase made by his agent, without disclosing the fact of the agency, are precisely co-extensive, as regards the other contracting party, if the limitation of his liability is accurately stated in the earlier cases. The qualification of the principal's liability to respond to his agent's contract, as stated in the earlier authorities mentioned, was narrowed by the interpretation adopted in *Heald* v. *Kenworthy*, 10 Exch. 739, to the effect that the principal is not discharged from full responsibility unless he has been led by the conduct of the seller to make payment to or settle with the agent; and the doctrine of this case has been reiterated in many subsequent cases, both in England and in this country, where the agent did not contract as for himself, but as a broker, or otherwise as representing an undisclosed principal. One of the more recent English cases of this class is *Davison* v. *Donaldson*, 9 Q. B. D. 623. But as is shown in *Armstrong* v. *Stokes*, L. R. 7 Q. B. 598, the version of *Heald* v. *Kenworthy*, while a correct interpretation of the rule of the principal's liability, when applied to cases in which the seller deals with the agent relying upon the existence of an undisclosed principal, is not to be applied in those in which the seller has given credit solely to the agent, supposing him to be the principal.

This case decides that the principal is not liable when the seller has dealt with the agent supposing him to be the principal, if he has in good faith paid the agent at a time when the seller still gave credit to the agent, and knew of no one else. See also *Irvine* v. *Watson*, 5 Q. B. D. 102.[1] Under such circumstances it is immaterial that the principal has not been misled by the seller's conduct or laches into paying or settling with his agent. It is enough to absolve him from liability that he has in good faith paid or settled with his agent. In that case the court was dealing with a contract made by an agent which was within the scope of the authority conferred on him, but which was nevertheless made by the agent as though he were acting for himself as principal.

In the present case Gibson had no authority at all to make a purchase upon the credit of the appellant. But as it appears that appellant, in the monthly settlements of account with Gibson, allowed him out of the earnings charges for supplies for which the latter had not actually paid, he must be deemed to have authorized Gibson to purchase supplies for him upon Gibson's own credit. Under the circumstances, if Gibson had purchased supplies, purporting to act as an agent of appellant in doing so, appellant, by consenting to their being used for his benefit, and by allowing the price in his settlements with Gibson, would have been liable to those who sold to him upon the theory of ratification. But, as Gibson did not assume to act as agent in making the purchases, there is no basis for applying the doctrine of ratification.

Very different considerations govern the case in which an agent who assumes to represent an undisclosed principal buys of a seller upon credit, and one in which the agent assumes to be acting for himself, and the seller deals with him, and gives him exclusive credit, supposing him to be the only principal. In the first, if the agent has authority, ex-

[1] The court overlooks the appeal in this case, L. R. 5 Q. B. D. 414, *ante*, p. 237.

press or implied, to buy upon credit for the principal, or ostensible authority to do so, upon which the seller relies, then, by the familiar rules of law, the contract is the contract of the principal, and is none the less so because the name of the principal does not happen to have been disclosed. The principal is bound by the acts of his agent within the scope of his real or apparent authority; and the seller understands that, even though he may hold the agent personally responsible, he may also resort to the undisclosed principal. But in the other, as the seller does not rely upon any ostensible authority of the one with whom he contracts to represent a third person, he can only resort to the third person as principal, and charge him as such, when the purchase is made by one having lawful authority to bind the third person. It is immaterial, in such a case, whether the contract is made by an agent who is employed, in a continuous employment or in a single transaction, by a principal, or whether he is one who may be deemed a general, instead of a special agent. "When the agency is not held out by the principal by any acts or declarations or implications to be general in regard to the particular act or business, it must from necessity be construed according to its real nature and extent; and the other party must act at his own peril, and is bound to inquire into the nature and extent of the authority actually conferred. In such a case there is no ground to contend that the principal ought to be bound by the acts of the agent beyond what he has apparently authorized, because he has not misled the confidence of the other party who has dealt with the agent." Story on Agency, § 133.

It is therefore difficult to understand how, as an original proposition, it could be reasonably maintained that there is any liability on the part of one who has employed another to manage his interests in a business, or series of transactions, in which, as an incident, purchases of goods are to be made, has given him instructions not to purchase on credit, and has supplied him with funds to purchase for cash, to a seller who has sold to the person employed upon credit, and dealt

with him as the only principal. *Taft* v. *Baker*, 100 Mass. 68. Of course he would be liable, and the instructions not to buy on credit would go for nothing, if he did not supply the agent with funds to pay for the necessary goods, because in that case the agent would have implied authority to buy them on credit. So also in a case which may be supposed, where a principal knows, or ought to know, that the agent is buying on credit in his own name, yet the principal takes all the income of the business without making any provision for payment to those who have trusted the agent, the principal would be liable, because in such a case his conduct would be inconsistent with good faith, and he ought not to be permitted to avail himself of the benefits without incurring full responsibility for the agent's acts.

But it is probably too late to consider the questions thus suggested upon principle; and it may be accepted as law that the seller, under the circumstances of a case like the present, upon discovery of the principal, can resort to and recover of him, if he [the principal] has not *bonâ fide* paid the agent in the meantime, or has not made such a change in the state of the account between the agent and himself that he would suffer loss if he should be compelled to pay the seller. Story on Agency, § 291; 1 Parsons on Cont. 63; *Fish* v. *Wood*, 4 E. D. Smith, 327; *Thomas* v. *Atkinson*, 38 Ind. 248; *Clealand* v. *Walker*, 11 Ala. 1058; *McCullough* v. *Thompson*, 45 N. Y. Super. Ct. 449; *Laing* v. *Butler*, 37 Hun, 144. In the case last cited the court used this language: —

"Where the purchase has been made by the agent upon credit authorized by the principal, but without disclosing his name, and payment is subsequently made by the principal to the agent in good faith before the agency is disclosed to the seller, then the principal would not be liable."

According to these authorities, if it should be conceded that the facts in the present case warrant the inference that the appellant gave Gibson authority to buy either upon his own credit or upon the credit of the appellant, the libellant

cannot recover. It certainly is not material that the appellant did not pay Gibson, or make any settlement with him, on account of the libellant's demands specifically. It is enough that he did settle with Gibson for, and allowed him to retain in his hands sufficient moneys to pay, all outstanding liabilities contracted by him for the appellant's benefit, including the demands of the libellant. At the time of the last settlement the appellant had paid the libellant's demands and all outstanding liabilities contracted by Gibson as between Gibson and himself, and this was before the libellant knew any principal in the purchases other than Gibson himself.

(The court then decides that the second cause of action is not enforceable in admiralty.)

Libel dismissed.

§ 125.] LAING *v.* BUTLER.

37 Hun (N. Y. S. C.), 144. — 1885.

Action to recover the price of certain hides sold to one Smith, ostensibly for himself, but really for the defendants as undisclosed principals. Defendants had supplied Smith with funds for the purchase of the hides. Judgment for plaintiff. Defendants appeal.

Haight, J. (after discussing various authorities [1]). It appears to us that where an agent buys in his own name, but for the benefit of his principal, without disclosing the name of the principal, the rule is that the principal as well as the agent will be bound, provided the goods are received

[1] Dunlap's Paley on Agency, pp. 245–250; Story on Agency, § 291; 1 Parsons on Cont. p. 63; *Armstrong* v. *Stokes,* L. R. 7 Q. B. 598; *Irvine* v. *Watson,* L. R. 5 Q. B. D. 102, 414; *Davison* v. *Donaldson,* L. R. 9 Q. B. D. 623; *Clealand* v. *Walker,* 11 Ala. 1058; *Komorowski* v. *Krundick,* 56 Wis. 23; *Taft* v. *Baker,* 100 Mass. 68; *Fish* v. *Wood,* 4 E. D. Smith, 327; *Jaques* v. *Todd,* 3 Wend. 83-94; *McCullough* v. *Thompson,* 45 N. Y. Super. Ct. 449; *Knapp* v. *Simon,* 96 N. Y. 284–288.

by the principal, if the agent in making the purchase acted within his power as agent; but that this rule is subject to the following limitations and exceptions: First. The purchase of the agent must be within the power conferred upon him by his principal, or it must be shown that the principal has subsequently ratified his acts; Second. If the principal furnished the agent with the money with which to make the purchase before the purchase, and the agent should, without his knowledge, purchase the property upon credit, without disclosing his principal, that the principal will not be bound; and, Third. Where the purchase has been made by the agent upon credit, authorized by the principal, but without disclosing his name, and payment is subsequently made by the principal to the agent in good faith before the agency is disclosed to the seller, then the principal would not be liable. In the case under consideration it appears that the defendants authorized Smith to purchase the hides for them; that they advanced the money to him with which to make the purchases they had authorized. The plaintiff, in selling the hides to Smith, sold to him upon his individual credit and promise to pay. The case therefore appears to us to be within the exceptions to the rule mentioned, and it consequently follows that the plaintiff is not entitled to recover.

Judgment reversed and a new trial ordered.

3. Same: exception based on election.

§ 126.] BEYMER *v.* BONSALL.

79 PENNSYLVANIA STATE, 298. — 1875.

ASSUMPSIT for breach of contract to deliver a quantity of petroleum. Judgment for plaintiff. Defendant brings error.

Plaintiff made the contract with brokers who were acting for defendant as undisclosed principal. Plaintiff brought an action against the brokers, and had judgment against them.

Defendant pleaded this judgment, and plaintiff demurred to the plea. The court reserved the point, and entered judgment upon the verdict of the jury.

Per Curiam. Undoubtedly an agent who makes a contract in his own name without disclosing his agency is liable to the other party. The latter acts upon his credit, and is not bound to yield up his right to hold the former personally, merely because he discloses a principal who is also liable. The principal is liable because the contract was for his benefit, and the agent is benefited by his being presumedly the creditor, for there can be but one satisfaction. But it does not follow that the agent can afterwards discharge himself by putting the creditor to his election. Being already liable by his contract, he can be discharged only by satisfaction of it, by himself or another. So the principal has no right to compel the creditor to elect his action, or to discharge either himself or his agent, but can defend his agent only by making satisfaction for him. We think no error was committed by the court below, except in the form of the reservation. Judgment should have been given directly on the demurrer itself, and not by way of a reserved point upon it. This, however, is not a substantial error, and judgment may be treated as entered upon the demurrer.

Judgment affirmed.

§ 126.] KINGSLEY v. DAVIS.

104 Massachusetts, 178. — 1870.

Contract, by brokers for commissions. Submitted to the court upon agreed facts.

Plaintiffs supposed they were acting for John J. Davis, whereas in fact the property sold by them belonged to his wife, the defendant. After learning this fact plaintiffs had taken judgment against John J. Davis, and had issued an execution upon it; but the judgment remained unsatisfied.

MORTON, J. . . . But the true inference to be drawn from the facts stated undoubtedly is, that the plaintiffs contracted with, and gave credit to, John J. Davis; and they now claim that he was acting as the agent of the defendant, and that they gave him credit in ignorance of this fact. If we assume that he was acting as her agent in contracting with the plaintiffs, yet there is an insuperable obstacle to their right to maintain this action. The general principle is undisputed, that, when a person contracts with another who is in fact an agent of an undisclosed principal, he may, upon discovery of the principal, resort to him, or to the agent with whom he dealt, at his election. But if, after having come to a knowledge of all the facts, he elects to hold the agent, he cannot afterwards resort to the principal. In the case at bar, it is admitted that the plaintiffs, after all the facts became known to them, obtained a judgment against John J. Davis upon the same cause of action for which this suit is brought. We are of opinion that this was conclusive evidence of an election to resort to the agent, to whom the credit was originally given, and is a bar to this action against the principal. *Raymond* v. *Crown & Eagle Mills*, 2 Met. 319.

Judgment for the defendant.

4. Same: exception as to sealed instruments.

§ 127.] BRIGGS *v.* PARTRIDGE.

64 NEW YORK, 357. — 1876.

ACTION to recover the purchase price unpaid under a contract for the purchase and sale of lands. Complaint dismissed. Plaintiff appeals.

The complaint and the opening remarks of plaintiff's counsel at the trial alleged that the contract was under seal; that it was signed by one Hurlburd; that defendant Partridge's name did not appear in the instrument; but that plaintiff would prove that Hurlburd was acting solely for

Partridge under a parol authority; and that Partridge had paid or caused to be paid the sum of $100 on the delivery of the instrument. Defendant's counsel moved to dismiss the complaint on the ground that the facts stated did not constitute a cause of action, and that it was not competent to vary the terms of the instrument by parol proof that the party signing it as principal was not a principal, but an agent. The court granted the motion.

Andrews, J. . . . The real question is, can the vendor, in a sealed executory agreement, *inter partes*, for the sale of land, enforce it as the simple contract of a person not mentioned in or a party to the instrument, on proof that the vendee named therein, and who signed and sealed it as his contract, had oral authority from such third person to enter into the contract of purchase, and acted as his agent in the transaction; and can the vendor on this proof, there having been no default on his part, and he being ready and willing to convey, recover of such third person the unpaid purchase money? This question here arises in a case where the vendor, so far as it appears, has remained in possession of the land, and where no act of ratification of the contract by the undisclosed principal has been shown. It is not disputed, and indeed it cannot be, that Hurlburd is bound to the plaintiff as covenantor, upon the covenants in the agreement. He covenants for himself and not for another, to pay the purchase money, and by his own seal fixes the character of the obligation as a specialty. He is liable to perform the contract irrespective of the fact whether it can be enforced against his nominal principal. On the other hand it is equally clear that Hurlburd's covenant cannot be treated as, or made the covenant of the defendant. Those persons only can be sued on an indenture who are named as parties to it, and an action will not lie against one person on a covenant which purports to have been made by another. *Beckham* v. *Drake*, 9 M. & W. 79; *Spencer* v. *Field*, 10 Wend. 88; *Townsend* v. *Hubbard*, 4 Hill, 351.

In the case last cited, it was held that where an agent duly

authorized to enter into a sealed contract for the sale of the land of his principals, had entered into a contract under his own name and seal, intending to execute the authority conferred upon him, the principals could not treat the covenants made by the agent as theirs, although it clearly appeared in the body of the contract that the stipulations were intended to be between the principals and purchasers and not between the vendees and the agent. The plaintiffs in that case were the owners of the land embraced in the contract, and brought their action in covenant to enforce the covenant of the vendees to pay the purchase money, and the court decided that there was no reciprocal covenant on the part of the vendors to sell, and that for want of mutuality in the agreement the action could not be maintained. It is clear, that unless the plaintiff can pass by the persons with whom he contracted, and treat the contract as the simple contract of the defendant, for whom it now appears that Hurlburd was acting, this action must fail. The plaintiff invokes in his behalf the doctrine that must now be deemed to be the settled law of this court, and which is supported by high authority elsewhere, that a principal may be charged upon a written parol executory contract entered into by an agent in his own name, within his authority, although the name of the principal does not appear in the instrument, and was not disclosed, and the party dealing with the agent supposed he was acting for himself, and this doctrine obtains as well in respect to contracts which are required to be in writing, as to those where a writing is not essential to their validity. *Higgins* v. *Senior*, 8 M. & W. 834; *Trueman* v. *Loder*, 11 Ad. & El. 589; *Dykers* v. *Townsend*, 24 N. Y. 57; *Coleman* v. *First Nat. Bank of Elmira*, 53 N. Y. 388; *Ford* v. *Williams*, 21 How. 289; *Huntington* v. *Knox*, 7 Cush. 371; *The Eastern R. R. Co.* v. *Benedict*, 5 Gray, 561; *Hubbert* v. *Borden*, 6 Wharton, 79; *Browning* v. *Provincial Ins. Co.*, 5 L. R. (P. C.) 263; *Calder* v. *Dobell*, 6 L. R. (C. P.) 486; Story on Agency, §§ 148, 160.

It is, doubtless, somewhat difficult to reconcile the doctrine

here stated with the rule that parol evidence is inadmissible to change, enlarge, or vary a written contract, and the argument upon which it is supported savors of subtlety and refinement. In some of the earlier cases the doctrine that a written contract of the agent could be enforced against the principal, was stated with the qualification, that it applied when it could be collected from the whole instrument, that the intention was to bind the principal. But it will appear from an examination of the cases cited, that this qualification is no longer regarded as an essential part of the doctrine. Whatever ground there may have been originally to question the legal soundness of the doctrine referred to, it is now too firmly established to be overthrown, and I am of opinion, that the practical effect of the rule as now declared is to promote justice and fair dealing. There is a well-recognized exception to the rule in the case of notes and bills of exchange, resting upon the law merchant. Persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them; and a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent. *Barker* v. *Mechanics' Ins. Co.*, 3 Wend. 94; *Pentz* v. *Stanton*, 10 Id. 271; *De Witt* v. *Walton*, 9 N. Y. 571; *Stackpole* v. *Arnold*, 11 Mass. 27; *Eastern R. R. Co.* v. *Benedict*, 5 Gray, 561; *Beckham* v. *Drake*, 9 M. & W. 79. That Hurlburd had oral authority from the defendant to enter into a contract for the purchase of the land, and that he was acting for the defendant in making it is admitted; and if the contract had been a simple contract and not a specialty the defendant would, I think, have been bound by it within the authorities cited. No question would arise under the Statute of Frauds, for the statute prescribing what shall be necessary to make a valid contract for the sale of lands requires only that the contract, or some note or memorandum thereof expressing the consideration, should be in writing and subscribed by the party by whom the sale is to be made, or his agent lawfully authorized. 2 R. S. 135, §§ 8, 9. In this case the contract

was signed by the vendors; and even if it had been executed on their part by an agent pursuant to an oral authority, it would have been a valid execution within the statute. *Lawrence* v. *Taylor*, 5 Hill, 107; *Worrall* v. *Munn*, 1 Seld. 229. But the vendee's contract need not be in writing. *McCrea* v. *Purmort*, 16 Wend. 460.

We return, then, to the question originally stated. 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 liable in assumpsit upon the promise contained in the instrument, which may be resorted to to ascertain the terms of the agreement. *Randall* v. *Van Vechten*, 19 John. 60; *Du Bois* v. *The Del. & Hudson Canal Co.*, 4 Wend. 285; *Lawrence* v. *Taylor*, 5 Hill, 107; see also *Evans* v. *Wells*, 22 Wend. 324; *Worrall* v. *Munn*, *supra;* Story on Agency, § 277; 1 Am. Leading Cases, 735, note.

The plaintiff's agreement in the case was with Hurlburd, and not with the defendant. The plaintiff has recourse against Hurlburd on his covenant, 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 *dehors* 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. The general rule is declared by Shaw, C. J., in *Huntington* v. *Knox*, 7 Cush. 371: "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."

The judgment of the General Term should be affirmed.

All concur. Judgment affirmed.

5 Same: exception as to negotiable instruments.

§ 128.] RENDELL *v.* HARRIMAN.

75 Maine, 497. — 1883.

[Reported herein at p. 360.]

6. Rights of undisclosed principal: general rule.

§ 129.] Mehitabel HUNTINGTON *v.* KNOX.

7 Cushing (Mass.), 371. — 1851.

Assumpsit for goods sold and delivered. Award by arbitrator in favor of plaintiff, subject to the opinion of the court on questions of law.

George H. Huntington entered into the contract in writing with the defendant. Plaintiff offered to prove that the bark was her property, and that George H. Huntington entered into the contract in his name as her agent. The arbitrator ruled that such parol evidence was competent, and that the evidence established the facts as alleged.

SHAW, C. J. This action is brought to recover the value of a quantity of hemlock bark, alleged to have been sold by the plaintiff to the defendant, at certain prices charged. The declaration was for goods sold and delivered, with the usual money counts. The case was submitted to a referee by a common rule of the court, who made an award in favor of the plaintiff, subject to the opinion of the court on questions reserved, stating the facts in his report, on which the decision of those questions depends.

The facts tended to show that the bark was the property of the plaintiff; that the contract for the sale of it was made by her agent, George H. Huntington, by her authority; that it was made in writing by the agent, in his own name, not stating his agency, or naming or referring to the plaintiff, or otherwise intimating, in the written contract, that any other person than the agent was interested in the bark.

Objection was made, before the referee, to the admission of parol evidence, and to the right of the plaintiff to maintain the action in her own name. The referee decided both points in favor of the plaintiff, holding that the action could be maintained by the principal and owner of the property, subject to any set-off, or other equitable defence which the buyer might have if the action were brought by the agent.

The court are of opinion that this decision was correct upon both points. Indeed, they resolve themselves substantially into one; for *primâ facie*, and looking only at the paper itself, the property is sold by the agent, on credit; and in the absence of all other proof, a promise of payment to the seller would be implied by law; and if that presumption of fact can be controverted, so as to raise a promise to the principal by implication, it must be by evidence *aliunde*, proving the agency and property in the principal.

It is now well settled by authorities 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 M. & W. 834, it is laid down as a general 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 M. & W. 440; *Trueman* v. *Loder*, 11 Ad. & El. 589; *Taintor* v. *Prendergast*, 3 Hill, 72; *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 his 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. 326.

And we think this doctrine is not controverted by the authority of any of the cases cited in the defendant's argument. *Hastings* v. *Lovering*, 2 Pick. 214, was a case where the suit was brought against an agent, on a contract of warranty upon a sale made in his own name. The case of the *United States* v. *Parmele*, Paine, 252, was decided on the ground that, in an action on a written executory promise, none but the promisee can sue. The court admit that, on a sale of goods made by a factor, the principal may sue.

This action is not brought on any written promise made by the defendant; the receipt is a written acknowledgment, given by the plaintiff to the defendant, of part payment for the bark, and it expresses the terms upon which the sale had been made. The defendant, by accepting it, admits the sale and its terms; but the law raises the promise of payment. And this is by implication, *primâ facie*, a promise to the agent; yet it is only *primâ facie*, and may be controlled by parol evidence that the contract of sale was for the sale of property belonging to the plaintiff, and sold by her authority to the defendant, by the agency of the person with whom the defendant contracted.

We are all of opinion that the provisions of Rev. Sts. c. 28, § 201, do not apply to the sale of bark, as made in this case.

Judgment on the award for the plaintiff.

7. Same: exception as to state of accounts.

§ 130.] MONTAGUE *v.* FORWOOD.

1893, 2 Queen's Bench Division (C. A.), 351.

Action to recover a sum of money alleged to have been received by the defendants to the use of the plaintiffs. Judgment for defendants. Plaintiffs appeal.

Plaintiffs had been engaged by the owners of a cargo to collect a general average loss from underwriters at Lloyd's. They employed a merchant firm, Beyts & Craig, who, not being members of Lloyd's, employed defendants as brokers. Defendants collected the loss and claimed the right to set off the amount collected against a sum due them from Beyts & Craig. Defendants had no notice that Beyts & Craig were acting as agents, and believed them to be principals. Beyts & Craig were adjudged bankrupt after the money was collected.

Lord Esher, M. R. I feel no doubt about this case. The plaintiffs were directed by a foreign bank, who were acting for the owners of the cargo, to collect a general average contribution from the underwriters in England who had insured against a general average loss. The plaintiffs employed Beyts & Craig to collect the money from the insurers. Beyts & Craig, who are not brokers, in their turn employed the defendants as their agents to collect the money, the defendants being brokers at Lloyd's. Beyts & Craig did not tell the defendants that they were acting as agents for any one. Beyts & Craig were not brokers, nor had they in any way the character of persons whose business it was to act as agents for others. It was found by the learned judge as a fact that the defendants did not know that Beyts & Craig were acting in the matter as agents for any one. The defendants accordingly, acting as agents for Beyts & Craig, collected the money, and at the very time when they did so Beyts & Craig were indebted to them in a larger amount. At that very time the defendants had a right of set-off as against Beyts & Craig, though the

right would not come into play until an action was brought. After the defendants had collected the money, and the right of set-off had accrued, the defendants, not knowing, and having no reason to suspect, and not in fact suspecting, that Beyts & Craig were acting for any principals, can the plaintiffs now intervene and say that the money belongs to them, and that the defendants were not their agents, and that the defendants cannot set off as against the plaintiffs a debt due to them from Beyts & Craig? The law of bankruptcy has nothing to do with the case. What is the law which governs it? I think it was settled by *Rabone* v. *Williams*, 7 T. R. 360, n.; *George* v. *Clagett*, 7 T. R. 359, and *Fish* v. *Kempton*, 7 C. B. 687.

In *Fish* v. *Kempton*, 7 C. B. at p. 691, Wilde, C. J., said: "Where goods are placed in the hands of a factor for sale and are sold by him under circumstances that are calculated to induce, and do induce, a purchaser to believe that he is dealing with his own goods, the principal is not permitted afterwards to turn round and tell the vendee that the character he himself has allowed the factor to assume did not really belong to him. The purchaser may have bought for the express purpose of setting off the price of the goods against a debt due to him from the seller. But the case is different where the purchaser has notice at the time that the seller is acting merely as the agent of another." And Cresswell, J., said (at p. 693): "This is an attempt to extend the rule laid down in *Rabone* v. *Williams*, 7 T. R. 360, n., and *George* v. *Clagett*, 7 T. R. 359, which has now been uniformly acted upon for many years. If a factor sells goods as owner, and the buyer *bonâ fide* purchases them in the belief that he is dealing with the owner, he may set off a debt due to him from the factor against a demand preferred by the principal. Lord Mansfield so lays down the rule distinctly in *Rabone* v. *Williams*, 7 T. R. 360, n. 'Where,' he says, 'a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and

purposes as the principal; and, though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This has been long settled.' The distinction between a factor and a broker has been noticed by Abbott, C. J., and Bayley, J., in *Baring* v. *Corrie*, 2 B. & A. 137."

In *Fish* v. *Kempton*, 7 C. B. 687, the plaintiffs' goods had been sold to the defendant by a factor, that is, a person whose business it is to sell in his own name goods placed in his hands for that purpose by his principal; but the same principle applies to any one who is authorized to sell goods, or to receive money for his principal, when there is nothing to lead the person who deals with him to suppose, and he does not in fact know, that he is acting as an agent. When a person who sells goods is known by the purchaser to be a broker, that is, an agent, the case is entirely different; the purchaser cannot then set off a debt due to him from the broker against the demand of the principal. Beyts & Craig were not brokers, and the defendants had no reason for supposing that they were acting for a principal. They acted as if the moneys to be collected would, when collected, belong to themselves. It is found as a fact by the learned judge that the defendants did not know that Beyts & Craig were acting for a principal. That being so, they had a right at the moment when they received the money to set off against it a debt due to them by Beyts & Craig, and if the plaintiffs could now intervene, they would be taking away from the defendants a valid and existing right.

Bowen, L. J. I am of the same opinion. The Master of the Rolls has so clearly expressed the law on the subject that I have really nothing to add, beyond saying that I concur in his view. The case is, in my judgment, governed by principles of the decision in *George* v. *Clagett*, 7 T. R. 359, by the rules of common sense and justice, and I think also by the law of estoppel. The principle is not confined to the sale of goods.

If A. employs B. as his agent to make any contract for him, or to receive money for him, and B. makes a contract with C., or employs C. as his agent, if B. is a person who would reasonably be supposed to be acting as a principal, and is not known or suspected by C. to be acting as an agent for any one, A. cannot make a demand against C. without the latter being entitled to stand in the same position as if B. had in fact been a principal. If A. has allowed his agent B. to appear in the character of a principal he must take the consequences. Here Beyts & Craig were allowed by the plaintiffs to deal with the defendants as if they had been dealing on their own account, and the defendants who dealt with Beyts & Craig are entitled to stand in the position in which they would have stood if Beyts & Craig had really been dealing as principals.

(KAY, L. J., also delivered a concurring opinion.)

Appeal dismissed.

8. Same: exception where exclusive credit is given to agent.

§ 132.] WINCHESTER *v.* HOWARD.

97 MASSACHUSETTS, 303. — 1867.

CONTRACT for the price of a pair of oxen alleged to have been purchased by the defendant of the plaintiffs. Judgment for plaintiffs. Defendant alleged exceptions.

Defendant offered to prove that one Smith claimed to be the owner of the oxen, and represented that plaintiffs had no interest in them; that relying upon this representation defendant purchased the oxen of Smith, and that as soon as he learned that the representation was false he returned the oxen to Smith, who refused to receive them, and offered defendant a bill of sale in plaintiffs' name, which offer defendant declined; that defendant would not willingly have any dealings with plaintiffs, and had for some years refused to deal with

them. This proof the court ruled would not constitute a defence, and directed a verdict for plaintiffs.

Chapman, J. The court are of the opinion that it should have been left to the jury in this case to determine whether the minds of the parties really met upon any contract, and if so, what the contract was.

It is true that an agent may sell the property of his principal without disclosing the fact that he acts as an agent, or that the property is not his own; and the principal may maintain an action in his own name to recover the price. If the purchaser says nothing on the subject, he is liable to the unknown principal. *Huntington* v. *Knox*, 7 Cush. 371. But on the other hand, every man has a right to elect what parties he will deal with. As was remarked by Lord Denman in *Humble* v. *Hunter*, 12 Q. B. 310, "You have a right to the benefit you contemplate from the character, credit, and substance of the person with whom you contract." There may be good reasons why one should be unwilling to buy a pair of oxen that has been owned or used, or were claimed by a particular person, or why he should be unwilling to have any dealings with that person; and as a man's right to refuse to enter into a contract is absolute, he is not obliged to submit the validity of his reasons to a court or jury.

In this case it appears that Smith, the plaintiffs' agent, told the defendant that he had a pair of oxen for sale (referring to the oxen in question), and that another pair belonging to one Blanchard were in his possession, which pair he was authorized to sell. A jury might properly find that this amounted to a representation that the oxen in question were his own. The defendant then made inquiries, in answer to which Smith affirmed that the oxen had never been hurt; that the plaintiffs had no mortgage upon them, and that there was no claim upon them except the claim which Smith had. A jury might properly find that this was, in substance, a representation that the title to the oxen was exclusively in Smith, and that, as the defendant was unwilling to deal with the plaintiffs, he made proper inquiries on the subject, and was led by Smith

to believe he was not dealing with the plaintiffs. The defendant took the cattle home with an agreement that he might return them "if he did not find things as Smith had told him." In the course of the evening he was informed that the cattle belonged to the plaintiffs, and being unwilling to buy oxen of them, he returned them to Smith the next morning before any bill of sale had been made. The jury would be authorized to find that he returned them within the terms of the condition upon which he took them, because he did not find things as Smith had told him. It is thus apparent that upon the whole evidence they would be justified in finding a verdict for the defendant.

Exceptions sustained.

§ 133.] HUMBLE *v.* HUNTER.

12 QUEEN'S BENCH REPORTS, 310. — 1848.

ASSUMPSIT on a charter-party. Judgment for plaintiff. The court granted a rule *nisi*, upon a motion for a new trial.

The charter-party was not signed by plaintiff, but by her son, C. J. Humble, and contained this clause: "It is . . . mutually agreed between C. J. Humble, Esq., owner of the good ship or vessel called 'The Ann,' . . . and Jameson Hunter," etc. C. J. Humble was offered as a witness to prove that plaintiff was the true owner of the vessel, and that he had signed as her agent. This was objected to on the ground that one who has expressly signed as principal cannot testify, in contradiction to the written instrument, that he signed as agent. The evidence was received, and this was alleged as error.

LORD DENMAN, C. J. We were rather inclined to think at first that this case came within the doctrine that a principal may come in and take the benefit of a contract made by his agent. But that doctrine cannot be applied where the

agent contracts as principal; and he has done so here by describing himself as "owner" of the ship. The language of Lord Ellenborough in *Lucas* v. *De la Cour*, 1 M. & S. 249, "If one partner makes a contract in his individual capacity, and the other partners are willing to take the benefit of it, they must be content to do so according to the mode in which the contract was made," is very apposite to the present case.

Patteson, J. The question in this case turns on the form of the contract. If the contract had been made in the son's name merely, without more, it might have been shown that he was the agent only, and that the plaintiff was the principal. But, as the document itself represents that the son contracted as "owner," *Lucas* v. *De la Cour* applies. There the partner who made the contract represented that the property which was the subject of it belonged to him alone. The plaintiff here must be taken to have allowed her son to contract in this form, and must be bound by his act. In *Robson* v. *Drummond*, 2 B. & Ad. 303, where Sharpe, a coach-maker, with whom Robson was a dormant partner, had agreed to furnish the defendant with a carriage for five years at a certain yearly sum, and had retired from the business, and assigned all his interest in it to C. before the end of the first three years, it was held that an action could not be maintained by the two partners against the defendant, who returned the carriage, and refused to make the last two yearly payments. In this case I was at first in the plaintiff's favor, on account of the general principle referred to by my Lord; but the form of the contract takes the case out of that principle.

Wightman, J. I thought at the trial that this case was governed by *Skinner* v. *Stocks*, 4 B. & Ald. 437. But neither in that nor in any case of the kind did the contracting party give himself any special description, or make any assertion of title to the subject-matter of the contract. Here the plaintiff describes himself expressly as "owner" of the subject-matter. This brings the case within the prin-

ciple of *Lucas* v. *De la Cour*, and the American authorities cited.

LORD DENMAN, C. J. *Robson* v. *Drummond*, 2 B. & Ad. 303, which my Brother Patteson has cited, seems the same, in principle, with the present case. You have a right to the benefit you contemplate from the character, credit, and substance of the party with whom you contract.

COLERIDGE, J., having heard the argument for the defendant only, gave no judgment.

Rule absolute.

CHAPTER XI.

ADMISSIONS AND DECLARATIONS OF AGENT.

§ 139.] WHITE *v.* MILLER. Op. 10.

71 NEW YORK, 118. — 1877.

ACTION against defendants as "trustees of the mutual society called Shakers" to recover damages for a breach of a contract of warranty of cabbage seed. Judgment for plaintiffs.

Plaintiffs bought the seed as "large Bristol cabbage seed." In fact the seed were impure and mixed, and did not answer the description.

ANDREWS, J. (after deciding that there was a warranty arising from the sale by description). The remaining questions arise upon exceptions taken by the defendants to the admission or rejection of evidence, and without passing upon the validity of the other exceptions of this character, we are of opinion that the referee erred in allowing the conversation between Chauncey Miller and the plaintiff White, at the interview between them in the fall of 1868, to be given in evidence. This conversation occurred nearly eight months after the sale of the seed, and the making of the warranty upon which the action is brought. If the declarations of Miller on this occasion were admissible to bind the society, they furnished very material evidence to sustain the plaintiffs' case. The plaintiffs sought to establish, among other things, that the defect in the seed was owing to improper and negligent cultivation, thereby raising an implied warranty, in addition to the warranty arising out of the description in the bill of parcels; and it was also an essential part of their case to establish that the seed sold were not Bristol cabbage seed; and this they sought to show by proving by

gardeners and other persons who had purchased seed of the defendants of the same kind as that sold to the plaintiffs, that their crops had also failed, and that the seed did not produce Bristol cabbage. The admissions of Miller, in the conversation proved, tended to establish both of the facts referred to, viz.: that the seed was inferior and mixed, owing to improper cultivation, and that it would not produce Bristol cabbage. He stated, in the conversation, that the impurity of the seed was owing to planting the Bristol cabbage stocks in the vicinity of stocks of the red cabbage, and that the society had, in consequence of the defective character of the seed, lost their own crops of cabbage in that year. The proof of this conversation was objected to on several grounds; and among others, that the declarations of Miller, when not engaged in the business of the society, were not admissible.

The general rule is, that what one person says, out of court, is not admissible to charge or bind another. The exception is in cases of agency; and in cases of agency, the declarations of the agent are not competent to charge the principal, upon proof merely that the relation of principal and agent existed when the declarations were made. It must further appear that the agent, at the time the declaration was made, was engaged in executing the authority conferred upon him, and that the declarations related to, and were connected with, the business then depending, so that they constituted a part of the *res gestæ*. In *Fairlie* v. *Hastings* (10 Ves. Jr. 123), Sir William Grant expressed, with great clearness and accuracy, the doctrine upon this subject. He said: "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." See also Story on Agency, §§ 134, 137; *Thallhimer* v. *Brinckerhoof*, 4 Wend. 394; *Hubbard* v. *Elmer*, 7 Id. 446; *Luby* v. *H. R. R. R. Co.*, 17 N. Y. 131. The rule that the declarations of the agent are inadmissible to bind the principal, unless they constitute the agreement which he is authorized to make, or relate to and accompany an act done in the course of the agency, is applicable in all cases, whether the agent is a general or special one, or the principal is a corporation or private person. Angell & Ames on Cor. § 309; 1 Gr. Ev., § 114 a.

The conversation with Miller was inadmissible within the rule stated. It was not a part of any contract between the society and the plaintiffs, nor was it connected with any business which Miller was at the time transacting for the defendants. The plaintiffs had not then, so far as it appears, made any claim that the defendants were liable on the warranty, or that the failure of the crop was owing to a defect in the seed. The plaintiff White states that up to the time of the conversation, he had not been able to account for the failure. He had written to Miller before the conversation, and requested him to look at the crop, and to explain, if he could, the cause of the failure; and, not receiving an answer, he went to see Miller, when the conversation referred to occurred. Miller at this time made no contract or arrangement with White for a settlement or adjustment of any liability incurred by the society, and he had no authority to bind the society, if he had attempted to do so, to pay the large damages subsequently claimed by the plaintiffs. The covenant expressly declares that no important contract made by the trustees shall be considered valid without the previous approbation of the ministry and elders. An agreement to pay several thousand dollars damages on a sale of thirty-six

dollars' worth of seed, would be an important contract, beyond the power of the trustees alone to make.

For these reasons, we are of opinion that the referee erred in the admission of the conversation in question.

The evidence was important, and we cannot say that it did not influence the result. For the error in admitting it, the judgment should be reversed and a new trial granted.

Judgment reversed.

§ 139.] WILLIAMSON *v.* CAMBRIDGE RAILROAD COMPANY.

144 MASSACHUSETTS, 148. — 1887.

TORT for personal injuries. Judgment for defendant. Plaintiff alleges exceptions.

Plaintiff was thrown from defendant's horse-car while attempting to alight. She was unconscious for a moment on striking the pavement; the conductor hastened to her assistance, and said, "I am very sorry, madam, that was my fault." The trial judge excluded evidence of this remark.

W. ALLEN, J. This case cannot be distinguished from *Lane* v. *Bryant*, 9 Gray, 245. That was an action for injury to the plaintiff's carriage by collision with the defendant's wagon driven by his servant. A witness was asked "what the servant said to the plaintiff at the time of the accident, and while the plaintiff was being extricated from his carriage, and while the crowd was about." The reply, that the servant said the plaintiff was not to blame, was admitted, and an exception to its admission was sustained. Mr. Justice Bigelow, in delivering the opinion of the court, said, in language which well applies to the case at bar: "The declaration of the defendant's servant was incompetent, and should have been rejected. It was made after the accident occurred, and the injury to the plaintiff's carriage had been done. It did not accompany the principal act, . . . or tend in any way to elucidate it. It was only the expression of an opinion about

a past occurrence, and not part of the *res gestæ*. It is no more competent because made immediately after the accident than if made a week or a month afterwards."

In the case under consideration, the plaintiff relied upon the act of the conductor in ringing the bell and starting the car while the plaintiff was leaving it, to prove negligence in the defendant. The words of the conductor did not form part of that transaction, or in any manner qualify his act, or any act of the plaintiff. They were in form and substance narrative, and expressed an opinion upon a past transaction. The words, if competent as an admission, might have been evidence to show what the character of the transaction was, but they did not enter into it and give it character, any more than would the declaration of the conductor that he had not been in fault, or that the plaintiff had been. In the opinion of a majority of the court, the evidence was properly excluded.

. . . .

Exceptions overruled.

§ 139.] ELLEDGE *v.* RAILWAY COMPANY.

100 California, 282. — 1893.

Action for damages for personal injuries. Judgment for plaintiff. Defendant appeals.

Plaintiff was a workman engaged in loading rock from a bank or cliff from ten to sixteen feet high, under the direction of defendant's roadmaster. There was a seam or crack behind the bank, known to the roadmaster but unknown to plaintiff, which rendered the place unsafe for work. A portion of the rocks and earth slid down and injured plaintiff. When the roadmaster saw what had happened, he exclaimed: "My God, I expected that!"

Temple, C. (after disposing of other matters). Appellant also alleges some errors of law at the trial.

He contends that it was error to permit the witness to state, against his objection, the exclamation of O'Connell (the road-

master), when the cliff came down. This is plainly part of the *res gestæ*. It was unpremeditated and could hardly have been made if O'Connell had not feared that it might come down. It does not depend for its probative force upon O'Connell's veracity, and therein is entirely unlike a deliberate admission made after the event. . . .

Judgment affirmed.

YORDY *v.* MARSHALL COUNTY, 86 Iowa, 340 (1892): In an action for damages for the breaking down of a county bridge, the court admitted evidence that a member of the board of supervisors, after the accident, declared that the bridge had been condemned by the board as unsafe, and notices to that effect ordered posted. *Held:* "It appears that the alleged declarations of Benedict were made after the accident, and it does not appear that when he made the declarations he was engaged in any official work or employment for the county. Under these circumstances, the testimony as to his declarations was not competent evidence. He was an agent of the county, and his declaration was in no way connected with, nor a part of, the *res gestæ*."

VICKSBURG, &c. R. *v.* O'BRIEN, 119 U. S. 99 (1886): An engineer ten to thirty minutes after an accident declared that at the time of the accident the train was running at the rate of eighteen miles an hour. *Held:* Incompetent. "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 shall be maintained, it would follow that the declarations of the engineer, if favorable to the company, would be 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."

CHAPTER XII.

NOTICE TO THE AGENT.

§ 144.] THE DISTILLED SPIRITS.

11 Wallace (U. S.), 356. — 1870.

Information filed by the United States upon the seizure of 278 barrels of distilled spirits for violation of the revenue laws. Appearance and claim of ownership by one Harrington and one Boyden. Decree against 50 barrels claimed by Harrington and all those claimed by Boyden. Appeal by claimants.

The spirits were withdrawn from bond by false and fraudulent representations, and upon false and fraudulent bonds. Defendants claimed to have purchased in open market without notice of this fraud, Harrington having purchased through Boyden as his agent. The court charged that if Boyden was cognizant of the fraud, Harrington would be bound by Boyden's knowledge.

Mr. Justice Bradley. . . . The substance of the third instruction prayed for was, that if the spirits were removed from the warehouse according to the forms of law, and the claimants bought them without knowledge of the fraud, they were not liable to forfeiture. The court charged in accordance with this prayer with this qualification, that if Boyden bought the spirits as agent for Harrington, and was cognizant of the fraud, Harrington would be bound by his knowledge. The claimants insist that this is not law.

The question how far a purchaser is affected with notice of prior liens, trusts, or frauds, by the knowledge of his agent who effects the purchase, is one that has been much mooted in England and this country. That he is bound and affected

by such knowledge or notice as his agent obtains in negotiating the particular transaction, is everywhere conceded. But Lord Hardwicke thought that the rule could not be extended so far as to affect the principal by knowledge of the agent acquired previously in a different transaction. *Warrick* v. *Warrick*, 3 Atkyns, 291. Supposing it to be clear, that the agent still retained the knowledge so formerly acquired, it was certainly making a very nice and thin distinction. Lord Eldon did not approve of it. In *Mountford* v. *Scott*, 1 Turner & Russel, 274, he says: "It may fall to be considered 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." The distinction taken by Lord Hardwicke has since been entirely overruled by the Court of Exchequer Chamber in the case of *Dresser* v. *Norwood*, 17 Common Bench, N. S. 466. 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 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. 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. This often happened in the case of large estates in England, where men of great professional eminence were frequently consulted. They thus became possessed, in a confidential manner, of secret trusts, or other defects of title, which they could not honorably, if they could legally, communicate to subsequent clients. This difficulty presented itself to Lord Hardwicke's mind, and undoubtedly lay at the bottom of the distinction which he established. Had he confined it to such cases, it would have been entirely unexceptionable.

The general tendency of decisions in this country has been to adopt the distinction of Lord Hardwicke, but it has several times been held, in consonance with Lord Eldon's suggestion, that if the agent acquired his information so recently as to make it incredible that he should have forgotten it, his principal will be bound. This is really an abandonment of the principle on which the distinction is founded, Story on Agency, § 140; *Hovey* v. *Blanchard*, 13 N. H. 145; *Patten* v. *Insurance Co.*, 40 Id. 375; *Hart* v. *Farmers' & Mechanics' Bank*, 33 Vt. 252. The case of *Hart* v. *Farmers' & Mechanics' Bank*, 33 Vt. 252, adopts the rule established by the case of *Dresser* v. *Norwood*. Other cases, as that of *Bank of United States* v. *Davis*, 2 Hill, 452; *New York Central Insurance Co.* v. *National Protection Co.*, 20 Barb. 468, adhere to the more rigid views. See cases collected in note to American

edition of 17 Common Bench, N. S. 482, and Mr. Justice Clifford's opinion in the Circuit Court in the present case.

On the whole, however, we think that the rule as finally settled by the English courts, with the qualification above mentioned, is the true one, and is deduced from the best consideration of the reasons on which it is founded. Applying it to the case in hand, we think that the charge was substantially correct. The fair construction of the charge is, that if the jury believed that Boyden, the agent, was cognizant of the fraud at the time of the purchase, Harrington, the principal, was bound by this knowledge. The precise words were, "that if Boyden bought the spirits as agent for Harrington, and Boyden was cognizant of the fraud, Harrington would be bound by his knowledge." The plain and natural sense of these words, and that in which the jury would understand them, we think, is that they refer to Boyden's knowledge at the time of making the purchase. Thus construed, the charge is strictly in accordance with the law as above explained. There was no pretence that Boyden acquired his knowledge in a fiduciary character.

. . . .

Judgment affirmed.

§ 144.] CONSTANT *v.* UNIVERSITY OF ROCHESTER.

111 New York, 604. — 1889.

Action to foreclose a mortgage dated February 17, 1883, given by A. & B. to plaintiff's testator. Defendant sets up title under foreclosure proceedings upon a mortgage dated January 10, 1884, given by A. & B. to defendant. At the time defendant purchased under the foreclosure sale plaintiff's mortgage had not been recorded, and defendant denies any notice or knowledge of it. One Deane acted as attorney and agent of plaintiff in taking the first mortgage, and of defendant in taking the second. Judgment for plaintiff. Defendant appeals.

Peckham, J. (after discussing the evidence and the authorities upon the subject of notice). But the burden is upon the plaintiff to prove, clearly and beyond question, that he [the agent] did, and it is not upon the defendant to show that he did not have such recollection. And we think that there is a total lack of evidence in the case which would sustain the finding that Deane has the least recollection on the subject at the time of the execution of the university mortgage. Under such circumstances we think it impossible to impute notice to the university, or knowledge in regard to a fact which is not proved to have been possessed by its agent. If such knowledge did not exist in Deane at the time of his taking the mortgage to the university, then the latter is a *bona fide* mortgagee for value, and its mortgage should be regarded as a prior lien to that of the unrecorded mortgage of Constant, which is prior in point of date. The plaintiff is bound to show, by clear and satisfactory evidence, that when this mortgage to the university was taken by Deane, he then had knowledge, and the fact was then present in his mind, not only that he had taken a mortgage to Constant eleven months prior thereto on the same premises, which had not been recorded, but that such mortgage was an existing and valid lien upon the premises, which had not been in any manner satisfied. If he recollected that there had been such a mortgage, but honestly believed that it was or had been satisfied, then, although mistaken upon that point, the university could not be charged with knowledge of the existence of such mortgage. . . .

One other question has been argued before us which has been the subject of a good deal of thought. It is this: Assuming that Deane had knowledge of the existence of the Constant mortgage at the time of the execution of the mortgage to the university, is his knowledge to be imputed to the university, considering the position Deane occupied to both mortgagees?

While acting as the agent of Constant in taking the mortgage in question as security for the funds which he

was investing for him, it was the duty of Deane to see that the moneys were safely and securely invested. The value of the property was between eleven and twelve thousand dollars; and it was obviously the duty of Deane to see that the mortgage which he took upon such property as a security for a loan of $6,000 for Constant should be a first lien thereon. *Whitney* v. *Martine*, 88 N. Y. 535. In order to become such first lien it was the duty of Deane to see that the Constant mortgage was first recorded. In January, 1884, when acting as agent for the university to invest its moneys, he owed the same duty to the university that he did to Constant, and it was his business to see that the security which he took was a safe and secure one. Neither mortgage was safe or secure if it were a subsequent lien to the other upon this property. This duty he continued to owe to Constant at the time he took the mortgage to the university.

At the time of the execution of the latter mortgage, therefore, he owed conflicting duties to Constant and to the university, the duty in each case being to make the mortgage to each principal a first lien on the property. Owing these conflicting duties to two different principals, in two separate transactions, can it be properly said that any knowledge coming to him in the course of either transaction should be imputed to his principal? Can any agent occupying such a position bind either principal by constructive notice? It has been stated that in such a case where an agent thus owes conflicting duties, the security which is taken or the act which is performed by the agent may be repudiated by his principal when he becomes aware of the position occupied by such agent. Story on Agency, § 210.

The reason for this rule is, that the principal has the right to the best efforts of his agent in the transaction of the business connected with his agency, and where the agent owes conflicting duties he cannot give that which the principal has the right to demand, and which he has impliedly contracted to give. Ought the university to be charged with notice of the existence of this prior mortgage when it was

the duty of its agent to procure for it a first lien, while, at the same time, in his capacity as agent for Constant, it was equally his duty to give to him the prior lien? Which principal should he serve? There have been cases where, in the sale and purchase of the same real estate, both parties have employed the same agent, and it has been held under such circumstances that the knowledge of the agent was to be imputed to both of his principals. If, with a full knowledge of the facts that his own agent was the agent of the other, each principal retained him in his employment, we can see that there would be propriety in so holding; for each then notes the position which the agent has with regard to the other, and each takes the risk of having imputed to him whatever knowledge the agent may have on the subject. See *Le Neve* v. *Le Neve,* 1 Ambler's Reports, 436, Hardwicke, Chancellor, decided in 1747; *Toulmin* v. *Steere*, 3 Merivale, 209, decided in 1817, by Sir Walter Grant, Master of the Rolls. The case of *Nixon* v. *Hamilton*, already referred to, decided by Lord Plunkett, Lord Chancellor in the Irish Court of Chancery, in 1838 (2 Drury & Walsh, 364), is a case in many respects somewhat like the one at bar, so far as this principle is concerned, if it be assumed that Deane really had the knowledge of the prior mortgage as an existing lien. It will be observed, however, upon examination of it, that the question, whether the knowledge of the common agent in two different transactions with two different principals was notice to the second principal, was not raised with reference to this particular ground. The whole discussion was upon the subject of imputing the knowledge of the agent to the second mortgagee, of the existence of the prior mortgage, which knowledge was not obtained in the last transaction. Whether such knowledge should or should not be imputed to the second mortgagee, because of the conflicting duties owed by the common agent, was not raised. The only defence set up was, that the information did not come to the agent of the second mortgagee in the course of transacting the business of the second mortgagee, and the question was simply

whether such knowledge could be imputed to the second mortgagee, because of the knowledge acquired by his agent at another time, in another transaction, with another principal. The court held, that where it appeared, as in this case it did appear, fully and plainly, that the matter was fresh in the recollection, and fully within the knowledge of the agent, and under such circumstances, that it was a gross fraud on the part of the agent, in the first place in keeping a prior mortgage off the record, and in the second place, in not communicating the knowledge which he had to his principal, the second mortgagee, that in such case the second mortgagee was charged with the knowledge of his agent.

Whether the same result would have been reached if the other ground had been argued we cannot of course assume to decide. I have found no case precisely in point where the subject has been discussed and decided either way. I have very grave doubts as to the propriety of holding in the case of an agent, situated as I have stated, that his principal in the second mortgage should be charged with knowledge which such agent acquired in another transaction, at a different time, while in the employment of a different principal, and where his duties to such principal still existed and conflicted with his duty to his second principal. We do not deem it, however, necessary to decide the question in this case.

For the reasons already given the judgment should be reversed and a new trial ordered, with costs to abide the event.

GRAY and ANDREWS, JJ., dissent.

Judgment reversed.

§ 144.] McCORMICK v. JOSEPH.

83 Alabama, 401. — 1887.

Action to recover possession of goods. Intervention by claimants. Judgment for plaintiffs. Claimants appeal.

Plaintiffs sold the goods to one Manasses. Manasses turned over a part of the goods to claimants in payment of a debt. Plaintiffs claim the right to rescind the contract of sale on the ground that Manasses fraudulently obtained the goods while insolvent and having no expectation of paying for them, and that claimants had notice of Manasses' insolvency. The evidence to sustain the contention that claimants had notice was this: One White, who was claimants' attorney in securing the goods in payment of the debt, had a few days earlier drawn a mortgage upon Manasses' stock of merchandise in favor of E., and had aided in a transfer of the rest of the stock to Manasses' wife; White testified that while performing these services he ascertained that Manasses was insolvent. The court charged in substance that claimants were chargeable in law with notice of the facts ascertained by White in the course of the previous transactions between Manasses and E. and Manasses and wife.

Stone, C. J. It was early settled in this State, and has been since followed, that notice, or knowledge by an attorney, to carry home constructive notice to the client, must be shown to have been given or acquired after the relation of attorney and client was formed. It is not enough that the notice is first, and the retainer afterwards. *Lucas* v. *Bank of Darien*, 2 Stew. 280; *Terrell* v. *Br. Bank*, 12 Ala. 502; *Freukel* v. *Hudson*, 82 Ala. 158; Story on Agency, § 140. The case of *City Nat. Bank* v. *Jeffries*, 73 Ala. 183, is not opposed to this view. In that case, the information was obtained while the relation of attorney and client existed.

This must work a reversal of this case.

§ 145.] HEGENMYER *v.* MARKS.

37 MINNESOTA, 6. — 1887.

[Reported herein at p. 339.]

§ 147.] CARPENTER *v.* GERMAN AMERICAN INSURANCE CO.

135 NEW YORK, 298. — 1892.

ACTION upon a policy of fire insurance. Judgment for plaintiff.

One Mandeville was agent of defendant. He employed a sub-agent, Andrews, to solicit insurance. Andrews inspected the premises and knew before the policy was issued that the plaintiff was not the absolute owner. Defendant contends that it is not chargeable with such notice and that the policy is avoided by breach of the term by which plaintiff undertakes that he is the "sole, absolute, and unconditional owner."

ANDREWS, J. It must be assumed in disposing of this appeal that Andrews, the sub-agent of Mandeville, before the original policy was issued of which the policy upon which this action is brought is a renewal, was sent by Mandeville to inspect the premises and arrange the insurance, and that he was then informed by the plaintiff that the property upon which the insured building was erected was held under a contract of purchase from the State Bank of Elizabeth, New Jersey. If this constituted notice to the defendant, then, within our decisions, the policy was not avoided by the printed condition that if the insured is not the "sole, absolute, and unconditional owner of the property insured, or if said property be a building, and the insured be not the owner of the land on which said building stands, by title in fee-simple, and this fact is not expressed in the written portion

of the policy, this policy shall be void." *Van Schoick* v. *Niagara Fire Ins. Co.*, 68 N. Y. 434. It appears that Mandeville was a general agent of the defendant, clothed with power to make contracts of insurance and to issue policies, and was furnished with printed forms which he filled up as occasion required. He was agent for several other companies also, which presumably upon the evidence was known to the defendant. Andrews had been employed by him for several years before the policy in question was issued, to solicit insurance, acting as Mandeville's clerk and employé. It has been the common custom and practice of agents of insurance companies, having the power of general agents, to employ subordinates to render services similar to those rendered by Andrews, and we have held that notice to such a sub-agent while engaged in soliciting insurance of any fact material to the risk, and which affects the contract of insurance, is notice to the company, and binds the company to the same extent as though it had been given directly to the agent himself. *Arff* v. *Starr Ins. Co.*, 125 N. Y. 57; *Bodine* v. *Exchange Ins. Co.*, 51 Id. 117. The point, therefore, based on the condition as to the ownership of the insured property must be overruled.

. . . .

Judgment affirmed.

CHAPTER XIII.

LIABILITY OF PRINCIPAL FOR TORTS OF AGENT.

1. Liability for torts generally.

§ **149.**] SINGER MANUFACTURING CO. *v.* RAHN.

132 UNITED STATES, 518. — 1889.

[Reported herein at p. 9.]

§ **149.**] HUNTLEY *v.* MATHIAS.

90 NORTH CAROLINA, 101. — 1884.

[Reported herein at p. 203.]

§ **149.**] DEMPSEY *v.* CHAMBERS.

154 MASSACHUSETTS, 330. — 1891.

[Reported herein at p. 94.]

2. Fraud for benefit of principal.

§ **153.**] BARWICK *v.* ENGLISH JOINT STOCK BANK.

LAW REPORTS, 2 EXCHEQUER (CHAMBER), 259. — 1867.

ACTION in tort for damages for fraud. At the close of plaintiff's case the trial court directed a non-suit on the ground that there was no evidence proper to go to the jury. Bill of exceptions.

WILLES, J. (for the court[1]). This case, in which the court took time to consider their judgment, arose on a bill of exceptions to the ruling of my Brother Martin at the trial that there was no evidence to go to the jury.

It was an action brought for an alleged fraud, which was described in the pleadings as being the fraud of the bank, but which the plaintiff alleged to have been committed by the manager of the bank in the course of conducting their business. At the trial, two witnesses were called, first, Barwick, the plaintiff, who proved that he had been in the habit of supplying oats to a customer of the bank of the name of Davis; and that he had done so upon a guarantee given to him by the bank, through their manager, the effect of which probably was, that the drafts of the plaintiff upon Davis were to be paid, subject to the debt of the bank. What were the precise terms of the guarantee did not appear, but it seems that the plaintiff became dissatisfied with it, and refused to supply more oats without getting a more satisfactory one; that he applied to the manager of the bank, and that after some conversation between them, a guarantee was given, which was in this form: —

DEAR SIR, — Referring to our conversation of this morning, I beg to repeat that if you sell to, or purchase for, J. Davis and Son not exceeding 1,000 quarters of oats for the use of their contract, I will honor the check of Messrs. J. Davis and Son in your favor in payment of the same, on receipt of the money from the commissariat in payment of forage supplied for the present month, in priority to any other payment except to this bank; and provided, as I explained to you, that they, J. Davis and Son, are able to continue their contract, and are not made bankrupts.

(Signed.) DON. M. DEWAR, Manager.

The plaintiff stated that in the course of the conversation as to the guarantee, the manager told him that whatever

[1] WILLES, BLACKBURN, KEATING, MELLOR, MONTAGUE SMITH, and LUSH, JJ.

time he received the government check, the plaintiff should receive the money.

Now, that being the state of things upon the evidence of the plaintiff, it is obvious that there was a case on which the jury might conclude, if they thought proper, that the guarantee given by the manager was represented by him to be a guarantee which would probably, or might probably, be paid, and that the plaintiff took the guarantee, supposing that it was of some value, and that the check would probably, or might probably, be paid. But if the manager at the time, from his knowledge of the accounts, knew that it was improbable in a very high degree that it would be paid, and knew and intended that it should not be paid, and kept back from the plaintiff the fact which made the payment of it improbable to the extent of being as a matter of business impossible, the jury might well have thought (and it was a matter within their province to decide upon) that he had been guilty of a fraud upon the plaintiff.

Now, was there evidence that such knowledge was in the mind of the manager? The plaintiff had no knowledge of the state of the accounts, and the manager made no communication to him with respect to it. But the evidence of Davis was given for the purpose of supplying that part of the case; and he stated that, immediately before the guarantee had been given, he went to the manager, and told him it was impossible for him to go on unless he got further supplies, and that the government were buying in against him; to which the manager replied, that Davis must go and try his friends, on which Davis informed the manager that the plaintiff would go no further unless he had a further guarantee. Upon that the manager acted; and Davis added, "I owed the bank above £12,000." The result was that oats were supplied by the plaintiff to Davis to the amount of £1,227; that Davis carried out his contract with the government, and that the commissariat paid him the sum of £2,676, which was paid by him into the bank. He thereupon handed a check to the plaintiff, who presented it

to the bank, and without further explanation the check was refused.

This is the plain state of the facts; and it was contended on behalf of the bank that, inasmuch as the guarantee contains a stipulation that the plaintiff's debt should be paid subsequent to the debt of the bank, which was to have priority, there was no fraud. We are unable to adopt that conclusion. I speak sparingly, because we desire not to anticipate the judgment which the constitutional tribunal, the jury, may pass. But they might, upon these facts, justly come to the conclusion that the manager knew and intended that the guarantee should be unavailing; that he procured for his employers, the bank, the government check, by keeping back from the plaintiff the state of Davis's account, and that he intended to do so. If the jury took that view of the facts, they would conclude that there was such a fraud in the manager as the plaintiff complained of.

If there be fraud in the manager, then arises the question, whether it was such a fraud as the bank, his employers, would be answerable for. With respect to that, we conceive we are in no respect overruling the opinions of my Brothers Martin and Bramwell in *Udell* v. *Atherton*, 7 H. & N. 172; 30 L. J. (Exch.) 337, the case most relied upon for the purpose of establishing the proposition that the principal is not answerable for the fraud of his agent. Upon looking at that case, it seems pretty clear that the division of opinion which took place in the Court of Exchequer arose, not so much upon the question whether the principal is answerable for the act of an agent in the course of his business, — a question which was settled as early as Lord Holt's time (*Hern* v. *Nichols*, 1 Salk. 289), — but in applying that principle to the peculiar facts of the case; the act which was relied upon there as constituting a liability in the sellers having been an act adopted by them under peculiar circumstances, and the author of that act not being their general agent in business, as the manager of a bank is. But with

respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. See *Laugher* v. *Pointer*, 5 B. & C. 547, at p. 554. That principle is acted upon every day in running down cases. It has been applied also to direct trespass to goods, as in the case of holding the owners of ships liable for the act of masters abroad, improperly selling the cargo. *Ewbank* v. *Nutting*, 7 C. B. 797. It has been held applicable to actions of false imprisonment, in cases where officers of railway companies, intrusted with the execution of by-laws relating to imprisonment, and intending to act in the course of their duty, improperly imprison persons who are supposed to come within the terms of the by-laws. *Goff* v. *Great Northern Railway Company*, 3 E. & E. 672; 30 L. J. (Q. B.) 148, explaining (at 3 E. & E. p. 683) *Roe* v. *Birkenhead Railway Company*, 7 Exch. 36; and see *Barry* v. *Midland Railway Company*, Ir. L. Rep. 1 C. L. 130. It has been acted upon where persons employed by the owners of boats to navigate them and to take fares, have committed an infringement of a ferry, or such like wrong. *Huzzey* v. *Field*, 2 C. M. & R. 432, at p. 440. In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true, he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in.

The only other point which was made, and it had at first a somewhat plausible aspect, was this: It is said, if it be

established that the bank are answerable for this fraud, it is the fraud of the manager, and ought not to have been described, as here, as the fraud of the bank. I need not go into the question whether it be necessary to resort to the count in case of fraud, or whether, under the circumstances, money having been actually procured for, and paid into, the bank, which ought to have got into the plaintiff's hands, the count for money had and received is not applicable to the case. I do not discuss that question, because in common-law pleading no such difficulty as is here suggested is recognized. If a man is answerable for the wrong of another, whether it be fraud or other wrong, it may be described in pleading as the wrong of the person who is sought to be made answerable in the action. That was the decision in the case of *Raphael* v. *Goodman*, 8 A. & E. 565. The sheriff sued upon a bond; plea, that the bond was obtained by the sheriff and others by fraud; proof, that it was obtained by the fraud of the officer; held, the plea was sufficiently proved.

Under these circumstances, without expressing any opinion as to what verdict ought to be arrived at by the jury, especially considering that the whole case may not have been before them, we think this is a matter proper for their determination, and there ought, therefore, to be a *venire de novo*. *Venire de novo.*

§ 153.] HASKELL *v.* STARBIRD.

152 Massachusetts, 117. — 1890.

Tort for false and fraudulent representations in the sale of land. Judgment for plaintiff. Defendant alleges exceptions.

The sale was made by defendant through an agent. The court was asked to charge that: "If the jury shall find that Rockwell was the agent of the defendant in selling the land

in question, the plaintiff cannot recover, unless it is proved that the defendant was privy to or adopted the misrepresentation relied on." This request was refused, and the court charged, in substance, that if the agent was authorized to sell the land the defendant would be liable for the methods employed, and therefore liable for the agent's fraudulent representations.

Devens, J. . . . The instructions of the court upon the second request for a ruling — which was in substance, that, even if Rockwell was the agent of the defendant to sell, the plaintiff could not recover unless it was proved that the defendant was privy to or adopted the misrepresentations relied on — made the defendant responsible for the false and fraudulent representations as to the land made by Rockwell, if Rockwell was employed by the defendant to sell the land as his agent, notwithstanding Rockwell was not authorized to make them, and notwithstanding the defendant did not know that he had made them until after the conveyance. They held that the defendant, by employing Rockwell as his agent to make the sale, became responsible for the methods which he adopted in so doing. The defendant contends that Rockwell was a special agent only, and that, as his authority extended only to the sale of this single tract of land, the defendant is not responsible for any representations Rockwell might have made which he did not authorize.

The cases in which a distinction has been made in the responsibility of a principal for the acts of general and of special agents are those where the special agent did not have, and was not held out as having, full authority to do that which he undertook to do, and where one dealing with him was informed, or should have informed himself, of the limitations of his authority. There is no distinction in the matter of responsibility for the fraud of an agent authorized to do business generally, and of an agent employed to conduct a single transaction, if, in either case, he is acting in the business for which he was employed by the principal, and had full authority to complete the transaction. While the principal

may not have authorized the particular act, he has put the agent in his place to make the sale, and must be responsible for the manner in which he has conducted himself in doing the business which the principal intrusted to him. Benjamin on Sale (3d Am. ed.), § 465. The rule that a principal is liable civilly for the neglect, fraud, deceit, or other wrongful act of his agent, although the principal did not in fact authorize the practice of such acts, is quoted with approbation by Chief Justice Shaw in *Lock* v. *Stearns*, 1 Met. 560. That a principal is liable for the false representations of his agent, although personally innocent of the fraud, is said by Mr. Justice Hoar, in *White* v. *Sawyer*, 16 Gray, 586, 589, to be settled by the clear weight of authority.

In the case at bar, if the false representations were made by Rockwell, they were made by him while acting within the scope of his authority, in making a sale of land which the defendant employed him to sell, and the instruction properly held the defendant answerable for the damage occasioned thereby. *Lothrop* v. *Adams*, 133 Mass. 471. The defendant urges that, even if in an action of contract the false representations of Rockwell as his agent might render the defendant responsible as the principal, he cannot thus be made responsible in an action of tort for deceit, and that in such action the misrepresentation must be proved to have been that of the principal. It is sufficient to say, that no such point was presented at the trial, nor do we consider that any such distinction exists. . . .

Exceptions overruled.

§ 153.] WHEELER AND WILSON MFG. CO. *v.* AUGHEY.

144 PENNSYLVANIA STATE, 398. — 1891.

[Reported herein at p. 50.]

3. Fraud for benefit of agent: fictitious stock.

§§ 154, 155.] BRITISH MUTUAL BANKING CO. *v.* CHARNWOOD FOREST RAILWAY CO.

LAW REPORTS, 18 QUEEN'S BENCH DIVISION (C. A.), 714. — 1887.

APPEAL from an order of the Queen's Bench Division (Manisty and Mathew, JJ.) directing judgment to be entered for the plaintiffs.

The action was brought to recover damages for fraudulent misrepresentations alleged to have been made by the defendants through their secretary. At the trial before Lord Coleridge, C. J., it appeared that certain customers of the plaintiffs had applied to them for an advance on the security of transfers of debenture stock of the defendant company. The plaintiffs' manager called upon Tremayne, the defendants' secretary, and was informed in effect that the transfers were valid, and that the stock which they purported to transfer existed. The plaintiffs thereupon made the advances. It subsequently appeared that Tremayne, in conjunction with one Maddison, had fraudulently issued certificates for debenture stock in excess of the amount which the company were authorized to issue, and the transfers as to which the plaintiffs inquired related to this over-issue. The plaintiffs accordingly lost their security. The defendants did not benefit in any way by the false statements of Tremayne, which were made entirely in the interest of himself and Maddison. There was some question whether Tremayne was still secretary at the time the statements were made; but the jury found that the inquiries were made of him as secretary, and that the defendants held him out as such to answer such inquiries. The jury assessed the damages, and the chief justice left either of the parties to move for judgment. A motion was accordingly made on behalf of

the plaintiffs before Manisty and Mathew, JJ., who directed judgment to be entered for them.

The defendants appealed.

LORD ESHER, M. R. In this case an action has been brought by the plaintiffs to recover damages for fraudulent misrepresentation by the defendants, through their secretary, as to the validity of certain debenture stock of the defendant company. The defendants are a corporation, and the alleged misrepresentations were, in fact, made by a person employed in the capacity of their secretary; and it cannot be doubted that when he made the statements he had a fraudulent mind, and made them knowing them to be false.

I differ from the judgment of the divisional court, but I do not think the ground on which my decision is based was present to the minds of the learned judges. The point principally argued in the divisional court seems to have been that the defendants could not be liable on account of their being a corporation. It seems to me, however, that there is a defect in the plaintiffs' case, irrespective of the question whether the defendants were a corporation or not. The secretary was held out by the defendants as a person to answer such questions as those put to him in the interest of the plaintiffs, and if he had answered them falsely on behalf of the defendants, he being then authorized by them to give answers for them, it may well be that they would be liable. But although what the secretary stated related to matters about which he was authorized to give answers, he did not make the statements for the defendants, but for himself. He had a friend whom he desired to assist and could assist by making the false statements, and as he made them in his own interest or to assist his friend, he was not acting for the defendants. The rule has often been expressed in the terms, that to bind the principal the agent must be acting "for the benefit" of the principal. This, in my opinion, is equivalent to saying that he must be acting "for" the principal, since if there is authority to do the act it does not matter if the principal is benefited by it. I know of no case where the

employer has been held liable when his servant has made statements not for his employer, but in his own interest. The attention of the learned judges seems to have been drawn off from this view of the case by the argument founded on the defendants being a corporation, and I think their judgment must be overruled.

The following judgment was read by

BOWEN, L. J. There is, so far as I am aware, no precedent in English law, unless it be *Swift* v. *Winterbotham*, Law Rep. 8 Q. B. 244, a case that was overruled upon appeal (*Swift* v. *Jewsbury*, Law Rep. 9 Q. B. 301), for holding that a principal is liable in an action of deceit for the unauthorized and fraudulent act of a servant or agent committed, not for the general or special benefit of the principal, but for the servant's own private ends. The true rule was, as it seems to me, enunciated by the Exchequer Chamber in a judgment of Willes, J., delivered in the case of *Barwick* v. *English Joint Stock Bank*, Law Rep. 2 Exch. 259. "The general rule," says Willes, J., "is that the master is answerable for every such wrong of his servant or agent as is committed in the course of his service and for the master's benefit, though no express command or privity of the master be proved." This definition of liability has been constantly referred to in subsequent cases as adequate and satisfactory, and was cited with approval by Lord Selborne in the House of Lords in *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317. *Mackey* v. *Commercial Bank of New Brunswick*, Law Rep. 5 P. C. 394, is consistent with this principle. It is a definition strictly in accordance with the ruling of Martin, B., in *Limpus* v. *London General Omnibus Co.*, 1 H. & C. 526, which was upheld in the Exchequer Chamber (see per Blackburn, J.).

It was argued on behalf of the plaintiffs in the present appeal that the defendant company, although they might not have authorized the fraudulent answer given by the secretary, had nevertheless authorized the secretary to do "that class of acts" of which the fraudulent answer, it was said, was one. This is a misapplication to a wholly different case of

an expression which in *Barwick* v. *English Joint Stock Bank*, Law Rep. 2 Exch. 259, was perfectly appropriate with regard to the circumstances there. In that case the act done, though not expressly authorized, was done for the master's benefit. With respect to acts of that description, it was doubtless correct to say that the agent was placed there to do acts of "that class." Transferred to a case like the present, the expression that the secretary was placed in his office to do acts of "that class" begs the very question at issue; for the defendants' proposition is, on the contrary, that an act done not for the employer's benefit, but for the servant's own private ends, is not an act of the class which the secretary either was or could possibly be authorized to do. It is said that the secretary was clothed ostensibly with a real or apparent authority to make representations as to the genuineness of the debentures in question; but no action of contract lies for a false representation unless the maker of it or his principal has either contracted that the representation is true, or is estopped from denying that he has done so. In the present case the defendant company could not in law have so contracted, for any such contract would have been beyond their corporate powers. And if they cannot contract, how can they be estopped from denying that they have done so? The action against them, therefore, to be maintainable at all, must be an action of tort founded on deceit and fraud. But how can a company be made liable for a fraudulent answer given by their officer for his own private ends, by which they could not have been bound if they had actually authorized him to make it, and promised to be bound by it? The question resolves itself accordingly into a dilemma. The fraudulent answer must have either been within the scope of the agent's employment or outside it. It could not be within it, for the company had no power to bind themselves to the consequences of any such answer. If it is not within it, on what ground can the company be made responsible for an agent's act done beyond the scope of his employment, and from which they derived no benefit? This shows that the

proposition that the secretary in the present case was employed to do that "class of acts" is fallacious, and cannot be maintained. The judgment of the court below is based upon the view that the act done was in fact within the scope of the secretary's employment; and if this proposition cannot be maintained, the judgment must fall with it. How far a statutory corporate body could in any case be made liable in an action for deceit beyond the extent of the benefits they have reaped by the fraud is a matter upon which I desire to express no opinion, for none is necessary to the decision here; but even if the principals in the present case were not a statutory body, with limited powers of contracting and of action, I think there would be danger in departing from the definition of liability laid down by Willes, J., in *Barwick* v. *English Joint Stock Bank*, Law Rep. 2 Exch. 259, and in extending the responsibility of a principal for the frauds committed by a servant or agent beyond the boundaries hitherto recognized by English law. I think, therefore, that this appeal must be allowed, with costs.

Fry, L. J. I agree in the view that the appeal must be allowed. It appears to me that the case is one of an action for fraudulent misrepresentation made by a servant, who in making it was acting not in the interest of his employers, but in his own interest. It is plain that the action cannot succeed on any ground of estoppel, for otherwise the defendants would be estopped from denying that the stock was good. No corporate body can be bound by estoppel to do something beyond their powers. The action cannot be supported, therefore, on that ground. Nor can it be supported on the ground of direct authority to make the statements. Neither can it be supported on the ground that the company either benefited by, or accepted or adopted any contract induced or produced by the fraudulent misrepresentation. I can see no ground for maintaining the action, and the appeal must be allowed.

Appeal allowed.

§§ 154, 155.] FIFTH AVENUE BANK *v.* FORTY-SECOND STREET AND GRAND STREET FERRY CO.

137 New York, 231. — 1893.

Action to recover damages for loss sustained by plaintiff in consequence of the issue by defendant's agent of false and fraudulent certificates of stock. Judgment for plaintiff.

Plaintiff took from H. a certificate of stock purporting to be issued by defendant. In fact the certificate was spurious, the signature of the president being forged by one Allen, who was the defendant's agent for countersigning certificates, and who had countersigned this, and delivered it to H. for the purpose of borrowing money upon it. Before taking the certificate plaintiff inquired at defendant's office as to its genuineness, and was informed by Allen that it was genuine, and that H. was the registered holder of it. Later, plaintiff took another like certificate, but without making inquiries as to its genuineness. Defendant refused to recognize these certificates.

Plaintiff recovered upon the first certificate, but not on the second. Defendant alone appeals.

Maynard, J. . . . It is very clear that under the regulations adopted by the defendant, and pursuing the mode of procedure which it has prescribed, the final act in the issue of a certificate of stock was performed by its secretary and transfer agent, and that when he countersigned it and affixed the corporate seal, and delivered it with the intent that it might be negotiated, it must be regarded, so long as it remained outstanding, as a continuing affirmation by the defendant that it had been lawfully issued, and that all the conditions precedent upon which the right to issue it depended had been duly observed. Such is the effect necessarily implied in the act of countersigning. This word has a well-defined meaning, both in the law and in the lexicon. To

countersign an instrument is to sign what has already been signed by a superior, to authenticate by an additional signature, and usually has reference to the signature of a subordinate in addition to that of his superior by way of authentication of the execution of the writing to which it is affixed, and it denotes the complete execution of the paper. (Worcester's Dic.) When, therefore, the defendant's secretary and transfer agent countersigned and sealed this certificate and put it in circulation, he declared, in the most formal manner, that it had been properly executed by the defendant, and that every essential requirement of law and of the by-laws had been performed to make it the binding act of the company. The defendant's by-laws elsewhere illustrate the application of the term when used with reference to the signatures of its officers. In section 10 it is provided that all moneys received by the treasurer should be deposited in bank to the joint credit of the president and treasurer, to be drawn out only by the check of the treasurer, countersigned by the president. If the president should forge the name of the treasurer to a check, and countersign it and put it in circulation, and use the proceeds for his individual benefit, we apprehend it would not be doubted that this would be regarded as a certificate of the due execution of the check, so far as to render the company responsible to any person who innocently and in good faith became the holder of it.

This result follows from the application of the fundamental rules which determine the obligations of a principal for the acts of his agent. They are embraced in the comprehensive statement of Story in his work on Agency (9th ed. § 452), that the principal is to be "held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances, or misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts or disapproved of them. In all such cases the rule applies *respondeat*

superior, and is founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency." It is true that the secretary and transfer agent had no authority to issue a certificate of stock, except upon the surrender and cancellation of a previously existing valid certificate, and the signature of the president and treasurer first obtained to the certificate to be issued; but these were facts necessarily and peculiarly within the knowledge of the secretary, and the issue of the certificate in due form was a representation by the secretary and transfer agent that these conditions had been complied with, and that the facts existed upon which his right to act depended. It was a certificate apparently made in the course of his employment as the agent of the company and within the scope of the general authority conferred upon him; and the defendant is under an implied obligation to make indemnity to the plaintiff for the loss sustained by the negligent or wrongful exercise by its officers of the general powers conferred upon them. *Griswold* v. *Haven*, 25 N. Y. 595; *N. Y. & N. H. R. R. Co.* v. *Schuyler*, 34 Id. 30; *Titus* v. *G. W. Turnpike Co.*, 61 Id. 237; *Bank of Batavia* v. *N. Y., L. E. & W. R. R. Co.*, 106 Id. 195. The learned counsel for the defendant seeks to distinguish this case from the authorities cited because the signature of the president to the certificate was not genuine; but we cannot see how the forgery of the name of the president can relieve the defendant from liability for the fraudulent acts of its secretary, treasurer, and transfer agent. They were officers to whom it had intrusted the authority to make the final declaration as to the validity of the shares of stock it might issue, and where their acts, in the apparent exercise of this power, are accompanied with all the *indicia* of genuineness, it is essential to the public welfare that the principal

should be responsible to all persons who receive the certificates in good faith and for a valuable consideration and in the ordinary course of business, whether the *indicia* are true or not. Beach on Pr. Cor. vol. 2, p. 790; *North River Bank* v. *Aymar*, 3 Hill, 262; *Jarvis* v. *Manhattan Beach Co.*, 53 Hun, 362; *Tome* v. *Parkersburg Branch*, 39 Md. 36; *Baltimore, &c. R. Co.* v. *Wilkens*, 44 Id. 11; *Western M. R. Co.* v. *Franklin Bank*, 60 Id. 36; *Com.* v. *Bank*, 137 Mass. 431; *Holden* v. *Phelps*, 141 Id. 456; *Manhattan Beach Co.* v. *Harned*, 27 Fed. Rep. 484; *Shaw* v. *Port Phillip & Co.*, 13 Q. B. D. 103.

The rule is, we think, correctly stated in Beach on Private Corporations (Vol. 2, § 488, p. 791): "When certificates of stock contain apparently all the essentials of genuineness, a *bonâ fide* holder thereof has a claim to recognition as a stockholder, if such stock can legally be issued, or to indemnity if this cannot be done. The fact of forgery does not extinguish his right when it has been perpetrated by or at the instance of an officer placed in authority by the corporation, and intrusted with the custody of its stock-books, and held out by the company as the source of information upon the subject."

Having reached the conclusion that the defendant is liable for the representations of its officers, appearing upon the face of its certificate over their official signature and under the seal of the corporation, we do not deem it necessary to consider the effect of the oral representations made at the office of the company to the plaintiff's clerk, except so far as they bear upon the question of the good faith of the plaintiff in the acquisition of the certificate.

The judgment and order must be affirmed with costs.

All concur. Judgment affirmed.

4. Fraud for benefit of agent: fictitious bills of lading.

§ 156.] FRIEDLANDER *v.* TEXAS & PACIFIC RAILWAY CO.

130 United States, 416. — 1889.

Action for damages for non-delivery of cotton named in a bill of lading. Judgment for defendant.

Defendant's shipping agent issued to one Lahnstein a bill of lading for cotton in the usual form. In fact no cotton was shipped, and the agent and Lahnstein were in collusion to obtain money upon the bill of lading. Lahnstein indorsed the bill of lading and attached it to a draft drawn on plaintiffs, which draft plaintiffs accepted and paid in good faith.

Mr. Chief Justice Fuller delivered the opinion of the court.

The agreed statement of facts sets forth "that, in point of fact, said bill of lading of November 6, 1883, was executed by said E. D. Easton, fraudulently and by collusion with said Lahnstein, and without receiving any cotton for transportation, such as is represented in said bill of lading, and without the expectation on the part of the said Easton of receiving any such cotton;" and it is further said that Easton and Lahnstein had fraudulently combined in another case, whereby Easton signed and delivered to Lahnstein a similar bill of lading for cotton "which had not been received, and which the said Easton had no expectation of receiving;" and also "that, except that the cotton was not received nor expected to be received by said agent when said bill of lading was by him executed as aforesaid, the transaction was, from first to last, customary." In view of this language, the words "for transportation, such as is represented in said bill of lading," cannot be held to operate as a limitation. The inference to be drawn from the statement is that no cotton whatever was delivered for transportation to the agent at Sherman station.

The question arises, then, whether the agent of a railroad company at one of its stations can bind the company by the execution of a bill of lading for goods not actually placed in his possession, and its delivery to a person fraudulently pretending in collusion with such agent that he had shipped such goods, in favor of a party without notice, with whom, in furtherance of the fraud, the pretended shipper negotiates a draft, with the false bill of lading attached. Bills of exchange and promissory notes are representatives of money, circulating in the commercial world as such, and it is essential, to enable them to perform their peculiar functions, that he who purchases them should not be bound to look beyond the instrument, and that his right to enforce them should not be defeated by anything short of bad faith on his part. But bills of lading answer a different purpose and perform different functions. They are regarded as so much cotton, grain, iron, or other articles of merchandise, in that they are symbols of ownership of the goods they cover. And as no sale of goods lost or stolen, though to a *boná fide* purchaser for value, can divest the ownership of the person who lost them or from whom they were stolen, so the sale of the symbol, or mere representative of the goods, can have no such effect, although it sometimes happens that the true owner, by negligence, has so put it into the power of another to occupy his position ostensibly as to estop him from asserting his right as against a purchaser who has been misled to his hurt by reason of such negligence. *Shaw* v. *Railroad Co.*, 101 U. S. 557, 563; *Pollard* v. *Vinton*, 105 U. S. 7, 8; *Gurney* v. *Behrend*, 3 El. & Bl. 622, 633, 634. It is true that while not negotiable as commercial paper is, bills of lading are commonly used as security for loans and advances; but it is only as evidence of ownership, special or general, of the property mentioned in them, and of the right to receive such property at the place of delivery.

Such being the character of a bill of lading, can a recovery be had against a common carrier for goods never actually in its possession for transportation, because one of its agents,

having authority to sign bills of lading, by collusion with another person issues the document in the absence of any goods at all?

It has been frequently held by this court that the master of a vessel has no authority to sign a bill of lading for goods not actually put on board the vessel, and, if he does so, his act does not bind the owner of the ship even in favor of an innocent purchaser. *The Freeman* v. *Buckingham*, 18 How. 182, 191; *The Lady Franklin*, 8 Wall. 325; *Pollard* v. *Vinton*, 105 U. S. 7. And this agrees with the rule laid down by the English courts. *Lickbarrow* v. *Mason*, 2 T. R. 77; *Grant* v. *Norway*, 10 C. B. 665; *Cox* v. *Bruce*, 18 Q. B. D. 147. "The receipt of the goods," said Mr. Justice Miller, in *Pollard* v. *Vinton*, *supra*, "lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver." "And the doctrine is applicable to transportation contracts made in that form by railway companies and other carriers by land, as well as carriers by sea," as was said by Mr. Justice Matthews in *Iron Mountain Railway* v. *Knight*, 122 U. S. 79, 87, he adding also: "If Potter (the agent) had never delivered to the plaintiff in error any cotton at all to make good the five hundred and twenty-five bales called for by the bills of lading, it is clear that the plaintiff in error would not be liable for the deficiency. This is well established by the cases of *The Schooner Freeman* v. *Buckingham*, 18 How. 182, and *Pollard* v. *Vinton*, 105 U. S. 7."

It is a familiar principle of law that where one of two innocent parties must suffer by the fraud of another, the loss should fall upon him who enabled such third person to commit the fraud; but nothing that the railroad company did or omitted to do can be properly said to have enabled Lahnstein to impose upon Friedlander & Co. The company not only did not authorize Easton to sign fictitious bills of lading, but it did not assume authority itself to issue such documents, except upon the delivery of the merchandise. Easton was not the company's agent in the transaction, for

there was nothing upon which the agency could act. Railroad companies are not dealers in bills of exchange, nor in bills of lading; they are carriers only, and held to rigid responsibility as such. Easton, disregarding the object for which he was employed, and not intending by his act to execute it, but wholly for a purpose of his own and of Lahnstein, became *particeps criminis* with the latter in the commission of the fraud upon Friedlander & Co., and it would be going too far to hold the company, under such circumstances, estopped from denying that it had clothed this agent with apparent authority to do an act so utterly outside the scope of his employment and of its own business. The defendant cannot be held on contract as a common carrier, in the absence of goods, shipment, and shipper; nor is the action maintainable on the ground of tort. "The general rule," said Willes, J., in *Barwick* v. *English Joint Stock Bank*, L. R. 2 Exch. 259, 265, "is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." See also *Limpus* v. *London General Omnibus Co.*, 1 H. & C. 526. The fraud was in respect to a matter within the scope of Easton's employment or outside of it. It was not within it, for bills of lading could only be issued for merchandise delivered; and being without it, the company, which derived and could derive no benefit from the unauthorized and fraudulent act, cannot be made responsible. *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.*, 18 Q. B. D. 714.

The law can punish roguery, but cannot always protect a purchaser from loss; and so fraud perpetrated through the device of a false bill of lading may work injury to an innocent party, which cannot be redressed by a change of victim.

Under the Texas statutes the trip or voyage commences from the time of the signing of the bill of lading issued upon the delivery of the goods, and thereunder the carrier

cannot avoid his liability as such, even though the goods are not actually on their passage at the time of a loss, but these provisions do not affect the result here.

We cannot distinguish the case in hand from those heretofore decided by this court, and in consonance with the conclusions therein announced this judgment must be

Affirmed.

§ 156.] BANK OF BATAVIA v. NEW YORK, L. E., & W. R. COMPANY.

see p 68 Ap

106 New York, 195. — 1887.

Action for damages for wrongful issue by defendant, through its shipping agent, of two bills of lading. Judgment for plaintiff.

Finch, J. 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. *North River Bank* v. *Aymar*, 3 Hill, 262; *Griswold* v. *Haven*, 25 N. Y. 595, 601; *N. Y. & N. H. R. R. Co.* v. *Schuyler*, 34 Id. 30; *Armour* v. *M. C. R. R. Co.*, 65 Id. 111. A discussion of that doctrine is no longer needed or permissible in this court, since it has survived an inquiry of the most exhaustive character, and an assault remarkable for its persistence and vigor. 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. The application of this rule to the case at bar has

determined it in favor of the plaintiff, and we approve of that conclusion.

One Weiss was the local freight agent of the defendant corporation at Batavia, whose duty and authority it was to receive and forward freight over the defendant's road, giving a bill of lading therefor specifying the terms of the shipment, but having no right to issue such bills except upon the actual receipt of the property for transportation. He issued bills of lading for sixty-five barrels of beans to one Williams, describing them as received to be forwarded to one Comstock, as consignee, but adding with reference to the packages that their contents were unknown. Williams drew a draft on the consignee, and procured the money upon it of the plaintiff by transferring the bills of lading to secure its ultimate payment. It turned out that no barrels of beans were shipped by Williams, or delivered to the defendant, and the bills of lading were the product of a conspiracy between him and Weiss to defraud the plaintiff or such others as could be induced to advance their money upon the faith of the false bills.

It is proper to consider only that part of the learned and very able argument of the appellant's counsel which questions the application of the doctrine above stated to the facts presented. So much of it as rests upon the ground that no privity existed between the defendant and the bank may be dismissed with the observation that no privity is needed to make the estoppel available other than that which flows from the wrongful act and the consequent injury. *N. Y. & N. H. R. R. Co.* v. *Schuyler*, *supra*.

While bills of lading are not negotiable in the sense applicable to commercial paper, they are very commonly transferred as security for loans and discounts, and carry with them the ownership, either general or special, of the property which they describe. It is the natural and necessary expectation of the carrier issuing them that they will pass freely from one to another, and advances be made upon their faith, and the carrier has no right to believe, and never does believe, that their office and effect is limited to the

person to whom they are first and directly issued. On the contrary, he is bound by law to recognize the validity of transfers, and to deliver the property only upon the production and cancellation of the bill of lading.

If he desires to limit his responsibility to a delivery to the named consignee alone, he must stamp his bills as "non-negotiable;" and where he does not do that, he must be understood to intend a possible transfer of the bills and to affect the action of such transferees. In such a case, the facts go far beyond the instance cited, in which an estoppel has been denied because the representations were not made to the party injured. *Mayenborg* v. *Haynes*, 50 N. Y. 675; *Maguire* v. *Selden*, 103 N. Y. 642. Those were cases in which the representations made were not intended, and could not be expected to influence the persons who relied upon them, and their knowledge of them was described as purely accidental and not anticipated. Here they were of a totally different character. The bills were made for the precise purpose, so far as the agent and Williams were concerned, of deceiving the bank by their representations, and every bill issued not stamped was issued with the expectation of the principal that it would be transferred and used in the ordinary channels of business, and be relied upon as evidence of ownership or security for advances. Those thus trusting to it and affected by it are not accidentally injured, but have done what they who issued the bill had every reason to expect. Considerations of this character provide the basis of an equitable estoppel, without reference to negotiability or directness of representation.

It is obvious, also, upon the case as presented, that the fact or condition essential to the authority of the agent to issue the bills of lading was one unknown to the bank and peculiarly within the knowledge of the agent and his principal. If the rule compelled the transferee to incur the peril of the existence or absence of the essential fact, it would practically end the large volume of business founded upon transfers of bills of lading. Of whom shall the lender in-

quire, and how ascertain the fact? Naturally he would go to the freight agent, who had already falsely declared in writing that the property had been received. Is he any more authorized to make the verbal representation than the written one? Must the lender get permission to go through the freight-house or examine the books? If the property is grain, it may not be easy to identify, and the books, if disclosed, are the work of the same freight agent. It seems very clear that the vital fact of the shipment is one peculiarly within the knowledge of the carrier and his agent, and quite certain to be unknown to the transferee of the bill of lading, except as he relies upon the representation of the freight agent. The recital in the bills that the contents of the packages were unknown would have left the defendant free from responsibility for a variance in the actual contents from those described in the bill, but is no defence where nothing is shipped and the bill is wholly false. The carrier cannot defend one wrong by presuming that if it had not occurred another might have taken its place. The presumption is the other way; that if an actual shipment had been made, the property really delivered would have corresponded with the description in the bills.

The facts of the case bring it, therefore, within the rule of estoppel as it is established in this court, and justify the decision made.

The judgment should be affirmed, with costs. All concur.

Judgment affirmed.

5. Fraud for benefit of agent: forged telegram.

§ 157.] M'CORD *v.* WESTERN UNION TELEGRAPH COMPANY.

39 MINNESOTA, 181. — 1888.

APPEAL from an order overruling a demurrer to the complaint. The opinion states the facts.

VANDERBURGH, J. Dudley & Co., who resided at Grove City, Minn., were the agents of plaintiff for the purchase of wheat for him. He resided at Minneapolis, and was in the habit of forwarding money to them, to be used in making such purchases, in response to telegrams sent over the defendant's line, and delivered to him by it. On the first day of February, 1887, the defendant transmitted and delivered to plaintiff the following message, viz.:

GROVE CITY, MINN., February 1, 1887.

To T. M. M'Cord & Co.: Send one thousand or fifteen hundred to-morrow.

DUDLEY & CO.

The plaintiff in good faith acted upon this request, believing it to be genuine, and, in accordance with his custom, forwarded through the American Express Company the sum of $1,500 in currency, properly addressed to Dudley & Co., at Grove City. It turned out, however, that this despatch was not sent by Dudley & Co., or with their knowledge or authority; but it was, in fact, false and fraudulent, and was written and sent by the agent of the defendant at Grove City, whose business it was to receive and transmit messages at that place. He was also at the same time the agent of the American Express Company for the transaction of its business, and for a long time previous to the date mentioned had so acted as agent for both companies at Grove City, and was well informed of plaintiff's method of doing business with Dudley & Co. On the arrival of the package by express at Grove City, containing the sum named, it was intercepted and abstracted by the agent, who converted the same to his own use. The despatch was delivered to the plaintiff, and the money forwarded in the usual course of business. These facts, as disclosed by the record, are sufficient, we think, to establish the defendant's liability in this action.

1. Considering the business relations existing between plaintiff and Dudley & Co., the despatch was reasonably

interpreted to mean a requisition for one thousand or fifteen hundred dollars.

2. As respects the receiver of the message, it is entirely immaterial upon what terms or consideration the telegraph company undertook to send the message. It is enough that the message was sent over the line, and received in due course by the plaintiff, and acted on by him in good faith. The action is one sounding in tort, and based upon the claim that the defendant is liable for the fraud and misfeasance of its agent in transmitting a false message prepared by himself. *New York, &c. Tel. Co.* v. *Dryburg*, 35 Pa. St. 298, 78 Am. Dec. 338; Gray, Tel. § 75.

3. The principal contention of defendant is, however, that the corporation is not liable for the fraudulent and tortious act of the agent in sending the message, and that the maxim *respondeat superior* does not apply in such a case, because the agent in sending the despatch was not acting for his master, but for himself and about his own business, and was, in fact, the sender, and to be treated as having transcended his authority, and as acting outside of, and not in, the course of his employment, nor in furtherance of his master's business. But the rule which fastens a liability upon the master to third persons for the wrongful and unauthorized acts of his servant is not confined solely to that class of cases where the acts complained of are done in the course of the employment in furtherance of the master's business or interest, though there are many cases which fall within that rule. *Mott* v. *Consumer's Ice Co.*, 73 N. Y. 543; *Fishkill Savings Inst.* v. *National Bank*, 80 N. Y. 162, 168; *Potulni* v. *Saunders*, 37 Minn. 517, 35 N. W. Rep. 379. Where the business with which the agent is intrusted involves a duty owed by the master to the public or third persons, if the agent, while so employed, by his own wrongful act, occasions a violation of that duty, or an injury to the person interested in its faithful performance by or on behalf of the master, the master is liable for the breach of it, whether it be founded in contract or be a common-law

duty growing out of the relations of the parties. 1 Shear. & R. Neg. (4th ed.) §§ 149, 150, 154; Tayl. Corp. (2d ed.) § 145. And it is immaterial in such case that the wrongful act of the servant is in itself wilful, malicious, or fraudulent. Thus a carrier of passengers is bound to exercise due regard for their safety and welfare, and to protect them from insult. If the servants employed by such carrier in the course of such employment disregard these obligations, and maliciously and wilfully, and even in disregard of the express instructions of their employers, insult and maltreat passengers under their care, the master is liable. *Stewart* v. *Brooklyn & Crosstown R. R. Co.*, 90 N. Y. 588, 593. In *Booth* v. *Farmers', &c. Bank*, 50 N. Y. 396, an officer of a bank wrongfully discharged a judgment which had been recovered by the bank, after it had been assigned to the plaintiff. It was there claimed that the authority of the officer and the bank itself to satisfy the judgment had ceased, and that hence the bank was not bound by what its president did after such assignment. But the court held otherwise, evidently upon the same general principle, as respects the duty of the bank to the assignee, and laid down the general proposition, equally applicable to the agent of the defendant in the case at bar, that the particular act of the agent or officer was wrongful and in violation of his duty, yet it was within the general scope of his powers, and as to innocent third parties dealing with the bank, who had sustained damages occasioned by such act, the corporation was responsible.

And the liability of the corporation in such cases is not affected by the fact that the particular act which the agent has assumed to do is one which the corporation itself could not rightfully or lawfully do. In *Farmers', &c. Bank* v. *Butchers' and Drovers' Bank*, 16 N. Y. 125, 133 (69 Am. Dec. 678), a case frequently cited with approval, the teller of a bank was, with its consent, in the habit of certifying checks for customers, but he had no authority to certify in the absence of funds, which would be a false representation; yet it was held, where he had duly certified a check though the drawer

had no funds, that the bank was liable, on the ground that, as between the bank which had employed the teller, and held him out as authorized to certify checks (which involved a representation by one whose duty it was to ascertain and know the facts), and an innocent purchaser of the check so certified, the bank ought to be the loser. *Gould* v. *Town of Sterling*, 23 N. Y. 439, 463; *Bank of New York* v. *Bank of Ohio*, 29 N. Y. 619, 632. See also *Titus* v. *President, &c., Turnpike Road*, 61 N. Y. 237; *New York and N. H. R. R. Co.* v. *Schuyler*, 34 N. Y. 30, 64; *Lane* v. *Cotton*, 12 Mod. 472, 490. The defendant selected its agent, placed him in charge of its business at the station in question, and authorized him to send messages over its line. Persons receiving despatches in the usual course of business, when there is nothing to excite suspicion, are entitled to rely upon the presumption that the agents intrusted with the performance of the business of the company have faithfully and honestly discharged the duty owed by it to its patrons, and that they would not knowingly send a false or forged message; and it would ordinarily be an unreasonable and impracticable rule to require the receiver of a despatch to investigate the question of the integrity and fidelity of the defendant's agents acting in the performance of their duties, before acting. Whether the agent is unfaithful to his trust, or violates his duty to, or disobeys the instructions of, the company, its patrons may have no means of knowing. If the corporation fails in the performance of its duty through the neglect or fraud of the agent whom it has delegated to perform it, the master is responsible. It was the business of the agent to send despatches of a similar character, and such acts were within the scope of his employment, and the plaintiff could not know the circumstances that made the particular act wrongful and unauthorized. As to him, therefore, it must be deemed the act of the corporation. *Bank of Cal.* v. *Western Union Tel. Co.*, 52 Cal. 280; *Booth* v. *Farmers', &c., Bank*, *supra*.

4. The defendant also insists that it is not liable for the

money forwarded in response to the despatch, because it was embezzled by Swanson as agent of the express company. It is unnecessary to consider whether an action for the amount might not have been maintained against that company as well as against the defendant or the agent himself. The position of trust in which the defendant had placed him enabled him, through the use of the company's wires in the ordinary course of his agency, to induce the plaintiff to place the money within his reach. It is immaterial what avenue was chosen. Had it been forwarded, and intercepted by a confederate, the result would have been the same. The proxi mate cause of plaintiff's loss was the sending of the forged despatch. The actual conversion of the money was only the culmination of a successful fraud. The acts of Swanson as agent of the defendant and of the express company were the execution of the different parts of one entire plan or scheme. That his subsequent acts aided and concurred in producing the result aimed at, did not make the forged despatch any the less operative as the procuring or proximate cause of plaintiff's loss. *Milwaukee & St. Paul Ry. Co.* v. *Kellogg*, 94 U. S. 469, 475; *Martin* v. *North Star Iron Works*, 31 Minn. 407, 410 (18 N. W. Rep. 109).

Order affirmed, and case remanded for further proceedings.

6. Liability for crimes of agent.

§ 159.] COMMONWEALTH v. KELLEY.

140 Massachusetts, 441. — 1886.

Indictment and conviction for violation of the statute which prohibited licensed liquor-sellers from maintaining a screen or curtain to cut off a public view of the premises. Defendant had instructed his clerk not to draw the curtains, but the clerk did so in violation of his instructions. The court ruled this was no defence.

W. ALLEN, J. We think that the ruling and instructions were correct. The provision of the statute relates to the use and management of licensed premises, and its express intent is to secure an unobstructed view of their interior at all times by persons outside. It is addressed to the licensee only; no other person can violate it. It forbids him to do, or to permit to be done, the prohibited act, and, by fair intendment, includes acts done in the use of the premises in carrying on the business licensed, whether they are done by the licensee in person, or by his agent left by him in charge and management of the business. *Commonwealth* v. *Emmons*, 98 Mass. 6; *Commonwealth* v. *Uhrig*, 138 Mass. 492; *Rex* v. *Medley*, 6 Car. & P. 292; *Rex* v. *Dixon*, 3 M. & S. 11.

Exceptions overruled.

COMMONWEALTH *v.* WACHENDORF, 141 Mass. 270 (1886): Indictment and conviction for selling liquor during prohibited hours. The court ruled that it was no defence that defendant had instructed his bar-keeper not to sell during those hours, and that the bar-keeper had disobeyed instructions. MORTON, C. J. (after distinguishing *Commonwealth* v. *Kelley*, *supra*). "Section 1, upon which the complaint in the case at bar is based, subjects to punishment any person who sells liquor unlawfully. It is to be presumed that the Legislature intended to use the language in its natural sense, and with the meaning given to equivalent language by the court in *Commonwealth* v. *Nichols*, 10 Met. 259. It is not a necessary or reasonable construction to hold that it subjects to punishment a person who does not sell, because a servant in his employment, in opposition to his will and against his orders, makes an unlawful sale. We are therefore of opinion that the instruction requested by the defendant should have been given. Of course, it would be for the jury, under the instruction, to determine whether the defendant did, in good faith, give instructions, intended to be obeyed and enforced, that no sale should be made after eleven o'clock. If he did, and a sale was made in violation of them, without his knowledge, he cannot be held guilty of the offence charged in the complaint."

State *v.* McCance, 110 Missouri, 398 (1892), holds that proof of sale by agent makes a *primâ facie* case against the principal, but that the latter may rebut the presumption by proof that the sale was forbidden by him. "As a general rule of law, the principal cannot be held criminally liable for the acts of his agent committed without his knowledge or consent. But there are statutes, which are in the nature of police regulations, which impose criminal penalties, irrespective of any intent to violate them. A number of these are collated by Chief Justice Cooley in *People* v. *Roby*, 52 Mich. 577."

Noecker *v.* People, 91 Illinois, 494 (1879): Indictment and conviction for selling liquor without a license. Mr. Justice Sheldon. . . . "Some of the sales testified to were made by clerks of the defendant. The court rejected testimony offered by the defendant, as to what instructions he gave his clerks in relation to the sale of intoxicating liquors. This is assigned for error. We think the testimony was properly excluded. The language of the statute is, whoever, by himself, clerk, or servant, shall sell, etc., shall be liable. The testimony was uncontradicted that the defendant kept intoxicating liquors for sale, and the defendant would be responsible for the acts of selling by his clerks, no matter what might have been his instructions to them. . . ."

Morse *v.* State, 6 Conn. 9 (1825): Information and conviction for violation of a statute prohibiting the giving of credit to college students. Hosmer, C. J. . . . "It is fairly to be inferred that no credit was given to Van Zandt by the defendant, but by Northam, his bar-keeper, only, without the knowledge or consent of Morse, and against his express directions. In the performance of this act Northam was not the defendant's agent. He was not authorized to give the credit, either expressly or in the usual course of his business, but was prohibited from doing it. Notwithstanding this, which the court below impliedly admitted, the jury were charged that if the defendant subsequently

assented to the acts of Northam, he ratified them, and made them his own. This was an unquestionable error. In the law of contracts a posterior recognition, in many cases, is equivalent to a precedent command; but it is not so in respect of crimes. The defendant is responsible for his own acts, and for the acts of others done by his express or implied command; but to crimes the maxim *omnis ratihabitio retrotrahitur ex mandato equiparatur*, is inapplicable."

7. Liability for torts of sub-agents.

§ 160.] HALUPTZOK *v.* GREAT NORTHERN RAILWAY COMPANY.

55 MINNESOTA, 446. — 1893.

ACTION for damages for personal injuries. Judgment for plaintiff. Defendant appeals from an order denying its motion for a new trial.

MITCHELL, J. The plaintiff brought this action to recover for personal injuries to his infant child, caused by the negligence of the alleged servant of the defendant. 1878 G. S. ch. 66, § 34.

The injuries were inflicted by one O'Connell, and the only question presented by this appeal is whether O'Connell was defendant's servant. The evidence, in which there is no material conflict, is substantially as follows: The defendant maintained a public depot and freight and passenger station at the village of Waverly. The premises were owned and controlled by the defendant, but the Great Northern Express Company and the Western Union Telegraph Company had their offices in the same building, one Westinghouse being the common agent for all three companies. Westinghouse had exclusive charge of all the defendant's business at the station. He testified that he had no authority to employ any assistants, such authority being exclusively vested in the

general officers of the company; and, as respects express authority, this testimony is not contradicted. For a year or more before the injury complained of, Westinghouse had permitted a young man named Foutch to use and practise on the instruments in the office, for the purpose of learning telegraphy; and during that time Foutch had been in the habit, as occasion required, of assisting Westinghouse in the performance of his railway duties, such as selling tickets, handling freight, putting out switch lights, etc. He had no contract with the railway company, and received no wages; the work he did evidently being in return for the privilege of the office, and the use of the instruments, in learning telegraphy. There is no evidence that the general officers of the defendant knew of or assented to Foutch's performing this work, except the length of time it had continued, and the absence of any testimony that they ever objected. About ten days before the accident, Westinghouse, with the permission of the Western Union Telegraph Company, gave O'Connell the privilege of the office, and the use of the instruments, for the purpose of learning telegraphy, evidently under substantially the same arrangement by which he had previously given Foutch similar privileges. O'Connell had no contract with the defendant, and received no wages. The time between his coming into the office and the date of the accident was so brief that the evidence is very meagre as to his doing railroad work about the station during that time, but there was evidence tending to show that he had on several occasions, with the knowledge and consent of Westinghouse, handled freight. On the day in question, he went to work, with a truck, to move some goods from the station platform into a freight room. Foutch assisted him by piling up the goods in the room while O'Connell carried them in. While thus handling the truck, O'Connell ran it against plaintiff's child, who was walking around the depot, and inflicted the injury complained of. There is no evidence that at or prior to the accident the general officers of the defendant knew that O'Connell was employed about the station.

But both Foutch and O'Connell, after the accident, continued at the depot, practising telegraphy, and assisting Westinghouse, as before, in selling tickets, handling freight, etc., and were still doing so at the date of the trial, which was five months after the accident, and over four months after the commencement of this action; and, while there is no direct evidence that this was with the knowledge of the general officers of the defendant, there is no evidence that they did not know of it, and none that they ever objected to it. Such we believe to be a fair and full statement of the effect of the evidence.

Under the doctrine of *respondeat superior*, a master, however careful in the selection of his servants, is responsible to strangers for their negligence committed in the course of their employment. The doctrine is at best somewhat severe, and, if a man is to be held liable for the acts of his servants, he certainly should have the exclusive right to determine who they shall be. Hence, we think, in every well-considered case where a person has been held liable, under the doctrine referred to, for the negligence of another, that other was engaged in his service either by the defendant personally, or by others by his authority, express or implied. There is a class of cases, of which *Bush* v. *Steinman*, 1 Bos. & P. 404 (often doubted and criticised), is an example, which seems to hold that a person may be liable for the negligence of another, not his servant. But these were generally cases where the injury was done by a contractor, sub-contractor, or their servants, upon the real estate of the defendant, of which he was in possession and control; and they seem to proceed upon the theory that, where a man is in possession of fixed property, he must take care that it is so used and managed by those whom he brings upon the premises as not to be dangerous to others. In that view, he is held liable, not for the negligence of another, but for his own personal negligence in not preventing or abating a nuisance on his own premises. See *Laugher* v. *Pointer*, 5 Barn. & C. 547. There will also be found in some text-books statements to the effect that

where a servant is employed to do a particular piece of work, and he employs another person to assist him, the master is liable for the acts of the person so employed, as much as for the acts of the servant himself. Thus generally stated, without qualification, the proposition is misleading, as well as inaccurate.

The cases most generally cited in support of it are *Booth* v. *Mister*, 7 Car. & P. 66, and *Althorf* v. *Wolfe*, 22 N. Y. 355. In *Booth* v. *Mister* the defendant's servant, whose duty it was to drive his master's cart, was riding in the cart, but had given the reins to another person, who was riding with him, but was not in the master's employment, and through the negligent management of this other person the plaintiff was injured. The defendant was held liable, not for the mere negligence of such other person, but for the negligence of the servant himself, who was riding in the cart, and either actively or passively controlling and directing the driving, as much as if he had held the reins in his own hands.

In *Althorf* v. *Wolfe*, a servant, having been directed to remove snow from the roof of his master's house, secured the services of a friend to assist him; and while the two were engaged together in throwing the snow from the roof into the street, a passer-by was struck and killed. It was held that it was immaterial which of the two threw the ice or snow which caused the injury; that in either case the master was liable. The case is a very unsatisfactory one, and it is very difficult to ascertain the precise ground upon which it was decided. Wright, J., seems to put it on one or all of three grounds: (1) That the servant had implied authority to procure assistance; (2) that defendant's family, who were left in charge of the house, ratified the act of the servant; and (3) upon the same ground upon which *Booth* v. *Mister* was decided. On the other hand, Denio, J., seems to place his opinion upon the ground upon which we have suggested that *Bush* v. *Steinman* proceeds. It is also to be observed that two of the justices dissented. But neither of these cases, if rightly understood, is in conflict with the proposition with which we started

out, — that a master, as such, can be held liable for the negligence only of those who are employed in his work by his authority; and hence, if a servant who is employed to perform a certain work procures another person to assist him, the master is liable for the sole negligence of the latter, only when the servant had authority to employ such assistant. Such authority may, however, be implied as well as express, and subsequent ratification is equivalent to original authority; and, where the servant has authority to employ assistants, such assistants, of course, become the immediate servants of the master, the same as if employed by him personally. Such authority may be implied from the nature of the work to be performed, and also from the general course of conducting the business of the master by the servant for so long a time that knowledge and consent on part of the master may be inferred. It is not necessary that a formal or express employment on behalf of the master should exist, or that compensation should be paid by or expected from him. It is enough to render the master liable if the person causing the injury was in fact rendering service for him by his consent, express or implied.

Under this view of the law, the evidence made a case for the jury to determine whether Westinghouse had implied authority from the defendant to employ O'Connell as an assistant, or, to state the question differently, whether O'Connell was rendering these services for the defendant by its consent.

If the evidence were limited to the employment of O'Connell alone, and to what occurred during the ten days preceding the accident, it would probably be insufficient to support a verdict in favor of the plaintiff. But it is an undisputed fact that Westinghouse had for over a year before this been employing Foutch as an assistant under a similar arrangement, without, so far as appears, any objection on part of the defendant, although the length of time was such that its knowledge of the fact may be fairly inferred. It is true that implied authority to employ Foutch as assistant would not necessarily include authority to employ O'Connell; but the

fact of Foutch's long continued employment has an important bearing upon the question of Westinghouse's implied authority, as indicated by the manner of conducting the business; and, as bearing upon this same question of implied authority, the fact is significant that after the accident both Foutch and O'Connell continued, without objection, to perform these services for defendant, as assistants to Westinghouse, up to the date of the trial. Additional force is added to all this, when considered in connection with the nature of the duties of a station agent at a place like this, which are of such multifarious character as to render the employment of an occasional assistant not only convenient, but almost necessary. The facts that the consideration for the services of these assistants moved from Westinghouse rather than defendant, and that their aid was for the accommodation or convenience of Westinghouse, are not controlling.

There is nothing in the point that defendant is not liable because the freight which O'Connell was moving had been delivered to the consignee, who had promised to take care of it where it lay, on the station platform.

O'Connell's act was in the line of his employment, and was being done in furtherance of defendant's business. The liability of the defendant to third parties cannot be made to depend upon the question whether, as between it and the owner of the goods, it owed the latter the continued duty of taking care of them. Order affirmed.

8. Liability of public principals and charities for torts of agents.

§ 161.] KEENAN *v.* SOUTHWORTH.

110 MASSACHUSETTS, 474. — 1872.

TORT against the postmaster of East Randolph, to recover damages for the loss, by the defendant's negligence, of a letter addressed to the plaintiff. At the trial in the superior

court, before Pitman, J., the plaintiff introduced evidence, not now necessary to report, that the letter was received at the post-office at East Randolph, and was lost by the negligence or wrongful conduct of one Bird, who was the postmaster's clerk. The plaintiff having disclaimed "any actual participancy or knowledge of the acts of Bird on the part of the defendant," the judge ruled that the defendant was not liable for any careless, negligent, or wrongful acts of Bird; and, by consent of the plaintiff, he directed a verdict for the defendant, and reported the case for the consideration of his court. If the ruling was wrong, the verdict to be set aside, and the case to stand for trial; otherwise, judgment for the defendant on the verdict.

Gray, J. The law is well settled in England and America, that the postmaster-general, the deputy postmasters, and their assistants and clerks, appointed and sworn as required by law, are public officers, each of whom is responsible for his own negligence only, and not for that of any of the others, although selected by him, and subject to his orders. *Lane* v. *Cotton*, 1 Ld. Raym. 646; S. C. 12 Mod. 472; *Whitfield* v. *Le Despencer*, Cowp. 754; *Dunlop* v. *Munroe*, 7 Cranch, 242; *Schroyer* v. *Lynch*, 8 Watts, 453; *Bishop* v. *Williamson*, 2 Fairf. 495; *Hutchins* v. *Brackett*, 2 Foster, 252.

The ruling at the trial was therefore right; and the plaintiff, having consented to a verdict for the defendant, reserving only the question of the correctness of that ruling, cannot now raise the question whether there was sufficient evidence of the defendant's own negligence to be submitted to the jury. Judgment on the verdict.

§ 161.] FIRE INSURANCE PATROL *v.* BOYD.

120 Pennsylvania State, 624. — 1888.

Action for wrongfully causing the death of plaintiffs' intestate. Judgment for plaintiffs.

Defendant's servants negligently pitched heavy bundles out of a fourth-story window. Plaintiffs' intestate was struck by one of these bundles and so seriously injured that he subsequently died of his injuries. Defendant corporation has no capital stock, declares no dividends, and is equipped and maintained by voluntary contributions or subscriptions made mainly by insurance companies. Its services are given however to the saving of life and property threatened by fire, whether the property endangered is insured or not.

Mr. Justice Paxson (after discussing the question whether defendant corporation is a public charity). Our conclusion is that the Fire Insurance Patrol of Philadelphia is a public charitable institution; that in the performance of its duties it is acting in aid and in ease of the municipal government in the preservation of life and property at fires. It remains to inquire whether the doctrine of *respondeat superior* applies to it. Upon this point we are free from doubt. It has been held in this State that the duty of extinguishing fires and saving property therefrom is a public duty, and the agent to whom such authority is delegated is a public agent and not liable for the negligence of its employés. This doctrine was affirmed by this court in *Knight* v. *City of Philadelphia*, 15 W. N. C. 307, where it was said: "We think the court did not commit any error in entering judgment for the defendant upon the demurrer. The members of the fire department are not such servants of the municipal corporation as to make it liable for their acts or negligence. Their duties are of a public character, and for a high order of public benefit. The fact that this act of assembly did not make it obligatory on the city to organize a fire department, does not change the legal lia-

bility of the municipality for the conduct of the members of the organization. The same reason which exempts the city from liability for the acts of its policemen, applies with equal force to the acts of the firemen." And it would seem from this and other cases to make no difference as respects the legal liability, whether the organization performing such public service is a volunteer or not. *Jewett* v. *New Haven*, 38 Conn. 368; *Russell* v. *Men of Devon*, 2 T. R. 667; *Feoffees of Heriot's Hospital* v. *Ross*, 12 C. & F. 506; *Riddle* v. *Proprietors*, 7 Mass. 169; *McDonald* v. *Hospital*, 120 Mass. 432; *Boyd* v. *Insurance Patrol*, 113 Pa. 269. But I will not pursue this subject further, as there is another and higher ground upon which our decision may be placed.

The Insurance Patrol is a public charity; it has no property or funds which have not been contributed for the purposes of charity, and it would be against all law and all equity to take those trust funds, so contributed for a special, charitable purpose, to compensate injuries inflicted or occasioned by the negligence of the agents or servants of the patrol. It would be carrying the doctrine of *respondeat superior* to an unreasonable and dangerous length. That doctrine is at best — as I once before observed — a hard rule. I trust and believe it will never be extended to the sweeping away of public charities; to the misapplication of funds, especially contributed for a public charitable purpose, to objects not contemplated by the donors. I think it may be safely assumed that private trustees, having the control of money contributed for a specific charity, could not, in case of a tort committed by any one of their members, apply the funds in their hands to the payment of a judgment recovered therefor. A public charity, whether incorporated or not, is but a trustee, and is bound to apply its funds in furtherance of the charity, and not otherwise. This doctrine is hoary with antiquity, and prevails alike in this country and in England, where it originated as early as the reign of Edward V., and it was announced in the Year Book of that period. In the *Feoffees*

of Heriot's Hospital v. *Ross*, 12 C. & F. 506, a person eligible for admission to the hospital brought an action for damages against the trustees for the wrongful refusal on their part to admit him. The case was appealed to the House of Lords, when it was unanimously held that it could not be maintained. Lord Cottenham said: "It is obvious that it would be a direct violation, in all cases, of the purpose of a trust if this could be done; for there is not any person who ever created a trust that provided for payment out of it of damages to be recovered from those who had the management of the fund. No such provision has been made here. There is a trust, and there are persons intended to manage it for the benefit of those who are to be the objects of the charity. To give damages out of a trust fund would not be to apply it to those objects which the author of the fund had in view, but would be to divert it to a completely different purpose." Lord Brougham said: "The charge is that the governors of the hospital have illegally and improperly done the act in question, and, therefore, because the trustees have violated the statute, therefore — what? Not that they shall themselves pay the damages, but that the trust fund which they administer shall be made answerable for their misconduct. The finding on this point is wrong, and the decree of the court below must be reversed." Lord Campbell: "It seems to have been thought that if charity trustees have been guilty of a breach of trust, the persons damnified thereby have a right to be indemnified out of the trust funds. That is contrary to all reason, justice, and common sense. Such a perversion of the intention of the donor would lead to most inconvenient consequences. The trustees would in that case be indemnified against the consequences of their own misconduct, and the real object of the charity would be defeated. Damages are to be paid from the pocket of the wrong-doer, not from a trust fund. A doctrine so strange, as the court below has laid down in the present case, ought to have been supported by the highest authority. There is not any authority, not a single shred, to support it. No foreign or constitutional

writer can be referred to for such a purpose." I have quoted at some length from the opinions of these great jurists because they express in vigorous and clear language the law upon this subject. I have not space to discuss the long line of cases in England and this country in which the above principle is sustained. It is sufficient to refer to a few of them by name. *Riddle* v. *Proprietors of the Locks*, 7 Mass. 187; *McDonald* v. *Massachusetts General Hospital*, 120 Mass. 432; *Sherbourne* v. *Yuba Co.*, 21 Cal. 113; *Brown* v. *Inhabitants of Vinalhaven*, 65 Me. 402; *Mitchell* v. *City of Rockland*, 52 Me. 118; *City of Richmond* v. *Long*, 17 Grattan, 375; *Ogg* v. *City of Lansing*, 35 Iowa, 495; *Murtaugh* v. *City of St. Louis*, 44 Mo. 479; *Patterson* v. *Penn. Reform School*, 92 Pa. 229; *Maxmillian* v. *Mayor*, 62 N. Y. 160.

I am glad to be able to say that no State in this country, or in the world, has upheld the sacredness of trusts with a firmer hand than the State of Pennsylvania. Not only is a trustee for a public or private use not permitted to misapply the trust funds committed to his care, but if he convert them to his own use the law punishes him as a thief. How much better than a thief would be the law itself, were it to apply the trust's funds contributed for a charitable object, to pay for injuries resulting from the torts or negligence of the trustee? The latter is legally responsible for his own wrongful acts. I understand a judgment has been recovered against the individual whose negligence occasioned the injury in this case. If we apply the money of the Insurance Patrol to the payment of this judgment, or of the same cause of action, what is it but a misapplication of the trust fund, as much so as if the trustees had used it in payment of their personal liabilities? It would be an anomaly to send a trustee to the penitentiary for squandering trust funds in private speculations, and yet permit him to do practically the same thing by making it liable for his torts. If the principle contended for here were to receive any countenance at the hands of this court, it would be the most damaging blow at the integrity of

trusts which has been delivered in Pennsylvania. We are not prepared to take this step.

We are not unmindful of the fact that it was contended for the defendant in error that the case of *Feoffees of Heriot's Hospital* v. *Ross* is in conflict with *Mersey Docks* v. *Gibbs*, L. R. 1 E. & I. App. Cas. 93, and *Parnaby* v. *Lancaster Canal Co.*, 11 Ad. & E. 223. I am unable to see any such conflict. The two corporations last named were evidently trading corporations, and in no sense public charities. In regard to the docks, it was said by Blackburn, J., at page 465: "There are several cases relating to charities which were mentioned at your lordship's bar, but were not much pressed, nor, as it seems to us, need they be considered now; for whatever may be the law as to the exemption of property occupied for charitable purposes, it is clear that the docks in question can come within no such exemption."

I will not consume time by discussing the case of *Glavin* v. *Rhode Island Hospital*, 12 R. I. 411, which, to some extent, sustains the opposite view of this question. There, a hospital patient, paying eight dollars per week for his board and medical attendance, was allowed to recover a verdict against the hospital for unskilful treatment, and it was held that the general trust funds of a charitable corporation are liable to satisfy a judgment in tort recovered against it for the negligence of its officers or agents. It is at least doubtful whether under its facts the case applies, and if it does, we would not be disposed to follow it in the face of the overwhelming weight of authority the other way, and of the sound reasoning by which it is supported.

The foregoing is little more than a re-assertion of the views of this court as heretofore expressed in this case by our Brother Clark. See 113 Pa. 269. Many of the authorities I have referred to are there cited by him. We are now more fully informed as to the facts of the case, and can apply to them the law as indicated in the former opinion.

We are all of opinion that the Insurance Patrol is not liable in this action, and the judgment against it is, therefore,

Reversed.

CHAPTER XIV.

LIABILITY OF THIRD PERSON TO PRINCIPAL.

1. Liability upon contracts.

§ 165.] HUNTINGTON *v.* KNOX.

7 Cushing (Mass.), 371. — 1851.

[Reported herein at p. 253.]

2. Liability in quasi-contract for money paid under mistake, duress, or fraud.

§ 167.] STEVENSON *v.* MORTIMER.

Cowper's Reports (K. B.), 805. — 1778.

Action for money had and received. Non-suit ordered. Rule to show cause why non-suit should not be set aside.

Plaintiffs were owners of a boat. Defendant was a custom-house officer. Plaintiffs' agent, the master of the boat, had paid to defendant certain fees which were alleged by plaintiffs to be unauthorized and exorbitant. The trial court ruled that the duty to pay the fees (if any) was imposed by statute upon the master, and that the action could not be maintained in the name of the plaintiffs.

Lord Mansfield. The ground of the non-suit at the trial was, that this action could not be well maintained by the plaintiffs, who are the *owners* of the vessel in question; but it ought to have been brought by the *master*, who actually paid the money. That ground, therefore, makes now the only question before us; as to which, there is not a particle of doubt. *Qui facit per alium, facit per se.* Where a man

pays money by his *agent*, which ought not to have been paid, either the agent, or the 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. If money is paid to a known agent, and an action brought against him for it, it is an answer to such action, that he has paid it over to the principal. *Sadler* v. *Evans*, 4 Bur. 1984. Here the statute lays the burden on the *master* from necessity, and makes him personally liable to penalties if he neglects to perform the requisitions of it. But still he is entitled to charge the necessary fees, etc., upon his doing so, to the account of his owners. And in this case there can be no doubt of the relation in which the master stood to the plaintiffs; for he is the witness, and he swears that the money was paid by the order of the plaintiffs. Therefore, they are very well warranted to maintain the action. If the parties had gone to trial upon an apprehension that the only question to be tried was, whether this was a case within the Act of Parliament, consequently, whether any fee was due, the plaintiffs could not have been permitted to surprise the defendant at the trial, by starting another ground, upon which to recover a Norfolk groat. An action for money had and received is governed by the most liberal equity. Neither party is allowed to entrap the other in form. But here, the plaintiff gave notice, that he meant to insist that too much was taken; and therefore, both came to the trial with equal knowledge of the matter in dispute. Therefore, the rule for a new trial must be absolute.

Lord Mansfield added, that he thought the plaintiffs ought to let the defendant know the amount of the excess which they claimed; that the defendant might have an opportunity of paying money into court; and the rule was drawn up accordingly.

3. Liability in tort for property diverted by agent.

a. General rule

§ 168.] THOMPSON *v.* BARNUM.

49 Iowa, 392. — 1878.

Replevin for six ploughs. Judgment for plaintiffs. Defendants appeal.

Plaintiffs made J. & S. sales agents for ploughs, and agreed to take approved notes of purchasers. The ploughs were shipped and a shipping bill in the name of J. & S. was forwarded. J. & S. turned over the ploughs in payment of a debt due from them to defendants.

Day, J. The court did not err in holding that, under the terms of the order pursuant to which the property in question was shipped, the title did not pass from the plaintiffs to Johnston & Searles, and that they had no authority to dispose of it in payment of a pre-existing debt which they owed the defendants. Under the terms of shipment Johnston & Searles were merely the agents of plaintiffs, with authority to dispose of the implements in the manner indicated in the order. To hold that they became either absolute or conditional purchasers of the ploughs, it would be necessary to ignore utterly many of the provisions of the order pursuant to which the shipment was made. The plaintiffs are not estopped from insisting upon their rights in the property because of the execution of the bill for the ploughs, set out in the court's finding of facts. The defendants were not induced to make their purchase because of the existence of this bill. From the finding of facts it appears that they had agreed to take this property in payment of the debt due them, before they had any knowledge of the existence of this bill. The bill was referred to simply for the purpose of ascertaining the price of the ploughs. For cases analogous in their principles to this, see *Conable* v. *Lynch*, 45 Iowa, 84; *Bayliss* v. *Davis*, 47 Iowa, 340. Affirmed.

b. *Exception: indicia of ownership.*

170.] McCAULEY *v.* BROWN.

2 Daly (N. Y. C. P.), 426. — 1869.

Action to recover the value of a truck and set of harness alleged to have been converted by defendants. Judgment for plaintiff.

The property was bought by defendants of J. M., a brother of plaintiff. J. M., with plaintiff's knowledge, had taken out a license in his own name for the truck, and had held himself out as owner. Defendants, before buying, went to the mayor's office, and ascertained that the license was in the name of J. M.

Barrett, J. By the provisions of the Revised Ordinances of 1859, p. 356, § 2, it is made unlawful "for any person to receive or hold a license to keep public carts, or to be a public cartman, unless he be the actual owner of the cart or carts so licensed." The taking out of the license for the truck in question was, therefore, a declaration of ownership made by the plaintiff's brother, John McCauley, with the plaintiff's full knowledge and consent, upon which the defendants had a right to and did rely in making the purchase. These facts, coupled with John McCauley's actual possession, and seeming ownership, bring the case within the principles that when the owner of goods stands by and permits another to treat them as his own, whereby a third person is led to purchase them in good faith, the former cannot recover the goods, or their value, from the buyer. *Thompson* v. *Blanchard*, 4 N. Y. 303; *Hibbard* v. *Stewart*, 1 Hilt. 207; *Brewster* v. *Baker*, 16 Barb. 613; *Cheeney* v. *Arnold*, 18 Barb. 434; *Dezell* v. *Odell*, 3 Hill, 215; *Pickard* v. *Sears*, 6 Ad. & El. 469; *Gregg* v. *Wells*, 10 Ad. & El. 90. The doctrine applies although the plaintiff was not present when the bargain was made. It is sufficient that, by his previous conduct, he enabled his

brother to assume the credit of ownership, and to deceive the defendants. *Thompson* v. *Blanchard*, *supra*.

The judgment with respect to the truck was, therefore, erroneous; and as there was no evidence of the separate value of the harness, except the wholly insufficient statement of what the plaintiff had paid for it some seven months prior to the sale, we have no basis for a modification of the judgment. Besides, the conduct of these brothers savors very strongly of collusion. John McCauley had previously offered the truck for sale, with the plaintiff's knowledge, and seemingly with his consent — certainly without any expression of his disapprobation. From these and other unfavorable circumstances, such as the plaintiff's failure to assert his title upon the discovery of the property in the defendants' possession, we are not inclined to strain a point with respect to the evidence of value, for the purpose of upholding this judgment, even in part. It is fairer to leave the parties in such a position, that the plaintiff may, if he thinks fit, bring a fresh action for the value of the harness, when the defendants can have these facts and circumstances submitted to a jury, upon the question of collusion and authority.

The judgment should be reversed.

§ 170.] PICKERING *v.* BUSK.

15 EAST (K. B.), 38. — 1812.

[Reported herein at p. 223.]

c. Exception: Factors Act.

§§ 170, 171.] BIGGS *v.* EVANS.

1894, 1 QUEEN'S BENCH DIVISION, 88.

ACTION to recover possession of personal property, intrusted to one Geddes, and by Geddes sold to defendant. Action tried by WILLS, J., without a jury.

WILLS, J., delivered judgment as follows: —

The plaintiff was the owner of a valuable table-top made of what is called opal matrix, an exceptional article, but of a class in which jewellers and dealers in gems might be expected to deal.

In the year 1886 he sent it to the business premises of a person named Geddes, who was a dealer in jewels and gems, and who also, as a part of his business, and as a known part of his business, sold such things for other people in his own name, and having them in his possession. The following letter gives the terms of the deposit: —

"APRIL 30, 1886.

"I will intrust you with the sale of my opal table upon the following conditions. That the table shall not be sold to any person nor at any price without my authorization is first obtained that such sale shall be effected. That the check handed to you in payment for the table shall be paid over to me intact for me to pay into my bankers, and that I shall pay for commission on the sale of the table one-third of the balance which remains after deducting cost of stone mounting and all expenses incurred by me in connection with the same."

Geddes, in the year 1888, sold the table out and out to the defendant for £200, which was satisfied as follows: Geddes asked the defendant to pay £170 for him to Streeter, a West End jeweller, in satisfaction of a judgment which Streeter had obtained against him, and to pay him (Geddes) £30 in cash. The defendant did not pay Streeter £170, but gave him a diamond valued between him and Streeter at £120, and paid him £50 in cash.

Geddes shortly afterwards became bankrupt and disappeared. The table-top at the time of action brought was in the possession of Streeter, who was holding it for the defendant. The plaintiff claims to recover the table-top from the defendant. The defendant resists the claim on two grounds: First, he says that at common-law the plaintiff is estopped from denying his title. Secondly, that he is protected by the Factors Acts, from which, of course, the Act

of 1889 must be excluded, as the transaction took place before it was passed.[1]

The claim of the defendant at common-law is put thus: It is said that the plaintiff enabled Geddes to sell the table-top as his own, and that his doing so was within the scope of his authority, as it would be understood by persons who dealt with him, and that, as he had put it in the power of Geddes to commit the fraud, his must be the loss.

I think, however, that a fallacy underlies the expression that he enabled Geddes to commit the fraud. In one sense, and one only, did he do so. He gave him the corporal possession of the table-top, and it was that possession which enabled Geddes to sell it as his own, or by way of a transaction within the scope of his apparent authority, as a person carrying on a business in which such sales are habitually effected. But it is quite clear that it requires more to found the argument in question. In one sense every person who intrusts an article to any person who deals in second-hand articles of that description enables him, if so disposed, to commit a fraud by selling it as his own. A man who lends a book to a second-hand bookseller puts it into his power, in the same sense, to sell it as his own. A man who intrusts goods for safe custody to a wharfinger, who also deals in his own goods, or in other people's goods intrusted to him for sale, in such a sense enables him to commit a fraud by selling them to a customer. But such a transaction clearly could not give a title to a purchaser as against the owner. The true test is, I take it, whether the authority given in fact is of such a nature as to cover a right to deal with the article at all. If it does, and the dealing effected is of the same nature as the dealing contemplated by the authority, and the agent carries on a business in which he ordinarily effects for other

[1] 52 & 53 Vict. c 45, which by section 14, and the schedule repeals the earlier Factors Acts, preserving any right acquired or liability incurred before the commencement of the Act. The provisions corresponding to 6 Geo. 4, c. 94, s. 4, are contained in section 1, sub-section 1, and section 2, sub-section 1, of the Act now in force.

people such dispositions as he does effect, what he has done is within the general authority conferred, and any limitations imposed as to the terms on which, or manner in which, he is to sell are matters which may give a right of action by the principal, but cannot affect the person who contracts with the agent. It is within the scope of the authority that the agent should sell the goods on some terms, and it is not usual in the trade to inquire into the limits or conditions of an authority of that kind; and therefore the principal is supposed, as respects other people, to have clothed the agent with the usual authority. The foundation, however, of the whole thing is that the agent should be authorized to enter into some such transaction. If the principal has intrusted the goods to the agent for some other purposes, the agent is acting outside his authority in selling at all, and then the principal, whose goods have been disposed of without any authority at all so to do, is entitled to recover them in spite of the disposition.

Now in the present case, the letter, taken as a whole, shows that the table-top never was intrusted to Geddes to sell. He was forbidden in express terms to sell without further authority. He was not to sell the table-top, but to keep it safely for the plaintiff until a further authority was given; and I think he sold, not violating instructions as to the terms on which he should effect a sale, but in spite of a prohibition to sell at all till some further authority should be given. At common-law, therefore, I think the plaintiff is entitled to succeed.

Do the Factors Acts protect the defendant? I think not. I think it is an essential condition of the validity of a sale protected by them that the goods should have been intrusted to the agent for sale. I think the Factors Acts would apply, so far as relates to the business which Geddes was carrying on, the nature of the article dealt in, and what was usual in such a trade. But the defect that the article never was intrusted to him for sale is fatal.

I think there is another difficulty. In order to validate payment to the agent under 6 Geo. 4, c. 94, s. 4, it must be

made in the ordinary course of business, that is, by cash or check or bill, as the case may be. I do not think that buying up a judgment from some one else, partly by delivery of a diamond of the defendant's own, can be considered as payment in the ordinary course within the section. And there is good reason for it. If the agent gets cash, he may be able to hand it to his principal; but if he does not get cash, and there is only a transaction of this kind, he cannot if impecunious pay the principal; it is out of his power to do so.

I am of opinion, therefore, that judgment must be entered for the plaintiff, with costs.

Judgment for the plaintiff.

4. Liability for collusive fraud.

§ 175.] MAYOR, &c. OF SALFORD *v.* LEVER.

1891, 1 Queen's Bench Division (C. A.), 168.

Action for damages for fraud, or, in the alternative, for money had and received. Judgment for plaintiffs. affirmed.

Defendant bribed plaintiffs' purchasing agent to accept defendant's offer to supply coal to plaintiffs. Upon discovering the fraud plaintiffs stayed action against the agent upon his agreement to furnish evidence against defendant and others, to pay the costs of the action against them, and to guarantee an aggregate recovery of £10,000, for which he gave security.

Lord Esher, M. R. The corporation of Salford have brought this action against the defendant, who is a coal merchant, and it is an action founded on fraud. What is the fraud which the defendant had committed? He had coals to sell, and he was obliged to make a bargain with the corporation through their agent, a man who, no doubt, would be known in Salford as having the power to make contracts for the corporation, and who, consequently, would be looked to

by traders. The defendant knew that this man was the agent of the corporation, and that it was his duty to buy coals for them at the price at which the defendant or some other trader was willing to sell them. The defendant was at liberty to sell the coals at any price he could get for them, not necessarily at market price, but at the best price which he could obtain. He was bound, however, to act honestly. He offered this man Hunter to sell him coal at a price which would give him such a profit as he desired. But then Hunter tempted him by saying, "You want to sell your coals at a price which will give you a profit. I have the power of buying coals from you or from anybody else, and I will not buy them from you at the price at which you are willing to sell them, unless you will help me to cheat the corporation out of another shilling a ton. You are to have your price; but you are to add to it in the bills which you send to the corporation another shilling per ton, making the real price apparently a shilling per ton more; but that shilling is to be mine, — you are to give it to me." They call this a commission, a term very well known, at all events in the North of England; and commissions sometimes cover a multitude of sins. In the present case it was meant to cover a fraud. The fraud was this, that the defendant allowed and assisted the agent of the corporation to put down a false figure as the price of the coals in order to cheat the corporation out of a shilling a ton, which was to be paid to their own agent; and the way in which it was done was this: the defendant sent in a bill to the corporation for the whole price thus increased. He got the advanced price into his hands, and as he got it by fraud he is bound to pay it back, unless something has happened to oust the right of the corporation. The damage to the corporation is clearly the one shilling per ton, out of which they have been cheated, neither more nor less. The form of the action, on which some stress has been laid in the argument, is immaterial. Unless something has happened to oust the right of the corporation, they are entitled to sue the defendant for the one shilling a ton in one form of action or another,

although he has parted with the money, and has handed it over to his confederate Hunter, because it was once in his hands, and he is liable for the fraud to which he was thus a party.

But the defendant says that something has happened which prevents the corporation from enforcing this right, and the first ground which was taken was this: that this money which came into his hands passed into the hands of Hunter, the agent of the corporation, and they have recovered it, or part of it, from Hunter, and therefore cannot recover it from the defendant. This defence was advanced independently of, and without reference to, the agreement between the corporation and Hunter. On what ground have the corporation recovered the money from Hunter? Hunter, their agent, had received money from the defendant, for the performance of a duty which he was bound to perform without any such payment. Nothing could in law be more fraudulent, dangerous, or disgraceful, and therefore the law has struck at such conduct in this way. It says that, if an agent takes a bribe from a third person, whether he calls it a commission or by any other name, for the performance of a duty which he is bound to perform for his principal, he must give up to his principal whatever he has by reason of the fraud received beyond his due. It is a separate and distinct fraud of the agent. He might have received the money without any fraud of the person who was dealing with him. Suppose that person thought that the agent was entitled to a commission, — he would not be fraudulent; but the agent would be, and it is because of his separate and distinct fraud that the law says he must give up the money to his principal. It signifies not what it may be called, whether damages or money had and received, the foundation of the claim of the principal is, that there is a separate and distinct fraud by his agent upon him, and therefore he is entitled to recover from the agent the sum which he has received. But does this prevent the principal from suing the third person also, if he had been fraudulent, because of his fraud? It has been settled that, if the principal brings

an action against the third person first, he cannot set up the defence that the action cannot be maintained against him because the thing was done through the agent, and the principal was entitled to sue the agent. What difference can it make that the principal sues the third party secondly instead of first? The agent has been guilty of two distinct and independent frauds, — the one in his character of agent, the other by reason of his conspiracy with the third person with whom he has been dealing. Whether the action by the principal against the third person was the first or the second must be wholly immaterial. The third person was bound to pay back the extra price which he had received, and he could not absolve himself or diminish the damages by reason of the principal having recovered from the agent the bribe which he had received.

But then the defendant says — and this is his second ground — that, even if this be so, the corporation have entered into an agreement with their agent, Hunter, which prevents them from suing the defendant in respect of the combined fraud of Hunter and himself. There is a well settled rule that, if there are two joint tort-feasors, and the third person to whom the wrong has been done releases one of the two, he cannot afterwards sue the other. That is a well-known rule. Whether the rule goes further, and extends to an accord and satisfaction with one tort-feasor, it is immaterial now to consider. Let us see what has been done. It is said that the corporation have entered into an agreement with Hunter. Though the corporation will not take the objection that the agreement is not under seal, I am not sure that the court ought not to take it, seeing that the defendant has been guilty of a fraud. There is in fact no agreement at all which is binding on the corporation, because the alleged agreement does not bear their seal. First, then, there is no agreement; and, secondly, even supposing there is an agreement such as the defendant alleges, namely, that the corporation undertook to bring actions in the first instance against the third parties, at his request and at his

expense, to recover the extra price which they had received, that would not, so far as I can see, be a compromise of a doubtful claim. It was an absolute agreement entered into by the officers of the corporation, and, if it were binding on the corporation, they bound themselves to bring the actions at the request of Hunter, and thus lost their independence as to whether those actions should proceed or not. If the actions failed, the corporation would be primarily liable for the costs to the persons against whom they were brought. It was true they were to get the costs from Hunter; but they would be primarily liable. They had given up their independence, and had bound themselves to bring the actions, whether they were likely to be successful or not. They had bound the rate-payers to pay the costs, in the first instance, if the actions failed, and to take the chance of Hunter paying them, and, supposing Hunter's securities proved insufficient, the rate-payers would lose these costs. Under these circumstances, speaking for myself alone, I am of opinion that the agreement was wholly *ultra vires* the corporation. They had no mandate from the rate-payers to agree to it.

But, suppose the difficulty to to be got over, what was the effect of the agreement? Was it a release of Hunter in respect of the combined fraud? Certainly it was not a release. It did not purport to be that. Moreover, it was not under seal, and it cannot therefore be dealt with as a release. And, when the terms of the agreement are looked at, it was clearly not a release of Hunter. It is perfectly true, as Mr. Henn Collins has pointed out, that the agreement merely suspended the action of the corporation against Hunter, and left it open to them to sue him afterwards, should circumstances arise in which they might think it right to do so. It was, in fact, nothing more than a postponement of their right of action, and that of itself cannot prevent them from suing Lever. Therefore, upon almost every ground upon which the case can be looked at, there is no defence to this action, and the defendant is liable. I know the result of it all may be this, — that the corporation will

recover their money from the defendant, and from other traders in a similar position against whom they may proceed, and that Hunter will have the benefit of it. Certainly the corporation cannot legally return to Hunter the money which they may thus recover. It belongs to the rate-payers, and the corporation have no possible right to pay it over to Hunter. But the result will be the same. These coal-dealers, who were tempted by Hunter and persuaded by him to pay him the bribes, will be the sufferers. They may be ruined; and Hunter, when he comes out of prison, may find the securities, which are the result of his plunder and his gross frauds, untouched, and he may retain the whole of the money which he has received in this way. I am sorry for it; but such, in my opinion, is the law. It follows, therefore, that the defendant has no defence, and the judgment of the divisional court must remain, and the appeal must be dismissed.

LINDLEY and LOPES, LL.J., also delivered concurring opinions. Appeal dismissed.

§ 175.] HEGENMYER v. MARKS.

37 MINNESOTA, 6. — 1887.

ACTION to rescind a sale and conveyance of land. Judgment for plaintiff.

GILFILLAN, C. J. The plaintiff owned a lot of land in Minneapolis. One Creigh was a real-estate broker, and at his request she employed and authorized him to sell the lot to any one who would purchase it at such sum as would net her $1,050; Creigh to receive as his compensation whatever he could get for the lot in excess of $1,050. At the time of such employing, he (believing it to be true) represented to her, and she believed, that $1,050 was the fair market value of the lot. Both of them supposed the lot to be entirely vacant; but a third person, owning the adjoining lot, had by

mistake constructed on her lot, thinking it was his, a valuable house and barn in such manner that they were part of the realty. Neither plaintiff nor Creigh knew anything of this at the time of the employing. With the buildings the lot was worth over $3,000. Creigh learned of it before making a sale, but did not disclose it to plaintiff. He sold the lot to defendant for $1,150; the latter knowing of the buildings on the lot, and knowing that Creigh knew, and that plaintiff was ignorant of the fact. Of the $1,150, $450 was paid in cash, plaintiff receiving $350 and Creigh $100, and $700 was secured by the defendant's note to plaintiff and his mortgage on the lot. Upon learning of the facts, plaintiff tendered to defendant the $350, with interest, and the note and mortgage, and demanded a reconveyance of the lot, which defendant refused. The action is to rescind the sale and conveyance. The court below decided in favor of plaintiff.

The decision of the court below proceeds on the propositions: First, that it was the duty of Creigh, upon learning of the buildings being upon the lot, to communicate that fact to plaintiff, and that by selling the lot without disclosing that fact, at a price which he knew she had put upon it in ignorance of that fact, he committed a fraud upon her; and, second, that defendant, by purchasing with notice of Creigh's fraud, became a party to it. If the first proposition be correct, the second follows as a necessary consequence.

The case turns upon whether it was the duty of Creigh, before making a sale, to disclose what he had learned to his principal. Upon this contract of agency, my brethren are of opinion (though it is not mine), that when Creigh learned a fact affecting the value of the property, and of which fact he knew she was ignorant when she fixed the price, and if he had reason to believe that, had she known the fact, she would have fixed a higher price (as in this case she undoubtedly would), then good faith towards his principal required of him, and it was his legal duty, to disclose the fact to her before he proceeded to sell, so that she might, if so disposed, fix the selling price in accordance with the actual condition of things.

This being so, his selling upon the basis of the price first fixed, without disclosing to her the fact he had learned, was of course a fraud on her.

The tender was sufficient. Defendant and Creigh were parties to the fraud on plaintiff, by which Creigh, one of the parties, received (in effect) from defendant, the other party to it, $100. No consideration of equity or morality would require of plaintiff to make that good either to Creigh or defendant. All that can be required of her as a condition of her repudiating the transaction imposed on her by the fraud of Creigh and defendant is to restore what (in ignorance of the facts) she received in the transaction.

Judgment affirmed.

5. Liability in equity for trust funds diverted by agent.

§ 178.] BAKER v. NEW YORK NATIONAL EXCHANGE BANK.

100 New York, 31. — 1885.

Action to recover the amount of a check drawn upon defendant by "C. A. Wilson & Bro., agents." The drawers were commission merchants who were insolvent, and who, in order to protect their principals, opened with defendant, under the above title, a deposit account to the credit of which they deposited the proceeds of the sales of their principals' goods. The check in question was given in settlement of the account of the agents with plaintiff, as principal. Defendant alleged that there was no balance of the account with which to pay the check, and offered to prove that by authority of the agents they had charged against the account an individual indebtedness of the firm. This evidence was excluded.

Andrews, J. The relation between a commission agent for the sale of goods and his principal is fiduciary. The title to the goods until sold remains in the principal, and

when sold, the proceeds, whether in the form of money, or notes, or other securities, belong to him, subject to the lien of the commission agent for advances and other charges. The agent holds the goods and the proceeds upon an implied trust to dispose of the goods according to the directions of the principal, and to account for, and pay over to him the proceeds from sales. The relation between the parties in respect to the proceeds of sales is not that of debtor and creditor simply. The money and securities are specifically the property of the principal, and he may follow and reclaim them, so long as their identity is not lost, subject to the rights of a *bonâ fide* purchaser for value. In case of the bankruptcy of the agent, neither the goods nor their proceeds would pass to his assignees in bankruptcy for general administration, but would be subject to the paramount claim of the principal. *Chesterfield Manufacturing Co.* v. *Dehon*, 5 Pick. 7; *Merrill* v. *Bank of Norfolk*, 19 Id. 32; *Thompson* v. *Perkins*, 3 Mason, 232; *Knatchbull* v. *Hallett*, L. R. 13 Ch. Div. 696; *Duguid* v. *Edwards*, 50 Barb. 288; Story on Agency, § 229. The relation between a principal and a consignee for sale is, however, subject to modification by express agreement, or by agreement implied from the course of business or dealing between them. The parties may so deal that the consignee becomes a mere debtor to the consignor for the proceeds of sales, having the right to appropriate the specific proceeds for his own use.

In the present case the bank account against which the check was drawn, represented trust moneys belonging to the principals for whom Wilson & Bro. were agents. The deposits to the credit of this account were made in the name of the firm, with the word "agents" added. They were the proceeds of commission sales. Wilson & Bro. became insolvent in October, 1878, and they opened the account in this form for the purpose of protecting their principals, which purpose was known to the bank at the time. The check in question was drawn on this account in settlement for a balance due to plaintiffs upon cash sales made by the drawers

as their agents. It is clear upon the facts 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 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 plaintiffs' goods, is answered by the case of *Van Alen* v. *American Nat. Bank*, 52 N.Y. 1. 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 the 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, is not well taken. The objection for defect of parties was not taken in the answer, and moreover it does not appear that there are 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 does not appear that the plaintiffs are not equitably entitled to this amount out of the fund, or that there is any conflict of interest between them and any other person or persons for whom Wilson & Bro. acted as consignees. The presumption, in the absence of any contrary indication, is, that the fund was adequate to protect all interests, and that Wilson & Bro. appropriated to the plaintiffs only their just share.

We are of opinion that the judgment was properly directed, and it should therefore be affirmed.

All concur. Judgment affirmed.

§ 178.] RIEHL *v.* EVANSVILLE FOUNDRY ASSOCIATION.

104 INDIANA, 70. — 1885.

ACTION to have defendant declared a trustee of certain real estate for benefit of plaintiff. Judgment for plaintiff.

ELLIOTT, J. The substantial averments of the appellee's complaint are these: Frederick A. Riehl was the appellee's book-keeper and salesman, and, in that capacity, received of its money $6,000 which he embezzled; with the money embezzled he bought real estate, caused the title to be made to his wife, and built a house on the real estate so purchased and conveyed to her; that she had no money of her own with which to purchase the property, but, with knowledge of her husband's fraudulent appropriation of his employer's money, took the title to the property for the purpose of defrauding his employer.

A book-keeper or salesman, who receives the money of his employer by virtue of his employment, does receive it in a fiduciary capacity, and if he fraudulently appropriates it to his own use, he is guilty of a breach of trust. The funds which come into the hands of an agent for his principal are trust funds, and the latter, as the beneficiary, becomes in equity the owner of the property purchased by the agent with these funds. Where one occupies the position of a trustee, either by express appointment or by implication of law, and wrongfully uses the money received by him as trustee in the purchase of property, the beneficiary may follow it into the property. Pomeroy Eq. Juris. sec. 1051; Story Eq. Juris. sec. 1260; *Bank of America* v. *Pollock*, 4 Edw. Ch. 215; *Taylor* v. *Plumer*, 3 M. & S. 562; *Pugh* v. *Pugh*, 9 Ind. 132; *Newton* v. *Porter*, 69 N. Y. 133 (25 Am. R. 152).

"The trust," says Mr. Bigelow, "will follow the estate into the hands of all purchasers with notice, and of volunteers or persons taking by gift or descent from the trustees." Bigelow, Eq. 63.

In this instance, Mrs. Riehl was a volunteer, and had notice of the trust. Clearly enough, she cannot successfully resist the effort of the beneficiary to follow the money into the property conveyed to her.

The complaint is not one by a creditor to set aside a fraudulent conveyance of property, but is one to enforce a trust arising by implication of law. Where an agent, in violation of his trust, uses the money of his principal, the law implies a trust in favor of the principal, and to enforce the trust thus implied equity will subject the property purchased to the claims of the principal, as against either a volunteer or a fraudulent grantee. It is this equitable principle which the complaint invokes.

Cases are cited holding that where an agent embezzles money from his employer and invests it in property, the principal cannot follow the trust into the property, because the remedy against the agent is by a criminal prosecution. *Campbell* v. *Drake*, 4 Ire. Eq. 94 ; *Pascoag Bank* v. *Hunt*, 3 Edw. Ch. 583.

We have no doubt that these cases were not well decided. They are in conflict with the very great weight of authority, and are unsound in principle. The fact that the agent may be criminally prosecuted does not affect the right of the principal to get back his money. With quite as much reason might it be urged that the principal could not take from the embezzler the money, if found on his person, because he can be punished by a criminal prosecution, as to urge that the principal cannot follow the trust because the embezzler is liable to be punished by a prosecution at the instance of the State. There is no conceivable reason why the wronged employer may not secure his money, and the embezzler be also punished. The punishment is not to vindicate or reward the principal, but to protect the community from the criminal acts of embezzlers.

We agree with counsel that the beneficiary cannot follow the trust into the property purchased by the agent, and also compel payment of the money from the agent. *Barker* v.

Barker, 14 Wis. 142; *Murray* v. *Lylburn*, 2 Johns. Ch. 441. But that question does not arise in this case. Here the beneficiary seeks to subject the property bought with the trust funds to its claims, and does not seek to coerce the agent to also refund the money embezzled. The rule of which we are speaking does not forbid the beneficiary from obtaining a judgment against the agent for the sum remaining due after deducting the value of the property, and, under our system, the plaintiff in such a case as this may, in one action, obtain both equitable and legal relief. This is what the complaint seeks, and it is not vulnerable to a demurrer, even though it may demand too much, for a complaint sufficient to entitle the plaintiff to some relief will repel a demurrer.

(The court then decides that the evidence is sufficient to sustain the finding and judgment of the trial court).

Judgment affirmed.

PART IV.

LEGAL EFFECT OF THE RELATION AS BETWEEN THE AGENT AND THIRD PARTIES.

CHAPTER XV.

CONTRACT RELATIONS BETWEEN AGENT AND THIRD PARTY.

1. Liability of agent upon an unauthorized contract.

§ 183.] KROEGER *v.* PITCAIRN.

101 Pennsylvania State, 311. — 1882.

Case, to recover damages against an agent for loss sustained by plaintiff in consequence of the agent's representations. Judgment for defendant *non obstante veredicto.*

Defendant was acting as agent for a fire insurance company, and represented to plaintiff that the company, notwithstanding the terms of the policy, would allow plaintiff to keep petroleum. Defendant had no authority to make this representation, and the policy was successfully defended by the company.

Sterrett, J. The subject of complaint, in both specifications of error, is the entry of judgment for defendant *non obstante veredicto.* It is contended that, upon the facts established by the verdict, judgment should have been entered thereon in favor of plaintiff. The jury were instructed to return a verdict for the amount claimed by him, if they were satisfied the allegations of fact contained in the point presented by him were true. In view of this, the finding in his favor necessarily implies a verification of the several matters

specified in plaintiff's point, and hence it must now be regarded as containing a truthful recital of the circumstances connected with the delivery of the policy and payment of the premium.

The transaction, as therein detailed, clearly amounted to a mutual understanding or agreement between the parties that the stock of merchandise mentioned in the policy should include one barrel of carbon oil; in other words, that the plaintiff should have the privilege of keeping that quantity of oil in connection with and as a part of the stock insured, without thereby invalidating his policy. It is impossible to regard the transaction in any other light. The jury found that plaintiff "took the policy upon the faith" of the representations made by defendant. These representations were not merely expressions of opinion as to the meaning of the policy. On the contrary, the defendant, acting as its agent and assuming authority to speak for the insurance company, asserted without any qualification that when carbon oil was kept as plaintiff was in the habit of keeping it — a single barrel at a time — it was unnecessary to mention the fact in the policy, or otherwise obtain the consent of the company; that no notice is ever taken of it unless "it is kept in large quantity — say several hundred barrels. In that case, when it is wholesale, it should be mentioned; but as long as it is kept, not more than a barrel in the store at a time, it is considered as general merchandise, and is not taken notice of in any other way." Such was the language employed by defendant, evidently for the purpose of dispelling any doubt that existed in the mind of the plaintiff, and inducing him to accept the policy and pay the premium; and to that end at least it was successful. What was said and done by defendant, in the course of the transaction, amounted to more than a positive assurance that the accepted meaning of the policy was as represented by him. In effect, if not in substance, his declarations were tantamount to a proposition, on behalf of the company he assumed to represent, that if the insurance was effected it should be with

the understanding that a barrel of carbon oil was included in and formed part of the insured stock of merchandise, without being specially mentioned in the policy.

The plaintiff doubtless so regarded his declarations, and relying thereon, as the jury has found, accepted the policy on the terms proposed, and thus concluded, as he believed, a valid contract of insurance, authorizing him to keep in stock, as he had theretofore done, a small quantity of carbon oil. It was not until after the property was destroyed that he was undeceived. He then discovered, that in consequence of defendant having exceeded his authority, he was without remedy against the company.

Has he any remedy against the defendant, by whose unauthorized act he was placed in this false position? We think he has. If the president, or any one duly authorized to represent the company, had acted as defendant did, there could be no doubt as to its liability. Why should not the defendant be personally responsible, in like manner, for the consequences, if he, assuming to act for the company, overstepped the boundary of his authority, and thereby misled the plaintiff to his injury, whether intentionally or not?

The only difference is, that in the latter the authority is self-assumed, while in the former it is actual; but that cannot be urged as a sufficient reason why plaintiff, who is blameless in both cases, should bear the loss in one and not in the other. As a general rule, "whenever a party undertakes to do any act as the agent of another, if he does not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally liable to the person with whom he is dealing, for or on account of his principal." Story on Agency, § 264. The same principle is recognized in Evans on Agency, 301; Whart. on Agency, 524; 2 Smith's Leading Cases, 380, note; 1 Parsons on Cont. 67, and in numerous adjudicated cases, among which are *Hampton* v. *Speckenagel*, 9 S. & R. 212, 222; 11 Am. Dec. 704; *Layng* v. *Stewart*, 1 W. & S. 222, 226; *McConn* v. *Lady*, 10 W. N. C. 493; *Jefts* v. *York*, 10 Cush. 392; *Baltzen* v. *Nicolay*, 53 N. Y. 467.

In the latter case, it is said, the reason why an 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 that 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. In *Layng* v. *Stewart*, *supra*, Mr. Justice Huston says: "It is not worth while to be learned on very plain matters. The cases cited show that if an agent goes beyond his authority and employs a person, his principal is not bound, and in such case the agent is bound."

The plaintiff in error, in *McConn* v. *Lady*, *supra*, made a contract, believing he had authority to do so, and not intending to bind himself personally. The jury found he had no authority to make the contract as agent, and this court, in affirming the judgment, said: "It was a question of fact submitted to the jury whether the plaintiff in error had authority from the school board to make the contract as their agent. They found he had not. He was personally liable whether he made the contract in his own name or in the name of his alleged principal. It is a mistake to suppose that the only remedy was an action against him for the wrong. The party can elect to treat the agent as a principal in the contract."

The cases in which agents have been adjudged liable personally have sometimes been classified as follows; viz.: (1) Where the agent makes a false representation of his authority with intent to deceive. (2) Where, with the knowledge of his want of authority, but without intending any fraud, he assumes to act as though he were fully authorized. (3) Where he undertakes to act *bonâ fide*, believing he has authority, but in fact has none, as in the case of an agent acting under a forged power of attorney. As to cases fairly brought within either of the first two classes, there cannot be any doubt as to the personal liability of the self-constituted

agent; and his liability may be enforced either by an action on the case for deceit, or by electing to treat him as principal. While the liability of agents, in cases belonging to the third class, has sometimes been doubted, the weight of authority appears to be that they are also liable.

In Story on Agency, the learned author, recognizing the undoubted liability of those belonging to the first two classes, says: "Another case may be put which may seem to admit of some doubt, and that is where the party undertakes to act as an agent for the principal, *bonâ fide*, believing he had due authority, and therefore acts under an innocent mistake. In this last case, however, the agent is held by law to be equally as responsible, as he is in the two former cases, although he is guilty of no intentional fraud or moral turpitude. This whole doctrine proceeds upon a plain principle of justice; for every person so acting for another, by a natural if not by a necessary implication, holds himself out as having competent authority to do the act, and he thereby draws the other party into a reciprocal engagement. If he has no such authority and acts *bonâ fide*, still he does a wrong to the other party; and if that wrong produces injury to the latter, owing to his confidence in the truth of an express or implied assertion of authority by the agent, it is perfectly just that he who makes such assertion should be personally responsible for the consequences, rather than that the injury should be borne by the other party who has been misled by it." Story on Agency, § 264. This principle is sustained by the authorities there cited, among which is *Smout* v. *Ilbery*, 10 M. & W. 1, 9.

Without pursuing the subject further, we are of the opinion that upon the facts established by the verdict, judgment should have been entered for the plaintiff, on the question of law.

Judgment reversed, and judgment is now entered in favor of the plaintiff for $3,027.20, the amount found by the jury, with interest from January 20, 1882, the date of the verdict. Judgment reversed.

§ 183.] BALTZEN *v.* NICOLAY.

53 NEW YORK, 467. — 1873.

ACTION for damages against an auctioneer. Judgment for plaintiffs.

Defendant, without disclosing his principal, sold stock to plaintiffs. The principal refused to perform because the stock was sold at a price lower than that authorized. Defendant sets up that the contract of sale was void because not in writing.

ANDREWS, J. There are but two theories upon which the plaintiffs can claim to recover in this action. The one is that the defendant, acting as agent for Belmont & Co. in selling the stock, exceeded his authority by selling it below the price limited by them for the sale. The other is that the defendant did not at the time of the sale disclose his principals, and thereby became bound as principal upon the contract made. 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 has 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 Id. 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. In order to make the agent liable in such a case, however, the unauthorized contract must be one which the law would enforce against the principal if it had been authorized by him. *Dung* v. *Parker*, *supra.* Otherwise the anomaly would exist of giving a right of action against the assumed agent for an unauthorized representation of his power to make a contract, when the breach of the contract itself, if he had been authorized to make it, would have furnished no ground of action. That the agent who makes a contract for an undisclosed principal is personally bound by it, although the party dealing with him may know the general fact that he is acting as agent, is well settled; nor does the fact that the agent is an auctioneer, and that the contract arises upon a sale by him as such, withdraw it from the operation of the rule. *Thomson* v. *Davenport*, 9 B. & C. 78; *Mills* v. *Hunt*, 20 Wend. 431.

Applying these principles to the case, the recovery cannot be upheld. There was no payment on account of the purchase of the stock, and no delivery; and no memorandum in writing, of the sale, was shown to have been made by the auctioneer. The plaintiffs upon the case made must recover, if at all, upon the basis of the existence of a contract, valid in form, for the purchase of the stock. If they rely upon the false warranty of authority by the defendant, then, if the contract was invalid within the Statute of Frauds, they can recover nothing, for in a legal sense they have sustained no injury. If they say that the contract was the personal contract of the defendant, he has a right to interpose the statute as his defence. The validity of the contract, under the Statute of Frauds, was put in issue by the pleadings. It appeared upon the trial that there was no delivery of the stock, and that the purchase money, although tendered, was not accepted by the defendant. The defendant, at the conclusion of the plaintiffs' case, moved to dismiss the complaint on the ground that no liability had been shown, and no valid

contract of purchase or sale, within the statute, had been proved. The referee denied the motion and the defendant excepted. The exception was well taken.

It was part of the plaintiffs' case to show a valid contract for the sale of the stock; and, upon objection being interposed on the ground of the statute, it appearing that the contract proved was within it, they were bound to establish affirmatively the existence of an agreement valid by its provisions.

The fact that the law imposes upon auctioneers the duty to make memoranda of sales made by them did not relieve the plaintiffs from the necessity, in this action, of proving a valid contract; and the presumption which in many cases is indulged, in favor of the performance of official duty, cannot stand for proof that there was a written contract of sale as against the defendant, who denies the fact, and against whom the contract is directly or indirectly sought to be enforced.

The waiver, by the defendant, of the deposit of a part of the purchase money required by the conditions of sale, precluded him from alleging the omission to make it as a breach of the contract by the plaintiffs; but it did not estop him from showing that there was no actual payment on the contract, without which the statute is not satisfied, where the fact of payment is relied upon to take a contract out of it.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

RAPALLO, ALLEN, and FOLGER, JJ., concur.

CHURCH, C. J., GROVER and PECKHAM, JJ., dissent.

Judgment reversed.

2. Liability of agent who acts for incompetent principal.

§ 184.] PATTERSON *v.* LIPPINCOTT.

47 NEW JERSEY LAW, 457. — 1885.

[Reported herein at p. 21.]

3. Liability of agent who acts for fictitious principal.

§ 185.] COMFORT *v.* GRAHAM.

87 Iowa, 295. — 1893.

Action for services rendered as attorney. Judgment for defendant.

Defendant, in behalf of an unincorporated society, engaged plaintiff to perform services as an attorney. The facts appear in the opinion.

Kinne, J. . . . It is insisted that, in making the contract with the plaintiff, the defendant was acting in a representative capacity only, and hence is not personally liable. It appears that the plaintiff was a member of the order, and knew that the defendant was acting in behalf of the branch of the order in Iowa, of which he was then the head, and it is true that the defendant, in writing the plaintiff about the work he was to do, expressed the hope that he (plaintiff) "would consider it a labor of love." But the plaintiff in his reply says: "My labors of love are somewhat extensive here, but will do the best I can in part, and you can send me the balance if you recover." The plaintiff did not charge full value for his services. Except the defendant's naked statement in his testimony that he was acting in the matter in a representative capacity, we find no evidence whatever to justify the contention that such was the arrangement or understanding between the plaintiff and the defendant. It appears to us, also, that if the defendant sought, as he did, to shield himself from personal liability because the contract for services was made in a representative capacity, it was incumbent on him to establish that fact. He has not done so. On the contrary, we think it clearly appears that the order which the defendant claimed to represent was an unincorporated, voluntary association, and hence he represented no principal which the law recognized; hence, if it be conceded that the

defendant undertook to act for such an association, he is personally liable. *Lewis* v. *Tilton*, 64 Iowa, 220; *Reding* v. *Anderson*, 72 Iowa, 498.

It is true that the judgment in this case stands as the verdict of a jury, and cannot be disturbed if it finds support in the evidence. We are unable, however, to see that the defendant has established any of his claims, and the judgment must be Reversed.[1]

4. Rights and liabilities of agent where credit is extended to him exclusively.

§ 186.] KELLY *v.* THUEY.

102 MISSOURI, 522.—1890.

ACTION for specific performance of a contract brought by James T. Kelly against defendant. Judgment for plaintiff.

The contract was made and executed by defendant and D. T. Kelly for the sale and purchase of land. Plaintiff claimed to be the real party in interest, and as such offered to perform the contract, and demanded a deed. Defendant had no knowledge of the interest of plaintiff in the contract.

BLACK, J. . . . We must take this verified answer as an admission that Thuey knew D. T. Kelly was buying the property for an unnamed person. The other evidence shows that he was acting for plaintiff, but this Thuey did not know. The contract was taken in the name of the agent by the directions of the plaintiff, for he had it prepared. Under these circumstances can the plaintiff compel specific performance?

Where, as here, the contract is not under seal, if it can be gathered from the whole instrument that one party acted as agent, the principal will be bound, or he may sue

[1] See also *In re* Northumberland Ave. Hotel, L. R. 33 Ch. D. 16, *ante*, p. 39; McArthur *v.* Times Printing Co., 48 Minn. 319, *ante*, p. 42; Western Pub. House *v.* District Tp. of Rock, 84 Iowa, 101, *ante*, p. 45.

thereon in his own name. Indeed, if the instrument is so uncertain in its terms as to leave it in doubt whether the principal or agent is to be bound, such uncertainty may be obviated by the production of parol evidence. *Hartzell* v. *Crumb*, 90 Mo. 630; *Klostermann* v. *Loos*, 58 Mo. 290. But these principles cannot aid the plaintiff in this case, for there is nothing whatever on the face of this contract to show that D. T. Kelly acted as agent for any one.

The plaintiff insists that a much more comprehensive doctrine should be applied, and he refers to the often cited case of *Higgins* v. *Senior*, 8 M. & W. 834, which was a contract for the sale of goods. The question presented there was, whether the defendant could discharge himself by proving that the agreement, though made in his own name, was really made by him as the agent of a third person, and that this was known to the plaintiff when the contract was signed. "There is no doubt," says the court, "that, where such an agreement is made, 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 so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principal; and this, whether the agreement be or be not required to be in writing by the Statute of Frauds."

Such proof, it is said, does not violate the rule of law which says, parol evidence will not be received to vary the terms of a written contract, because it only shows that the agreement binds another person by reason of the act of the agent in signing the agreement pursuant to his authority. The doctrine of that case has been quoted with approval by this court on two occasions. *Briggs* v. *Munchon*, 56 Mo. 467; *Higgins* v. *Dellinger*, 22 Mo. 397. The following, and many other authorities, are to the same effect: Story on Agency (9th ed.), sec. 160 a; Whart. on Agents, sec. 403; Fry on Spec. Perf. sec. 148; *Huntington* v. *Knox*, 7 Cush. 371; *Briggs* v. *Partridge*, 64 N. Y. 357.

This broad doctrine, that, when an agent makes a contract

in his own name only, the known or unknown principal may sue or be sued thereon, may be applied in many cases with safety, and especially in cases of informal commercial contracts. But it is certain that it cannot be applied where exclusive credit is given to the agent, and it is intended by both parties that no resort shall be had by or against the principal (Story on Agency, sec. 160 a), nor does it apply to those cases where skill, solvency, or any personal quality of one of the parties to the contract is a material ingredient in it. Fry on Spec. Perf. sec. 149.

Now, in this case, the written contract is full, complete, and formal. It expresses just what the parties thereto intended it should express. The plaintiff had it prepared, and must be taken to have directed it to be made in the name of D. T. Kelly and not in his own name. In short, the contract is one between Thuey and D. T. Kelly, and was so intended by all the parties. It contains agreements to be performed by both parties. Thuey agreed to sell the land to D. T. Kelly, and agreed to take the latter's notes and deed of trust for the deferred payments. He did not agree to take the notes and deed of trust of the plaintiff for the deferred payments. To admit parol evidence to show that D. T. Kelly acted as an agent of the plaintiff, and then substitute, or add, the plaintiff as a party, is simply to make a new contract for the parties. To say that the admission of such evidence does not alter the written contract, in a case like the one in hand, is a doctrine too subtle and refined to be comprehended. D. T. Kelly contracted for the warranty deed of Thuey, and he is entitled to Thuey's covenant of warranty, and could not be required to take the covenants of some person to whom Thuey should sell the property. *Steiner* v. *Zwickey*, 43 N. W. Rep. 376.

So, on the other hand, Thuey contracted for, and is entitled to have, the notes and deed of trust of D. T. Kelly, and he cannot be compelled to take the notes of another person. Whatever the rights may be as between the Kellys, the plaintiff is not a party to the contract with Thuey, and he

cannot enforce specific performance of it, and thereby compel Thuey to accept his obligations for the deferred payments.

The right to enforce specific performance of this contract exists in D. T. Kelly, and not the plaintiff. D. T. Kelly must make the note and deed of trust, and to that end the title must be vested in him, and he is, therefore, a necessary and indispensable party to this suit.

The judgment is, therefore, reversed and the cause remanded. All concur.

5. Liability of agent who acts for a foreign principal.

§ 187.] KAULBACK *v.* CHURCHILL.

59 New Hampshire, 296. — 1879.

Assumpsit, for apples sold and delivered. The defendant, residing in this State, was the agent of A. & O. W. Mead & Co., a firm doing business in Boston, and all its members resident in Massachusetts. At the time of the sale of the apples, the plaintiff was informed and knew that the defendant was acting as agent of the firm. A referee found for the defendant.

Clark, J. "If a duly authorized agent uses such terms as legally import an undertaking by the principal only, the contract is that of the principal, and he alone is the party by whom it is to be performed." Met. on Cont. 106. Whether the defendant assumed a personal liability in making the contract is a question of fact, which has been determined by the finding of the referee. *Noyes* v. *Patrick*, 58 N. H. 618. The fact that the firm of A. & O. W. Mead were residents of Massachusetts, doing business there, is not of itself a ground for holding the defendant personally liable. "The present doctrine is, that when the terms of a contract made by an agent are clear, they are to have the same construction and legal effect, whether made for a domestic or for a foreign principal." Met. on Cont. 111. The statement cited by

the plaintiff from Story, Agency, sec. 268, is not now recognized as the law, excepting, perhaps, in Maine and Louisiana. Met. on Cont. 111; *Bray* v. *Kettell*, 1 Allen, 80; *Kirkpatrick* v. *Stanier*, 22 Wend. 244; *Oelricks* v. *Ford*, 23 How. 49. Judgment for the defendant.

6. Liability of agent who contracts in his own name in an instrument under seal.

§ **188.**] BRIGGS *v.* PARTRIDGE.

64 NEW YORK, 357. — 1876.

[Reported herein at p. 248.]

7. Liability of an agent who contracts in his own name in a negotiable instrument.

a. Construction from signature alone.

§ **190.**] RENDELL *v.* HARRIMAN ET AL.

75 MAINE, 497. — 1883.

ASSUMPSIT upon the following promissory note.

The plea was the general issue with brief statement that the instrument declared on was the note of the Prospect and Stockton Cheese Company.

[NOTE.]

$246.50 STOCKTON, October 19, 1878.

For value received, we promise to pay S. A. Rendell, or order, two hundred forty-six and fifty one-hundredths dollars, in one year from date, with interest.

OTIS HARRIMAN, *President.*
R. M. TREVETT,
L. MUDGETT,
W. H. GINN,
} *Directors of Prospect and Stockton Cheese Company.*

Defendants offered to show that they signed the above instrument as duly authorized agents of the Prospect and Stockton Cheese Company; that plaintiff knew that fact when he accepted the note; that a payment had been made thereon by the company and receipted for by plaintiff; and that the note was for a balance due plaintiff for machinery purchased by the company from plaintiff and paid for by the company save for this balance. If this evidence is admissible the action is to stand for trial; otherwise defendants are to be defaulted.

DANFORTH, J. All the questions which have been or can be raised in this case growing out of the common law, as well the purpose and effect of R. S. c. 73, § 15, were raised and fully discussed and settled in *Sturdivant* v. *Hull*, 59 Me. 172. A case so well considered and so fully sustained by the authorities as that would seem to be decisive of all the questions involved and would undoubtedly have been so considered, but for a hope raised by what is claimed "as a modification of the rule established by it, in *Simpson* v. *Garland*, 72 Me. 40, following a more liberal construction of the statute in *Nobleboro'* v. *Clark*, 68 Me. 87." But upon a review of *Sturdivant* v. *Hull*, we see no occasion to depart from its teachings, nor do we perceive any modification of its doctrine in any case which follows. On the other hand, *Mellen* v. *Moore*, 68 Me. 390, "is exclusively based" upon it; it is referred to as authority in *Nobleboro'* v. *Clark*, and is followed in the still later case of *Ross* v. *Brown*, 74 Me. 352; nor do we find anything inconsistent with it in *Simpson* v. *Garland*. In the latter case the note contained language purporting to show that the promise was that of the principal and which the court held did show it; while in *Sturdivant* v. *Hull*, no such language is used. True, in the case of *Ross* v. *Brown*, it is suggested that it does not appear that the maker of the note had any authority to bind the town; but from the opinion it clearly appears that the liability is fixed upon the agent by force of the terms of the contract and not by any extraneous evidence, or the want of it. In *Nobleboro'* v. *Clark*, the contract was set up

as binding upon the principal, and was so held because by its terms it appeared that such was the intention of the agent, and such being the intention, it was necessary with or without the statute to show the authority of the agent before the contract could be regarded as that of the principal. The action at bar is against the alleged agents, and as suggested in *Sturdivant* v. *Hull*, whatever may be the effect of the statute in "extending a liability to the real party in interest and affording a remedy against him, it cannot be so construed as to discharge one who, for a sufficient consideration, has expressly assumed a liability by means of a written contract, or to allow proof *aliunde* for that purpose." Nor do we find any case at common law to go so far. All the authorities, including those cited by the defendant in this case, concur in holding that the liability of the one party or the other must be ascertained from the terms of the written instrument, and parol proof cannot be received to vary or control such terms.

That an agent may make himself responsible for his principal's debt is beyond doubt. That the defendants in this case have done so by the terms of the note in suit, uncontrolled by extraneous evidence, is settled by the uniform decisions in this State, supported, as shown in *Sturdivant* v. *Hull*, by the weight of reason, as well as of authority elsewhere.

The evidence, then, offered, if admitted, would not avail the defendants unless it had the effect to discharge them from a contract into which they have entered.

It is true, that in the cases cited, such evidence was admitted and was perhaps admissible, under the well established rule of law, that when there is an ambiguity in the contract, when the language used is equally susceptible of two different constructions, evidence of the circumstances by which the parties were surrounded and under which the contract was made may be given, not for the purpose of proving the intention of the parties independent of the writing, but that the intention may be more intelligently ascertained from its terms. But to make this evidence admissible

some ambiguity must first appear; there must be language used such as may, without doing violence to its meaning, be explained consistently with the liability of either party, some language which, as in *Simpson* v. *Garland*, tends, in the words of the statute, to show that the contract was made by the agent "in the name of the principal, or in his own name for his principal."

In this case no such ambiguity exists, no such language is used. The promise is that of the defendants alone without anything to indicate that it was for or in behalf of another. True, the defendants affixed to their names their official title, with the name of the corporation in which they held office, but nothing whatever to qualify their promise or in the slightest degree to show it other than their own. The statute as well as the decisions, with few exceptions, as we have seen, requires more than this to make the testimony admissible. *Bray* v. *Kettell*, 1 Allen, 80.

Defendants defaulted for the amount of the note and interest.

b. Construction from signature aided by recitals in the instrument.

§ 191.] BRADLEE *v.* BOSTON GLASS MANUFACTORY.

16 Pickering (Mass.), 347. — 1835.

Assumpsit on the following promissory note: —

Boston, 13th January, 1823.

For value received, we, the subscribers, jointly and severally, promise to pay Messrs. J. and T. Bradlee or order, for the Boston Glass Manufactory, thirty-five hundred dollars, on demand, with interest.

Jonathan Hunnewell,
Samuel Gore,
Charles F. Kupfer.

Thirty days' notice shall be given before payment of this note, by either side.

Plaintiffs loaned the company $3,500, for which they received the note of the company, signed by Kupfer as treasurer, and by Hunnewell and Gore as sureties. That note was cancelled and this note given in its stead. The company continued to pay the interest on this note. Plaintiffs have already recovered a judgment against Hunnewell, Gore, and Kupfer on this note, and issued a body execution thereon against Hunnewell, and covenanted with Gore, upon his payment of one third of the judgment, not to proceed further against him.

SHAW, C. J., delivered the opinion of the court.

The first question which arises here is, whether this was the promissory note of the Boston Glass Manufactory, or of the individuals who signed it. It is not now contended that a corporation may not give a promissory note by its agents, and is not to be treated, in this respect, like a natural person. 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 forms 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? It is held in many cases, that although the contract of one is given for the debt of another, and although it is understood between the person promising and the party for whom the contract is entered into, that the latter is to pay it, or to reimburse and indemnify the contracting party, if he should be required to pay it, it is still, as between the parties to it, the contract of the party making it. A leading and decisive case on this point is *Stackpole* v. *Arnold*, 11 Mass. R. 27.

With these views as to what the question is, and the grounds on which it is to be considered, we are of opinion that this was the promissory note and obligation of the three makers, and not of the company.

The words, "for the Boston Glass Manufactory," if they stood alone, would perhaps leave it doubtful and ambiguous, whether they meant to bind themselves as promisors to pay the debt of the company, or whether they meant to sign a contract for the company, by which they should be bound to pay their own debt; though the place in which the words are introduced would rather seem to warrant the former construction.

But other considerations arise from other views of the whole tenor of the note. The fact is of importance that it is signed by three instead of one, and with no designation or name of office, indicating any agency or connection with the company. No indication appears on the note itself that either of them was president, treasurer, or director, or that they were a committee to act for the company. But the words "jointly and severally" are quite decisive. The persons are "we, the subscribers," and it is signed Jonathan Hunnewell, Samuel Gore, and Charles F. Kupfer. This word, "*severally*" must have its effect; and its legal effect was to bind each of the signers. This fixes the undertaking as a personal one. It would be a forced and wholly untenable construction to hold, that the company and signers were all bound; this would be equally inconsistent with the terms and the obvious meaning of the contract.

If we go out of the contract itself, and look at the relation in which the parties stood to each other, with the view of giving effect to the language of their contract for one purpose, we must for another. It is a circumstance relied on for the plaintiffs with some confidence, that the money was originally borrowed for the company, that the note was entered on the books as the debt of the company, and that the interest was paid by them. But it further appears that from 1814 to 1823 these promisees held the note of the company, guaranteed by

two of these promisors, Gore and Hunnewell, the other, Kupfer, having signed it as treasurer, which did not render him personally liable, and that at that time all the parties were in good credit. Now upon the plaintiffs' hypothesis, they must have voluntarily relinquished the liability of two responsible guarantors, retaining the liability of the company only, and that for a large debt, which, from the clause providing for a mutual notice of thirty days, seems intended to have been a kind of permanent loan. But upon the other hypothesis they retained the names of two responsible persons, and that in the more direct and unquestionable form of joint and several promisors, together with the name of another responsible person as promisor, *in lieu* of that of the company.

. . . .

Plaintiffs non-suit.

§ 191.] FRANKLAND *v.* JOHNSON.

147 ILLINOIS, 520. — 1893.

ASSUMPSIT upon the following instrument: —

$5,592.00. CHICAGO, June 1, 1885.

On or before the first day of June, 1888, the Western Seaman's Friend Society agrees to pay to L. M. Johnson, or order, the sum of five thousand five hundred and ninety-two dollars, with interest at the rate of six per cent per annum.

B. FRANKLAND, *Gen. Sup't.*

Judgment was given for the plaintiff, and the defendant (Franklin) appeals.

MR. JUSTICE WILKINS. . . . The writing on its face is not distinctly the note of Frankland. A personal note by him, in proper form, would have used the personal pronoun "I," instead of the name of the corporation, and would have been signed without the designation "Gen. Sup't." Neither is it, by its terms, the note of a corporation. As such, it should have been been signed with the name of the corporation, by its president, secretary, or other officers authorized to execute

it, or, as in *Scanlan* v. *Keith*, 102 Ill. 634, by the proper officers designating themselves officers of the corporation for which they assumed to act, or, as in *New Market Savings Bank* v. *Gillet*, 100 Ill. 254, using the corporate name both in the body of the note and in the signatures to it.

But if it be conceded that, *primâ facie*, a general superintendent of a corporation has authority to make promissory notes in its name, and this instrument be held to appear, on its face, to be the obligation of the society, rather than of Frankland, certainly it could not even then be contended that it was conclusively so. It is well understood that if the agent, either of a corporation or an individual, makes a contract which he has no authority to make, he binds himself personally, according to the terms of the contract. Angell & Ames on Corp. sec. 303. It was said by Sutherland, J., in *Mott* v. *Hicks*, 1 Cow. 573 (13 A. D. 556): "It is perfectly well settled that if a person undertake to contract, as agent, for an individual or corporation, and contracts in a manner which is not legally binding upon his principal, he is personally responsible (citing authorities). And the agent, when sued upon such a contract, can exonerate himself from personal liability only by showing his authority to bind those for whom he has undertaken to act. It is not for the plaintiff to show that he had not authority. The defendant must show, affirmatively, that he had."[1] This rule is quoted with approval in *Wheeler* v. *Reed et al.*, 36 Ill. 81.

This action is against Frankland, individually. The note is declared upon as his personal promise to pay. The question, then, as to whether it is his contract or that of the Western Seaman's Friend Society, is one of fact, and so it was treated on the trial. Both parties went fully into the facts and circumstances leading to and attending the making of the note. So far from showing affirmatively that appellant had authority to make the note so as to bind the corporation, the evidence strongly tends to show the contrary, and that it was the inten-

[1] But see *Baltzen* v. *Nicolay*, *ante*, p. 352. The decision may be approved without assenting to this line of argument.

tion of the parties that he should be individually responsible. No record proceedings whatever, on the part of the corporation, pertaining to appellant's transactions with appellee or her husband, were shown. It is clear that if suit had been against the society there could have been no recovery on the evidence in this record. At all events, the facts have been settled adversely to appellant, and are not open to review in this court.

The propositions submitted to the trial court by appellant, to be held as law applicable to the case, are mainly requests to hold certain facts to have been proved, and, under the evidence, they were all properly refused. In fact, no argument is made in support of them. There is but one theory on which the judgment below could be reversed by this court, and that is, that the note sued on must be held to be the contract of the corporation, absolutely and conclusively, and all parol proof tending to establish appellant's liability, was incompetent, and that theory is clearly untenable.

As to the judgment on the attachment, it is only necessary to say that the evidence at least tended to support the allegations of the original affidavit, and the judgment of affirmance in the Appellate Court is conclusive.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

c. Construction from signature aided by marginal headings or memoranda.

§ 192.] MECHANICS' BANK OF ALEXANDRIA *v.* THE BANK OF COLUMBIA.

5 WHEATON (U. S.), 326. — 1820.

ASSUMPSIT on the following check: —

MECHANICS' BANK OF ALEXANDRIA.	No. 18. MECHANICS' BANK OF ALEXANDRIA. June 25, 1817. Cashier of the Bank of Columbia, Pay to the order of P. H. Minor, Esq., Ten Thousand Dollars. WM. PATON, JR. $10,000.

Paton was cashier and Minor teller of the Mechanics' Bank. Minor turned over the check to the Bank of the United States in payment of a balance due that bank by the Mechanics' Bank. The Bank of the United States presented the check to the Bank of Columbia, which paid it and charged it to the account of the Mechanics' Bank, treating it as the check of the latter bank. The Mechanics' Bank contended that the check was Paton's private obligation; that it bought it for value; that he had funds in the Bank of Columbia to meet it; and that it should be charged to his account. The court heard parol evidence to establish the official character of the check, and gave judgment for the plaintiff. Defendant objected to this evidence and requested a charge that the check was on its face a private check of Paton's, which charge was refused.

Mr. Justice Johnson. . . . The only ground on which it can be contended that this check was a private check, is, that it had not below the name the letters *Cas.* or *Ca.* But the fallacy of the proposition will at once appear from the consideration, that the consequence would be, that all Paton's checks must have been adjudged private. For no definite meaning could be attached to the addition of those letters without the aid of parol testimony.

But the fact that this appeared on its face to be a private check is by no means to be conceded. On the contrary, the appearance of the corporate name of the institution on the face of the paper, at once leads to the belief that it is a corporate, and not an individual transaction: to which must be added the circumstances, that the cashier is the drawer, and the teller the payee; and the form of ordinary checks deviated from by the substitution of *to order*, for *to bearer*. The evidence, therefore, on the face of the bill predominates in favor of its being a bank transaction. Applying, then, the plaintiff's own principle to the case, and the restriction as to the production of parol or extrinsic evidence could have been only applicable to himself. But it is enough for the purposes of the defendant to establish, that there existed, on the face of the paper, circumstances from which it might reasonably be inferred, that it was either one or the other. In that case, it became indispensable to resort to extrinsic evidence to remove the doubt. The evidence resorted to for this purpose was the most obvious and reasonable possible, viz., that this was the appropriate form of an official check; that it was, in fact, cut out of the official check-book of the bank, and noted on the margin; that the money was drawn in behalf of, and applied to the use of the Mechanics' Bank; and by all the banks, and all the officers of the banks through which it passed, recognized as an official transaction. It is true, it was in evidence that this check was credited to Paton's own account on the books of his bank. But it was done by his own order, and with the evidence before their eyes that it was officially drawn. This would never have

been sanctioned by the directors, unless for reasons which they best understood, and on account of debits which they only could explain.

It is by no means true, as was contended in argument, that the acts of agents derive their validity from professing, on the face of them, to have been done in the exercise of their agency. In the more solemn exercise of derivative powers, as applied to the execution of instruments known to the common-law, rules of form have been prescribed. But in the diversified exercise of the duties of a general agent, the liability of the principal depends upon the facts: (1) That the act was done in the exercise, and, (2) Within the limits of the powers delegated. These facts are necessarily inquirable into by a court and jury; and this inquiry is not confined to written instruments, (to which alone the principle contended for could apply), but to any act with or without writing, within the scope of the power or confidence reposed in the agent; as, for instance, in the case of money credited in the books of a teller, or proved to have been deposited with him, though he omits to credit it.

Judgment affirmed.

§ 192.] HITCHCOCK *v.* BUCHANAN.

105 UNITED STATES, 416. — 1881.

THIS was an action of assumpsit by Hitchcock as indorsee, against Buchanan and Waugh as drawers, of the following bill of exchange: —

OFFICE OF BELLEVILLE NAIL MILL CO.,
$5,477.13. BELLEVILLE, ILL., Dec. 15, 1875.

Four months after date, pay to the order of John Stevens, Jr., cashier, fifty-four hundred and seventy-seven $\frac{13}{100}$ dollars, value received, and charge same to account of Belleville Nail Mill Co.

WM. C. BUCHANAN, *Pres't.*
JAMES C. WAUGH, *Sec'y.*

To J. H. PIEPER, *Treas.*, Belleville, Illinois.

Demurrer to a declaration against the defendants as drawers of the bill was sustained, and judgment given for the defendants, on the ground that the instrument was the bill of the Belleville Nail Mill Company, and not the bill of the defendants.

Mr. Justice Gray, after stating the case, delivered the opinion of the court.

The bill of exchange declared on is manifestly the draft of the Belleville Nail Mill Company, and not of the individuals by whose hands it is subscribed. It purports to be made at the office of the company, and directs the drawee to charge the amount thereof to the account of the company, of which the signers describe themselves as president and secretary. An instrument bearing on its face all these signs of being the contract of the principal cannot be held to bind the agents personally. *Sayre* v. *Nichols,* 7 Cal. 535; *Carpenter* v. *Farnsworth*, 106 Mass. 561, and cases there cited.

The allegation in the declaration, that the defendants made "their" bill of exchange, is inconsistent with the terms of the writing sued on and made part of the record, and is not admitted by the demurrer. *Dillon* v. *Barnard*, 21 Wall. 430; *Binz* v. *Tyler*, 79 Ill. 248.

The provision of the statute of Illinois (ed. 1877, title Practice, secs. 34, 36) prohibiting defendants sued on written instruments from denying their signatures, except under plea verified by affidavit, has no application where the fact of signature is admitted by demurrer, and the only issue is one of law.

Judgment affirmed.

§ 192.] CHIPMAN *v.* FOSTER ET AL.

119 MASSACHUSETTS, 189. — 1875.

CONTRACT against the defendants as drawers of three drafts indorsed in blank by the payees, of which the following is a copy: —

No. 176. $5,000.

NEW ENGLAND AGENCY OF THE PENNSYLVANIA FIRE INSURANCE COMPANY, PHILADELPHIA.

FOSTER & COLE, General Agents for the New England States, 15 Devonshire Street, Boston.

BOSTON, August 18, 1873.

Pay to the order of Haley, Morse, & Company, five thousand dollars, being in full of all claims and demands against said company for loss and damage by fire on the 30th day of May, 1873, to property insured under policy No. 824, of Boston, Mass., agency.

FOSTER & COLE.

To the Pennsylvania Fire Insurance Company, Philadelphia.

Defendants were general agents of the Pennsylvania Fire Insurance Company of Philadelphia, and drew the drafts in question in payment of three policies issued by that company. The company refused to honor the drafts, and they were duly protested.

GRAY, C. J. Each of these drafts, upon its face, purports to be issued by the New England agency of the Pennsylvania Fire Insurance Company, and shows that Foster & Cole are the general agents of that corporation for the New England States, as well as that the draft is drawn in payment of a claim against the corporation. It thus appears that Foster & Cole, in drawing it, acted only as agents of the corporation, as clearly as if they had repeated words expressing their agency after their signature; and they cannot be held personally liable as drawers thereof. *Carpenter* v. *Farnsworth*, 106 Mass. 561, and cases cited.

Judgment for the defendants.

§ 192.] CASCO NATIONAL BANK *v.* CLARK ET AL.

139 NEW YORK, 307. — 1893.

ACTION against defendants as makers of a promissory note. Judgment for plaintiff. The opinion states the facts.

GRAY, J. The action is upon a promissory note, in the following form, viz: —

RIDGEWOOD ICE CO.

BROOKLYN, N. Y., August 2, 1890.

$7,500. Three months after date, we promise to pay to the order of Clark & Chaplin Ice Company, seventy-five hundred dollars at Mechanics' Bank: value received.

JOHN CLARK, *Prest.*

E. H. CLOSE, *Treas.*

It was delivered in payment for ice sold by the payee company to the Ridgewood Ice Company, under a contract between those companies, and was discounted by the plaintiff for the payee, before its maturity. The appellants, Clark and Close, appearing as makers upon the note, the one describing himself as "Prest." and the other as "Treas.," were made individually defendants. They defended on the ground that they had made the note as officers of the Ridgewood Ice Company, and did not become personally liable thereby for the debt represented.

Where a negotiable promissory note has been given for the payment of a debt contracted by a corporation, and the language of the promise does not disclose the corporate obligation, and the signatures to the paper are in the names of individuals, a holder, taking *bonâ fide*, and without notice of the circumstances of its making, is entitled to hold the note as the personal undertaking of its signers, notwithstanding they affix to their names the title of an office. Such an affix will be regarded as descriptive of the persons and not of the character of the liability. Unless the promise purports to

be by the corporation, it is that of the persons who subscribe to it; and the fact of adding to their names an abbreviation of some official title has no legal signification as qualifying their obligation, and imposes no obligation upon the corporation whose officers they may be. This must be regarded as the long and well settled rule. Byles on Bills, §§ 36, 37, 71; *Pentz* v. *Stanton*, 10 Wend. 271; *Taft* v. *Brewster*, 9 Johns. 334; *Hills* v. *Bannister*, 8 Cow. 31; *Moss* v. *Livingston*, 4 N. Y. 208: *De Witt* v. *Walton*, 9 Id. 571; *Bottomley* v. *Fisher*, 1 Hurlst. & Colt. 211. It is founded in the general principle that in a contract every material thing must be definitely expressed, and not left to conjecture. Unless the language creates, or fairly implies, the undertaking of the corporation, if the purpose is equivocal, the obligation is that of its apparent makers.

It was said in *Briggs* v. *Partridge*, 64 N. Y. 357, 363, that persons taking negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them, and a person not a party cannot be charged, upon proof that the ostensible party signed, or indorsed, as his agent. It may be perfectly true, if there is proof that the holder of negotiable paper was aware, when he received it, of the facts and circumstances connected with its making, and knew that it was intended and delivered as a corporate obligation only, that the persons signing it in this manner could not be held individually liable. Such knowledge might be imputable from the language of the paper, in connection with other circumstances, as in the case of *Mott* v. *Hicks*, 1 Cow. 513, where the note read, "the president and directors promise to pay," and was subscribed by the defendant as "president." The court held that that was sufficient to distinguish the case from *Taft* v. *Brewster*, *supra*, and made it evident that no personal engagement was entered into or intended. Much stress was placed in that case upon the proof that the plaintiff was intimately acquainted with the transaction out of which arose the giving of the corporate obligation.

In the case of *Bank of Genesee* v. *Patchin Bank*, 19 N. Y. 312, referred to by the appellants' counsel, the action was against the defendant to hold it as the indorser of a bill of exchange, drawn to the order of "S. B. Stokes, Cas.," and indorsed in the same words. The plaintiff bank was advised, at the time of discounting the bill, by the president of the Patchin Bank, that Stokes was its cashier, and that he had been directed to send it in for discount; and Stokes forwarded it in an official way to the plaintiff. It was held that the Patchin Bank was liable, because the agency of the cashier in the matter was communicated to the knowledge of the plaintiff as well as apparent.

Incidentally, it was said that the same strictness is not required in the execution of commercial paper as between banks, that is, in other respects, between individuals.

In the absence of competent evidence showing or charging knowledge in the holder of negotiable paper as to the character of the obligation, the established and safe rule must be regarded to be that it is the agreement of its ostensible maker and not of some other party, neither disclosed by the language, nor in the manner of execution. In this case the language is, "we promise to pay," and the signature by the defendants, Clark and Close, are perfectly consistent with an assumption by them of the company's debt.

The appearance upon the margin of the paper of the printed name "Ridgewood Ice Company" was not a fact carrying any presumption that the note was, or was intended to be, one by that company.

It was competent for its officers to obligate themselves personally, for any reason satisfactory to themselves; and, apparently to the world, they did so by the language of the note, which the mere use of a blank form of note, having upon its margin the name of their company, was insufficient to negative.

(The court then decides that the fact that one Winslow was a director in the payee company, and also in the plaintiff bank, did not charge the latter with notice as to the origin of the paper.) Judgment affirmed.

d. Indorsers of bills and notes.

§ 194.] SOUHEGAN NATIONAL BANK *v.* BOARDMAN.

46 MINNESOTA, 293. — 1891.

ACTION against defendant as indorser upon the following promissory note: —

$1,000. MINNEAPOLIS, May 12, 1884.

Six months after date we promise to pay to the order of A. J. Boardman, treasurer, one thousand dollars, value received, with interest at eight per cent. after maturity.

MINNEAPOLIS ENGINE & MACHINE WORKS.
By A. L. CROCKER, *Sec'y.*

[Indorsed:] A. J. BOARDMAN, *Treasurer.*

Defendant was treasurer of the Minneapolis Engine & Machine Works, and claims to have made the indorsement in that capacity. Judgment for plaintiff.

MITCHELL, J. (after stating the facts, and deciding that the trial court erred in not submitting to the jury a question as to the extension of the time of payment without the consent of the defendant). With a view to another trial it is necessary to consider the questions involved in the first defence. These are (1) whether, on the face of the paper, this is the indorsement of the corporation or of defendant individually; and (2) whether its character is conclusively determined by the terms of the instrument itself, or whether extrinsic evidence is admissible to show in what character — officially or individually — the defendant made the indorsement.

Where both the names of a corporation and of an officer or agent of it appear upon a bill or note, it is often a perplexing question to determine whether it is in legal effect the contract of the corporation, or is the individual contract of the officer

or agent. It is very desirable that the rules of interpretation of commercial paper should be definite and certain; and if the courts of the highest authority on the subject had laid down any exact and definite rules of construction for such cases, we would, for the sake of uniformity, be glad to adopt them. But, unfortunately, not only do different courts differ with each other, but we are not aware of any court whose decisions furnish any definite rule or system of rules applicable to such cases. Each case seems to have been decided with reference to its own facts. If what the courts sometimes call "corporate marks" greatly predominate on the face of the paper, they hold it to be the contract of the corporation, and that extrinsic evidence is inadmissible to show that it was the individual contract of the officer or agent. If these marks are less strong, they hold it *primâ facie* the individual contract of the officer or agent, but that extrinsic evidence is admissible to show that he executed it in his official capacity in behalf of the corporation; while in still other cases they hold that it is the personal contract of the party who signed it, that the terms "agent," "secretary," and the like, are merely descriptive of the person, and that extrinsic evidence is not admissible to show the contrary. See Daniel, Neg. Inst. § 398 *et seq.* When others have thus failed we can hardly hope to succeed. Perhaps the difficulty is inherent in the nature of the subject.

This court has in a line of decisions held that where a party signs a contract, affixing to his signature the term "agent," "trustee," or the like, it is *primâ facie* his individual contract, the term affixed being presumptively merely descriptive of his person, but that extrinsic evidence is admissible to show that the words were understood as determining the character in which he contracted. See *Pratt* v. *Beaupre*, 13 Minn. 177 (187); *Bingham* v. *Stewart*, 13 Minn. 96 (106), and 14 Minn. 153 (214); *Deering* v. *Thom*, 29 Minn. 120 (12 N. W. Rep. 350); *Rowell* v. *Oleson*, 32 Minn. 288 (20 N. W. Rep. 227); *Peterson* v. *Homan*, 44 Minn. 166 (46 N. W. Rep. 303); *Brunswick-Balke Co.* v. *Boutell*, 45 Minn.

21 (47 N. W. Rep. 261). Only one of these, however (*Bingham* v. *Stewart*), was a case of commercial paper where the name of a corporation appeared on its face, and in that case possibly the court did not give due weight to all the "corporate marks" upon it. Where there is nothing on the face of the instrument to indicate in what capacity a party executed it except his signature with the word "agent," "treasurer," or the like suffixed, there can be no doubt of the correctness of the proposition that it is at least *primâ facie* his individual contract, and the suffix merely a description of his person. But bills, notes, acceptances, and indorsements are to some extent peculiar,—at least, the different relations of the parties, respectively, to the paper are circumstances which in themselves throw light upon, and in some cases control, its interpretation, regardless of the particular form of the signature. For example, if a draft were drawn on a corporation by name, and accepted by its duly authorized agent or officer in his individual name, adding his official designation, the acceptance would be deemed that of the corporation, for only the drawee can accept a bill; while, on the other hand, if drawn on the drawee as an individual, he could not by words of official description in his acceptance make it the acceptance of some one else. So if a note was made payable to a corporation by its corporate name, and is indorsed by its authorized official, it would be deemed the indorsement of the corporation; for it is only the payee who can be first indorser, and transfer the title to the paper. But this is not such a case. It does not appear on the face of this note what the defendant was treasurer of. Extrinsic evidence has to be resorted to at the very threshold of the case to prove that fact.

Counsel for the defendant relies very largely upon the case of *Falk* v. *Moebs*, 127 U. S. 597 (8 Sup. Ct. Rep. 1319), which comes nearer sustaining his contention than any other case to which we have been referred. But that case differs from this in the very important particular that it appeared *upon the face of the paper itself* that the payee and indorser was the secretary and treasurer of the corporation, and that as such

he himself executed the note in its behalf. The case was also decided largely upon the authority of *Hitchcock* v. *Buchanan*, 105 U. S. 416, which is also clearly distinguishable from the present case, for there the bill sued on purported on its face to be drawn at the office of the company, and directed the drawee to charge the amount to the account of the company, of which the signers described themselves as president and secretary.

Our conclusion is that there is nothing upon the face of the note sued on to take it out from under the rule laid down in the decisions of this court already referred to, that upon its face this is *primâ facie* the indorsement of defendant individually, but that extrinsic evidence is admissible to show that he made the indorsement only in his official capacity as the indorsement of the corporation. Order reversed.

8. Liability of agent who contracts in his own name in a simple contract.

§ 197.] HIGGINS *v.* SENIOR.

8 Meeson & Welsby (Exch.), 834. — 1841.

Special assumpsit to recover compensation for the non-delivery of iron. Judgment for plaintiffs. Rule for a non-suit or a new trial. The contract of sale was signed by defendant, but he was known to be acting for the Varteg Iron Co.

Parke, B. The question in this case, which was argued before us in the course of last term, may be stated to be, whether in an action on an agreement in writing, purporting on the face of it to be made by the defendant, and subscribed by him, for the sale and delivery by him of goods above the value of £10, it is competent for the defendant to discharge himself, on an issue on the plea of *non assumpsit* by proving that the agreement was really made by him by the authority

of and as agent for a third person, and that the plaintiff knew those facts at the time when the agreement was made and signed. Upon consideration, we think that it was not, and that the rule for a new trial must be discharged.

There is no doubt that, where such an agreement is made, 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, so as to give the benefit of the contract on the one hand to (*Garrett* v. *Handley*, 4 B. & C. 664; *Bateman* v. *Phillips*, 15 East, 272), and charge with liability on the other (*Paterson* v. *Gandasequi*, 15 East, 62), the unnamed principals; and this, whether the agreement be or be not required to be in writing by the Statute of Frauds: and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal.

But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement, which cannot be done. And this view of the law accords with the decisions, not merely as to bills of exchange (*Sowerby* v. *Butcher*, 2 C. & M. 368; *Le Fevre* v. *Lloyd*, 5 Taunt. 749) signed by a person, without stating his agency on the face of the bill, but as to other written contracts, namely, the cases of *Jones* v. *Littledale*, 6 Ad. & Ell. 486, 1 Nev. & P. 677, and *Magee* v. *Atkinson*, 2 M. & W. 440. It is true that the case of *Jones* v. *Littledale* might be supported on the ground that the agent really intended to contract as principal, but Lord Denman, in delivering the judgment of the court, lays down this as a general proposition, "that if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself

from that responsibility." And this is also laid down in Story on Agency, § 269. *Magee* v. *Atkinson* is a direct authority, and cannot be distinguished from this case.

The case of *Wilson* v. *Hart*, 7 Taunt. 295, 1 Moore, 45, which was cited on the other side, is clearly distinguishable. The contract in writing was, on the face of it, with another person named Read, appearing to be the principal buyer; but there being evidence that the defendant fraudulently put forward Read as the buyer, whom he knew to be insolvent, in order to pay a debt from Read to himself with the goods purchased, and having subsequently got possession of them, it was held, on the principle of *Hill* v. *Perrott*, 3 Taunt. 274, and other cases, that the defendant was liable; and as is observed by Mr. Smith in the very able work to which we were referred (Leading Cases, Vol. II. p. 125), that decision turned altogether upon the fraud, and if it had not, it would have been an authority for the admission of parol evidence to charge the defendant not to discharge Read.

Rule discharged.

§ 197.] BRIGGS *v.* PARTRIDGE.

64 New York, 357. — 1876.

[Reported herein at p. 248.]

9. Liability of agent arising from interest in subject-matter.

§ 199.] WOOLFE *v.* HORNE.

L. R. 2 Queen's Bench Division, 355. — 1877.

Action to recover damages for non-delivery of goods sold by defendants, as auctioneers, to plaintiff. Plaintiff was non-

suited. Order to show cause why non-suit should not be set aside and verdict entered for plaintiff. Defendants relied upon the fact that they sold as agents for a disclosed principal.

MELLOR, J. I am of opinion that the verdict must be entered for the plaintiff. The general doctrine with regard to the authority of auctioneers is laid down in the case of *Williams* v. *Millington*, 1 H. Bl. 81, at pp. 84, 85, by Lord Loughborough, who says: "An auctioneer has a possession coupled with an interest in goods which he is employed to sell, not a bare custody, like a servant or shopman. There is no difference whether the sale be on the premises of the owner, or in a public auction-room; for on the premises of the owner an actual possession is given to the auctioneer and his servants by the owner, not merely an authority to sell. I have said a possession coupled with an interest; but an auctioneer has also a special property in him, with a lien for the charges of the sale, the commission, and the auction duty, which he is bound to pay." Now, it was conceded by the counsel for the defendants that an auctioneer is entitled to sue for the price of goods which he has put up to auction; but it was contended that an auctioneer is no more a contracting party, and no more liable to be sued, than a broker or any other kind of agent. But, having regard to the general doctrine which I have stated, and to the conditions of sale by which the auctioneer undertakes to deliver the goods, and particularly to the condition by which, in case the auctioneers are unable to deliver any lot, the purchaser is to accept compensation, I think that in the present case the auctioneer is responsible for his neglect to deliver.

Then it was contended that the plaintiff had not complied with the conditions of sale as to the removal of his lot within three days, and that he had, therefore, no right of action. My answer to this objection is that these stipulations cannot be looked upon as conditions precedent. I cannot think that the mere fact that the purchaser did not present himself till Monday morning deprived him of the right to claim his goods.

I think, therefore, the action was properly brought against the auctioneers, and that the conditions afford them no defence.

FIELD, J., concurred. Order absolute.

10. Where neither principal nor agent is bound.

§ 200.] LONG *v.* THAYER.

150 UNITED STATES, 520. — 1893.

[Reported herein at p. 141.]

§ 201.] WILSON *v.* SMALES.

1892, 1 QUEEN'S BENCH DIVISION, 456.

ACTION for damages against agents. The agents, having doubt as to the correctness of a telegraphic authority, signed the contract "by telegraphic authority of Sam Reischer, — Smales, Eeles, & Co., as agents." There was a mistake, and Reischer refused to be bound. Plaintiffs sue the agents as upon a warranty of authority. Defendants contend that the signature negatives a warranty.

DENMAN, J. . . . It appeared from the evidence of trustworthy witnesses for the defendants, that whenever charters are entered into by brokers in accordance with telegraphic instructions, it is usual to sign in this form with the very object of avoiding the implication of an absolute warranty. I see no reason to doubt that this was the real object of the defendants in signing as they did; and this being my opinion, I think that there can be no ground for fixing them with a warranty, such as they never intended to give, and which would be wholly inconsistent with the general understanding of persons engaged in the business in which they were employed. I therefore give judgment for defendants with costs.

Judgment for defendants.

§ 202.] BALTZEN *v.* NICOLAY.

53 New York, 467. — 1873.

[Reported herein at p. 352.]

11. Liability of agent for money received through mistake or fraud.

§ 204.] LA FARGE *v.* KNEELAND.

7 Cowen (N. Y.), 456. — 1827.

Assumpsit to recover a balance of an advance made by plaintiffs on certain cotton consigned to them by defendant acting for B. & A. Judgment for plaintiffs.

When defendant received the advance from plaintiffs it was carried to the credit of B. & A., who already had a balance in their favor. Later this balance was, by order of B. & A., credited on defendant's account against B., individually, who, after such credit, still owed defendant.

Curia, *per* Savage, C. J. (after deciding that the court erred in receiving certain testimony). The main question in the case is, whether the defendant can be made liable, he having disclosed his principal at the time? And if that alone is not a sufficient defence, then whether he has so paid over or disposed of the money, as to alter his relation to his principals in respect to it.

The general rule, no doubt, is well settled, that an agent who discloses his principal, and so contracts as to give a remedy against the principal, is not liable personally, unless it was clearly his intention to assume personal responsibility. But where money has been paid to an agent for his principal, under such circumstances that it may be recovered back from the latter, then it may be recovered from the agent, provided he has not paid it to his principal, nor altered his situation in relation to him; for instance, by giving fresh credit. That

point was so decided in *Buller* v. *Harrison*, Cowp. 565. There was in that case, no doubt of a right once to recover from the principal; but the agent of the defendant had given credit to his principal, and rendered him his account containing the credit. His situation, however, was not altered in any other respect. Lord Mansfield said the jury were embarrassed with the question, whether this was a payment over. He said, for some purposes, it would be a payment over; and the law was clear that an agent who received money by mistake, and paid it over, was not liable, but the principal. As there was no alteration, however, in the situation of the agent in relation to his principal, it was held wrong that he should be in any better situation than if the mistake had not happened. It was, therefore, the opinion of the court, that the agent should pay back the money. In *Cox* v. *Prentice* (3 M. & S. 344), Lord Ellenborough says, "I take it to be clear that an agent who receives money for his principal is liable as a principal, 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."

In this case, the defendant has not paid over the money to Braham & Atwood, in any other manner than by passing it to their credit. There was then a large balance in their favor. But Bogart & Kneeland had also an account with Braham alone, who did business upon his own account as well as in connection with Atwood. Atwood, one of the partners, was in New York. The money was received and credited on the 12th of November, 1818. An account sales was rendered on the 28th of the same month, when the credit due to Braham & Atwood was, by their order, transferred to the credit on Braham's separate account. Had this transfer been made to the account of any person distinct from the firm of Braham & Atwood, it would be considered equivalent to a payment. It closed the concerns of Bogart & Kneeland with Braham & Atwood. Braham, in his individual capacity, had nothing to do with Braham & Atwood.

I think, therefore, the judge was correct in charging the jury that this was such an appropriation of the money as excused the defendant from liability.

The ground upon which agents have been held liable, in such cases, is, that there has been no change in the relative situation of the parties. Where there is a mere passing of credit on the books, for instance, the agent still has it in his power to redress himself. It is not, however, in the power of Kneeland, the defendant, to alter the credit to Braham. He cannot retain the money, as he might have done had no transfer been made. Kneeland virtually paid the money to Atwood, and received the same amount on account against Braham.

I think, therefore, the plaintiffs ought not to recover, and that a new trial should be granted.

As the judge erred in receiving testimony, and as the question of appropriation, upon which the jury erred, is a question of law (Cowper, 566), I think the costs should abide the event. It is not strictly a verdict against evidence only.

Rule accordingly.

12. Liability of third person to agent.

§ 207.] KELLY *v.* THUEY.

102 Missouri, 522. — 1890.

[Reported herein at p. 356.]

§ 207.] BRIGGS *v.* PARTRIDGE.

64 New York, 357. — 1876.

[Reported herein at p. 248.]

§ 208.] ROWE *v.* RAND.

111 Indiana, 206.—1887.

[Reported herein at p. 126.]

§ 210.] STEVENSON *v.* MORTIMER.

Cowper's Reports (K. B.), 805.—1778.

[Reported herein at p. 326.]

CHAPTER XVI.

TORTS BETWEEN AGENT AND THIRD PARTY.

1. Liability of agent for non-feasance.

§ **212.**] DELANEY *v.* ROCHEREAU.

34 Louisiana Annual, 1123. — 1882.

Action to hold agents liable to third parties for injuries sustained by the giving way of the gallery of a house in possession and under control of defendants as agents. Judgment for defendants.

Bermudez, C. J. . . . The contention is, that as the injuries received caused intense suffering, and as they were occasioned by the falling of the gallery, which was in very bad condition, to the knowledge of the defendants, who, as the agents of the owner, were bound to keep it in good order, and who, without justification, neglected to do so, their firm and each member thereof are responsible *in solido* for the damages claimed.

The theory on which the suit rests is, that agents are liable to third parties injured for their non-feasance.

In support of that doctrine, both the common and the civil law are invoked.

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, 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.

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.

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 towards 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.

The 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. Story on Agency, 308, 309; Id. on Bailments, 165; Shearman & Redfield on Negligence, 111, 112, ed. 1874; Evans on Agency, notes by Ewell, 437, 438; Wharton on Negligence, 535, 78, 83, 780.

It is an error to suppose that the principle of the civil law, on the liability of agents to third persons, is different from those of the common law. It is certainly not *broader*.

While treating of "negligence in discharge of duties not based on contract," which had not previously been considered, Wharton, beginning the third book of his remarkable work on Negligence, says: —

"The Roman law in this respect rests on the principle that

the necessity of society requires that all citizens should be educated to exercise care and consideration in dealing with the persons and property of others. Whoever directly injures another's person or property by the neglect of such care, is in *culpa*, and is bound to make good the injury caused by his neglect. The *general* responsibility is recognized by the Aquilian law, enacted about three centuries before Christ, which is the basis of Roman jurisprudence in this relation. *Culpa* of this class consists mainly in commission *in faciendo.* Thus, an omission by a stranger to perform an act of charity is not *culpa;* it is *culpa* however to inadvertently place obstacles on a road, over which another falls and is hurt; to kindle a fire by which another's property may be burned; to dig a trench which causes another's wall to fall." He subsequently states that the following are cases in which no responsibility can possibly attach:

"When a man does everything in his power to avoid doing the mischief, or when it is of a character utterly out of the range of expectation, the liability ceases and the event is to be regarded as a casualty.

"If the injury is due to the fault of the party injured, the liability of the party injuring is extinguished.

"*Quod quie ex sua culpa damnum sentit, non intelligitur sentire.*" *Pomponius.* Wharton, 780, 300.

The allusion made by certain writers to the Roman law, which gives a remedy in all cases of special damages, must necessarily be understood as referring to instances in which the wrong or damage is done or inflicted by an actual wrong-doing or commission of the injuring party.

The article of the French code, 1992, from which article 3003 of our R. C. C. derives, which is to the effect that the agent is responsible not only for unfaithfulness in his management, but also for his fault and mistake, contemplates an accountability to the principal only, and this by reason of the assumption of responsibility by the acceptance of the mandate. How, indeed, can an agent be responsible to a third person for the *management* of the affairs of his principal, or

for a *mistake* committed in the administration of his property? The responsibility for *fault* is likewise in favor of the "*mandant*" alone.

The Napoleon Code, article 1165, contains the formal provision that agreements have effect only on the contracting parties; they do not prejudice third parties, nor can they avail them, except in the case mentioned in article 1121. This last article refers to stipulations in favor of *autrui*, which become obligatory when accepted.

The Code of 1808 contained a corresponding article, but that of 1825 did not; neither does the Revised Code of 1870. It must not be concluded, however, that the omission to incorporate the provision in the subsequent legislation must be considered as a repudiation of the doctrine.

The distinguished compilers and framers of the Code of 1825 account for the omission to reproduce, because the provisions were already embodied in other Articles, and might be deemed to be exceptions to the undoubted rule that contracts can only avail, or prejudice, the parties thereto. Projet du Code de 1825, p. 264.

Quod inter alios actum est, aliis neque nocet, neque prodest, § L. 20, De instit. Act; see also Pothier on Oblig. Nos. 85, 87; Domat, L. 1, t. 16, sec. 3, No. 8; L. 2, t. 8; Troplong Mand. No. 510; Duranton, 10, No. 541; Toullier, 6, 341; Toullier, 7, 252, 306; Demolombe, 25, No. 38; Laurent, 10, No. 377; Larombière, 1, 640.

That such is the case was formally recognized by the Court of Cassation of France, in the case of Thomassin, decided in July, 1869, and reported in Part 1 of Dalloz, J. G., for that year. The *syllabus* in the case is in the words following:

"Le mandataire n'est responsable des fautes qu'il commet dans l'exécution du mandat, qu'envers le mandant."

See also, J. G., Vo. Obl., Nos. 878, *et seq.*, and Vo. Mandat, No. 213.

The case of *Beaugillot* v. *Callemer*, 33 Sirey, 322, far from expounding a doctrine antagonistical to that prevailing, as was seen at common-law, and which we consider as well

settled likewise under the civil law, is fully confirmatory of the same.

It was the case of an agent condemned to pay damages for obstructing, by means of beams, a water-course partly closed up by masonry, and thus causing an over-flow, in consequence of which a hay crop was damaged. The plea of *respondeat superior* did not avail. The court well held that the *commission* of the act constituted a *quasi* offence, in justification of which the mandate could not be set up.

This anterior view of the case relieves the court from the necessity of passing upon the other questions presented relative to *fault*, *trespass*, *contributory negligence*, *suffering*, *and damages*.

Judgment affirmed with costs.

§ 212.] BAIRD *v.* SHIPMAN.

132 Illinois, 16. — 1890.

Action for damages for injuries resulting in the death of plaintiff's intestate, caused by the defective condition of premises controlled by defendants, as agents. Judgment for plaintiff.

When defendants rented the premises to one W., the barn-door was in a very insecure condition, and defendants promised W. to repair it. This was not done, and the door fell and killed plaintiff's intestate, an expressman, who was delivering goods at the barn.

The Appellate Court (33 Appellate Court Reports, 503) delivered the following opinion: —

Garnett, P. J. . . . Appellants make two points. First, that the verdict is clearly against the weight of the evidence; second, that they were the agents of the owner, Goodman, and liable to him only for any negligence attributable to them.

There is nothing more than the ordinary conflict of evidence found in such cases, presenting a question of fact for

the jury, and the finding must be respected by this court in deference to the well settled rule.

The other point is not so easily disposed of. An agent is liable to his principal only for mere breach of his contract with his principal. He must have due regard to the rights and safety of third persons. He cannot, in all cases, find shelter behind his principal. If, in the course of his agency, he is intrusted with the operation of a dangerous machine, to guard himself from personal liability he must use proper care in its management and supervision, so that others in the use of ordinary care will not suffer in life, limb, or property. *Suydam* v. *Moore*, 8 Barb. 358; *Phelps* v. *Wait*, 30 N. Y. 78. It is not his contract with the principal which exposes him to or protects him from liability to third persons, but his common-law obligation to so use that which he controls as not to injure another. That obligation is neither increased nor diminished by his entrance upon the duties of agency, nor can its breach be excused by the plea that his principal is chargeable. *Delaney* v. *Rochereau*, 34 La. Ann. 1123.

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 a third person who suffers injury by reason of his having so left them without proper safeguard. *Osborne* v. *Morgan*, 130 Mass. 102.

A number of authorities charge the agent, in such cases, on the ground of misfeasance, as distinguished from non-feasance. Mechem, in his work on Agency (sec. 572), says: "Some confusion has crept into certain cases from 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." To the same effect are *Lottman* v. *Barnett*, 62 Mo. 159; *Martin* v. *Benoist*, 20 Mo. App. 262; *Harriman* v. *Stowe*, 57 Mo. 93; and *Bell* v. *Josselyn*, 3 Gray, 309.

A case parallel to that now in hand is *Campbell* v. *Portland Sugar Co.*, 62 Me. 552, where agents of the Portland Sugar Company had the charge and management of a wharf belonging to the company, and rented the same to tenants, agreeing to keep it in repair. They allowed the covering to become old, worn, and insecure, by means of which the plaintiff was injured. The court held the agents were equally responsible to the injured person with their principals.

Wharton, in his work on Negligence (sec. 535), insists that the distinction, in this class of cases, between non-feasance and misfeasance, can no longer be sustained; that the true doctrine is, that when an agent is employed to work on a particular thing, and has surrendered the thing in question into the principal's hands, then the agent ceases to be liable to third persons for hurt received by them from such thing, though the hurt is remotely due to the agent's negligence, the reason being, that the causal relation between the agent and the person hurt is broken by the interposition of the principal as a distinct center of legal responsibilities and duties, but that wherever there is no such interruption of causal connection, and the agent's negligence directly injures a stranger, the agent having liberty of action in respect

to the injury, then such stranger can recover from the agent damages for the injury. The rule, whether as stated by Mechem or Wharton, is sufficient to charge appellants with damages, under the circumstances disclosed in this record. They had the same control of the premises in question as the owner would have had if he had resided in Chicago, and attended to his own leasing and repairing. In that respect, appellants remained in control of the premises until the door fell upon the deceased. There was no interruption of the causal relation between them and the injured man. They were, in fact, for the time being, substituted in the place of the owner, so far as the control and management of the property was concerned. The principle that makes an independent contractor, to whose control premises upon which he is working are surrendered, liable for damages to strangers, caused by his negligence, although he is at the time doing the work under contract with the owner (Wharton on Negligence, sec. 440), would seem to be sufficient to hold appellants. The owner of cattle who places them in the hands of an agister is not liable for damages committed by them while they are under the control of the agister. It is the possession and control of the cattle which fix the liability, and the law imposes upon the agister the duty to protect strangers from injury by them. *Ward* v. *Brown*, 64 Ill. 307; *Ozburn* v. *Adams*, 70 Id. 291.

When appellants rented the premises to Mrs. Wheeler, in the dangerous condition shown by the evidence, they voluntarily set in motion an agency which, in the ordinary and natural course of events, would expose persons entering the barn to personal injury. Use of the barn for the purpose for which it was used when the deceased came to his death, was one of its ordinary and appropriate uses, and might, by ordinary foresight, have been anticipated. If the insecure condition of the door-fastenings had arisen after the letting to Mrs. Wheeler, a different question would be presented; but as it existed before and at the time of the letting, the owner or persons in control are chargeable with the consequences.

Gridley v. *Bloomington*, 68 Ill. 47; *Tomle* v. *Hampton*, 129 Id. 379.

Neither error is well assigned, and the judgment is affirmed.

PER CURIAM. We fully concur in the legal proposition asserted in the foregoing opinion, and deem it unnecessary to add to what is therein said in support of that proposition.

The judgment is affirmed.

2. Liability of agent for misfeasance.

§ **213.**] WEBER *v.* WEBER.

47 MICHIGAN, 569. — 1882.

CAMPBELL, J. Plaintiff sued defendant in case for making false representations to him concerning the freedom from incumbrance of certain land which she sold to him as agent for her husband, Henry Weber. The declaration contains full averments showing the purchase and payment to have been made in reliance on these representations, — their wilful falsehood, and the loss of the entire premises by sale under the mortgage which existed, and which defendant had said did not exist, by declaring that there was no incumbrance whatever.

Defendant demurred to the declaration on the grounds, *first*, that defendant was Henry Weber's wife, and that he should have been made co-defendant; *second*, that defendant is not averred to have been interested in the property; *third*, that it does not appear the representations were made at Henry Weber's request and by his authority; and *fourth*, that the mortgage being recorded was notice. The court below sustained the demurrer, and gave judgment for defendant.

It is not now claimed that the fact that the mortgage was recorded was of any importance. Where positive represen-

tations are made concerning a title for fraudulent purposes, and are relied on, it can hardly be insisted that what would be merely constructive notice in the absence of such declarations will prevent a person from having the right to rely on statements which, if true, would render a search unnecessary. And it is not necessarily true that a recorded mortgage is unpaid, merely because not discharged.

Neither is it true that an agent is exempt from liability for fraud knowingly committed on behalf of his principal. A person cannot avoid responsibility merely because he gets no personal advantage from his fraud. All persons who are active in defrauding others are liable for what they do, whether they act in one capacity or another. No one can lawfully pursue a knowingly fraudulent employment; and, while it may be true that the principal is often liable for the fraud of his agent, though himself honest, his own fraud will not exonerate his fraudulent agent. *Starkweather* v. *Benjamin,* 32 Mich. 305; *Josselyn* v. *McAllister,* 22 Mich. 300.

If liable at all, the agent may as well be sued separately as any other joint wrong-doer. It is not usually necessary to sue jointly in tort. And we do not think that under our present statutes the case of husband and wife makes any different rule applicable. At common law the husband was liable personally for his wife's torts, and she could not be sued without him. But under our statutes now, that liability has been abolished, and she is solely responsible for them. Comp. L. §§ 6129, 7382. This being the case, we can see no ground for joining them in a suit, unless both are sued as wrong-doers. The evident purpose of the law was to put him, as to her personal wrongs, on the same footing with any third person.

The demurrer should have been overruled. The judgment below must be reversed, with costs of both courts, and the defendant required to answer over within twenty days.

§ 213.] SWIM *v.* WILSON.

90 CALIFORNIA, 126.—1891.

DE HAVEN, J. The plaintiff was the owner of one hundred shares of stock of a mining corporation, issued to one H. B. Parsons, trustee, and properly indorsed by him. This stock was stolen from plaintiff by an employé in his office, and delivered for sale to the defendant, who was engaged in the business of buying and selling stocks on commission. At the time of placing the stock in defendant's possession, the thief represented himself as its owner, and the defendant, relying upon this representation, in good faith, and without any notice that the stock was stolen, sold the same in the usual course of business, and subsequently, still without any notice that the person for whom he had acted in making the sale was not the true owner, paid over to him the net proceeds of such sale. Thereafter, the plaintiff brought this action to recover the value of said stock, alleging that the defendant had converted the same to his own use, and the facts as above stated appearing, the court in which the action was tried gave judgment against defendant for such value, and from this judgment, and an order refusing him a new trial, the defendant appeals.

It is clear that the defendant's principal did not, by stealing plaintiff's property, acquire any legal right to sell it; and it is equally clear that the defendant, acting for him, and as his agent, did not have any greater right, and his act was therefore wholly unauthorized, and in law was a conversion of plaintiff's property.

"It is no defence to an action of trover that the defendant acted as the agent of another. If the principal is a wrong-doer, the agent is a wrong-doer also. A person is guilty of a conversion who sells the property of another without authority from the owner, notwithstanding he acts under the authority of one claiming to be the owner, and is ignorant of

such person's want of title." *Kimball* v. *Billings*, 55 Me. 147; 92 Am. Dec. 581; *Coles* v. *Clark*, 3 Cush. 399; *Koch* v. *Branch*, 44 Mo. 542; 100 Am. Dec. 324.

In *Stephens* v. *Elwall*, 4 Maule & S. 259, this principle was applied where an innocent clerk received goods from an agent of his employer, and forwarded them to such employer abroad, and in rendering his decision on the case presented, Lord Ellenborough uses this language: "The only question is, whether this is a conversion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance, and for his master's benefit, when he sent the goods to his master; but, nevertheless, his acts may amount to a conversion; for a person is guilty of conversion who intermeddles with my property, and disposes of it, and it is no answer that he acted under the authority of another who had himself no authority to dispose of it."

To hold the defendant liable, under the circumstances disclosed here, may seem upon first impression to be a hardship upon him. But it is a matter of every-day experience that one cannot always be perfectly secure from loss in his dealings with others, and the defendant here is only in the position of a person who has trusted to the honesty of another, and has been deceived. He undertook to act as agent for one who, it now appears, was a thief, and, relying on his representations, aided his principal to convert the plantiff's property into money, and it is no greater hardship to require him to pay to the plaintiff its value than it would be to take the same away from the innocent vendee, who purchased and paid for it. And yet it is universally held that the purchaser of stolen chattels, no matter how innocent or free from negligence in the matter, acquires no title to such property as against the owner; and this rule has been applied in this court to the case of an innocent purchaser of shares of stock. *Barstow* v. *Savage Mining Co.*, 64 Cal. 388; 49 Am. Rep. 705; *Sherwood* v. *Meadow Valley Mining Co.*, 50 Cal. 412.

The precise question involved here arose in the case of *Bercich* v. *Marye*, 9 Nev. 312. In that case, as here, the

defendant was a stock-broker who had made a sale of stolen certificates of stock for a stranger, and paid him the proceeds. He was held liable, the court, in the course of its opinion, saying: "It is next objected that as the defendant was the innocent agent of the person for whom he received the shares of stock, without knowledge of the felony, no judgment should have been rendered against him. It is well settled that agency is no defence to an action of trover, to which the present action is analogous."

The same conclusion was reached in *Kimball* v. *Billings*, 55 Me. 147, 92 Am. Dec. 581, the property sold in that case by the agent being stolen government bonds, payable to bearer. The court there said: "Nor is it any defence that the property sold was government bonds payable to bearer. The *bonâ fide* purchaser of a stolen bond payable to bearer might perhaps defend his title against even the true owner. But there is no rule of law that secures immunity to the agent of the thief in such cases, nor to the agent of one not a *bonâ fide* holder. . . . The rule of law protecting *bonâ fide* purchasers of lost or stolen notes and bonds payable to bearer has never been extended to persons not *bonâ fide* purchasers, nor to their agents."

Indeed, we discover no difference in principle between the case at bar and that of *Rogers* v. *Huie*, 1 Cal. 429, 54 Am. Dec. 300, in which case, Bennett, J., speaking for the court, said: "An auctioneer who receives and sells stolen property is liable for the conversion to the same extent as any other merchant or individual. This is so both upon principle and authority. Upon principle, there is no reason why he should be exempted from liability. The person to whom he sells, and who has paid the amount of the purchase money, would be compelled to deliver the property to the true owner or pay him its full value; and there is no more hardship in requiring the auctioneer to account for the value of the goods, than there would be in compelling the right owner to lose them, or the purchaser from the auctioneer to pay for them."

It is true that this same case afterwards came before the

court, and it was held, in an opinion reported in 2 Cal. 571, 56 Am. Dec. 363, that an auctioneer who in the regular course of his business receives and sells stolen goods, and pays over the proceeds to the felon, without notice that the goods were stolen, is not liable to the true owner as for a conversion. This latter decision, however, cannot be sustained on principle, is opposed to the great weight of authority, and has been practically overruled in the later case of *Cerkel* v. *Waterman*, 63 Cal. 34. In that case the defendants, who were commission merchants, sold a quantity of wheat, supposing it to be the property of one Williams, and paid over to him the proceeds of the sale, before they knew of the claim of the plaintiff in that action. There was no fraud or bad faith, but the court held the defendants there liable for the conversion of the wheat.

It was the duty of the defendant in this case to know for whom he acted, and, unless he was willing to take the chances of loss, he ought to have satisfied himself that his principal was able to save him harmless if in the matter of his agency he incurred a personal liability by the conversion of property not belonging to such principal.

Judgment and order affirmed.

GAROUTTE, MCFARLAND, and SHARPSTEIN, JJ., concurred.

BEATTY, C. J., and PATTERSON, J., dissented.

Rehearing denied.

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