CASES

ON

THE LAW OF AGENCY

To accompany this volume:

THE LAW OF AGENCY, Including the Law of Principal and Agent and the Law of Master and Servant. By Ernest W. Huffcut. Second Edition, Revised and Enlarged.

CASES

ON

THE LAW OF AGENCY

INCLUDING

THE LAW OF PRINCIPAL AND AGENT

AND

THE LAW OF MASTER AND SERVANT

EDITED BY

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NOTE

THE cases which follow are arranged in accordance with the analysis of the editor's second edition of the Law of Agency in this series. The second edition of the text, and, correspondingly, this (the second) edition of the casebook, include both the Law of Principal and Agent and the Law of Master and Servant.

E. W. H.

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CASES ON AGENCY.

BOOK I.

PRINCIPAL AND AGENT.

CHAPTER I.

Preliminary Topics.

1. *Distinction between Agent and Servant.*

KINGAN & CO. *v.* SILVERS.

13 Ind. App. 80. 1895.

Lotz, J. The appellant was the plaintiff and the appellees the defendants in the court below. The complaint is in one paragraph, and alleges that on September 25, 1888, the defendants, at Lebanon, Ind., executed to the plaintiff the following note:

$388.03. Lebanon, Ind., Sept. 25, 1888.

Ninety days after date we promise to pay to the order of Kingan and Co., at the Meridian National Bank of Indianapolis, Ind., three hundred and eighty-eight and 03-100 dollars, with eight per cent. interest after maturity until paid, and five (5) per cent attorney's fees; value received; without any relief from valuation or appraisement laws. And it is hereby understood that the drawers and indorsers severally waive presentment for payment, protest, and notice of protest, and nonpayment of this note.

W. F. Silvers.
James Silvers.

Due Dec. 24, 1888.

The complaint further alleges that the note was procured from defendants by the plaintiff's travelling salesman, one W. H. Nichols; that said salesman was not a general agent, and had no general authority to make settlements or take notes on plaintiff's account, nor was that a part of his duties; that, being about to go to Lebanon in the course of his duties as such travelling salesman, the plaintiff instructed him to procure for plaintiff from defendants a note on account of an indebtedness to plaintiff amounting to $388.03; that this agent accordingly procured the note sued upon; that, after the execution of the note, the agent took it to another part of Lebanon, entirely away from and out of communication with defendants, or either of them, and there, while he was in the process of conveying

the note to plaintiff, and without the authority or knowledge or consent of the plaintiff or of the defendants or either of them, he altered the note by striking out the words "after maturity" and inserting the words "from date," so as to make the note read, "with eight (8) per cent interest from date;" that the agent then transmitted the note to plaintiff, but did not inform plaintiff of the alteration, nor did plaintiff have any knowledge of it until after the note became due, and was sent to Lebanon for collection; that the plaintiff has never in any way ratified or approved the agent's act in changing said note, but, since learning of the same, has only demanded, and now only demands, payment of the note as originally executed; that the agent believed that he had the right to make the alteration; that the note was written on a printed blank; and that in commerce it is the constant practice, if the instrument is to bear interest from date, to make a change exactly similar to this change, and that there was nothing in the appearance of the note to put plaintiff upon inquiry.

The defendants separately demurred to the complaint for want of sufficient facts. The demurrers were sustained, to which ruling the plaintiff excepted, and, electing to abide by its complaint, final judgment on demurrer was rendered for the defendants.

The errors assigned are the rulings of the court in sustaining the separate demurrers to the complaint. According to the allegations of the complaint, the note, as originally executed, provided for "eight per cent interest after maturity until paid." It was altered or changed by striking out the words "after maturity" and the words "from date" inserted, so as to make it read, "with eight per cent interest from date." This was a material alteration, and so changed the terms of the note as to increase the obligations of the makers. . . . The change in the note was not made by the plaintiff's order or direction, but it intrusted certain business to another as its agent, and such person made the alteration. If the alteration was made by the agent while in the transaction of the principal's business, and in the scope of his authority, then the act of the agent is the act of the principal, — *Qui facit per alium facit per se.*

The solution of this case depends upon the relation existing between Nichols and the plaintiff at the time the alteration was made. If he was the plaintiff's agent, and the act was within the scope of his authority, then his act must be deemed the act of the plaintiff, and the law is with the defendants. If his position was that of a mere stranger to the note, then the law is with the plaintiff. . . .

The appellees insist that Nichols was the agent of the payee in making the alteration; that he was acting in the line of his agency, and under color of his employment; that his wrongful act is imputable to his principal. In support of this position appellees' learned counsel say: "This is upon the legal maxim, 'Whatever a man *sui juris* may do of himself, he may do by another,' and, as a correlative, what-

ever is done by such other in the course of his employment is deemed to be done by the party himself. On this principle the liability of one person for the acts of another who is employed in the capacity of an agent is extended to the wrongful and tortious acts of the latter committed in the line and under color of the agency, although such unlawful acts were not contemplated by the employment, and were done by the agent in good faith, and by mistake. In other words, where a principal directs an act to be done by an agent in a lawful manner, but the agent errs in the mode of executing his authority to the prejudice of another person, the principal will be held responsible." This is a correct statement of the law. The same principles extend to the relations existing between a master and his servant. Thus, if the engineer of a railway company negligently run a train of cars over a person who is without fault, the company is liable for the injury caused. The same doctrine is applied to the wilful acts and the mistakes of agents and servants, committed by them while acting within the scope of the agency or line of the employment. May *v.* Bliss, 22 Vt. 477; Luttrell *v.* Hazen, 3 Sneed, 20; Pennsylvania Co. *v.* Weddle, 100 Ind. 138; Railroad Co. *v.* McKee, 99 Ind. 519; Crockett *v.* Calvert, 8 Ind. 127.

At the time Nichols made the alteration of the note, was he the agent or servant of the plaintiff in respect to his duties pertaining to said note? It is averred that he was the travelling salesman, but that he was not a general agent, and had no authority to make settlements or take notes on plaintiff's accounts, nor was that any part of his duties; that, being about to go to Lebanon in the course of his duties as such travelling salesman, the plaintiff instructed him to procure for plaintiff from the defendants a note on account of an indebtedness due from them to the plaintiff. But the averments of the complaint negativing the fact of agency will not control if it appear from all the averments that the legal relation of agency exists. The same person may be a special agent for the same principal in several different matters. Nichols was the agent of the plaintiff to sell goods. He was also its agent to procure the note. We are here concerned with the latter agency only. Did his relation as agent cease when he obtained the note, or did it continue until the note was delivered to the plaintiff? If the agency ceased when the note was obtained by him, what relation did he sustain to the plaintiff in the interval of time between the delivery to him and the delivery to the plaintiff?

This leads to the inquiry, who are agents, and who are servants? In the primitive conditions of society, the things which were the subjects of sale and trade were few in number. There was little occasion for any one to engage in commercial transactions, and when it did become necessary the business was generally transacted by the parties thereto in person. But the strong and powerful had many servants, who were usually slaves. The servants performed menial

and manual services for the master. As civilization advanced, the things which are the subjects of commerce increased, and it became necessary to perform commercial transactions through the medium of other persons. The relation of principal and agent is but an outgrowth or expansion of the relation of master and servant. The same rules that apply to the one generally apply to the other. There is a marked similarity in the legal consequences flowing from the two relations. It is often difficult to distinguish the difference between an agent and a servant. This difficulty is increased by the fact that the same individual often combines in his own person the functions of both agent and servant. Agents are often denominated servants, and servants are often called agents. The word "servant," in its broadest meaning, includes an agent. There is, however, in legal contemplation, a difference between an agent and a servant. The Romans, to whom we are indebted for many of the principles of agency, in the early stages of their laws used the terms *mandatum* (to put into one's hand, or confide to the discretion of another) and *negotium* (to transact business, or to treat concerning purchases) in describing this relation. Story, Ag. § 4. Agency, properly speaking, relates to commercial or business transactions, while service has reference to actions upon or concerning things. Service deals with matters of manual or mechanical execution. An agent is the more direct representative of the master, and clothed with higher powers and broader discretion than a servant. Mechem, Ag. §§ 1, 2.

The terms "agent" and "servant" are so frequently used interchangeably in the adjudications that the reader is apt to conclude they mean the same thing. We think, however, that the history of the law bearing on this subject shows that there is a difference between them. Agency, in its legal sense, always imports commercial dealings between two parties by and through the medium of another. An agent negotiates or treats with third parties in commercial matters for another. When Nichols was engaged in treating with the defendants concerning the note, he was an agent. When the note was delivered to him, it was in law delivered to the plaintiff, and he ceased to treat or deal with the defendants. All his duties concerning the note then related to the plaintiff. It was his duty to carry and deliver it to the plaintiff. In doing this he owed no duty to the defendants. He ceased to be an agent, because he was not required to deal further with third parties. He was then a mere servant of the plaintiff, charged with the duty of faithfully carrying and delivering the note to his master. When Nichols made the alteration in the note he was the servant, and not the agent, of the plaintiff. . . .

Appellees' learned counsel further contend that if it be true that the master is liable for the wrongful and tortious acts of his servant, it can make but little difference whether Nichols was agent or servant when he made the change. Upon what principle is the master liable

for the wrongful acts of his servant? This inquiry carries us back to the very dawn of jurisprudence.

The principle involved in this case is that of the master's liability for the tort of his servant. Let us take a common illustration: The driver of a grocer's cart negligently runs over another in the street, the person injured being without fault. The grocer is liable for the negligence of his servant, the driver. But why, or upon what principle? It is sometimes said that the reason for the master's liability in such cases is his negligence in employing an unskilful servant. If this were really the true reason, the logical result would be that, if the master was guilty of no negligence in employing the servant, he would not be liable. This, however, we know does not follow. It is no defence that the master used the greatest care in employing his servant. Again, suppose an engineer or servant of a railroad company wilfully run a train of cars over another person, we know the company is liable for the wrongful act of its servant, and that it is no excuse for the company to say it did not authorize the act, and that it was done without the knowledge or consent of the company, or against its express will or order.

It is difficult to understand this principle of liability unless we approach it from the side of history. It is, in reality, a survival of the ancient doctrine that the master or owner was liable for the act of his slave, and for injuries committed by animals in his possession. The ancient idea was that the family of the master, including his slaves, his animals, and all other property, was a unity; and that the personality of the master affected all of his property; that, as he was entitled to all the benefits of ownership, he must accept the consequences flowing from injuries caused by his property. He might buy off the vengeance of the injured person, or he might appease it by surrendering the offending property to the person aggrieved. In Roman law there was a class of actions known as *noxal* actions which provided for this vicarious liability. The defendant had the option of surrendering the delinquent, instead of paying damages. In ancient times the masses were slaves; in modern times the masses are freemen. When slaves became freemen, the master was shorn of his power to surrender the delinquent servant; but he still continues to be liable for the acts of this servant done in the line of the employment. This principle of liability originates in slavery, and in the power and dominion that the master exercised over the members of his family. But it may be said that, as the master has ceased to have any property in his servants, and as he is shorn of his power to surrender a delinquent, the reason for the rule fails, and that the law must fall with the reason, and that this would result in exonerating the master from all liability in all such cases. It is true that the power of surrendering the delinquent has ceased, but it is not true that the personality of the master has ceased to affect his servants. The will of the master domi-

nates any given enterprise. He calls to his aid servants and appliances. The servant surrenders his time, and in a measure permits the will of the master to dominate and control his actions. He is the instrument of his master in accomplishing certain ends. The servant is placed in the position and given the opportunity to commit the wrong by the will of the master. In a qualified sense, the servant is the representative of the master. Without the controlling, dominating influence of the master's will, there is but the remotest probability that the servant would have been placed in the position or given the opportunity to commit the particular wrong. Anciently, the liability of the master was not limited by the duties imposed upon his slave. When a servant became a freeman he was no longer a member of the master's family, and he could not properly be said to be the representative of his master, except in the line of the employment. Modern jurisprudence properly and justly limits the liability of the master to the acts of his servant done within the scope of his employment. There are still substantial and just grounds for the principle that the master is liable for the wrongful acts of his servant. No liability arises against the master for the wrongful acts of his servant unless the servant has perpetrated an injury either upon the person or property of another.

Nichols was the servant of the plaintiff when he made the alteration of the note. But did he inflict any injury upon the property of the defendants? Certainly not. The injury, if any, was inflicted by the servant upon the property of his own master, and not upon the property of the defendants. If appellees' contention be true, Nichols destroyed the plaintiff's note, and no recovery can be had upon it, nor upon the original consideration. The principle that the master is liable for the tortious acts of his servant committed in the line of his employment has no application to the facts of this case, for no injury was done the defendants' property.

Even if it be conceded that Nichols was the agent of the plaintiff when he made the alteration, there is high authority sustaining the position that in doing so he exceeded his authority, and that his act would not be binding on his principal. An agent to transact the business of the principal is not clothed with authority to destroy the property of the principal, or to violate a rule of public policy. Nickerson *v.* Swett, 135 Mass. 514; Gleason *v.* Hamilton, 138 N. Y. 353, 34 N. E. 283; Hunt *v.* Gray, 35 N. J. Law, 227; Yeager *v.* Musgrave, 28 W. Va. 90; Bigelow *v.* Stilphen, 35 Vt. 521. As announcing a contrary rule, the appellees cite and rely upon Hollingsworth *v.* Holbrook, 80 Iowa, 151; Reynolds *v.* Witte, 13 S. C. 5; Bowser *v.* Cole, 74 Tex. 212, 11 S. W. 1131. These cases seem to support appellees' contention. We think the first rule is more in accordance with justice and right.

The change made in the note in this case was not only a material

one, but, as it seems, one that could have been made only for a fraudulent purpose, — that of increasing the obligations of the makers and inuring to the benefit of the holder. If the alteration was made for a fraudulent purpose, and the act of Nichols be construed as the act of the plaintiff, then it would result in the plaintiff losing its debt entirely, for there can be no recovery upon the note in either its original or altered state, nor upon the original consideration, and the defendants would be forever released from paying the debt. No direct injury was done the defendants by the alteration of the note. The utmost that can be said is that a rule of public policy was violated. The doctrine of public policy, like the Statute of Frauds, should be invoked to prevent, and not to perpetrate, a fraud. A clear and unmistakable case of the violation of a rule of public policy should be made before the law will lend its aid to depriving one person of his property for the benefit of another.

Our conclusion is that Nichols, when he made the alteration of the note, stood in the relation to it of a stranger, and that his act was a mere spoliation. In the consideration of this case we have been materially assisted by the oral argument and briefs of able counsel. Judgment reversed, at the costs of appellees, with instructions to overrule the demurrers to the complaint.

DAVIS, C. J., and GAVIN, J., dissent.

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2. *Combination of Functions of Agent and Servant in the same Representative.*

SINGER MANUFACTURING CO. *v.* RAHN.

132 U. S. 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 dis-

approved 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 "further 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.*

KINGAN & CO. *v.* SILVERS.

13 Ind. App. 80. 1895.

[Reported herein at p. 1.]

3. *Construction of Words Descriptive of Service in Statutes.*

The rights of employees have sometimes, by statute, been made to depend upon the character of the services they perform, and the courts have, by reason of this fact, been forced, in construing these statutes, to distinguish carefully between various words descriptive of employees performing different kinds of service.

Thus, in Hand *v.* Cole, 88 Tenn. 400, a travelling salesman or drummer brought an action against the stockholders of the corporation employing him to recover his salary under a statute providing that "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 court, in holding the defendants liable, said, in part:

"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."

In Jones *v.* Avery, 50 Mich. 326, the plaintiff brought an action against a stock-

holder to recover salary due him from the corporation under a statute making the stockholders personally liable "for all labor performed" for corporations. The court in sustaining a judgment for defendant, said, in part:

"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 descriptive words in the New York Stock Corporation Law, § 54, are "laborers, servants, or employees other than contractors." In Bristor *v.* Smith, 158 N. Y. 157, the court in holding that an attorney and counselor-at-law, regularly employed at a fixed salary, is not an employee under the statute, said:

"The statute was a continuation of previous legislation, which had for its object the protection of those who earned their living by manual labor, and not by professional services, and who were supposed to be the least able to protect themselves. To such persons, and to all who become employed in subordinate and humble capacities and to whom the hardship would be great, if their wages or salaries were not promptly paid, the legislative policy is to afford the protection of a recourse to the stockholders of a company, upon the latter's default. (Coffin *v.* Reynolds, 37 N. Y. 640; Gurney *v.* Atl. & Gt. W. Railway Co., 58 *ib.* 358; Wakefield *v.* Fargo, 90 *ib.* 213.) When, in section 54 of the Stock Corporation Law, the general word 'employees' was added after the words 'laborers' and 'servants,' it could not have been intended, from the collocation of words and for the want of reason in the thing, to include persons performing services to the corporation of a higher dignity, such as its legal adviser."

PART I.

FORMATION OF THE RELATION OF PRINCIPAL AND AGENT.

CHAPTER II.

Formation of the Relation by Agreement.

1. *Agreement by Contract or Conduct.*

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

16 U. S. App. 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 com-

pany 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 Aug. 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 probabilities, 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.

ALLEN *v.* BRYSON.

67 Iowa, 591. 1885.

[Reported herein at p. 210.]

2. *Competency of Parties.*

PHILPOT *v.* BINGHAM.

55 Ala. 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, [1897] A. C. 22, reversing [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; Thomason *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. 636; Knox *v.* Flack, 22 Penn. 33; Tyler on Infancy, 46–47; 1 Amer. Leading Cases, 5th ed. 247, in margin; Saunderson *v.* Marr, 1 H. Bla. 76; Tucker *v.* Moreland, 10 Pet. 58, 68; 2 Kent's Com., m. p. 235. So, in Alabama, it has been said, "an infant cannot appoint an agent." Ware *v.* Cartledge, 24 Ala. 628. In Weaver *v.* Jones, 24 Ala. 424, 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; Haney *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.[1]

COURSOLLE *v.* WEYERHAUSER.

69 Minn. 328. 1897.

APPEAL by plaintiff from a judgment for defendant in an action to determine adverse claims to land.

Under an act of Congress there was issued to plaintiff in 1856 scrip for 320 acres of land. In 1870, when 20 years old, plaintiff sold the scrip to Dorr and executed two powers of attorney, one authorizing Dorr to locate the land, and one authorizing him to sell and convey any land to which plaintiff might be entitled by virtue of the scrip. Dorr, in the name of plaintiff, sold and conveyed the land in controversy to Brown, and afterward located the scrip on the lands so sold and conveyed. The entry was later cancelled by the land office on the ground that plaintiff was not of age when he executed the power of attorney under which the entry was made. In 1878, when plaintiff was 28, he executed another power of attorney authorizing Brown to locate the land, and under this Brown relocated the scrip on the same land, but, of course, in plaintiff's name. On this entry, patents to the land were issued in plaintiff's name and delivered to Brown. Defendants hold under mesne conveyances from Brown, taken without knowledge of any claim in plaintiff. In 1895 plaintiff began this action.

MITCHELL, J. . . . We are of the opinion that the doctrine of rati-

[1] Accord (in addition to cases cited in the opinion above): Waples *v.* Hastings, 3 Harr. (Del.) 403; Trueblood *v.* Trueblood, 8 Ind. 195; Armitage *v.* Widoe, 36 Mich. 124; Wamboie *v.* Foote, 2 Dak. 1 (statutory). The acts of an attorney-at-law appointed by an infant were held to be void in Wainwright *v.* Wilkinson, 62 Md. 146; see also Turner *v.* Bondalier, 31 Mo. App. 582.

fication is applicable. Two defects in the Brown title were: First, that plaintiff was a minor when he executed to Dorr the power of attorney to sell and convey the land; and, second, that the conveyance was not authorized by the power, because the land had not then been entered with the scrip. We are of the opinion that plaintiff, by his conduct, had fully ratified both the power of attorney and the deed assumed to be executed under it, — at least, as to both these defects. As respects the fact that the conveyance before the entry of the land was unauthorized by the power, there is no difficulty in holding that the conveyance was subsequently ratified by plaintiff's conduct.

We are not unmindful of the general rule that the form of ratification should be the same as required for the original appointment; but until the amendment of G. S. 1878, c. 41, § 12, in 1887 (see G. S. 1894, § 4215), the authority of an agent to make a contract for the sale of land was not required to be in writing. Dickerman *v.* Ashton 21 Minn. 538; Brown *v.* Eaton, id. 409. And, where an agent authorized to contract to sell conveys under a defective power, the deed will be treated as a good contract to sell. Minor *v.* Willoughby, 3 Minn. 154 (225); Hersey *v.* Lambert, 50 Minn. 373, 52 N. W. 963. Ratification may be implied from the principal's acts, and from silence and nonaction as well as from affirmative words and acts. The execution of the power of attorney in 1878 to relocate the scrip for the purpose of protecting Brown's title, after being fully advised of all the facts, followed by an entire omission for 17 years to assert by word or act any claim to the land, or to repudiate what had been done in his name, constituted a ratification on plaintiff's part of what had been done, as far as those things were capable of ratification.

The rule is that the act to be ratified must be voidable merely, and not absolutely void; and the question remains — which to our minds is the most important one in the case — whether the act of a minor in appointing an agent or attorney is wholly void, or merely voidable. Formerly the acts and contracts of infants were held either void, or merely voidable, depending on whether they were necessarily prejudicial to their interests, or were or might be beneficial to them. This threw upon the courts the burden of deciding in each particular case whether the act in question was necessarily prejudicial to the infant. Latterly the courts have refused to take this responsibility, on the ground that, if the infant wishes to determine the question for himself on arriving at his majority, he should be allowed to do so, and that he is sufficiently protected by his right of avoidance. Hence the almost universal modern doctrine is that all the acts and contracts of an infant are merely voidable. Upon this rule there seems to have been ingrafted the exception that the act of an infant in appointing an agent or attorney, and consequently all acts and

contracts of the agent or attorney under such appointment, are absolutely void. This exception does not seem to be founded on any sound principle, and all the text writers and courts who have discussed the subject have, so far as we can discover, conceded such to be the fact.

On principle, we think the power of attorney of an infant, and the acts and contracts made under it, should stand on the same footing as any other act or contract, and should be considered voidable in the same manner as his personal acts and contracts are considered voidable. If the conveyance of land by an infant personally, who is of imperfect capacity, is only voidable, as is the law, it is difficult to see why his conveyance made through an attorney of perfect capacity should be held absolutely void. It is a noticeable fact that nearly all the old cases cited in support of this exception to the general rule are cases of technical warrants of attorney to appear in court and confess judgment. In these cases the courts hold that they would always set aside the judgment at the instance of the infant, but we do not find that any of them go as far as to hold that the judgment is good for no purpose and at no time.

The courts have from time to time made so many exceptions to the exception itself that there seems to be very little left of it, unless it be in cases of powers of attorney required to be under seal, and warrants of attorney to appear and confess judgment in court. See Freeman's note to Craig *v.* Van Bebber, 18 Am. St. Rep. 629 (s.c., 100 Mo. 584, 13 S. W. 906); Schouler, Dom. Rel. § 406; Ewell's Lead. Cas. 44, 45, and note; Bishop, Cont. § 930; Metcalf, Cont. (2d ed.) 48; Whitney *v.* Dutch, 14 Mass. 457–463; Bool *v.* Mix, 17 Wend. 119–131.

Hence, notwithstanding numerous general statements in the books to the contrary, we feel at liberty to hold, in accordance with what we deem sound principle, that the power of attorney from plaintiff to Dorr, and the deed to Brown under that power, were not absolutely void because of plaintiff's infancy, but merely voidable, and that they were ratified by him after attaining his majority. . . .

Judgment affirmed.[1]

BUCK, J. dissents.

[1] An infant partner may authorize the adult partner to execute a joint promissory note which will be good against the infant until avoided, and which the infant may ratify. Whitney *v.* Dutch, 14 Mass. 457. An infant payee of a promissory note may authorize an agent to indorse and transfer it. Hastings *v.* Dollarhide, 24 Calif. 195; Hardy *v.* Waters, 38 Me. 450. An infant may authorize an agent to rescind a contract for him. Towle *v.* Dresser, 73 Me. 252. See also Patterson *v.* Lippincott, 47 N. J. L. 457, *post*, p. 535, where a contract of purchase by an infant, through an agent, was held voidable but not void.

DEXTER *v.* HALL.

15 Wall. (U. S.) 9. 1872.

EJECTMENT by heirs of John Hall against defendant. John Hall while insane executed a power of attorney to one Harris to sell the lands in question. Harris conveyed under the power to defendant's grantors. Hall died while still insane. Verdict and judgment for plaintiff.

Mr. Justice STRONG delivered the opinion of the court.

The prominent question in this case is, whether a power of attorney executed by a lunatic is void, or whether it is only voidable. The Circuit Court instructed the jury that a lunatic, or insane person, being of unsound mind, was incapable of executing a contract, deed, power of attorney, or other instrument requiring volition and understanding, and that a power of attorney executed by an insane person, or one of unsound mind, was absolutely void. To this instruction the defendant below excepted, and he has now assigned it for error.

Looking at the subject in the light of reason, it is difficult to perceive how one incapable of understanding, and of acting in the ordinary affairs of life, can make an instrument the efficacy of which consists in the fact that it expresses his intention, or more properly, his mental conclusions. The fundamental idea of a contract is that it requires the assent of two minds. But a lunatic, or a person *non compos mentis,* has nothing which the law recognizes as a mind, and it would seem, therefore, upon principle, that he cannot make a contract which may have any efficacy as such. He is not amenable to the criminal laws, because he is incapable of discriminating between that which is right and that which is wrong. The government does not hold him responsible for acts injurious to itself. Why, then, should one who has obtained from him that which purports to be a contract be permitted to hold him bound by its provisions, even until he may choose to avoid it? If this may be, efficacy is given to a form to which there has been no mental assent. A contract is made without any agreement of minds. And as it plainly requires the possession and exercise of reason quite as much to avoid a contract as to make it, the contract of a person without mind has the same effect as it would have had he been in full possession of ordinary understanding. While he continues insane he cannot avoid it; and if, therefore, it is operative until avoided, the law affords a lunatic no protection against himself. Yet a lunatic, equally with an infant, is confessedly under the protection of courts of law as well as courts of equity. The contracts of the latter, it is true, are generally

held to be only voidable (his power of attorney being an exception). Unlike a lunatic, he is not destitute of reason. He has a mind, but it is immature, insufficient to justify his assuming a binding obligation. And he may deny or avoid his contract at any time, either during his minority or after he comes of age. This is for him a sufficient protection. But as a lunatic cannot avoid a contract, for want of mental capacity, he has no protection if his contract is only voidable.

It must be admitted, however, that there are decisions which have treated deeds and conveyances of idiots and lunatics as merely voidable, and not void. . . .

(The court then discusses various English authorities upon the subject of lunatics' deeds and conveyances.)

In this country there has been inconsistency of decision. Some courts have followed Mr. Justice Blackstone, and Beverly's Case, 4 Reports, 123 *b*, without noticing the distinction made in Leach *v.* Thompson, Carthew, 435; Yates *v.* Boen, 2 Strange, 1104, and other English cases. Such are the decisions cited from New York, beginning with Jackson *v.* Gumaer, 2 Cowen, 552, and those relied upon made in other states. Nowhere, however, is it held that the power of attorney of a lunatic, or any deed of his which delegates authority but conveys no interest, is not wholly void. And in Pennsylvania, in the Estate of Sarah De Silver, 5 Rawle, 111, it was directly ruled that a lunatic's deed of bargain and sale is absolutely null and void, and the distinction between his feoffment and his deed was recognized. So also in Rogers *v.* Walker, 6 Penn. St. 371, which was an ejectment by a lunatic, it was held that a purchaser from her had no equity to be reimbursed his purchase-money, or the cost of improvements, and Chief Justice GIBSON said: "Since the time of Thompson *v.* Leach, Carthew, 435, it has been held that a lunatic's conveyance executed by sealing and delivery only is absolutely void as to third parties, and why not void as to the grantor? It was said to be so for the very unphilosophical reason, that the law does not allow him to stultify himself, — an early absurdity of the common law, which was exploded with us by Bensell *v.* Chancellor, 5 Wharton, 371."

The doctrine that a lunatic's power of attorney is void finds confirmation in the analogy there is between the situation and acts of infants and lunatics. Both such classes of persons are regarded as under the protection of the law. But, as already remarked, a lunatic needs more protection than a minor. The latter is presumed to lack sufficient discretion. Reason is wanting in degree. With a lunatic it is wanting altogether. Yet it is universally held, as laid down by Lord Mansfield, in Zouch *v.* Parsons, 3 Burrow, 1805, that deeds of an infant which do not take effect by delivery of his hand (in which class he places a letter of attorney), are void. We are not aware that any different rule exists in England or in this country.

It has repeatedly been determined that a power of attorney made by an infant is void. Saunderson *v.* Marr, 1 Henry Blackstone, 76; 2 Lilly, Abridgment, 69; 1 American Leading Cases, 248–9. So it has been decided in Ohio, Lawrence *v.* McArter, 10 Ohio, 37, in Kentucky, Pyle *v.* Cravens, 4 Littell, 17, in Massachusetts, Whitney *v.* Dutch, 14 Mass. 462, and in New York, Fonda *v.* Van Horne, 15 Wendell, 636. In fact we know no case of authority in which the letter of attorney of either an infant or a lunatic has been held merely voidable.

It must, therefore, be concluded that the Circuit Court was not in error in instructing the jury that a power of attorney executed by an insane person, or one of unsound mind, is absolutely void. . . .

Judgment affirmed.

DREW *v.* NUNN.

4 Q. B. D. (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 had knowledge of his principal's incompetency to act. In a case of that 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.

MERRITT *v.* MERRITT.

43 N. Y. App. Div. 68. 1899.

APPEAL by the defendant, John Merritt, as executor of and trustee under the will of Hannah B. Merritt, deceased, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 2d day of July, 1898,

upon the decision of the court rendered after a trial at the New York Special Term.

This action was brought to foreclose a mortgage executed in the name of Hannah B. Merritt, now deceased, by George Merritt, her attorney in fact. The mortgagee, John Post, assigned the bond and mortgage to the plaintiffs. The defence was that at the time of the execution of the mortgage Hannah B. Merritt was *non compos mentis* and that she received no consideration therefor.

The nature of the action and the defence are stated in the opinion upon a former appeal. (27 App. Div. 208.)

BARRETT, J. What we held, when this case was before us upon the former appeal was, as correctly stated in the head note, that "the authority of an agent acting under a power of attorney ceases or is suspended by the insanity of his principal; and where the fact of such insanity is known, both to the agent *and to the party dealing with him,* the contract entered into by the agent on behalf of his principal is not binding upon the latter." This precise proposition was all that the exceptions contained in the record then called upon us to decide. A different question is presented upon this appeal. Upon the second trial, now under review, the plaintiffs rested, as they did before, upon proof of the power of attorney from Mrs. Hannah B. Merritt to her son, George Merritt, of the bond and mortgage executed by the latter as such attorney to William Post, and of the assignment of the bond and mortgage by Post to the plaintiffs. It is not disputed that upon this proof the plaintiffs were *prima facie* entitled to a judgment of foreclosure and sale as prayed for. The defendant John Merritt, as executor and trustee under Mrs. Merritt's will, then proceeded with his defence. He gave evidence tending to show that, at the time when the bond and mortgage were executed, Mrs. Merritt was *non compos mentis.* Before he had completed his proofs on this head, the learned trial justice asked his counsel whether he intended to offer evidence showing knowledge on Mr. Post's part of Mrs. Merritt's insanity at the time he took the bond and mortgage. The counsel's reply was in the negative. Thereupon the court held that Mrs. Merritt's insanity, standing alone, was no defence to the action, and that the defendant was bound to prove the additional fact that Post knew of her insanity, or had reason to believe that she was insane, when he took the bond and mortgage. Acting upon this view, the learned justice declined to pass upon the question of Mrs. Merritt's sanity, and at once gave judgment for the plaintiffs. In his decision he frankly and fairly states that "the defendant did not complete his proof as to the mental condition of Hannah B. Merritt, and I make no decision as to what her mental condition was at the time of the execution of the bond and mortgage in suit."

We think that, under the authorities in this State, this was an

inaccurate view of the burden of proof. It was seemingly in accordance with the rule in England (Campbell *v.* Hooper, 3 Smale & G. 153), where Vice-Chancellor Stuart in a similar case said that you must show that the contracting party, claiming under the contract (there, as here, a mortgage), knew of the lunacy of the other party and took advantage of it, before you can deprive him of the right to recover under the contract at law, and it would be very strange if a court of equity in dealing with contracts were to proceed upon a different principle. So, in Imperial Loan Co. *v.* Stone (61 L. J. [Q. B.] 499), it was held that the burden of proving both the insanity and the knowledge of it by the other contracting party lies upon the party seeking to avoid the contract.

In this State, however, the rule is the other way. Whatever question there may be as to deeds, it is well settled that a mortgage executed by a lunatic is voidable only. (Ingraham *v.* Baldwin, 9 N. Y. 45.) Being voidable at the election of the lunatic's personal representatives, the latter may in the first instance rest upon proof of the lunacy, and it thereupon becomes incumbent upon the mortgagee or his assignees "to show the facts necessary in equity to sustain" the instrument. (Goodyear *v.* Adams, 24 N. Y. St. Repr. 31; affd., 119 N. Y. 650; Riggs *v.* American Tract Society, 84 *id.* 330; Hicks *v.* Marshall, 8 Hun, 327; Johnston *v.* Stone, 35 *id.* 380, 383.) Our rule seems to be the more reasonable one. It is quite enough to put upon the lunatic's representatives the burden of proving the lunacy. That burden is by no means light. They must show that their testator, when he executed the instrument, was "so deprived of his mental faculties as to be wholly, absolutely and completely unable to understand or comprehend the nature of the transaction." (Aldrich *v.* Bailey, 132 N. Y. 87, 88.) When they have proved this, the party claiming under the instrument may well be called upon to show his good faith and ignorance of the insanity. If the mortgagor was insane when he signed the mortgage, the mortgagee's rights under the instrument are not *prima facie* sustainable. Equity, however, will sustain them and enforce the contract in a proper case; but the least that can then be required of the mortgagee is that he point out and establish the grounds upon which equity should lend him its aid. What are sufficient grounds for the enforcement of such contracts in equity has been repeatedly pointed out in the cases. (Mutual Life Ins. Co. *v.* Hunt, 79 N. Y. 541; Hicks *v.* Marshall, *supra;* Riggs *v.* American Tract Society, *supra;* Johnston *v.* Stone, *supra.*)

. . . . . .

The rule laid down in these cases is not affected by the incident that the alleged lunatic in the case at bar acted through an agent. The equities between the original parties must still determine the question of enforcement. In his opinion upon the former appeal,

Justice RUMSEY thus summed up the rule on that head: "It must be held that when one undertakes to deal with an agent having a written power of attorney, he, *equally with an agent, knowing of the insanity of the principal, that the transaction thus made has no more weight* than if the transaction had been directly with the insane principal himself." We may add that it has no less weight.

In the case from which Justice Rumsey so copiously quotes (Davis *v.* Lane, 10 N. H. 156) Chief Justice PARKER also said that "The act of the agent in the execution of the power, however, may not in all cases be avoided on account of the incapacity. If the principal has enabled the agent to hold himself out as having authority, by a written letter of attorney, or by a previous employment, and the incapacity of the principal is not known to those who deal with the agent, within the scope of the authority he appears to possess, the transaction may be held valid, and binding upon the principal. Such case forms an exception to the rule, and the principal and those claiming under him may be precluded from setting up his insanity as a revocation, because he had given the agent power to hold himself out as having authority, and because the other party had acted upon the faith of it, and in ignorance of any termination of it."

The same limitation upon the rule of revocation or suspension resulting from the insanity of the principal was laid down in Matthiessen & W. Refining Co. *v.* McMahon's Adm'r., 38 N. J. L. 536; Hill *v.* Day, 34 N. J. Eq. 150, and Drew *v.* Nunn, L. R. [4 Q. B. Div.] 661. In Hill *v.* Day it was held that "Where a principal becomes insane after appointing an agent, the principal's insanity operates, *per se,* as a revocation or suspension of the agent's authority, except . . . where a consideration of value is given by a third party, trusting to an apparent authority and in ignorance of the principal's incapacity."

In Drew *v.* Nunn the defendant's wife had authority to pledge his credit for goods. It was held that goods furnished to her, while he was insane, by a tradesman acting in ignorance of the insanity, might be recovered for. Lord Justice BRETT stated the ground of the decision as follows: "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 on 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 *bona 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."

If the contract was thus enforcible in a case where the agent obtained goods from the tradesman for her own benefit upon the faith of her apparent authority, *a fortiori* is it enforcible where the contract is made directly for the benefit of the lunatic to relieve his property from a lien thereon or to swell his estate.

We have thus gone over the various features of this case more fully, perhaps, than was essential to the decision of the present appeal. We have done this to correct any possible misapprehension upon another trial of the scope of our previous decision. Upon the first trial all the defendant's evidence in support of his defence was excluded. That evidence apparently embraced notice of the insanity as well as of the insanity itself. The precise question, therefore, was whether the insanity, plus the notice, constituted a defence. We held that it did. We were not called upon to decide whether the insanity, minus the notice, constituted, *prima facie,* a defence. The defendant clearly had a right to prove notice of the insanity, but we did not hold that he was bound to do so. If his testimony sufficiently established Mrs. Merritt's insanity within the definition formulated in Aldrich *v.* Bailey, *supra,* he was, in our judgment, then and now entitled to rest; and, if his testimony on that head was not balanced by testimony subsequently adduced by the plaintiffs, he was entitled to a finding to that effect. If, upon all the testimony adduced by both sides, the court had found itself unable to make such a finding, all other grounds of equity would have disappeared, and the plaintiffs would have been entitled to judgment. If, however, the court had found the fact of insanity, then the equitable considerations to which we have referred would have supervened and have become entitled to consideration.

The plaintiffs did not prove — indeed were not called upon to prove — the facts upon which such considerations would have become material for the reason that the court, as we have seen, gave them judgment precipitately upon an erroneous view of the burden of proof.

It is said that there is evidence that the plaintiffs, as Mr. Post's assignees, had notice of Mrs. Merritt's insanity. But the real question on that head relates to the transaction with Mr. Post. If he was entitled, owing to the absence of notice and the advance of the full sum of $25,000, which, as is said, went to pay off an existing mortgage upon Mrs. Merritt's property, to enforce the security, his assignment to the plaintiffs carried the same right.

Our conclusion is that the defendant should have been permitted to complete his proof of insanity, with the right on the plaintiff's part thereupon to put in counterproofs of sanity, and also to prove any facts which would have entitled Mr. Post equitably to enforce the mortgage notwithstanding Mrs. Merritt's insanity.

The judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., PATTERSON, INGRAHAM, and MCLAUGHLIN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.[1]

VAIL *v.* MEYER.

71 Ind. 159. 1880.

ACTION to establish a lien for work and labor upon the house of defendant, a married woman. Judgment for plaintiff.

WORDEN, J. . . . We think it clear, also, that, under the enlarged rights of married women in reference to their property, they may make contracts for the improvement of their real estate, not such as will bind them personally, but such as will clearly authorize the mechanic, material-man or builder, to avail himself of the law on the subject of liens, and thus acquire and enforce a lien upon the property. See Capp *v.* Stewart, 38 Ind. 479; Shilling *v.* Templeton, 66 Ind. 585. . . .

There was evidence tending to show that the defendant, Mary A. Vail, made the contract in question through her husband, as her agent; and it is insisted that a married woman cannot appoint an agent.

It may be conceded, as a general rule, that a married woman cannot appoint an agent. But a married woman holds and enjoys her real estate as if she were sole, and it becomes essential to its enjoyment that she have the power to make improvements, by building new or repairing old buildings upon it. Contracts for this purpose we have already said she can make, whereby the builder, mechanic or material-man may acquire a lien under the law. And we think it follows that she may make such contracts in person or by an agent, whom she may appoint for that purpose. So far as she is enabled to contract, she may contract in person or by agent.

The evidence tends to sustain the verdict, and we find no error in the record.

The judgment below is affirmed, with costs.[2]

[1] On retrial plaintiff prevailed on the ground that the defendant did not show total incapacity. 32 Misc. 21, aff'd 62 App. Div. 617.

[2] A married woman having no separate estate cannot in some states have an agent. See Flesh *v.* Lindsay, 115 Mo. 1, *post*, p. 31, and cases cited therein; also Macfarland *v.* Heim, 127 Mo. 327.

FLESH *v.* LINDSAY.

115 Mo. 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, as if made 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.

EICHBAUM *v.* IRONS.

6 Watts & S. (Pa.) 67. 1843.

THIS was an action of assumpsit brought in the district court of Allegheny County by John Irons against William Eichbaum, John D. Davis, William Black, and William D. Darlington. The case was this.

When the event of the presidential election in 1840 had been ascertained, General Harrison's friends in Pittsburg and Allegheny met at the plaintiff's tavern, their late headquarters, to discuss the propriety of celebrating their success by a public entertainment. It was resolved that a free dinner should be prepared by the plaintiff to compensate him for the use of his house as a political rendezvous during the canvass, and for the consequent wear of his carpets and furniture; or, as a witness expressed it, to give him a benefit. The meeting appointed

a committee of thirteen to order the dinner and make the arrangements; and another committee, of the same number, to invite the guests. Mr. Black was a member of the committee of arrangements; and the other defendants were members of the committee of invitations. On the following day these committees met a concourse of people of the same political stamp at the same place; and the whole being organized as an original meeting, by placing Mr. Eichbaum in the chair, the expediency of the measure was warmly contested, among others, by Davis and Eichbaum, who spoke and voted against it, but eventually succumbed to the majority, by whom the measure was carried anew, and a committee appointed to solicit subscriptions. At the conclusion the plaintiff was called in and directed to prepare a dinner for one thousand persons, and serve it at Taaffe's warehouse, where four thousand people, of all political parties, subsequently partook of it with wonderful cordiality. Mr. Davis, who was dissatisfied with the measure, called on the plaintiff a few days after the dinner was ordered, stated to him that it would be very difficult to procure money, and requested him to give the matter up; but the plaintiff became excited, and declared that the dinner should go on though he were to pay for it himself. At this time the provisions had been laid in, and were in the hands of the cook. The defendants alleged that payments had incautiously been made to the plaintiff without taking receipts; but, as they were unable to prove them, they were compelled to insist that they were not personally liable. The plaintiff, who had assigned his claim in payment of a debt, and was examined without objection, testified that he furnished the dinner on the order of the whig party and the committee who employed him; that the committee were the only persons he had to look to; that the meeting at his house, when the order was given, was a public and general one; and that he thought it was the committee who contracted with him. On these facts the court directed a verdict for the plaintiff.

The opinion of the court was delivered by

GIBSON, C. J. This case is unique, but readily resolvable on principle. It seemed, at first, to resemble the case of a committee sued for the price of meats and wines furnished on its order to a club; but though the defendants acted in obedience to a constituency, it was, unlike the club, which is a permanent body, an intactible and irresponsible one. The plaintiff, being examined without objection, testified that he furnished the dinner on the order of the whig party, but that it was to the committee he looked for payment. It is probable that neither he nor they spent a thought on the subject; but it is not, therefore, to be concluded that he agreed to give the dinner for nothing; and the responsibilities of the parties concerned are to be determined on the ordinary principles of the law of contracts. The facts are, that the defendants and others, being a committee constituted by a popular meeting to order and manage a dinner, contracted with the plaintiff

to furnish it, and directed the secretary of the meeting to report the proceeding to the Tippecanoe Club, an affiliated society, for its approbation.

Now it will not be pretended that nobody was responsible to the plaintiff for the order; and, if the defendants were not, who else was? Were they to be viewed as the agents of the club, we would have something palpable to deal with. The question would be, whether they had become personally liable by having exceeded their authority, or whether they had not contracted on the credit of their constituents. But a club is a definite association, organized for indefinite existence: not an ephemeral meeting, for a particular occasion, to be lost in the crowd at its dissolution. It would be unreasonable to presume that the plaintiff agreed to trust to a responsibility so desperate, or furnish a dinner on the credit of a meeting which had vanished into nothing. It was already defunct; and we are not to imagine that the plaintiff consented to look to a body which had lost its individuality by the dispersion of its members in the general mass. But the question would not depend on the law of partnership, even were such a meeting to be treated as a club; for though Lord Eldon, in Beaumont *v.* Meredith, 3 Vez. & Beat. 180, and Lord Abinger, in Flemyng *v.* Hector, 2 Meeson & Welsb. 179, seemed to have thought that a member of a club is a partner, the notion was exploded by Chief Justice Tyndal in the last trial of Todd *v.* Emly, cited in Wordsworth on Joint Stock Companies, 183. Neither is it determinable on the law of principal and agent; for there was no principal. At first I thought the credit might have been given to the primary meetings on the authority of those cases in which officers have been held liable to have contracted on the credit of the government; but the certainty of payment, in those instances, was so great as to make the moral responsibility of the government the preferable security. Not so the moral responsibility of a populace, which is infinitely weakened by being infinitely divided. In a case like this, the usual presumption of credit is inverted; and, in the absence of evidence to the contrary, the vendor is supposed to have relied on the responsibility of the persons who gave the order. What we have to do, then, is to determine how far each of the defendants was a party to it.

When several dine together at a tavern, each is liable for the reckoning. (Collyer on Partn. 25, *note w.*) But, as I take it, they are liable jointly and not severally; for though only one should order, those who approve of it become parties, except where credit is given to one, in exclusion to those who happen to be his guests. This principle is deducible from Delauney *v.* Strickland, 4 Stark. R. 366. Did the defendants, then, all concur in the order given for the dinner in question? If they did not, the plaintiff cannot recover.

It is not disputed that they were present when the measure was definitely adopted; but it is proved that Davis and Eichbaum opposed

it while it was under consideration. What then? They at last submitted to the majority, and made the resolution their own. In Braithwaite *v.* Skofield, 9 B. & C. 401, a member of a committee who was present at the adoption of a resolution to have certain work done was held liable to the tradesmen. Every member present assents beforehand to whatever the majority may do, and becomes a party to acts done, it may be, directly against his will. If he would escape responsibility for them, he ought to protest and throw up his membership on the spot; and there was no evidence that any of the defendants did so. On the contrary, they all remained till the meeting was dissolved and the order given. It is true that Mr. Davis afterwards desired the plaintiff to give the matter up; but the dinner was in preparation, and it was too late to retract. Of what importance, then, is the disputed fact of his having partook of the repast with the rest? Had he done so, his final accession would, according to Delauney *v.* Strickland, have made him liable despite of other considerations; but he had become irrevocably liable by the order of the committee, given in his presence, and apparently with his approbation. The defendants have not pleaded the non-joinder of the other members in abatement; and the evidence showed such a joint liability of those who have been sued as warranted the direction.

Judgment affirmed.[1]

McCABE *v.* GOODFELLOW.

133 N. Y. 89. 1892.

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made July 7, 1891, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought to recover for services alleged to have been

[1] Accord: Heath *v.* Goslin, 80 Mo. 310. In Sizer *v.* Daniels, 66 Barb. (N. Y.) 426, the members of a county political committee were sued by an agent employed to organize the party in the county. The court said, in part (page 432): "The plaintiff's contract is in terms with the county committee, but only such of the members as voted for the resolutions under which the plaintiff was employed are liable; unless those not voting had authorized the others to pass the resolutions, and agreed to be bound thereby. A part of the members of a voluntary organization cannot bind the others without their consent before the act which it is claimed binds them is done, or they, with full knowledge of the facts, ratify and adopt it. There are cases, doubtless, in which the act done is so clearly in furtherance of the objects for which the association was organized that all will be presumptively bound by it. When such is not the case, consent or ratification must be proved. The termination of the term of office of the committee will not relieve them from liability. Those who made the contract were bound to see it performed. The committee that was appointed to succeed the defendants never assumed any obligation to pay the plaintiff for his services, and they were not the successors of the defendants in that sense that rendered them liable on the contracts of their predecessors. Flemyng *v.* Hector, 2 Mees. & Welsh, 172. Reynell *v.* Lewis, 15 *id.* 519."

rendered by plaintiff, as attorney for the Law and Order League of the town of Kirkland, of which defendant was treasurer.

MAYNARD, J. This action must be upheld, if at all, under section 1919 of the Code of Civil Procedure, which provides that an action may be maintained against the president or treasurer of an unincorporated association consisting of seven or more persons, upon any cause of action for which the plaintiff might maintain such an action against all the associates by reason of their liability therefor, either jointly or severally. Under the subsequent sections of the Code (1921, 1922), the judgment recovered does not bind the property of the officer, and the execution issued must require the sheriff to satisfy it out of any personal property belonging to the association or owned jointly or in common by all the members thereof, but must omit any direction respecting real property.

Where such an action has been brought, another action for the same cause shall not be brought against the members of the association until the return unsatisfied, wholly or in part, of an execution upon a judgment against the officer. The plaintiff, however, is not bound to sue the officer, for section 1923 provides that he may, in the first instance, bring his action against all the members of the association. It will thus be seen that the right to maintain the action against the officer is conferred upon the plaintiff for his convenience and in order that he may more speedily reach the personal property of the association for the satisfaction of any judgment which he may recover. But the plaintiff cannot, in any case, maintain such an action against the officer, unless the debt, which he seeks to recover, is one upon which he could maintain an action against all the associates by reason of their liability therefor, either jointly or severally. This, therefore, is the test to be applied to the present case. The plaintiff must allege and prove, and the court must find that all the members of the association were liable, either jointly or severally, to pay the plaintiff the amount of his claim, or the judgment in this action cannot stand.

The defendant was the treasurer of a Law and Order League, an association organized in and for the town of Kirkland, Oneida County, in December, 1886. It eventually consisted of two hundred and seventy members, of whom the plaintiff was one. It was formed pursuant to a resolution adopted at a public meeting of citizens, which declared that they voluntarily associated themselves together for the purpose of forming such a league, the object of which should be to give their personal and united influence, and, if need be, their material aid to assist the town and village officers in enforcing the excise and corporate laws. A constitution was at the same time adopted, to which each member subscribed his name, which stated that the object of the league should be to unite, as far as possible, all the orderly and law-abiding citizens of the town in giving moral support and aid in all proper ways to the village and town officers while in the discharge

of their official duties, and to see that they were faithful in enforcing all village and town laws, and especially those intended to regulate the traffic in intoxicating drinks; and that the members of the league should consist, first, of all the members of the special or central committee composed of three persons appointed by each church and temperance society in the town, and three members appointed by the league itself, and, second, all other persons willing to pledge themselves individually by signing the constitution, that they will give personal or material aid when needed to make effective the object of the league.

A president, two vice-presidents, and a secretary were provided for, whose duties were defined to be the same as of those chosen in similar associations, and they were to constitute the executive committee of the special or central committee and also of the league. Regular meetings of the executive and special committees were to be held on the third Tuesday evening of each month, for the purpose of hearing reports and adopting such measures as their united counsel and wisdom might decide upon as necessary to carry out the letter and spirit of the league.

The method of raising funds for the prosecution of their work seems to have been in part by collections at meetings, but mainly by subscriptions to what was known as the guarantee fund, by which each subscriber pledged himself to pay a specific sum in such instalments as might be needed to carry out the work of the enforcement of the excise laws. The plaintiff was one of the subscribers to this fund, which amounted to over $1200. Whether all of the subscribers were members of the league does not appear.

The plaintiff, who is an attorney, sues for services rendered, as he alleges, in the prosecution of actions for penalties and in other legal proceedings brought and instituted by the association and under an employment by them. The referee has found that the league, through its officers, duly authorized agents and committees, retained him to perform these services and to bring these actions, and that his services were of the value of $1850, including necessary disbursements; that he has received on account thereof $175, leaving $1680 due and payable, for which judgment is ordered.

So far as this is to be considered as a finding that the individual members of the league became bound under any agreement, express or implied, to pay plaintiff for his services, we think it is a finding not supported by the evidence. We fail to discover anything in the organization of this association, or in its constitution, or professed objects, or in the methods which it adopted for the conduct of its affairs, which indicates an intention on the part of these members to become personally bound for any debts contracted by its officers and committees beyond what might be necessary for the maintenance of its existence. The scheme of its operations seems to have contemplated the raising

of money by collections and voluntary subscriptions to be placed at the disposal of its committees for the purpose of defraying any proper expenses which they might incur, and no authority was given to any officer, agent, or committee of the association, to pledge without limit the personal credit of its members.

The transitory character of the organization also renders it improbable that the people who joined it ever intended to authorize the transaction of business upon their individual credit.

It was one of those spasmodic moral movements which have their origin because of the laxity of the administration of the police regulations of the community, and which inevitably subside when the exigency for their creation has ceased, or when the zeal of their members has spent its force. The plaintiff belonged to the order, subscribed to its funds, and must be charged with full knowledge of its scope and powers. It was not in any sense a partnership. In Lindley on Partnerships, 2d Am. ed. p. 50, it is said: "It is a mere misuse of words to call such associations partnerships; and if liabilities are to be fastened on any of their members it must be by reason of the acts of those members themselves, or by reason of the acts of their agents, and the agency must be made out by the person who relies on it, for none is implied by the mere fact of association."

In this respect there is a plain distinction between associations formed for the purpose of pecuniary profit and those formed for other objects.

In Natl. Bank *v.* Van Derwerker, 74 N. Y. 234, the association belonged to the former class, and was engaged in a commercial enterprise, and it was shown that the officer contracting the debt had authority to bind its members. Such associations have, in fact, all the powers and incidents of a partnership, and their transactions are governed by the law relating to such adventures;[1] but associations formed for moral, benevolent, social, or political purposes, rest upon a different basis. The individual liability of the members for contracts made by the association or its officers or committees depend upon the application of the principles of the law of agency, and authority to create such liability will not be presumed or implied from the existence of a general power to attend to or transact the business, or promote the objects for which the association was formed, except where the debt contracted is necessary for its preservation.

In Flemyng *v.* Hector, 2 M. & W. 172, the committee had authority

[1] In Davison *v.* Holden, 55 Conn. 103, the defendants with sundry others associated themselves, without incorporation, under the name of the Bridgeport Co-operative Association, for the purpose of procuring provisions at a lower rate for the members. Sales were made to non-members at a higher rate, but no profits were expected beyond the payment of the expenses of management. The members held meetings and elected officers, and the officers employed the defendants as managers to conduct the business. The defendants as such managers bought and sold goods, paying the receipts to the treasurer. Held that the individuals composing the association were liable for goods purchased by the managers for the benefit of the association. See, also, Bennett *v.* Lathrop, 71 Conn. 613.

to "manage the affairs of the club," and it was held that the members were not individually liable for debts incurred by a committee for work done or goods furnished, as the committee had no authority to pledge the personal credit of its members.

In Todd *v.* Emly, 7 M. & W. 427, a fund was subscribed to be administered by a committee, and it was held that the authority of the committee was confined to the administration of the fund, and that they were not empowered to deal upon credit except for such articles as it might be immediately necessary for them to have purchased on credit. So it has been held that the general regulation of a club vesting the conduct of all its concerns in a committee does not authorize the committee to raise money by debentures, or otherwise to pledge the credit of its members. *In re* St. James Club, 2 DeG., M. & G. 383. Other English cases to the same effect are Caldicott *v.* Griffiths, 8 Exch. 898; Wood *v.* Finch, 2 F. & F. 447; Bailey *v.* Macaulay, 19 L. J. (Q. B.) 73. These decisions have been followed by the American cases, Ash *v.* Guie, 97 Pa. St. 493; Ferris *v.* Thaw, 5 Mo. App. 279; Richmond *v.* Judy, 6 *id.* 465; Devoss *v.* Gray, 22 Ohio St. 159.

Granting that the members of the league had knowledge of the plaintiff's employment by their president, or by the general or executive committee, and of the rendition of these services, and ratified and approved of his retainer, it does not follow that they became personally obligated to pay them.

The record, we think, very clearly shows that they had no reason to suppose that the committee so employed the plaintiff upon their individual credit. On the contrary, it fairly appears that they expected that his compensation, as well as the other expenses incurred by the officers and committees, were to be met by the funds voluntarily contributed for that purpose and placed at the disposal of the committees, and that they did not intend there should be any debts contracted in excess of those funds.

The plaintiff, as a member of the organization, must have so understood it. His conversations with the president and the letters put in evidence upon the subject, all refer to the moneys subscribed or contributed, as affording the means out of which he was to be paid. Having, therefore, failed to establish the liability of his associates for the debt, upon which he brought his suit, the plaintiff was not entitled to recover.

The order and judgment appealed from should be reversed and a new trial granted, with costs to abide the event.

All concur. *Judgment reversed.*[1]

[1] Accord: Stikeman *v.* Flack, 175 N. Y. 512, reversing judgment for plaintiff and granting a new trial on the dissenting opinion in 58 App. Div. 277.

TALBOT *v.* BOWEN.

1 A. K. Marsh. (Ky.) 436. 1819.

JUDGE OWSLEY delivered the opinion of the court.

This suit was brought in chancery by Bowen, to obtain a title to a moiety of a lot of ground in the town of Henderson, the equity whereof is asserted by him through a certain William Featherston, who, it is alleged, purchased it from the son and agent of Talbot.

The purchase of Featherston is admitted by the answer of Talbot, but the authority of his son to sell the land is denied; and if authorized, it is contended that, owing to his son's infancy and the inadequacy of the consideration for which the sale was made, a specific execution of the contract ought not to be inferred. . . .

But as the authority of Talbot's son is expressly denied, it is also contended that evidence of his authority should not only have been introduced, but it is, moreover, urged that the authority should be shown to have been in writing. That to make the sale obligatory upon Talbot, his son must have been clothed with power to sell, is a proposition not to be controverted; but as respects the justice of the case, it cannot be material whether the authority was created either by writing or parol, and the statute against frauds and perjuries has never been held to require it to be in writing.

And that the son was authorized either verbally or in writing to make the sale, from the circumstances detailed in the evidence, there is no room for a moment to doubt.

And if authorized, according to the settled doctrine of the law, his being an infant can afford no objection against the liability of Talbot; for although the contracts of infants are not, in all cases, binding upon them, there is no doubt but, as they may act as agents, their contracts, made in that character, if otherwise unexceptionable, will be binding upon their principal. . . .

[*Reversed on a point of procedure.*]

CHASTAIN *v.* ZACH.

1 Hill (S. C.) 270. 1833.

THIS was an action on the case against the defendants as common carriers on the Savannah river, for a loss sustained by the burning of the plaintiff's cotton on board their boat. The boat was passing down the river, when the plaintiff came to a landing and asked if it could

carry his cotton. The patroon (a slave belonging to one of the defendants) answered that it could. The cotton was received and was burnt on board the boat before it reached Augusta. It was proved that the defendants had given general instructions to their patroons to take in freight whenever it could be had, and that in one instance one of the defendants had received pay for freight engaged by his patroon.

The presiding judge charged the jury that the defendants were not liable, unless the patroon was his master's agent, and authorized to take in freight. That the authority might be proved by showing that such was the custom of boat owners, or by proving that the defendants had given such authority; that to establish a custom it must be proved to be universal; that a slave might be the agent of his master, and if his agency was established the master was bound; and whether the agency of the slave was established in this case was a question submitted to their decision. The jury found for the plaintiff and the defendants appealed, and move for a new trial, on the ground of error in the charge of the presiding judge.

JOHNSON, J., delivered the opinion of the court.

From the instructions given to the jury it is more than probable that they found the verdict on the ground that the defendants had constituted their patroon, the slave Jack, their agent, to contract with the plaintiff for carrying his cotton, and on that ground it can be well sustained.

It is not questioned that a master may constitute his slave his agent, and I cannot conceive of any distinction between the circumstances which constitute a slave and a freeman an agent — they are both the creatures of the principal, and act upon his authority. There is no condition, however degraded, which deprives one of the right to act as a private agent — the master is liable even for the act of his dog, done in pursuance of his command. Two witnesses, Beck and Eaton, prove that defendants had given general instructions to their patroons to procure freight wherever they could; and in one instance it is shown that one of the defendants received the price of freight on produce so received and carried by the patroon, a distinct recognition of their authority to contract for them; and there is not a tittle of evidence that this authority was ever rescinded. The authority was general as to that particular business, and the contract to carry was directly in pursuance of it. The defendants were therefore bound.

The proof of the custom appears to me to have been too equivocal to have supported the verdict on that ground alone. To make a good custom it must be proved to be general, and if the proof had been that those concerned in the navigation of the Savannah river had from time immemorial authorized and permitted their slave patroons to contract for carrying freight, the defendants would have unquestionably been bound by it; but the proof here, with the exception of

one witness, is confined to particular instances, and it is not very obvious that that witness clearly understood what is meant by a general custom.

Motion dismissed.

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3. *Joint Agents.*

LOEB & BRO. *v.* DRAKEFORD.

75 Ala. 464. 1883.

BILL in equity against executors of Thomas B. Dryer. From a decree dismissing the bill complainants appeal.

SOMERVILLE, J. The purpose of the present bill is to claim the benefit of certain mortgages and other collateral securities placed in the hands of Lehman, Durr & Co. by one Thomas B. Dryer, in the latter part of the month of March, in the year 1881. Dryer was indebted to complainants for advances made to him during that year, and also for antecedent debts aggregating about two thousand dollars, and based on previous transactions. The theory of the bill is, that there was an express agreement made by Dryer, during his life-time, that the old, or pre-existing debt should be paid out of these securities. The whole question is as to the existence of such an agreement. It is not contended that such a contract was made with the deceased person, but only with his authorized agents.

The written instruments introduced in evidence very certainly fail to furnish any satisfactory proof of it. The agreement between Dryer and Lehman, Durr & Co., bearing date on the 30th of March, 1881, extends the benefit of these securities only so far as to cover such indebtedness as might be afterwards incurred for advances made by the complainants to Dryer for the current year. No reference is made to any other indebtedness, except that due to Lehman, Durr & Co. as to which there is no controversy. The fact that the latter parties labored under the conviction that Dryer had made such a contract, and, upon the faith of such conviction, entered into a written agreement with complainants to hold the securities for them under the provisions of the supposed contract, could not, in any manner, prejudice the rights of Dryer's estate, if in truth and fact there was no such contract. This proposition is too manifest for argument.

It is claimed, however, that this agreement was authorized by one Felts, who acted under a written power of attorney executed by Dryer, and bearing date March 28, 1881. The testimony shows very conclusively, that Felts did assent to such an arrangement, claiming his authority under certain power of attorney, which was at the time

exhibited to the other contracting parties. But this was a *joint* power of attorney, given to W. G. Campbell, M. B. Swanson, and W. W. Felts, authorizing the three to act as agents in this transaction jointly. Such a power conferred upon several cannot be exercised by one alone, at least in the case of private agencies. It is required that all must act together jointly in the execution of such an agency. Caldwell *v.* Harrison, 11 Ala. 755; Story on Agency, § 42; Evans on Agency (Ewell's ed.), *32.

Nor could such a trust be delegated by one of such agents to another. The principal is supposed to rely upon the personal integrity and ability of each of his selected agents, these qualifications constituting the reason of the trust. Hence, the maxim applies, *Delegatus non delegare potest.* Story on Contr. § 127.

We are satisfied from the testimony that neither Campbell nor Swanson concurred with Felts in the execution of this power. They were not personally present at the time, and are not satisfactorily shown to have afterwards assented to what he did in the attempted execution of their joint authority. The power was not, therefore, legally executed, and the contract made by Felts, acting alone, conferred no lien in favor of the complainants upon the proceeds of the various collateral securities placed by Dryer in the hands of Lehman, Durr & Co.

We see nothing in the record authorizing us to infer that any other person or persons had authority from the deceased, either to make or to ratify the contract attempted to be made between Felts and the complainants, as stated in the bill.

The decree of the chancellor is, in our judgment, free from error, and it is affirmed.[1]

DEAKIN *v.* UNDERWOOD.

37 Minn. 98. 1887.

PLAINTIFF appeals from an order denying a new trial after judgment for defendant.

MITCHELL, J. This was an action to compel specific performance of a contract for the sale of real estate. Plaintiff alleges that the defendant made the contract "by A. B. Wilgus, his duly-authorized

[1] Accord: Brown *v.* Andrews, 18 L. J. Q. B. (N. S.) 153; Rundle *v.* Cutting, 18 Colo. 337; Rollins *v.* Phelps, 5 Minn. 463; Salisbury *v.* Brisbane, 61 N. Y. 617; North Carolina Ry. *v.* Swepson, 71 N. C. 350. Private arbitrators must all act. Green *v.* Miller, 6 Johns. (N. Y.) 39. But in a public quasi-judicial body a majority may act. *Ex parte* Rogers, 7 Cow. (N. Y.) 526.

If the power is by its terms to be exercised "jointly or severally" any number may act. Guthrie *v.* Armstrong, 5 Barn. & Ald. 628; Wamsley *v.* Darragh, 14 Misc. (N. Y.) 566; Cedar Rapids, &c., Co. *v.* Stewart, 25 Iowa, 115. If the intent that a majority may act is reasonably to be inferred that construction will be followed. Hawley *v.* Keeler, 53 N. Y. 114.

agent and attorney in fact." The contract is attached as an exhibit to the complaint, and is signed: "O. W. UNDERWOOD, By A. B. WILGUS, Agent."

It appears from the evidence that the authority to sell was given to the firm of A. B. Wilgus & Bro., a partnership composed of A. B. Wilgus and E. P. Wilgus. It is claimed that, upon this state of facts, there was a failure of proof. But the material allegation of the complaint was that defendant had made this contract with plaintiff. It was not necessary to allege that it was made through an agent. It would have been enough to declare upon it generally as of the personal act of the principal. The substance of the issue was not whether defendant had made the contract through an agent, but whether he had made it at all. Hence it cannot be said that there was a failure of proof. The most that can be possibly claimed is that there was a variance between the allegation and proof, but which could not, in this case, have misled the defendant to his prejudice, and therefore is not material.

Defendant further contends that the authority to sell being to the firm of A. B. Wilgus & Bro., which was composed of two members, this authority could only be executed by the two jointly, and not by one separately, so as to bind the principal. In support of this contention, he invokes the well-known general rule of the common law that, where an authority to do an act is conferred upon two or more agents, the act is valid to bind the principal *only* when all of them concur in doing it; the power being joint and not several. Rollins *v.* Phelps, 5 Minn. 373 (463). Even where the authority is given to several agents, this rule is not so rigid and inflexible as to overcome the apparent intention of the parties to the contrary. Story, Ag. §§ 42, 43; Hawley *v.* Keeler, 53 N. Y. 114. But we think the rule has no application where the authority is given to a partnership as such. Each member of a partnership is the agent of the firm, and all the partners are jointly accountable for the acts of each other; and, where a person appoints a partnership as his agent, he must be deemed to have done so with reference to these rules of law. When a person delegates authority to a firm, it is an appointment of the *partnership* as his agent, and not of the individual members as his several and separate agents. Hence each partner may execute, and the act of one is the act of the firm, and in strict pursuance of the power. Gordon *v.* Buchanan, 5 Yerg. 71.

But it is claimed that, conceding this, he must do it in the name of the firm, and that if, as in the present case, he uses his individual name, it is not the act of the partnership, and will not bind it. The defendant seems to overlook the fact that the contract is the act of the principal and not of the agent, and that the party to be bound is the former and not the latter. Hence the important question is whether the principal's name has been signed to the contract by one

having authority to do so. That in this case, A. B. Wilgus, as a member of the firm of A. B. Wilgus & Bro., had, by virtue of the authority given the firm, power to execute this contract in the name of defendant, cannot be questioned, and it is wholly immaterial whether to that name be added "by A. B. Wilgus & Bro.," or "by A. B. Wilgus," or nothing at all. An agent authorized to sign the name of his principal effectually binds him by simply fixing to the instrument the name of the principal, as if it were his personal act. The particular form of the execution is not material, if it be done in the name of the principal, and by one having authority in fact to execute the instrument. Berkey *v.* Judd, 22 Minn. 287, 302; First National Bank *v.* Loyhed, 28 Minn. 396, 10 N. W. Rep. 421; Devinney *v.* Reynolds, 1 Watts & S. 328; Forsyth *v.* Day, 41 Me. 382. . . .

Order reversed.

COMMONWEALTH *ex rel.* HALL *v.* CANAL COMMISSIONERS.

9 Watts (Pa.) 466. 1840.

THIS was an application by Elizabeth Hall for a rule to show cause why a mandamus should not issue to the canal commissioners of Pennsylvania, requiring them to pay the sum of two thousand five hundred dollars to the petitioner, being the amount of damages awarded to her by the board of appraisers for injury done to her lands by reason of the construction of the canal.

On the 24th of August, 1835, Elizabeth Hall made an application to the canal commissioners for the payment of damages done to her land, and they offered to pay her two hundred dollars in full, which she refused, and appealed to the board of appraisers, who, on the 6th of September, 1838, made a report in her favor of two thousand five hundred dollars; this report was signed by two only of the three appraisers, the third having previously resigned, and no appointment had been made in his room. This report was made to the canal commissioners on the 6th of November, 1838, and they ordered the amount to be paid by the superintendent. The money was not paid.

The question submitted to the court was: — Whether the adjudication of the appraisers of the 6th of September, 1838, submitted to the canal commissioners on the 6th of November, 1838, and then approved by them, is final and conclusive, and entitles the applicant to the amount of the damages thus assessed?

The opinion of the court was delivered by

GIBSON, C. J. It is usually said that a power of a private nature — that is, a power to do a private act — must be executed by all

to whom it is given; but that a power of a public nature, or to do a public act, may be executed by a majority. That there is a distinction, is undoubted; but that the specific ground of it is to be found in the nature of the act, is not quite so clear. In Withnell *v.* Gartham, 6 Term Rep. 388, a power to appoint a *private* charity which had been delegated by a testator to the vicar and church wardens of the parish, was held to have been well executed by a majority of the church wardens, because they were a *quasi* corporation; while, on the other hand, an order of affiliation was quashed in The Queen *v.* West, 6 Mod. 180, because it was founded on an affidavit made before only one of the justices, though the act of taking it was certainly of a public nature. If, then, the general rule is as it is usually stated, these two cases must be excepted from it.

The criterion, however, seems to be not so much the character of the power, or of the act to be done by virtue of it, as the character of the agent appointed for the performance of it. Perhaps the result of the cases is, that an authority committed to several *as individuals*, is presumed to have been given to them for their personal qualifications, and with a consequent view to an execution of it by them all; but that where it is committed to them as a body, there is no presumption in the way of the usual method of corporate action by a majority. In the case of The Baltimore Turnpike, 5 Binn. 481, viewers appointed by the quarter sessions to assess damages done to the soil by a turnpike company, were held to be such a body. That case is identical with the present, except that it is not near so strong, inasmuch as the official and *quasi* corporate character of the canal appraisers, keeping as they must a record of their proceedings, having succession, and being called a board in the act by which they are constituted, is more distinct than that of viewers of damages, who become *functi officio* by performance of the single act for which they were appointed. So, in The County Commissioners of Allegheny *v.* Lecky, 6 Serg. & Rawle, 170, a power to purchase a site for a jail, was held to be well executed by a majority, having been given to the commissioners, not individually but collectively by their official title, and therefore carrying with it an apparent intent that it should be executed by them as a board. In the case before us, the appraisers could not have acted otherwise.

The principle of execution by a majority was doubtless borrowed from the practice of corporations, with whom, as with every associated body, it is a principle of necessity; for it would, in most cases, be impossible to obtain the assent of all the members of a numerous assembly; and this, perhaps, is the consideration which lies at the root of the whole matter. In The Commissioners *v.* Lecky, it was said by the chief justice, that the rule which requires execution by all, has never been applied to public business of a *judicial* or of a *deliberative* nature; or to cases where powers are given to corporate bodies —

all which is incontestable. But all judicial and deliberative bodies partake strongly of the nature of corporations. Every legislature is strictly a court; whence it is said by Sir Edward Coke, that the British Parliament, consisting as it does of the king, lords, and commons, is the highest, most absolute, and most honorable court of justice in England; 1 Inst. 109 *a*; and I believe it is still customary in some of the Eastern States to call a legislature the general court. County commissioners have always been at least *quasi* corporations; in which respect they differ from commissioners to take depositions, and from arbitrators chosen for their presumed fitness for the business committed to them, who, where the contrary is not specified in the terms of their appointment, must all join. It may be safely said, then, that any duty of an aggregate organ of the government, may be performed by a majority of its members where the constituting power has not expressly required a concurrence of the whole.

Now these appraisers were constituted a board for the performance of duties of a public, deliberative, and judicial nature; they were, in short, a tribunal of appellate jurisdiction. Though not apparent on the face of the return, it is conceded that there was a vacancy by resignation in the membership at the time of the assessment. But that is a fact which, instead of weakening the relator's case, would strengthen it, and the possibility of its recurrence may make it a legitimate ground of argument; for it cannot be supposed that the functions of the board would be suspended, to the detriment of the public, by the loss of one of its members. Private business might bear to be postponed till such a loss could be repaired, but public affairs are usually so urgent that they could not. Thus it was held in Townsend *v.* Wilson, 3 Mad. Chan. Rep. 361; s. c. 1 Barn & Ald. 608; that the survivors of three trustees, to whom a power to sell as well as to fill up vacancies in their number had been given by deed, were rendered incompetent to act, by the death of one of them; and that their competency could be restored only by a new appointment. But in *Doe dem.* Read *v.* Godwin, 1 Dowl. & Ryl. 259, where Parliament had vested the prizes of a city lottery in five trustees by name, with power to fill up vacancies by death before the drawing and conveyance of the prizes (city lots) to the fortunate ticket-holders, it was held in ejectment that the conveyance of a prize by four of the five (one having died) was effectual and good. In every aspect, then, it appears that two members of the board are competent to constitute a quorum; and that an appraisement by it, thus constituted, is valid.

As the parties desire no more than to have the opinion of the court on the point presented by the merits, we forbear to inquire into our power to issue a mandamus to officers who represent the government; or make any final disposition of the rule.[1]

[1] In National Bank *v.* Mt. Tabor, 52 Vt. 87, the necessity that all should assemble, or have due notice of a lawful meeting, is insisted upon as a prerequisite to the

4. *Form of Contract.*

JOHNSON *v.* DODGE.

17 Ill. 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

validity of the acts of a majority. See also Williams *v.* School District, 21 Pick. (Mass.) 75; People's Bank *v.* St. Anthony's Church, 109 N. Y. 512; Cammeyer *v.* The Churches, 2 Sandf. Ch. (N. Y.) 186; Constant *v.* Rector, 4 Daly (N. Y.) 305; Cooley *v.* O'Connor, 12 Wall. (U. S.) 391. A majority of the directors of a corporation, or a committee, constitute a quorum, and a majority of the quorum may act. McNeil *v.* Boston Chamber of Commerce, 154 Mass. 277.

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 mere 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.* Chance, 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. 283; Kerby *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. Truman *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. 160; Shirly *v.* Shirly, 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. 278. Nor do we find any substantial departure in the contract from the authority proved. While we hold that the author-

ity 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.

HANFORD *v.* McNAIR.

9 Wend. (N. Y.) 54. 1832.

ACTION of covenant on a sealed instrument signed "For Matthew McNair, Aaron Bush, L. S." Verdict for plaintiff.

By the Court, SUTHERLAND, J. It is an insuperable objection to the plaintiff's recovery in this action, that no competent authority from the defendant to Bush is shown to execute the covenant on which this suit is founded. An agent cannot bind his principal by deed, unless he has authority by deed so to do. The only exception to the rule that the authority to execute a deed must be by deed, is where the agent or attorney affixes the seal of the principal in his presence and by his direction.[1] Co. Litt. 52, *a*; 7 T. R. 209; 5 Mass. R. 40; Comyn's Dig. tit. Attor. C. 1, C. 5; 4 T. R. 313; 2 Caines' Cas. in Err. 1; 9 Johns. R. 285; Liverm. on Agency, 35; 2 Kent's Comm. 478; 7 Cowen, 453. The authority of *Bush* was to contract with the plaintiff for the timber in question. It does not appear ever to have been in writing. It conferred no power upon him to bind his principal by a contract under seal. The subsequent acts of the defendant under this contract, recognizing and carrying it into effect, may be sufficient to make it binding upon him as a parol contract, but cannot make it his deed. If a deed executed by an agent under an express original parol authority would not be binding on the principal, it must necessarily follow that no subsequent parol acknowledgment or acts *in pais* can produce such effect. This was expressly held by Gibbs, Ch. J., in Sterglity *v.* Eggington, 1 Holt, 141; 3 Com. L. R. 54, S. C. That was debt upon an award made pursuant to a submission under seal, executed by one partner for himself and his co-partner. The plaintiff offered to prove that the partner who did not execute the deed gave authority to the other to execute it for him, and that he had subsequently acknowledged the agreement. The chief justice said the authority to execute must be by deed. If one partner, who does not execute, acknowledged that he gave an authority to execute for him, it

[1] Or in case of a partnership or corporation. Smith *v.* Kerr, 3 N. Y. 144; Fitch *v.* Steam Mill Co., 80 Me. 34.

must be presumed to have been a legal authority; and that must be under seal and produced. One man cannot authorize another to execute a deed for him, except by deed. No subsequent acknowledgment will do. I do not perceive how the circumstance that a counterpart of the agreement, executed in the same manner as the original was delivered by Bush to McNair and received by him without objection, avoids the difficulty. It is but evidence of a subsequent acknowledgment or ratification of the deed. The principle of the case of Lewis *v.* Payne, 8 Cowen, 71, does not apply. There both parts of the lease were originally well executed, and it was held that the subsequent fraudulent alteration of the one by one of the parties did not affect or destroy the other. They were both originals.

Whether the plaintiff can treat this as the parol contract of the defendant, and recover upon it in an action of assumpsit, I give no definitive opinion. The case of Banorgee *v.* Hovey and others, 5 Mass. R. 14, would seem to hold that he could not. That case, however, is in some respects essentially different from this.

Although the verdict of the jury appears to me to be against the weight of evidence on some of the points on which they must have passed, if that were the only difficulty in the case, I should not feel authorized to disturb the verdict. On the first ground, however, the verdict must be set aside, and a new trial granted.[1]

GORDON *v.* BULKELEY.

14 Serg. & R. (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?

[1] "It is a maxim of the common law that an authority to execute a deed or instrument under seal must be conferred by an instrument of equal dignity and solemnity; that is, by one under seal. This rule is purely technical. A disposition has been manifested by most of the American courts to relax its strictness, especially in its application to partnership and commercial transactions. I think the doctrine as it now prevails may be stated as follows, viz.: if a conveyance or any act is required to be by deed, the authority of the attorney or agent to execute it must be conferred by deed; but if the instrument or act would be effectual without a seal, the addition of a seal will not render an authority under seal necessary, and if executed under a parol authority or subsequently ratified or adopted by parol, the instrument or act will be valid and binding on the principal. It is said that the rule as thus relaxed is confined in its application to transactions between partners. But it seems to me that a distinction between partners and other persons in the application of the rule as relaxed and qualified by recent decisions, stands upon no solid foundation of reason or principle." PAIGE, J., in Worrall *v.* Munn, 5 N. Y. 229, 239.

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. I 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. 52.

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.

GARDNER *v.* GARDNER.

5 Cush. (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, and 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 a 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. & M. 576, s. c. 4 Barn. & 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.

STATE OF MINNESOTA *v.* YOUNG AND OTHERS.

23 Minn. 551. 1877.

ACTION against Young, as principal, and others, as sureties, upon an official bond. When the bond was executed by the sureties it con-

tained no named sum as a penalty; the sum was afterwards fixed by the county commissioners and by their direction the sum of $25,000 was inserted as the penalty. No one of the sureties ever authorized any one to insert a penal sum in the instrument, except in so far as such authority was implied in the signing of the same on said Sunday, as and for the official bond of said Young, and permitting said Young to take the same with him. The trial court gave judgment for the defendants, and plaintiff appeals.

MITCHELL, J.[1] . . . The defendants urge that the instrument in question never had any force as against them; because: (1) When signed and sealed by them it did not express any penal sum, and this was afterwards inserted at the direction of the board of county commissioners, without authority; and (2) if executed at all, it was executed on Sunday.

In support of their first proposition, defendants insist that this instrument being a deed or instrument under seal, therefore authority to fill a blank therein with material matter could only be conferred by an instrument of equal solemnity — that is to say, one under seal.

Whatever may formerly have been the rule, or may still be the holding of some courts, upon this question, we think the better opinion, both on principle and authority, is that parol authority is adequate and sufficient to authorize an addition to, or alteration of, even a sealed instrument. At the present day, the distinction between sealed and unsealed instruments is arbitrary, meaningless, and unsustained by reason. The courts have, for nearly a century, been gradually doing away with the former distinctions between these two classes of instruments, and if they have not yet wholly disappeared, it simply proves the difficulty of disturbing a rule established by long usage, even after the reason for the rule has wholly ceased to exist. We therefore hold that parol authority is sufficient to authorize the filling of a blank in a sealed instrument, and that such authority may be given in any way in which it might be given in case of an unsealed instrument.[2] Drury *v.* Foster, 2 Wall. 24; Inhabitants of South Berwick *v.* Huntress, 53 Me. 89; Woolley *v.* Constant, 4 John. 54; *Ex parte* Kerwin, 8 Cow. 118; Wiley *v.* Moore, 17 S. & R. 438; Field *v.* Stagg, 52 Mo. 534; Vliet *v.* Camp, 13 Wis. 198; Smith *v.* Crooker, 5 Mass. 538. Therefore, in our view, the only question is whether the facts, as stipulated in this case, establish parol authority from defendants to the board of county commissioners to insert a penal sum in the blank left in this instrument.

There is no claim that any express authority was given; but this is

[1] GILFILLAN, C. J., and CORNELL, J., having been of counsel, did not sit in this case. Hon. Samuel Lord, judge of the fifth district, and Hon. William Mitchell, judge of the third district, were assigned, by the governor, to sit with Berry, J., as judges of this court, *pro hac vice*, and the case was heard and determined by the court as thus constituted.

[2] Accord: Cribben *v.* Deal, 21 Or. 211.

not necessary. Such authority may be implied from circumstances. It may be implied from the facts proved, when these facts, all taken together and fairly considered, justify the inference. In the case at bar, we think that all the circumstances, as they appeared to the board at the time they received the bond, established an apparent implied authority, from the sureties to the board, to fill the blank with such penal sum as they deemed sufficient and proper.

It is stipulated, as facts in the case, that the sureties "did know, when they signed and sealed the said instrument, that the same was intended by the said Young to be used as the official bond of the said Young for his term, commencing March 1, 1872; and they severally signed and sealed the same as and for such his official bond; and, at the time of signing and sealing said instrument, the said sureties intended to be bound that said Young, as such treasurer, should perform the condition thereof." The instrument was fully completed, except the insertion of the penal sum. It is evident that the sureties neither stipulated nor expected that the instrument would be returned or afterwards exhibited to them, before its delivery for use. When the bond was presented to the board, they had a right to presume the existence of the facts thus stipulated. The board would also have a right to presume (certainly, in the absence of something affirmative to show the contrary) that the signers knew the contents of the bond when they executed it; also, that they knew the requirements of the law, to wit, that the instrument, to be a complete bond, must contain a penal sum, and that the amount thereof had to be fixed by the board. This was the apparent and presumptive state of facts, as they appeared to the board when the instrument was presented them for their official action.

Now what did these facts imply, and what had the board a right to presume that they implied? Why, clearly this: "We (the sureties) have executed this instrument as the official bond of Young. We intend it to be used and delivered as such; but, inasmuch as we do not know at what amount you will fix the penal sum which the law requires you to fix, we have left this blank, which you can fill with such sum as you may determine." We think all the circumstances, fairly considered, imply all this almost as clearly as if expressed in words. The nature of the blank to be filled, also, was calculated to raise a presumption of implied authority to fill it. The condition of a bond is the essential feature of it. The penal sum is, in a certain sense, almost a matter of form. In this case, the sureties intended to execute a bond to secure the State from loss by any default of Young. This was the whole substance of their agreement. No penal sum, however large, could extend this liability. The insertion, therefore, of a penal sum, operated simply to perfect the bond according to the original understanding of the signers, without injuriously affecting them, or in any manner changing the contract from what

they intended it to be. It was in one sense, therefore, wholly immaterial to them what the penal sum should be. The nature of the blank itself was, therefore, a circumstance or fact that tended to show an implied authority to the board to fill it. Cases are to be found in the books where implied authority to fill blanks has been held to exist, without any evidence of assent on the part of the maker beyond the instrument itself. We think, therefore, that all these facts and circumstances clearly implied an authority to the board to insert a penal sum in this blank, which authorized them to act in the matter by so filling it.

It is urged by defendants that this authority could not be implied, because the sureties did not in fact know of the existence of the blank. It is undoubtedly true that in most, if not all, of the cases cited it does appear that the parties signing the instrument actually knew of the existence of the blank; and the knowledge of that fact, at the time an instrument is delivered for use, being a strong circumstance tending to establish an implied authority to the other party to fill the blank, it is undoubtedly true that the courts have, in such cases, put great stress upon this circumstance. But we find no case expressly holding that actual knowledge of the existence of the blank is indispensable, and without which authority can never be implied. The correct rule seems to be that this authority will be implied whenever it is fairly and legally inferable from all the circumstances of the particular case under consideration. Moreover, in this case, as we have already said, the board had a right to presume that the sureties knew of the existence of this blank, and, in view of this and all the other circumstances of the case, there was an apparent implied authority to the board, upon which they had a right to act; and, having thus acted, the sureties cannot now be heard to say that they did not know of the existence of the blank. In other words, they are now estopped from denying the existence of the apparent and presumptive state of facts which they, by their conduct, have authorized the board to believe and act upon; and now the apparent authority with which they clothed the board must be held to be the real authority.

As to when authority to fill blanks in written instruments will be implied from circumstances, see Inhabitants of South Berwick *v.* Huntress, 53 Me. 89; Hunt *v.* Adams, 6 Mass. 519. . . .

Judgment reversed.

CHAPTER III.

Formation of the Relation by Ratification.

1. *Act must be Performed in Behalf of Existing Person.*

In Re NORTHUMBERLAND AVENUE HOTEL COMPANY.

33 Ch. D. (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 explains 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.

McARTHUR *v.* TIMES PRINTING CO.

48 Minn. 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 the 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 existence. *In re* Empress Engineering Co., 16 Ch. Div. 128; Melhado *v.* Porto Alegre, N. H. & B. Ry. Co., L. R. 9 C. P. 505; Kelner *v.* Baxter, L. R. 2 C. P. 185. 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.[1]

[1] "In England it has been held in the more recent cases that, in the absence of a charter or statutory provision, a contract made by the promoters of a corporation on its behalf before incorporation is a nullity, and that the corporation cannot ratify or adopt it and thus make it binding upon it after incorporation, although an action *quasi ex contractu* may be maintained against it if it accepts the benefit of such a contract. Kelner *v.* Baxter, L. R. 2 C. P. 174; Melhado *v.* Porto Alegre, New Hambourgh & B. Ry. Co., L. R. 9 C. P. 503; *In re* Empress Engineering Co., 16 Ch. Div. 125; *In re* Northumberland Ave. Hotel Co., 33 Ch. Div. 16; 1 Clark & Marshall, Private Corporations, 306.

"A similar view has been taken by the Supreme Court of Massachusetts. Abbott *et al. v.* Hapgood *et al.*, 150 Mass. 248; Holyoke Envelope Co. *v.* U. S. Envelope Co., 182 Mass. 171; Bradford *v.* Metcalf, 185 Mass. 205.

"A more liberal view is taken by the courts in other States which hold generally that a contract made by the promoters of a corporation on its behalf may be ratified or adopted by the corporation when organized, and that the corporation is then liable both at law and in equity on the contract itself and not merely for the benefits received. Stanton *v.* N. Y., etc., Ry. Co., 59 Conn. 272; Smith *v.* Parker, 148 Ind. 127; Grape Sugar & Vinegar Mfg. Co. *v.* Small, 40 Md. 395; Low *v.* Railroad, 45

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

N. H. 370; Bell's Gap Ry. Co. *v.* Christy, 79 Pa. 54; Buffington *v.* Bardon *et al.*, 80 Wis. 635; Whitney *v.* Wyman, 101 U. S. 392.

"The American courts, however, insist in every instance on an express resolution or some other act by the corporation subsequent to organization showing an intent to be bound. Ireland *v.* Globe Milling & Reduction Co., 20 R. I. 190.

"Consequently it is held that a corporation is not liable, in the absence of ratification or adoption or of a charter or statutory provision imposing liability, for the salary of a superintendent or other person for services performed for it before its organization under a contract made by its promoters, although the contract may have been made on its behalf and with the understanding that it should be bound, and although the promoters who made it have become its stockholders and officers. Western Screw & Mfg. Co. *v.* Cousley, 72 Ill. 531; Little Rock & Ft. Smith R. Co. *v.* Perry, 37 Ark. 164; Carey *v.* Des Moines Co.-Op. Coal & Min. Co. 81 Iowa, 674; 1 Clark & Marshall, Private Corporations, 304.

"Nor is it bound by an agreement by its promoters that a person shall be employed by it at a certain salary when it shall be organized.

"In the case of Oakes *v.* Cattaraugus Water Co., 143 N. Y. 430, it was held by a divided court that, while such a contract was not binding upon the corporation at its inception, yet it might be ratified by the president on behalf of the corporation when it attained a legal existence; and that, there being evidence that the services were performed at the request of the president, who was also the chief promoter of the corporation, and that he acknowledged the indebtedness and promised to pay it, there were under the circumstances questions of fact for the jury." Peabody, J., in Tuttle *v.* Tuttle Co. (1906), 64 Atl. (Me.) 496, 498.

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.*

KEIGHLEY, MAXSTED & CO. *v.* DURANT.

[1901] A. C. 240 (H. L.).

ROBERTS, a corn merchant at Wakefield, was authorized by Keighley, Maxsted & Co., the appellants, to buy wheat on a joint account for himself and them at a certain price. Having failed to buy at the authorized price, Roberts, on May 11, 1898, without authority from the appellants, made a contract by telegram with the respondent Durant, a corn merchant in London, to buy from him wheat at a higher price. Roberts made the contract in his own name, but, as he afterwards said at the trial, intending it to be on a joint account for the appellants, Keighley, Maxsted & Co., and himself. That intention was not disclosed by Roberts to Durant. The next day the appellants, by their manager Wright, agreed with Roberts to take the wheat on a joint account with him. Roberts and appellants having failed to take delivery of the wheat, Durant resold it at a loss and sued them for the amount in an action tried before Day, J., and a special jury. At the close of the plaintiff's case, the jury having been discharged, Day, J., dismissed the action against the appellants on the ground that there was no ratification in law of the contract, and gave judgment against Roberts for the amount claimed. The Court of Appeal (COLLINS and ROMER, L. JJ., A. L. SMITH, M.R., then L. J., dissenting) reversed the decision as regards the appellants, and ordered a new trial on the ground that there was evidence for the jury that Roberts contracted on behalf of himself and the appellants.

[The question of law, therefore, is, whether a contract made by a man purporting and professing to act on his own behalf alone, and not on behalf of a principal, but having an undisclosed intention to give the benefit of the contract to a third party, can be ratified by that third party, so as to render him able to sue or liable to be sued on the contract. In the course of his judgment Collins, L. J., says that the point has never been actually decided, though he admits there are numerous dicta upon it which have become the foundation of statements in text-books more or less adverse to the present respondent's contention, and he says that the question must now be determined on principle. Lord Davey, p. 253.]

EARL OF HALSBURY, L. C. My Lords, there are here no facts really in dispute in this case. Roberts made a contract on his own behalf, and without the authority of anybody else. The contract was made and the parties to it ascertained, and I am of opinion that upon no principle known to the law could the present appellants be made parties to that contract. They could, of course, make another contract in the same terms if they pleased, but it would not be this contract. It is suggested by the judgment of the Court of Appeal as

possible, that what is described as ratification might, if the parties had so pleased, make the contract, which was one made between A. and B., to include C. as one of the contracting parties. I think such a suggestion is contrary to all principle, and for it there is no decision which calls for your Lordships to override it, though I confess I should have no hesitation in doing so if there were. The parties to the contract, who have already bound themselves by it, are just as much part of the contract as any other part of the contractual obligations entered into.

I confess I do not see the relevancy of the argument that a contract might be made in the name of an unknown principal, and that such a principal may sue and be sued, though the name was not given at the time the contract was made. The fact is that in such a case the contract is made by him, and the disclosure afterwards does not alter or affect the contract actually made. Here it would alter the contract afterwards and make it a different contract. If it is said it is an anomaly, it certainly is not the only one in our law, and if it were sought to make our laws harmonious by deciding that any proposition which our laws establish involves as a necessary consequence the establishment of everything that is analogous to it, the result would be very perplexing indeed. I agree with the Master of the Rolls that a long line of authorities has decided the question in favor of the view which he maintains.

My lords, I should say no more but for Collins, L. J.'s appeal to the Roman law, and, with great respect for anything that falls from the Lord Justice, I cannot think that if the law were as there laid down it would help the present respondents. I do not think the passage in the Digest upon which he founds his argument refers to what we call ratification at all; but I wish to add that, if it could be clearly made out that it did so, I should not be much impressed by it. There are parts of the Roman law which undoubtedly we have made part of our own law, and they are binding on us, not because they are part of the Roman law, but because they have become part of our law. There are some countries which have made the Roman law their own, but in this country we have never adopted it in such a wholesale fashion. Hale, C. J., said the sources of the English law are as undiscoverable as the sources of the Nile, and although in our day such a phrase cannot be appropriately used, it was true in Hale's time. Our law differs in most important respects from the Roman law, and to quote the latter as an authority we must show that it has become part of our own jurisprudence.

I move your Lordships that the judgment appealed from be reversed, and that the respondents do pay to the appellants the costs both here and below.

Lord Shand. . . . The question which arises on this state of the facts is whether, where a person who has avowedly made a contract

for himself (1) without a suggestion that he is acting to any extent for another (an undisclosed principal), and (2) without any authority to act for another, can effectually bind a third party as principal, or as joint obligant with himself, to the person with whom he contracted, by the fact that in his own mind merely he made a contract in the hope and expectation that his contract would be ratified or shared by the person as to whom he entertained that hope and expectation. I am clearly of opinion, with all respect to the majority of the Court of Appeal, that he cannot. The only contract actually made is by the person himself and for himself, and it seems to me to be conclusive against the argument for the respondents, that if their reasoning were sound it would be in his power, on an averment of what was passing in his own mind, to make the contract afterwards either one for himself only, as in fact it was, or one affecting or binding on another as a contracting party, even although he had no authority for this. The result would be to give one of two contracting parties in his option, merely from what was passing in his own mind and not disclosed, the power of saying the contract was his alone, or a contract in which others were bound with him. That, I think, he certainly cannot do in any case where he had no authority, when he made the contract, to bind any one but himself. . . .

Lord Brampton (after stating the facts). My Lords, it was not suggested that in any of the several telegrams in which the contract was contained, or in any other way, Durant was made aware, or that Roberts ever hinted to him, that in making it he was acting by the authority, or on behalf, of an undisclosed principal. Had he so made it — though at that time no authority from Keighleys was then in existence — Keighleys might have ratified and adopted it, and having done so both they and Durant would have been as responsible upon it, each to the other, as if Keighleys had been a party to it from the beginning; but as this contract was clearly not so made, but was a simple written contract between Durant, the vendor, and Roberts, acting apparently for himself only, as vendee, it could not be so ratified by Keighleys, for there was no contract open for them to ratify; and it could not have been adopted by them, for after a contract has been finally concluded between two persons it cannot be altered so as to make a third person liable upon it. If this is desired, it must be done through the medium of a new contract.

But it is said for the plaintiff that when Roberts made his contract he had within his mind an intention, though he never communicated or disclosed it to anybody, to make it on the joint account of Keighleys and himself, and that such secret intention was quite sufficient to empower Keighleys to ratify or adopt it. I cannot assent to this view. I have always been under the impression that a concurrence of intention was an essential element of a contract. Nobody can doubt that it is essential in making an agreement to ascertain who are

then intended to be made parties to it. It is impossible in construing a contract to give any weight to such a reserved intention as that suggested in this case; to do so would be to open wide a doorway to fraud and deception; and it would necessitate the addition of the doubtful science of thought-reading to the requirements of a mercantile education. I reject, therefore, this doctrine of mental reservation, and strip from the case the element of secret intention.

The case then is reduced to this: that there is a contract between Roberts and Durant simply, to which it was never avowedly contemplated that Keighleys should be parties. Neither Keighleys nor Durant could make the former liable by adoption or ratification of a contract to which, when it was concluded, it was not in contemplation of themselves or Durant that they should or could be so. This action, therefore, which is based on a contract to which Keighleys were not parties, must fail.

I say nothing about any new contract which it was open for the parties, or any of them, to have made if they had so thought fit — a new contract between themselves. It may or may not be that some contract between Roberts and Keighleys might have been formulated out of the interview with Wright on May 12 at Manchester. I am now dealing only with the contract made on the 11th between Roberts and Durant, to which, in my opinion, the appellants (Keighleys) could not make themselves, or be made by Durant, parties.

I will not detain your Lordships by again referring to the numerous cases cited at the bar, nor to those so fully discussed by the Court of Appeal; in addition to these, I desire only to refer to that of Kelner *v.* Baxter, (1866) L. R. 2 C. P. 174, decided by Erle, C. J., and Willes, Byles, and Keating, JJ. I agree in the judgment of the present Master of Rolls in the Court of Appeal. It follows that, with all respect to the opinions expressed by the majority of that Court, I cannot concur in their views. In my opinion, therefore, the judgment of the Court of Appeal should be reversed, the judgment of Day, J., restored, and this appeal allowed with costs.

Lord Robertson. . . . With the Master of Rolls, and in his words, I hold that, "unless the contract made by the unauthorized agent purports or professes . . . to have been entered into on behalf of another . . . then that contract made by the unauthorized agent was not capable of being ratified by a stranger to it." To speak of the "purporting or professing" as if this were one condition, more or less, of ratification, seems to me to be rather an understatement. All are agreed that there must be some special relation between the ratifier and the contract other than and antecedent to his claiming the contract. To hold otherwise would be to admit extravagant results. It seems to me that the whole hypothesis of ratification is, that the ultimate ratifier is already in appearance the contractor,

and that by ratifying he holds as done for him what already bore, purported or professed to be, done for him. There is, as it seems to me, no room for ratification (unless all the world may ratify) until the credit of another than the agent has been pledged to the third party. Whether the unauthorized agent be marked out as an agent by what he says, or by what he wears, is, of course, a mere matter of circumstance and evidence; but an agent he must be known to be, and as an agent he must act. On the other hand, the only theory consistent with the respondents' argument is, that the essential condition is that the person making the contract did so in a state of mind which may more accurately be described as hope than intention, that the person who *ex hypothesi* ultimately "ratifies" would "ratify." The difficulty of stating this theory, and the difficulty of working it, having regard to its basis being unexpressed and very likely half-formed expectations, are not indeed conclusive objections, but they challenge scrutiny of supposed origin of the theory. . . .

LORD LINDLEY. . . . The principle relied on, and the only principle which by our law can be invoked with any chance of success, is that known as ratification, by which an approval of what has been done is sometimes treated as equivalent to a previous authority to do it. The mere statement of the general nature of what is meant by ratification shows that it rests on a fiction. Where a man acts with an authority conferred upon him, no fiction is introduced; but where a man acts without authority and an authority is imputed to him a fiction is introduced, and care must be taken not to treat this fiction as fact. . . .

The doctrine of ratification as hitherto applied in this country to contracts, has always, I believe, in fact given effect in substance to the real intentions of both contracting parties at the time of the contract, as shown by their language or conduct. It has never yet been extended to other cases. The decision appealed from extends it very materially, and I can find no warrant or necessity for the extension.

I have examined all the authorities referred to in the judgments of the Court of Appeal, and those cited by counsel in this House, and with two apparent exceptions they are all, in my opinion, adverse to the plaintiffs. One exception is the passage in Bird *v.* Brown, 4 Ex. 786, which has been already commented on, and which I do not clearly understand. The other apparent exception is Soames *v.* Spencer, 1 D. & R. 32; 24 R. R. 631, which, when examined, does not really help the plaintiffs. There, one of two co-owners of oil sold the oil to the defendants. The buyers — i. e., the defendants — apparently did not know that the oil did not wholly belong to the seller. When informed that there was a co-owner who objected to the bargain, the defendants insisted that he was bound by it, and he acquiesced in their view. Both parties treated the contract as if

made between both owners, as sellers, and the buyers. Afterwards, when sued by both co-owners for not accepting the oil, the defendants — i. e., the buyers — changed their tactics, and contended that there was no ratification, and no contract in writing, to satisfy the Statute of Frauds. It is plain from the judgment of Abbott, C. J., that the conduct of the defendants themselves removed any real difficulty as regards ratification which otherwise might have arisen.

It may be that if one of several co-owners of a chattel sells it, without the authority of his co-owners, to a person who believes he is dealing with the sole owner of the property sold, the transaction can be ratified by the undisclosed co-owners, and that they can then sue or be sued on the contract as undisclosed principals. Their interest in the property may justify this view. In Soames *v.* Spencer, 1 D. & R. 32; 24 R. R. 631, it was assumed rather than decided that ratification in such case is possible, and I am far from saying that it is not. The co-ownership shows that the seller, if acting honestly, must in fact have been acting for his co-owners as well as for himself. His intention is supplemented by a fact which completes the proof of what is necessary. In the present case there is no co-ownership, which was the foundation of the decision in Soames *v.* Spencer, 1 D. & R. 32; 24 R. R. 631, and consequently the decision when carefully looked at is not really an authority for the plaintiffs. . . .

Order appealed from reversed and judgment of Day, J., restored, with costs here and below.[1]

HAYWARD *v.* LANGMAID.

181 Mass. 426. 1902.

CONTRACT for a balance due for the construction of a house and repairs upon other property. The house was constructed upon defendant's land under a contract in writing between the plaintiff and Webster C. Langmaid, a son of defendant. There was evidence that Webster C. Langmaid in making the contract did so as the agent of the defendant; that he did not disclose to the plaintiff that he was acting as agent, and that the plaintiff supposed that Webster C. Langmaid was the owner of the land upon which the house was to be erected, and, relying upon these facts, signed the contract, furnished the materials, and constructed the house, and that he did not learn until after the house was constructed that Webster C. Langmaid was not the owner of the land. There were certain other items in the

[1] Concurring opinions were also delivered by Lord Macnaghten, Lord James of Hereford, and Lord Davey.

declaration outside of the written contract amounting to about $82, for work done and materials furnished on other property of the defendant at the request of Webster C. Langmaid; and the plaintiff offered evidence tending to show that in ordering this work Webster C. Langmaid acted as the agent of his mother and was acting within the scope of his authority as such agent. There was evidence put in by the plaintiff which, he contended, not only tended to prove such agency, but also tended to show that, if Webster C. Langmaid had in any respect exceeded his authority, the defendant had ratified his acts. It was admitted by the defendant that if the plaintiff was entitled to recover anything, he should recover for the full amount claimed.

The jury found for the plaintiff in the sum of $2,754.09.

The defendant filed a notice for a new trial on the ground that "the judge refused to instruct the jury, as prayed for by the defendant, that the meaning of ratification in law is the adoption of an act which has been done by one purporting or assuming to act as agent."

MORTON, J. There are two questions in this case: 1st, whether the instruction that was requested, "that the meaning of ratification in law is the adoption of an act which has been done by one purporting or assuming to act as agent"; and 2d, whether the motion for a new trial was rightly overruled.

It is evident, we think, that the instruction was understood, and rightly, by the presiding judge to mean that it was necessary to a ratification, that the act should have been done by one who represented or held himself out as an agent in respect to the matter to which it related. But such is not the law. It is necessary in order to a ratification that the act should have been done by one who was in fact acting as an agent, but it is not necessary that he should have been understood to be such by the party with whom he was dealing. Sartwell *v.* Frost, 122 Mass. 184; Ford *v.* Linehan, 146 Mass. 283; New England Dredging Co. *v.* Rockport Granite Co., 149 Mass. 381; Schendel *v.* Stevenson, 153 Mass. 351. The request was therefore properly refused. . . .

Exceptions overruled.

WYCOFF *v.* DAVIS.

127 Iowa, 399. 1905.

REPLEVIN. Plaintiff's agent, Dahlberg, had authority to sell and deliver plaintiff's typewriting machines and to collect for the same. Dahlberg was short in his accounts with plaintiff and went to defendant, told him of the shortage, and borrowed $125 to send to

plaintiff. Dahlberg delivered to defendant the machines in question as security for this loan, giving, however, a receipt to Davis for $205 as if for payment for the machines. Dahlberg sent the money to plaintiff and it was received and credited. Afterward plaintiff learned of the transaction and brought this action to recover the machines. Judgment for defendant, fixing his interest in the machines at $134.23.

DEEMER, J. . . . There is but a single proposition involved in the case, and that is, may plaintiff recover the machines from Davis without returning the $125 loaned by him to Dahlberg? . . . Divested of all extraneous matter, the case is this. Dahlberg had possession of the machines as agent for the plaintiff, with authority to sell the same and to collect the purchase price. He was short in his accounts with his principal, and applied to Davis for a loan to make up this shortage, stating the facts to him, Davis. He represented to Davis that the machines were his, and that he had authority to sell them. Davis loaned $125 to Dahlberg individually, and took the machines as security for the loan, but, in order to make the transaction appear as a sale, insisted upon a receipt showing a sale rather than a pledge. Dahlberg did not, of course, own the machines, and he could not pledge them as security for his individual indebtedness. These being the facts, the ultimate conclusion is clear. Dahlberg having no express or implied authority to pledge the machines as security for his own debt, the transaction was not binding upon the plaintiff, and it may recover its property, unless it be that, by receiving the money as a result of the transaction, it ratified the same and is estopped from asserting its title. Of course, if Dahlberg had assumed to act as an agent for his company in securing the loan and pledging the machines, and plaintiff had received the money so obtained, it could not repudiate the transaction without returning the money. But that is not this case. Here the loan was not made to the plaintiff either actually or ostensibly, but to Dahlberg in his individual capacity to enable him to meet a shortage to his company. The property was not pledged as the property of the company, but as Dahlberg's. Dahlberg was indebted to his company for other accounts, and the loan was to enable him to make up his shortage to his principal. The company had the right to receive its money from its agent to apply on this shortage, no matter what its source, so long as the agent had not undertaken to act in his capacity as agent in obtaining the money. It was not bound to return the money, because its agent borrowed the same in his individual capacity and pledged his principal's property as security therefor, not as agent, but representing himself to be the owner thereof, with authority, in virtue of such ownership, to sell. The doctrine of ratification has no application to such a state of facts, for there is nothing to ratify; nothing was done on the company's behalf or in its name; the trans-

action was in the name of Dahlberg and for his individual benefit. In such cases the rules relating to ratification manifestly do not apply. Thacher *v.* Pray, 113 Mass. 291, 18 Am. Rep. 480; Mechem on Agency, § 127; Hamlin *v.* Sears, 82 N. Y. 327; White *v.* Sanders, 32 Me. 188.

We are then brought down to the simple question as to which of the parties to this litigation has the better title or right to the possession of the property. Plaintiff is conceded to have been the owner. If it has lost its title, it was through the act of Dahlberg, its agent. Dahlberg had no authority, either express or implied, to mortgage or pledge the property for a debt of his own. Bray *v.* Flickinger, 69 Iowa, 167, 28 N. W. 492; s. c., 79 Iowa, 313, 44 N. W. 554. Even if Dahlberg had assumed to mortgage the property as the property of his principal, he would not have had authority to do so under power to sell and collect the purchase price, although here the question of estoppel by ratification might perhaps arise. See, as supporting these conclusions: Mordhurst *v.* Boies, 24 Iowa, 99; Gilbert *v.* Baxter, 71 Iowa, 327, 32 N. W. 364; Van Vechten *v.* Jones, 104 Iowa, 436, 73 N. W. 1032; Edgerly *v.* Cover, 106 Iowa, 670, 77 N. W. 328. None of the cases cited and relied upon by appellee are in point, for in each there was some act done by the agent in the name of or on behalf of his principal which was the subject of ratification. This is not true in the case at bar. . . .

The judgment of the district court, which was evidently based upon the theory of ratification, is wrong, and it is therefore reversed.

GARVEY *v.* JARVIS.

46 N. Y. 310. 1871.

ACTION to procure a decree to the effect that defendant held a judgment against plaintiff, assigned to defendant from one Malcolm, as agent or trustee of plaintiff and to enjoin its collection. The judgment was first assigned by Malcolm to one Roach and by him to Jarvis. Plaintiff appeals from a judgment for defendant. (54 Barb. 179.)

CHURCH, Ch. J. The judge before whom this action was tried found, as facts, that one Malcolm held a judgment against the plaintiff for upward of $2,000, and had told the plaintiff he would discharge it for $500, but the plaintiff had not accepted the offer; that the defendant (who was a stranger to the plaintiff), having learned of the willingness of Malcolm to discharge the judgment for that sum, applied to him, and by the false representation, that he came from and was a friend of the plaintiff, induced Malcolm to assign the

judgment to him, for which he paid $500, and the plaintiff now claims the benefit of this purchase. . . .

It is claimed, however, that upon principles applicable to principal and agent, or trustee and *cestui que trust,* the plaintiff is entitled to maintain the action; that Roach having assumed to act as the agent of the plaintiff, the latter could ratify the act and entitle himself to the benefits of it; and that the defendant holds the judgment as trustee for the plaintiff, and must account to him for it. It is a familiar rule, that the ratification of an unauthorized act of an agent is equal to an original authority. (Dunlap's Paley's Agency, 171, note a.) But in this case the essential element is wanting, that the act must be done *for another.* Here it was not so done. The most that can be claimed is, that the defendant said he was acting for the plaintiff, which was false. He paid his own money, and in fact, acted for himself. He was a stranger to the plaintiff, and of course, under no obligation to act for him, and as we have seen, he deprived the plaintiff of nothing to which he was entitled. The cases on this subject, have generally arisen between the principal and the person with whom the agent acted, either to enable the former to derive some advantage or to enforce some liability against him; but in all these cases the agent acted for the principal, and the act was assumed by him, with the assent of the agent. It has been held, that where A does an act as agent for B, without any communication with C, the latter cannot afterward, by adopting it, make A his agent, and thereby incur any liability or take any benefit under the act of A. Wilson *v.* Tunman, 6 Mann. & Grang. 236.

No authority has been cited, and I think it is safe to assert that none exists, in which any court has ever held, that a false declaration of agency for another enables the latter, as against the alleged agent, to receive the benefit of an act actually performed for the latter, unless that act was performed under such circumstances as to create an estoppel, or unless the assumed principal has been deprived of some legal right, or otherwise injured. There is no *estoppel* in this case. The plaintiff neither did anything, nor omitted to do anything in consequence of the statement of the defendant, and he was deprived of no legal right. . . .

[The court then holds that defendant did not hold the judgment as a trustee for plaintiff.]

RAPALLO, J., read a dissenting opinion, maintaining that the assignment of the judgment, having been intended by Malcolm for the benefit of Garvey, and Roach with knowledge of this, having procured it to be made to himself, by representing to Malcolm that he, Roach, came from Garvey, and was acting for his benefit, and the assignment having thus been delivered to and received by Roach, in the assumed character of Garvey's representative, Roach, in fact, received it as trustee for Garvey.

That Garvey had the right to affirm this trust, and claim the benefit of it, though created without his previous authority, knowledge, or privity. . . .

That the maxim "*Omnis ratihabitio retroharitur, et mandato equiparatur,*" was applicable to this case. Dunlap's Paley on Agy. 324; Broom's Leg. Max. 835; 6 M. & Gr. 242; 4 Exch. R. 798, 799. . . .

For affirmance, Ch. J. Allen, Grover, and Folger, JJ.; for reversal, Rapallo and Peckham, JJ.

Judgment affirmed.

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2. *Assent may be express or implied.*

JONES *v.* ATKINSON.

68 Ala. 167. 1880.

ACTION to recover possession of a mule named *John*. Judgment for plaintiff. Defendant appeals.

Plaintiff rented a mule named *Jerry* to one Pritchett. With plaintiff's consent Pritchett traded the mule *Jerry* for the mule *John*. Later Pritchett traded the mule *John* for a mare called the "Clanton mare." Clanton sold the mule *John* to defendant. There was a conflict of evidence whether plaintiff authorized Pritchett to trade the mule *John* for the "Clanton mare"; but there was evidence that after the trade plaintiff saw the mare in Pritchett's possession, and that plaintiff offered to trade the mare with one witness and sent another to Pritchett to make such a trade. The defendant asked the court to charge the jury that "if they find that Pritchett afterwards traded the mule *John* for a certain mare, and, while said mare was in the possession of Pritchett, plaintiff claimed her as his property, and offered to trade her, this was, in law, a ratification of the trade of *John* for the mare, and he cannot recover in this suit." The court refused to give this charge, and the defendant excepted to its refusal; and he now assigns said refusal as error.

STONE, J. When we first considered the charge refused in this case, we doubted somewhat whether the hypothesis, or premises, justified the conclusion it invoked. Knowledge of the unauthorized act done is a necessary element in every binding ratification, and knowledge is not expressed in the charge, as one of the conditions on which a verdict for the defendant was claimed. We now think that, under the facts and circumstances shown in the evidence, that constituent was necessarily implied. The acts of ratification supposed in the charge are, that Atkinson, while said mare was in the possession of Pritchett, claimed her as his property, and offered to trade

her. The undisputed facts are, that Pritchett had in his possession a mule called *Jerry,* which Atkinson claimed as his property; that Pritchett traded the mule *Jerry,* for a mule named *John,* and Atkinson ratified the trade, and claimed the mule *John* as his property; and that subsequently Pritchett traded the mule *John* for the mare, called the "Clanton mare." Now, the only claim Atkinson could have or assert to the mare, rested on the title he acquired by the exchange of the mule *John* for her. This claim, if he made it, rests alone on the fact that she stood in the place of the mule *John.* If he claimed the mare, and if he asserted and attempted to exercise acts of ownership over her, this was a ratification, and being once made, he could not revoke it, unless it was made under a misapprehension of the facts. His right and claim to the mare had no foundation to rest on, unless he had parted with right and claim to the mule. He could not claim both, and claiming one, he renounced the other.

The case of Meehan *v.* Forrester, 52 N. Y. 277, presented a question of ratification *vel non.* Pinkney, as the attorney and agent of Bertine, was intrusted with the collection of a claim due the latter. Without any authority from his principal, Pinkney took from the debtor a deed to lands, absolute on its face, but intended as security only. The Court of Appeals said: "There was no dealing on the subject between the plaintiff [debtor] and Bertine, except through Pinkney. The evidence justifies the inference that the deed was received by Pinkney for Bertine, in pursuance of the agreement made between Pinkney and the plaintiff, and delivered by Pinkney to Bertine. The agency of Pinkney was to collect the debt, not to purchase lands. When, under those circumstances, Pinkney delivered to Bertine the deed obtained from the plaintiff, it was the duty of Bertine to inquire, and of Pinkney to communicate, under what arrangement the deed had been obtained. In the absence of any evidence to the contrary, the presumption is that these duties were performed. If not, and Bertine received the deed blindly, without receiving or making any inquiry, he must be deemed to have confided the whole matter to his attorney, and adopted whatever arrangement the latter may have made to obtain the deed." Carving *v.* Southland, 3 Hill, 552. And a ratification once made becomes irrevocable. Wharton on Agency, § 73; Buck *v.* Jones, 16 Texas, 461; Clark *v.* Van Riemsdyk, 9 Cranch, 153; Seago *v.* Martin, 6 Heisk. 308; Story on Agency, § 253; Lee *v.* Fontaine, 10 Ala. 755; Fireman's Ins. Co. *v.* McMillan, 29 Ala. 147; Crawford *v.* Barkley, 18 Ala. 270. In Lee *v.* Fontaine, *supra,* it is said, "Even the silence of the principal will, in many cases, amount to a conclusive presumption of the ratification of an unauthorized act." The charge asked should have been given.

Reversed and remanded.

RUTLAND AND BURLINGTON RAILROAD CO. *v.* LINCOLN.

29 Vt. 206. 1857.

ASSUMPSIT to recover assessments upon an alleged subscription to stock. One Buckmaster signed Lincoln's name as a subscriber to ten shares of stock in the plaintiff company. Plaintiff offered evidence that defendant had stated to several witnesses, but not in the presence of Buckmaster or any officer of the company, that he had subscribed for ten shares in plaintiff company. Defendant asked the court to charge that the mere declaration of defendant as above did not amount to ratification. The court refused the charge, and gave one to the contrary. Verdict for plaintiff.

The opinion of the court was delivered by

REDFIELD, Ch. J. This case seems to have been tried in such a manner as to be practically about as advantageous to the defendant, perhaps, as if the charge had been strictly and technically correct. The testimony no doubt tended very strongly to show either an original authority in Buckmaster to make the subscription in the defendant's name, or that he had consented to assume it. But the specific question raised, and upon which the court were requested to charge was, whether Lincoln's declaration to mere strangers that he had such an amount of stock in the defendants' company amounted to such a ratification of the subscription. And it is not claimed in argument that it did. We think it impossible, therefore, to affirm the charge without making presumptions so remote that they seem to us somewhat unnatural. . . .

Judgment reversed and case remanded.

HYATT *v.* CLARK.

118 N. Y. 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, his rights would have been forthwith terminated, and he 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 Ev. 123; Wharton on Ev. § 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 lessee, 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 tenant was 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 lessee had given notice of his 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 bases 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 upon 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.

WHEELER *v.* NORTHWESTERN SLEIGH CO.

39 Fed. 347. 1889.

ACTION to recover dividends declared by defendant on March 1 and payable on May 1 and July 1 upon stock at the time owned by plaintiff. After the dividend was declared and before it was payable, plaintiff authorized one Benjamin to sell the stock at par but expressly reserved the dividend. Benjamin on March 12 sold the stock and the dividend to Chapman & Goss at the par value of the stock, representing that it belonged to his wife. The buyers were ignorant that Benjamin was in fact plaintiff's agent. On March 15 plaintiff delivered the stock to Benjamin, who delivered it to the buyers. Benjamin paid to plaintiff the purchase money, which he still retains. Defendant, after a demand by plaintiff, paid the dividend to Chapman & Goss.

JENKINS, J. (after deciding that the dividend would not pass as an incident to the sale of the stock).

Did the retention by the plaintiff of the avails of the stock amount to a ratification? The plaintiff received as avails of the stock the exact amount for which he had authorized his agent to dispose of his stock. He had no reason to suppose that any false representation had been made, or that his agent had assumed to dispose of any other property than the stock as the consideration for the money paid by the purchasers and received by him. Under such circumstances, the retention of the money cannot be held to be a ratification by him of the unauthorized acts of the agent, because it was retained without knowledge of the facts. Bell *v.* Cunningham, 3 Pet. 69, 81; Hastings *v.* Proprietors, 18 Me. 436; Bryant *v.* Moore, 26 Me. 87; Thacher *v.* Pray, 113 Mass. 291; Navigation Co. *v.* Dandridge, 8 Gill & J. 248; Smith *v.* Tracy, 36 N. Y. 79; Baldwin *v.* Burrows, 47 N. Y. 199; Smith *v.* Kidd, 68 N. Y. 130; Reynolds *v.* Ferree, 86 Ill. 576; Roberts *v.* Rumley, 58 Iowa, 301, 12 N. W. Rep. 323; Bohart *v.* Oberne, 36 Kan. 284, 13 Pac. Rep. 388; Insurance Co. *v.* Iron Co., 21 Wis. 458, 464.

So far as the record discloses, the first notice which the plaintiff received that the purchasers of the stock claimed the dividend was about May 7th, when the treasurer of the defendant seems to have advised him thereof, and requested to know if the plaintiff made claim thereto. It does not appear that the grounds of the claim were then disclosed. It would seem probable that the plaintiff understood the claim to be bottomed upon the ground that by law the stock carried dividend previously declared and unpaid, — a ground insisted upon at the trial, — as the plaintiff in his letter of that date speaks of the purchaser undertaking to hold the dividend "under some technicality." There seems to have been no communication between Chapman

& Goss and the plaintiff at any time touching their claim. They asserted no claim, and disclosed no ground of claim. They knew the false representation and the agreement, of which the plaintiff was ignorant, and were, I think, bound, if they sought to hold the plaintiff to a ratification of the unauthorized act of his agent, to possess the plaintiff with facts within their knowledge, and not in his, and to assert a claim founded thereon. This they did not do, but, knowing that the plaintiff claimed the dividend, remained passive so far as concerns getting information to him of the grounds of their claim. It cannot surely be said that under such circumstances the retention of the money was an act of affirmance. To so hold would place every principal at the mercy of his agent with respect to matters as to which he had conferred no apparent authority. So that if one should authorize his agent to sell his house for $20,000, and the agent selling the house for that sum should include in the sale certain bank-stock which he was not authorized to sell, and of which he had not possession, the principal, by the mere receipt and retention of the sum which he had authorized to be taken for the house, and in ignorance of the fact that the bank-stock was part of the consideration running to the purchaser, would be bound to deliver the stock. I cannot yield assent to such doctrine. The purchaser had, in the case supposed, no right to trust the agent with respect to the bank-stock. He had not the possession of it, and was not clothed with any authority with respect to it. The purchaser was bound to inquire into the authority of the agent in such case. The reception and retention of the exact sum authorized to be taken for the house in ignorance of the act of the agent with respect to the bank-stock, is no ratification. Otherwise the principal is bound for every unauthorized act of the agent, and the purchaser may trust the agent, who can exhibit no authority. Such a principle would be ruinous. Upon maturity of the dividend, suit was at once brought against the company. Until the trial the plaintiff is not shown to have knowledge of the facts upon which the claim of the purchasers to the dividend is based. They had not communicated them to him. He could not have learned them from the agent, for he denied the representations and agreement. This was no acquiescence, working ratification of the unauthorized act of Benjamin. The cases relied upon by the defendant are of that class, either of recognized agency or of acts adopted by the principal as done for him, where a right obtained by the agent is sought to be enforced, or where the principal receives the avails of a contract either authorized or adopted by him. The liability of the principal for the fraud of his agent is bottomed upon the principle that, by adopting the contract made by the agent, and receiving the avails, the principal assumes responsibility for the means adopted to effect the contract; but, as well observed in Baldwin *v.* Burrows, *supra,* where the cases are ably reviewed, and the lines of distinction are sharply defined, "this responsibility for instru-

mentalities does not extend to collateral contracts made by the agent in excess of his actual or ostensible authority, and not known to the principal at the time of receiving the proceeds, though such collateral contracts may have been the means by which the agent was enabled to effect the authorized contract, and the principal retains the proceeds thereof after knowledge of the fact." The present case is not within the class of cases relied upon. The collateral contract for the transfer of the dividend was in excess of any authority, actual or ostensible. The proceeds of the authorized sale of the stock were received in ignorance of the fraud perpetrated by the agent. The amount of such proceeds was the exact amount authorized to be received for the stock. The plaintiff, by retaining the proceeds, adopted and ratified what he had authorized. Such action cannot be tortured into ratification of unauthorized acts. Smith *v.* Tracy, 36 N. Y. 79; Condit *v.* Baldwin, 21 N. Y. 219. *Judgment for plaintiff.*

GRESHAM, J., concurs.

STRASSER *v.* CONKLIN.

54 Wis. 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 that question undetermined.

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

WHEELER AND WILSON MFG. CO. *v.* AUGHEY.

144 Pa. St. 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 representative 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 prin-

cipal 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.

BRYCE *v.* CLARK.

42 N. Y. St. Rep. (N. Y. C. P. Gen. T.) 471. 1892.

PER CURIAM. This action was brought to recover for advertising done for the Harvard Publishing Co. upon an order signed "Harvard Publishing Co., W. Campbell Phelan, Manager."

It is always the duty of the plaintiff claiming to have a contract with the defendant made through an agent to inform himself whether the agent had the power to make the contract relied upon. In this case the testimony left that question in doubt, so that it was within the province of the court to determine whether there was such an agency or not. We do not think the evidence warrants us in disturbing its conclusion.

But it further appears that the defendant and his manager received a statement of plaintiff's claim, which indicated that he thought a contract had been made with defendant. Under such circumstances, it was his duty to immediately notify the plaintiff to discontinue the advertisement. Instead of this, it was allowed to appear in two subsequent numbers of the plaintiff's periodical, and the justice very properly rendered judgment for those two insertions, and the judgment will, therefore, be affirmed, with costs.

PHILADELPHIA, W. & B. RAILROAD CO. *v.* COWELL.

28 Pa. St. 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. Tindal, 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 was 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 whatever is done in my name, I am bound for it as by the act of an authorized agent, it is apparent that my silence, in view of what has been done, is to be regarded simply as evidence of ratification, more or less expressive, according to the circumstances in which it occurs. It is not ratification of itself, but only evidence of it, to go to the jury along with all the circumstances that stand in immediate connection with it. Among these the prior relations of the parties are very important. If the party to be charged 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 author-

ity 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 in-

terests, 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 convince 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.[1]

[1] "If, after knowledge of what the agent had done, the principal made no objection for an unreasonable time, a ratification would result by operation of law. What is a period long enough to bring about such a result would usually be a question for the jury, depending upon the peculiar circumstances of each case. But, in proceeding to recover the land and set aside the deed, the pleadings of the principal may themselves allege enough to show a ratification results as matter of law. . . . If there be a good and sufficient explanation as to why the principal did not know of the transaction, or had been unable to discover it, or if there be an

EBERTS *v.* SELOVER.

44 Mich. 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 subse-

excuse for delay in bringing the suit, these facts would have to be specially averred in order to prevent the defendant from taking advantage of the acquiescence implied by non-action for a long lapse of time." Whitley *v.* James, 121 Ga. 521.

quently 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] Plaintiffs' agent sold to defendant a piano and agreed that it should be paid for out of certain commissions that might become due from the agent to defendant on future stock transactions. Plaintiffs bring an action for the price of the piano. *Held:* "When the plaintiffs were informed of the terms of the contract made by their agent for the sale of the piano to the defendant, they had an election to repudiate the arrangement, and by tendering back what they had received in ignorance of the terms of the sale, and demanding the piano, they could have recovered it by an action of replevin, or obtained its value in trover. But, knowing the terms of the sale, they elected to sue in assumpsit on the contract for the agreed price, and thereby they affirmed the contract and ratified the act of the agent precisely as if it had been expressly approved upon being reported to them by the agent or the defendant; and in contemplation of law a subsequent ratification and adoption of an act has relation back to the time of the act and is tantamount to a prior command. 1 American Leading Cases, 4th ed., 592.

"The argument for the plaintiffs (though it is not so stated) seems really to involve the fallacious assumption that the plaintiffs could affirm the contract in part and repudiate it in part, that is, that the contract is to be treated as good for the agreed price, but bad as to the agreed mode of payment. But the law requires a contract to be affirmed or repudiated in its entirety. Shepard *v.* Palmer, 6 Conn. 100; Newell *v.* Hulburt, 2 Vt. 351. See also the cases hereinafter cited.

"There was no contract at all relative to the piano except the one made by Day as their agent, and when the plaintiffs, knowing the facts, sued on that contract, they affirmed it in every essential particular both as to price and as to the terms of paying the price." Shoninger *v.* Peabody, 57 Conn. 42. Compare Stewart *v.* Woodward, 50 Vt. 78, *post*, p. 321.

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.

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.[1]

FOWLER *v.* TRULL.

1 Hun (N. Y.) 409. 1874.

ACTION to recover a balance for merchandise sold and delivered to defendant's husband acting, as is claimed, as her agent. The nego-

[1] "When a person deals with an authorized agent, he is bound to inquire and ascertain the extent and limit of his authority to bind the principal, and the principal is bound by all acts of the agent within the scope of his authority; and when a principal adopts the contract of a self-constituted agent, who has assumed to act for such principal without authority he is bound to inquire and ascertain the extent the self-constituted agent assumed to act in his behalf, and the principal, when he becomes such by adopting his acts, is bound by all acts within the scope of the assumed authority; and in both cases the liability of the principal extends to the frauds or misrepresentations of the agent committed or made while acting within the scope of the real or assumed authority." Busch *v.* Wilcox, 82 Mich. 336, 342.

tiations were conducted by the husband with the plaintiff. The sum of $200 was paid in cash, and the balance secured by the note of the defendant, a mortgage being assigned by her as collateral security thereto, and by a chattel mortgage given by her on the goods purchased, containing the usual covenant to pay the amount secured. Judgment for plaintiff.

MILLER, P. J. It appears from the evidence in this case, that the defendant's husband made the purchase of the property and took a bill of sale, of the same, in the name of his wife, the defendant, without any authority from her, and without her knowledge; that she never took possession of the property, and that the business was carried on in his name afterward, and not for the benefit of the wife's separate estate. If there were no other facts connected with the transaction, there would be no question that the defendant was not liable. But it appears that the defendant gave her own note, and assigned mortgages as collateral security for a portion of the purchase money, which note was afterwards paid, and that she also executed a chattel mortgage on the property sold, to secure the balance which remained unpaid upon the sale. It is also proved that subsequently, and on the 15th day of November, 1870, she executed another chattel mortgage to one Crawford, upon the same property. By these acts, she assumed ownership and control over the property sold, and, I think, ratified what her husband had done on her behalf at the sale, claiming, as he did, according to the plaintiff's testimony, to act as her agent. It is true, that the defendant testifies that her husband had no authority; that she did not know what she was signing, when she executed the chattel mortgages; and that the one given to Crawford was without consideration. This, however, does not relieve the defendant, and, inasmuch as she voluntarily signed these papers, in the absence of misrepresentation or fraud, with ample opportunity for information as to their contents, the effect cannot be avoided upon the ground of negligence, or omission to read, or to avail herself of such information. Breese *v.* U. S. Telegraph Co., 48 N. Y. 132. There is no sufficient ground for claiming that the defendant's signature was procured by fraud, and the mortgages as executed are far more than presumptive evidence, and, I think, must be regarded as a ratification of the acts of her husband, even if he acted without authority originally, Story on Agency, 283, and a ratification of at least a part of an unauthorized transaction of an agent, or of one who assumes to act as such, which amounts to a confirmation of the whole, and binds the principal. Farmers' L. & T. Co. *v.* Walworth, 1 N. Y. 433. As no fraud was shown, and, as the defendant, by writing, adopted the representations made by her husband when the contract of sale was made, she is estopped from denying her liability. If the views expressed are correct, then proof of the husband's declar-

ation to the plaintiff, at the time of the sale, was proper, as the agency of the husband was ratified by the subsequent acts of the defendant, and there was no error, either in receiving or in refusing to strike out, this testimony.

The judgment was right and must be affirmed, with costs.

Present: MILLER, P. J., BOCKES and BOARDMAN, JJ.

Judgment affirmed with costs.

TRUSTEES, &c., OF EASTHAMPTON *v.* BOWMAN.

136 N. Y. 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 principal 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, par-

ticularly 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]

KELLEY *v.* NEWBURYPORT HORSE RAILROAD CO.

141 Mass. 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.

[1] Compare Hyatt *v.* Clark, 118 N. Y. 563, *ante*, p. 76.

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.

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3. *Right of Other Party to Recede before Ratification.*

WALTER *v.* JAMES.

L. R. 6 Exch. 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 rati-

fication 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 there-

upon 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.

BOLTON PARTNERS *v.* LAMBERT.

41 Ch. D. (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 an 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.[1]

McCLINTOCK *v.* SOUTH PENN OIL CO.

146 Pa. St. 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.

[1] "We are of opinion that T. could validly ratify and adopt the contracts, and, first of all, that he could do so notwithstanding the previous repudiation of these contracts by the buyers. That point seems to be covered by the decision in Bolton Partners *v.* Lambert." *In re* Tiedemann and Ledermann Frères [1899], 2 Q. B. 66.

"The principal, upon being informed of an act of his agent in excess of his authority, has the right to elect whether he will adopt the unauthorized act, or not, and so long as the condition of the parties is unchanged, he cannot be prevented from such adoption because the other party to the contract may for any reason prefer to treat the contract as invalid." Andrews *v.* Ætna Life Ins. Co., 92 N. Y. 596, 604.

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 husband 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 specifically 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.

DODGE *v.* HOPKINS.

14 Wis. 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 application of the principle. The payment of the money to the agent did not affect the validity of the contract, or make it binding upon the plaintiff. He was at liberty to reject the money, and his acceptance of it was an act of ratification with which the defendant was in no way connected, and which, although it might bind him, imposed no obligation upon the defendant until he actually assented to it. It required the assent of both parties to give the contract any vitality or force.

I am well aware that there are dicta and observations to be found in the books, which, if taken literally, would overthrow the doctrine of the cases to which I have referred. It is said in Lawrence *v.* Taylor, 5 Hill (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]

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4. *Form of Ratification.*

HEATH *v.* NUTTER ET AL.

50 Me. 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.*

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

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.*

KOZEL *v.* DEARLOVE.

144 Ill. 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 of 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.

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5. *Legality or Validity of Act Ratified.*

RIGHT *d.* FISHER *v.* CUTHELL.

5 East (K. B.) 491. 1804.

EJECTMENT against a tenant after six months' notice to quit, as required by the lease. The notice was signed by two out of three joint owners, but purported to be in behalf of all three. An attempt was made to establish a ratification by the third but not six months before the period fixed for terminating the lease.

LAWRENCE, J. I think there is great weight in the argument of the defendant's counsel, that for the notice to be good it ought to be binding on all the parties concerned at the time it was given, and not to depend for its validity, in part, upon any subsequent recognition of one of them: because the tenant is to act upon the notice at the time, and therefore it should be such as he may act upon with security. But if it be to depend upon a subsequent ratification of one of the joint-tenants, landlords, whether or not it is to be binding upon

him, the condition and situation of the tenant must remain doubtful till the time of such ratification. Now the intention of the parties to the lease was, that the tenant should not be obliged to quit without being apprised of it for a certain time, that he might have an opportunity to provide himself with another dwelling; but if a ratification will do, instead of six months, he might not know certainly for as many days or hours whether he must quit or not. The rule of law, that *omnis ratihabitio retrotrahitur,* etc., seems only applicable to cases where the conduct of the parties on whom it is to operate, not being referable to any agreement, cannot in the meantime depend on whether there be a subsequent ratification. But here the intermediate acts of the tenant referable to the terms of his lease are to be affected by relation. *Rule discharged.*[1]

MILFORD BOROUGH *v.* MILFORD WATER CO.

124 Pa. St. 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.

[1] Accord: Doe *v.* Goldwin, 2 Q. B. 143; Dibbins *v.* Dibbins, [1896] 2 Ch. 348.

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.

WORKMAN *v.* WRIGHT.

33 Oh. St. 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.[1]

GREENFIELD BANK *v.* CRAFTS.

4 Allen (Mass.) 447. 1862.

CONTRACT upon a note, bearing the name of Thomas Crafts as joint maker, and upon three drafts, bearing the name of Thomas Crafts as indorser. The action was originally commenced against Thomas Crafts, and after his death his executors appeared and took upon themselves the defence, which was that the signatures of his name were forged.

The defendants requested the court to instruct the jury that if they were satisfied that the signatures of the name of Thomas Crafts, when made, were forgeries, the defendants could not be held liable upon the ground that they were ratified and adopted, unless upon proof of such facts as would amount to an estoppel *in pais*. The court declined to instruct the jury in accordance with this request, but instructed them that the evidence was competent for their consideration upon the question whether Thomas Crafts had ratified or adopted the signatures as his own, and such ratification or adoption, if proved, would be equivalent to a previous authority; and upon the question what would constitute such ratification or adoption, the court gave such instructions as would be applicable to an ordinary case of apparent or assumed agency, and no objection was made that the instructions were not proper as applied to such a case. Defendants excepted.

DEWEY, J. It is apparent from the finding of the jury, that the plaintiffs failed to prove that the signature of Thomas Crafts' name was placed upon these various instruments with his previous authority. The right of the plaintiffs to maintain their verdict rests upon proof of ratification and adoption by Thomas Crafts of the act of

[1] **Accord: Henry *v.* Heeb, 114 Ind. 275.**

signing, or upon the ground of an estoppel to deny the signature thereto, by reason of his acts in reference to the same, when brought to his knowledge. . . .

But it is now urged on the part of the defendants, that these signatures were incapable of such adoption or ratification. . . .

The only question upon this part of the case is, whether a signature, made by an unauthorized person under such circumstances as to show that the party placing the name on the note was thereby committing the crime of forgery, can be adopted and ratified by any acts and admissions of the party whose name appears on the note, however full, and intentionally made and designed to signify an adoption of the signature. The defendants insist that it cannot, by such evidence as would in other cases warrant the jury in finding an adoption; and that nothing short of an estoppel, having the element of actual damage from delay or postponement, occasioned by the acts of the person whose name is borne upon the note, misleading the holder of it, will have this effect. As to the person himself whose name is so signed, it is difficult to perceive any sound reason for the proposed distinction, as to the effects of ratifying an unauthorized act, in the two supposed cases.

In the first case, the actor has no authority any more than in the last. The contract received its whole validity from the ratification. It may be ratified where there was no pretence of agency. In the other case, the individual who presents the note thus signed passes the same as a note signed by the promisor, either by his own proper hand, or written by some one by his authority. It was clearly competent, if duly authorized, thus to sign the note. It is, as it seems to us, equally competent for the party, he knowing all the circumstances as to the signature and intending to adopt the note, to ratify the same, and thus confirm what was originally an unauthorized and illegal act. We are supposing the case of a party acting with full knowledge of the manner the note was signed, and the want of authority on the part of the actor to sign his name, but who understandingly and unequivocally adopts the signature, and assumes the note as his own. It is difficult to perceive why such adoption should not bind the party whose name is placed on the note as promisor, as effectually as if he had adopted the note when executed by one professing to be authorized, and to act as an agent, as indicated by the form of the signature, but who in fact had no authority.

It is, however, urged that public policy forbids sanctioning a ratification of a forged note, as it may have a tendency to stifle a prosecution for the criminal offence. It would seem, however, that this must stand upon the general principles applicable to other contracts, and is only to be defeated where the agreement was upon the understanding that if the signature was adopted the guilty party was not to be prosecuted for the criminal offence.

In the case of Forsyth *v.* Day, 46 Maine, 176, it was held that there might be a ratification and adoption of a forged note by the person whose name appears as promisor.

We perceive no valid objections to the ruling of the court, and instructions given to the jury on this point. . . .

Defendants' exceptions overruled.

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6. *Legal Effects of Ratification.*

GRANT *v.* BEARD.

50 N. H. 129. 1870.

A FATHER directs plaintiff to make repairs on two wagons which he said belonged to his sons. Later the sons ratified the act of the father and paid a part of the bill.

Among other things the jury were further instructed that, if they found that the defendants did not authorize their father to make the contract as their agent, but afterwards assented to what had been done, their assent would not make them liable in this action unless they owned the wagons at the time they were repaired, or received some benefit from the repairs. To this last instruction the plaintiff excepted.

The plaintiff requested the following instruction: "If the jury find that the father procured the credit as the agent, either actual or assumed, of the defendants, and the credit was really given to them, then the subsequent ratification by the defendants will bind them, even though they may not have received the benefit of the credit."

The instruction was not given, and the plaintiff excepted. Verdict for the defendants.

Motion to set aside the verdict.

FOSTER, J. The ratification, upon full knowledge of all the circumstances of the case, of an act done by one who assumes to be an agent, is equivalent to a prior authority. By such ratification the party will be bound as fully, to all intents and purposes, as if he had originally given express authority or direction concerning the act.

A parol contract may be ratified by an express parol recognition of the act, or by conduct implying acquiescence, or by silence when the party, in good faith, ought to speak. And so the principal may be estopped to deny the agent's original authority. Story on Agency, § 239; Metcalf on Contracts, 112; Hatch *v.* Taylor, 10 N. H. 538; Despatch Line *v.* Bellamy Manf. Co., 12 N. H. 232; Davis *v.* School District, 44 N. H. 399; Warren *v.* Wentworth, 45 N. H. 564; For-

syth *v.* Day, 46 Me. 194; Ohio & Mississippi R. Co. *v.* Middleton, 20 Ill. 629.

Such ratification relates back to and incorporates the original contract or transaction, so that, as between the parties, their rights and interests are to be considered as arising at the time of the original act, and not merely from the date of the ratification; and a suit to enforce the obligation assumed by the party who ratifies, is, to all intents and purposes, a suit founded upon the original act or contract, and not on the act of ratification. Davis *v.* School District, before cited; Low *v.* Railroad, 46 N. H. 284; Doggett *v.* Emerson, 3 Story, 737; Mason *v.* Crosby, 1 Woodb. & M. 342; Clark's Executors *v.* Van Riemsdyk, 9 Cr. 153; Culver *v.* Ashley, 19 Pick. 301; Forsyth *v.* Day, before cited.

Therefore the original consideration applies to the ratification, thus made equivalent to an original contract, and supports the implied promise upon which the present action is founded.

The ratification operates *directly,* and not merely as presumptive evidence that the act was originally done by the authority of the defendants; and therefore it is unnecessary to consider whether or not the evidence tends to show an original authority. The subsequent assent is, *per se,* a confirmation of the agent's act; and there is no valid distinction between a ratification of the agent's act, and a direct and original promise to pay for the services rendered by the plaintiff. Wherever there would have been a consideration for the original engagement if no agent or party assuming to act as agent had intervened, such original consideration is sufficient to sustain the act of ratification.

In none of the cases cited is the subject of a new consideration, to support the ratification, alluded to as necessary; but the logical deduction from the principle that the ratification relates back to and covers the original agreement, is wholly inconsistent with such a proposition; and the contrary doctrine is expressly held in numerous cases. Commercial Bank of Buffalo *v.* Warren, 15 N. Y. Rep. 583, and cases cited.

There was abundant evidence, in the present case, from which the jury might have found that the defendants owned the wagons and received a positive benefit from the repairs; but such evidence and such finding were wholly unnecessary, because it is not material that the party making the promise should receive a *benefit* from the other party's act; it is sufficient if any trouble, prejudice, expense, or inconvenience accrued to the party to whom the promise is made. Metcalf on Contracts, 163; 1 Parsons on Contracts, 431.

We are therefore of the opinion that the instruction of the court to the jury "that if they found that the defendants did not authorize their father to make the contract as their agent, but afterwards assented to what had been done, their assent would not make them

liable unless they owned the wagons at the time they were repaired, or received some benefit from the repairs," was erroneous; and for this reason the verdict must be set aside, and a

New trial granted.

DEMPSEY *v.* CHAMBERS.

154 Mass. 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. By-

ington 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. Trespass, 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.

WOOD *v.* McCAIN.

7 Ala. 800. 1845.

ONE Revis was appointed Stedman's agent to collect book accounts. In excess of his authority he transferred the accounts to Wood to secure the latter against possible loss as surety on Stedman's note. Wood notified the debtors of Stedman of the assignment, and, among others, notified one John S. Smith. Thereafter McCain, a creditor of Stedman, garnisheed, or attached Smith's debt to Stedman. Later Stedman ratified the assignment to Wood. Smith now required Wood to appear and contest with McCain the right of the money owing to Stedman. The court charged that Revis had no authority to make the assignment to Wood and that as against McCain the subsequent ratification by Stedman was ineffectual.

COLLIER, C. J. . . . Now although the general rule is, that the ratification relates back to the time of the inception of the transaction, and has a complete retroactive efficacy, or as the maxim is, *omnis ratihabitio retrotrahitur,* yet this doctrine is not universally applicable. Thus, if third persons acquire rights, after the act is done and before it has received the sanction of the principal, the ratification cannot operate retrospectively so as to overreach and defeat those rights. If the law were otherwise, the constituent would be invested with the power of preferring his creditor in the present case, although his means of payment has been seized by an attaching creditor. We have seen that the assignment in question was inoperative and ineffectual for all purposes, until after the return of Stedman when he approved it. This act of approval was entirely voluntary, and could not have been coerced. Previous to its ratification, the plaintiff below acquired a lien upon the debt owing by the garnishee, which could not have been defeated at the mere volition of the defendant in the judgment. To show that the ratification of an unauthorized act of an agent is

thus limited in its application, we need but refer to Story on Agency, 241 to 244; Paley on Agency, 345 to 347.

The view we have taken is decisive of the cause. We will not stop to inquire, whether if Revis had authority to dispose of the accounts of his principal to indemnify a surety of the latter, an assignment (followed by a delivery of the accounts) would be invalid, because it was executed under seal in virtue of a parol authority. Without adding more, the result is that the judgment must be affirmed.

GELATT *v.* RIDGE.

117 Mo. 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.

BRAY *v.* GUNN.

53 Ga. 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.

TRIGGS *v.* JONES AND OTHERS.

46 Minn. 277. 1891.

PLAINTIFF recovered a judgment against defendant Jones for damages resulting from the unauthorized delivery by him of a deed placed in his hands in escrow. From an order denying a new trial defendant appeals.

The deed was executed in payment of prospective stock in a corporation to be formed. Defendant was instructed to hold the deed in escrow until the corporation was organized and the stock issued and delivered. Defendant delivered the deed at once and the grantee conveyed the property to another person. The whole corporate scheme failed and plaintiff never received anything for his property.

MITCHELL, J. . . . . The remaining, and really the only important, question in the case is as to the alleged ratification by plaintiff of the

act of Jones in delivering the deed. It is claimed that, after knowledge of the facts, plaintiff ratified Jones's act, and that such ratification operated the same as original authority, and absolved Jones from all liability, even if the delivery of the deed was unauthorized when made. The court finds that Jones immediately informed plaintiff (by letter dated August 8, 1887) that he had delivered the deed to Cook, and that plaintiff did not at once repudiate the act, and never prior to the commencement of this action notified Cook that he repudiated, but left the deed in the possession of Cook, and joined with Jones in taking the preliminary steps in the formation of the contemplated corporation, in which it had been agreed that plaintiff was to receive stock as already stated. It was because of this delay to promptly repudiate the act of Jones that the court refused to grant plaintiff relief against defendant George, who was an innocent purchaser. But while the facts found may be evidence of a ratification, they do not, as a matter of law, amount to that, at least in favor of Jones, the party who committed the unauthorized act. It is, however, assigned as error that the court failed to find that plaintiff had ratified the delivery of the deed. It is impracticable to state, or even discuss, the evidence at length. A careful perusal of it satisfies us that, while plaintiff was informed by letter as early as August, 1887, that the deed had been delivered, yet this information was accompanied and frequently followed by statements and assurances from Jones to the effect that the original arrangement was being or would be carried out, so that he would get his stock as had been agreed, and that Cook would return the deed or reconvey the property if he (plaintiff) desired, etc., which were calculated to keep plaintiff quiet and allay any possible fears on his part; and that, influenced and induced by these considerations, he made no express repudiation of Jones's act, but let matters rest, hoping and expecting that the deal would still be consummated according to agreement, and he get the stock to which he would be entitled; and that with this hope and expectation, and at the instance of Jones, in whom he seemed still to have implicit confidence, he sent a proxy to one Mahle, authorizing him to subscribe for stock in his name, and to vote it for officers of the company at the meeting for organization; but that finally, having discovered that the whole scheme had fallen through, and would never be consummated, he brought this action to recover either the land or damages. At least, the evidence is such that it would have justified the court in taking this view of the facts.

There is no doubt that the general rule is that, by a ratification of an unauthorized act, the principal absolves the agent from all responsibility for loss or damage growing out of the unauthorized transaction, and that thenceforward the principal assumes the responsibility of the transaction with all its advantages and all its burdens. Neither is there any question but that, where the rights

and obligations of third persons may depend on his election, the principal is bound to act, and give notice of his repudiation or disaffirmance of the unauthorized act at once, or at least within a reasonable time after knowledge of the act; and, if he does not so dissent, his silence will afford conclusive evidence of his approval. Such a rule is necessary to protect the rights of third parties who have dealt with the agent. If the principal, after knowledge, remains entirely passive, it is but just, when the protection of third parties requires it, to presume that what, upon knowledge, he has failed to repudiate, he has tacitly confirmed. But it is apparent that the reasons for such a rule do not apply with equal force in favor of the agent himself, who has wrongfully committed the unauthorized act. Consequently mere passive inaction or silence, which would amount to an implied ratification in favor of third parties, might not amount to that in favor of the agent, so as to absolve him from liability to his principal for loss or damage resulting from the unauthorized act, especially if such inaction or failure to immediately disaffirm was induced by the assurances or persuasion of the agent himself. Nor in this case does the affirmative action of the plaintiff, after knowledge of the delivery of the deed, in taking part in the preliminary steps for the organization of the contemplated stock company, of itself amount to a ratification of the unauthorized act. Such steps were right in the line of the original agreement between the parties, and were designed to carry it into effect. Induced, as such action probably was, by the assurances of Jones that the enterprise would still go on, and plaintiff get his stock, it really amounted to nothing more than an effort on plaintiff's part, after knowledge of Jones's deviation from his instructions, to avoid loss thereby, which is not such a ratification as will relieve the agent. Mechem, Agency, § 173. Upon proof that Jones's act was without original authority, the burden was upon him to show such a subsequent ratification as would relieve him from liability. The court has not found any such ratification, and, in our opinion, under the evidence, he was justified in finding, as he in effect does, that there was none. *Order affirmed.*[1]

[1] See also Coursolle *v.* Weyerhauser, *ante*, p. 17; Bray *v.* Gunn, *ante*, p. 124; School District *v.* Aetna Ins. Co., 62 Me. 330.

CHAPTER IV.

Formation of the Relation by Estoppel.[1]

EDGERTON *v.* THOMAS.

9 N. Y. 40. 1853.

Action for conversion by mortgagee of Mrs. Strong against a sheriff who levied on the property as that of her husband. When the property was mortgaged the husband stood by and assented. Judgment for plaintiff.

Willard, J., delivered the opinion of the court.

As between the plaintiff in this case and Charles L. Strong, the bill of sale and mortgage were a valid and effectual transfer of the property from the latter to the former. Strong stood by and saw his wife execute those instruments with a view to secure the plaintiff for his cash advances to her, and assented to it. She then became his agent for that purpose, and he is as much bound as if he had executed them himself. In Hopkins *v.* Mollineux (4 Wend. 465) it was held that the wife may act as the agent of her husband, and a subsequent acknowledgment or ratification of her acts by the husband is evidence of and equivalent to an original authority. Church *v.* Landers, 10 Wend. 79; Riley *v.* Suydam, 4 Barb. 222; Prestwich *v.* Marshall, 4 C. & P. 594; Miller *v.* Delamater, 12 Wend. 433. This case is stronger than any of those cited, as the husband was by and expressly assented to the act of the wife. It is therefore as obligatory upon him as if it had been his personal act. . . .

Whatever may have been the decision of the court below on the other points, the one just considered is decisive of the action. If the property belonged to the plaintiff at the time of the levy and sale, and not to Strong, the execution debtor, the plaintiff was entitled to recover.

Morse, J., was not present.

All the other judges concurring. *Judgment affirmed.*[2]

[1] Many of the cases in Chapter IX also involve considerations of the doctrine of estoppel as applied to the law of principal and agent.

[2] This is rather a case of ostensible ownership than of ostensible agency, although such cases are frequently treated as if involving an agency by estoppel. It is perhaps better to say that the husband (as well as those claiming under him) is estopped to deny that the wife had the title she professed to have when she mortgaged the goods to the plaintiff. See Biggs *v.* Evans, [1894] 1 Q. B. 88, *post*, p. 516. — Ed

STEFFENS *v.* NELSON.

94 Minn. 365. 1905.

ACTION to foreclose a mechanic's lien for material furnished by Steffens to a contractor for use in the building of Nelson's house. Other lien holders were made defendants with Nelson. Nelson paid the contractor upon his producing Steffens' and others' receipts. The contractor procured these receipts by giving his checks, payable at a later date. When the checks were due they were not paid and Steffens and others filed liens on Nelson's house. The trial court held that all whose receipts were present when Nelson paid the contractor were estopped, but that no valid and binding receipt from plaintiff was present.

The plaintiff Steffens had no office; he had placed the number of his residence on his cards and billheads. The agent of the contractor called there in Steffens' absence, gave his wife a check of the contractor, dated ahead, for the amount of Steffens' claim, and directed her to sign a receipt. She signed that receipt, "Peter Steffens, Maria Steffens." She had no express authority from her husband so to do. This receipt was taken by the contractor to the owner and agent of the mortgagee, and was present at the time of settlement with the contractor about noon on Saturday, April 12th. On the afternoon of that day the wife gave her husband the contractor's check, and explained that she had to sign a paper for it. The husband took the check and deposited it; that check was never paid.[1]

JAGGARD, J. (after stating the facts). The wife, like another person, may be made an agent for her husband, and as such impose upon him obligations by his authority, express or implied, precedent or subsequent. Hopkins *v.* Mollineux, 4 Wend. 465; Benjamin *v.* Benjamin, 15 Conn. 347, 39 Am. Dec. 384; Willingham *v.* Simons, 1 Desaus. (S. C.) 272.

The proper decision of the question thus presented depends upon consideration of a neglected distinction between ratification and estoppel. Lord Coke said, "The name 'estoppel' or 'conclusion' was given because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth." However much this definition may have been criticised as vicious (Everest & Strode on Estoppel, 9–16; Bigelow on Estoppel, 5), it is a brief statement of the effect of the essential principle of estoppel, viz., "that, wherever one of two innocent persons must suffer by the act of a third, he who enables such third person to occasion the loss must sustain it." Lickbarrow *v.* Mason, 2 T. R. 63; 1 Smith, Leading Cas. 759; Ewart on Estoppel, 9. Ratification, on the other hand, means confirmation. "To ratify is to give sanction and validity to something done with-

[1] Facts and a part of the opinion concerning other lien holders are omitted.

out authority." Evans, Principal and Agent (Bedford's ed.) 90. The underlying principle upon which liability for ratification attaches is that he who has commanded is legally responsible for the direct results and for the natural and probable consequences of his conduct, and that it is immaterial whether that command was given before or after the conduct.

The substance of estoppel is the inducement to another to act to his prejudice. The substance of ratification is confirmation after conduct. "This is enough," said Mr. Bigelow, "to indicate that there may be danger in using the term 'estoppel' freely. It is common enough at present to speak of acquiescence and ratification as an estoppel. Neither the one nor the other, however, can be more than part of an estoppel, at best. An estoppel is a legal consequence — a right — arising from acts or conduct, while acquiescence and ratification are but facts presupposing a situation incomplete in its legal aspect, *i. e.*, not as yet attended with full legal consequences. The most that acquiescence or ratification can do — and this either may under certain circumstances do — is to supply an element necessary to the estoppel, and otherwise wanting, as, *e. g.*, knowledge of the facts at the time of making a misrepresentation. But each stands upon its own grounds, and must be made out in its own way, not necessarily in the way required by the ordinary estoppel by conduct." Bigelow on Estoppel (5th ed.) pp. 456, 457. And see Reinhart on Agency, § 101.

An unauthorized act may be made to operate by ratification as an estoppel upon the person in whose behalf it was done. That ratification presupposes knowledge on the part of such person ratifying. If he intentionally ratify what another has done for him without authority, and actually or constructively knows also of the circumstances connected with the unauthorized acts which are the basis of the estoppel, he should clearly be held bound thereby. See Dimond *v.* Manheim, 61 Minn. 178, 63 N. W. 495.

In this case the acceptance of the check given to plaintiff by his wife operated to ratify the receipt signed by her for him. In the eyes of the law, at least, he knew that this receipt would be used as evidence of the payment of the debt by the contractor to whom it was delivered. He is responsible for the direct results and the natural and probable consequences of the act he has ratified. His situation is not therefore different, in law, from that of other creditors who signed receipts before the date of settlement, and who, as he did also, accepted and now retain the check of the contractor. He is not entitled to recover because of his ratification. See Ewart on Estoppel, 133, 137, 139.

The judgment appealed from is affirmed, except as to the plaintiff, Steffens, and the defendants Delamater & Son. As to them, let judgment be entered in accordance with this opinion.

COLUMBIA MILL CO. *v.* NATIONAL BANK OF COMMERCE.

52 Minn. 224. 1893.

APPEAL by defendant, the National Bank of Commerce, from an order of the District Court of Hennepin County, denying its application for a new trial.

GILFILLAN, C. J. The plaintiff was a corporation in the business, at Minneapolis, of manufacturing and selling flour, and the defendant was a bank at that place.

The action is for the conversion of nineteen checks drawn by different persons or firms upon different banks or concerns, each payable to the order of, and the property of, the plaintiff. The allegations of the complaint are that one Leo Heilpern feloniously abstracted and purloined the checks from plaintiff, wrongfully and without authority impressed on the back of each, with a rubber stamp, the words "Columbia Mill Co.," and wrote underneath his name, L. Heilpern, and wrongfully sold and disposed of them to defendant, which collected and appropriated to its own use the money called for by them. Heilpern was plaintiff's bookkeeper and cashier; that is, he had charge of its books and its "petty cash," *i. e.*, the payments received upon its sales at retail.

The sole controversy was upon Heilpern's authority to dispose of and receive the money for the checks. It was conceded that he had no express authority to do so, and the question was narrowed to that of implied authority, and the further question, if it be not included in that, as to whether the plaintiff had either intentionally or negligently so conducted its business with defendant, or permitted it to be so conducted, that it had a right in good faith to believe, and did believe, that Heilpern had the authority he assumed to exercise, and, acting on and because of such belief, received the transfer of the checks, and paid him the money.

It appeared that, when the relation of banker and patron between defendant and plaintiff began, the latter left in the signature book of the former the signature of S. Zeidler, its treasurer, as of the only person authorized to sign for it in its transactions with the bank, and except during a short period, when he was absent, his was the only signature in the bank for that purpose.

It also appeared that there grew up and continued for years a usage that when plaintiff sent to the bank, for deposit to its credit, checks payable to its order, it made no other indorsement on them than by impressing them with a rubber stamp. Whether there was a similar usage in any other bank is immaterial. It existed between these parties.

It also appeared that Heilpern and his predecessors in employment as bookkeeper and cashier, extending over a period of two or three years, were accustomed to take or send to the bank, and transfer to it, and receive the money for, checks, mostly small ones, payable to its order, with no indorsement except the stamp, or with none at all.

It was upon this custom mainly that defendant relied to show implied or at least apparent authority in Heilpern to transfer the checks without the signature of Zeidler, and receive the money for them.

And because one dealing with an agent may show actual authority in him, — that is, such authority as the principal in fact intended to vest in the agent, although such intention is to be shown by acts and conduct, rather than by express words, — without showing that he (the person dealing with the agent) knew when he dealt with him of the acts and conduct from which the intention is to be implied, it was competent for defendant to show the course and manner of conducting business in the office of plaintiff, so far as the bookkeepers and cashier had charge of it. The officers of plaintiff testified that Heilpern had no authority to transfer the checks and receive the money, and that they never knew of the bookkeeper and cashier doing so with plaintiff's checks. But the jury were not bound to their testimony. Such a manner of conducting the business in the office might have been proved as would have justified the jury in finding that the officers must have known of the custom of the bookkeeper and cashier in regard to checks; and had that been found, and that it was acquiesced in by plaintiff, the intention to vest authority might have been implied.

For the sake of convenience, we make a distinction between implied authority — that is, such as the principal in fact intends the agent to have, though the intention is implied from the acts and conduct of the principal — and apparent authority, — that is, such as, though not actually intended by the principal, he permits the agent to appear to have. The rule as to apparent authority rests essentially on the doctrine of estoppel. The rule is that, where one has reasonably and in good faith been led to believe from the appearance of authority which a principal permits his agent to have, and because of such belief has in good faith dealt with the agent, the principal will not be allowed to deny the agency, to the prejudice of the one so dealing.

One may be estopped by his acts of culpable negligence, as well as by his intentional acts; and if through culpable negligence the plaintiff permitted Heilpern to appear to the bank to have authority to transfer the checks and receive the money, and the latter reasonably and in good faith was induced by such appearance to believe he had that authority, and on that belief received and paid for the checks,

plaintiff cannot deny the authority, for to permit it to do so would sanction a fraud.

The defendant complains that the court in its charge withheld from the jury the proposition that the plaintiff might be bound by the appearance of authority which it, through negligence, permitted Heilpern to have. . . .

The court, at the request of the defendant, charged: "If you find that the plaintiff so conducted its business with the defendant as to lead the defendant reasonably to believe that Heilpern possessed the authority which he assumed to exercise in the cashing of the checks in question, your verdict will be for the defendant." This, in giving other requests by defendant, was several times reiterated in substance, though in different terms, sometimes more full; and, as I think, left it to the jury to give the specified effect to plaintiff's conduct of its business, though through negligence. The part of the charge excepted to, and claimed to have withdrawn from the jury the matter of negligence in the conduct of the business as bearing on the question of authority, we do not quote in full, as it is very long, and the pith of it may appear from only a part of it. After referring to the transfers of checks upon stamped indorsements by the bookkeepers, by Heilpern's predecessors and by him, the court said: "The plaintiff claims that it had no knowledge of such payment upon such indorsements. Now, unless you find from the evidence that the plaintiff or its duly-authorized officers in the present instance (and the duly-authorized officers would be only the president, vice-president, general manager, secretary, treasurer), or either of them, knew of the manner in which such indorsements and payments had been made, you cannot find that Leo Heilpern had any such implied authority; the implied authority in this case, resting upon what we call a 'ratification' by the mill company of the acts of its cashiers and bookkeepers; and you cannot find that the mill company ratified any act of which it had no knowledge." In the part of the charge excepted to, this is, in substance, reiterated, the court in each instance using the term "implied authority." If by this the court meant, or if the jury must have understood it to mean, to qualify the part of the charge first herein quoted, so as to exclude from the consideration of the jury any appearance of authority which plaintiff's negligent conduct of its business may have permitted its bookkeepers to have, it was error. After a perusal of the entire charge, to ascertain in what sense the jury must have understood the court to use the term "implied authority," the majority of this court are of opinion (in which, though I have my doubts, I do not concur) that the jury must have understood that, in order to make a case of apparent authority, it was not enough that the plaintiff's negligent conduct of its business permitted its bookkeepers and cashier to appear to have it, unless such appearance of authority was actually known to it.

This, of course, renders a reversal inevitable, and renders unnecessary the consideration arising on rulings excluding or admitting evidence, which need not arise on another trial.

Order reversed.

VANDERBURGH, J., took no part in this decision.

MAGUIRE *v.* SELDEN.

103 N. Y. 642. 1886.

ACTION to foreclose a mortgage. Defence, payment. There was evidence that when one Lyon owned the mortgaged premises his agent, Mykoff, was informed by plaintiff that one Evans was her agent to receive payment; but this was denied by plaintiff. Defendant afterward bought the premises of Lyon and made payment of the mortgage to Evans. Judgment for plaintiff.

DANFORTH, J. . . . It is quite immaterial to enquire who of these witnesses should be credited. The trial judge has found that Evans was not in fact the agent of the plaintiff for the purpose of receiving the principal of the mortgage; that he did not have the bond and mortgage, and that the defendant was not misled to the contrary by anything the plaintiff said or did. But however the plaintiff's statements, as testified to by the defendant's witnesses, are interpreted, they cannot help his case. They were not made to the defendant, nor were they made to be communicated to him. It so happened that Mykoff afterward was employed by the defendant. That was an accidental circumstance not anticipated by the plaintiff and not sufficient to give the character of an estoppel to her statements in favor of the defendant. They were not intended to influence his conduct, and, however understood, could not be extended beyond the party to the transaction in relation to which they were made. (Mayenborg *v.* Haynes, 50 N. Y. 675.) They were competent as evidence, but could have no greater effect. Some exceptions have been argued, but they seem to us without merit.

All concur. *Judgment affirmed.*

CLARK *v.* DILLMAN.

108 Mich. 625. 1896.

HOOKER, J. The plaintiffs are copartners engaged in the business of selling musical instruments. They appeal from a judgment against them in an action of replevin brought by them for a piano which at one time belonged to them, but which the defendant claims

to have purchased from one Pressburg, claiming that Pressburg was plaintiffs' agent, duly authorized to sell said piano, or at least that the plaintiff held him out as such agent.

The case turned upon the right of the defendant to deal with Pressburg as the agent of the plaintiffs; and, while the court seems to have considered the only question in the case to be whether there was a holding out, the charge left to the jury the question of Pressburg's actual authority. This was proper, as there was some testimony tending to show an admission of such authority by the plaintiffs; but if that question was to be left to the jury, the plaintiffs should have been permitted to show whether Pressburg actually was their agent, authorized to make sales generally, which they offered to do, but the testimony was excluded. At the time this offer was made the court seems to have taken the view that the case should turn upon an estoppel growing out of the holding out as agent, and therefore excluded the testimony upon the subject of agency as immaterial. This was error, unless the jury were to be instructed that Pressburg was not authorized to make this sale.

The charge is silent upon another essential. It is undoubtedly the law that a person may be bound by the representation and acts of another, as agent, where there has been such a holding out as to reasonably lead one dealing with him to believe in the existence of such agency. But all of the elements of an estoppel must be present. There must be conduct calculated to mislead, and it must be under circumstances which justify the claim that the alleged principal should have expected that the representations would be relied and acted upon; and, further, it must appear that they were relied and acted upon, in good faith, to the injury of an innocent party. Mechem, Ag. §§ 85, 86; Railroad Co. *v.* Chappell, 56 Mich. 190, 22 N. W. 278. The rule that estops a party from denying the existence of an agency is a shield and not a sword; and unless the jury could find from the evidence that the defendant acted in good faith, and in the honest belief that Pressburg had authority to sell this piano for $455, and that he purchased it to his injury, a verdict for the defendant should not have been rendered. There is no allusion in the charge to the other elements essential to an estoppel, and, in the testimony returned, we discover no avowal of belief in, or *bona fide* reliance upon, the authority of Pressburg, unless the circumstances were sufficient evidence to go to the jury upon this subject. In any event, there was ample opportunity for the jury to find the contrary. Maxwell *v.* Bridge Co., 41 Mich. 454, 2 N. W. 639; Ferguson *v.* Millikin, 42 Mich. 443, 4 N. W. 185; Morrill *v.* Mackman, 24 Mich. 279, note; De Mill *v.* Moffat, 49 Mich. 125, 131, 13 N. W. 387; Fletcher *v.* Circuit Judge of Kalkaska, 81 Mich. 193, 45 N. W. 641; Bank *v.* Todd, 47 Conn. 219. We do not discover that the plaintiffs' counsel asked instruction upon this subject, and he could

not complain of the failure to mention it, but for the fact that the charge, as given, was objectionable by reason of the exclusion of these important considerations.

The first request of defendant was given, and included the statement that "if, by word or act, they were led by the plaintiffs to believe he [Pressburg] had authority, the plaintiffs cannot repudiate the contract he made, and your verdict must be for the defendant." The fact that, by word or act, the plaintiffs led the defendant and his wife to believe that Pressburg had authority, did not require a verdict for defendant. This was making the doctrine of estoppel too broad, and, by omitting all of the elements but the representation, the jury may have been led to understand that reliance upon the representation, and action in good faith, were not essential. The judgment is reversed, and a new trial ordered.

LONG, C. J., and GRANT and MOORE, JJ., concurred with HOOKER, J.

MONTGOMERY, J. I concur in the result, but I think the first request of defendant not open to the criticism made by Mr. Justice Hooker.

JOHNSTON *v.* MILWAUKEE & WYOMING INVESTMENT CO.

46 Neb. 480. 1895.

REPLEVIN for 250 head of cattle. Plaintiff company owned a cattle ranch in Wyoming, but its corporate and business office was in Wisconsin. One Adams was employed as manager of the ranch with authority to purchase supplies, hire men, and send in accounts for the same to the treasurer in Milwaukee, who would remit payment for the same; to gather cattle and ship the same to a commission house in Chicago; but with no authority to ship elsewhere or to sell cattle. Prior to the transaction in question he had never sold cattle or anything else from the ranch except some old fence wire and a part of a slaughtered animal; but neither plaintiff nor defendants knew of these sales. Adams, through a cattle salesman in Omaha, sold to defendants (Johnston, *et al.*) 250 head of cattle from the ranch at $22 a head, defendants then being in Wyoming. At defendants' request Adams shipped the cattle to Central City, Nebraska, and received therefor checks payable to his order; these he cashed and embezzled the proceeds. Neither defendants nor their Omaha agent had ever before dealt with either plaintiff or Adams. This action is to replevin the cattle from defendants.[1]

[1] The statement of facts is abridged from the report of a former appeal in this case (35 Neb. 554). It was decided upon that appeal that Adams had no actual authority and no authority derived from local custom or usage. — ED.

Judgment was given in favor of plaintiff. Defendants appeal.

IRVINE, C. This was an action of replevin for 250 head of cattle by the defendant in error [Plaintiff] against the plaintiffs in error [Defendants]. On the first trial there was a verdict and judgment in favor of the defendants in the district court. This judgment was reversed by this court. (Milwaukee & Wyoming Investment Co. *v.* Johnston, 35 Neb., 554.) The case has been retried, resulting in a verdict and judgment for the plaintiff, and the defendants now prosecute error. The evidence is substantially the same as on the first trial, and the facts having been stated somewhat in detail in the former opinion, we refer to that and will not restate them, except that, in view of one argument now made, it should perhaps be stated that the business of the corporation, as set forth in its charter, is "buying, selling, raising, shipping, exchanging, and dealing in all kinds of cattle, horses, and other live stock, in the Territory of Wyoming," etc., and that the duties of the manager, as provided by the by-laws, and as briefly referred to in the former opinion, are prescribed as follows: "The manager and assistant manager shall reside and keep their office in the Territory of Wyoming and shall have the charge and management, subject to the orders of the directors, of all the affairs and property of the company in said territory."

On the former hearing the case was decided solely on the effect of the evidence as to a custom in Wyoming whereby the manager of a cattle ranch, it was claimed, had power to sell cattle therefrom, and the court in the former opinion laid down certain rules for the determination of that question alone; that is, as to what was necessary in order to establish a custom vesting in the manager authority to so dispose of cattle. As now presented, an entirely different question arises. On the trial in the district court a special verdict was taken whereby, under instructions conformable to the former opinion, the jury found that no such custom prevailed. The jury also found that prior to the sale of the cattle in question Adams had not, with the plaintiff's knowledge, performed any similar acts, and under a peremptory instruction there was a finding that Adams possessed no actual authority to make the sale. There were other findings not material to the questions which we shall consider. The former opinion strongly implied a holding that no actual authority existed for the sale made by Adams, and we shall not here reconsider that question.

The judgment in favor of the plaintiff was evidently entered on the theory, that in the absence of such actual authority, or apparent, conferred either by a custom of business or by the exercise of prior similar acts, the plaintiff could not be bound by Adams' acts. One instruction given by the court clearly shows that the judgment proceeded on this theory. This instruction was as follows:

"An act is within the apparent authority of the agent when it is of like character as that of prior acts performed by him for the same principal, and which such principal, knowing the same, sanctioned or ratified. The act of an agent within his apparent but not within his real authority will bind his principal only in case the person dealing with such agent knew of such prior acts and dealt with the agent in reliance thereon; and in this case you are instructed that unless you find from a preponderance of the evidence that Thomas R. Adams had prior to the sale of these cattle performed acts of a similar character, and that the plaintiff, after knowledge or notice thereof, sanctioned or ratified such prior or similar acts, then you will not be justified in finding that Adams possessed the apparent authority to sell the cattle in question. The defendants cannot base any rights in this action upon the ground that they dealt with Thomas R. Adams as having the apparent authority to sell the cattle unless it appears from the evidence that they, or one of them, knew of facts giving such apparent authority to Adams, and acted upon such appearances in the transaction of purchasing the cattle in question.

"The mere fact that the plaintiff had entrusted the care, management, and possession of these cattle to Thomas R. Adams, gave him no authority to sell them. Although authority on the part of an agent may in proper cases be implied from the words and conduct of the parties, or from the circumstances of the case, yet the extent of the authority so implied cannot exceed the necessary and legitimate effect of the facts from which it is inferred, but must be limited to the performance of like acts under like circumstances. The authority, if implied at all, can only be implied from facts."

In the light of all the instructions it was clearly the view of the court that, it having disposed of the question of actual authority, and the jury having found that no such general custom existed as would, under the former opinion of the court, confer authority upon the agent, no apparent authority could exist unless by the exercise by the agent of such authority in the past, supplemented by knowledge of those acts on the part of the company, and by similar knowledge on the part of defendants, relied on by them in making the purchase. It is familiar law that a principal is bound by the acts of his agent, not only when performed within the scope of his actual or implied authority, but when within the scope of apparent authority conferred upon him by the principal. There have been many cases distinguishing in this respect between a general agent and a special agent; and perhaps this distinction is not without value, although in most cases it simply throws back one step the process of investigation. Indeed, with regard to acts of corporations it has often been said that the only general agents are its directors acting in their corporate capacity. Strict application of the distinction would, therefore, constitute all acts of corporations not performed under a resolution of the board of directors the acts of special agents, and would require all persons dealing with corporations, except in pursuance of such resolutions, to proceed at their peril. This at one stage of the law might have been a proper doctrine, but the courts must take notice of the fact that the province of corporations is now vastly enlarged; that corporations now exist, not only for the transaction of public or ecclesiastical

affairs, but for the purpose of carrying on ordinary business transactions. We have now private corporations, not only operating railroads and other institutions having quasi-public functions, but also corporations conducting banks, manufacturing establishments, live stock raising, as in the present instance, and even retail shops. The domain of individual enterprise has, in other words, been invaded by corporations, and in the conduct of such enterprises we can see no reason and no principle of law requiring the application of rules to such corporations different from those applying to individuals under similar circumstances, except where the acts relate to the operations of the corporation in its capacity as such. What we mean to express by this is that in transactions having no relation to the corporation in its corporate capacity, but solely in regard to the conduct of its business affairs, the general principles applicable to individuals should apply.

[The court then holds that a by-law of a business corporation does not enlarge an agent's actual authority as to a third person who deals with an agent in ignorance of the by-law.]

The sale of these cattle was clearly within the power of the corporation, the only question was the apparent authority of this particular agent of the corporation to make the sale, and we may thus divest ourselves in the present inquiry of all investigation as to corporate functions, and consider whether or not there was error in the judgment independent of the fact that the plaintiff is a corporation. A review of the authorities bearing on the question would be almost endless, and their confusion is such that it would hardly be profitable. We conceive that the rule whereby a principal is bound by the acts of his agent beyond his actual authority, but within its apparent scope, is founded in the first place on the maxim that where one of two innocent persons must suffer, it should be that one who misled the other into the contract (Story, Agency, § 443), and this doctrine is founded on a broad principle of equitable estoppel or estoppel *in pais*. We conceive that a proper statement of it, with reference to such a case as we have before us, is as follows: That where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform on behalf of his principal a particular act, such particular act having been performed, the principal is estopped, as against such innocent third person, from denying the agent's authority to perform it. We do not think that in order to bring a case within this principle it is in all cases necessary to show that by general custom, as defined in the former opinion of the court, such agents have such authority; nor do we think that it is necessary in all cases to show that the same agent had previously performed similar acts; that such acts were known to the principal; that the third person

also knew of them, and relied on them in the transaction; or even that similar agents had in the past performed such acts. A number of elements may influence the solution of the question. In this case the corporation was located in Milwaukee, in the state of Wisconsin. It was formed for the purpose of doing business in Wyoming, and most of its business was there conducted. The very fact that the corporation and its general officers held their office at a remote point was an element for consideration. Rathbun *v.* Snow, 123 N. Y. 343. One might be justified in dealing with a person in apparent management of the business in Wyoming, where the office of the corporation was in a distant state, where he would not be so justified if he found the general offices and general officers of the corporation at or near the place where the business was conducted. Furthermore, the general nature of the business and its requirements was an element for consideration. Montgomery Furniture Co. *v.* Hardaway, 104 Ala. 100. It might well be that one would be justified in buying ripe fruit from one found in charge of orchards where he might not be justified in dealing with such a person in goods not perishable in their nature. Business usage might have its influence, although not so general and uniform as by implying notice to the principal to also imply that such custom was in view when the agent was appointed. We mention these instances merely by way of illustration, and we hold that the apparent authority of the agent, beyond his actual authority, does not depend solely upon custom or solely on the performance of previous similar acts, whether known or unknown to a person dealing with him, but that, subject to the general rule we have above stated, and to general legal principles, the question is one of fact to be determined by the jury under all the circumstances of the transaction and the business, as disclosed by the evidence.

It follows that the special findings referred to were insufficient whereon to found the judgment, and that the instruction quoted was erroneous.

Reversed and remanded.

CRANE *v.* GRUENEWALD.

120 N. Y. 274. 1890.

ACTION to foreclose a mortgage. Defence, payment. Plaintiff through an agent, Baker, loaned defendant $8,000 and took a bond and mortgage as security. These were left in the custody of Baker who had authority to receive the interest, but no authority to collect the principal. After the principal was due defendant paid Baker $1,000 at one time and a second $1,000 at a later time, in each case seeing the bond and mortgage in Baker's possession. Still later de-

fendant paid Baker a third $1,000 without seeing the bond and mortgage, but being truly informed by Baker that he still held them. Baker then sold and delivered the bond and mortgage to one Mount upon a forged assignment. Defendant afterward paid Baker at various times the remaining $5,000 being falsely informed by Baker that he still held the bond and mortgage. Plaintiff having obtained the bond and mortgage brings this action for foreclosure. The trial court held that defendant was entitled to credit for the first two payments of $1,000 each, and rendered judgment of foreclosure and sale for the remaining $6,000. Defendant appeals.

PARKER, J. A mortgagor who makes a payment to one, other than the mortgagee, does so at his peril. If the payment be denied, upon him rests the burden of proving that it was paid to one clothed with authority to receive it. There is, however, one exception to this general rule. If payment be made to one having apparent authority to receive the money, it will be treated as if actual authority had been given for its receipt. Paley on Agency (3d ed.), 275; Story on Agency, § 98; Williams *v.* Walker, 2 Sandf. Ch. 325; Smith *v.* Kidd, 68 N. Y. 130; Brewster *v.* Carnes, 103 Id. 556–564.

So, if a mortgagee permits an attorney, who negotiates a loan, to retain in his possession the bond and mortgage after the principal is due, and the mortgagor, with knowledge of that fact, and relying upon the apparent authority thus afforded, shall make a payment to him, the owner will not be permitted to deny that the attorney possessed the authority which the presence of the securities indicated that he had. This rule comprises two elements: First, possession of the securities by the attorney with the consent of the mortgagee; and second, knowledge of such possession on the part of the mortgagor. The mere possession of the securities by the attorney is not sufficient. The mortgagor must have knowledge of the fact. It would not avail him to prove that subsequent to a payment he discovered that the securities were in the actual custody of the attorney when it was made. For he could not have been misled or deceived by a fact, the existence of which was unknown to him. It is the information which he acquires of the possession which apprises him that the attorney has apparent authority to act for the principal. It is the appearance of authority to collect, furnished by the custody of the securities, which justifies him in making the payment. And it is because the mortgagor acts in reliance upon such appearance, an appearance made possible only by the act of the mortgagee in leaving the securities in the hands of an attorney that estops the owner from denying the existence of authority in the attorney which such possession indicates.

Now, applying that rule to the facts found by the learned trial court in this case, the attorney Baker negotiated the loan of $8,000, which was made to this defendant on his bond secured by a mortgage

on real estate. The mortgagor and mortgagee never saw each other. The securities were permitted to remain in the possession of the attorney. He had authority to collect the interest, but was not authorized to collect the principal or any part of it. After the principal became due he received from the mortgagor two payments of $1,000 each, on each occasion exhibiting the bond and mortgage to the mortgagor. Clearly as to these two items the attorney had apparent authority to receive the principal and the mortgagor could not deny to them the effect of payment *pro tanto* by proof that he did not have actual authority. Subsequently, and while the bond and mortgage still remained in the possession of the attorney, this defendant paid to him a further sum of $1,000, to be applied as a payment on account of the principal due. True, he did not at this time see the bond and mortgage, but it was actually in the possession of the attorney and the attorney so informed him. Here then was possession and information of possession. It was information upon which he acted, and inasmuch as it was true, it constituted apparent authority. If it had turned out to be untrue it could not have availed the defendant. We see no ground for insisting that a party must actually see and examine the securities in order to entitle him to the protection of the doctrine of apparent authority, if he have trustworthy information of the fact which he believes and relies upon, and it shall prove to be true, there seems to be no reason why it should not avail him as well as a personal examination of the securities. It follows, that the defendant should have been credited with the third payment of $1,000.

The remaining $5,000 was paid to Baker after he had parted with the possession of the bond and mortgage, and the question presented is, whether the defendant is entitled to be credited with the payments made by him while the attorney Baker did not have actual possession of the securities. It will be observed that Baker was not deprived of the possession by any act of Mrs. Crane. She believed that they were still in the custody of Baker. So far as she is concerned, therefore, or the plaintiff in this action who occupies no better or other attitude, she is not in position to deny such responsibility as her conduct imposes. She cannot say that by any act of hers she is relieved from the operation of the estoppel which prevents her from denying that the first three payments of $1,000 each were effectual as such. If then the defendant is not entitled to be credited with the payments aggregating $5,000, it is because he is not in a situation to insist upon the estoppel. We are of the opinion that a proper application of this doctrine of apparent authority, requires us to hold that the defendant's failure to take the precaution of ascertaining whether the attorney was actually in the possession of the securities when he paid the several sums aggregating $5,000, deprives him of the right to assert that he was induced to make the payments because it appeared

to him that the attorney had the right to receive the money. For, as we have already observed, it cannot appear to the mortgagor that an attorney has authority to receive the principal, save where he has present possession of the securities.

Information of the physical facts of possession by the attorney is alone effectual for protection. And he must have such knowledge when every payment is made, for no presumption of a continuance of possession can be indulged in for the purpose of giving support to an apparent authority on the part of an attorney to act, where no actual authority exists. This knowledge he did not have for it was not the fact. By his own wrongful act, the attorney had parted with possession, and as a necessary consequence has deprived himself of the power to longer misrepresent his authority in respect thereto to the detriment of the mortgagee. The mortgagor thereafter placed his trust solely in the assertions of the attorney and was deceived. In so doing he was legally as much at fault as the mortgagee, who also relied upon the attorney's trustworthiness. Therefore, he cannot invoke in support of his contention the doctrine of apparent authority. A rule which undoubtedly had its foundation in the equitable principle, that if one of two innocent persons must suffer, he ought to suffer in preference whose conduct has misled the confidence of the other into an unwary act.

The judgment should be reversed and a new trial granted with costs to the appellant; unless within thirty days the plaintiff stipulates to modify the judgment by deducting therefrom $104.50, that being the amount of the costs of General Term, and the further sum of $1,000, with interest thereon from July 1, 1882, to the date of entry of the judgment together with any other sum paid by Gruenewald to Baker whether for principal or interest prior to July 20, 1883, for which he was not credited by the trial court; in which event the judgment as modified is affirmed with costs of this court to the appellant.[1]

[1] In Central Trust Co. *v.* Folsom, 167 N. Y. 285 (1901), the Court of Appeals applied the rule laid down in Crane *v.* Gruenewald to an investment by an agent in an outstanding bond and mortgage, and held that the rule was not confined to an investment in an original loan. Cullen, J., said, in part (pp. 288, 289): "The general rule stated by all the text-writers is that where an agent who negotiates a loan for his principal is allowed to retain possession and control of the security taken on the loan, he has apparent authority after maturity to receive payments for his principal. Story on Agency, § 98; Mechem on Agency, § 273; Paley on Agency, § 274. This rule has been repeatedly upheld by the decisions in this State. Williams *v.* Walker, 2 Sandf. Ch. 325; Hatfield *v.* Reynolds, 34 Barb. 612; Wardrop *v.* Dunlop, 1 Hun, 325; Merritt *v.* Cole, 9 Hun, 98; Smith *v.* Kidd, 68 N. Y. 130; Crane *v.* Gruenewald, 120 N. Y. 274. . . . The learned Appellate Division did not question the general rule, but held that the present case did not fall within it because Weeks did not make the original loan on which the bond and mortgage were given. The only authority in this State in exact point is the case of Williams *v.* Walker, *supra*. In that case, as in the present, the attorney had not made the original loan, but had negotiated the purchase of an outstanding bond and mortgage. It was held that the rule applied, and that payments made to the attorney, so long as he held possession of the securities, were good payments to his principal. The case has been often cited with approval in the opinions of this court, and I cannot find that its authority has ever been questioned until in this case. But apart from authority we

POTTER, J., dissented as to the foreclosure for the remaining $5,000, holding that the mortgage had been fully paid.

All concur with PARKER, J., except POTTER, J., dissenting.

Judgment accordingly.

QUINN *v.* DRESBACH.

75 Cal. 159. 1888.

APPEAL from a judgment of the Superior Court of Yolo County, and from an order refusing a new trial.

HAYNE, C. Action to enjoin a sale by defendants under a deed of trust given to secure the payment of a promissory note. The plaintiff paid the amount of the note to one Treadwell, who appropriated the money to his own use, and the question is, whether Treadwell was the agent of the payee.

Treadwell was not the actual agent of the payee in the matter. It is true that the plaintiff testifies that he was instructed by the payee to pay to Treadwell. But the payee denies this, and in view of the rule in cases of a substantial conflict in the evidence, it must be assumed that there was no actual agency. Then was there an ostensible agency?

The facts as shown by uncontradicted evidence are as follows: The land which is the subject of the deed of trust was sold by the defendant Haneke to the plaintiff. The plaintiff gave his promissory note for eight hundred dollars, and assumed the payment of an outstanding indebtedness secured upon the property. Neither of these obligations having been met, the defendant Haneke placed the matter in the hands of Treadwell, who was an attorney-at-law residing in Yolo County, where the property is situated and where the plaintiff resided. The result of Treadwell's operations was the advance by Haneke of money to pay off the outstanding indebtedness, and the taking of a new note from plaintiff covering the amount of the former note and the amount advanced by Haneke. So far, there is no kind

think that the fact that there was an investment in an existing security, instead of in an original loan, does not necessarily distinguish the cases in principle. The reason why a payment to an agent who has made the loan and who continues to hold the security is good payment to the principal, and why, under such circumstances, the agent has apparent authority to collect the debt is not very clearly stated in either the text-books or the earlier decided cases. It was first established in England, and doubtless there grew out of the general course of business as to loans made through attorneys or scriveners. The fact that the attorney or agent has made the loan does not give him the authority to collect the debt, nor, it seems, does the mere possession of the security by the attorney give such authority. Doubleday *v.* Kress, 50 N. Y. 410. Both conditions must concur, that the agent acted for the principal at the inception of the business and that he holds the securities. It is said in the case last cited: 'The reason of the rule that one who has made the loan as agent and taken the security is authorized to receive payment when he retains possession of the security is founded upon human experience that the payer knows that the agent has been trusted by the payee about the same business, and he is thus given a credit with the payer.'"

of doubt but that Treadwell was the agent of Haneke for the collection of the principal and interest of the first note. This agency, however, terminated with the giving of the second note. This note was by its terms payable at the Bank of California in San Francisco; and the note was given to the bank for collection. The plaintiff seems to have known of this fact. He fell into the habit, however, of paying his interest to Treadwell, who assumed still to be the agent of Haneke. At least six payments of interest were made in this way. Treadwell sent the money to the bank, and the receipts therefor were forwarded to him, and by him delivered to the plaintiff. On some occasions, however, the plaintiff sent the interest to the bank through one R. W. Pendergast, who had no connection with Treadwell. Not only was interest paid to Treadwell, as above stated, but on one occasion a part payment of the principal was made to him. This payment was sent by Treadwell to the bank with the following letter:

WOODLAND, December 24, 1881.

THOMAS BROWN, ESQ., Cashier Bank of California:

Herewith I send you check for $437.50 on the part of Isaac Quinn, being $400 principal and $37.50 interest on note favor of Carl Haneke. I also send receipt of tax of Carl Haneke on mortgage given to secure said note, amounting to $36, which was *paid* by Mr. Quinn. This makes up the amount of $73.50 interest due December 27th. Please acknowledge receipt.

Yours, W. B. TREADWELL.

This payment of the principal was properly credited on the note.

There can be no doubt that the plaintiff believed in good faith that Treadwell remained the agent of Haneke for the collection of the principal and interest after the giving of the second note. And this belief was justified by the conduct of Haneke. Plaintiff had made one payment of principal to Treadwell, and this payment had not been repudiated by Haneke, but was credited upon the note. Ostensible authority may be conferred by the recognition of a single act of the agent if sufficiently unequivocal. Wilcox *v.* C. M. & St. P. R. Co., 24 Minn. 270.

It was negligence in Haneke to have allowed the plaintiff to act under the belief that Treadwell was authorized to receive the money. Haneke was chargeable with knowledge that Treadwell continued to act in some way in the matter. He was chargeable with this knowledge, because the bank knew it, and the bank was his agent for the collection of the debt. See Bierce *v.* Red Bluff Hotel Co., 31 Cal. 166. Now, if Haneke knew that Treadwell was continuing to act in the matter *at all*, the only inference which he was entitled to draw, and the one which he ought to have drawn, was that he was continuing to act as he had commenced, *viz.*, as his (Haneke's) agent. It was not a natural inference that Treadwell had changed his position in the matter, and was acting for the other side. The presumption was that he was assuming to act for Haneke, and we think that this was what

nine out of ten business men would have thought. This being the case, Haneke ought to have repudiated the assumed agency, and not have suffered the matter to stand as it did.

The Civil Code provides that: "Ostensible authority is such as a principal intentionally or *by want of ordinary care* causes *or allows* a third person to believe the agent to possess." Civ. Code, sec. 2319.

And this is the embodiment of a well-established principle of the common law, which has been called "the foundation of the law of agency." 1 Parsons on Contracts, *44; Kasson *v.* Noltner, 43 Wis. 650.

Nor does the fact that the note was not in the possession of Treadwell change the result. The want of possession of the note is a circumstance to be considered in determining the question of authority, but is not conclusive. The fact that the bank held the note for collection would not prevent the owner from collecting it himself. Flanagan *v.* Brown, 70 Cal. 257. . . .

We therefore advise that the judgment and order denying a new trial be reversed, and the cause remanded for a new trial.

BELCHER, C. C., and FOOTE, C., concurred.

THE COURT. For the reason given in the foregoing opinion, the judgment and order denying a new trial are reversed, and cause remanded for a new trial.

MCKINSTRY, J., expressed no opinion.[1]

[1] "If, in the case at bar, the McKeon securities had been in Merwin's possession, with Mrs. Winchester's allowance, at the time the contested payments were made, and the payments had been made in good faith in reliance upon the facts of such possession, Merwin would in law, as to such payments, have been treated as the agent of Mrs. Winchester. In cases like that the law is well settled that possession of the securities by the agent, of itself, in the absence of countervailing facts, clothes the agent with apparent authority; and justifies a third party, relying upon that fact and acting in good faith and without notice, in making payments upon the securities to the agent. Wheeler *v.* Guild, 20 Pick. 545; Smith *v.* Kidd, 68 N. Y. 130; Crane *v.* Gruenewald, 120 N. Y. 274; Haines *v.* Pohlmann, 25 N. J. Eq. 179; Lawson *v.* Carson, 50 N. J. Eq. 370; Central Trust Co. *v.* Folsom, 167 N. Y., 285.

"But while this is so, it does not follow that such possession is, as matter of law, essential to the existence of apparent authority, or that without it there can be no apparent authority. In reason, other facts may justify a third party in inferring, or a court in finding, the existence of such authority; and we know of no case holding a contrary doctrine. On the contrary, it has been distinctly held that such possession is not in every case essential to the existence of apparent authority. Doyle *v.* Corey, 170 Mass. 337; Quinn *v.* Dresbach, 75 Cal. 159; Fitzgerald *v.* Beckwith, 182 Mass. 177. Of course, such possession or the want of it is ever, in cases of this kind, a fact of great significance and importance." Union Trust Co. *v.* McKeon, 76 Conn. 508, 513.

DREW *v.* NUNN.

4 Q. B. D. (C. A.) 661. 1879.

[Reported herein at p. 22.]

BRADISH *v.* BELKNAP.

41 Vt. 172. 1868.

[Reported herein at p. 172.]

HANNON *v.* SIEGEL-COOPER CO.

167 N. Y. 244. 1901.

[Reported herein at p. 470.]

CHAPTER V.

Formation of the Relation by Necessity.

BENJAMIN *v.* DOCKHAM.

134 Mass. 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 count, 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.

BERGH *v.* WARNER.

47 Minn. 250. 1891.

Appeal by plaintiff from an order refusing a new trial after a trial by the court and judgment ordered for defendant.

Mitchell, J. It is sought in this action to hold the defendant liable for debts contracted by his wife during coverture and cohabitation. The first cause of action is for the price of a pair of diamond ear-rings, purchased by the wife for her own use. . . .

The wife has, by virtue of the marriage relation alone, no authority to bind her husband by contracts of a general nature. She may, however, be his agent, and, as such, bind him. This agency is frequently

spoken of as being of two kinds — First, that which the law creates as the result of the marriage relation, by virtue of which the wife is authorized to pledge the husband's credit for the purpose of obtaining those necessaries which the husband himself has neglected or refused to furnish; second, that which arises from the authority of the husband, expressly or impliedly conferred, as in other cases. The first of these, sometimes called an "agency in law," or an "agency of necessity," is not, accurately speaking, referable to the law of agency; for the liability of the husband in such cases is not at all dependent upon any authority conferred by him. He would, under such circumstances, be liable although the necessaries were furnished to the wife against his express orders. The real foundation of the husband's liability in such cases is the clear legal duty of every husband to support his wife, and supply her with necessaries suitable to her situation and his own circumstances and condition in life. But the wife's authority on this ground to contract debts on the credit of her husband is limited in its extent and nature to the legal requirements fixed for its creation, of the existence of which those persons who assume to deal with the wife must take notice at their peril. If they attempt to hold the husband liable on this ground, the burden of proof is upon them to show — first, that the husband refused or neglected to provide a suitable support for his wife; and, second, that the articles furnished were necessaries. The term "necessaries," in its legal sense, as applied to a wife, is not confined to articles of food and clothing required to sustain life or preserve decency, but includes such articles of utility, or even ornament, as are suitable to maintain the wife according to the estate and rank of her husband.

In regard to the much vexed question as to how it is to be determined, in a given case, whether the articles furnished were necessaries, the general rule adopted is that laid down by Chief Justice Shaw in Davis *v.* Caldwell (12 Cush. 512), *viz.*, that it is a question of fact for the jury, unless in a very clear case, where the court would be justified in directing authoritatively that the articles cannot be necessaries.

In this case the plaintiff utterly failed to establish a right to recover for the articles sued for in the first cause of action as "necessaries." Conceding, for the sake of argument, that, in view of the estate and rank of the defendant, the trial judge would have been justified in finding as a fact that diamond ear-rings were necessaries; yet, so far from there being any evidence that the defendant neglected or refused to provide his wife a suitable support, it affirmatively appeared that he provided for her amply, and even liberally.

The only other ground upon which the defendant could be held liable was by proof that he expressly or impliedly authorized his wife to purchase the articles on his credit. This is purely and simply a question of agency, which rests upon the same considerations which control the creation and existence of the relation of principal and

agent between other persons. The ordinary rules as to actual and ostensible agency must be applied. The agency of the wife, if it exists, must be by virtue of the authorization of the husband, and this may, as in other cases, be express or implied. Her authority, however, when implied, is to be implied from acts and conduct, and not from her position as wife alone. Of course, the husband, as well as every principal, is concluded from denying that the agent had such authority as he was held out by his principal to have, in such a manner as to raise a belief in such authority, acted on in making the contract sought to be enforced. Such liability is not founded on any rights peculiar to the conjugal relation, but on other grounds of universal application. By having, without objection, permitted his wife to contract other bills of a similar nature on his credit, or by payment of such bills previously incurred, and thus impliedly recognizing her authority to contract them, a husband may have clothed his wife with an ostensible agency and apparent authority to contract the bill sued on, so as to render him liable, although she had no actual authority, just as any principal would be liable under like circumstances. It is also true that where the wife is living with her husband, she, as the head and manager of his household, is presumed to have authority from him to order on his credit such goods or services as, in the ordinary arrangement of her husband's household, are required for family use. Flynn *v.* Messenger, 28 Minn. 208, 9 N. W. Rep. 759; Wagner *v.* Nagel, 33 Minn. 348, 23 N. W. Rep. 308. This presumption is founded upon the well-known fact that, in modern society, almost universally, the wife, as the manager of the household, is clothed with authority thus to pledge her husband's credit for articles of ordinary household use. But the articles sued for here are not of that character, and no such presumption would arise from the mere fact that the parties were living together as husband and wife. To hold the husband liable there must have been some affirmative proof of authority from him, either express, or implied from his acts and conduct. In this case there is an entire absence of any evidence of express authority. Indeed, the evidence tends quite strongly to show that it was his expressed wish that his wife would incur no bills, and that his monthly allowance to her of "pin-money" was intended to avoid any occasion for her doing so. The evidence of acts and conduct on part of defendant tending to show that he had clothed his wife with apparent or ostensible authority to buy any such articles on his credit was exceedingly slight. The mere fact that he furnished his wife with expensive wearing apparel had little, if any, tendency to prove any such fact. The same may be said of the evidence that on one occasion he paid a dressmaker's bill of $136, contracted by his wife, especially as there is no evidence that plaintiff had any knowledge of that fact. As to previous dealings between the parties, the only evidence is that on various occasions plaintiff had sold the wife articles of jewelry for

cash, but on one occasion, nearly three years before, he had sold her on credit a bill of jewelry amounting to some $19, the principal item of which was a pair of opera glasses of the value of $12, and that this bill was charged on plaintiff's books to the wife, but that the husband, about a year afterwards, paid it. We do not think that the evidence was such as to require a finding that the wife had authority to purchase the articles on the credit of the defendant. . . .

The order appealed from is affirmed as to the first cause of action.[1] . . .

[1] Gates *v.* Brower, 9 N. Y. 205, proceeds upon the theory of the husband's assent or ratification. Wanamaker *v.* Weaver, 176 N. Y. 75, decides that where there is an alleged agency by necessity the husband may show that the wife is already amply supplied with articles of the same character as those purchased or with money for their purchase.

In Johnson *v.* Briscoe, 104 Mo. App. 493 (1903), an action was brought against a husband to recover the purchase price of a gold watch bought by the defendant's wife from the plaintiff. GOODE, J., said in part (pages 498, 500) : "The defendant and his wife were dwelling together contentedly, so far as appears, and he was providing for the wants and comfort of his family, including herself, to their satisfaction, or, at least without complaint. There was no proof that she had ever asked him to get her a watch, or that he was unwilling to get her one. There may be a good reason why, at a particular time, it is inexpedient for a man to purchase such an article, useful but not indispensable, though he may be perfectly willing to purchase it when his affairs permit. He certainly ought to have something to say about what debts he will incur, if he is providing for his family according to his means. Nor is it conclusive of his duty that wives of persons of his fortune and station have watches. That fact by no means determines that he had been so remiss in not providing one for his wife that she may get it on his credit, as a thing of necessity. The case is very different where a man's neglect is a source of distress to his wife, whether she has been abandoned or is living with him. With facts like those we have before us, we think the power of a wife to pledge her husband's credit must rest on an agency, either express or implied. Everything Mrs. Briscoe bought from the plaintiff was sold to her on the assumption, not that she was unsuitably provided for, or was suffering; but as one having authority to pledge her husband's credit for such articles as she was accustomed to buy. The better decisions declare the law to be that when husband and wife are living together, with the family relation undisturbed, and he is making such provision as excites no comment among their friends and no complaint from her, the question of her right to pledge his credit for any purchase depends on her actual or ostensible authority, and is to be determined by the rules of the law of agency. . . .

"As to necessaries in the sense of the old cases, that is, food, clothing, shelter, medical attendance, and such things as every one must have, there can never be a question of a wife's right to provide them if her husband does not. The law holds that, among the various obligations a man may be under, the primary one is to support his family. Hence, our homestead and exemption statutes. And whether a woman is treated by legal fiction or by an inference from the facts, as an agent in the matter, or is regarded as exercising a prerogative attached by the law to the status of wife, is for practical purposes immaterial when the suit is for absolute necessaries sold to her; though the agency notion is then theoretically unsound; for such indispensable things may be furnished at the husband's cost, notwithstanding a notice from him not to furnish her. But when necessaries are taken to mean not only articles of strict necessity, but those needed to equalize the wife in comfort to other women of her condition, an element of uncertainty is introduced. For when is a man bound to provide such things, and who shall judge if he was delinquent? Shall he, his wife, a merchant, or a jury decide the matter? If the question is remitted in every instance to a jury, to say that the husband is or is not bound, accordingly as they may deem the articles purchased to be necessary or the reverse, a privilege of no defined limits to use her husband's credit will be accorded to the wife, and his financial affairs largely taken from his control. The sounder doctrine is that the husband's responsibility does not stand on the question of necessity in a case like this; but, as said, on the wife's agency. The necessity of the article bought, the means of the parties, their condition in life, and the previous conduct of the husband with reference to the wife's purchases in his name, — all enter into the inquiry as circumstances bearing on the measure of authority she has received or appears to have received from him. We hold this case should be referred to the jury on such evidence, to say whether Mrs. Briscoe acted within the scope of

WALSH *v.* CURLEY.

42 N. Y. St. Rep. (N. Y. C. P. Gen. T.) 470. 1892.

In an action brought in the district court of the city of New York for the seventh judicial district defendant pleaded a counterclaim, which was allowed by the court, and judgment entered for plaintiff for the balance, from which judgment plaintiff appeals.

Bookstaver, J. In April, 1890, the plaintiff sent to defendant, who was a carriage builder in the city of New York, a phaeton to be sold, fixing the price which he was to receive for the same at $125 net. About a month later, plaintiff sent defendant another wagon to be sold. It was admitted on the trial that the phaeton had been sold for $125. The wagon was not sold, and was taken away by the plaintiff because it had not been. Before the action was commenced a settlement was repeatedly asked for by the plaintiff, and the defendant finally rendered him a bill charging $119.70 for repairs to the two wagons and storage, showing a balance in plaintiff's favor of $5.30 only.

If we admit all of the defendant's evidence to be exactly as stated by him, we do not think he is entitled to his bill for repairs. He admits the plaintiff did not order the repairs personally, and that he had no conversation with him on the subject at any time; and it is apparent from the evidence that the repairs, if ordered by anyone, were ordered by the son of the plaintiff. There is no proof that this son was authorized by his father to negotiate for repairs or to order them. The defendant himself testifies that he could not say whether the plaintiff ever authorized his son to direct the repairs, and that he took it for granted that a man's son had authority, or he would not have come; in other words, that he made no inquiry as to the son's authority. The son denies giving the order for the repairs. Under these circumstances we think there was a failure to establish an agency on the part of the son to act for his father.

It has been repeatedly decided that mere relationship does not confer authority to act as agent. In Le Count *v.* Greenley, 6 St. Rep. 91, it was held that a father could not be presumed to have authority to act for a daughter. In Ritch *v.* Smith, 82 N. Y. 627, it was held that a son, merely as such, did not have authority to act for his father. In Hutchinson *v.* Brook, 15 Daly, 486; 29 St. Rep. 317, it was held by this court that a husband who was acting as a general agent for his wife in the management of the feed business could not bind her for the repairs to his stable.

her ostensible or actual agency when she bought the watch. The instructions given at the trial went further than this rule, and made the defendant answerable if the watch was needed to adorn the defendant's wife like her neighbors and women in the same social sphere." A judgment for plaintiff was reversed and a new trial ordered.

It was, therefore, error for the justice to allow anything for these repairs, and for this reason the judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event. On such new trial it may be more satisfactorily established that the defendant was entitled to storage for the wagon that was taken away so that he should be allowed it, and, on the other hand, it may appear that the defendant neglected his duty in regard to the sale of the second wagon, and would be entitled to no storage.

BISCHOFF, J., concurs.

TERRE HAUTE AND INDIANAPOLIS RAILROAD CO. *v.* McMURRAY.

98 Ind. 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, employ 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

[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.

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 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 employee, 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 required 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 could 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 employee 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.[1]

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.

LOUISVILLE, ETC., RY. *v.* SMITH.

121 Ind. 353. 1889.

ELLIOTT, C. J. Jesse Vawter was in the service of the appellant, in the capacity of a brakeman on one of its freight trains, and on the morning of June 11th, 1885, while engaged in the discharge of the duties of his service, at Stinesville, his leg was broken. Dr. Judah, a competent and skilful surgeon, of Stinesville, was called to treat the injured man. He set, dressed, and bandaged the broken limb, and gave the unfortunate man such treatment as his injury required. After the broken limb had been set and bandaged the conductor caused the appellees, who lived at Gosport, to be summoned by telegraph, and one of them obeyed the summons and treated the patient in conjunction with Dr. Judah.

The appellant had fully discharged its duty to its injured brakeman when it procured the services of a competent surgeon. The conductor

[1] A petition for a rehearing was overruled in 98 Ind. 371. This case was disapproved in The Pennsylvania R. Co. *v.* Gary, 22 Fla. 356, where the court holds that a roadmaster or conductor has no authority to employ a physician. See, also, as tending to the same conclusion, Cooper *v.* N. Y. C., etc., R., 6 Hun (N. Y.) 276 (station-agent); Stephenson *v.* N. Y. & Harlem R., 2 Duer (N. Y.) 341 (superintendent).

Even if the railroad company is liable for the physician's services, it is not liable to the injured person for the physician's mistake or want of skill. Pittsburgh, etc., R. *v.* Sullivan, 141 Ind. 83.

had no authority to employ other surgeons, for his authority was special, not general, and it did not extend beyond the duty created by the emergency which required him to act. With that duty his authority arose, and with it terminated. He had authority to do what the emergency demanded, in order to preserve his injured fellow-employee from serious harm, but he had no authority to do more. When the company had procured the services of a competent surgeon it did all that it was morally or legally bound to do, and the conductor could not impose upon it any greater obligation. We hold that the conductor did have authority to at once employ the surgical aid demanded by the urgency of the occasion; but we hold, also, that his authority did not extend beyond this limit. Terre Haute, etc., R. R. Co. *v.* McMurry, 98 Ind. 358; Terre Haute, etc., R. R. Co. *v.* Brown, 107 Ind. 336; Terre Haute, etc., R. R. Co. *v.* Stockwell, 118 Ind. 98.

In the case of Terre Haute, etc., R. R. Co. *v.* Brown, *supra,* the distinction is drawn between cases where the conductor may bind the company, and cases where he may not; and this case belongs to the latter class. The authority of the conductor was exhausted when a competent surgeon was procured, and he could not, as the agent of the company, employ additional surgeons. If the urgency of the case demanded additional surgical aid, the surgeon might possibly be justified in summoning it; but, as held in Terre Haute, etc., R. R. Co. *v.* Brown, *supra,* if additional assistance is required, the surgeon first called must include the expense in his charges.

It is immaterial whether Dr. Judah was called by a brakeman or by the conductor in person; for, if he was called by the direction, express or implied, of the conductor, or if the conductor confirmed what had been done, he could not subsequently employ another surgeon.

It is possible that Dr. Smith may be entitled to compensation for one visit, that made in obedience to the telegram, for it may be that he had a right to act upon it at once, but when he found the injured man attended by a competent surgeon he had no right to continue to give the case attention, and charge the company. He was bound to know that when the agent, who possessed limited special authority, had procured the services of a competent surgeon his authority was exhausted, and if, with this knowledge, he continued to give the injured man attention, he did it at the expense of some other person than the agent's principal.

Judgment reversed.

HOLMES v. McALLISTER.

123 Mich. 493. 1900.

ASSUMPSIT by Arthur D. Holmes against David J. McAllister and James A. McAllister, copartners as the Siau Laundering Company, for medical services rendered to an employee of defendants. From a judgment for plaintiff, defendants bring error.

The employee, Augusta Senken, had her hand seriously injured on April 19, 1898. Neither of the defendants was in the laundry at the time. Defendant James usually spent most of his time there. One Miss McGrath, the forewoman, had charge of the work on the four floors of the building; hired and discharged girls when she saw fit; and, when James was not there, acted in case of an emergency. The injury was so serious that Miss McGrath deemed prompt medical assistance advisable. She sent a boy for a physician, not designating any particular one. The boy called plaintiff. He immediately responded, dressed the wound, and ordered her to be taken home, saying that he would have to see her again. She was taken home in a carriage. In the afternoon of the same day she was suffering pain, and sent a note to a store near by to telephone to the laundry. Some one at the laundry telephoned to plaintiff, and he went to see her. Defendants had no knowledge of this. Plaintiff treated her at her home until she was able to go out, and then she went to his office, and there received treatment until the wound was healed. She was under treatment for about three months.

There was evidence that defendants had promised to pay the bill, or some portion of it.

GRANT, J. (after stating the facts). Had defendants' forewoman authority to bind them by sending for plaintiff to attend the injured employee? She had no general authority to do so. If she was clothed with any authority to do so, it must be because an emergency arose in which it was the defendants' duty to have some one to act for them. There are authorities which hold parties liable in certain emergencies for the acts of their managers or foremen in employing physicians. These authorities, however, go no further than to hold the parties liable for the immediate services made necessary by a present urgency. Authority to act is implied from the necessity of the case. Chaplin *v.* Freeland, 7 Ind. App. 676 (34 N. E. 1007); Terre Haute, etc., R. Co. *v.* McMurray, 98 Ind. 358 (49 Am. Rep. 752); St. Louis, etc., R. Co. *v.* Hoover, 53 Ark. 377 (13 S. W. 1092); Louisville, etc., R. Co. *v.* Smith, 121 Ind. 353 (22 N. E. 775, 6 L. R. A. 320); Arkansas Southern R. Co. *v.* Loughridge, 65 Ark. 300 (45 S. W. 907). Neither the authorities nor reason carry the rule beyond the emergency. Such employment does not make the employer

liable for the services rendered by the physician to the employee after the emergency has passed. If the physician desires to hold the employer responsible for subsequent services, he must make a special contract with him.

The cases above cited, and others, are those in which the employment is hazardous, exposing the employees to dangers and risks greater than those in the ordinary pursuits of life. The ground for such liability is thus stated in Chaplin *v.* Freeland, *supra:*

"Railroad companies occupy a peculiar position with reference to such matters, exercising *quasi* public functions, clothed with extraordinary privileges, carrying their employees necessarily to places remote from their homes, subjecting them to unusual hazards and dangers. The law has, by reason of the dictates of humanity and the necessities of the occasion, imposed upon such companies the duty of providing for the immediate and absolutely essential needs of injured employees, when there is a pressing emergency calling for their immediate action. In such cases, even subordinate officers are sometimes, for the time being, clothed with the powers of the corporation itself for the purposes of the immediate emergency, and no longer."

There is no evidence in this case that employment in a laundry is accompanied by any such dangers. We may infer the contrary, as no accident had ever before occurred in the defendants' business, an extensive one. An employee in a bank, store, or shop, or upon a farm, may become suddenly very ill, or in some way seriously injured, so that some foreman or other employee might properly deem immediate medical attendance necessary, and, in the absence of the employer, summon a physician. Is the employer liable? We are cited to no authority which so holds. It is doubtful whether such an employer would be liable if he himself sent for the physician to attend one of his employees. It is unnecessary upon this point to express an opinion. We do not, however, hesitate to hold that, in those avocations of life unaccompanied by dangers, an employer is not liable for the services of a physician summoned by his manager or foreman or other servant to attend an employee in a case of a sudden illness or injury, whatever his moral obligation may be.[1] If, therefore, the plaintiff had known that Miss McGrath summoned him, the defendants would not be liable. He did not know and made no inquiries as to who summoned him. He testified, "A boy from their office summoned me from the laundry." He never informed defend-

[1] "We have been referred to no cases where it has been held to be within the duties of the manager of a factory for either an individual or corporation to employ physicians or surgeons for employees. We are not, therefore, prepared to hold as a matter of law that the employment of physicians or surgeons for injured employees comes within the scope of the duties of a general manager of an ordinary manufacturing business. It seems to us that the rule that appellant seeks to have applied to this case is confined exclusively to railroad companies, and, generally, in cases which involve some act of negligence on the part of the company which occasioned the injury." Godshaw *v.* J. N. Struck & Bro., 109 Ky. 285, 290.

ants that he was treating her, or that he expected them to pay him, or presented a bill, until he had ceased to treat her. He now seeks to bind defendants, not only for his own services, but for the services of other physicians whom he employed to assist him without their knowledge or assent. He could, in no event, recover for the services of the other physicians. Mayberry *v.* Railroad Co., 75 Mo. 492. We therefore hold that there was no original contract.

There is no evidence of ratification. The testimony of Mr. Knack and the attorney, Mr. Kissane, does not show a ratification. To Mr. Kissane defendant James denied liability, though willing to pay for the first visit at the laundry. As already shown, defendants were not originally liable. The language of Knack and Kissane imports no more than the promise to pay the debt of another, which is void under the statute of frauds.

Judgment reversed, and new trial ordered.

The other Justices concurred.[1]

GWILLIAM *v.* TWIST ET AL.

[1895] 1 Q. B. 557. [1895] 2 Q. B. (C. A.) 84.

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

[1] The manager of a business corporation has no authority to furnish medical aid and assistance to a servant of the corporation who has been injured outside the line of his duties. Chase *v.* Swift & Co., 60 Neb. 696.

Where employees of a mining company, while working in its mines, suffer bodily injury by the explosion of a blast, and it does not appear that the company was in anywise at fault, the secretary and general manager of the company has no power, by virtue of his office, to bind the company by a contract for medical attendance on such injured employees. *Quaere*, whether in a case where an employee is injured through the actionable negligence of the company, the general manager of a mining company can bind his principal by such a contract. Speiman *v.* Gold Coin Mining, etc., Co., 26 Mont. 76.

In Raney *v.* Weed, 3 Sandf. (Superior Ct. N. Y. City) 577, the plaintiffs sued defendants to recover for an advertisement of the sale of lands under an execution, which the plaintiffs had published in their newspaper by direction of the officer in whose hands the defendants had placed the execution. The evidence failed to show any authority in fact in the officer to bind the defendants, and the court held that the law gave him no such authority. "It is perfectly just that he, who employs an agent, should be responsible for the acts, within the scope of his authority, of the person whom he selects, trusts, and controls; but it is not just that any person should be responsible for the acts of a public officer, whom, without regard to his own wishes, the law commands, and unless he choose to abandon his rights, compels him to employ. It is not just that he should be liable for the acts of a person whom he does not select, may not trust, and has no power to remove. So far as by special instructions he controls his discretion, and so far as he participates in the wrongful acts of the officer, he is justly liable, and no further. . . . The referee has erred in founding his report upon the supposition of an existing privity between the parties, which entities plaintiffs to maintain this action; he has erred in deciding that the defendants were in any sense parties to the contract upon which the claim of the plaintiffs is founded."

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. 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, however 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.][1]

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;

[1] [1895] 2 Q. B. (C. A.) 84.

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.*

ROWE, Trustee *v.* RAND, Receiver.

111 Ind. 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 hereinabove 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.

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2. *By Revocation.*

BROOKSHIRE *v.* BROOKSHIRE.

8 Ired. 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 Marine 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.

DAVOL *v.* QUIMBY.

11 Allen (Mass.) 208. 1865.

CONTRACT, to recover wages. The defence was payment to the plaintiff's agent; whose agency was denied by the plaintiff.

Plaintiff authorized one Howe to collect a debt due plaintiff from defendant. Afterward plaintiff authorized an attorney to collect the debt, and the attorney demanded it of defendant. After this the defendant paid the money to Howe. Plaintiff did not notify Howe of any withdrawal of his authority.

The plaintiff's counsel requested the court to instruct the jury that if the defendant had notice to pay the attorney of the plaintiff, he could not be justified in paying the money to Howe after such notice from the plaintiff, and if he did so he did it at his own risk, and did not discharge himself from liability to the plaintiff. The

judge refused so to rule, and the jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

BIGELOW, C. J. The instruction asked for by the defendant was rightly refused. It appeared distinctly from the evidence that the plaintiff authorized Howe to receive the money from the defendant; but it was not shown that this authority was subsequently revoked. The mere fact that the plaintiff also authorized another person to receive the same money did not prove a revocation. There may be two persons appointed to exercise the same power as agents for a principal. If there is nothing in the nature of the agency to render an authority in one person inconsistent with a like authority in another, both may well be authorized, and the acts of either or both, within the scope of the agency, will be valid and binding on the principal. So it was in the case at bar. The defendant paid to one agent of whose authority he had had notice. This authority was not revoked by the notice given to the defendant that the plaintiff had also appointed another agent with similar authority. There was no other evidence of revocation.

Exceptions overruled.[1]

WALKER *v.* BARRINGTON.

28 Vt. 781. 1856.

BOOK ACCOUNT. In the plaintiff's account were charges which were allowed in his favor, for a shoat, and for a quantity of coal sold to the defendant. Items 17 and 18, in the defendant's account, were "for cash for pig, paid to Wilbur Barrington," and "for cash for coal, paid to the same," which the auditor disallowed, subject to the opinion of the court upon the following facts.

At the time the plaintiff let the defendant have the shoat and coal, the defendant was to pay for the same to his father Wilbur Barrington, and so offered to do; but said Wilbur refused to receive it, for the reason that he thought it would affect certain contracts between him and the plaintiff. Said sums were not paid by said defendant to his father until the 15th day of December, 1855, which was after the commencement of this suit. The balance reported in the plaintiff's favor was five dollars and seventy-nine cents. The items 17 and 18, in the defendant's account, amounted to thirteen dollars and thirty-nine cents.

The county court, January Term, 1856, — POLAND, J., presiding, — rendered judgment on the report for the plaintiff for the above balance reported in his favor. Exceptions by the defendant.

[1] *Contra:* Williamson *v.* Richardson, 30 Fed. Cas. 17.

The opinion of the court was delivered by

BENNETT, J. The only dispute in this case is in relation to items 17 and 18 in the defendant's account. If the defendant is not entitled to recover for these items, the balance on the accounts, as allowed, is for the plaintiff. The auditor finds that at the time the plaintiff let the defendant have the shoat and the coal, it was agreed that the defendant was to pay the amount for the same to the father of the defendant; and that the defendant offered to pay his father, but he at first declined to receive the pay, for reasons assigned in the report; but the case finds, as we understand it, that he did pay his father the two items, on the 15th day of December, 1855, which was after the suit was commenced, but before the audit. It being a part of the agreement, when the shoat and coal were sold to the defendant, that payment should be made for the same to the father of the defendant, it may well be questioned whether it was competent for the plaintiff to countermand the authority to pay the amount to the father. But be this as it may, it is quite clear, we think, that the bringing of this suit is not, *per se,* a revocation of the authority; and there is nothing else in the case to ground such a claim upon. There were running accounts between these two parties, which the action was brought to settle; and the auditor has not found any revocation, in fact, of the authority to make payment for these items to the father.

We think, then, the judgment of the county court should be reversed, and judgment be rendered, on the report, for the defendant, allowing to him items 17 and 18, in his account.

AHERN *v.* BAKER.

34 Minn. 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 plain-

tiff, 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.

BRADISH *v.* BELKNAP ET AL.

41 Vt. 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.

BARKLEY *v.* RENSSELAER AND SARATOGA R. CO.

71 N. Y. 205. 1877.

THIS action was brought to recover a balance alleged to be due on the sale of a quantity of wood.

In 1870, one Rising, plaintiff's assignor, and one Wilson, who was the wood measurer of the defendant authorized to purchase, measure and accept wood for it, entered into a parol agreement by which Rising agreed to sell and deliver to defendant 2,000 cords of wood at $4.50 per cord, to be delivered at Rupert. During the year 1871 a portion of the wood was delivered, accepted by Wilson, and paid for by defendant. In May, 1871, defendant leased its road to the Delaware & Hudson Canal Company, which company thereafter operated it, and Wilson thereupon became, and thereafter acted, as the wood measurer of said lessee; and defendant's superintendent and employees continued to occupy their respective positions. Rising, without notice or knowledge of this change, continued to deliver, and did deliver, during 1871, 1,232 cords of wood, which were measured and accepted by Wilson. Rising, after the wood was delivered and accepted, received from the Delaware & Hudson Canal Company $4 per cord for the wood so delivered. An account of the wood, with a receipt at the foot in full of the account, was presented to Rising by the station agent at the time of the payment, and he was required to sign the receipt as a voucher. The bill was headed "The Delaware & Hudson Canal Company, Rensselaer & Saratoga Railroad Department, to Seth Rising, Dr."

The referee directed a verdict for the balance unpaid, — *i. e.* fifty cents per cord, with interest.

PER CURIAM. It is conceded that Wilson was authorized by the defendant to make the contract with Rising for the purchase of the

2,000 cords of wood. By the contract, which was verbal, Rising was to deliver the wood at the defendant's yard at Rupert, subject to inspection and measurement by the defendant; and a portion of the wood was to be delivered more than a year after the contract was made. The contract for this reason was void by the statute of frauds. But Rising delivered the wood at the place fixed by the contract, and if the defendant accepted it, it was bound to pay for it at the contract-price. The vendor delivered a portion of the wood prior to May, 1871, which was inspected and measured by Wilson, the wood-buyer and measurer of the defendant, and paid for by the defendant. The balance of the wood, about 1,232 cords, was delivered subsequently and prior to January, 1872, after the defendant had leased its road to the Delaware & Hudson Canal Company. It was inspected, measured, and accepted by Wilson.

The referee finds that the plaintiff had no notice of the lease, or that the agency of Wilson for the defendant had terminated, until after all the wood was delivered.

There was no change of employees on the road, and it was managed and operated after the lease apparently as it had been before. Under these circumstances, the acceptance of Wilson bound the defendant. Rising had a right to assume that his agency for the defendant continued until he had notice to the contrary, and that in accepting the wood, Wilson was acting for the defendant. Wilson, before the lease, had authority to receive wood on the contract, notwithstanding it was void; and, as to Rising, the authority continued until he had notice of Wilson's change of relation to the defendant.

Upon the findings and evidence, the averment that the wood was delivered to the defendant is established, and the right of the plaintiff to recover the contract-price became perfect as soon as it was measured and accepted by Wilson.

The fact that Rising subsequently accepted part payment for the 1,232 cords from the Delaware & Hudson Canal Company, did not discharge the defendant from its liability to pay the balance of the purchase-price. There was no agreement by Rising to accept the Delaware & Hudson Canal Company as his debtor in place of the defendant.

The form of the receipt given for the money received from that company did not conclude the plaintiff from claiming that the wood was sold to, and accepted by, the defendant. It was taken as a voucher for the money paid, and for no other purpose. It certainly was not conclusive evidence that the wood mentioned in the receipts was sold to the Delaware & Hudson Canal Company.

The judgment should be affirmed.

All concur, except FOLGER and MILLER, JJ., absent.

Judgment affirmed.

3. *Operation of Law.*

COX *v.* BOWLING.

54 Mo. App. 289. 1893.

GILL, J. This is a suit for commissions for sale of real estate. Plaintiff had judgment below, and defendant appealed. The material facts are about as follows: Bowling owned a house and lot in Lamar, Missouri, which he desired to sell. He agreed with Cox, an agent, that if he, Cox, would find a purchaser for the house and lot at the price of $2,500 he would allow him $100 as commissions. Cox entered into negotiations with one Snyder, a resident of Lamar, and made an effort to sell the property to Snyder at the fixed price of $2,500. Snyder refused to give that sum and offered to purchase at a less amount, which Bowling then declined. Cox made repeated efforts to get the parties together, but to no purpose, and the negotiations then ceased. A short time thereafter the building on the lot was destroyed by fire. A few days after the fire Bowling and Snyder met on the street, and after a brief interview Bowling sold the lot (then vacant) to Snyder for $2,000.

Plaintiff originally brought his action before the justice of the peace on the special contract which, as already stated, was that defendant was to pay plaintiff the agreed price of $100 if he sold the property for $2,500; but since plaintiff was unable to prove that the lot was sold for $2,500 the complaint was amended in the circuit court, over defendant's objection, so as to sue in *quantum meruit,* and it was upon this amended petition plaintiff was allowed to recover. . . .

Plaintiff did not secure a purchaser for the house and lot he engaged to sell. Snyder and Bowling were never able to agree on a price for the property as it stood when Cox conducted the negotiations. Bowling's price — and that, too, at which Cox undertook to sell — was $2,500, but Snyder was not willing to pay that for the property. Subsequently, however, when the building was destroyed and the property became materially changed (so that indeed it was not the same as when Cox was employed to sell it), Bowling and Snyder came together and a sale of the vacant lot was effected. But this was not the property that Cox was empowered to sell. There was nothing said between Bowling and Cox after the destruction of the building. So material a change in the subject-matter of the agency amounts to a revocation of Cox's authority as agent. It is well settled that the authority of the agent is determined by the destruction of the subject-matter of the agency. Story on Agency, sec. 499; Ewell's Evans on Agency, sec. 132; Mechem on Agency, sec. 238.

The judgment of the circuit court must be reversed. All concur.

TURNER *v.* GOLDSMITH.

[1891] 1 Q. B. (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 subject 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]

[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.

LACY *v.* GETMAN, EXECUTRIX.

119 N. Y. 109. 1890.

PLAINTIFF contracted to work for McMahan upon his farm for one year. At the end of about four months McMahan died making defendant executrix and willing a life estate in the farm to his widow. Plaintiff without any new contract with either the widow or executrix remained to the end of the year working under the direction of the widow. He recovered from the executrix the full amount of his year's wages.

FINCH, J. The relation of master and servant is no longer bounded by its original limits. It has broadened with the advance of civilization until the law recognizes its existence in new areas of social and business life, and yields in many directions to the influence and necessities of its later surroundings. When, therefore, it is said generally, as the commentators mostly agree in saying, that the contract relations of principal and agent, and of master and servant, are dissolved by the death of either party, it is very certain that the statement must be limited to cases in which the relation may be deemed purely personal, and involves neither property rights nor independent action. Beyond that, a further limitation of the doctrine is asserted, which approaches very near to its utter destruction, and is claimed to be the result of modern adjudication. The limitation is that the rule applies only to the contract of the servant, and not to that of the master, and not at all, unless the service employed is that of skilled labor peculiar to the capacity and experience of the servant employed, and not the common possession of men in general; and it is proposed to adopt as a standard or test of the limitation an inquiry in each case whether the contract on the side of the master can be performed after his death by his representatives substantially, and in all its terms or requirements, or cannot be so performed without violence to some of its inherent elements. . . .

We have then the peculiar case of a contract made to work *for* McMahan and under his direction and control, which could not be performed because of his death, transmuted into a contract to work *for* Mrs. Getman upon a farm which she did not possess and had no right to enter; and performed by working for the widow and under her direction and control alone; and this because of the supposed rule that the contract survived the death of the master and remained binding upon his personal representatives. . . .

It seems to be conceded that the death of the servant dissolves the contract. Wolfe *v.* Howes, 20 N. Y. 197; Spaulding *v.* Rosa, 71 id. 40; Devlin *v.* Mayor, etc., 63 id. 14; Fahy *v.* North, 19 Barb. 341; Clark *v.* Gilbert, 32 id. 576; Seymour *v.* Cagger, 13 Hun, 29;

Boast *v.* Firth, L. R. (4 C. P.) 1. Almost all these cases were marked by the circumstance that the services belonged to the class of skilled labor. In such instances the impossibility of a substituted service by the representative of the servant is very apparent. The master has selected the servant by reason of his personal qualifications, and ought not, when he dies, to abide the choice of another or accept a service which he does not want. While these cases possess, with a single exception, that characteristic, I do not think they depend upon it. Fahy *v.* North was a contract for farm labor, ended by the sickness of the servant, and quite uniformly the general rule stated is that the servant's agreement to render personal services is dissolved by his death. There happens a total inability to perform; it is without the servant's fault; and so further performance is excused and the contract is apportioned. If in this case, Lacy had died on that day in July, his representative could not have performed his contract. McMahan, surviving, would have been free to say that he bargained for Lacy's services, and not for those of another selected and chosen by strangers, and either the contract would be broken or else dissolved. I have no doubt that it must be deemed dissolved, and that the death of the servant, bound to render personal services under a personal control, ends the contract, and irrespective of the inquiry whether those services involve skilled or common labor. For, even as it respects the latter, the servant's character, habits, capacity, industry, and temper, all enter into and affect the contract which the master makes, and are material and essential where the service rendered is to be personal and subject to the daily direction and choice and control of the master. He was willing to hire Lacy for a year; but Lacy's personal representative, or a laborer tendered by him, he might not want at all and at least not for a fixed period, preventing a discharge. And so it must be conceded that the death of the servant, employed to render personal services under the master's daily direction, dissolves the contract. Babcock *v.* Goodrich, 3 How. Pr. (N. S.) 53.

But if that be so, on what principle shall the master be differently and more closely bound? There is no logic and no justice in a contrary rule. The same reasoning which relieves the servant's estate relieves also the master's, for the relation constituted is personal on both sides and contemplates no substitution. If the master selects the servant, the servant chooses the master. It is not everyone to whom he will bind himself for a year, knowing that he must be obedient and render the services required. Submission to the master's will is the law of the contract which he meditates making. He knows that a promise by the servant to obey the lawful and reasonable orders of his master within the scope of his contract is implied by law; and a breach of this promise in a material matter justifies the master in discharging him. King *v.* St. John, Devizes, 9 B. & C.

896. One does not put himself in such a relation for a fixed period without some choice as to whom he will serve. The master's habits, character, and temper enter into the consideration of the servant before he binds himself to the service, just as his own personal characteristics materially affect the choice of the master. The service, the choice, the contract are personal upon both sides, and more or less dependent upon the individuality of the contracting parties, and the rule applicable to one should be the rule which governs the other.

If now, to such a case — that is to the simple and normal relation of master and servant, involving daily obedience on one side and constant direction on the other — we apply the suggested test of possibility of performance in substantial accord with the contract, the result is not different. It is said, that if the master dies his representatives have only to pay, and anyone may do that. But under the contract, that is by no means all that remains to be done. They must take the place of the master in ordering and directing the work of the farm, and requiring the stipulated obedience. That may prove to effect a radical change in the situation of the servant, as it seems to have done in the present case, leading the plaintiff to the verge of refusing to work further for either widow or executrix, whose views apparently jangled. The new master cannot perform the employer's side of the contract as the deceased would have performed it, and may vary so far, from incapacity or fitful temper or selfish greed, as to make the situation of the servant materially and seriously different from that which he contemplated and for which he contracted.

We are, therefore, of opinion that in the case at bar the contract of service was dissolved by the death of McMahan, and his estate was only liable for the services rendered to the date of his death.

The judgment should be reversed and a new trial granted with costs to abide the event. All concur.

Judgment reversed.

WEBER, Adm'x *v.* BRIDGMAN.

113 N. Y. 600. 1889.

This action was for the foreclosure of a mortgage executed by James Dunn to Thomas Bierds, covering premises situated on Carlton Avenue, Brooklyn, as security for the payment of his bond of $2,000, dated May 9, 1872. It was assigned to Paul Weber. He died intestate. On the 4th of June, 1874, the plaintiff, Louisa Weber, his widow, was appointed administratrix of his estate, and on July 1, 1886, commenced this action. Both the defendants aver

that the mortgage in suit was paid to the then holder and duly satisfied of record May 13, 1874.

The trial judge found in favor of the plaintiff and directed the usual judgment of foreclosure and sale. The General Term, upon the defendant's appeal, reversed the judgment "upon questions of fact and questions of law." The question of fact litigated upon the trial arose upon the defence of payment. It appeared, to the satisfaction of the trial judge, that Paul Weber, then residing in New York, but about to visit Europe with his wife and family, did, on June 6, 1871, execute to one August Hartwig a power of attorney under seal, authorizing him to collect all debts and demands due him and give receipts therefor. Weber died Jan. 11, 1874. During his absence Hartwig bought for him the bond and mortgage in question, taking an assignment to Paul Weber, and, after record, held possession of said bond, mortgage and assignment till May 12, 1874, collected and receipted for, in Paul Weber's name, the semi-annual interest.

On April 23, 1874, Bridgman acquired title to the premises and assumed payment of the mortgage. It became due May 9, 1874, and was paid by him by check to Hartwig May 12, 1874, and a discharge was given by Hartwig as attorney for Weber. At the same time the bond and mortgage, the assignment to Weber, and the power of attorney were delivered to Bridgman. Hartwig, during all this transaction, knew of the death of Weber, having been informed of it as early as the first of February, 1874, but he did not disclose that fact to Bridgman. But the trial judge also finds that Bridgman made no inquiry "as to the whereabouts of the principal, Paul Weber, or whether he was dead or alive."

Mrs. Weber returned from Europe on the twenty-second or twenty-fourth of May. The trial judge also found that Hartwig never accounted to the plaintiff for the bond and mortgage or its proceeds, nor for the assets in his hands, nor did he pay her any money; that plaintiff never ratified the act of Hartwig in cancelling said mortgage; that she had no notice of the existence of said bond and mortgage or the cancellation thereof, and never knew of the cancellation until within a short time before the commencement of this action; that said Hartwig left no record of it, nor ever informed plaintiff of its existence or cancellation; that said mortgage is wholly unpaid, and remains unimpaired as a valid and subsisting lien by reason of any act of the plaintiff or her duly authorized agent.

As conclusion of law, he held that the agency of Hartwig terminated with the life of Paul Weber, and that the satisfaction of the mortgage was invalid and void.

DANFORTH, J. It should be assumed, without argument, that the plaintiff is not bound by the act of Hartwig, unless his authority to receive the money and discharge the mortgage was established,

or unless she has, with knowledge of the facts, recognized that transaction and adopted it. The respondents' contention is that both alternatives are established, viz.: That the payment to Hartwig was a valid payment, and also that Hartwig accounted with the plaintiff and paid over to her the money so received by him. As Bridgman dealt with Hartwig as an agent, and now seeks to charge the representative of Weber as if his dealing had been with the principal, the burden of proof was on him to show either that the agency existed, and that the agent with whom he dealt had the authority he assumed to exercise, or that the plaintiff is estopped from disputing it. That an agency of some kind did at one time exist in favor of Hartwig was sufficiently manifested by the power of attorney and proof of its due execution and delivery by Weber. If it be conceded that the act in question was within the authority which Hartwig once had, it would not aid the defendant, for that authority was determined by the death of Weber before the act was performed, and although Bridgman had no notice of his death the act was void and the estate of the principal is not bound.

The question is not new, and it has been uniformly answered by our decisions to the effect that the death of the principal puts an end to the agency, and, therefore, is an instantaneous and unqualified revocation of the authority of the agent. (2 Kent's Com. 646; Hunt *v.* Rousmanier, 8 Wheat. 174.) There can be no agent where there is no principal. There are, no doubt, exceptions to the rule, as where the agency is coupled with an interest (Knapp *v.* Alvord, 10 Pai. 205; Hunt *v.* Rousmanier, *supra;* Hess *v.* Rau, 95 N. Y. 359); or where the principal was a firm and only one of its members died. (Bank *v.* Vanderhorst, 32 N. Y. 553.) But both cases recognize the general rule to be as above stated. In Davis *v.* Windsor Savings Bank (46 Vt. 728), the rule was applied. The defendant paid money to the agent after the death of his principal, but in ignorance of it, and the administrator of the deceased recovered. It is quite unnecessary to go through the cases on this subject. The rule at common law which determines the authority of an agent by the death of his principal is well settled, and no notice is necessary to relieve the estate of the principal of responsibility, even on contracts into which the agent had entered with third persons who were ignorant of his death. Those who deal with an agent are held to assume the risk that his authority may be terminated by death without notice to them. This rule was established in England (Leake on Con. 487), although now modified by statute, and is generally applied in this country. (Story on Agency, § 488; Pars. on Con. vol. 1, p. 71; 2 Kent's Com. (12th ed.) 645, 646.)

In some states alterations have been made by statute; and, following the civil law, it was held in Pennsylvania (Cassiday *v.* M'Kenzie, 4 Watts & Serg. 282), that the acts of an agent or attorney,

done after the death of his principal, of which he was ignorant, are binding upon the parties. This was, however, in opposition to the current of authority. (1 Pars. on Con. 71; 2 Kent's Com. 646.) But even that case does not aid the defendant, for here the agent knew of the death of his principal. Moreover, the defendant might have known it had he taken the precaution to inquire. He had never before dealt with the agent. The power of attorney was not of recent date, and the defendant should be held to have assumed the burden of showing that Hartwig was, at the moment of the transaction, a person authorized to act so as to bind the real owner of the bond and mortgage, whoever that person might prove to be. There is no equity in his favor, for the loss, if any, is from his own negligence.

It is claimed, however, by the learned counsel for the respondents, that the rule has application only where the act of the agent is required to be done in the name of the principal, and his contention is, as we understand it, that, inasmuch as Hartwig had possession of the bond and mortgage, the defendant from that fact had a right to infer an agency to collect, and so the payment was valid.[1] However that might be under other circumstances, the contention has no force in this instance. The power of Hartwig was not left to inference. Whatever it was it came before the defendant in writing. The power of attorney was in his hands. It authorized such acts only as could be performed in the name of the principal, and so the defendant understood it. He caused the power to be recorded, took a discharge of the mortgage under it executed by Hartwig as agent for Weber, and gave the check payable to the order of Hartwig in that character. Except for the power of attorney and its recitals, and the acts of Hartwig under it, the defendant would not have even the shadow of a defence. In his own name Hartwig could do nothing, and of this the defendant had full notice. The power of attorney which accompanied possession of the securities defined the actual authority, and the defendant had notice of its contents at the same moment that he saw the bond and mortgage in the hands of the attorney. The authority which might be gathered

[1] Ish *v.* Crane, 8 Oh. St. 520, and again 13 Oh. St. 574, while admitting the general rule that death revokes the agency, holds that a transaction which need not necessarily be executed in the name of the principal will, if executed in good faith after the death of the principal and in ignorance of that event, be binding on his representatives. In that case the agent, acting under a prior authority, sold the lands of the principal and entered into a written contract of sale after the principal, unknown to either the agent or the purchaser, was already deceased. The court cites as sustaining this decision Cassiday *v.* M'Kenzie, 4 Watts & Serg. 282, and Dick *v.* Page & Bacon, 17 Mo. 234. In Deweese *v.* Muff, 57 Neb. 17, a principal indorsed a note in blank and delivered it to his agent for collection; after the principal's death, unknown to the maker of the note, the latter paid it to the agent and it was held that the payment was binding on the principal's representatives. In Meinhardt *v.* Newman, 99 N. W. (Neb.) 261, it was held that the principal's representatives were by their conduct estopped to deny the validity of payments made to the agent after the principal's death.

from their mere possession is, under these circumstances, of no force. The giving of an authority in writing imports that the extent of the authority is to be looked for in its terms, and not elsewhere.

[The court then holds that there was not sufficient evidence of knowledge and ratification by plaintiff.]

The order of the General Term should, therefore, be reversed, and the judgment of the Special Term affirmed, with costs.

All concur.

Ordered accordingly.[1]

LONG *v.* THAYER.

150 U. S. 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 quitclaim 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 nonpayment 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 payments 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,

[1] In Moore *v.* Weston, 102 N. W. (N. Dak.) 163, the payee of a note by a memorandum written on it authorized the maker upon the death of the payee to expend any unpaid balance in funeral expenses, monument, etc. The maker did so. It was held that he was liable to the estate of the payee for the full amount of the note since death terminated the authority and a disposition of property to take effect after death must be by a formal will.

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 made 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."

DREW *v.* NUNN.

4 Q. B. D. (C. A.) 661. 1879.

[Reported herein at p. 22.]

MERRITT *v.* MERRITT.

43 N. Y. App. Div. 68.

[Reported herein at p. 25.]

HUBBARD *v.* MATTHEWS.

54 N. Y. 43. 1873.

DEFENDANT was indorser of notes transferred to plaintiff and payable in New Orleans. While still in New Orleans defendant, on April 26, 1861, gave one Burke authority to receive and acknowledge notices of protest, and then returned to his home in New York. After the outbreak of the Civil War the notes were duly presented for payment in New Orleans and upon dishonor notice was duly given to Burke in New Orleans. Judgment for plaintiff.

JOHNSON, C. . . . The doctrine that an agent constituted before a war may continue to represent his principal in transactions not contrary to the policy or interests of the government of the agent's residence, though the principal be an enemy resident under the hostile government, seems to have been often affirmed; several times acted upon by the courts, and never, that I have found, denied. In United States *v.* Grossmayer (9 Wall. 72) Mr. Justice DAVIS, delivering the opinion of the Supreme Court of the United States, says: "We are not disposed to deny the doctrine that a resident in the territory of one of the belligerents may have, in time of war, an agent residing in the territory of the other, to whom his debtor could pay his debt in money, or deliver to him property in discharge of it; but in such a case the agency must have been created before the war began, for there is no power to appoint an agent for any purpose, after hostilities have actually commenced; and to this effect are all the authorities."

The same principle is recognized in Ward *v.* Smith, 7 Wall. 452; Conn. *v.* Penn., 1 Peters' Cir. C. 496, 524; Denniston *v.* Imbrie, 3 Wash. C. C. 396, 403; Paul *v.* Christie, 4 Harris & McH. 161; Robinson *v.* International Life Ins. Co., 42 N. Y. 54, 62; and also in the earlier cases in this State of Buchanan *v.* Curry, 19 J. R. 137, 141; Griswold *v.* Waddington, 16 *id.* 484; Clarke *v.* Morey, 10 *id.* 69, 73. Moneys received by such an agent are lawfully paid and lawfully received though a remittance by him to his enemy principal would be unlawful. If such an agency can exist at all for any purpose, it is not perceived why, being lawfully constituted in its beginning, it may not subsist for any purpose not hostile, and especially for such a purpose as to receive notices of dishonor upon notes in order to charge an absent indorser.

The judgment should be affirmed.

All concur. *Judgment affirmed.*

MARTINE *v.* INTERNATIONAL LIFE INS. SOCIETY.

53 N. Y. 339. 1873.

ACTION on a life insurance policy. Premiums were paid up to 1861 to the defendant's agents, Starke & Pearce, in North Carolina. After Starke's death the premiums for 1862, 1863, and 1864 were paid to Pearce, the surviving partner. The insured died in 1864. The referee directed judgment for the full amount of the policy. The General Term reversed the judgment. Plaintiff appeals.

CHURCH, Ch. J. The referee found that payments upon the policy had been duly made up to the death of Mr. Martine. The payment to the agents, Starke & Pearce, in April, 1861, was good. They were the agents of the defendant at Fayetteville, North Carolina, and the assured had repeatedly been notified to pay the premiums at the office of their agency at that place. The instructions to the agents as to the manner of receiving them, viz., upon receipts forwarded from the New York office, were never communicated to the assured, and she was not affected by them. She was directed to pay at the office of their agent, and she had a right to comply with the direction.

The validity of the subsequent payments for 1862, 1863, and 1864 is more difficult to be maintained. Between 1861 and 1862, Starke, one of the firm, died, and the payments were made to and received by Pearce, as surviving partner. The assured is chargeable with notice of the death of Starke, and the authority by which Pearce assumed to act, by the receipts executed and received for the premiums for those years. He did not profess to be the agent of the defendant, but acted as the surviving partner of the firm who had been agents. There is no authority to sustain his right to so act. The death of one member of a firm operates immediately and inevitably as a dissolution. Story on Part. § 317; Parsons, *id.*, 438. During the existence of a partnership, each member is deemed to be authorized to transact any business for the firm, but upon dissolution this authority ceases, and the only authority of the survivor is to close up the business. He has no right to create new obligations, nor indeed to do anything in the name of the firm, except such as is necessary in adjusting and closing its concerns. Van Keuren *v.* Parmelee, 2 N. Y. 523. It is a general rule of the common law that an authority by a principal to two persons to do an act is joint, and the act must be concurred in by both. Dunlap's Paley on Agency, 177; Green *v.* Miller, 6 J. R. 39; 13 Jurist, 938; Story on Agency, § 42. When a firm is appointed to an agency, this rule would necessarily be modified to the extent that either member of a firm could do any act within the scope of the agency, the same as

he could perform any other partnership act. By appointing a partnership firm it would be implied that the authority was joint and several.[1] But upon dissolution of the firm such an agency would cease. This is the necessary result of the principles alluded to. The principal would not be bound by the act of a surviving member of a firm, because he had never appointed him to act nor agreed to be responsible for his acts, and the latter could incur no obligation against the deceased member or his representatives.

The counsel for the appellant suggested that, as the notice to the assured required payment at the office of its agent in Fayetteville, she was justified in paying at the office of Starke & Pearce. The answer is, that if the company had no agent, then it had no office of an agent, and, as we have seen, the agency ceased upon the death of Starke. It is also suggested that it was the duty of the company to appoint an agent at that place to receive the premiums, and that it cannot take advantage of its own negligence. There is nothing in the contract indicating Fayetteville as the place of payment. The notices to pay at Fayetteville would justify such payments, so long as the privilege was unrecalled and the defendant had an agent there. Upon the death of Starke the agency ceased, which the assured must have known, and the defendant was under no legal obligation to appoint another, but the obligation to pay the premiums to the society remained. The case of Hamilton *v.* Mutual Life Ins. Co., 9 Blatch. 235, was different. By the contract the premiums were payable to an agent residing in Alabama, appointed in pursuance of a statute of that State, and required as a condition of transacting business there. The company revoked the agency, which prevented the assured from paying the premiums, and the court held the assured excused. Here there was no statute and no contract to pay or receive the premiums at the place where they were paid.

There were three notices produced for the years 1852, 1853, and 1855, which stated the time when the premiums for those years were due, and that they must be paid at the office of the Fayetteville agency within thirty days or the policy would be void, but two of them stated that the notice was not required by the rules of the society, and that the want of it would not excuse non-payment. It was not a notice that all premiums must be paid at Fayetteville, but that those specified must be. The notices would have justified such payments so long as defendant had an agent there, but cannot be construed into a contract that the company must always have an agent at that place, or that payments might always be made there.

We think the General Term right in holding that the referee erred in finding the payments for the specified years duly made. This is irrespective of the effect of the war upon the transaction, but it dis-

[1] See Deakin *v.* Underwood, 37 Minn. 98, *ante*, p. 43.

poses of the findings of the referee, which were reversed by the General Term. . . .

[The court then held that payments to the New York office would have been unlawful during the progress of the Civil War, and that the failure to pay the premiums in 1862, 1863, and 1864 did not therefore forfeit the policy.]

The order granting a new trial must be reversed, and judgment of referee modified, by deducting the premiums payable in 1862, 1863, and 1864, with interest, and, as modified, affirmed without costs to either party as against the other.

All concur, except GROVER, J., not voting.

Judgment accordingly.

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4. *Irrevocable Agencies.*

BLACKSTONE *v.* BUTTERMORE.

53 Pa. St. 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. 20.

The judgment is therefore affirmed.

CHAMBERS *v.* SEAY.

73 Ala. 372. 1882.

ACTION for commissions. Judgment for defendant. [A demurrer for the misjoinder of counts for breach of contract and counts in *assumpsit* for work and labor was sustained and the latter counts were withdrawn.]

SOMERVILLE, J. The main contention in this case involves the right of the principal to revoke the agent's authority to sell, so as to deprive the latter of his commissions.

The agreement, which is the basis of this suit, is in writing, bearing date February 28, 1878, and is signed by both the plaintiff and defendant. Its substance is briefly as follows: Seay was the owner of a tract of land in Talladega county, valuable for the quantity of iron ore it was known to contain. He placed this land in the hands

of Chambers for sale, subject to Seay's ratification, if he (Seay) should "deem the price to be paid for said property sufficient to warrant a sale." Chambers, on his part, agreed to undertake the sale of the land, and to this end undertook and promised to transport specimens of ore taken from it to Birmingham, England, for inspection there; and also to advertise the property in one respectable paper in each of the cities of Birmingham and London, England. By way of compensation for his services and expenses, it was stipulated that Chambers should receive "an undivided one-fourth interest in *the proceeds of sale* when sold as aforesaid," and his right to sell was made "exclusive."

The evidence tends to show that Seay revoked the agency of Chambers in January, 1880, and very soon afterwards himself sold the property to one Glidden for the sum of twenty thousand dollars. The circuit court charged the jury, that the agreement in question was a mere *revocable* agency, which could be recalled by the principal, Seay, at any time before it had been executed by his making a sale of the property; and if it was so revoked prior to the sale made by Seay to Glidden, then Chambers was not entitled to recover any commissions.

The rule is not denied, that, in ordinary cases, a principal, who has empowered an agent to sell, may at any time before sale revoke the agent's authority. It is equally true that the usual theory of commissions is, that the agent is to receive them only in event of success. Wood's Mayne on Damages (Amer. ed.), §§ 746–747.

It is argued that the present agreement does not come within this general rule, because it confers on the agent a power coupled with an interest, and that such a power is irrevocable. It is a generally admitted proposition of law, that a principal is not permitted to revoke the authority of his agent, where such authority is *coupled with an interest,* or where it is *necessary to effectuate a security.* Ewell's Evans on Agency, marg. page 83. These are the two established exceptions, which seem, indeed, to be essentially similar in principle. It is contended that the agency of the plaintiff, Chambers, comes within the influence of the first exception, as being coupled with an interest, and it was not competent, therefore, for Seay to revoke it. It is not any interest, however, that will suffice to render an agency irrevocable. An interest in the proceeds of sale, or money derived from the sale of property by an agent is not sufficient for this purpose. Barr *v.* Schroeder, 32 Cal. 609; Hartley's Appeal, 53 Penn. St. 212; Gilbert *v.* Holmes, 64 Ill. 549. To be irrevocable, it seems now well settled, that the power conferred must create *an interest in the thing itself,* or in the property which is the subject of the power. In other words, "the power and estate must be united and co-existent," and, possibly, of such a nature that the power would survive the principal in the event of the latter's death, so as to be

capable of execution in the name of the agent. Blackstone *v.* Buttermore, 53 Penn. St. 266; Bonney *v.* Smith, 17 Ill. 531; Mansfield *v.* Mansfield, 6 Conn. 559; Hunt *v.* Rousmanier, 8 Wheat. 174; Evans on Agency (Ewell), marg. page 83, *note,* and p. 85; Raleigh *v.* Atkinson, 6 M. & W. 670. In Hunt *v.* Rousmanier, *supra,* such a power was denied by Chief Justice Marshall to be one "engrafted on an estate in the thing itself."

The power conferred on Chambers was not of this nature very clearly. He had no interest in the subject-matter of his agency, the land itself. He was interested only in the money to be derived as the proceeds of the sale of the land, which could only be realized by the completion of his agency, or by some negotiation which was tantamount to it. He had parted with no money, or other value, for the security of which the power of sale was conferred in the agreement. He had risked in the venture of his agency only his personal services and the expenses incidental to its execution. The undertaking to export specimens of iron ore to England, and to advertise the lands there, may be embraced as a part of the ordinary expense to be incurred in the usual course of such an employment. It is fair to presume that he risked this much in view of the large compensation to be reaped as commissions, in the event of a successful sale. Simpson *v.* Lamb, 17 C. B. 603.

It is insisted further that the agency is rendered irrevocable by reason of the fact that the power of sale conferred on Chambers was stipulated to be *exclusive.* This can not be stronger than the use of the word "irrevocable," which has been construed to fail of such a purpose, unless the agency comes within the exceptions above discussed. In the case of a naked power, an express declaration of irrevocability will not prevent revocation. McGregor *v.* Gardner, 14 Iowa, 326; Blackstone *v.* Buttermore, 53 Penn. St. 266.

The chief difficulty arises in those cases where the agent has incurred trouble and expense in the execution of his agency, and has been prevented from effecting a sale by the interference of his principal, whether by revocation of his authority, or otherwise. It is not just, it is true, for a principal to revoke an agent's authority without paying him for labor and expense reasonably incurred in the course of the agent's employment. Unless otherwise stipulated, the agent may, in a proper form of action, ordinarily claim reimbursement for the value of these. Evans' Agency (Ewell), marg. pages 83–84. So where a sale of property is brought about by the advertisements or exertions of a broker or agent, the broker being the efficient cause of the sale, and the purchaser being found through his instrumentality, he may often recover his commissions. Sussdorff *v.* Schmidt, 55 N. Y. 319; Earp *v.* Cummins, 54 Penn. St. 394. These are mentioned as just qualifications of the general rule, to

which we have above adverted, touching the subject of the revocation of an agent's authority by his principal.

The pleadings in the present case, upon which it was tried, are framed very clearly with reference to a recovery of the stipulated commissions promised to Chambers, and the gravamen of the action is, in effect, alleged to be the wrongful revocation of the agency by act of the principal. We need not, for this reason, discuss the question as to the plaintiff's right to recover for the value of his services, or for expenses incurred. The first and fifth counts were obviously actions on the case, and the other counts were in *assumpsit*. Myers *v.* Gilbert, 18 Ala. 467. The demurrer for misjoinder was consequently well taken, and was properly sustained by the court.

The rulings of the circuit court were in accordance with the above views, and its judgment must be affirmed.

HUNT *v.* ROUSMANIER'S ADMINISTRATORS.

8 Wheat. (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.*

Chancellor WALWORTH in KNAPP *v.* ALVORD, 10 Paige's Ch. (N. Y.) 205. 1843. As the possession of the property was delivered to Meads, in connection with this power to dispose of it for the security and protection of himself and the other indorsers, the property must be considered as pledged to him for that purpose. The power to sell, therefore, was coupled with an interest in the property thus pledged, and survived. Bergen *v.* Bennett, 1 Cai. Cas. in Err. 1; Raymond *v.* Squire, 11 Johns. 47. In the case decided by the Supreme Court of the United States (Hunt *v.* Rousmanier, 8 Wheat. 174) there was no actual pledge of the property; but a mere power of attorney was executed authorizing the plaintiff to transfer it in the name of Rousmanier. It was upon that ground, as I understand the case, that Chief Justice Marshall held that the power was not coupled with any interest in the vessels. And I presume his opinion upon that point would have been different if the power had been accompanied by an actual delivery of the vessels as a pledge for the payment of the debt. But even in that case the court protected the rights of Hunt as an equitable mortgagee of the vessels, though the decision was placed on the debatable ground that a party may be relieved in equity against a mistake of law merely. . . .

TERWILLIGER *v.* ONTARIO, ETC., R. CO.

149 N. Y. 86. 1896.

ACTION for the purchase price of railroad ties. The defence was that plaintiff, having cut other timber on the lands of one Wheeler, gave him oral authority to sell these ties and pay himself out of the proceeds, and that Wheeler did sell them to defendant and was paid therefor. The trial court found that if such authority was ever given it was revoked before the authority was exercised, and gave judgment for the plaintiff.

ANDREWS, Ch. J. . . . The distinction between the cases of a power given for the purpose of security and a power given for the same purpose, but supplemented by a transfer of an interest, seems technical; but in the latter case it at least preserves the substance and effectuates the intent, while it obviates in the particular case the general doctrine that a power is determined by the death of the creator of the power. In Watson *v.* King, 4 Camp. 272, Lord Ellenborough, in a case very similar to that of Hunt *v.* Rousmanier, also held that a power of attorney to a creditor to sell a vessel was revoked by the death of the principal, and upon the same ground, namely, that it could not thereafter be executed in his name. The

same point was ruled in equity in Lepard *v.* Vernon, 2 Ves. & B. 51, where it was held that a power given to a creditor to receive a debt, expressly for the purpose of liquidating the claim, unaccompanied, however, by any assignment of the debt, was revoked by the death of the principal. Knapp *v.* Alvord, 10 Paige, 205, is an illustration of a power coupled with an interest. . . . But there are a class of powers which are irrevocable by the act of the principal, although they do not come within Chief Justice Marshall's definition of powers coupled with an interest. This is clearly recognized by that eminent judge in the case to which reference has been made. After stating the general rule that a power may at any time be revoked by the party conferring it, he says: "But this general rule which results from the nature of the act has sustained some modification. Where a letter of attorney forms part of a contract and is 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," and he proceeds to state that the power to sell the vessel by Rousmanier in that case could not have been revoked by him during his life, but not being a power coupled with an interest it was revoked by his death. Kent uses similar language. He says (2 Kent Comm. 644): "But where it (power of attorney) constitutes part of a security for money, or is necessary to give effect to such security, or where it is given for a valuable consideration, it is not revocable by the party himself, though it is necessarily revoked by his death." And Story in his work on Bailment (§ 209) says: "But if it is given as part of a security, as if a letter of attorney is given to collect a debt as a security for money advanced, it is irrevocable by the party." This doctrine has support in adjudged cases. Hunt *v.* Rousmanier, 8 Wheat. 174; Walsh *v.* Whitcomb, 2 Esp. 566; Gaussen *v.* Morton, 10 B. & C. 731; Hutchins *v.* Hebbard, 34 N. Y. 24; Wilde, C. J., Smart *v.* Sandars, 5 C. B. 895; Raymond *v.* Squire, 11 John. 47. In the cases referred to the authority was conferred by formal written powers of attorney. But unless an authority given is for the performance of some act which by statute or by the common law the agent cannot perform in the name of his principal unless thereunto authorized in writing, we can perceive no legal distinction in the application of the doctrine, between formal written power and an informal oral authority. . . . If the authority is given as a security and based upon a sufficient consideration, so that if it had been in writing it would have been irrevocable, there is no reason in law why the oral authority should not be irrevocable also. . . . In Hutchins *v.* Hebbard, *supra,* the written power authorized the attorney to collect and receive certain moneys from the state. It was on its face a mere naked power, revocable at the pleasure of the principal. But it was held that oral proof was

admissible to show that it was intended as a security for indorsements made by the person to whom the power was given, and upon the proof of this fact his right to the fund was established. . . . If the authority to Wheeler was irrevocable, it was because of the nature, consideration and purpose for which the agency was constituted. Unless there was a consideration for the authority conferred on Wheeler to sell the ties and apply the proceeds on his claim, it is plain that it was not irrevocable. Raleigh *v.* Atkinson, 6 M. & W. 670. Without going into particulars, it is sufficient to say that the evidence given on the part of the defendant would, in our opinion, justify an inference that Wheeler accepted the arrangement proposed by the plaintiff, and forbore the pursuit of his lumber or its proceeds, in reliance upon the authority given him by the plaintiff to sell the ties and apply the proceeds on his claim. . . . It will be for the court or jury on a new trial to determine upon the facts found whether there was any valid consideration within the law applicable to executory contracts, to uphold the authority. If such consideration existed, then we are of the opinion that the authority was irrevocable, and that the payment by the defendant to Wheeler, under the contract made with him, was binding upon the plaintiff. . . . *Judgment reversed.*[1]

STROTHER *v.* LAW.

54 Ill. 413. 1870.

Mr. Justice Scott delivered the opinion of the court:

The plaintiff in error, as widow of Bolton F. Strother, deceased, claims the right to redeem and have dower in certain premises described in the bill, which were sold under a mortgage, executed by her and her late husband, to Van H. Higgins. It is not doubted that the mortgage, in its execution and acknowledgement, was suffi-

[1] In Pacific Coast Co. *v.* Anderson, 107 Fed. 973, it was held that a power given for a valuable consideration and to secure the payment of money, is irrevocable by the act of the grantor, citing: Hutchins *v.* Hibbard, 34 N. Y. 24; Farmers, etc., Bk. *v.* Kansas City Pub. Co., 3 Dill. 287; Clark *v.* Iron Co., 81 Fed. 310; Hurley *v.* Bendel, 67 Minn. 41; *In re* Keys' Estate, 137 Pa. St. 565; Montague *v.* McCarroll, 15 Utah, 318.

In Stevens *v.* Sessa, 50 N. Y. App. Div. 547, where A borrowed $2,000 of B, who had charge of the leasing of A's property and collection of rents, and gave B authority to collect the rents and apply them on the loan, it was held that this was a power coupled with an interest and was not revoked by A's death. See also Kelly *v.* Bowerman, 113 Mich. 446.

In re Hannan's, etc., Co., [1896] 2 Ch. 643, a contract with the agent to take shares in a company formed to purchase the agent's property and an authority to the agent to subscribe for the shares were together regarded as giving the agent an irrevocable authority to subscribe for the principal. "Where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such authority is irrevocable. The object was to enable the vendor to obtain his purchase money, and it therefore conferred a benefit on the donee of the authority."

cient to convey all the right, title and interest of the parties, and to bar their equity of redemption, if the same was legally foreclosed. It was sought to foreclose the mortgage by a sale out of court, under a clause contained therein, conferring an irrevocable power on the mortgagee and his assigns for that purpose. A sale was made under the authority contained in the mortgage, and deed executed by the mortgagee and his assignee to the defendant's grantor. The words used in the *habendum* are, "all the right, title, interest, claim, demand, and equity," and it would seem that the words used are broad and comprehensive enough to convey all possible interest the parties could have in the premises, including the equity of redemption.

The sale was not made, however, until after the death of the mortgagor, Bolton F. Strother, and the power to make the sale after his death is questioned. It is true, that a mere simple power, or naked power, as it is generally termed, to do a thing in the name of, and for the benefit of, another, ceases at the death of the grantor. Such is a letter of attorney.

But if the power is coupled with an interest on an estate on which the power is to be exercised, and is to be executed in the name of the grantee, then such power is deemed a part of the estate, and is not dependent on the life of the grantor. And of this nature is a power to sell contained in a mortgage deed, on default of payment. Such power is there coupled with an interest in the estate itself, and does not become inoperative by reason of the death of the mortgagor. The case of Bergen *v.* Bennett, 1 Caine's Cases, 1, is in point. That was a bill filed to redeem from a mortgage sale, on the ground that the power was executed after the death of the mortgagor. In that case, the party mortgaged the estate as collateral security, and gave authority to the grantee to sell the estate absolutely; and the court, in a very elaborate opinion, held that the grantee might sell the estate, notwithstanding the death of the grantor. The court, in that case, defined with great accuracy, the distinction between naked powers, and powers coupled with an interest. The learned judge says, "a power simply collateral, and without interest, or a naked power, is when to a mere stranger authority is given to dispose of an interest in which he had not, before, nor hath by the instrument creating the power, any estate whatever. But when power is given to a person who derives under the instrument creating the power, or otherwise, the present or future interest in the land, it is a power relating to the land."

In the case of Hunt *v.* Rousmanier, 2 Mason, 244, Mr. Justice STORY cites the case of Bergen *v.* Bennett, as certainly good law, and as illustrating the distinction between naked powers and powers coupled with an interest, and in commenting on the case, says: "but if he (the grantee) did sell, in whose name was the deed to

be made? Plainly not in the name of the grantor, for he was dead; but in the name of the grantee, as his own act, in virtue of his power, and as having an interest in the estate conveyed."

In the case before us the power is irrevocable. It was coupled with an interest in the grantee, in the estate conveyed, and was to be executed in the name of the grantee, and not in the name of the grantor, and was not, therefore, affected by the death of the mortgagor. The grantee has an interest in the power, as well as the estate, and if the same could not be executed after the death of the grantor, it would defeat and destroy the value of such securities. . . .

The bill was properly dismissed, and the decree is affirmed.

Decree affirmed.[1]

ROLAND, ADMINISTRATOR, *v.* COLEMAN & COMPANY.

76 Ga. 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

[1] Accord: Varnum *v.* Meserve, 8 Allen, 158 (death); Beattie *v.* Butler, 21 Mo. 313 (death); Reilly *v.* Phillips, 4 S. Dak. 604 (death); Grandin *v.* Emmons, 10 N. Dak. 223 (death); Berry *v.* Skinner, 30 Md. 567 (insanity); Hall *v.* Bliss, 118 Mass. 554 (bankruptcy).

But if the mortgage conveys no estate (as by statute in some states) the power of sale is revoked by the death of the mortgagor. Johnson *v.* Johnson, 27 S. Car. 309; Miller *v.* McDonald, 72 Ga. 20.

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.[1]

HESS *v.* RAU.

95 N. Y. 359. 1884.

ACTION to recover a balance due plaintiffs, stock-brokers, on account of purchase of stocks to fill short sales made for defendant's testator, Henry Rau. The short sales were made prior to Rau's death, which occurred October 29, 1880. The executrix qualified December 29, 1880. In the interval plaintiffs continued to borrow stock from time to time to keep the transaction good. On January 5, 1881, they notified the executrix to furnish additional margins or they would be compelled to buy in stock on her account to complete the transaction. No margins were furnished and plaintiffs bought stock at a loss of $9,437.98, and closed the deal. Judgment for plaintiffs.

ANDREWS, J. . . . It is claimed by the counsel for the defendant that upon the familiar doctrine of agency, the death of Rau operated as a revocation of the plaintiff's prior authority. The application of this principle, it is said, disabled the plaintiffs from continuing the speculation by borrowing stocks thereafter on account of his estate. This claim is supplemented by the further one that the plaintiffs were bound within a reasonable time after Rau's death to close the transaction by buying in the stocks, although no representative of his estate had meanwhile been appointed. We are of the opinion that neither of these claims can be sustained. . . .

It is clear that after the death of Rau, the plaintiffs could not enter into fresh transactions in the purchase or sale of stocks on account of Rau or his estate, in execution of unexecuted orders or a general authority to deal in stocks for his account given before his death. But the rule that the death of a principal revokes the authority of an agent has a well-settled exception when the agency is coupled with an interest. Hunt *v.* Rousmanier, 8 Wheaton, 174.

[1] A trust deed conveys an estate and the power of sale is irrevocable by death or any other cause. American Loan and Trust Co. *v.* Billings, 58 Minn. 187; Muth *v.* Goddard, 28 Mont. 237.

The death of Rau left the plaintiffs in the position they had previously occupied, of being borrowers of the stocks to deliver, with a personal liability to replace them when called for by the lenders. This obligation was not and could not be terminated by Rau's death. The estate of Rau on the other hand was bound to indemnify the plaintiffs for any loss they might sustain on closing out the transactions, or as the phrase is, "covering the sale."

Until the appointment of a representative of Rau's estate there was no one on whom the plaintiffs could call for additional margin or to close the transactions, and no one to give directions in its behalf. The result of continuing the transactions might be favorable or unfavorable, but which, could not be foreseen. The speculation was Rau's, and while he lived he could control the adventure so long as he performed his duty under the contract. Upon his death this right naturally devolved upon his representatives. What the plaintiffs did was to keep the speculation in *statu quo* awaiting the qualification of the executrix, the only change meanwhile in the situation arising from the fluctuations in the market price of the stocks. As it turned out it would have been to the advantage of the estate if the stocks had been bought in immediately after Rau's death. But if this course had been taken and the market had gone the other way, the plaintiffs would then have been called upon to justify the transaction. We think the plaintiffs were not bound to place themselves in this dilemma, but were authorized, acting in good faith, to maintain the existing situation until a representative of the estate should be appointed. They had such an interest in the transaction by reason of the personal obligation they had assumed, as entitled them to continue it until that time.

The act of buying in the stocks on account of the estate, which the defendant insists should have been done, would have been a more decisive act of agency, than to borrow stocks to replace others previously borrowed in order to discharge their own obligation. We do not say that circumstances might not exist which would justify a broker in closing a stock transaction after the death of the principal, without awaiting the appointment of a representative, but however this may be, we think it plain that no exigency existed in the case now under consideration, which imposed any such duty upon the plaintiffs.

There are no other questions calling for special consideration.

We find no error in the judgment, and it should, therefore, be affirmed.

All concur. *Judgment affirmed.*[1]

[1] Accord: Durbrow *v.* Eppens, 65 N. J. L. 10 (agent of numerous Lloyd insurance underwriters may adjust losses for which each and all are liable and bind estate of a deceased member upon policies issued during his life time); Willingham *v.* Rushing, 105 Ga. 76 (factor who has made advances may sell enough of the principal's goods to reimburse himself after death of principal); Read *v.* Anderson, 13 Q. B. D.

GOODWIN *v.* BOWDEN.

54 Me. 424. 1867.

ASSUMPSIT for money had and received.

WALTON, J. Action for money had and received. The plaintiff introduced evidence tending to prove that one Ramsdell was indebted to him, that Ramsdell had in the hands of the defendant funds more than sufficient to pay him, that out of these funds Ramsdell ordered the defendant to pay the plaintiff, and that the defendant promised so to do.

The defendant introduced evidence tending to prove that Ramsdell afterwards revoked the order and directed him not to pay the plaintiff.

The plaintiff contended, and requested the court to instruct the jury, that Ramsdell had no power to revoke the order or change the appropriation of the money after the same had been assented to by the plaintiff and the defendant; that, by virtue of the agreement between the plaintiff and the defendant and Ramsdell, the funds were held by the defendant in trust to pay the plaintiff, and that such trust could not be revoked without the plaintiff's consent.

The court declined to give this instruction, and instructed the jury "that the plaintiff had no vested right in the funds of Ramsdell in the hands of Bowden, and that if there was a revocation by Ramsdell before any payment to Goodwin by the defendant, then the plaintiff had no right to recover; that if, before Bowden made the payment, or before this suit was brought, the principal revoked his orders, then he (Bowden) was bound by the orders of his principal."

When this instruction was given, we think the presiding judge either overlooked or did not attach sufficient importance to the fact that the plaintiff's evidence tended to prove that, before the attempted revocation by Ramsdell, the defendant expressly promised the plaintiff to pay him out of the funds in his hands.

If a debtor, having funds in the hands of his agent, orders him to pay a creditor, and the agent promises to execute the order, and the creditor accepts and relies upon the agent's promise, the debtor's power to control the funds is gone. The agent becomes an original promisor, and the creditor may have an action of assumpsit against

(C. A.) 779 (stakeholder may pay bet made in his name for principal although after the bet is lost the principal revokes).

"If a principal employs an agent to do a legal act, the doing of which may in the ordinary course of things put the agent under an absolute or contingent obligation to pay money to another, and at the same time gives him an authority if the obligation is incurred to discharge it at the principal's expense, the moment the agent on the faith of that authority does the act, and so incurs the liability, the authority ceases to be revocable." Read *v.* Anderson, 10 Q. B. D. 100.

him if he does not keep his promise. No consideration need pass as between the agent and the creditor. The funds in his hands are a sufficient consideration for his engagement.

Being grounded upon the consideration of funds in his hands, it is an original undertaking, and the promise is not within the Statute of Frauds and need not be in writing. It is not a promise to pay the debt of another, but a promise to discharge an obligation resting upon himself. Having funds in his hands for which he is already liable, he agrees to discharge his liability by disposing of the funds as the owner directs. And when by reason of the agent's promise a right of action against him accrues to the creditor, the debtor's authority over the funds ceases. After such a promise has been made by the agent and accepted by the creditor, to allow the debtor, at his own will and pleasure, to nullify the engagement, and by withdrawing his funds destroy the security he has voluntarily given, would not only violate the obligation of a contract, but, as declared by Judge STORY, would be against the clearest principles of justice and equity. In fact it would seem to be a self-evident proposition that the defendant's promise, made upon sufficient consideration and accepted by the plaintiff, creates a contract between them of the benefits of which the plaintiff cannot be deprived except with his own consent. Story on Agency, § 477; 2 Greenl. on Ev. § 119; Dearborn *v.* Parks, 5 Maine, 81; Hilton *v.* Dinsmore, 21 Maine, 410; Maxwell *v.* Haynes, 41 Maine, 559; Hall *v.* Marston, 17 Mass. 575; Arnold *v.* Lyman, 17 Mass. 400; Brewer *v.* Dyer, 7 Cush. 337; Carnegie *v.* Morrison, 2 Met. 381; Warren *v.* Batchelder, 16 N. H. 580. *Exceptions sustained. — New trial granted.*[1]

APPLETON, C. J., CUTTING, KENT, DANFORTH, and TAPLEY, JJ., concurred.

KINDIG *v.* MARCH.

15 Ind. 248. 1860.

PERKINS, J. Kindig gave a power of attorney to Chamberlain, to confess a judgment in favor of March, for a debt due him.

The power was duly executed and proved. We are satisfied of this from an examination of the record.

When judgment was about to be entered in execution of the power, Kindig presented to the court a revocation of it, on the ground that it was for too large an amount. The court disregarded the revocation, and directed the judgment to be entered.

A power of attorney to confess judgment is not revocable by act

[1] But if the agent has not come under an obligation to the third party, the principal may revoke. Simonton *v.* First N. Bk., 24 Minn. 216.

of the party. See Story on Agency, § 477; 2 Archbold's Pr. p. 21. But if any fact affecting its validity be alleged, the court will permit an issue to be formed and tried, and act in the premises accordingly, annulling the warrant or reducing the amount of judgment upon it, as the case proved may require. In this case the defendant may yet have the judgment corrected, on complaint filed and heard, as in other cases. Archbold, *supra;* 15 Petersdorf, pp. 366, 367, 368.

PER CURIAM. The appeal is dismissed with costs.[1]

[1] In Evans *v.* Fearne, 16 Ala. 689, the court says: "The power of attorney before us is but a simple authority conferred by the plaintiff in error upon Philpot and Price to confess judgment, and before they exercised it, the party revoked the power. It is not shown that it was executed upon any consideration, or that it was given as security for any demand, or to render a security effectual, and we think it falls under the general rule of revocable powers. Walsh *v.* Whitcomb, 2 Esp. Rep., is an instance of the execution of a power as part of a security. . . . So it seems that to fall within any exception to the general rule, the power must constitute part of a security for money, or must be necessary to give effect to such security, or must have been given for a valuable consideration."

PART II.

LEGAL EFFECT OF THE RELATION AS BETWEEN PRINCIPAL AND AGENT.

CHAPTER VII.

Obligations of Principal to Agent.

1. *Compensation for Authorized Act.*

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.*

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2. *Compensation for Gratuitous Service.*

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 matters 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.

WALTON *v.* CLARK.

54 Minn. 341. 1893.

ACTION for commissions. Plaintiff claimed defendants employed him to procure a purchaser for defendants' property, and that he found and introduced to defendants a purchaser who bought the property. There was conflicting evidence as to the employment, and the jury returned a verdict for defendants. New trial denied.

VANDERBURGH, J. . . . It is true the plaintiff interested himself in procuring a purchaser, and defendants dealt with a person introduced by him as they would with any other person, but not, if their testimony is to be believed, in pursuance of any agreement with, or employment of, plaintiff, or with any expectation of paying a commission. There was no error in the charge of the court. If there was no agency or agreement to employ plaintiff, defendants' subsequent acts in consummating a bargain with a party introduced by plaintiff would not create a liability. The mere fact that plaintiff had been instrumental in bringing the parties together, as any third party might have volunteered to do, would not debar the defendants from treating with him, nor, if they did so, either directly or through plaintiff, would it establish or recognize an agency, in the absence of any agreement between the parties, and against the consent of the defendants. . . .

Order affirmed.

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3. *Compensation dependent upon Performance of Conditions.*

KALLEY *v.* BAKER.

132 N. Y. 1. 1892.

PLAINTIFFS brought defendant and H. together in pursuance of a contract of agency to sell defendant's farm. Defendant and H. entered into a contract to exchange defendant's farm for H's apartment house. Afterward defendant rejected H's title as defective. Judgment for plaintiffs for commissions.

FOLLETT, Ch. J. This action was begun to recover commissions alleged to have been earned by plaintiffs in procuring the execution of a contract between the defendant and one Humphrey, for the exchange of real estate. . . .

The question underlying all others in this case, and which is decisive of it, is, was it the understanding of the parties to this action that the plaintiffs were not to be entitled to commissions, unless mutual conveyances of the properties contracted to be exchanged were made and accepted, or whether they were entitled to commissions when the contract of exchange was executed? . . .

There is no evidence that the plaintiffs knew anything about the title to the "Aldine;" that they made any representations in respect to it, nor does it appear that the defendant asked them to make, or cause to be made, a search.

The trial court submitted the question as to what the agreement was to the jury, instructing them as follows: "In ordinary cases, the law is well settled where a broker is employed in reference to

a sale or exchange of real estate, that when he brings a buyer to the seller who is willing and ready to enter into an agreement with the seller for the purchase of his property on the terms that the seller has fixed, and the seller is satisfied to accept him as a purchaser, then the broker has earned his commission. The earning of it is not dependent, in such cases, on the question as to whether the buyer carries out the contract, or as to whether the seller is able to complete his contract. . . . Therefore, I say to you, in the absence of any express agreement to the contrary, the law is that the broker is entitled to his commissions when the vendor accepts, when he (the broker) brings to the vendor a party ready and willing to accept the terms fixed by the vendor, and the party is satisfactory to the vendor, and he enters into a contract with him. The contention is that there was a different agreement here. . . . Now, I propose to leave that question to you to determine. If you find that this was an ordinary contract, made without any conditions, the broker employed in the usual way, and that there was no bargain entered into between the plaintiffs and Mr. Baker, that they were only to be paid their commissions in case this sale went through, then plaintiffs are entitled to recover. If, however, the bargain agreed upon between Mr. Kalley and Mr. Baker was, that commission was only to be paid in case this whole transaction went through, as provided by the terms of the contract of exchange, the plaintiff is not entitled to recover unless you are satisfied from the evidence here that Mr. Baker capriciously refused to carry out the contract."

To this instruction the defendant took no exception except to that part of it which laid down the rule that ordinarily the broker "is entitled to commissions when the parties have been found satisfactory to each other and they have entered into a mutual contract of purchase and sale."

This exception presents no error. In Knapp *v.* Wallace, 41 N. Y. 477, the defendant employed a broker to purchase certain real estate for a price named, agreeing to pay him one per cent on that price for his services. Through the aid and assistance of the broker a contract of sale at the price named was entered into personally between the defendant and the owner of the property. As a defence to an action brought to recover the commissions the defendant sought to show that the title of the vendor was defective, and for that reason he was unable to perform his contract. It was held "it was no defence to the plaintiff's claim that the title to the property was defective. Messmore (the broker) had not undertaken that it should be good. The contract between him and defendant did not place his right to compensation on such a condition."

When a broker, as a part of his employment, assumes to execute for his principal an executory contract of sale or exchange he does not become entitled to his commissions unless the other contracting

party is able to perform the contract on his part. Barnes *v.* Roberts, 5 Bosw. 73; McGavock *v.* Woodlief, 20 How. (U. S.) 221.

But under the facts found, these and kindred cases have no application to this case.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.[1]

ROCHE *v.* SMITH.

176 Mass. 595. 1900.

LORING, J. This case was submitted to the superior court on an agreed statement of facts. Judgment was entered in that court for the defendant, and from that judgment an appeal was taken to this court.

It appears that the defendant, being the owner of certain land in Boston, "employed the plaintiff to exchange said property for any other suitable property." The plaintiff brought the matter to the attention of Michael F. Armstrong, who offered to exchange a specified piece of land owned by him for the land of the defendant. Armstrong's land was accepted by the defendant as "suitable," and through the efforts of the plaintiff a written agreement was made between the defendant and Armstrong, by which the defendant was to convey her land to him, and he was to convey his land to her. It was stipulated that each lot of land was "to be conveyed within twenty days from this date by a good and sufficient warranty deed, . . . conveying a good and clear title to the same free from all incumbrances, except [in the case of Armstrong's land] taxes for 1897 and a mortgage for thirteen thousand dollars." On examining Armstrong's title, the defendant discovered that, acting under St. 1891, c. 323, St. 1892, c. 418, and St. 1895, c. 449, the board of street commissioners of the city of Boston had filed plans in the office of the city engineer of the city of Boston, by which certain streets or ways were located over the land to be conveyed to her by Armstrong, in consequence of which he "was unable to convey his said property free from the operation and effect of any of the said doings of the board of street commissioners, and by reason thereof the defendant refused to carry out said agreements." Thereupon the plaintiff brought this suit for his commission.

It is expressly stated that "the plaintiff had no knowledge of the . . . facts relative to the acts of the board of street commissioners of the city of Boston" which are stated above, and that he

[1] If the principal's title is defective and the purchaser refuses to take the property, the agent is entitled to his commissions. Doty *v.* Miller, 43 Barb. (N. Y.) 529.

"acted in good faith in all said negotiations." It was held in Knapp *v.* Wallace, 41 N. Y. 477, where the broker was employed to find a person to convey land to be paid for in money, and in Kalley *v.* Baker, 132 N. Y. 1, where the broker was employed to find a person to convey land to be paid for by a conveyance of other land, — that is to say, to effect an exchange, — that where the principal makes a valid agreement with the customer produced by the broker, the broker has earned his commission, even if it turns out that the customer cannot make a good title, and the land is not conveyed; provided the broker acted in good faith in the matter. In the opinion of a majority of the court, those cases were rightly decided. The question is the same in the two cases; the only difference is that in one case payment is to be made in money, in the other by a conveyance of other land. Where the broker is employed to get a customer to buy and pay for his principal's land, and it turns out that the customer is not able to pay for the land, it is settled that his inability to do so does not deprive the broker of his commission; provided the principal made a valid and binding agreement for the sale of the land with the customer produced by the broker. Ward *v.* Cobb, 148 Mass. 518; Burnham *v.* Upton, 174 Mass. 408, 409. The ground on which this is settled is that, by entering into a valid contract with the customer produced by the broker, the principal accepts the customer as able, ready, and willing to buy the land and pay for it. In such a case the decision would have to be the other way, were it not that by entering into the contract with him the principal accepts the customer produced by the broker. What the broker is employed to do is to produce a customer who will buy and pay for his principal's land. Fitzpatrick *v.* Gilson, 176 Mass. 477. If it turns out that the customer produced by the broker is not able to pay, and does not pay, for the land, the broker has not performed his duty, and has not earned his commisssion; and it is only because the principal accepts the customer, by entering into a valid contract with him, that it is held, in cases like Ward *v.* Cobb, that the broker has earned his commission. Coleman's Ex'r *v.* Meade, 13 Bush, 358; Donohue *v.* Flanagan (City Ct. N. Y.) 9 N. Y. Supp. 273; Francis *v.* Baker, 45 Minn. 83; Wray *v.* Carpenter, 16 Colo. 271; Lockwood *v.* Halsey, 41 Kan. 166; Springer *v.* Orr, 82 Ill. App. 558. The law is settled in other jurisdictions in accordance with Ward *v.* Cobb (see Francis *v.* Baker, 45 Minn. 83; Wray *v.* Carpenter, 16 Colo. 271; Love *v.* Miller, 53 Ind. 294); and generally that a broker makes out a case for a commission earned by proving a contract made. See Cook *v.* Fiske, 12 Gray, 491; Rice *v.* Mayo, 107 Mass. 550; Keys *v.* Johnson, 68 Pa. St. 42; Veazie *v.* Parker, 72 Me. 443; Conkling *v.* Krakauer, 70 Tex. 735, 739.

The same rule obtains when the principal wants to buy in place

of wanting to sell. Where the principal wants to buy 100 bushels of wheat at a price named by him, and employs a broker to get him the wheat at that price, the broker earns his commission when he produces a customer, and his principal makes a valid, binding agreement with the customer for the wheat; and the broker's right to his commission is not affected by the inability or refusal of the customer to deliver the wheat. In such a case the broker has not produced a customer able to supply his principal with the wheat, and would not have earned his commission had it not been that his principal, by contracting with the customer, had accepted him. In such a case the principal has a right to full compensation for the loss of his bargain by recovering damages for breach of the contract, and in the event which has happened the commission paid the broker is paid for that.

The rule is the same when the broker is employed to get for his principal a certain piece of land. If through the broker's efforts a binding contract is made between his principal and the owner of the land, the broker has earned his commission, and his right to it is not affected by the fact — if it turns out to be the fact — that the owner, the broker's customer, cannot make a good title. The principal has his remedy by recovering full damages for the loss of his bargain in an action at law on the contract, and in the event which then happens it is for that which the commission is paid.

We have no doubt that in this commonwealth a party has a right to recover full damages for the loss of his bargain under a contract for the exchange or purchase of land where it turns out that the party who agreed to convey the land has not a good title. Brigham *v.* Evans, 113 Mass. 538; Railroad Corp. *v.* Evans, 6 Gray, 25, 33. The rule which obtains in England and some other jurisdictions never has obtained here.

When a broker employed to procure a person to convey land to his principal by way of sale or exchange in good faith produces a customer as a person ready, able, and willing to do so, the principal has three courses of action open to him: (1) He may examine the title of the customer, and accept him or not accept him on learning the result of the examination; (2) he may enter into a contract with him, in which it is provided that his title shall be examined, and if it turns out that his title is not good, the contract is at an end; or (3) he may enter into a binding contract with him for the conveyance of the land. In case he takes the third course of action, he is given full compensation in damages for the loss of his bargain if the customer fails to fulfil his contract by conveying the land. Since the principal gets full compensation for the loss of his bargain in that event, there is no escape from holding that the broker has earned his commission when his efforts have resulted in the making of a valid contract. It does not lie in the mouth of a principal to

say that the broker's commission has not been earned, when he has secured through the broker's efforts the land he wished, or full compensation for the loss of it. He cannot retain the right to this compensation, and not pay for the broker's services in obtaining it for him.

When the broker knows that the customer produced by him has not a title, and omits to tell his principal of that fact, he has not acted in good faith, and has not earned his commission. Burnham *v.* Upton, 174 Mass. 408; Butler *v.* Baker, 17 R. I. 582.

It is stipulated in the agreed facts that if the plaintiff is entitled to recover, the amount to which he is entitled is $800. The entry must be,

Judgment for the plaintiff for $800, with interest from the date of the writ.

WHITCOMB *v.* BACON.

170 Mass. 479. 1898.

ACTION for commissions. Judgment for plaintiff. Defendant excepts to certain rulings of the trial judge. Defendant authorized plaintiff to sell his property. Plaintiff negotiated with one Wentworth, but failed to make a sale, although Wentworth said he might possibly give $63,000, which defendant then refused to consider. Later another broker took the matter up with Wentworth and defendant and negotiated a sale at $63,000, upon which defendant paid commissions.

ALLEN, J. It has been held by us in two recent cases that a broker who does not have the exclusive sale of real estate does not become entitled to a commission merely by bringing the property to the attention of the person who finally buys it, but he must also show that his services were the efficient or effective means of bringing about the actual sale. Dowling *v.* Morrill, 165 Mass. 491; Crowninshield *v.* Foster, 169 Mass. 237. Where two or more brokers are employed, there is no implied contract to pay more than one commission, and it therefore becomes necessary to lay down a rule for determining which one of different possible claimants is entitled to be paid. A similar rule exists in the law of insurance, stated thus in 1 Phil. Ins. § 1132: "In case of the concurrence of different causes, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril, whether it is or is not in activity at the consummation of the disaster." And again, in § 1137: "If, where different parties, whether the assured and the underwriter, or different underwriters, are responsible for different causes of loss, which concur in the loss, and the damage

by each cause cannot be distinguished, the party responsible for the predominating efficient cause, or that by which the operation of the other is directly occasioned, as being merely incidental to it, is liable to bear the loss." This latter rule is expressly accepted as correct in Insurance Co. *v.* Transportation Co., 12 Wall. 194, 199, the court saying: "When there are two concurrent causes of a loss, the predominating efficient one must be regarded as the proximate, when the damage done by each cannot be distinguished." In determining what constitutes proximate cause, the same considerations apply equally in actions of contract and of tort. New York & B. D. Exp. Co. *v.* Traders & M. Ins. Co., 132 Mass. 377. It may be that there are different causes which assist in producing a result, and that the result would not have happened if either one of the different causes had been wanting. A familiar example is found in cases where there has been a delay by a carrier in transporting goods, which are afterwards destroyed by flood or fire. Hoadley *v.* Transportation Co., 115 Mass. 304; Denny *v.* Railroad Co., 13 Gray, 481; Railroad Co. *v.* Reeves, 10 Wall. 176. So, where several brokers have each endeavored to bring about a sale which finally is consummated, it may happen that each has contributed something without which the result would not have been reached. One may have found the customer, who otherwise would not have been found, and yet the customer may refuse to conclude the bargain through his agency, and another broker may succeed where the first has failed. In such a case, in the absence of any express contract, that one only is entitled to a commission who can show that his services were the really effective means of bringing about the sale, or, to use the language of Phillips, the predominating efficient cause.

The instructions of the learned judge to the jury laid special stress on the inquiry whether the sale would have been made but for the efforts of the plaintiffs. He said: "The real question is here whether you are satisfied that this sale to Wentworth would not have been made but for the efforts which the plaintiffs had made to induce him to buy it. That is the real question." And afterwards: "The real question is, and it is the crucial question, in my judgment, whether the sale would have taken place without the efforts made by the plaintiffs. If it would, then the plaintiffs have not made the sale, and they cannot recover the commission unless they have. If, however, you are satisfied this sale as made would not have taken place unless the plaintiffs had done what they did, and that what they had done was, at the time of the sale, an operating cause, — not the sole cause, but one of the controlling causes, of the sale (and the burden is upon the plaintiffs to satisfy you of that), — then the plaintiffs can recover." This rule, as it seems to us, would allow two brokers to recover commissions upon the same sale. There might be another broker whose services were equally meritorious

and essential in producing the result. But in such a case it is not enough to show that one of several causes stood in such a relation to the result that without it the result would not have happened, and that it was one cause, among others, which assisted or contributed in producing it. It becomes necessary to make a discrimination between the causes, and to ascertain which is the particular cause which can be called the efficient or effective one. In addition to the cases cited in Dowling *v.* Morrill, 165 Mass. 491, see Railroad Co. *v.* Burrows, 33 Mich. 15; Behling *v.* Pipe Lines, 160 Pa. St. 359; Romney Marsh *v.* Trinity House, L. R. 5 Exch. 204, — discussing questions of *causa causans,* as distinguished from *causa sine qua non.*

Exceptions sustained.

DONOVAN *v.* WEED.

182 N. Y. 43. 1905.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

CULLEN, Ch. J. The action was brought to recover commissions for services as a broker in effecting the sale of a tract of wild lands in St. Lawrence county. The answer put in issue all the allegations of the complaint except the defendants' ownership and the sale of the lands mentioned therein. As the affirmance below was unanimous, the only exceptions which can be reviewed by this court are those taken on rulings of evidence and on the charge. It is, therefore, unnecessary to refer to the details of the evidence given to support the contentions of the parties, except so far as to present the rulings of the trial court.

In January, 1899, the defendants gave the plaintiff an option for the sale of the land at a specified price, they agreeing to pay him ten per cent commission in case the option was exercised by himself or by any person he might obtain. On August 31, 1900, the defendants gave the plaintiff another agreement by which they promised to pay him one dollar an acre commission if he should bring about the sale of their land at nine dollars per acre, the option to continue for thirty days. The plaintiff, on September 26, telegraphed the defendants for an extension of the option, which the latter refused. On September 29 the plaintiff sent to the defendants an acceptance of the option by one John J. Conklin, who it was admitted was an irresponsible party whom the plaintiff had induced to accept the option, so as thereby to get an extension of time. On December 27 the defendants wrote to the plaintiff stating that Conklin had failed to carry out the option,

and that in consequence thereof they (the defendants) withdrew the same and terminated the relation with the plaintiff as agent for the sale of the land. During the period covered by these transactions the plaintiff endeavored to effect a sale of the lands to A. A. Low, the owner of an adjacent tract, but no sale was made. In the February following the defendants sold the lands to Mr. Low, as they claimed, through the agency of another person. The learned trial court submitted the case to the jury to determine whether the plaintiff was the efficient cause in procuring the sale, and in that connection charged the following: "He (plaintiff) had gone to the Adirondacks at that time in reference to this property. They revoked his authority. They had a right to revoke it at any time they saw fit. A man's authority to a broker to sell his property, or to find him a purchaser, is revocable at any time, absolutely revocable. But if the broker has already planted the seed, which afterwards grows, and they take the fruits of it, he is entitled to a commission, not because they could not revoke the authority, but because the question is whether what he has already done, whether the crop he has already sown, comes up and ripens. If it does, then he is entitled to his commission. It is exactly the counterpart of the sowing of the seed, which may not mature for months, but if it does mature, although it matures after the authority to act as a broker has been revoked, the broker is entitled to his commission. . . . It is for you to say whether this sale was the result, in that sense, of Mr. Donovan's negotiations with Mr. Low." At the conclusion of the charge counsel for the defendants asked the court to instruct the jury "that the defendants had the right to terminate his employment at any time if the plaintiff did not, within a reasonable time, procure a purchaser of the property." To this the court responded: "I have already charged that and I charge it again. But that does not prevent him from being entitled to the fruits of the seed he had already sown." To this the defendants duly excepted.

The materiality of these instructions of the court and their vital character is apparent. They constituted the theory on which the jury either did award or might have awarded the verdict in favor of the plaintiff. We think they were essentially erroneous. The duties, obligations and rights of brokers were most fully defined by this court in the case of Sibbald *v.* Bethlehem Iron Co. (83 N. Y. 378). The authority of that case has never been impaired or limited. It was there held that where the broker has been allowed a reasonable time to procure a purchaser and effect a sale, and has failed so to do, and the principal in good faith has terminated the agency, and subsequently a sale is consummated, the fact that the purchaser is one whom the broker introduced and that the sale was in some degree aided by his previous efforts does not give him a right to commission. In other words, the law as settled by that case is that to entitle a broker to commission he must procure a

purchaser during the term of his employment; that where no definite time is fixed the broker has a reasonable time in which to effect the sale; but that after the lapse of a reasonable time the principal may terminate his authority and relieve himself from liability unless such action is taken in bad faith for the purpose of depriving the broker of the fruits of his labor at the time such labor was about to prove effectual. The portion of the charge quoted shows that the learned trial judge entertained a view of the right of the broker to compensation in direct conflict with this rule and so instructed the jury. Even the analogy that he suggested to the jury is in direct opposition to that announced by Judge FINCH in the Sibbald case. The trial judge said: "If the broker has already planted the seed, which afterwards grows, and they take the fruits of it, he is entitled to a commission, not because they could not revoke the authority, but because the question is whether what he has already done, whether the crop he has already sown, comes up and ripens." Judge FINCH, however, wrote: "And in such event it matters not that after his (the broker's) failure, and the termination of his agency, what he has done proves of use and benefit to the principal. In a multitude of cases that must necessarily result. He may have introduced to each other parties who otherwise would have never met; he may have created impressions which, under later and more favorable circumstances, naturally lead to and materially assist in the consummation of a sale; he may have planted the very seeds from which others reap the harvest; but all that gives him no claim." Therefore, the request to charge made by the defendants was correct, and the trial court erred in qualifying that request by the instruction that such revocation did not prevent the broker (the plaintiff) from being entitled to the fruits of the seed he had already sown.

The judgments appealed from should be reversed and a new trial granted, costs to abide the event.

GRAY, O'BRIEN, BARTLETT, VANN and WERNER, JJ., concur; HAIGHT, J., dissents.

Judgments reversed, etc.

HOLDEN *v.* STARKS.

159 Mass. 503. 1893.

CONTRACT, to recover $50 as a commission for selling defendant's real estate. The trial judge directed the jury to return a verdict for the plaintiff; and, by consent of the parties, reported the case for the determination of this court. The facts appear in the opinion.

KNOWLTON, J. By the terms of the report, if the verdict for the plaintiff was warranted by any evidence which was properly admitted,

it is to stand; otherwise, it is to be set aside and judgment entered for defendant.

It was proved, and not disputed, that the plaintiff made a contract of sale of the defendant's house and lot to one who for a long time afterward was able, ready, and willing to take the property and pay for it the price agreed, and who was prevented from doing so by the defendant's refusal to carry out the contract. A payment of part of the purchase money was made to the plaintiff, with the intention of thereby rendering the contract irrevocable. If the plaintiff was authorized to make the sale as an agent employed by the defendant, he is, under these circumstances, entitled to compensation, notwithstanding that the purchaser could not have been compelled to carry out his contract if he had chosen to set up the statute of frauds. It was the defendant's own fault that the sale was not consummated. Cook *v.* Fisk, 12 Gray, 491; Desmond *v.* Stebbins, 140 Mass. 339; Witherell *v.* Murphy, 147 Mass. 417; Loud *v.* Hall, 106 Mass. 404, 407; McGavock *v.* Woodlief, 20 How. 221; Knock *v.* Emmerling, 22 How. 69; Duclos *v.* Cunningham, 102 N. Y. 678; Edwards *v.* Goldsmith, 16 Penn. St. 43; Prickett *v.* Badger, 1 C. B. (N. S.) 296. . . .

Judgment on the verdict.[1]

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4. *Compensation after Revocation of Agency.*

CUTTER *v.* GILLETTE.

163 Mass. 95. 1895.

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

[1] *Contra:* Wilson *v.* Mason, 158 Ill. 304 (*semble*).

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 this 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; Lichtenstein *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.

SUTHERLAND *v.* WYER.

67 Me. 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. Remelu *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.

GLOVER *v.* HENDERSON.

120 Mo. 367. 1893.

ACTION for services rendered and expenses incurred in selling lots for defendant. Judgment for plaintiff.

Defendant gave plaintiff the exclusive agency to sell lots in a plat at a specified commission, and agreed that if plaintiff sold the whole plat in one year he should have an added compensation of $1,500. All expenses of advertising and sale were to be borne by plaintiff. After plaintiff had sold four-sevenths of the plat, and before the expiration of the year, the defendant revoked the agency. The jury allowed plaintiff the reasonable value of his services, including moneys reasonably expended in the performance of his duties.

BLACK, P. J. . . . 1. The first question is whether this action is *quantum meruit* for services rendered and reasonable expenses incurred, as claimed by the plaintiff; or whether it is an action for damages for breach of contract. That the petition declares upon *quantum meruit* we think there can be no doubt. It is true the petition sets out the contract of employment, and shows that services were rendered and moneys expended in the execution of it; but it proceeds to aver that defendant wrongfuly discharged the plaintiff, and then states the value of the services rendered and moneys expended, and prays judgment therefor, less the amount received. Had the plaintiff declared for the value of his services, saying nothing about the contract and to this the defendant had answered by setting up the special contract according to his version of it, and the plaintiff had replied by setting out the contract according to his theory of it, and alleged that the defendant wrongfully revoked the agency, because of which he demanded the value of his services up to the date of his discharge, the issues would have been in substance the same that they are under the present pleadings. It is the theory of our code that the plaintiff must state the facts constituting his cause of action. If he proposes to treat the contract as rescinded and recover for the value of services rendered, as he may do under certain

circumstances, there is no reason why he may not set out the contract, the rendition of services thereunder, the wrongful termination of the contract by the defendant, and then declare for the value of the services rendered. Such is the plaintiff's petition in this case, and it is clearly a declaration upon *quantum meruit*. Ehrlich *v.* Ins. Co., 88 Mo. 249.

2. The contract in question was one of agency, so that we are brought to the question whether defendant, having revoked the agency, is liable to the plaintiff for the *value* of services rendered and expenses incurred up to the date of revocation.

There is and can be no claim made in this case that plaintiff had conferred upon him a power coupled with an interest. And as he had no interest in the subject-matter of the agency, the principal had the power, and, in a qualified sense, the right, to revoke the agency at his will. State *ex rel. v.* Walker, 88 Mo. 279; Mechem on Agency, § 204. But the question of the liability of the principal to the agent for services rendered is another and a different thing from the power or even right to terminate the agency. Contracts of agency are numerous and widely variant in their objects, purposes and terms; so that the question of compensation of the agent, when the agency has been revoked by the principal, will depend upon a variety of circumstances. It is laid down by a recent text writer that "the mere fact that an agent is employed to perform a certain act will not, of itself, amount to an undertaking on the part of the principal that the agent shall be permitted to complete the act, at all events, and the principal may fairly, and in good faith, revoke the agency without liability at any time before performance." But "where an agent is employed to perform an act which involves expenditure of labor and money before it is possible to accomplish the desired object, and after the agent has in good faith incurred expense and expended time and labor, but before he has had a reasonable opportunity to avail himself of the results of this preliminary effort, it could not be permitted that the principal should then terminate the agency and take advantage of the agent's services without rendering any compensation therefor." Mechem on Agency, § 620. This is good sense, and, we believe, good law.

But there is still another well settled and more specific rule which will determine this branch of this case, and that is this: Where there is an employment for a definite period of time, expressed or implied, and the agent is discharged without cause before the expiration of that period, the principal will be liable to the agent the same as in case of a breach of any other contract; and in such cases the agent may elect to treat the contract as rescinded, and bring an action to recover the value of his services and money expended. Mechem on Agency, §§ 614, 621; Ehrlich *v.* Ins. Co., 88 Mo. 249; Kirk *v.* Hartman, 63 Pa. St. 97.

The contract between the plaintiff and the defendant, as found by the jury, contains no express stipulation to the effect that the agency should continue for one year, but it contains the stipulation that the plaintiff should have an additional compensation of $1,500 if he sold the lots within one year; and the question then is whether there arises an implied agreement that he should have one year in which to sell the lots.

Although a contract on its face and by its terms appears to be obligatory on one party only, yet if it was the manifest intention of the parties that there should be a correlative obligation on the other party, the law will imply such obligation. Lewis *v.* Ins. Co., 61 Mo. 534. But, as said in Churchward *v.* Queen, L. R. 1 Q. B. at side p. 195, "Where a contract is silent, the court or jury who are called upon to imply an obligation on the other side which does not appear in the terms of the contract must take great care that they do not make the contract speak . . . contrary to what . . . was the intention of the parties." The question after all is one of intention, to be gathered from the tenor and all the terms of the contract, considered in the light of the subject-matter of which the contract treats.

The subject of the agency in question was one whole addition, consisting of two hundred and eighty lots, and the plaintiff was to have the exclusive right to sell all of them. It is plain to be seen that the $1,500 was an inducement to plaintiff to accept the agency. It was a part, and a considerable part, of the compensation which he was to receive. It is true this part of the consideration was conditional, that is to say, upon the fact that he sold the lots within one year, but the very condition shows that he was to have a year in which to perform it. His right to have a year in which to sell the lots is clearly implied, and this implied part of the agreement is as certain and definite as if it had been stated in so many words. This conclusion seems to us irresistible.

Nor was it necessary to submit this question to the jury; for the jury found that the plaintiff was to have an additional compensation of $1,500, if he sold out the lots within one year. The clear intendment and construction of this language is that he was to have a year in which to sell out the addition.

But it is said the plaintiff testified that he reserved the right to quit the work at any time, and hence the defendant had the corresponding right to terminate the agency at will, notwithstanding the agreement concerning the $1,500. The plaintiff testified that he did not bind himself to sell the addition for $80,000 within one year, or to pay a forfeiture if he failed to sell it. He states at one place in the lengthy examination that he did not bind himself to devote the entire year to the sale of Round Top, and could have quit at any time, but he was not that kind of a man. At another place he says

he was bound to give his time and attention to the sale of the land and to try to sell it. He evidently undertook to make a reasonable effort to sell the lots. This much is implied in the terms of the agreement found by the jury to have been made by these parties. It is equally true that he was not bound, at all events, to continue his efforts during the entire year. But it does not follow that the defendant had the right to revoke the agency, without cause, at any time during the year. Says Mechem: "It is, in many cases, difficult to determine whether the parties have made a definite agreement for a fixed time or not. It is not indispensable that they should, in the first instance, be both bound for the same period. It may lawfully be made to rest with either party to determine, at his option, that the agreement shall be one for a certain time." Mechem on Agency, § 211.

Such questions as this must be considered in the light of the nature and object of the agency, and the agreement which the parties have made. The defendant was anxious to dispose of the addition, and the scheme devised to sell it was problematical and doubtful. The defendant agreed, as we have seen, to give the plaintiff one year in which to earn, if he could, the extra $1,500, and this agreement as to time is not void or unlawful because the plaintiff had the right, at his option, to abandon the contract before the expiration of the year. The fact that the plaintiff had such right or option gave the defendant no right to terminate the agency before the expiration of the year so long as the plaintiff was making diligent efforts to sell the lots.

3. As the plaintiff can maintain this action to recover the value of his services and the reasonable expenses incurred by him, it follows that he had the right to produce evidence showing the value of such services. Evidence of what is usually charged for similar services at the same place was admissible. And it was also competent to show by persons who were acquainted with the value of like services, what, in their opinion, the services of the plaintiff were worth. The witnesses called by the plaintiff for this purpose were real estate agents, and their evidence shows that they were fairly acquainted with the value of like services. The fact that commissions in like cases are generally regulated by contract, and the further fact that these lots were sold under what is called a unique and unusual plan, did not affect the competency of the evidence of the witnesses as to the value of the services rendered by the plaintiff. And it was also competent to show what commissions had been paid in the same locality, for selling other additions. The differences between the plan adopted in making such other sales, and the sales in question, would be a matter for the jury to consider, but such differences do not affect the competency of the evidence. There was no error in the admission of evidence on this subject.

4. It follows also from what has been said that the measure of the plaintiff's damages was the reasonable value of the services rendered and the moneys fairly expended in performing such services. The instructions as to damages proceed on this theory, and there is no error in them. . . .

Judgment affirmed.

CADIGAN *v.* CRABTREE.

179 Mass. 474. 1901.

LORING, J. 1. The presiding justice was right in directing a verdict for the defendant on the fifth and sixth counts.

There was no evidence which would have warranted a verdict for the plaintiff. The most that could have been found in favor of the plaintiff was that the defendant employed him as a broker, in September, 1898, to find for her a purchaser for the Hotel Reynolds, and that it was then stated that he was the only broker in the matter. The plaintiff's employment in the matter was brought about by one Gilman, the agent in Boston of the defendant, who did not live in that city. The plaintiff testified that Gilman "said that he thought that Miss Crabtree, from his conversation with her, would sell the property for $800,000. Under a suggestion that I ask $815,000, I started out." The plaintiff got several offers, — one for $750,000 in cash, and another for $750,000, part in cash and part in "other property in trade." These offers were reported to the defendant personally between November 7th and November 11th of the same year, and were refused. The defendant then fixed her price at $1,100,000, which the plaintiff testifies "practically stopped the negotiations." On February 25, 1899, the defendant notified the plaintiff that she was willing to take $850,000 for the property, but on March 1st following she revoked the plaintiff's authority to sell the estate at all, and notified him that she had put the property in the hands of another broker for sale, to the exclusion of the plaintiff and every one else.

No sale of the property has been made. It appears that the defendant has paid the plaintiff the amount he was out of pocket in the matter.

The plaintiff's contention is that he is entitled to recover damages from the defendant for preventing him from earning a commission by finding a person who would buy the estate, and on the ground that he was entitled to a reasonable time in which to find a customer, and his authority to do so was revoked before that time had passed.

Until February 25th, when the defendant put a price upon the property, it is plain that the defendant could revoke the plaintiff's

employment without coming under any liability to the plaintiff for so doing. We take February 25th as the date when a price was put upon the property, because the plaintiff's contention was that the price of $1,100,000 put upon the property in the early part of November could not seriously be regarded as a price that could be obtained for the property. Where the owner of property employs a broker to bring him an offer for the purchase of it, without naming a price at which he is willing to sell, — that is to say, where the owner of property employs a broker to bring him an offer which he is to pass upon after it is brought to him, — there can be no implied agreement or understanding that the broker is to be entitled to a reasonable time in which to procure such an offer. In such a case the owner has a right to reject every offer brought to him, as was held in Walker *v.* Tirrell, 101 Mass. 257; and it is plain that under those circumstances he could decide not to accept any offer, and to dismiss the broker altogether. But the right of an owner to put an end to the broker's employment is based on a consideration which goes deeper than that, and includes the case where a price is named by the owner at which he is willing to sell his property. That consideration is the nature of a brokerage commission. The very essence of a brokerage commission is that it is dependent upon success, and that it is in no way dependent upon, or affected by, the amount of work done by the broker. A brokerage commission is earned if the broker, without devoting much or any time to hunting up a customer, succeeds in procuring one; and it is equally true, on the other hand, not only that no commission is earned if a broker is not successful, but a broker is not entitled to any compensation, no matter how much time he has devoted to finding a customer, provided a customer is not found. See, in this connection, Sibbald *v.* Iron Co., 83 N. Y. 376, 383. The promise to pay a brokerage commission, if a customer is found to purchase at a stated price, is not the ordinary employment of labor, but is more in the nature of an offer, namely, an offer to pay a commission if a person is produced who buys at the price named; and, like any other offer, it can be withdrawn at any time, without regard to the fact that work has been done by a person in reliance on it, provided the work done has not brought the person within the terms of the offer. A broker who has not been successful in procuring a customer for his principal is never entitled to recover on a *quantum meruit* for work done. Where a broker has done work, but another broker has closed the trade, it was held that, under the peculiar circumstances of Dowling *v.* Morrill, 165 Mass. 491, not that he could recover on a *quantum meruit* for work done, but that a commission was earned if his work was in fact the efficient and predominating cause of the sale; and so, where a customer is found to purchase property, but the trade is not made or is not carried through because the broker's principal is not able,

or does not choose, to convey the property for which he employed the broker to find a purchaser, it is now settled that the broker's remedy is to sue his principal for a commission, and that in such an action he can recover his commission (see Fitzpatrick *v.* Gilson, 176 Mass. 477, and cases there cited), although at one time countenance was given to the proposition that in such a case the remedy of the broker was on a *quantum meruit* for work done (see Drury *v.* Newman, 99 Mass. 256, 258; also Walker *v.* Tirrell, 101 Mass. 257, 258, citing with approval Prickett *v.* Badger, 1 C. B. [N. S.] 296).

PEOPLE *v.* GLOBE MUTUAL LIFE INS. CO.

91 N. Y. 174. 1883.

CLAIM by James C. Mix upon funds in the hands of the receiver of the Globe Mutual Insurance Company. In December, 1876, Mix entered into a contract with the company as agent for five years. In May, 1879, at the instance of the state the company and its officers and agents were restrained from continuing the insurance business, a receiver was appointed, and the corporation dissolved. In June, 1879, Mix was notified by the receiver of such dissolution. Mix claims damages for the breach of his contract. The claim was dismissed.

FINCH, J. There was no breach of the contract between Mix and the insurance company by either of the parties. It was in process of continued performance according to its terms, and was unbroken at the moment when the injunction order was served. That operated upon both parties at the same instant, and perpetuated the then existing rights and conditions. Before its service the company had done nothing to prevent performance, and we must assume was both ready and able to perform. It had done no act which amounted to a refusal, or which made it unable to carry out its contract. For aught that appears it would have done so if let alone. But it was not permitted to perform. The state, by the injunction order operating alike upon the company and its agents, paralyzed the action of both the contracting parties, so that neither could perform, or put the other in the wrong. Thereupon the company could not refuse, and did not refuse. To put it in the wrong and make it liable for a breach required action on the part of Mix. As a condition precedent he was bound to show both ability and readiness to perform on his part. Shaw *v.* Republic Life Ins. Co., 69 N. Y. 292, 293; James *v.* Burchell, 82 *id.* 113. He could do neither. Performance by him had become illegal. It would have been a criminal contempt, and possibly a misdemeanor. There could be neither readiness nor

ability to do the forbidden and unlawful acts. Jones *v.* Knowles, 30 Me. 402. So that from the necessity of the case, as there was no breach on either side before the injunction, so there could be none after. What had happened was a dissolution of the contract by the sovereign power of the state, rendering performance on either side impossible. And this result was within the contemplation of the parties, and must be deemed an unexpressed condition of their agreement. One party was a corporation. It drew its vitality from the grant of the state, and could only live by its permission. It existed within certain defined limitations, and must die whenever its creator so willed. The general agent who contracted with it did so with knowledge of the statutory conditions, and these must be deemed to have permeated the agreement, and constituted elements of the obligation. People *v.* Security Life Ins. Co., 78 N. Y. 115. Then, too, the subject-matter of the contract was that of skilled personal services to be rendered by one and received by the other. It was inherent in the bargain that a substituted service would not answer. The company were not bound to accept another's performance instead of the chosen agent's, nor was he in turn bound to work for some other master. The contract in its own nature was dependent upon the continued life of both parties. With the natural death of one, or the corporate death of the other, the contract must inevitably end. So that, in its own inherent nature, by the unexpressed conditions subject to which it was made, and by the decree enjoining both parties at the same moment from further performance, the contract was terminated and no breach existed. . . .

In all of the cases cited there was no incapacity affecting both parties alike. The one suing for a breach was free, so far as he was concerned, to offer performance, and had the necessary ability. He could thus put his adversary in the wrong, while here the same blow, at the same instant, stopped performance on both sides and made it illegal on the part of either.

But exactly at this point the learned counsel for the appellant interposes a proposition which presents a difficulty. Practically conceding most that we have said, he insists that the contract is only dissolved when its destruction comes from an outside and independent force, operating separately, and not occasioned directly or indirectly by the act or omission of the party pleading it as an excuse. In other words, such party must be innocent and blameless in respect to *vis major* which dissolves the contract, and if not so, cannot plead as an excuse what practically is his own fault and act. And our attention is directed to this feature as characterizing the cases in which the agreements were held to have been ended. They are grouped in the appellant's points and need not be repeated. He has stated their purport correctly. In all of them both parties were innocent of and

blameless for the outside and independent agency which dissolved the contract. And the argument is now pressed that in the present case the company was not only not blameless for its dissolution, but that resulted from its own acts or omissions, was directly caused by them, and, therefore, such dissolution must be deemed its own act, which it cannot plead as an excuse. This leads to the inquiry whether the company was so the responsible cause of the action of the state as to make the dissolution its own act.

The answer is that no such fact is shown, nor is it a necessary inference from the facts which do appear. . . .

If, in such case, in some sense, such dissolution may be deemed the act of the company, in a similar sense, and through the same mode of reasoning, we might, in a case of master and servant, trace the death of the former to his own negligence in eating or drinking, or exposure to heat and cold, and so determine his non-performance to be inexcusable, and to draw after it damages for a breach. As it is thus evident that a man may be, in some sense, the occasion, or even the indirect cause of his own death, and in the same sense blamable for it, without its being, in a legal sense, and considered as a *vis major,* his own act; so a corporation may be said, through the conduct of its officers, to have, in some sort, occasioned its own corporate death, while yet it would remain true that its dissolution by the independent force of the state would be not its own act; not at all the product of its own volition; and not a breach by it of its contracts previously unbroken. Especially is this true as between the company and its own officers contracting with it. One of these may be innocent himself of any wrongful act or neglect, and yet it is inherent in the nature of his contract that he takes the risk of such act, or neglect, on the part of the other officers, as may tend, under the law, to produce a dissolution, if such dissolution in fact occurs. That possibility entered into his contract when made, and belonged to it as an inevitable condition, for its complete performance depended upon the corporate life, and that under the law upon the fulfillment of the law's conditions. In the event of such corporate death the motive of the state or the ground of its act is wholly immaterial. Its risk was upon the contractor, whatever its cause or occasion; and, however it may have been provoked or induced, it must be deemed the act of the state, and not of the corporate body. And it is the independent act of the state, for although the reserve may have fallen below the prescribed level, a dissolution is not the necessary consequence. That may follow, or may not follow. The superintendent of insurance may make the certificate which sets the law in motion, or may withhold it. The matter lies within his sole discretion and control. He may act or not, as he chooses; but if he does it is his act, and not the company's; de-

pendent wholly on his volition and not on that of the corporation; an independent agency guided by its own motives, and not the act of the company producing its own death. . . .

Order affirmed.[1]

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5. *Compensation after Renunciation of Agency.*

TIMBERLAKE *v.* THAYER.

71 Miss. 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.

[1] In Bovine *v.* Dent (21 T. L. Rep. 82) it was held that where a partnership agreed to serve as agent for a fixed term, the voluntary dissolution of the partnership terminated the contract and the principal could not maintain an action for the breach; that there was no implied term in the contract that the partnership should be continued.

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.)

DAVIS *v.* MAXWELL.

12 Metc. (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.

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6. *Compensation where Agent Acts for Both Parties.*

CANNELL *v.* SMITH.

142 Penn. St. 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.

RICE *v.* WOOD.

113 Mass. 133. 1873.

CONTRACT to recover a broker's commission.

The defendant asked the court to instruct the jury that if a broker acts for both parties in effecting a sale or exchange of property, he cannot recover compensation from either of the parties, unless both knew and assented to his acting for both.

The court refused to give the instruction prayed for, but did instruct the jury as follows: "If the plaintiffs were employed by the defendant as brokers to exchange his stock for real estate, and he was informed by them, or had knowledge, that they were to make the exchange with persons whose estates had been left in their hands for exchange or sale, and that they were to receive commissions from those persons for disposing of their estates, and that with this knowledge the defendant agreed to pay the plaintiffs a commission for making the exchange, the fact that the plaintiffs were employed by and were to receive a commission from the other parties would not in itself defeat the plaintiffs' claim."

The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions.

DEVENS, J. In this case there was evidence at the trial in the court below that the plaintiffs had been employed by a third person, who had promised to pay them a commission therefor, to dispose of certain real estate, and that afterwards, without the knowledge of such person, an agreement was made between the plaintiffs and the defendant, by which the plaintiffs were employed to act for the defendant in the exchange of certain stocks held by him for real estate, and were promised a commission if such exchange should be effected, the defendant knowing at the time that the plaintiffs were employed for a commission to sell such real estate; and further, that afterwards the plaintiffs introduced the defendant to the owner of such real estate, and by the instrumentality of the plaintiffs the exchange of the defendant's stock for such real estate was effected.

If this were an action by the plaintiffs against the owner of the real estate, for commissions earned in disposing thereof, the decision of this court in Farnsworth *v.* Hemmer, 1 Allen, 494, would be conclusive against the claim, upon the ground that the plaintiffs, if such fact should be proved, had entered into a relation inconsistent with the confidence reposed in them by such owner, and placed themselves in a position antagonistic to his interests. This case presents, however, the question whether, conceding that the plaintiffs could not recover their commissions from the owner of the real estate, they may not recover those they claim to be entitled to from the defend-

ant, as he knew fully, at the time of entering into his contract, the relation in which the plaintiffs stood to the third party.

It was the duty of the plaintiffs to get the highest price for the real estate that could be obtained for it in the market; while the contract between the plaintiffs and the defendant was an inducement to the plaintiffs to effect a sale to the defendant, even if it was on lower terms than might have been obtained from others, because they thereby secured their commissions from both parties. It was therefore an agreement which placed the plaintiffs under the temptation to deal unjustly with the owner of the real estate. Walker *v.* Osgood, 98 Mass. 348.

Contracts which are opposed to open, upright, and fair dealing are opposed to public policy. A contract by which one is placed under a direct inducement to violate the confidence reposed in him by another is of this character. If the plaintiffs were guilty of injustice to the owner of the real estate, by placing themselves under an inducement to part with it at less than its full market value, they should not be allowed to collect the promised commissions on the sale of the stock, which was the consideration for which they put themselves in such a position. No one can be permitted to found rights upon his own wrong, even against another also in the wrong. A promise made to one in consideration of doing an unlawful act, as to commit an assault or to practice a fraud upon a third person, is void in law; and the law will not only avoid contracts, the avowed purpose or express object of which is to do an unlawful act, but those made with a view to place, or the necessary effect of which is to place, a person under wrong influences, and offer him a temptation which may injuriously affect the rights of third persons. Nor is it necessary to show that injury to third persons has actually resulted from such a contract, for in many cases where it had occurred this would be impossible to be proved. The contract is avoided on account of its necessarily injurious tendency. Fuller *v.* Dame, 18 Pick. 472.

We are of opinion, therefore, that the judge who presided at the trial erred in the instruction given, and that the defendant was entitled to an instruction substantially like that asked for. Nor can the ruling be sustained upon the ground suggested at the bar, that the plaintiffs were middlemen only, bringing the parties together and doing nothing further, the parties themselves making the contract. In Rupp *v.* Sampson, 16 Gray, 398, the plaintiff was permitted to recover, not for services rendered to the defendant as a broker, but for the performance of a certain specific act, namely the introduction of the other party to him, the parties after such introduction making their own contract. It was there held that this was not such a fraud upon the other party, who also paid for the service of the plaintiff in introducing him, although concealed from such party, as to make the contract of the plaintiff with the defendant

void for illegality. That, however, is not the present case. It here appears, by the bill of exceptions, not only that there was evidence that the plaintiffs introduced the parties, but that, through the instrumentality of the plaintiffs, the exchange was effected, and that in effecting such exchange the plaintiffs acted as brokers for both parties. It is to be observed also, that both the instructions asked for by the defendant and those given by the presiding judge proceed upon the ground that the plaintiffs were brokers, and not middlemen only.

Exceptions sustained.

SHORT *v.* MILLARD.

68 Ill. 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 purshaser 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.

MONTROSS *v.* EDDY ET AL.

94 Mich. 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.

GRACIE *v.* STEVENS, 56 N. Y. App. Div. 203.[1] RUMSEY, J. . . . There can be no doubt of the general rule that a broker who is employed to sell property, and whose duty it is not only to find a purchaser but to negotiate the sale, cannot accept any compensation from any other person than his employer; and if he does make an agreement to be paid by the purchaser, or if he assumes a position with reference to the transaction where his duty and interest might clash, he loses all right to his commissions from his employer. Among the numerous cases where that rule is laid down it is only necessary to cite Abel *v.* Disbrow, 15 App. Div. 536, and Knauss *v.* Krueger Brewing Co., 142 N. Y. 70; but that rule, as is stated in the cases above cited, applies only to a case where the duty of the broker to his employer calls for the exercise of his judgment or discretion when he must confine himself to acting for the person who employed him and look solely to him for his reward. But when he is employed simply to find a purchaser upon terms fixed by his employer, his duty is performed by bringing to the seller one who is willing to purchase upon such terms. He has no discretion to exercise, and there is no reason why he should not be permitted to take from the purchaser such compensation as he may see fit to give for the benefit he has received by being informed of the fact that he would be able to make such a purchase. Knauss *v.* Krueger Brewing Co., 142 N. Y. 70. In the case at bar it is evident that the terms of the sale were fixed by the defendants themselves, and that all the plaintiff had to do in that regard was to state to the intending purchaser the price and the terms of payment upon which the property could be bought. But there are many other things which he might do which are not matters of discretion; for instance, in this case it appears that he not only sought a purchaser but informed himself as to the extent, the value and the income of the property, and learned what it was composed of and

[1] Affirmed, 171 N. Y. 658, no opinion.

the liens upon it, and obtained other information which could only be acquired with effort and much trouble, and which undoubtedly tended to bring about the purchase of this property by Eldridge. We think that when the court charged the jury as it did, it had stated quite as favorably to the defendants as they were entitled to have the limit of the right of the plaintiff to make a contract for compensation with Eldridge, and when they found, as they might, that with respect to all matters of negotiation no discretion was vested in the plaintiff, they were then justified in finding further that he was entitled to a verdict against the defendants.[1]

TERRY *v.* BIRMINGHAM NATIONAL BANK.[2]

99 Ala. 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.

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

[1] *Contra*, Bartram *v.* Lloyd, 88 L. T. 286 (*semble*).
[2] For former appeal see 93 Ala. 599.

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.

ANDREWS *v.* RAMSAY & CO.

[1903] 2 K. B. 635.

DEFENDANTS sold plaintiff's property to one C. for £2,100, saying that was the best price they could get. C. paid defendants £100 deposit, and defendants paid over £50 to plaintiff, retaining £50 commission with plaintiff's consent. It subsequently transpired that C. had paid defendants £20 commission. Plaintiff brought an action to recover this from defendants and they paid it into court. The present action was then brought to recover the £50 commission retained by defendants. Judgment for plaintiff.

LORD ALVERSTONE, C. J. In this case an action was brought to recover a sum of £50, which had been retained by the defendants with the assent of the plaintiff as their remuneration for their services in negotiating the sale of the plaintiff's house. The main point of the case is the suggestion that, because the defendants, while acting as the plaintiff's agents, had received from the purchaser £20 as a secret profit, and because when that was discovered by the plaintiff the defendants had paid over that £20 to the plaintiff, the plaintiff is not entitled to recover back from the defendants the amount retained by them by way of commission. I cannot see how that fact has anything to do with the matter. The £20 was recoverable by the plaintiff from the defendants because it was a secret profit made by them, and came out of the sum which the purchaser would, it may be assumed, have been willing to pay for the house, and it therefore rightly belonged to the plaintiff. That the plaintiff was undoubtedly entitled to the £20 seems to me to have no bearing on the question whether the defendants were entitled to commission from the plaintiff. It is said that the defendants ought not to be called upon to hand over the £50 to the plaintiff because the plaintiff has had the benefit of their services. The principle of Salomons *v.* Pender (1865), 3 H. & C. 639, seems to me to govern the case, and it is, in my opinion, amply sufficient to do so. In that case it was held that an agent who was himself interested in a contract to purchase property of his principal was not entitled to any commission from his principal. The principle there laid down is that, when a person who purports to act as an agent is not in a position to say to his principal, "I have been acting as your agent, and I have done my

duty by you, he is not entitled to recover any commission from that principal. In Salomons *v.* Pender, 3 H. & C., at p. 642, Bramwell, B., said: "It is true that . . . the defendant has had the benefit (if it be one) of the plaintiff's services. But the defendant is in a position to say, 'What you have done has been done as a volunteer, and does not come within the line of your duties as agent.'" And in the same case Martin, B., quoted the passage from Story on Agency, p. 262, § 210. . . .

It seems to me that this case is only an instance of an agent who has acted improperly being unable to recover his commission from his principal. It is impossible to say what the result might have been if the agent in this case had acted honestly. It is clear that the purchaser was willing to give £20 more than the price which the plaintiff received, and it may well be that he would have given more than that. It is impossible to gauge in any way what the plaintiff has lost by the improper conduct of the defendants. I think, therefore, that the interest of the agents here was adverse to that of the principal. A principal is entitled to have an honest agent, and it is only the honest agent who is entitled to any commission. In my opinion, if the agent directly or indirectly colludes with the other side, and so acts in opposition to the interest of his principal, he is not entitled to any commission. That is, I think, supported both by authority and on principle; but if, as is suggested, there is no authority directly bearing on the question, I think that the sooner such authority is made the better. The result is that the county court judge was right, and this appeal must be dismissed.

WILLS, J., and CHANNEL, J., concurred.

Appeal dismissed.[1]

HIPPISLEY *v.* KNEE BROTHERS.

[1905] 1 K. B. 1.

ACTION to recover discounts allowed to plaintiff's agents on a printer's bill in advertising plaintiff's goods for sale, and also the commission retained by the agents. Judgment for defendants. By the contract defendants were to be repaid all out-of-pocket expenses, including advertisements, etc. They charged to plaintiff the gross amount of the printer's bills without subtracting the discounts.

LORD ALVERSTONE, C. J. (after deciding that the plaintiff could recover the amount of the discounts). . . . The other claim made by the plaintiff, and in respect to which we did not call upon the defendants' counsel, was that in consequence of the defendants' con-

[1] **Accord**: Wadsworth *v.* Adams, 138 U. S. 380; McKinley *v.* Williams, 74 Fed. 94; Humphrey *v.* Eddy Transportation Co., 107 Mich. 163; Vennum *v.* Gregory, 21 Iowa, 326; Jansen *v.* Williams, 36 Neb. 869.

duct they were not entitled to retain the £20 which they had deducted from the gross proceeds for their commission, and in support of that claim Mr. Salter relied upon the judgment of this court in Andrews *v.* Ramsay, [1903] 2 K. B. 635, where we held that a dishonest agent could not recover any commission at all. I desire, speaking for myself, to say that in this case I am satisfied that there was no fraud, but that what was done by the defendants was done under a mistaken notion as to what they were entitled to do under the contract: they thought that by reason of the alleged custom they were entitled to deduct from the proceeds of sale the gross amounts of the advertising and printing bills. That is enough to differentiate the present case from Andrews *v.* Ramsay (1903), 2 K. B. 635, where we were dealing with an agent who acted with downright dishonesty. But Mr. Salter went further, and contended that if there has been a failure by the agent to account for a secret discount received, even though that failure may have been due to a bona fide mistake, he is not entitled to receive any commission or remuneration for his services from the principal. I am not prepared to go that length. If the court is satisfied that there has been no fraud or dishonesty upon the agent's part, I think that the receipt by him of a discount will not disentitle him to his commission unless the discount is in some way connected with the contract which the agent is employed to make or the duty which he is called upon to perform. In my opinion, the neglect by the defendants to account for the discounts in the present case is not sufficiently connected with the real subject-matter of their employment. If the discount had been received from the purchasers the case would have been covered by Andrews *v.* Ramsay, [1903] 2 K. B. 635; but here it was received in respect of a purely incidental matter; it had nothing to do with the duty of selling. It cannot be suggested that the plaintiff got by one penny a lower price than he would otherwise have got. Therefore I come to the conclusion that, so far as the £20 commission is concerned, the plaintiff is not entitled to succeed.

KENNEDY, J. I am of the same opinion. . . . With regard to the £20 claim, I agree with my Lord that this is not one of the cases in which it would be just to deprive the agent of his agreed remuneration as well as of his secret profit. I feel it is difficult to lay down any definite rule upon the subject with confidence, but I would venture to suggest the following: that where the agent's remuneration is to be paid for the performance of several inseparable duties, if the agent is unfaithful in the performance of any one of those duties by reason of his receiving a secret profit in connection with it — and I here use that word "unfaithful" as including a breach of obligation without moral turpitude — it may be that he will forfeit his remuneration, just as in certain cases a captain of a ship might be held in the Admiralty Court to forfeit his wages as a result of misconduct

in any branch of his duty as a captain; but where the several duties to be performed are separable, as to my mind they are in the present case, the receipt of a secret profit in connection with one of those duties would not, in the absence of fraud, involve the loss of the remuneration which has been fairly earned in the proper discharge of the other duties. Here the auctioneers were employed for a certain commission to act faithfully as auctioneers. If they had improperly by connivance sold to a purchaser at a lower price than they could fairly have got they would clearly not have been able to recover their commission. There is nothing of this kind in the present case. But by the special terms of their contract they undertook, in addition to their duty as auctioneers, that if the plaintiff would pay them their out-of-pocket expenses they would truly account to the plaintiff for those expenses. And it seems to me that it would be wrong to say that because the defendants failed in the performance of their duty properly to account for the out-of-pocket expenses, therefore they are not to have their commission, although they performed all their duty as auctioneers faithfully.

RIDLEY, J. I concur in the judgment of my Lord.

Judgment of county court judge varied accordingly.[1]

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7. *Compensation for Illegal Services.*

RICHARDSON *v.* BRIX.

94 Iowa, 626. 1895.

ACTION by broker for commissions. The court directed a verdict for defendant.

Defendant engaged plaintiff to procure a purchaser for defendant's real property, and plaintiff procured a purchaser to whom defendant sold the property. Plaintiff was a real estate broker in Davenport. The city ordinance provided that no person should follow the business of real estate broker without first obtaining a license, and provided a penalty for violation of the ordinance.

ROTHROCK, J. . . . There is nothing in the record made in the court below from which it may be inferred that the ordinance of the

[1] If the agent acts for each party unknown to the other and sells the vendor's property to the vendee for more than the fixed price and retains the excess, both the vendor and the vendee may sue him for such excess. Lewis *v.* Denison, 2 App. Cas. D. C. 387.

If the agents of the respective parties agree to pool or divide their commissions, they forfeit thereby their right to any commissions whatever. Norman *v.* Roseman, 59 Mo. App. 682; Levy *v.* Spencer, 18 Colo. 532. But if the vendor's agent agrees to divide his commission with the vendee in order to induce the latter to purchase at the price fixed by the vendor, the agent does not forfeit his commission thereby. Scott *v.* Lloyd, 19 Colo. 401.

city was not fully authorized by its charter. The city is organized under a special charter, and the court below did not find that there was a want of authority in the city to pass the ordinance, and that question is not certified to this court for decision. The only question to be determined is whether the plaintiff, being an unlicensed real estate agent, may recover a commission for procuring a purchaser for defendant's property. We think the court correctly held that there was no right of action. It is a general and well-established rule of law that, where a statute or valid city ordinance absolutely prohibits the carrying on of such a business as the plaintiff was engaged in without first procuring a license to do so, he cannot recover for services rendered in that occupation. The ordinance under consideration, in express terms, prohibits the exercise of the calling without a license. In Pangborn *v.* Westlake, 36 Iowa, 548, it is said: "There is no doubt that the well-settled general rule is that, when a statute prohibits or attaches a penalty to the doing of an act, the act is void, and will not be enforced, *nor will the law assist one to recover money or property which he has expended in the unlawful execution of it;* or, in other words, a penalty implies a prohibition, and makes the act illegal and void." In Bishop on Contracts, § 472, it is said: "Wages earned by a minor forbidden by a statute to be employed in the particular business, or by a school teacher not having the certificate of qualifications which a statute provides for, or by a broker for services rendered without the license ordained by a statute, . . . cannot be recovered in a judicial tribunal." See, also, Dillon *v.* Allen, 46 Iowa, 299. In Buckley *v.* Humason, 50 Minn. 195, it was held that where, by a valid city ordinance, it was made unlawful for any person to exercise within the city the business of a real estate broker without a license, a person so engaged in violation of such ordinance could recover no commission for his services. It will be understood that we do not hold that the contract between the vendor and purchaser would in such case be void. The case presented is whether the plaintiff can recover compensation for services rendered in violation of an ordinance expressly prohibiting him from making sales of real estate without a license.

The judgment of the district court is affirmed.[1]

[1] Accord: Whitfield *v.* Huling, 50 Ill. App. 179; Yount *v.* Denning, 52 Kan. 629; Buckley *v.* Humason, 50 Minn. 195; Johnson *v.* Hulings, 103 Pa. St. 498; Stevenson *v.* Ewing, 87 Tenn. 46.

Contra: Fairly *v.* Wappos Mills, 44 S. Car. 227; Prince *v.* Eighth St. Baptist Church, 20 Mo. App. 332; Amato *v.* Dreyfus (Tex.), 34 S. W. Rep. 450.

One engaged in other business who makes a single sale for another is not within the statute requiring a license. O'Neill *v.* Sinclair, 153 Ill. 525; Johnson *v.* Williams, 8 Ind. App. 677.

8. *Reimbursement and Indemnity.*

MOORE *v.* APPLETON.

26 Ala. 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, n. *x*.

That rule is applicable, whenever it appears that the act of the agent was manifestly illegal in itself. For example, if A. employ 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.[1]

[1] Accord: Gower *v.* Emery, 18 Me. 79; Drummond *v.* Humphrey, 39 Me. 347; Guerney *v.* St. Paul, etc., Ry., 43 Minn. 496.

HOWE *v.* BUFFALO, N. Y. & E. R. CO.

37 N. Y. 297. 1867.

PLAINTIFF was a conductor on defendant's railroad. He was instructed not to accept certain tickets. One H. presented such a ticket and plaintiff refused it, and, as H. refused to pay his fare, removed him from the train. H. brought an action against plaintiff and recovered damages. This action is for indemnity. Judgment for plaintiff.

PORTER, J. The plaintiff acted in good faith and in obedience to the defendant's instructions. He supposed the company to possess the authority it assumed, and he found himself involved in a serious liability by fidelity in discharge of a duty imposed by his principal, where he was wholly free from intentional wrong. Under these circumstances the company very properly assumed the burden of defending his act. Whether the judgment recovered against him was right or wrong, is a question which does not arise on the present appeal. If it was right, the defendant should have paid it, without exposing him to imprisonment, for an act done in good faith, in the interest and by the orders of the company. If it was wrong, the error should have been corrected by a review of the judgment. The appellant chose to abandon the defence and permit him to be the sufferer. The court below was right in holding that the plaintiff was entitled to redress. There is an implied obligation on the part of the principal to indemnify an innocent agent for obeying his orders, where the act would have been lawful in respect to both, if the principal really had the authority which he claimed. Adamson *v.* Jarvis, 4 Bing. 66; Coventry *v.* Barton, 17 Johns. 142; Powell *v.* Trustees of Newburgh, 19 id. 284, 289; Story on Agency, §§ 339, 340.

The record of the judgment recovered by Hotchkin was properly admitted as evidence. Kip *v.* Brigham, 6 Johns. 158; Blasdale *v.* Babcock, 1 id. 517. There was no error in permitting proof of the fact, that the plaintiff used no more force than was necessary, in removing Hotchkin from the car. It appeared, presumptively, from the record, that the judgment was rendered on the ground that the removal itself was unlawful, and not on the ground of excessive force in the exercise of a legal right; but, it could not prejudice the defendant to exclude any possible conclusion that the latter was the ground of recovery. Dunkle *v.* Wiles, 1 Kern. 420; Gardner *v.* Buckbee, 3 Cow. 120. . . .

The judgment should be affirmed. All the judges concurring, except BOCKES, J., who took no part in the decision.

Judgment affirmed.

D'ARCY *v.* LYLE.

5 Bin. (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 transactions 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 Chris-

tophe, 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.[1]

[1] A contrary decision is reached by a trial judge in Halbronn *v.* International Horse Agency, [1905] 1 K. B. 270. In that case defendant instructed plaintiff, an auctioneer in Paris, to advertise and sell a thoroughbred mare named Pentecost. Plaintiff advertised the mare as directed. A French horse-breeder, owning a thoroughbred mare registered in the French Stud Book as Pentecost, brought an action against plaintiff and under the French law recovered damages. Plaintiff sought to compel defendant to indemnify him. The trial judge without citing any similar authority, but attempting to distinguish prior adverse authorities, held that in the absence of a false representation by defendant there could be no recovery.

In Clark *v.* Jones, 84 Tenn. 351, the agent was compelled wrongfully to pay for property bought for his principal and was allowed indemnity.

In Delafield *v.* Smith, 101 Wis. 664, a sale broker was denied indemnity for damages arising from the non-delivery of the goods by the principal because he sold in his own name, but by a strange inconsistency was nevertheless allowed to recover for his commissions.

CHAPTER VIII.

Obligations of Agent to Principal.

1. *Obedience.*

WHITNEY ET AL. *v.* MERCHANTS' UNION EXPRESS CO.

104 Mass. 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.

EVANS *v.* ROOT.

7 N. Y. 186. 1852.

ACTION for damages against an agent for disobeying instructions. The trial judge ordered a non-suit.

In 1847 the plaintiff shipped from Lockport to the defendant, who was a commission merchant in Albany, two cargoes of flour, containing together six hundred and eight barrels, to be sold on arrival. The first cargo consisting of three hundred and eight barrels arrived at Albany on the twenty-first day of June. At this time the price of flour was $7.37 per barrel. The defendant commenced selling it on the twenty-ninth of June, when the price had fallen to $7.25, and continued to sell it during the month of July, the price constantly diminishing. The second cargo, consisting of three hundred and eight barrels, arrived on the ninth day of July, when the price was $6 per barrel. It was sold on the twenty-fourth and twenty-fifth days of July at $5.40 and $5.44.

Evidence was also given that flour can be sold in Albany at any time by selling under the market, and that during June and July, 1847, the sales of flour in that city would average from five hundred to three thousand barrels per day: that the defendant had flour of other persons than the plaintiff on hand and for sale at the time, and that his sales ranged from ten to three hundred barrels per day, and that the plaintiff's flour was not offered for sale below the market price.

GRIDLEY, J. The plaintiff brought this action against the defendant in the supreme court to recover damages for a disobedience of instructions concerning the sale of two boat loads of flour shipped to the defendant in the months of June and July, 1847. The instructions were "to sell on arrival," and it was for the loss occasioned by a failure to comply with this direction that the appellant brought this action. There is no doubt that these instructions were received and understood by the defendant. In answer to a letter of the plaintiff dated August 20, 1847, alleging that he had desired the defendant "to sell the flour on arrival," and complaining that the instructions had not been followed, the defendant writes under date of the 25th of August as follows: "Sir, yours of the 20th is at hand. I represented your interest in the sale of six hundred and eight barrels of flour as well as I knew how. It would not sell on arrival. There was a panic in the market and only little lots for home consumption would sell at all. I am prepared to prove this fact to your satisfaction. *It is my plan to obey orders if I break owners generally.*" If the defendant could not in fact sell the flour on its arrival, then he was not responsible for a disobedience of instructions; but we think

the evidence shows, and especially that of the witness Barrett, that flour could be sold at any time in Albany at a reasonable deduction from the market price. There were sold daily through the season from five hundred to three thousand barrels at the usual market price in Albany. If the flour could have been sold even *below the market price* on its arrival, then all the authorities concur to show that it was the duty of the defendant to have sold it. It is laid down in Paley on Agency (ed. of 1822), p. 4, that the primary obligation of an agent whose authority is limited by instructions is to adhere faithfully to those instructions, for if he unnecessarily exceed his commission or risk his principal's effects without authority, he renders himself responsible for the consequences of his act. In Rundle *v.* Moore, 3 Johns. Cas. 36, it is said that "if the defendants have as the agents or factors of the plaintiffs, through mistake or design, disobeyed their instructions, they are undoubtedly responsible." So in Parkist *v.* Alexander, 1 John Ch. 394, it is laid down that "if an agent departs from the instructions of his principal he does it at his peril." In Coursier *v.* Ritter, 4 Wash. C. C. R. 549, it was held that it was the duty of an agent who was instructed to make sale of the article consigned for sale, "*immediately on arrival,* to sell immediately on arrival, no matter at what loss." See also to the same effect Bell *v.* Palmer, 6 Cowen, 128, where an agent under similar instructions was held liable for refusing the first offer, although under the market price. And this is a reasonable doctrine; for if a loss occur by reason of an implicit obedience to the instructions of the owner such loss falls on him. Considering the lateness of the season and the probability of a rapid decline in prices we can well see why the plaintiff would desire an immediate sale of the flour and be willing to take the consequences of such deduction from the market price as might be necessary to effect a sale rather than incur the danger of delay.

The supreme court in refusing a new trial placed their decision upon the uncertain nature of the instructions. But it seems to us that a direction "to sell on arrival" is an explicit instruction, and the defendant seems to have so understood it in his letter of the 25th of August. It is substantially like the instruction in the cases in the sixth volume of Cowen, and in Washington's circuit court reports. But if there were any doubt on this question and the direction was open to two interpretations, it should have been submitted to the jury under proper instructions to say in what sense it was understood by the defendant.[1] For these reasons we are of the opinion that a new trial should be granted.

All the judges except WATSON, who dissented, concurring.

Judgment reversed and a new trial ordered.

[1] An agent who, in good faith and without negligence, acts upon his own understanding of faulty or ambiguous instructions, is not liable to his principal in dam-

FORRESTIER *v.* BORDMAN, 1 Story (U. S. C. Ct.) 43. 1839. STORY, J., in summing up to the jury, said: The first point made at the bar is, that Williams, the supercargo, had no authority to carry the flour to Batavia and to sell it there, under the terms of his instructions. The voyage contemplated was to several ports of South America, where it was supposed that the flour might and would be sold, and from hence the vessel was to proceed to India, for a return cargo. Certainly the instructions, in their terms, did not contemplate any other event than a sale of all the flour at some one or more of the South American ports. It turned out, however, that the flour could not all be sold at the South American ports, or at least not sold, unless at an enormous sacrifice. The parties had not looked for any such event. What then was it the duty of the supercargo to do, in such a case of unexpected occurrence, not within the contemplation of the instructions? Was he to sacrifice the flour, or throw it overboard? No one pretends that it was intended to be brought back again to the United States under any circumstances. It would probably have been spoiled and ruined on the return voyage, and come home utterly worthless. Now, I take it to be clear that if, by some sudden emergency, or supervening necessity, or other unexpected event, it becomes impossible for the supercargo to comply with the exact terms of his instructions, or a literal compliance therewith would frustrate the objects of the owner, and amount to a total sacrifice of his interests, it becomes the duty of the supercargo, under such circumstances, to do the best he can, in the exercise of a sound discretion, to prevent a total loss to his owner; and if he acts *bona fide,* and exercises a reasonable discretion, his acts will bind the owner. He becomes, in such a case, an agent from necessity for the owner. Suppose, for example, that a cargo of a perishable nature is shipped on a voyage, and is to be carried to a particular port of destination, and there sold, and the ship should in the course of the voyage meet with a storm, which should disable her, and she should go into a port of necessity to refit; and that the cargo should be found so much damaged that the whole must perish before her arrival at the port of destination; would not the supercargo have a right to sell it there, in order to prevent a total loss, although no such case was contemplated in his orders? Certainly he would have a right to sell; and indeed it would become his duty, under such circumstances, to sell. In truth, in all voyages of this sort there is an implied authority to act for the interest and benefit of the owner in all cases of unforeseen necessity and emergency, created by operation and intendment of law. I shall put it to the jury to say, there-

ages, although his interpretation of them may be erroneous. Falksen *v.* Falls City State Bank (Neb.), 98 N. W. Rep. 425.

If the agent is directed to ship goods by the X line and he ships by the Y line, the goods are at the agent's risk owing to his disobedience. Johnson *v.* N. Y. C. R., 33 N. Y. 610; Wilts *v.* Morrell, 66 Barb. (N. Y.) 511.

fore, whether the carrying the flour to Batavia, and selling it there, was not an act of necessity to prevent a total loss to the owner. If it was, then the supercargo was justified in directing the sale.[1] . . .

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2. *Prudence.*

HEINEMANN *v.* HEARD.

50 N. Y. 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. 822) 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

[1] Accord: Dusar *v.* Perit, 4 Binney (Pa.) 361; Judson *v.* Sturges, 5 Day (Conn.) 556; Greenleaf *v.* Moody, 13 Allen (Mass.) 363; Bartlett *v.* Sparkman, 95 Mo. 136 (agent sent for one physician who is out calls another). See cases on Agency by Necessity, *ante*, pp. 147–165.

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.*[1]

THOMAS *v.* FUNKHOUSER.

91 Ga. 478. 1893.

ACTION against an agent for negligence in not keeping the plaintiff's house insured. A policy for $1,000 lapsed, and a new one was written up by the Rome (Ga.) Fire Insurance Company on September 5, 1890, but as defendant failed to call for it and pay the premium the company cancelled it. On May 6, 1891, the house burned. It was worth $1,800 and was insurable for $1,000. Verdict for defendant, under a charge which threw upon plaintiff the burden of showing that the Rome Fire Insurance Company was not liable to her.

BLECKLEY, Chief Justice. Whether tested by the general law irrespective of the particular custom which seems to have prevailed at Rome in the transaction of insurance business, or by that custom itself, there was a *prima facie* liability on the defendant to answer for the damages in the present case. He was the plaintiff's agent to keep the premises insured. She had reason to rely upon him and to believe that he had done so. Under the code, § 2794, there could be no valid contract of insurance without writing. The duty of keeping the property insured would therefore embrace the duty of seeing that some contract of insurance in writing was kept on foot. No such contract covering the period at which this loss occurred was ever consummated, though a policy was written up and might possibly have been delivered if the local custom in respect to collecting the premium had been complied with. But that was not complied with, and hence the writing up of the policy counted for nothing. It is said that it was the company's fault that the premium was not paid, because the custom was for the companies to send out bills for premiums, and in this instance no bill was sent. But it is not

[1] Accord: Whitney *v.* Martine, 88 N. Y. 535 (agent to invest made loan on second mortgage security); Samonset *v.* Mesnager, 108 Cal. 354 (improvident loan); Sawyer *v.* Mayhew, 51 Me. 398 (unenforcible insurance policy); Kinnard *v.* Willmore, 2 Heisk. (Tenn.) 619 (failure to obtain a judgment and execution upon a debt sent agent for collection); Robinson Machine Works *v.* Vorse, 52 Iowa, 207 (negligently taking notes from insolvent upon sale of principal's property).

sufficient for an agent employed to keep up insurance to put the company in fault. The owner of the property does not want any company to be put in fault, because that would most probably involve a lawsuit. What the owner wants is to have right and regular insurance kept up, so as to avoid trouble and litigation in case loss should occur. It would be unreasonable to allow an agent to turn over a lawsuit to his principal, even though a recovery might ultimately be had, instead of a proper and regular contract of insurance, at least one fully consummated with the insurance company, instead of lacking a material element of consummation according to general law and the local usage.

The court erred in not granting a new trial.

Judgment reversed.

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3. *Good Faith.*

GEISINGER *v.* BEYL.

80 Wis. 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 land.

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.

CONKEY *v.* BOND.

36 N. Y. 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 extravagant 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; Davoue *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. 327.

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.*[1]

BUNKER *v.* MILES.

30 Me. 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

[1] A sale to the agent's wife may stand on the same basis as a sale to himself. Tyler *v.* Sanborn, 128 Ill. 136; Winter *v.* McMillan, 87 Cal. 256; McNitt *v.* Dix, 83 Mich. 328; Green *v.* Hugo, 81 Tex. 452. So also a transfer by the agent to X and a transfer from X to the agent. McKay *v.* Williams, 67 Mich. 547. An insurance policy issued by an agent to himself as receiver of another's goods was held void on the ground of adverse interest in Wildberger *v.* Hartford Ins. Co., 72 Miss. 338.

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.[1]

HOLMES *v.* CATHCART.

88 Minn. 213. 1903.

ACTION to recover damages from Cathcart, as plaintiff's agent, and from the Pioneer Apartment House Company for alleged fraud committed by Cathcart in collusion with said company. The trial judge directed a verdict in favor of both defendants.

Plaintiff, who resided at Buffalo, N. Y., authorized her agent (Cathcart) in St. Paul to exchange twelve houses owned by her there for other property.

Cathcart first procured from one Horeish a proposition to exchange a brick block in St. Paul, mortgaged for $15,000, for the twelve houses, plaintiff also to pay about $1,600 overdue interest and taxes. Later Cathcart procured from Horeish an agreement to exchange the brick block, subject to the mortgage and the payment of back taxes and interest, for two of plaintiff's houses and $200 in cash; but this second offer was never communicated to plaintiff.

Cathcart then entered into some sort of an arrangement with the Pioneer Apartment House Company, by which that company agreed to advance all money necessary to pay the back taxes and interest over and above the sum of $1,000, in consideration of which it was to receive ten of the houses.

Cathcart then informed plaintiff that he could effect an exchange of her twelve houses for the Horeish block, subject to the incumbrance, interest, and taxes (plaintiff to pay $1,000, instead of $1,600, according to the previous proposition); and he subsequently informed her that the balance of the $1,600 necessary to pay the back taxes and

[1] If a sub-agent is, with consent of the principal, employed in the agency he must account to the principal for any secret profits actually received. Powell *v.* Evena, [1905] 1 K. B. 11. But neither an agent nor a sub-agent is a trustee of the agreement for secret profits, and the principal cannot have a declaration that the unpaid portion shall be paid to him. *Ibid.*; Lister *v.* Stubbs, 45 Ch. D. 1.

interest in full would be advanced by a third party, who was to receive some of the houses.

She was not informed that Horeish was willing to exchange the brick block for two of her houses and the sum of $200, subject to the mortgage and the taxes and interest. She understood all along that all of her houses were to be transferred and exchanged for that property, and she was not informed at any time that the apartment house company was to receive ten of her houses for the amount of money it was to advance.

She finally accepted this proposition, deeded the houses to the Pioneer Apartment House Company, and paid the $1,000 toward the back taxes and interest. The balance necessary to pay the same in full was paid by the apartment house company. The precise amount paid by it is not shown by the record, but it was probably in the neighborhood of $1,200 or $1,400, including a commission to Cathcart of the sum of $500.

A verdict was directed for defendants at the trial in the court below when plaintiff rested. Defendants were not required to offer any evidence, and the facts in defence of the action, or upon which they would rely if required to defend, do not appear. This action was brought against both defendants, — Cathcart, the agent, and the apartment house company, — on the theory that those parties were in collusion, and that plaintiff was entitled to recover against both for any damage she had suffered for the failure of her agent to disclose to her all the material facts in reference to the exchange of the properties.

BROWN, J. (after stating the facts). The evidence is insufficient, perhaps, to show a collusive agreement between the defendants, though it is somewhat strange, or at least not wholly clear, that the apartment house company should receive ten of plaintiff's houses for the nominal consideration of about $1,200, when they were worth at least the sum of $4,000. But at the trial below defendants joined in a motion to direct a verdict, which motion was granted; and, if the court erred in granting the motion as to either, a reversal must apply to both, and the case will be left as though no trial had ever been had, and must be tried again as to both defendants.

The theory on which the learned court below directed a verdict was that the plaintiff had not been injured by any act on the part of defendants, and she could not recover; that, as she was willing to part with all her houses in exchange for the brick block, it was immaterial to whom they were in fact deeded, — whether to Horeish or to the apartment house company; that she lost nothing by the transaction, and has no cause of action. We think the court was in error. It is not controlling whether plaintiff was willing, or not, to made the exchange on the terms proposed to her. The action involves the duty of an agent when acting for his principal, and whether he

performed that duty in accordance with the law. The principal may authorize his agent to sell or exchange his property, but it does not necessarily follow that the agent, by carrying out the specific instructions given him, fully performs his duty, and is relieved from liability. He is bound to the exercise of the most perfect good faith, and to keep his principal informed of facts coming to his knowledge affecting his rights and interests. If, after receiving instructions to sell property on certain specified terms, the agent learns that other and more advantageous terms can be obtained, it is his plain duty, and he is under every legal and moral obligation, to communicate the facts to the principal, that he may act advisedly in the premises. As stated by Chief Justice GILFILLAN in Hegenmyer *v.* Marks, 37 Minn. 6, 32 N. W. 785:[1] "Upon this contract of agency, we are of the opinion that when the agent learned of a fact affecting the value of the property, and of which fact he knew the principal was ignorant when she fixed the price, and if the agent had reason to believe that, had she known the fact, she would have fixed a higher price, then good faith towards his principal required 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 upon her." That case is in accord with the unanimous voice of the authorities. Mechem, Ag. § 538; 1 Am. & Eng. Enc. Law (2d ed.), 1069; Arrott *v.* Brown, 6 Whart. 9; Devall *v.* Burbridge, 4 Watts & S. 305; Harvey *v.* Turner, 4 Rawle, 223; Tilleny *v.* Wolverton, 46 Minn. 256, 48 N. W. 908.

Plaintiff was not informed at any time prior to the closing up of the transaction that she could obtain the brick block for two of her houses and the payment of about $1,600 in money, and the question arises whether defendant Cathcart should have communicated that fact to her. If, as now claimed by plaintiff, that bargain was a better one for her, — more beneficial in its results, — it was the clear duty of Cathcart to communicate the facts to her; and if, by his failure to do so, plaintiff was damaged, she is entitled to recover whatever loss she actually suffered. Whether defendant did fail in his duty in this respect is, of course, a question of fact, which we do not attempt to pass upon; but we do hold that the evidence offered by plaintiff on the trial was such as to require a finding on the question by the trial court, or the submission of the same to a jury. The measure of her relief would be the actual damage suffered in consequence of defendant's failure of duty. The case must therefore be reversed.

It was also claimed by plaintiff that she was entitled to the commission received by defendant Cathcart, her agent, and that the

[1] *Post*, p. 523.

court erred in holding otherwise. It appears, without dispute, that Cathcart did receive from the apartment house company a commission of $500 for his services in effecting the exchange of properties. We do not concur with plaintiff's counsel, however, that plaintiff is entitled to any portion of it. The evidence disclosed by the record fairly shows that plaintiff contemplated that defendant should receive some sort of a commission, and this is clearly shown by the correspondence between the parties. As a condition to the acceptance of the final offer to exchange the properties, she distinctly stated that it must include all commissions to be received or claimed by Cathcart. It therefore appears from the record that Cathcart was entitled to negotiate for and accept and receive a commission for his services in the premises, and this with the knowledge and consent of plaintiff. And having done so with her express consent, he is entitled to retain the same.

Order reversed and new trial granted.

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4. *Accounting.*

MACKENZIE *v.* JOHNSTON.

4 Madd. 373. 1819.

BILL for an account against agents who received from plaintiff certain earthenware to be sold in India. Demurrer on the ground that plaintiff's remedy was at law.

Sir JOHN LEACH, V. C. The defendants here were agents for the sale of the property of the plaintiff, and wherever such a relation exists, a bill will lie for an account. The plaintiff can only learn from the discovery of the defendants how they have acted in the execution of their agency; and it would be most unreasonable that he should pay them for that discovery, if it turned out that they had abused his confidence; yet such must be the case if a bill for relief will not lie.

Demurrer overruled.[1]

[1] A bill in equity will lie for an account against an agent based upon the obligation to render an account. Marvin *v.* Brooks, 94 N. Y. 71; Warren *v.* Holbrook, 95 Mich. 185; Weaver *v.* Fisher, 110 Ill. 146; Rippe *v.* Stodgill, 61 Wis. 38; Decell *v.* Hazelhurst & Co., 83 Miss. 346.

An action at law may, of course, be had at the election of the principal. In Britton *v.* Ferris, 171 N. Y. 235 (an action at law) it was held that the agents could not set off as a counterclaim a debt against the principal purchased by them of a third person. In Dodge *v.* Hatchett, 118 Ga. 883, it was held that when a principal has shown that his property has been sold by the agent the burden is shifted to the agent to show that he has accounted or why he is not liable. See also Farmers' Warehouse Ass'n *v.* Montgomery, 92 Minn. 194.

DECELL *v.* HAZLEHURST OIL, ETC., CO.

83 Miss. 346. 1904.

BILL by W. A. Decell against the Hazlehurst Oil Mill & Fertilizer Company. From a decree overruling a demurrer to the bill, defendant appeals.

CALHOON, J. The bill of appellant calls on Decell to account as its agent for money, etc., misappropriated by him in his prosecution of that agency. It sets up that it had two businesses — one as an oil mill, on which, on a misconstruction of the law, it had not paid the privilege tax; and the other as a fertilizer company, on which it had paid the privilege tax, and it is on the fertilizer business it charges misappropriation and demands accounting. Decell demurred on the ground that appellant was one corporation simply, with two branches of business, and, as shown by the bill, had but one set of books, and the nonpayment of the privilege tax was a complete defence to the claims of either branch of the business, and on the ground that there was a complete remedy at law. The court took jurisdiction, and decreed that Decell should account, and we will not disturb the decree on the ground of want of jurisdiction. Mr. Decell is compellable to account with appellant on both branches of its business for what he did as agent. The law making void the contract of those in reference to their business carried on in disregard of the privilege tax act does not shield Mr. Decell. It has no reference to the dealers *inter sese* and their agents in the conduct of their business. It does not authorize or condone embezzlement, nor prevent partners or stockholders from requiring honest settlements among themselves or from their agents. One engaged or employed in the business cannot set up the statute the design of which was to get revenue by making contracts void in dealing with the outside world, not in the inside management of the business. Howe *v.* Jolly, 68 Miss. 323, 8 South. 513; Gilliam *v.* Brown, 43 Miss. 641.

Decree affirmed.

BALDWIN BROS. *v.* POTTER.

46 Vt. 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.* Elliott, 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.[1]

[1] ILLEGAL SALES GENERALLY. An agent having in his hands the proceeds of an illegal sale of his principal's property must pay it over. Gilliam *v.* Brown, 43 Miss. 641; Hertzler *v.* Geigley, 196 Pa. 419.

LOTTERIES. It seems to have been generally held that an agent who sells lottery tickets for his principal cannot be compelled to pay the money over to the principal. Lemon *v.* Grosskopf, 22 Wis. 447; Mexican Banking Co. *v.* Lichtenstein, 10 Utah, 338. It has also been held that money received by defendant upon a joint illegal adventure with the plaintiff in a lottery drawing, cannot be recovered. Goodrich *v.* Houghton, 134 N. Y. 115. But the contrary has also been held. Roselle *v.* Becks-

NORTON *v.* BLINN.

39 Oh. St. 145. 1883.

ACTION to recover from the agent the sum deposited by the principal together with the profits made therefrom in an illegal transaction in "futures." The trial court refused to charge that if the agent received such sums for his principal he was bound to pay them over upon demand even though it was agreed between them that the money first deposited should be used in an unlawful wagering transaction. Exception. Verdict and judgment for defendant. Reversed in District Court. Defendant appeals.

MCILVAINE, J. While it has ever been the policy of the law to leave the parties to an illegal transaction where it finds them by refusing relief to either in respect thereto, it has, on the other hand, never regarded property or money employed therein or produced thereby as common plunder to be seized or retained by others in no way interested in such business.

The question, however, in this case, arising on the refusal of the court of common pleas to charge the jury as requested by the plaintiff is: May an agent who has transacted illegal business for his principal and has received money belonging to his principal and accruing from such business, defend himself, in a court of law, against liability to account therefor, by showing such unlawful business and his connection therewith as such agent?

If the agent receiving such money had not been employed in conducting such business, it would seem to be quite plain, upon principles of purest morality, that he should account to his principal therefor; but where the sole employment of the agent was to manage and conduct the unlawful transactions, it seems to me a much more difficult question arises. In the latter case the agent is a *particeps criminis*. In offenses against trade, and the like, the law, regulating the administration of penal justice, does not recognize the relation of principal and agent, unless the agent be an innocent instrument merely. In such cases the guilty offenders against the law are all principals; hence, as between such, with some show of reason it might be said, that the law will afford no redress by civil remedies.

The rulings upon this question, however, have been so uniformly the other way, it becomes our duty to follow them, unless we find them totally repugnant to public policy and morality. Upon a careful

meier, 134 Mo. 380. One who as agent received lottery prize money for another was compelled to deliver it to the winner in Brady *v.* Horvath, 167 Ill. 610.

In Alexander *v.* Barker, 64 Kans. 397, it was held that the agent need not account for the rents of Indian lands which the principal had illegally seized and occupied.

examination of the authorities, we find no repugnancy — indeed they commend themselves to our judgment.

In the first place the rule which denies civil remedies in such cases applies only to the *parties* to the illegal transaction. Public policy does not require that one engaged in an unlawful enterprise should, by pleading it, shield himself from liability for the wages of his employees, agents or servants. It is enough that the rule should be enforced as between those who have some interest in the enterprise as principals.

In the second place, it is contrary to public policy and good morals, to permit employees, agents, or servants to seize or retain the property of their principal, although it may be employed in illegal business and under their control. No consideration of public policy can justify a lowering of the standard of moral honesty required of persons in these relations.

And again, if parties to an illegal contract, waive the illegality, and honestly account as between themselves, no other person can be heard to complain of such accounting. Hence, we think, that if in making such settlement one of the guilty parties should deliver property or money to an agent of another to be delivered by the agent to his principal, such agent is bound to account therefor to his principal.

A leading case on this question is Tenant *v.* Elliott, 1 Bos. and Pul. 3, where the defendant, a broker, effected an illegal insurance for the plaintiff on a ship, and after a loss the underwriters paid the amount of the insurance to the defendant, who refused to pay the same over to plaintiff, on the ground that the insurance contract was illegal. Judgment for the plaintiff. EYRE, C. J., said: "The defendant is not like a stakeholder. The question is, whether he who has received money to another's use on an illegal contract, can be allowed to retain it, and that not even at the desire of those who paid it to him? I think he cannot."

[The court also cites and discusses Brooks *v.* Martin, 2 Wall. 70;[1] Baldwin *v.* Potter, 46 Vt. 402;[2] Evans *v.* Trenton, 4 Zab. 764; Wood on M. & S. § 202; German, etc., Church *v.* Stegner, 21 Ohio St. 488.]

Judgment of district court affirmed.[3]

[1] This case is much limited by McMullen *v.* Hoffman, 174 U. S. 639.

[2] *Ante*, p. 271.

[3] Accord: Floyd *v.* Patterson, 72 Tex. 202 (money received on a gambling transaction); Hardy *v.* Jones, 68 Kans. 8 (unexpended balance of fund delivered to agent for illegal purpose); Smith *v.* Blackley, 188 Pa. 550 (money paid to agent for illegal purpose and still in his hands); Irwin *v.* Currie, 171 N. Y. 409 (money collected by attorney under illegal champertous contract to share fee with broker).

But accounting was denied against an agent who acted for plaintiffs in an illegal conspiracy to raise the price of commodities. Leonard *v.* Poole, 114 N. Y. 371. See also Bishop *v.* American Preserves Co., 157 Ill. 284, with which compare Gilbert *v.* American Surety Co., 121 Fed. Rep. 499, and Star Brewery Co. *v.* United Brewery Co., 121 Fed. Rep. 713.

HELBER *v.* SCHANTZ.

109 Mich. 669. 1896.

ASSUMPSIT by Eugene Helber against Martin Schantz. From a judgment for defendant on verdict directed by the court, plaintiff brings error.

MOORE, J. Plaintiff furnished five dollars to defendant with which to make a bet upon the result of an election. The bet was made, and Schantz won the money. He paid plaintiff five dollars, and declined to pay over the balance. Plaintiff sued him in justice's court, and recovered a judgment. The case was appealed to the circuit court. The trial judge directed a verdict for the defendant upon the ground that what occurred between the parties was a gaming transaction, and that the courts will not interfere in behalf of a party to such a transaction. The case is brought here by writ of error.

The trial judge made a proper disposition of the case.

The judgment is affirmed.

The other Justices concurred.

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5. *Appointment of Sub-Agents.*

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, 242); 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.[1]

McCROSKEY *v.* HAMILTON.

108 Ga. 640. 1899.

ACTION to dispossess tenant and recover statutory double rent since notice to quit. Denial that term had expired. Nonsuit.

Under the lease plaintiff had a right to declare a forfeiture for non-payment of rent. Defendants were in default, and one Rustin, a clerk of plaintiff's authorized agent, was sent by the agent to demand the rent and in case of non-payment to give notice to quit. Defendant claimed that Rustin was not plaintiff's agent and had no authority to give notice to quit, and, having no authority, his acts could not afterward be ratified by plaintiff.

LUMPKIN, P. J. (after stating the facts). It may be true, as matter of law, that if Rustin's acts at the time he demanded the rents and the possession of the premises were wholly unauthorized, a subsequent ratification of them by Mrs. McCroskey would not establish by relation a notice to the Hamiltons to give up the premises. 1 Am. & Eng. Enc. L. (2d ed.) 1194. "The reason is that the tenant must act upon the notice at the time it is given, and it must, therefore, at that time, be such a notice as he can act upon with security; and if authority by relation were sufficient, the tenant would be subjected to the injustice of being left in doubt as to his action until the ratification or disavowal of the principal." Brahn *v.* Jersey City Forge Co., 38 N. J. L. 74.

We agree with counsel for the defendants in error, that Rustin was not acting in the capacity of agent for Mrs. McCroskey, and consequently we do not think that the doctrine of ratification is applicable. As to this branch of the case, our views are as follows: Girardeau was unquestionably Mrs. McCroskey's agent, and as such was not only authorized but expressly directed to declare the lease forfeited upon non-compliance with its terms. He certainly could, in his own proper person, have exercised the authority conferred upon him by his principal. We are quite clear he could also do so by using his servant, and that as to this matter Rustin was nothing more. He was not, in any proper sense, a sub-agent of Girardeau, but a mere instrument. On this occasion he simply acted as the messenger of his employer. The relation between Girardeau

[1] Accord: Norwich University *v.* Denny, 47 Vt. 13; Weaver *v.* Cornell, 35 Ark. 198.

and Rustin was plainly that of master and servant. Girardeau, as agent for Mrs. McCroskey and in attending to her business, surely had the right to avail himself of the services of his own servant as a means for accomplishing the end in view. "It is a general principle that an agent's authority is construed to embrace all the means usual and necessary for its proper execution." 1 Am. & Eng. Enc. L. (2d ed.) 979-980. "A deputy possessing general powers may, in many cases, constitute another person his servant or bailiff, for the purpose of doing some particular act; provided, of course, that such act be within the scope of his own legitimate agency." Broom's Legal Maxims (7th ed.), 841. And see the instances, pertinent here, which this great author gives of the application of this rule. Girardeau, representing Mrs. McCroskey, could have sent to the Hamiltons by Rustin a written demand for the rent which had been due for more than thirty days, and could have stated therein that, in case of non-payment, they might understand that the lease was at an end. Instead of doing this, he sent Rustin to the Hamiltons with instructions what to do; and we shall presently undertake to show that this was, in substance, the same thing as sending a written demand and notice of the kind just indicated. The distinction between "servant" and "agent" is clearly pointed out in Mechem on Agency, § 2, and Wharton on Agency, § 19. According to these authorities, an agent has more or less discretion, while a servant acts under the master's control and direction. Clearly, Rustin was not invested with any discretion. He was simply to do as he was bid.[1]

The next question is: Did Girardeau direct Rustin, in case the demand for the rent was not compiled with, to declare a forfeiture of the lease? [The court then holds that Rustin was directed by the agent to demand possession in case of non-payment of the rent, and that what he did amounted to an authorized notice that plaintiff was exercising her option to terminate the lease.]

Judgment reversed.

ELDRIDGE *v.* HOLWAY.

18 Ill. 446. 1857.

PLAINTIFF authorized one Cobb, as his attorney in fact, to bring a forcible detainer suit against the defendant. By Cobb's direction, one Kales, an attorney-at-law, served a written notice upon the defendant demanding the immediate possession of the premises in controversy.

[1] See Kingan *v.* Silvers, *ante*, p. 1.

SCATES, C. J. An attorney in fact of plaintiff employed an attorney-at-law in this case, who served the written notice and demand of possession. The court excluded this evidence on the ground that delegated authority can not be delegated.

This is true as a general principle, when properly applied to the classes of cases where personal confidence is reposed, and skill, judgment, etc., are involved. Story on Agency, §§ 12, 13, 14. It was, doubtless, to obviate this literal application of the principle that the convention, out of abundant caution, inserted clause 17 of section 8, article 1, in the Constitution of the United States. 3 Story, Com. Const. §§ 1236-7. Some powers arise by implication, as incidents to others, and are essential to their exercise. So, in the performance of a general or special agency, many acts are to be performed, of an indifferent nature, which may as well be done by one person as another, and which an agent might find it extremely inconvenient to be compelled to perform personally. The maxim withholding the power of subdelegation of authority only has place when there is an object, an end to be gained — where the interest of the principal may be neglected or injured by substitution. When, from the nature of the act to be done, there can be no difference, the principle can not apply.

Such is the case here. There is neither confidence, skill, discretion or judgment required to deliver a written notice, and make oath of it, which could prevent the employment of any one by an agent. The service of declarations in ejectment, notices to take depositions, and a great variety of acts now done by attorneys' clerks and others, would fall under the same rule contended for, and compel attorneys to do such acts personally.

An attorney may serve such notice and demand, and we perceive no reason why an agent, to bring suit, may not employ an attorney. Agents, as such, can not appear in courts for parties. Where agents are not licensed as attorneys, they must employ attorneys to appear for the client in the courts.

The act here falls strictly within a class which may be done by such supposed subdelegation. It is rather the true and only mode of acting out an agency when an attorney becomes necessary, than a subdelegation of power.

Had the agency here been an attorneyship, it might present another question — one involving a question of confidence reposed, or skill and judgment — which could not be transferred. But the agency does not appear to be of that character.

Judgment reversed and cause remanded.

Judgment reversed.

FRANKLIN FIRE INS. CO. *v.* BRADFORD.

201 Pa. St. 32. 1901.

ACTION against an agent for loss occasioned to the principal through the disobedience of the agent. The trial judge directed a verdict for defendant.

DEAN, J. The defendant, Thomas Bradford, was a duly-appointed agent of the Franklin Fire Insurance Company at New Brighton, Pa., with authority to effect insurance, countersign, issue, and renew policies signed by the president and attested by the secretary at the office of the company in Philadelphia, to fix premium rates, receive money, and in general to attend to all the business of the company at New Brighton and the neighboring region, subject, however, to the rules, regulations of, and such instructions as might from time to time be given him by the general officers of the company. The appointment was made in 1887, and Bradford continued to act under it until January 1, 1897. By their terms policies had no force until countersigned by Bradford, the local agent. During his agency Bradford employed a sub-agent, — one Hoyt, — who was given by him general charge of Bradford's insurance business, and had access to all documents and blank policies, and was an occupant of his office in New Brighton. As such sub-agent for Bradford, he solicited policies, fixed rates, collected premiums, and filled blanks in policies, made daily reports to the company, and signed Bradford's name to them. A short time before July 1, 1896, J. and E. Mayer, owners of a pottery at Beaver Falls, wrote to Bradford, asking to renew insurance of $15,000, which Bradford had before that taken on their pottery for one year in the Franklin and other companies, of which he was also agent, which policies were about to expire. In response to the letter, Hoyt went to the place of business of the pottery company, and delivered to the company policies aggregating $15,000, to run for one year, to take the place of those about to expire. Among the renewal policies was one for $2,000 in the Franklin Company, this appellant. The policy was signed by the president and attested by the secretary. It was also countersigned with the name of Thomas Bradford, agent. The total premiums on the whole $15,000 were paid by one check in the sum of $225 drawn by the Mayers and the pottery company, and payable to the order of Thomas Bradford. This check was deposited to the general account of Bradford in the National Bank of New Brighton. The amount of premium paid on this policy was $30.

On the 21st of October following, within the year, the pottery was destroyed by fire, and the insurance company had to pay its share

of the loss, — the $2,000 covered by the policy. It will be noticed that the policy was delivered by Hoyt to the insured on the 1st of July, 1896, but before that date the insurance company, through its general state agents, had notified Bradford to issue no policies on the pottery, such property not being considered a satisfactory risk. While daily reports of the business had been made to the company by Bradford, no report was made of this risk. Bradford's name had been countersigned on the policy by Hoyt as if Bradford himself had written it, but without express authority from him, and without his actual knowledge. We may remark here that, while the evidence shows there was no express authority to Hoyt by Bradford to sign Bradford's name to the policy, there was evidence from which such authority might have been inferred; but this is not material, in the view we take of the question. We assume that Hoyt had no such authority. But the evidence fails to show, as argued, that Hoyt committed a criminal act — that is, a forgery — when he affixed Bradford's name. "Forgery is the fraudulent making of a writing to the prejudice of another's right." Evidence of the fraudulent intent is here almost wholly lacking. Hoyt earned the premium, and the insured paid it over to Bradford, into whose account it entered, and he received the commission. Hoyt appropriated not one cent to his own use; nor does the evidence show that he benefited in the remotest degree by the act. There is no evidence indicating a fraudulent intent.

After paying the loss, the company brought this suit against Bradford to recover the amount paid, averring as a cause of action that their payment was occasioned by reason of Bradford's malfeasance and neglect of duty. The learned judge of the court below, after hearing the evidence, directed a verdict for defendant on the grounds that Bradford had no knowledge of the delivery of the policy by Hoyt, nor any knowledge of the payment by the pottery company of the premium. From judgment entered on this verdict, plaintiff now appeals, assigning for error the peremptory instruction of the court.

That Hoyt was the authorized agent of Bradford, the principal agent, is not questioned. This being the fact, the insurance company at once invokes the application of the rule: "The principal is responsible civiliter to third persons for the acts, even the tortious acts, of his agent, if done in the course of the agent's employment, although the principal did not authorize the acts, or, indeed, may have forbidden them." Railroad Co. *v.* Derby, 14 How. 468, 14 L. Ed. 502; Hower *v.* Ulrich, 156 Pa. 412, 27 Atl. 37; Brunner *v.* Telegraph Co., 151 Pa. 447, 25 Atl. 29; and many other cases. How does the court below relieve the defendant from the application of the rule? It answers: (1) Bradford had no knowledge of the delivery of the policy. (2) He had no knowledge that Hoyt received

the premium, and deposited the same in the bank to his (Bradford's) account.

That the policy, when delivered, fixed the liability of the company, cannot be doubted. In fact, that liability was judicially decided by the common pleas, and the company had to pay. True, Bradford was not a party defendant to that suit, and is not concluded by that judgment, but he is a party to this one, in which all the evidence has been heard, and we are constrained to hold that, if the same evidence had been presented then, the judgment would have been the same. We turn, then, to inquire if the reasons given by the learned judge are sufficient to sustain the judgment. Assume the fact that Bradford had no specific knowledge of the delivery of this particular policy; but Hoyt was his agent for that very purpose. He had access to the blanks in the office, and had Bradford's authority to deliver them. He was not the agent of the company, and had no authority from it. All his authority was derived from Bradford, and by reason of Bradford's authority the company was compelled to pay. What one does by another he does by himself. Hoyt, having general authority to take the blanks from the office, fill them up, and deliver them, made the act that of Bradford. It does not follow that, to be his act, he must have handed this particular blank to Hoyt, and have directed him to fill it up for the pottery company. Hoyt's general authority to fill up particular policies and receive the premiums would cover this particular act. The pottery company wrote to Bradford, asking for the insurance. In response, Hoyt took from the office the blank, filled it up, and delivered it. As to Bradford, it must be conclusively presumed that he knew that Hoyt did just what he gave him opportunity and power to do. The principal who has conferred general power on an agent cannot escape answerability for a particular act of the agent within the scope of the general power. If the business was large, and the distinct acts necessary to its transaction were numerous, it would be unreasonable to assume that the principal would have specific knowledge of each particular act. But this fact does not shield the principal. It only suggests extreme care in the selection of his agent. We hold that Bradford legally had knowledge of the act he gave his agent authority to perform.

Second. The court holds that Bradford had no knowledge that any premium had been paid to Hoyt, and credited to his account. The fact that the premium had been paid is important only in fixing the liability of the insurance company. A condition precedent to recovery is the payment by the insured of the premium. Bradford avers that Hoyt alone received the premium, and deposited it to his (Bradford's) credit in the bank; that he had no knowledge of the fact. Here again knowledge must be conclusively presumed on his part. It is highly probable that among a large number of items to his

credit in the bank he had no specific knowledge of this particular item, and he could probably say the same of most of the others. Depositors having large bank accounts generally send their agents or messengers with the funds in the shape of bills, checks, or drafts to make the deposits, and have little knowledge of the particular items. Here Hoyt made this deposit, with many others, to the credit of Bradford. Bradford had a right to know just what they were. He could, by a mere examination of his own account, have known whence came every dollar. No other had such right. If he chose not to exercise his right, to remain in ignorance, still the law will impute to him knowledge of how he became the owner of the money which stood in his name in the bank. It must be borne in mind that this is not a criminal prosecution, where knowledge might be an important element as showing intent, but is a civil suit for damages occasioned by neglect of an agent to obey the instructions of his principal. The evidence shows conclusively that Bradford flatly disobeyed the instructions of the Fire Insurance Company not to insure the pottery, and that by reason of this disobedience the company had to pay. In its most favorable aspect for defendant, he comes under the rule "that, where one of two innocent persons must suffer from the wrongful act of a third, the loss should be borne by him who put the wrongdoer in a position of trust and confidence, and thus enabled him to perpetrate the wrong."

The judgment is reversed, and venire facias de novo awarded.[1]

POWER ET AL. *v.* FIRST NATIONAL BANK.

6 Mont. 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

[1] A contrary conclusion was reached on the same facts in Bradford *v.* Hanover Fire Ins. Co., 102 Fed. Rep. 48, the court holding that Bradford had not clothed Hoyt with any apparent authority to sign the policy and deliver it to the Pottery Company and was not therefore estopped to repudiate the act of his clerk.

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 being in the deposit for collection the implied authority to employ a sub-agent, 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.

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 overdue 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, §§ 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. 243; 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, § 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.*

THORNE *v.* DEAS.

4 Johns. (N. Y.) 84. 1809.

THIS was an action on the case, for a nonfeasance, in not causing insurance to be made on a certain vessel, called the *Sea Nymph*, on a voyage from New York to Camden, in North Carolina.

The plaintiffs were co-partners in trade, and joint owners of one moiety of a brig called the *Sea Nymph*, and the defendant was sole owner of the other moiety of the same vessel. The brig sailed in ballast, the 1st December, 1804, on a voyage to Camden, in North Carolina, with William Thorne, one of the plaintiffs, on board, and was to proceed from that place to Europe or the West Indies. The plaintiffs and defendant were interested in the voyage, in proportion to their respective interests in the vessel. On the day the vessel sailed, a conversation took place between William Thorne and the defendant, relative to the insurance of the vessel, in which W. Thorne requested the defendant that insurance might be made; to which the defendant replied, "that he (Thorne) might make himself perfectly easy on the subject, for that the same should be done." About ten days after the departure of the vessel on her voyage, the defendant said to Daniel Thorne, one of the plaintiffs, "Well, we have saved the insurance on the brig." D. Thorne asked, "How so? or whether the defendant had heard of her arrival?" To which the defendant answered, "No; but that, from the winds, he presumed that she had arrived, and that he had not yet effected any insurance." On this, D. Thorne expressed his surprise, and observed, "that he supposed that the insurance had been effected immediately, by the defendant, according to his promise, otherwise, he would have had it done himself; and that, if the defendant would not have the insurance immediately made, he would have it effected." The defendant replied, that "he (D. Thorne) might make himself easy, for he would that day apply to the insurance offices, and have it done."

The vessel was wrecked on the 21st December, on the coast of North Carolina. No insurance had been effected. No abandonment was made to the defendant by the plaintiffs.

The defendant moved for a nonsuit on the ground that the promise was without consideration and void; and that, if the promise was binding, the plaintiffs could not recover, without a previous abandonment to the defendant. These points were reserved by the judge.

A verdict was taken for the plaintiffs, for one-half of the cost of the vessel, with interest, subject to the opinion of the court on the points reserved.

KENT, Ch. J., delivered the opinion of the court. The chief objection raised to the right of recovery in this case is the want of a consideration for the promise. The offer, on the part of the defendant, to cause insurance to be effected, was perfectly voluntary. Will, then, an action lie, when one party intrusts the performance of a business to another, who undertakes to do it gratuitously, and wholly omits to do it? If the party who makes this engagement, enters upon the execution of the business, and does it amiss, through the want of due care, by which damage ensues to the other party, an action will lie for this misfeasance. But the defendant never entered upon the execution of his undertaking, and the action is brought for the nonfeasance. Sir William Jones, in his "Essay on the Law of Bailments," considers this species of undertaking to be as extensively binding in the English law, as the contract of mandatum in the Roman law; and that an action will lie for damage occasioned by the non-performance of a promise to become a mandatary, though the promise be purely gratuitous. This treatise stands high with the profession, as a learned and classical performance, and I regret, that, on this point, I find so much reason to question its accuracy. I have carefully examined all the authorities to which he refers. He has not produced a single adjudged case; but only some dicta (and those equivocal) from the year books, in support of his opinion; and was it not for the weight which the authority of so respectable a name imposes, I should have supposed the question too well settled to admit of an argument. (See the note to Edwards *v.* Davis, 16 Johns. Rep. 283.)

A short review of the leading cases will show, that, by the common law, a mandatary, or one who undertakes to do an act for another, without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do it, and does it amiss. In other words, he is responsible for misfeasance, but not for nonfeasance, even though special damages are averred. Those who are conversant with the doctrine of mandatum in the civil law, and have perceived the equity which supports it, and the good faith which it enforces, may, perhaps, feel a portion of regret that Sir William Jones was not successful in his attempt to ingraft this doctrine, in all its extent, into the English law. I have no doubt of the perfect justice of the Roman rule, on the ground, that good faith ought to be observed, because the employer, placing reliance upon that good faith in the mandatary, was thereby prevented from doing the act himself, or employing another to do it. This is the reason which is given in the Institutes for the rule: *Mandatum non suscipere cuilibet liberum est; susceptum autem consummandum est, aut quam primum renunciandum, ut per semetipsum aut per alium, eandem rem mandator exequatur.* (Inst. lib. 3. 27. 11.) But there are many rights of moral obligation which civil laws do not enforce,

and are, therefore, left to the conscience of the individual as rights of imperfect obligation; and the promise before us seems to have been so left by the common law, which we cannot alter, and which we are bound to pronounce.

The earliest case on this subject is that of Watson *v.* Brinth, Year Book, 2 Hen. IV. 3 b, in which it appears that the defendant promised to repair certain houses of the plaintiff and had neglected to do it, to his damage. The plaintiff was nonsuited, because he had shown no covenant; and Brincheley said, that if the plaintiff had counted that the thing *had been commenced, and afterwards, by negligence, nothing done,* it had been otherwise. Here the court, at once, took the distinction between nonfeasance and misfeasance. No consideration was stated, and the court required a covenant to bind the party.

In the next case, 11 Hen. IV. 33 a, an action was brought against a carpenter, stating that he had undertaken to build a house for the plaintiff, within a certain time, and had not done it. The plaintiff was also nonsuited, because the undertaking was not binding without a specialty; but, says the case, *if he had undertaken to build the house, and had done it illy or negligently,* an action would have lain, without deed. Brooke, Action sur le Case, pl. 40, in citing the above case, says, that "it seems to be good law to this day; wherefore the action upon the case which shall be brought upon the assumption, must state that for such a sum of money to him paid, etc., and that in the above case, it is assumed, that there was no sum of money, therefore it was a *nudum pactum.*"

The case of 3 Hen. VI. 36 b, is one referred to, in the "Essay on Bailments," as containing the opinion of some of the judges, that such an action as the present could be maintained. It was an action against Watkins, a mill-wright, for not building a mill according to promise. There was no decision upon the question, and in the long conversation between the counsel and the court there was some difference of opinion on the point. The counsel for the defendant contended that a consideration ought to have been stated; and of the three judges who expressed any opinion, one concurred with the counsel for the defendant, and another, Babington, Ch. J., was in favor of the action, but he said nothing expressly about the point of consideration, and the third, Cokain, J., said, it appeared to him that the plaintiff had so declared, for it shall not be intended that the defendant would build the mill for nothing. So far is this case from giving countenance to the present action, that Brooke, Action sur le Case, pl. 7, and Contract, pl. 6, considered it as containing the opinion of the court that the plaintiffs ought to have set forth what the miller was to have for his labor, for otherwise it was a *nude pact;* and in Coggs *v.* Bernard, 2 Ld. Ray. 909, Mr. Justice Gould gave the same exposition of the case.

The general question whether assumpsit would lie for a nonfeasance, agitated the courts in a variety of cases, afterwards, down to the time of Hen. VII. 14 Hen. VI. 18 b, pl. 58; 19 Hen. VI. 49 a, pl. 5; 20 Hen. VI. 34 a, pl. 4; 2 Hen. VII. 11, pl. 9; 21 Hen. VII. 41 a, pl. 66. There was no dispute or doubt, but that an action upon the case lay for a misfeasance in the breach of a trust undertaken voluntarily. The point in controversy was, whether an action upon the case lay for a nonfeasance, or non-performance of an agreement, and whether there was any remedy where the party had not secured himself by a covenant or specialty. But none of these cases, nor, as far as I can discover, do any of the dicta of the judges in them, go so far as to say, that an assumpsit would lie for the nonperformance of a promise, without stating a consideration for the promise. And when, at last, an action upon the case for the nonperformance of an undertaking came to be established, the necessity of showing a consideration was explicitly avowed.

Sir William Jones says, that "a case in Brooke, made complete from the Year Book to which he refers, seems directly in point." The case referred to is 21 Hen. VII. 41, and it is given as a loose *note* of the reporter. The chief justice is there made to say, that if one agree with me to build a house by such a day, and he does not build it, I have an action on the case for this nonfeasance, equally as if he had done it amiss. Nothing is here said about a consideration; but in the next instance which the judge gives of a nonfeasance for which an action on the case lies, he states a consideration paid. This case, however, is better reported in Keilway, 78, pl. 5, and this last report must have been overlooked by the author of the "Essay." Frowicke, Ch. J., there says, "that if I covenant with a carpenter to build a house, and pay him £20 to build the house by a certain day, and he does not do it, I have a good action upon the case, *by reason of the payment of my money; and without payment of the money in this case,* no remedy. And yet, if he make the house in a bad manner an action upon the case lies; and so for the nonfeasance, *if the money be paid,* action upon the case lies."

There is, then, no just reason to infer, from the ancient authorities, that such a promise as the one before us is good, without showing a consideration. The whole current of the decisions runs the other way, and, from the time of Henry VII. to this time, the same law has been uniformly maintained.

The doctrine on this subject, in the "Essay on Bailments," is true, in reference to the civil law, but is totally unfounded in reference to the English law; and to those who have attentively examined the head of Mandates, in that essay, I hazard nothing in asserting that that part of the treatise appears to be hastily and loosely written. It does not discriminate well between the cases; it

is not very profound in research, and is destitute of true legal precision.

But the counsel for the plaintiffs contended that if the general rule of the common law was against the action, this was a commercial question, arising on a subject of insurance, as to which a different rule had been adopted. The case of Wilkinson *v.* Coverdale, 1 Esp. Rep. 75, was upon a promise to cause a house to be insured, and Lord Kenyon held that the defendant was answerable only upon the ground that he had proceeded to execute the trust, and had done it negligently. The distinction, therefore, if any exists, must be confined to cases of marine insurance. In Smith *v.* Lascelles, 2 Term Rep. 188, Mr. Justice Buller said it was settled law, that there were three cases in which a merchant, in England, was bound to insure for his correspondent abroad.

1. Where the merchant abroad has effects in the hands of his correspondent in England, and he orders him to insure.

2. Where he has no effects, but, from the course of dealing between them, the one has been used to send orders for insurance, and the other to obey them.

3. Where the merchant abroad sends bills of lading to his correspondent in England, and engrafts on them an order to insure, as the implied condition of acceptance, and the other accepts.

The case itself, which gave rise to these observations, and the two cases referred to in the note to the report, were all instances of misfeasance, in proceeding to execute the trust, and in not executing it well. But I shall not question the application of this rule, as stated by Buller, to cases of nonfeasance, for so it seems to have been applied in Webster *v.* De Tastet, 7 Term Rep. 157. They have, however, no application to the present case. The defendant here was not a factor or agent to the plaintiffs, within the purview of the law-merchant. There is no color for such a suggestion. A factor, or commercial agent, is employed by merchants to transact business abroad, and for which he is entitled to a commission or allowance. Malyne 81; Beawes 44. In every instance given, of the responsibility of an agent for not insuring, the agent answered to the definition given of a factor who transacted business for his principal, who was absent, or resided abroad; and there were special circumstances in each of these cases, from which the agent was to be charged; but none of those circumstances exist in this case. If the defendant had been a broker, whose business it was to procure insurances for others, upon a regular commission, the case might, possibly, have been different. I mean not to say that a factor or commercial agent cannot exist, if he and his principal reside together at the same time, in the same place; but there is nothing here from which to infer that the defendant was a factor, unless it be the business he assumed to perform, viz., to procure the insurance of

a vessel, and that fact alone will not make him a factor. Every person who undertakes to do any specific act, relating to any subject of a commercial nature, would equally become, *quoad hoc,* a factor; a proposition too extravagant to be maintained. It is very clear, from this case, that the defendant undertook to have the insurance effected, as a voluntary and gratuitous act, without the least idea of entitling himself to a commission for doing it. He had an equal interest in the vessel with the plaintiffs, and what he undertook to do was as much for his own benefit as theirs. It might as well be said that, whenever one partner promises his co-partner to do any particular act for the common benefit, he becomes, in that instance, a factor to his co-partner, and entitled to a commission. The plaintiffs have, then, failed in their attempt to bring this case within the range of the decisions, or within any principle which gives an action against a commercial agent, who neglects to insure for his correspondent. Upon the whole view of this case, therefore, we are of opinion, that the defendant is entitled to judgment.

Judgment for the defendant.[1]

SHIELLS *v.* BLACKBURNE.

1 H. Bl. (C. P.) 159. 1789.

ACTION to recover the value of leather wrongly entered by defendant at the custom house and seized by the government. Defendant, who was entering his own leather, gratuitously undertook to enter plaintiff's also, and entered both parcels under the denomination of "wrought leather" instead of "dressed leather." Both were seized and forfeited for this error. Verdict for plaintiff.

A rule was obtained to show cause why the verdict should not be set aside, and a new trial granted, on the ground that the defendant not professing the business of entering goods at the custom house, having undertaken to enter those in question without reward, and having taken the same care of them as of his own, was not liable for the loss.

LORD LOUGHBOROUGH.[2] I agree with Sir William Jones, that where a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, there the bailee is only liable for gross negligence; but if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is

[1] Defendant gratuitously undertook to effect new insurance on plaintiff's property and to give notice to prior insurer. He effected the insurance but failed to give the notice and plaintiff suffered loss thereby. Held, as defendant had entered on performance he was liable for negligence as to what was unfulfilled. Baxter & Co. *v.* Jones, 6 Ont. L. R. 360.

[2] The concurring opinions of HEATH, J., and WILSON, J., are omitted.

such as to imply skill, an omission of that skill is imputable to him as gross negligence. If in this case a ship-broker, or a clerk in the custom house, had undertaken to enter the goods, a wrong entry in them would be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries; but when an application, under the circumstances of this case, is made to a general merchant to make an entry at the custom house, such a mistake as this is not to be imputed to him as gross negligence.

Rule absolute for new trial.[1]

DELANO *v.* CASE.

121 Ill. 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.*

[1] See Stanton *v.* Bell, 2 Hawks (N. C.) 145; Grant *v.* Ludlow's Adm'r, 8 Oh. St. 1; Williams *v.* Higgins, 30 Md. 404.

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

141 N. Y. 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 centre, 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, § 182 a; 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. Marwin *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. *General Doctrine.*

NEW YORK IRON MINE *v.* FIRST NATIONAL BANK OF NEGAUNEE.

39 Mich. 644. 1878.

Cooley, J. The plaintiff in error is sued as maker of three promissory notes [1] and endorser of a fourth.[2] . . . By reference to these notes it will be seen that the name of plaintiff in error is subscribed or endorsed by W. L. Wetmore, and the contest has been made over his authority to make use of the name of plaintiff in error as he has done. The New York Mine is a corporation, having its place of operations at Ishpeming in this state. It was organized some fourteen years ago, with Samuel J. Tilden and William L. Wetmore as corporators. Mr. Tilden has had the principal interest from the first, and has always acted as president and treasurer, keeping his office in New York City. Mr. Wetmore has always, until this controversy arose, acted as general agent with his office at Ishpeming. The board of direction has been made up of these gentlemen with some nominal holders of stock in New York City as associates. Meetings of the board appear to have been held very seldom, and the whole business of the company has been done by Mr. Wetmore and Mr. Tilden, the latter looking after the finances, and visiting Ishpeming only twice or three times during the whole period of the corporate existence. Mr. Wetmore hired and paid all the miners and other laborers, and transacted such other business as is usually taken charge of by a general agent whose principal is at a distance. As such agent he has paid out in all upwards of $3,000,000, the pay-

[1] All three notes were made payable "to the order of Wetmore & Bro.," signed "New York Iron Mine. By W. L. Wetmore," and endorsed, "Wetmore & Bro."

[2] By this note the "Munising Iron Company" promised to pay "to the order of New York Iron Mine"; it was signed "E. P. Williams, Secretary," and "W. L. Wetmore, President," and endorsed "New York Iron Mine. By W. L. Wetmore."

ments being generally made in drafts on Mr. Tilden, or in the proceeds of such drafts. For a while the drafts were on time, but latterly the financial condition of the corporation has been easy, and only sight drafts have been drawn. The firm of Wetmore & Bro. named in the three notes purporting to be made by the New York Mine, was composed of William L. and F. P. Wetmore, and there was evidence that the New York Mine had had business transactions with that firm to the amount in all of $125,000. The Munising Iron Company was a corporation of which W. L. Wetmore, as its note shows, was the president.

It was not claimed on the trial that there had ever been any corporate action expressly empowering Wetmore as general agent to make promissory notes, nor did it appear that he had ever executed any in its name except a few as hereinafter stated. Some evidence was put in which it was claimed had a tendency to show the existence of a general custom in the mining region for the general agents of mining companies to make promissory notes in the names of their principals without special authorization, but as there was no showing that authority was not generally given, the attempt was a manifest failure. It was also insisted on the part of the plaintiff that as matter of law, the general agent of a mining corporation by virtue of his appointment as such had authority to bind it by commercial paper, and that the court must take notice of his authority, as they must of the authority of the cashier of a bank, the master of a vessel, or other known agents. Adams Mining Co. *v.* Senter, 26 Mich. 73, 76. On the other hand the defence contended that the authority to issue commercial paper was not implied in any general agency, and when conferred must be strictly construed, and in its exercise strictly limited to its exact terms; and that an authority to draw bills would not authorize the making of notes. And it was further contended that even if authority to make notes was implied, the particular notes in suit were presumptively not within the authority; three of them being drawn by Wetmore as agent, payable to the order of a partnership of which he was one of the members, and *prima facie* for the benefit of that partnership, while the other like these was made by Wetmore in one capacity and endorsed by him in another, so that apparently he was dealing with himself in making and negotiating all of them.

It was not disputed by the defence that the corporation as such had power to make the notes in suit. The question was whether it had in any manner delegated that power to Wetmore. We cannot agree with the plaintiff that the mere appointment of general agent confers any such power. White *v.* Westport Cotton Manf'g Co., 1 Pick. 215, is not an authority for that position, nor is any other case to which our attention has been invited. In McCullough *v.* Moss, 5 Denio, 567, the subject received careful attention, and it

was held that the president and secretary of a mining company, without being authorized by the board of directors so to do, could not bind the corporation by a note made in its name. Murray *v.* East India Co., 5 B. & Ald. 204; Benedict *v.* Lansing, 5 Denio, 283; and The Floyd Acceptances, 7 Wall. 666, are authorities in support of the same view. The plaintiff, then, cannot rest its case on the implied authority of the general agent; the issuing of promissory notes is not a power necessarily incident to the conduct of the business of mining, and it is so susceptible of abuse to the injury, and indeed to the utter destruction of a corporation, that it is wisely left by the law to be conferred or not as the prudence of the board of direction may determine.

But it was further insisted on the part of the plaintiff that though Wetmore may never have had the corporate authority to make notes in the corporate name, yet that the course of business was such, with the express or implied assent of Mr. Tilden, as to lead the public to suppose that his authority was ample, and that this course of business should be conclusive in favor of those who had taken the notes in good faith relying upon it. In support of this position evidence was given that Wetmore was in the practice of taking notes from the creditors of the corporation, and procuring them to be discounted on his indorsement as general agent; and it appeared that the note of $1,000 counted on in this case was made for a balance remaining unpaid on a much larger note made by the Munising Iron Company payable to the order of defendant and discounted by the plaintiff. And on this part of the case we are of opinion that enough appeared to warrant the jury in finding that this practice of Wetmore to indorse the paper of the company for collection or discount was known to Mr. Tilden and not objected to by him; that parties taking such paper had a right to believe the indorsement was authorized, and that it was made in the interest of defendant, and not in fraud of its rights.

It was also shown that within the three or four years preceding the commencement of this suit Wetmore had made a few notes in the name of the defendant which he had procured to be discounted. But it was not shown that Mr. Tilden knew of the making of any of these notes until a short time before this suit was brought, and his evidence, taken on commission, was offered to show that when the existence of such notes first came to his knowledge, he took immediate steps to remove Mr. Wetmore from his agency, and to have notice given to the parties concerned that the notes were issued without any authority whatever, and would not be recognized. This evidence, on objection for the plaintiff, was ruled out.

So far as we can judge from this record, there is no ground for the suggestion that Mr. Tilden had knowledge that such notes were being issued, or any reason to suspect that such was the fact. It

seems probable that Wetmore made the notes in his own interest, or in the interest of some other concern with which he was connected, and not in the interest of the New York Mine. Nor do we think there was anything in the course of the business as it had previously been conducted by him that should have led parties to take such notes without inquiry. It had been customary to transmit to Mr. Tilden the bills receivable and all moneys, and to draw against them in paying demands against the company, and in providing funds to meet its current necessities; but this was a suitable, proper and prudent mode of doing the corporate business, and tended rather to negative than to support the existence of any authority in Wetmore to make notes. Indeed, it is difficult to understand how the putting out of notes could have been either necessary or convenient. Time drafts would accomplish quite as well any honest purpose that could have existed for making them, without at the same time exposing the corporation to the same risks; for the drafts would necessarily go forward to the financial officer of the corporation for payment, and would appear when paid, in the corporate accounts, while the notes, if fraudulently issued, might be kept from that officer's knowledge for a long time, perhaps for years, and, if the fraud was successfully carried out, perhaps permanently.

But it is further insisted on the part of the plaintiff that the defendant corporation is chargeable with negligence in suffering Wetmore to manage the business independently as he did for so long a period, and that this negligence was so gross and so likely to mislead as to call for the application of the familiar and very just principle, that where one of two innocent parties must suffer from the dishonesty of a third, that one shall bear the loss who by his negligence has enabled the third to occasion it. Merchants Bank *v.* State Bank, 10 Wall. 604; Bank of United States *v.* Davis, 2 Hill, 465; Holmes *v.* Trumper, 22 Mich. 427-434; Farmers' etc. Bank *v.* Butchers' etc. Bank, 16 N. Y. 133; Welland Canal Co. *v.* Hathaway, 8 Wend. 480; N. Y. & N. H. R. R. Co. *v.* Schuyler, 34 N. Y. 30.

While the principle invoked is a very just and proper one, it is one that must be applied with great circumspection and caution. Any person may be said to put another in a position to commit a fraud when he confers upon him any authority which is susceptible of abuse to the detriment of others; but if the authority is one with which it is proper for one man to clothe another, negligence cannot be imputed to the mere act of giving it. Any one who entrusts to another his signature to a written instrument furnishes him with a means of perpetrating a fraud by an unauthorized alteration or other improper use of it. But if the instrument was a proper and customary instrument of business, and has been issued without fraudulent intent in a business transaction, there is no more reason

for imposing upon the maker the consequences of a fraudulent use of it than there is for visiting them upon any third person. In other words, it is not the mere fact that one has been the means of enabling another to commit a fraud that shall make him justly chargeable with the other's misconduct; but there must be that in what he has done or abstained from doing that may fairly be held to charge him with neglect of duty.

If neglect of duty is imputed in this case, it is important to know in what it consists. The argument made for the plaintiff directs our attention to the following facts:

1. Mr. Tilden and Mr. Wetmore were the sole corporators having substantial interests, and, without any supervision by Mr. Tilden, Mr. Wetmore has been suffered for many years to manage the business at the mine as he pleased; the public dealing with no other person, either natural or artificial, and having no reason to suppose that any one was reserving from Mr. Wetmore any authority, or questioning his power to act for the corporation and make use of its name and its credit to the full extent that any one might use them under corporate authority. And the making of promissory notes is an act so similar in all respects to that of drawing bills, and so likely to be conferred where the other is given, that one might fairly infer its existence in this case in view of the extensive use made by Wetmore of bills in the corporate business.

2. Mr. Tilden and Mr. Wetmore have conducted the corporate business as if they were partners; Mr. Wetmore exercising unlimited authority at one place and Mr. Tilden at the other; and the public had a right to suppose that they were trusting each other to the full extent that partners do and must; and therefore that Mr. Wetmore might bind himself and Mr. Tilden, — or what is the same thing — might bind the corporation, by notes in its name.

3. These views are strengthened by the fact that the corporators did not for years hold corporate meetings or go through the ordinary corporate forms of election, as they should have done, and would be expected to do if they expected to insist upon the application of strict rules in the corporate dealings with others.

These are the facts which are supposed to have enabled Mr. Wetmore to impose upon the public with an appearance of authority which had not been conferred upon him. So far as the neglect to hold corporate meetings or to go through corporate forms is concerned, there is no ground for making it cut any figure in the case. It does not appear that this plaintiff was influenced by any such neglect or knew anything about it; and from anything that appears their action would not have been affected by it in any way. It is therefore a fact entirely foreign to this controversy.

Neither do we perceive that the fact that Tilden and Wetmore conducted their business as if they were partners concerns this

plaintiff in any manner. If Wetmore had dealt with the plaintiff in the character of a partner, and had by Mr. Tilden's course been enabled to deceive the bank officers into the belief that they were partners, the case would be different. But the plaintiff has dealt with no partnership; the notes sued upon were given as corporate notes, taken as corporate notes, and are now sued upon as corporate notes. The plaintiff must therefore make out a corporate liability; and as Wetmore gave the notes assuming to be empowered thereby to pledge the corporate credit, it is of no importance whatever that perhaps he might have pledged his associate as a partner and had attempted to do so, and had the plaintiff taken from him paper that purported to be the paper of partners. For the purposes in this case it is sufficient to say that it is not the case the pleadings make.

Nevertheless the plaintiff is perfectly right in the argument that the corporation must be held responsible for any appearances which these two corporators held out to the public whereby the plaintiff has been deceived to its prejudice. The plaintiff is therefore entitled to all that can be claimed from Mr. Wetmore's course of business as general agent, so far as it was known to Mr. Tilden. Now Mr. Tilden knew that Mr. Wetmore was managing the business as general agent with little or no supervision by any one; but it would be very dangerous to hold that this should charge him with Mr. Wetmore's frauds. There was nothing in this that might not happen in any case where the business was conducted by an agent at a distance from his principal; say by an agent in New York for his principal in London, or by an agent in San Francisco for a principal in one of the Atlantic cities. Mr. Tilden also knew that Mr. Wetmore was drawing and negotiating bills upon him in the name of the corporation; but this was a proper and customary mode of dealing as between principal and agent, and we see nothing in it calculated to mislead any one into the supposition that Mr. Wetmore was empowered to do for the company any thing not customary for such agents to do, and not included in the authority Mr. Tilden knew Mr. Wetmore to be exercising.

But before the maxim which the plaintiff invokes can be applied to the case, it is necessary to determine not only that fault is imputable to the defendant, but also that the plaintiff is free from negligence. There must be one innocent party and one negligent party before the requirements of the maxim are answered; and the conduct of the plaintiff is therefore as important as that of the defendant. Was the plaintiff in this case free from negligence in discounting the three $5,000 notes? In law the officers of the bank must be held to have known that Mr. Wetmore had no right to make such paper without express authority, and we look in vain for any evidence that they demanded proof of such authority, or extended their inquiries beyond the agent himself. Moreover, there was that

on the face of these notes to suggest special caution; they were made by Mr. Wetmore in one capacity to himself and his associate in another capacity, and they indicated, or at least suggested, an interest on his part in making them which was adverse to the interest of his principal.

The notes also bore the largest interest admissible under our statutes; and this fact, in the case of a corporation whose credit was such that its paper would be readily discounted, and having its office in the city of New York, might well have arrested attention. We do not think that when the bank discounted such paper without inquiry into the authority of Wetmore, it gave such evidence of prudence and circumspection as placed it in position to complain of Mr. Tilden's course of business as negligent. A fair statement of the case for the plaintiff is that both parties have been overtrustful in their dealings with Mr. Wetmore; the defendant not more so than the plaintiff. Unfortunately for the plaintiff, the consequences of the overtrust have fallen upon its shoulders.

The circuit judge in his instructions to the jury assumed that there was evidence in the case from which they might find that Wetmore was held out to the public as possessing the authority he assumed to exercise. We find no such evidence and there must therefore be a new trial. The case of the $1,000 note is different, as already explained. . . .

The judgment must be reversed with costs, and a new trial ordered.

The other Justices concurred.

STAINER *v.* TYSEN.

3 Hill (N. Y.) 279. 1842.

Action on a promissory note payable to the order of George W. Tysen & Co., by whom it was endorsed to the plaintiff. The note purported on its face to have been made by the defendant David I. Tysen, by George W. Tysen, his attorney. It appeared on the trial that before the making of the note the defendant had executed a letter of attorney constituting George W. Tysen his agent, among other things, "to draw and endorse checks, notes and bills of exchange in my name." The note in question was given under the following circumstances: Prior to its date, George W. Tysen — then a member of a firm styled George W. Tysen & Co., which was largely indebted to the plaintiff and insolvent — applied to the plaintiff in behalf of his firm for a compromise. Terms were agreed upon, and George W. Tysen made and delivered the note by way of perfecting

the compromise. It was not pretended that the defendant was connected with the firm of George W. Tysen & Co.; indeed, it was expressly admitted by the plaintiff's attorney at the trial, that the note, so far as the defendant was concerned, was given without consideration. The plaintiff, however, when he took it, was not apprised in terms of that fact. Upon these facts appearing, the judge directed the jury to find for the defendant which they accordingly did. The plaintiff excepted, and moved for a new trial on a bill of exceptions.

By the court, COWEN, J. The argument by which those who advance money or discharge debts on the faith of paper executed under letters of attorney like this, claim that the principal should be bound at all events, is, that he has authorized another in general words and without any qualification to give his notes. That having given such authority, he cannot require any person who takes under it to notice and decide at his peril whether the agent act in good faith towards his principal or not. That he has virtually authorized his agent to speak conclusively and by way of estoppel as to all extrinsic circumstances — all facts not apparent on the face of the power, or actually known to the man who trusts to it. That the attorney, by the very act of making the note, etc., does, in effect, declare that it is available. . . . The answer given to the argument is, that such letters of attorney import, in their own nature, an obligation to act for and in behalf of the principal and in his proper business; that the man who receives the note is bound to look to the power, and in so doing must take notice of its legal effect at his peril; that he is therefore bound to see that the attorney does not go beyond his power by making or endorsing notes for the benefit of himself or persons other than his principal. The authorities *pro* and *con* are cited in The North River Bank *v.* Aymar, 3 Hill, 262.

But we are all of the opinion that the necessity for weighing these arguments does not exist in the case before us. It cannot be pretended that, where the person who takes the note is aware of the attorney acting fraudulently towards his principal, there is any color for insisting on the ground of estoppel. There is no doubt that a power drawn up nakedly to do acts for and in the name of the principal, negatives all idea of interest in the agent, or authority to act for the benefit of any one beside the principal. This limitation, therefore, the plaintiff was bound to notice. It is an intrinsic fact, and when he is moreover told that the attorney, as between himself and principal, is abusing his trust, the reason for making the act conclusive entirely ceases. The plaintiff himself then becomes a party to the fraud. In this case, he must be presumed to have known who it was that constituted the insolvent firm of George W. Tysen & Co., the payees of the note — a firm which had just compromised with him — and that this defendant was therefore not a member

of the firm. Had he been, there was no need of George acting as attorney. When a person sees the note of a stranger made and endorsed by one of the payees to discharge their own debt, and takes such an endorsement, he has seen enough, in connection with the power, to raise a strong suspicion, not to say conviction, that the whole is a fraud upon that stranger. It is too much to allow that he may shut his eyes and say, he supposed there was some special circumstances on which the attorney had a right thus to act. The transaction is, on its face, out of the ordinary course of business. This was of itself sufficient to put him on inquiry. In the case of The North River Bank *v.* Aymar, *supra,* it was assumed that the plaintiffs were *bona fide* holders.

We are therefore of opinion that the circuit judge was right in directing a verdict for the defendant.

New trial denied.[1]

[1] In Merchants', etc., Nat. Bank *v.* Ohio Valley Furniture Co., 50 S. E. (W. Va.) 880, the bank sued on a negotiable promissory note of the defendant which it had discounted at the request of one Huston whom it knew at the time to be an agent of the defendant. On this occasion, Huston represented, not that his agency had ceased, or that the paper belonged to him, but that he had secured authority to use the proceeds of the note, and, in view of that situation, he requested the bank to take the note as a matter of personal accommodation to him, which it did. In reversing a judgment for plaintiff and ordering a new trial, the court said: "The declaration on the part of the holder, after having admitted the agency, that he had secured the right to use the note for his own benefit, calls for the application of another principle of the law of agency, which is a limitation imposed by law upon the power of every agent, general or special, of which all persons must take notice, namely, that an agent has no power to use his office otherwise than for the benefit of his principal. When he undertakes to exercise it for a purpose which can in no way benefit his principal, but will benefit himself or some third person, he places himself in a position in which the law determines that he is outside of the scope of his agency, and the person who deals with him in such position will not be heard to say he was in ignorance of the want of authority, for ignorance of law excuses no man. It is of the very essence of an agency that it shall be used for the benefit of the principal. Men appoint agents to subserve their interests, carry on their business, preserve their property, and not for the purpose of giving it away to others and converting it to their own use. (After discussing Dowden *v.* Cryder, 55 N. J. L. 329; Stainback *v.* Bank of Virginia, 11 Grat. 269; and Stainer *v.* Tysen, reported above, the court continues:) Other cases illustrating the rule are Bank *v.* Aymar, 3 Hill (N. Y.) 262; Suckley *v.* Tunno, 1 Brev. (S. C.) 257; Holden *v.* Durant, 29 Vt. 184; Odiorne *v.* Maxcy, 13 Mass. 178; Bank *v.* Studley, 1 Mo. App. 260. Most of these are cases in which the agent pledged or sold the paper in payment of his own debt, so that the third party dealing with him derived a peculiar benefit from the unauthorized transaction. This, however, does not seem to be the reason for denying validity of title in such purchaser. It seems to stand upon the want of authority in the agent to exercise his powers for his own benefit or for the benefit of anybody except his principal. Knowledge of this perversion of authority on the part of the purchaser is necessary to the invalidity of his title, of course. But when he does have such knowledge, he is bound to know the want of authority in the agent to so use his powers."

HAMBRO *v.* BURNAND AND OTHERS.

[1904] 2 K. B. (C. A.) 10.

ACTION upon a guaranty policy. Each of the defendants other than Burnand had given to the latter, who was a member of Lloyd's, an authority in writing, which, in substance, authorized Burnand to act as his agent for the purpose of underwriting policies of insurance, and carrying on the ordinary business of an underwriter, at Lloyd's, in his name and behalf, in accordance with the usual custom at Lloyd's. The written authorities so given to Burnand by the other defendants were never shown, nor was their existence known, to the plaintiffs. Burnand signed the guaranty policy in his own name, and the names of the other defendants, in aid of a company of which he was a member and for his own ends and not for or in the interests of the other defendants. The trial judge gave judgment against Burnand alone.

COLLINS, M. R. . . . It has been contended for the appellants that, although express authority was given in writing, as in the present case, authorizing an agent to make such a contract as he has made, it is open to the principal to say that, nevertheless, if it appears, on inquiring into the motives which existed in the agent's mind, that he intended, in making the contract, to misuse for his own ends the opportunity given to him by his authority, and apply it to a purpose, which, if the principal had known of it, he would not have sanctioned, then, because the agent was so influenced by improper motives, the principal is not liable upon the contract made by him. I should have said myself, apart from authority on the subject, that such a proposition could not hold water. I am somewhat surprised to find that, in an American case, a view favorable to it has been taken by one of the judges. I gather that it was in consequence of what was said in that case that Bigham, J., for whose opinion on a commercial point I have the greatest respect, was led to the conclusion which he adopted. The case of North River Bank *v.* Aymar, 3 Hill, 262, was cited to him, in which case there was a difference of opinion between the judges, one of them adopting the view that, though an agent had acted within the terms of his authority, it was competent to the court to look into the mind of the agent, and, if he had misapplied his authority for his own purposes, the principal was not bound. The other two judges did not agree with that view. Bigham, J., after examining the reasons given in that case, came to the conclusion that the reasoning of the dissentient judge was the stronger; and, not being fully apprised of the present state of American authorities, he decided on similar grounds that the principals in the case before him were not liable

for the act of the agent; but since that case the question has been mooted several times in America, and ultimately the American courts have authoritatively laid it down as the true principle that, where a written authority given to an agent covers the thing done by him on behalf of his principal, no inquiry is admissible into the motives upon which the agent acted. It would be impossible, as it seems to me, for the business of a mercantile community to be carried on, if a person dealing with an agent was bound to go behind the authority of the agent in each case, and inquire whether his motives did or did not involve the application of the authority for his own private purposes. The matter however does not rest there, for the view which has been ultimately established in the United States by a strong concatenation of American authorities appears to have been anticipated in England, and at length finally adopted in a recent decision of the Judicial Committee of the Privy Council. There is a very remarkable passage in the judgment delivered by LORD BROUGHAM in the year 1849 in the case of Bank of Bengal *v.* Fagan, 7 Moo. P. C. 61, at p. 74. He said: "But it is said that the power was given to do the acts in question on the donor's behalf. This is really only saying that, what the agent is to do, he is to do as representing the principal; as doing it on behalf of, or in the place and in the right of, the principal. But it is further said that, even if the expression be read as only amounting to this, the indorsement is to be only made for the benefit of the principal, and not for the purposes of the agent. We do not see how this very materially affects the case, for it only refers to the use to be made of the funds obtained from the indorsement, not to the power; it relates to the purpose of the execution, not to the limits of the power itself; and, though the indorsee's title must depend upon the authority of the indorser, it cannot be made to depend upon the purposes for which the indorser performs his act under the power." That passage seems by anticipation to deal with the very point which was the salient point of the judgment of Brigham, J., in this case and of the argument before us. In the case of Bryant, Powis & Bryant, Ld. *v.* Quebec Bank, [1893] A. C. 170, LORD MACNAGHTEN, in delivering the judgment of the Judicial Committee of the Privy Council, says: "The law appears to their Lordships to be very well stated in the Court of Appeals in the State of New York in President, etc., of the Westfield Bank *v.* Cornen, 37 N. Y. 320, cited by ANDREWS, J., in his judgment in another case brought by the Quebec Bank against the company. The passage referred to is as follows: 'Whenever the very act of the agent is authorized by the terms of the power, that is whenever, by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent, as to all persons dealing in good faith with the agent; such persons are not bound to inquire into

facts *aliunde*. The apparent authority is the real authority.'" That passage, as pointed out by the plaintiffs' counsel, though acted on and adopted by the Court of Appeals of New York, was taken from the language of the majority of the judges in the first-mentioned American case. So that, after a series of cases, that is the final view of the courts in America, which has been adopted by the Judicial Committee of the Privy Council. The defendants' counsel sought to distinguish the case of Bryant, Powis & Bryant, Ld. *v.* Quebec Bank, [1893] A. C. 170, on the ground that it related to a negotiable instrument in the hands of a *bona fide* holder for valuable consideration. But, as Romer, L. J., has pointed out, it appears that the agent who indorsed the bills in that case indorsed them "per pro," thereby giving notice to any one who took the bill of the fact that he was acting within the terms of a special authority. It is not *ad rem*, therefore, to say that the case concerned a negotiable instrument; the rights of the person who took the bill under such circumstances had to be measured by the authority given to the agent. It seems to me that the law on the subject is clearly established, and therefore the ground of the judgment of Bigham, J., fails. That being so, it is really unnecessary for me to go into the various matters relied upon by the defendants in relation to the question whether, in underwriting the policy, Burnand was acting for his own benefit, and in his own interests, and not in those of the other defendants. On the view which I have taken the plaintiffs were not concerned to inquire into those matters, and they do not affect their right to recover upon the contract which was made by the defendant Burnand with the authority of the other defendants. On these grounds I think the appeal must be allowed.

ROMER, L. J. . . . Consider how the case would have stood if the plaintiffs in this case, who accepted the guarantee policies, had not relied merely on the representation which Burnand necessarily made to them by professing to sign the policies on behalf of his co-defendants. The utmost which, it appears to me, they need have done, as between themselves and the principals of the agent, was to ask the agent to produce his written authority, if he had any. Had they done that, and had that authority been shown to them, it would have been hopeless, in my opinion, for the principals of the agent afterwards to say that they were not bound by the written authority so inspected because the agent had acted in bad faith towards them in acting upon that authority. As a matter of principle this appears to me so clear that I will not further consider the point. Then does it make any difference that in point of fact the plaintiffs did not inspect the authority? I think not. . . .

I think the cases cited for the defendants which concerned the relation of master and servant are not applicable to the present case. In those cases the sole question was as to the authority by

implication conferred by a master upon a servant. They have nothing to do with a case where there is an express authority in writing. Further I agree with the Master of the Rolls that the point has been decided in this country, if not before, by the case of Bryant, Powis & Bryant *v.* Quebec Bank, [1893] A. C. 170, to which we have been referred. Therefore both on principle and authority I think the point of law ought to be decided contrary to the view which Bigham, J., took. . . .

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

Appeal allowed.

HEATH *v.* STODDARD.

91 Me. 499. 1898.

THIS was an action of replevin to recover a piano which one Spencer sold to the defendant for $125 in cash and a horse worth from $10 to $25. The jury returned a verdict for the plaintiff, and assessed damages in the sum of one cent.

At the trial the defendant contended that if the plaintiff after knowing that Spencer had talked with the defendant relative to the purchase of a piano, delivered the piano in suit to Spencer to be carried to the defendant's home in Greene to plant, and if Spencer instead of planting the same as instructed by the plaintiff, sold the same to the defendant and appropriated the proceeds, then having placed Spencer in the position to commit a fraud, the plaintiff must suffer the loss incurred by the fraudulent acts of Spencer in selling the piano and appropriating the proceeds, and not the defendant, who was an innocent party.

The presiding justice did not instruct the jury as contended for by the defendant, but did instruct them among other matters and things as stated in the opinion.

WISWELL, J. Replevin for a piano. The piano was at one time the property of the plaintiff who intrusted it to one Spencer for the purpose of taking it to, and leaving it at, the house of the defendant, but without any authority, as the plaintiff claims and as has been found by the jury, to sell the piano or to make any contract for its sale: the arrangement being, as the plaintiff claims, that Spencer should merely take it and leave it at the defendant's house, and that a day or two later the plaintiff would go there and make a sale of it if he could.

Spencer had the piano taken to the defendant's house, but instead of simply leaving it so that the plaintiff might subsequently sell it, he assumed authority in himself to sell it to the defendant, who bought it and paid in cash and otherwise the full pur-

chase price fixed by Spencer, without any knowledge of his want of authority.

Spencer was himself a dealer in pianos and musical instruments, and upon the very day when he made the arrangement with the plaintiff to take one of his (plaintiff's) pianos to the defendant's house, he had seen the defendant and attempted to sell him one of his pianos.

Upon the question of Spencer's authority as an agent the presiding justice instructed the jury as follows:

"The mere fact that Spencer had possession of that piano and sold it to the defendant, even as the defendant says, Heath's name not having been mentioned to the defendant, would not necessarily give a title to the defendant. To illustrate: Suppose you are a livery stable keeper and you let a man have a horse to go from here to Portland. You let him have that horse, but it is for a special purpose to go from here to Portland. He meets a man on the road and asks him what he will give for the horse; they dicker and finally the man whom he meets buys that horse for $125. You do not suppose that would divest you of the title as a livery stable keeper, because you have never given authority to that man to sell it. You gave authority to that man to drive to Portland and back, and if any man was foolish enough to buy that horse of that man, he will have to stand his chances. I give you this as an illustration. It may be an extreme illustration. Now, if a party allows another to take a piano and go into the country to leave it, and that party who takes it sells it and there is not any authority for that sale, then whoever purchases it in the country, or wherever it is left, or on the way, can obtain no greater title than the party has who sells it. So it comes back to the question of whether this man Heath, the plaintiff in this case, ever authorized Spencer to so deal with that property in the way of a sale of it as to constitute him an agent for that purpose."

While these instructions were technically correct, so far as they go, we do not think that they were adequate in view of the defendant's position, and we fear that the illustration given was so extreme as to be misleading.

A principal is not only bound by the acts of his agent, whether general or special, within the authority which he has actually given him, but he is also bound by his agent's acts within the apparent authority which the principal himself knowingly permits his agent to assume, or which he holds the agent out to the public as possessing. Am. & Eng. Encyl. of Law, 2d ed., vol. 1, page 969, and cases cited.

Whether or not the principal is bound by the acts of his agent when dealing with a third person who does not know the extent of his authority, depends, not so much upon the actual authority given or intended to be given by the principal, as upon the question, what did such third person, dealing with the agent, believe and have a right to believe as to the agent's authority, from the acts of the principal. Griggs *v.* Selden, 58 Vt. 561; Towle *v.* Leavitt, 23 N. H. 360 (55 Am. Dec. 195); Walsh *v.* Hartford Ins. Co., 73 N. Y. 5.

For instance, if a person should send a commodity to a store or warehouse where it is the ordinary business to sell articles of the same nature, would not a jury be justified in coming to the conclusion that, at least, the owner had by his own act invested the person with whom the article was intrusted, with an apparent authority which would protect an innocent purchaser? [1]

In Pickering *v.* Busk, 15 East, 43, quoted by Mellen, C. J., in Parsons *v.* Webb, 8 Maine, 38, LORD ELLENBOROUGH says: "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."

Let us apply this principle to the present case. Spencer was a dealer in pianos. Immediately before this transaction he had been trying to sell a piano to the defendant. There was evidence tending to show that the plaintiff knew these facts. With this knowledge he intrusted the possession of this piano with Spencer for the purpose of its being taken by Spencer to the defendant's house with a view to its sale. Spencer was not acting merely as a bailee; he did not personally take the piano to the defendant's house, but had it done by a truckman or expressman; Spencer was employed for some other purpose. Whatever may have been the private arrangement between the plaintiff and Spencer, or the limit of authority given by the plaintiff, would not a jury have been warranted in coming to the conclusion that the purchaser was justified in believing, in view of all of these facts, that Spencer had authority to sell, and that the plaintiff knowingly placed Spencer in a position where he could assume this apparent authority to the injury of the defendant? We think that a jury might have properly come to such a conclusion, and that consequently the instructions were inadequate in this respect, that it was nowhere explained to the jury that a principal might be bound by the acts of an agent, not within his actual authority, but within the apparent authority which the principal had knowingly and by his own acts permitted the agent to assume.

Exceptions sustained.

RIPLEY *v.* COCHRAN.

10 Abb. Pr. N. S. (N. Y. C. P. Gen. T.) 52. 1870.

IT appeared from the evidence on the trial, that William Cochran, defendant, contracted with David Ripley & Sons, plaintiffs, for the use of a log to be used by Cochran on a job he intended to do at Elizabeth, N. J., on Westminster Church. Cochran obtained credit

[1] See Biggs *v.* Evans [1894], 1 Q. B. 88, *post*, p. 516.

through a letter of introduction and recommendation from third persons.

The log was selected and agreed upon between Cochran and plaintiff's bookkeeper, and it was agreed that defendant was to send word when he wanted the log, and send a man for it.

About a week after the agreement, one Smith, who had the Westminster job, but did not so state to plaintiffs, called on them and said he came for Cochran's log — he wanted to see about the log Cochran had ordered. There was also testimony that the spring after the job was done, plaintiffs, on presenting the bill to Cochran, were told that "Smith ought to pay for the log" — "if Smith did not, defendant would" — "wanted to get it out of Smith if he could" — "that it was mean in Smith not to pay."

Mr. Justice Loew, before whom the case was tried, gave judgment for the plaintiff, and defendant appealed.

By the court, JOSEPH F. DALY, J. The finding of the justice settles the fact, that Cochran went to the plaintiffs, selected the log, and told them he would send a man after it. That afterwards Smith came to the plaintiffs and asked for the log Cochran had ordered; that the plaintiffs delivered the log to Smith for Cochran, giving the latter credit for it on the strength of a letter of Thornburn & Waterbury, presented by him when he first came for the log; that Smith was not, in fact, the agent of Cochran, but was told by Cochran, that he could get at plaintiffs' a log of the proper size for the work he (Smith) was about to undertake, being the same work Cochran had in view when he went for the log.

The sole question is whether Cochran, by any act, held out Smith to plaintiffs as his agent, so as to charge himself.

In my opinion he did. He knew he had left the plaintiffs' promising to send a man for the log, and he must have known that his recommending Smith to go there after the same property could not fail to mislead the plaintiffs. It was his duty to have notified them that he did not want the log, but that Smith did, if he desired to avoid responsibility.

The judgment should be affirmed.

CHARLES P. DALY, Ch. J., and ROBINSON, J., concurred.

Judgment affirmed.

WATTS *v.* HOWARD.

70 Minn. 122. 1897.

APPEAL by defendant from a judgment of the municipal court of Duluth, entered pursuant to a verdict of $151.06 in favor of plaintiffs.

MITCHELL, J. This action was brought to recover the purchase price of certain logs sold and delivered by plaintiffs to defendant. The sale and delivery and the agreed price per thousand feet were admitted by the defendant; the only real controversy being as to the number of feet in the logs. They had been scaled by the scaler employed at defendant's mill. . . .

When plaintiffs solicited defendant to buy the logs, he referred them to one Campbell, as the person who attended to that business for him, and requested them to go and talk to him. In pursuance of this direction, plaintiffs sought Campbell, and took him where the logs were; and after he had examined them he and they agreed on the terms of the sale, one of which was that the logs were to be scaled by the scaler employed at the defendant's mill as soon as they arrived there, and that they should be paid for according to that scale, at $3.50 per thousand feet.

Upon the trial, defendant offered to prove that Campbell had no authority to bind him by agreeing that the logs should be scaled in any particular way, "or that the scale of any particular person should govern or fix the basis for the parties," or to "designate the manner in which the merchantable pine lumber in the saw logs should be ascertained." The exclusion of this evidence is assigned as error. There was no offer to prove that the plaintiffs had notice of any such limitations upon Campbell's authority. The evidence was properly excluded.

Every agency carries with it, or includes in it, the authority to do whatever is usual and necessary to carry into effect the principal power, and the principal cannot restrict his liability for acts of the agent within the apparent scope of his authority by private instructions not communicated to those with whom he deals. These principles apply as well to special as to general agents. An agent with authority to sell or buy has authority to sell or buy in the usual and ordinary manner. In this state the purchase and sale of logs according to a scale to be made is so general and notorious that courts will take notice of the fact. The manner stipulated in this contract for ascertaining the amount of lumber in the logs was the usual and ordinary way, and hence within the apparent authority of an agent to purchase logs, and the plaintiffs are not bound by any private limitations upon Campbell's authority in that regard not communicated to them. . . .

Judgment affirmed.[1]

[1] "While a general agent has broader powers than one selected to do a particular act, the authority in both cases must be construed to include all necessary and usual means for effectually executing it. Where one is appointed to sell a particular article to a particular person, this confers on the special agent authority to agree on the price — otherwise the appointment is illusory, and not real." Bass Dry Goods Co. *v.* Granite City Mfg. Co., 119 Mo. 124.

BENTLEY *v.* DOGGETT ET AL.

51 Wis. 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 § 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 § 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.

BYRNE *v.* MASSASOIT PACKING CO.

137 Mass. 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 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.*

AMERICUS OIL CO. *v.* GURR.

114 Ga. 624. 1902.

LUMPKIN, P. J. An action was brought in the superior court of Sumter county, by W. H. Gurr against the Americus Oil Company, for the price of certain cottonseed. There was a verdict for the plaintiff, and the defendant complains here of the court's refusal to grant it a new trial. The theory of the plaintiff was, that he sold the seed to one Ward, as agent of the defendant; that it received the seed, and was therefore liable to him for the price thereof. The motion for a new trial presents a number of points involving familiar and well-settled rules of the law of agency. . . .

We reverse the judgment rendered in this case, because it was contrary to law. The plaintiff failed entirely to show that Ward was the general agent of the defendant company, or that he had authority to buy seed upon its credit. It clearly and distinctly appears from the evidence as a whole, and there is no testimony to the contrary, that the arrangement between the company and Ward was for him to buy seed and ship the same to the company, he in each instance to pay for the seed purchased, with cash furnished him for this purpose by the company. His agency was thus limited, and Gurr in dealing with him was bound, at his peril, to know exactly what authority Ward had in the premises. It is too well settled to require citation of authority, that one who deals with a special agent must ascertain for himself the scope and extent of the agent's authority to bind his principal. There is not one line of testimony in the record before us which would warrant a finding that the Oil Company contemplated or intended that Ward should have any other authority, except to buy for it, with cash supplied to him, the cottonseed which the company needed in its business.

The fact that it actually received the seed which were delivered by Gurr to Ward did not make it liable to the former under the doctrine of ratification. It did not know of or sanction Ward's purchase or credit, and had in point of fact furnished him with more than enough cash to pay for the seed he obtained from Gurr. The verdict returned by the jury necessarily embraced a finding that Ward was authorized to buy seed on credit, and make the company liable to the seller; and this finding is wholly unsupported.

Judgment reversed.[1]

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2. *Scope of Particular Powers.*

COWAN *v.* SARGENT MFG. CO.

141 Mich. 87. 1905.

ACTION by J. Fred Cowan against the Sargent Manufacturing Company. There was a judgment for defendant, and plaintiff brings error.

MOORE, C. J. . . . The defendant is a corporation with a manufacturing plant at Muskegon. It had a branch house in New York for the purpose of marketing the goods manufactured in the Muskegon factory. Mr. Hughson was in charge of this branch house. The stock of goods carried, and which Mr. Hughson was authorized to sell, consisted of folding chairs, revolving book cases, hospital supplies, and invalid goods, for sick people. The Sargent Manufacturing Company did not deal in brass beds, springs, mattresses, pillows, or parlor furniture, such as armchairs. It had none of these goods in its branch house in New York. Giving the fullest force possible to the testimony offered on the part of the plaintiff, it shows that plaintiff made three sales at plaintiff's store to Hughson under the following circumstances: Hughson visited plaintiff's store in New York about October 8, 1902, in company with two lady friends, and ordered three brass beds, three springs, two hair mattresses and one mattress made over, and two pillows, for a total price of $141.25. These goods were never delivered to defendant, or in its store. It was arranged at the time Hughson ordered them that they were to be delivered to a Mrs. Beebe, in Brooklyn. Plaintiff says this was done to save cartage. These goods are part of plaintiff's claim. Mrs. Beebe paid Hughson for these goods, and he receipted for them in the name of the defendant. On May 25, 1901, Hughson ordered one iron bedstead, springs and mattress made special. These goods were delivered to Walter Cleveland, 659 Bedford Avenue,

[1] Accord: Saugerties, etc., Co. *v.* Miller, 76 N. Y. App. Div. 167 (M. gave S. money to pay for transportation of team, and S. induced the carrier to charge to M.).

Brooklyn, by direction of Hughson, and paid for by defendant's check, drawn by Hughson. On July 29, 1902, Hughson came to plaintiff's store and ordered a brass bed from stock. This was delivered at defendant's store, and was paid for on November 5, 1902, by a check signed, "Sargent Manufacturing Company, Mr. Hughson, Manager." On December 20, 1902, Estabrook & Co. sold at their place of business one armchair for $49, which was delivered at 273 Sixth Street, Brooklyn, to Mrs. F. L. Ingram. The dealings were with Mr. Hughson, who gave the directions as to place of delivery of the chair. This is the other item of plaintiff's claim. On June 7, 1899, a five-piece parlor suit, for $82.50, was ordered by Hughson, in person, at Estabrook & Co.'s store, and was by his direction delivered to F. Morris, 959 Bedford Avenue, Brooklyn; also on May 22, 1901, a parlor suit of four pieces, at $52.25, was ordered by Hughson, in person, at Estabrook & Co.'s store, and was by his direction delivered to Walter Cleveland, 659 Bedford Avenue, Brooklyn. Estabrook & Co. never had any dealings with the defendant, other than those mentioned. They satisfied themselves when they sold the first bill that Hughson was manager of the defendant, from the fact that he had "a card or something" with him. At least, "Hughson gave them to so understand." Their salesman who sold these goods never saw Mr. Hughson at any other time than when these three purchases were made, nor in any other place, except in their (Estabrook & Co.'s) store. No representations were made by anybody to them, other than by Mr. Hughson himself, that he was manager of the defendant. The last two items were paid for by checks signed the same as the others.

It is argued that, as Mr. Hughson was in charge of the New York house, plaintiff was authorized to act upon his statement that he had authority to make the purchases. The trouble with the argument is that the articles purchased were not within the scope of the business of the defendant in New York. The business it was conducting there was the selling of articles made by it in Muskegon. It would hardly be claimed that sales to Mr. Hughson, by a jeweler, of diamonds, or, by a manufacturer, of a touring car, would bind defendants. The principle of law is well settled that "The authority of a general agent is not unlimited, but must necessarily be restricted to the transactions and concerns within the scope of the business of the principal, and if he exceeds the authority the principal is not bound." 1 Am. & Eng. Ency. of Law (2d ed.) 990, and the many cases there cited. See Rice *v.* Peninsular Club, 52 Mich. 87; Hurley et al. *v.* Watson, 68 Mich. 531; Stilwell, etc., Co. *v.* Paper Mill Co., 115 Mich. 35.[1]

[1] In discussing the scope of authority of an agent to manage a business, Stayton, Associate Justice, in Collins *v.* Cooper, 65 Tex. 461, at p. 464, said: "The agency conferred on James Collins in 1869, and continued until near the close of the year

It is contended that a ratification of the acts of Hughson can be inferred from the fact that bills for the purchases hereinbefore mentioned were sent to the New York house, and were paid for with its checks. The trouble with this contention is that it is not shown that any one acting for defendant, except Hughson, knew he was purchasing in the name of the defendant articles outside of the scope of its business, and paying for them with the company funds.

Judgment is affirmed.

STEWART *v.* WOODWARD.

50 Vt. 78. 1877.

ONE Currier was plaintiff's general agent. He was indebted to defendant and induced defendant to take his pay in goods from plaintiff's store. Currier charged the goods on plaintiff's books to defendant, and paid himself his own wages in full from plaintiff's funds. Plaintiff sues defendant for the price of the goods. Judgment for defendant.

The opinion of the court was delivered by

POWERS, J. The report of the auditor states that Currier was the general agent of the plaintiffs in the conduct of their business at Montpelier. His authority there empowered him to do all things usual and useful to conduct the business of merchant-tailors. A general agency is, however, a restricted service. The agent cannot go outside the proper scope of his principal's business. So far as the business of his principal is concerned, he may do all that his principal could do. He cannot steal his principal's goods, nor appropriate them to his own use. He can only appropriate them to the use and profit of the principal. Persons dealing with a general agent

1884, through which he conducted, as sole manager, a large mercantile business for the appellants, was given verbally and was of the most general character. The determination of the extent of authority conferred on an agent under such circumstances, and in such a manner, often becomes difficult; and in such a case it is not only proper, but becomes necessary, to consider the character of the business, the manner in which it is usual to carry on such a business, and, where the agency has continued for a long time, the manner in which the particular business was carried on, in order to ascertain the powers which are to be implied from the direct or principal authority. Every agency 'carries with it, or includes in it, as an incident, all the powers which are necessary or proper, or usual, as means to effectuate the purpose for which it was created,' unless the inference of such powers be expressly excluded by the instrument creating the agency, or by the circumstances of the business to which the agency relates. Incidental powers may be held, in a given case, to exist by inference or intendment of law. Their existence in another case may be a mere inference of fact arising from the circumstances of the case, and in such a case the question is one for a jury to determine. There is hardly a conflict in the evidence as to the language used in conferring the agency on James Collins, nor in reference to the manner in which the business was conducted, but the witnesses vary very materially in their opinions as to the powers conferred. If, however, there was a conflict in the evidence, it would rest with the jury to settle it, and, unless there was some error in the charge of the court submitting the question of authority to the jury, we could not disturb their verdict."

are bound to measure the scope of his authority, as they are in dealing with a special agent. Although the compass of authority in the one case is wider than in the other, it is to be understood that it has its limits. It is to be understood that it is an *agent,* not a *principal,* who acts. Lapoint *v.* Scott, 36 Vt. 608.

The defendant's good faith in the transaction avails him nothing. It does not cure Currier's bad faith.

The plaintiffs have not misled the defendant. They notified everybody that Currier was an agent, authorized to sell their goods. Purchasers understood they were buying goods of the plaintiffs through Currier as their salesman, and that the pay went, or should go, to the plaintiffs.

The defendant purchased the goods sued for, and attempted a mode of payment which he was bound to know was unauthorized. He has had the goods and converted them to his own use, never having paid the plaintiffs for them. The implied promise arising from taking the benefit of the delivery of them, is sufficient to warrant a recovery in this action.

Judgment reversed, and judgment on the report for the plaintiffs.

CANNON *v.* HENRY.

78 Wis. 167. 1890.

DEFENDANTS having sub-let a railroad construction contract employed one McQuade as walking boss to superintend or inspect the construction work of the sub-contractors; to see that they did the work according to contract and had a sufficient number of men to fulfil the contract and carry out the instructions of the engineer. McQuade requested plaintiff to board certain laborers employed by sub-contractors and promised to pay for the service.

Plaintiff testified that he gave credit for such board solely to the defendants, for whom McQuade was acting in the matter. The court submitted to the jury the questions: (1) Did McQuade promise on behalf of defendants to pay such board bills, and (2) Had he apparent authority to bind defendants by such promise?

Verdict and judgment for plaintiff. There is no question as to the amount of recovery, if defendants are liable. The defendants appeal from the judgment.

LYON, J. Two questions are presented by this appeal for determination. The first of these is, Did McQuade promise on behalf of the defendants to pay the board bills in controversy? It does not appear that he named his principals, the defendants, as the parties who were to pay the bills. The testimony only tends to show

that he said he would pay them or, what is the same thing, would see them paid. But he was acting for the defendants in the business and not for himself, and whatever he said or did on that occasion was in their behalf. The plaintiff was not dealing with him personally, but was dealing with the defendants through him as their agent, with full knowledge that they alone were interested in the transaction. We find no difficulty in holding the testimony sufficient to support a finding that McQuade promised the plaintiff, on behalf of defendants, to pay the board bills of these men.

The other question is, Was it within the scope of McQuade's authority as agent for defendants, to bind them by such promise? The question must be answered in the affirmative. He was the representative of the defendants in the building of the spur track, and superintended the work for them. He had authority to compel the sub-contractors to keep sufficient men on the work to fulfil their contracts with defendants. If, to do this effectually, it was necessary to pledge his principals to pay the board bills of the laborers (and it must be assumed that it was), he had apparent if not actual authority to charge the defendants with such liability. In other words, he acted within the scope of his authority as agent of the defendants when he promised, in their behalf, to pay the board bills. All this is elementary law.

The charge of the court to the jury accords with the foregoing views, and none of the exceptions thereto are well taken.

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

PICKERT *v.* MARSTON.

68 Wis. 465. 1887.

Action for price of codfish. Defence, breach of warranty. Judgment for defendant.

Cassoday, J. The evidence is undisputed that the fish were in good condition when shipped to the defendants from Boston, and worthless when they reached the defendants at La Crosse. The defendants made the contract of purchase at La Crosse with the plaintiff's travelling salesman, who resided at Chicago. There was evidence tending to prove that the fish shipped were not the fish ordered; and also that by the terms of the contract the fish ordered were guaranteed by the travelling salesman to reach the defendants in La Crosse in good merchantable condition. The evidence on the part of the plaintiff was to the effect that the travelling salesman had no authority to make such guaranty, nor any assurance as to the condition in which the fish should be on reaching La Crosse;

and that he so informed the defendants about a month prior to the taking of the order in question. The issue made does not arise between the principal and agent, but between the principal and the defendants who made the contract of purchase with the agent. The agency and the right to contract for the sale are admitted. But the authority to make the guaranty or warranty is denied. Beyond question, an agent may bind his principal if he does not exceed the power with which he is ostensibly invested, notwithstanding he has secret instructions from his principal to the contrary. Putnam *v.* French, 53 Vt. 402; Bentley *v.* Doggett, 51 Wis. 224; Bouck *v.* Enos, 61 Wis. 664. Assuming that the travelling salesman had no actual authority to make such guaranty or warranty of the fish, then it became important to determine whether his authority to sell or contract for the sale clothed him with an implied authority to make such guaranty or warranty. "The general rule is, as to all contracts, including sales," said a late learned author, "that the agent is authorized to do whatever is *usual* to carry out the object of his agency, and *it is a question for the jury* to determine what is *usual*. If, in the sale of the goods confided to him, it is *usual* in the market to give a warranty, the agent may give that warranty in order to effect a sale." 2 Benj. Sales (4th Am. ed.), § 945, p. 824. The text is supported by the citation of numerous authorities. See Bayliffe *v.* Butterworth, 1 Exch. 425; Graves *v.* Legg, 2 Hurl. & N. 210; Dingle *v.* Hare, 97 Eng. C. L. 145; Upton *v.* Suffolk Co. Mills, 11 Cush. 586, 59 Am. Dec. 163; Herring *v.* Skaggs, 62 Ala. 180, 34 Am. Rep. 4; Smith *v.* Tracy, 36 N. Y. 82; Ahern *v.* Goodspeed, 72 N. Y. 108.

Thus, in Dingle *v.* Hare, *supra,* ERLE, C. J., observed: "The strong presumption is that when a principal authorizes an agent to sell goods for him he authorizes him to give all such warranties as are *usually* given in the particular trade or business;" and BYLES, J., added: "An agent to sell has a general authority to do all that is *usual* and necessary in the course of such employment." So in Smith *v.* Tracy, *supra,* PORTER, J., speaking for the court, said: "The rule applicable to such a case is stated with discrimination and accuracy in our leading text-book (Parsons) on the law of contracts: 'An agent employed to sell, without express power to warrant, cannot give a warranty which shall bind the principal, unless the sale is one which is *usually* attended with warranty.'"

Here the plaintiff offered to prove, by different witnesses having the requisite knowledge, the general custom of the trade as known and universally followed by dealers in fish, as to their being warranted or guaranteed against spoiling or turning red in transit; but it was excluded and, as we think, erroneously, under the rules of law above stated. It would seem, however, that to be binding upon the defendants, such custom should be known to them or exist in their section

of the country. Thus, in Graves *v.* Legg, *supra,* it was said by COCKBURN, C. J.: "The only question is whether, when a merchant residing in London contracts with a Liverpool merchant in Liverpool, he is bound by the *usage* of trade at Liverpool. We think that as he employed an agent at Liverpool to make a contract there, it must be taken to have been made with all the incidents of a contract entered into at Liverpool, and one is that notice to the buyer's agent is notice to the principal."

BY THE COURT. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

HERRING, ET AL. *v.* SKAGGS.

62 Ala. 180. 1878.

ACTION to recover damages for breach of warranty of a safe. Defendant's agent sold the safe to plaintiff and warranted it to be of an unusually hard, tough iron, three-eighths to one-half inch in thickness, and capable of resisting the efforts of a skilled burglar, armed with suitable implements, for twenty-four hours or of two so armed for twelve hours. Plaintiff put the safe in his store and deposited his money in it. The safe was cut open on the top by burglars and about $5000 stolen. The iron proved to be very thin and it appeared to have been cut and turned back as a sardine-box is turned when opened.

Demurrers to the complaint having been overruled, the case went to trial and the plaintiff gave evidence as above.

Stewart, the alleged agent, was then examined, and after testifying to the circumstances of the sale, he was asked by the defendants if he had any authority to warrant the safe sold as burglar-proof. The plaintiff objected to this question; the court sustained the objection, and defendant excepted. The defendants then offered to prove by the witness, that he had no authority to warrant the safe sold to plaintiff as burglar-proof, or as anything but an improved fire-proof safe. The plaintiff objected to this proof, the court sustained the objection, and defendants excepted. Defendants then offered to prove by said witness that he had present during the negotiations with plaintiff a pamphlet published by the defendants, containing an accurate description of the sizes and qualities of the safes made by them, and the difference between burglar-proof and fire-proof safes, and in connection with this testimony offered the pamphlet in evidence. The plaintiff objected to this evidence, the court sustained the objection, and the defendants excepted.

Verdict and judgment for plaintiff. Defendants appeal.

STONE, J. In Skinner *v.* Gunn, 9 Por. 305, speaking of the power of an agent to bind his principal, this court said: "The power in this case is to sell and convey the negro in the name of the plaintiff, and the agent must, as an incident of that power, and in the absence of any prohibition, have the right to warrant the soundness of the slave, as that is a usual and ordinary stipulation in such contracts, and must therefore be implied to effectuate the object of the power." The court, in the same case, had said: "An authority to do an act must include power to do everything usual and necessary to its accomplishment." This doctrine was reaffirmed in Gaines *v.* McKinley, 1 Ala. 446, and in Cocke *v.* Campbell, 13 Ala. 286. It will be observed that, in these cases, the court states, *as matter of law,* that power given to sell a slave carried with it power to warrant his soundness, in the absence of prohibition. A similar principle is found in the books, in reference to the power of an agent to bind his principal, by warranty of the soundness of a horse he is authorized to sell. It is a "usual and ordinary stipulation in such contracts," say the courts. Perhaps the custom of such warranties is so general, and has prevailed so long, that it has come to be treated as judicial knowledge. Certainly it was not intended to be affirmed, that an agent with general powers of sale has unlimited power to bind his principal, by any and every stipulation the various phases of traffic may be made to assume. If so, the words "in the absence of prohibition," found in the case of Skinner *v.* Gunn, *supra,* are meaningless and powerless. In the case of Fisher *v.* Campbell, 9 Por. 210, a question arose on the implied power of an agent to bind his principal. That was the case of a non-resident planter, whose overseer in charge made purchases of supplies for the plantation hands. It was proved that the employer had given the overseer instructions to purchase pork for his slaves from a particular mercantile house at Montgomery, with whom he had made arrangements for that purpose, and had given him no directions to buy anywhere else, nor had he any authority to purchase from any other person. The plantation was in Lowndes county, and, the roads being bad, the overseer purchased pork in his own county, much nearer to him, and at Montgomery prices. Commenting on a charge requested by plaintiffs, and refused by the court below, this court said, "The last branch of the charge is stated as a corollary from the preceding propositions; 'that any special directions given to McKay (the overseer) by the defendant, as to the place of purchasing, was wholly immaterial as to this purchase, unless from the evidence they were satisfied that plaintiffs were *informed* at the time of such sale of such special directions; and that without this information the plaintiffs would be entitled to recover, if the proof was fully made out.' We understand the law to be the exact converse of this proposition. When a person deals with one who professes to be the agent of another person, the person

contracting with him is bound to know the extent of his authority." See also McCreary *v.* Slaughter, 57 Ala.

We are not prepared to assent to the doctrine, in unlimited sense, that a general agent to sell has, by virtue thereof, the power to bind his principal by every species of warranty a purchaser may exact. In Benjamin on Sales, § 624, is the following language: "Warranties are sometimes given by agents without express authority to that effect. In such cases the question arises as to the power of an agent, who is authorized to sell, to bind his principal by a warranty. The general rule is, as to all contracts including sales, that the agent is authorized to do whatever is usual to carry out the object of his agency, and it is a question for the jury to determine what is usual. If in the sale of the goods confided to him it is usual in the market to give a warranty, the agent may give that warranty in order to effect a sale." We fully approve and adopt this language of this very accurate writer. We do not intend, however, to overturn the doctrine declared in Skinner *v.* Gunn and Cocke *v.* Campbell, *supra.* As a general rule, the agent has power to do whatever is usual — to enter into such express stipulations as are usual and customary — in effecting such sales. What stipulations are usual and customary in effecting such sales is not always a matter of judicial knowledge. It is declared in the sale of slaves and horses to be within the knowledge of the court that it is usual to give warranties. It cannot be affirmed that such custom exists in the sale of all chattels. Generally, and we hold in a sale like the present, "it is a question for the jury to determine what is usual." This, in the absence of express authority in the agent to warrant; for if the agent had such express authority, then his act is the act of his principal. And, in the absence of express authority, the question arises, and it is one for the jury, whether such warranty is customary in the sale of safes. If the jury, on the evidence, find there was such custom, then the principal is bound, "in the absence of prohibition" resting on the agent, and brought to the knowledge of the purchaser, to the same extent as if the principal himself had given the warranty. On the other hand, if there was no such authority given, and no such custom found to exist, then the principal would not be bound. True, if the principal ratified the act of such agent, although the act itself had been unauthorized, this would bind the principal. But the receipt of the purchase money would have no such effect, unless received or retained with knowledge that the agent had given the warranty.

The sale in the present case was made by an agent. In the absence of proof of express authority to warrant, it was incumbent on the plaintiff to show a custom in the sale of safes, to warrant them as burglar-proof. Either the express authority, or the authority implied from such proven custom, would constitute the act of the agent the act of the principal; but the law does not imply the authority from

the fact that Stewart, who conducted the sale, was a general agent.[1] The third count of the complaint avers that the defendants "did employ an agent, and authorized him to sell such safes, and did hold him forth to the public residing in and about the town of Talladega, Alabama, and elsewhere, as their general agent for the sale of iron safes." This is the entire averment of authority, and we hold it insufficient. It should have been averred that the agent had authority to make the warranty. Being averred, proof of express authority, or custom to warrant, would have sustained the averment. The third count is insufficient, and the demurrer to it should have been sustained.

Under the principle above declared, it became a material inquiry whether Stewart had express authority to warrant the safe as burglar-proof. He should have been permitted to prove he had not such express authority. True, this would not necessarily exonerate the defendants. It would bear on only one phase of the inquiry; for if such warranties are usual and customary in the sale of iron safes, then even a prohibition of such authority to the agent would amount to nothing, unless knowledge of such prohibition was carried home to the purchaser before the sale was consummated. So, if the published descriptive pamphlet with which the agent was furnished tended to disclose what classes of safes were, and what were not represented as burglar-proof, and such pamphlet was exhibited to the purchaser pending the negotiation, then the pamphlet should have been allowed to go to the jury, as shedding some light upon the controverted question of warranty *vel non*. . . .

Reversed and remanded.

SMITH *v.* TRACY.

36 N. Y. 79. 1867.

THE action was for breach of warranty, on the sale of two hundred shares of stock, owned by the late Albert H. Tracy, in the Hollister Bank of Buffalo, of the nominal value of $10,000. Tracy authorized Hollister to sell the stock for him. There was no evidence of any authority from Tracy to give a warranty, or of any knowledge on his part, then or afterward, that one had been given. It was proved that it was not usual to give a warranty on the sale of bank stocks, and the representations did not purport to be made in the name of Mr. Tracy.

The jury found for the plaintiff, and a new trial was denied at the General Term, DAVIS, J., dissenting.

PORTER, J. We concur with the court below in the opinion that

[1] But see Talmage *v.* Bierhause, 103 Ind. 270, *post*, p. 329.

Hollister had no authority to warrant the stock, which his principal empowered him merely to sell. The rule applicable to such a case is stated with discrimination and accuracy in our leading text-book on the law of contracts: "An agent employed to sell, without express power to warrant, cannot give a warranty which will bind the principal, unless the sale is one which is usually attended with warranty." (1 Parsons on Contracts, 5th ed., 60.) It was proved that no such custom exists in connection with the sale of bank stocks, and that the special agent, in this instance, had nothing but a naked authority to sell. . . .

The plaintiff is chargeable with notice of the extent and limits of the power of the special agent from whom he purchased. Nixon *v.* Palmer, 4 Seld. 398; Sage *v.* Sherman, Lalor's Supp. 147, 152; Beals *v.* Allen, 18 Johns. 363, 366. He knew that Hollister was not the owner of the stock he assumed to sell; and he was content to take a warranty from one who had neither actual nor apparent authority to bind his principal by such an engagement. It was a single isolated transaction, unaided by any extrinsic fact or any antecedent relation; and upon its own merits it must stand or fall. The sole authority of Hollister was to sell the stock at par, with interest from the date of the last dividend, and to insert the name of the purchaser in the blank, left in the body of the transfer written and signed by Mr. Tracy. The representations to the plaintiff were not even made in the testator's name; and the purchaser who assumed the risk of bargaining without inquiry cannot transfer to the defendant a loss resulting from his own neglect and incaution.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All judges concurring, except GROVER, J., who did not vote.

Judgment accordingly.

TALMAGE *v.* BIERHAUSE.

103 Ind. 270. 1885.

ACTION for the price of goods. Defence, off-set for breach of warranty of quality of rice under a prior sale. The sale was made by a travelling salesman of the plaintiffs. At the time the order was given, the evidence tended to show that one of the defendants inquired of the salesman whether the rice would keep. He replied that "he would guarantee it to keep all summer if kept in a dry, cool place." The rice was shipped from Charleston, S. C., and received by the defendants in Vincennes, Ind., some time during the month of April, 1882. One barrel of it was examined casually on its arrival,

and seemed to be all right, and according to the sample exhibited at the time of the sale. The whole was put in a dry, cool place, and not further examined until some time in July following, when it was found to be musty and damaged. Judgment for defendants.

MITCHELL, C. J. . . . It is next contended that the evidence fails to show that the salesman had authority to make the guarantee 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, 27 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.

COOLEY *v.* PERRINE.

41 N. J. L. 322. 1879.

ACTION on a note given for the price of a horse. Defence, breach of warranty of soundness of horse. The horse was sold to defendant by plaintiff's agent who was given special authority to sell this one horse to this defendant for $150. Exception was taken to the refusal

of the court to charge that "the servant of a private owner, intrusted to sell and deliver a horse on a particular occasion, is not, by law, authorized to bind his master by a warranty."

DIXON, J. . . . In a sale of a horse, subject to the buyer's inspection, no warranty of quality is implied, and it seems a short and clear deduction of reasoning thence to conclude that in an authority to make such a sale, no authority so to warrant is implied. The warranty is outside of the sale, and he who is empowered to make the warranty must have some other power than that to sell. Accordingly, in Brady *v.* Todd, 9 C. B. (N. S.) 592, the court directly decided that the servant of a private owner, intrusted by his master to sell and deliver a horse on one occasion, is not, *by law,* authorized to bind his employer by a warranty of quality, but, to do so, authority in fact must be shown. The significant circumstances of that case were precisely like those in this, and Chief Justice ERLE points out the soundness, both in law and policy, of the rule there applied. . . .

[The court cites and discusses Fenn *v.* Harrison, 3 T. R. 757; Helyear *v.* Hawke, 5 Esp. 72; Alexander *v.* Gibson, 2 Camp. 555.]

For these *dicta* and decisions no authority is cited. Chief Justice ERLE says, in Brady *v.* Todd, *ubi supra,* that he understands these judges to refer to a general agent employed for a principal to carry on his business of horse dealing. Certainly if the ruling in Alexander *v.* Gibson had regard to a particular agent, it has not been followed to the extent to which it was there carried. No other case holds that such an agent could bind his principal by a warranty expressly interdicted. But to the extent of holding that a special agent might warrant if not forbidden, these observations have formed the foundation of some judicial assertions and adjudications. . . .

[The court cites and discusses Lane *v.* Dudley, 2 Murph. 119; Skinner *v.* Gunn, 9 Porter, 305; Gaines *v.* McKinley, 1 Ala. 446; Cocke *v.* Campbell, 13 Ala. 286; Bradford *v.* Bush, 10 Ala. 386; Ezell *v.* Franklin, 2 Sneed, 236; Tice *v.* Gallup, 2 Hun, 446; Nelson *v.* Cowing, 6 Hill, 336.]

These are the only cases I have found wherein it has been decided that an authority to a special agent to sell embraces an authority to warrant quality. Resting, as they all do, either directly or indirectly on Fenn *v.* Harrison, Helyear *v.* Hawke, and Alexander *v.* Gibson, they no longer have any foundation on authority, since these three cases, if they ever applied to a special agency, are now, in that respect, distinctly overruled by Brady *v.* Todd, *ubi supra;* a decision foreshadowed by CRESWELL, J., when, in Coleman *v.* Riches, 16 C. B. 104, 113 (1855), he asked counsel, citing 2 Camp. 555, "would you hold that to be good law at the present day?" and clearly approved as correct in principle in Udell *v.* Atherton, 7 H. & N. 170.

Nor have they any better basis on principle than on authority. Their underlying principle is said to be that the agent, being em-

powered to sell, is intrusted with all the powers proper for effectuating the sale, and a warranty of quality is both a proper and a usual power for that purpose. If by this were meant that the agent is intrusted with all the powers proper to the making of an effectual sale, its accuracy could not be questioned. Undoubtedly his authority extends to whatever is proper to be done in fixing the price, and the time and mode of payment, and the time and mode of vesting the title and delivering the chattel. All these things are incident to the sale. But if the expression mean that the agent is intrusted with all the powers convenient for the purpose of inducing the purchaser to buy, even to the extent of enabling him to make collateral contracts to that end, then I think it is in violation of the settled rule that the special agent must be confined strictly to his express authority, and is in opposition to well-considered and authoritative decisions. For example, it might very much facilitate the sale if the agent could endorse the vendee's note for the purpose of raising the money to pay the price, and such an exercise of power would jeopardize the principal no more than would a sale on credit, and very much less than might a warranty of quality; and yet I imagine that a special agent could not make such an endorsement binding on his employer, for in Gulik *v.* Grover, 4 Vroom, 463, the court of errors held that even a general agent had no authority so to endorse, to enable his principal's debtor to borrow money to pay the debt. So in Upton *v.* Suffolk County Mills, 11 Cush. 586, it was adjudged that even a general agent for the sale of flour could not warrant that it would keep good during a voyage to California. And in Bryant *v.* Moore, 26 Vt. 84, a warranty of oxen by a special agent empowered to exchange was held invalid against the principal. Likewise, in Lipscomb *v.* Kitrell, 11 Humph. 256, it was decided that an authority to sell a claim confers no authority to guarantee it — that such a guarantee is not a necessary incident of the sale; and a similar conclusion was reached as to bank stock, in Smith *v.* Tracy, 36 N. Y. 79. . . .

Nor do I see the propriety of asserting, as a matter of law, that a warranty of quality is a usual means of effecting the sale of a chattel by a private person, *i. e.,* one not a tradesman in the line of the sale, or that it is even a usual attendant upon such a sale. Such warranties may be as various as the qualities of the object sold, and to determine, as by a rule of law, which are usual and which are not, will involve the courts in discussions where the personal experience of judges must have more influence than legal principles. In every such case the question of usage should be regarded as one of fact and not of law. . . .

In the present suit I think that the unauthorized warranty, inferred from the honest statement of the agent that the horse was all right, not communicated to the vendor or his representatives until

after the horse was delivered to and had died in the possession of the vendee, formed no defence to the claim for the price, and that the appellee's prayer for instructions to the jury was justified by the facts and the law, and should have been granted. Its refusal was error, for which the judgment should be reversed, with costs.

The cause may be remitted to the common pleas for a new trial.[1]

TICE *v.* GALLUP.

2 Hun (N. Y.) 446. 1874.

APPEAL from a judgment in favor of the plaintiff. The facts are stated in the opinion.

GILBERT, J. Action for a breach of warranty, on sale of a horse by defendant through an agent named Burgo. The authority to Burgo was to sell the horse if he got sixty dollars. Burgo sold to plaintiff for that price, and induced the plaintiff to purchase by representing, among other things, that the horse was only eleven years old, whereas he was fifteen; that a lameness which he had came from a kick, whereas it was caused by a bone spavin. No question is made that these representations amounted to a warranty, or that there was a breach. The plaintiff recovered judgment, which was affirmed by the County Court. The error complained of is, that a question put to the defendant when testifying on his own behalf, viz., whether he instructed Burgo to make the representations which constitute the warranty, was excluded. We perceive no error. Whether Burgo was a general or special agent, he had authority to make the representations, by virtue of his agency to sell, unless he was forbidden to do so by his principal. Nelson *v.* Cowing, 6 Hill, 336; Story on Agency, 137. The question was irrelevant. A specific authority to warrant is not necessary. The judgment must be affirmed.

Judgment affirmed.[2]

[1] Affirmed 42 N. J. L. 623.

[2] Accord: Scott *v.* McGrath, 7 Barb. (N. Y.) 53.

"True there is no direct proof that David had authority to warrant the pumps, or make any representation concerning their quality or condition. But a warranty — and so of a representation — is one of the usual means for effecting the sale of a chattel: and when the owner sells by an agent, it may be presumed, in the absence of all proof to the contrary, that the agent has been clothed with all the usual powers for accomplishing the proposed end. So long as the agent is acting within the general scope of his authority, persons dealing with him are considered as dealing with the principal. I will not stop to inquire whether David is to be regarded as a general or special agent; for if he was only a special agent, his authority to warrant the quality or condition of the thing sold would be presumed, until the contrary appeared. Fenn *v.* Harrison, 4 T. R. 177; Sandford *v.* Handy, 23 Wend. 260. The plaintiffs rely on Gibson *v.* Colt, 7 John. 390; but that case was much shaken, if not entirely overthrown, by the decision in Sandford *v.* Handy; which is also an authority for saying, that the principal will be affected by the fraudulent representations of the agent making the sale." Nelson *v.* Cowing, 6 Hill, 338.

"Bound & Co., being his agents to sell the notes without expressed restrictions of their powers, had authority to do any act, or make any declaration in regard to

CARSTENS *v.* McREAVY.

1 Wash. 359. 1890.

ACTION to compel a specific performance of an alleged agreement to sell and convey certain real estate in the city of Seattle, King County, State of Washington.

STILES, J. . . . The appellant was the owner of certain real property in the city of Seattle, and the court found that at a certain date agents named, who were real estate agents in Seattle, "were the agents of defendant for the sale of the aforesaid real estate, and were then and there duly authorized and empowered by the defendant, by writing under the defendant's hand, to make and negotiate a sale of said real estate." The agents thus authorized, executed and delivered to the appellee a contract of sale for the appellant's property, without his knowledge, and in his absence from the state, and received a portion of the purchase money. Appellant refused to recognize the contract thus made, claiming that the authority by him given to *sell* did not include the authority to execute a contract, or anything more than to find a purchaser. This was the vital point in the case, upon which the court held with the appellee, and directed that the contract thus made be performed.

The statute of frauds may be satisfied by the execution of a contract for the sale of lands by the hand of another person than the

them, found necessary to make a sale, and usually incidental thereto. Andrews *v.* Kneeland, 6 Cow. 354; Nelson v. Cowing, 6 Hill, 336; Sturgis *v.* N. J. St. Bt. Co., 62 N. Y. 625." Ahern *v.* Goodspeed, 72 N. Y. 108, 114.

"Whatever may be the law in regard to the customary power of an agent to warrant the article which he sells, there is no case which I have found after considerable search in which it has ever been held that an agent to sell a particular article has the right not only to warrant the article which he then sells, but to warrant all which may thereafter be sold by his principals to the party with whom he closes his own sale. There is no principle upon which such a claim can be founded. The idea upon which is founded the right to warrant on the part of an agent to sell a particular article, is that he has been clothed with power to make all the common and usual contracts necessary or appropriate to accomplish the sale of the article entrusted to him. And if in the sale of that kind or class of goods thus confided to him it is usual in the market to give a warranty, the agent may give that warranty in order to effect a sale, and the law presumes that he has such authority. . . .

"But nowhere is there any rule laid down that I have been able to find, enlarging the scope of the agent's power to warrant beyond the necessities of the case, or so as to include subsequent sales not made by himself, but by his principals. It would, in my opinion, be granting an agent altogether too broad a power, and it would be placing the principal too much at the mercy of the agent who, for the purpose of accomplishing a sale of a small amount, might lead his principals into liabilities of which they knew nothing and might know nothing until a claim for their settlement was presented to them. It is not necessary to grant to agents any such extensive powers in order that they may accomplish the purpose for which they are engaged, viz.: the present sale by them of an article which belongs to the principal. Public policy, I think, forbids any such inferential powers, and if vendees seek to place liabilities of that nature upon principals, it is not too much to require that they should show actual authority of the agent to make such contracts." Peckham, J., in Wait *v.* Borne, 123 N. Y. 592, 603, 604.

party to be charged, if that person be thereunto lawfully authorized, and it is well settled that such third person may be thus lawfully authorized orally, by written direction not under seal, and, even, by a course of conduct amounting to an estoppel. It, therefore, only remains to determine whether the ordinary real estate agent or broker, authorized to *sell* land, is thereby empowered to enter into a contract binding upon his principal in an action for specific performance. A real estate agent is a person who is, generally speaking, engaged in the business of procuring purchases or sales of lands for third persons upon a commission contingent upon success. He owes no affirmative duty to his client, is not liable to him for negligence or failure, and may recede from his employment at will, without notice. On the other hand, courts almost unanimously unite in holding that in case of an ordinary employment to sell, once he has procured a party able and willing to buy, upon the terms demanded by his principal, and has notified him of the purchaser's readiness to buy, the agent's work is ended and he is entitled to his commission. It is not his duty to procure a contract or make one, and he is not in default if he fails to do either. Therefore to our mind it seems clear that ordinarily it is not within the contemplation of the owner and agent, where property of this character is placed in the hands of the latter for sale, that he shall, without consultation with his client, execute a contract. We are aware that courts have held to this extent, basing their decisions upon a distinction between an authority to sell and an authority to find a purchaser, and upon the well-known rule that an authority to an agent to do a thing is presumed to include all the necessary and usual means of executing it with effect. But such holdings do not commend themselves to our judgment, and, as this is a new question in this state, and we are satisfied that it is not the general practice of agents to make such contracts, we do not hesitate to dissent from the decisions above mentioned, especially as there is no lack of authority for the position we take. We cannot shut our eyes to the obvious defect in the argument that authority to sell, in this instance, necessarily implies authority to execute a contract. A sale of land, "executed with effect," includes the execution of a deed and the delivery of possession, neither of which the agent can do, unless his authority to sell is supplemented by the delivery of possession to him and a power of attorney to convey. So that he does not, although in possession of the authority to *sell*, have all the necessary means of executing that authority with final effect. He stops short somewhere, and when we are inquiring where the probable and proper place of his stoppage is, the evils that would attend the extension of his actual authority beyond the finding of a purchaser, furnish ample reason for fixing his limit there. An agency of this kind may be created by the slightest form of words,

without any writing, leaving it to litigation to determine whether the substance of the authority is "to sell" or "to find a purchaser," wherein the unscrupulous and dishonest agent would be at once arrayed as the principal witness against his client, with every advantage, from some note, "made at the time," of what the instruction was. Perjury would go at a premium in such cases, and the confiding and unlettered would be its victims. Scarcely any man, when listing his property with a real estate agent, stops to give details as to the property itself or as to the arrangements he desires to make, yet no one would sell upon equal terms to a first class business man and to an habitual drunkard or well known insolvent; and the ordinary owner would not sell at all to a person whose very occupancy would tinge the neighborhood with a bad repute. These are good reasons, and are, probably, some of the reasons why custom and law have made it not necessary that real estate agents should actually procure contracts in order to earn their compensation; and why, in this connection, the common understanding of the phrase "authority to sell" means only authority to find a purchaser, whether the authority be given orally or by written request.

In considering this case we have examined the numerous authorities cited by both sides, as well as many others, and find the position we take fully sustained by Morris *v.* Ruddy, 20 N. J. Eq. 236; Milne *v.* Kleb, 44 N. J. Eq. 378; Duffy *v.* Hobson, 40 Cal. 240; Armstrong *v.* Lowe, 76 Cal. 616; Mechem on Agency, § 966; Warvelle on Vendors, 213; 2 Am. and Eng. Ency. Law, p. 573, note 2. The earlier cases in New York were to the same effect, notably: Coleman *v.* Garrigues, 18 Barb. 60, and Glentworth *v.* Luther, 21 Barb. 145; but they were overthrown by Haydock *v.* Stow, 40 N. Y. 363, without sufficient reason, as it seems to us. We note that in nearly if not all the states where the courts at any time held agents to sell real estate authorized to execute contracts of sale, especially in New York and Illinois, the legislatures very soon after amended the statutes of frauds so as to require the agent's authority to contract to be in writing.

Lyon *v.* Pollock, 99 U. S. 668, presents a state of facts not found, to any extent whatever, in the case at bar, and is, therefore, not applicable, and the same may be remarked of Rutenberg *v.* Main, 47 Cal. 213. What a broker must do to "complete a sale" is well defined in McGravock *v.* Woodlief, 20 How. 221, thus: "The broker must *complete the sale;* that is, he must find a purchaser in a situation and ready and willing to complete the purchase on the terms agreed on, before he is entitled to his commission." *Per contra,* if the broker has "completed the sale" so as to be entitled to his commissions, by finding a purchaser, without a contract, his duty is thereby performed and his authority exhausted.

The judgment of the court below must be reversed, and the action dismissed. Costs to the appellant.

ANDERS, C. J., and HOYT, DUNBAR, and SCOTT, JJ., concur.[1]

McCULLOUGH *v.* HITCHCOCK.

71 Conn. 401. 1899.

SUIT for specific performance. Judgment for defendant.

The complaint alleged that the defendant, on the seventh day of July, 1897, acting by his agents and brokers, Anderson & Mead, agreed in writing to convey to her, free from incumbrances, certain lands in consideration of $1,100; that the plaintiff tendered said sum to the defendant, but that he refused to convey said land; and claimed a decree for a conveyance, or that the title be otherwise vested in the plaintiff, and damages.

The answer denied, in substance, all the complaint, and specifically denied that Anderson & Mead were his agents; and asserted that if they had ever made any such contract with the plaintiff as she claimed, they had no authority therefor from the defendant.

The court found the issues for the defendant, and the plaintiff appealed.

Upon the trial of the cause the plaintiff, to prove the averment of her complaint, offered in evidence a certain letter as follows:

ANSONIA, CONN., November 23, 1896.

MESSRS. ANDERSON & MEAD, Bridgeport, Conn.

Gentlemen, — I have a building lot on William St., E. D., that I would like to sell if I can do so at any advantage. It is located next to the residence of S. W. Hubbell, 268 Wm. St. As I am not a resident of Bpt. I do not know the value of said lot, but could you not look at the lot and give me an idea of its value and if possible find a purchaser for same.

Yours truly,

M. C. HITCHCOCK.

It was admitted that the defendant was the owner of the land, and that Anderson & Mead were real estate agents or brokers.

ANDREWS, C. J. Anderson & Mead had no authority to make a written contract binding on the defendant to convey the land in question, unless it can be found in the letter of November 23d, 1896. That letter does not in terms purport to give any such authority. The contention of the plaintiff is that such authority is implied

[1] Accord: Donnan *v.* Adams, 30 Tex. Civ. App. 615.

In the following cases the authority to sell was, under the circumstances, held to carry with it the power to execute a contract of sale. Valentine *v.* Piper, 22 Pick. 85 (principal in England and agent authorized to collect and disburse proceeds of sale); Lyon *v.* Pollock, 99 U. S. 668 (principal a fugitive); Ish *v.* Crane, 13 Oh. St. 574.

from the request in the letter to find a purchaser; that it is a custom of the real estate business that a broker authorized to find a purchaser for lands may sign a binding contract for the sale of that land. We do not understand any such custom to exist in this State. A custom can exist only as a matter of fact. Smith *v.* Phipps, 65 Conn. 302, 307. There is no finding that any such custom prevails in Connecticut; and there is no case cited which recognizes any such rule.

A real estate broker or agent is one who negotiates the sales of real property. His business, generally speaking, is only to find a purchaser who is willing to buy the land upon the terms fixed by the owner. He has no authority to bind the principal by signing a contract of sale. A sale of real estate involves the adjustment of many matters besides fixing the price. The delivery of the possession has to be settled; generally the title has to be examined; and the conveyance with its covenants is to be agreed upon and executed by the owner. All of these things require conferences, and time for completion. These are for the determination of the owner, and do not pertain to the duties and are not within the authority of a real estate agent. For these obvious reasons, and others which might be suggested, it is a wise provision of the law which withholds from such an agent, as we think it does, any implied authority to sign a contract of sale in behalf of his principal. Coleman *v.* Garrigues, 18 Barb. (N. Y.) 60[1]; Roach *v.* Coe, 1 E. D. Smith (N. Y.), 175; Lindley *v.* Keim, 54 N. J. Eq. 418, 423; Duffy *v.* Hobson, 40 Cal. 240; 4 Amer. & Eng. Ency. of Law (2d ed.), 964, note; 3 Wait's Actions & Defenses, 286, 287; Halsey *v.* Monteiro, 92 Va. 581; Armstrong *v.* Lowe, 76 Cal. 616.

There is no error. In this opinion the other judges concurred.

WILLIAM DEERING & CO. *v.* KELSO.

74 Minn. 41. 1898.

Buck, J. The plaintiff is a non-resident corporation, created under the laws of the State of Illinois, and engaged in the manufacture and sale of harvesting machinery and other farm implements. The defendants are co-partners and bankers at the village of Hallock, Kittson County. On January 16, 1895, one B. P. Lewis, a collector

[1] "An agent authorized to sell either real or personal estate may enter into a contract, within the terms of his authority, which will bind his principal. This is of the very essence of the authority given, viz., an authority to sell. That he can bind his principal by a formal contract is the doctrine of the books from the earliest law on the subject. (Worrall *v.* Munn, 1 Seld. 229, and the numerous cases cited; McWhorter *v.* Baldwin, 10 Paige, 386; Champlin *v.* Parrish, 11 Paige, 411; Story on Agency, §§ 58, 60.) The case of Coleman *v.* Garrigues (18 Barb. 60), to the contrary was not well decided." Haydock *v.* Stow, 40 N. Y. 363, 368.

for the plaintiff, went to the firm of Westerson & Johnson, in Hallock, and received from this firm a bank check for the sum of $200, dated on that day, and payable to plaintiff or order, drawn on the defendants, in part payment of a debt then due and owing from said firm to the plaintiff. Lewis, instead of transmitting this check to the plaintiff, residing in the State of Illinois, took the same to the banking house of the defendants, and then indorsed upon the back of the check the words "William Deering & Co., by B. P. Lewis" (the name of the plaintiff), and received from the defendants, in exchange for said check, a draft payable to himself or order, on Gilman, Son & Co., of New York, for $199.80, issued by the defendants. Lewis collected the proceeds of the draft, and absconded. He never paid to plaintiff any part of the proceeds so collected, and never made any report to plaintiff of such collection. When the plaintiff was informed of the transaction, it caused a demand to be made on the defendants for the payment to it of the amount of said check so indorsed by Lewis. The defendants refused to pay the same. In the meantime the defendants charged the account of Westerson & Johnson with the amount of said check, and stamped upon its face that the same had been paid. Upon defendants' refusal to pay the amount of the check, the plaintiff brought this action for the recovery thereof, and upon trial the defendants had a verdict, and, from the judgment entered thereon, the plaintiff appeals to this court.

It quite conclusively appears that Lewis, as collector for the plaintiff, was authorized to make collections in money, or to receive what are commonly called "bank checks," conditioned, however, that they were payable to the order of William Deering & Co.; and, upon the receipt of such checks, it was his duty to send these identical checks forthwith to plaintiff for indorsement and collection, through the clearing house and other banks. Lewis never had any express authority to indorse or collect the checks after they were received by him; and it is a well established general rule of commercial law, applicable to all cases of implied agencies, that no authority will be implied from an express authority, unless it is positively needful for the performance of the main duties contemplated by the express authority. Tiedman, Com. Paper, § 77, and authorities cited; Jackson *v.* Bank, 92 Tenn. 154, 20 S. W. 802.

In this case no such necessity was shown or existed. The check in the possession of Lewis was not payable to him, but to his principal, William Deering & Co.; and no implication arose that *prima facie* it was payable to Lewis, or that he had authority to demand or secure payment in the name of the true owner. Where the drawer has funds in a bank, it is by custom obliged to honor checks payable to order, and it pays them at its peril to any other than the person to whose order they are made payable. Tiedmann, Com. Paper, § 431. The check was payable to plaintiff, and, when Lewis received

it in payment of a debt due his principal, his duty as collector ceased, except to transmit it to his principal. The indorsement of the check was not a necessary incident of the collection of the account, and his power to receive checks, instead of cash, did not confer power to indorse checks. Jackson *v.* Bank, *supra;* Graham *v.* U. S., 46 Mo. 186.

The fact that Lewis was authorized to make collections in money as well as in checks did not enlarge his authority to indorse checks so taken in the name of the principal. Jackson *v.* Bank, *supra.* If he took checks in payment, he was not thereby authorized to indorse them to the bank on which they were drawn, and receive the proceeds. 1 Daniel Neg. Inst. § 294. See Mechem, Ag. 382.

We do not think that any custom or usage was proven that plaintiff permitted its collection agents to indorse checks payable to itself, and receive the proceeds; nor do we in any manner intimate that, if such usage or custom was proven, it would be competent evidence to overcome well-established commercial law. It seems a hardship for this loss to fall upon the bank, but it took no steps to inquire by what authority Lewis made the indorsement, and, like other litigants who mistake the law, it must necessarily abide the consequences. *Judgment reversed.*[1]

LAW *v.* STOKES.

32 N. J. L. 249. 1867.

THIS cause was tried at the Essex Circuit and a verdict rendered for the defendant. On the coming in of the *postea,* the plaintiff moved to set aside the verdict, and for a new trial.

[1] "A drummer or commercial traveller, employed to sell and take orders for goods, to collect accounts, and receive money and checks payable to the order of his principal, is not, by implication, authorized to indorse such principal's name to such checks." Jackson *v.* Bank, 92 Tenn. 154, 160.

An agent for attending to and managing a grocery and provision store is not, in consequence of such agency, authorized to draw or indorse notes in the name of his principal. Smith *v.* Gibson, 6 Blackf. (Ind.) 369.

"The weight of authority seems to be in favor of the contention of appellant, that authority to endorse commercial paper can only be implied, where the agent is unable to perform the duties of his agency without the exercise of such authority. In other words, the power of an agent to endorse commercial paper for his principal must be a necessary implication from an express authority conferred upon such agent. Wherever such power is implied from the acts of the agent, the acts, subject to such implication, must be acts of a kind like those from which the implication is drawn. . . . It is true that Jackson was the superintendent of appellant's mill, and managed the business of running the mill; but 'an agent having general authority to manage his principal's business, has, by virtue of his employment, no implied authority to bind his principal by making, accepting, or endorsing negotiable paper. Such an authority must be expressly conferred, or be necessarily implied from the peculiar circumstances of each case. It may undoubtedly be conferred, and by implication, but it will not be presumed from the mere appointment as general agent.' (Mechem on Agency, sec. 398)." Jackson Paper Co. *v.* Commercial Bank, 199 Ill. 151, 156, 157.

See also New York Iron Mine *v.* Bank, 39 Mich. 644, reported herein at p. 298.

The opinion of the court was delivered by

DEPUE, J. The plaintiff brought this action to recover the amount of a bill of goods, sold by him to the defendant. The sale and delivery of the goods were not denied, and the only question in controversy at the trial was whether the defendant had paid for them.

The plaintiff, at the time of the transaction, was an importer of earthenware, doing business in the city of New York, and the defendant the keeper of a hotel at Long Branch in this state.

On the fifth of July, 1865, the defendant purchased, at the store of the plaintiff, in New York, of one J. B. Sheriden, a bill of earthenware, amounting to the sum of $320.37. It appears from the evidence in the cause that Sheriden was employed by the plaintiff to sell goods for him, without any salary, for a commission on his sales. The goods in question were sold on a credit, and were to be paid for on the first day of the next August. The goods were shipped to the defendant on the sixth day of July, 1865, and on the same day the plaintiff wrote the defendant a letter, of which the following is a copy:

MR. W. STOKES, Long Branch:

DEAR SIR, — I beg to hand you bill of ware purchased by you, and duly forwarded as per direction. I trust you will find all satisfactory. Please remit amount *direct to me.*

$320.37 Yours truly,

HENRY D. LAW.

August 1, 1865.

Enclosed with the letter was a bill of the goods, in the name of Henry D. Law, as vendor, in the heading of which was printed plainly and conspicuously, in red letters, "all remittances on account, or in settlement of bills, must be made direct to the principal; salesmen not authorized to collect." On the sixteenth of August, 1865, the defendant paid Sheriden for the goods, at the defendant's hotel at Long Branch, and took from him a receipt for the same, signed, "J. B. Sheriden, for Henry D. Law." Sheriden never paid the money to the plaintiff, and has left the country.

The fact of this payment to Sheriden is not disputed, but the plaintiff insists that Sheriden had no authority to collect the money, and, therefore, the payment to him is no discharge.

Sheriden was a mere salesman for a commission. As such he had authority to sell goods on credit, but not to discharge purchasers from debts incurred by them in purchasing goods, through him, of the plaintiff. An agent employed to make sales, and selling on credit, is not authorized subsequently to collect the price in the name of the principal, and payment to him will not discharge the purchaser, unless he can show some authority in the agent other than that necessarily implied in a mere power to make sales. Seiple *v.* Irwin, 30 Penn. (6 Casey) 513. Such authority may be shown by proof,

either that the agent was expressly authorized to receive and discharge debts, or that he was held out by his principal to the public, or to the defendant, as having such authority.

A principal is bound by the acts of his agent within the authority he has actually given him, which includes not only the precise act which he expressly authorizes him to do, but also whatever usually belongs to the doing of it, or is necessary to its performance. Beyond that, he is liable for the acts of his agent within the appearance of authority which the principal himself knowingly permits the agent to assume, or which he holds the agent out to the public as possessing. For the acts of his agent, within his express authority, the principal is liable, because the act of the agent is the act of the principal. For the acts of the agent, within the scope of the authority he holds the agent out as having or knowingly permits him to assume, the principal is made responsible, because to permit him to dispute the authority of the agent in such cases would be to enable him to commit a fraud upon innocent persons. In whichever way the liability of the principal is established, it must flow from the act of the principal. And when established it cannot, on the one hand, be qualified by the secret instructions of the principal, nor, on the other hand, be enlarged by the unauthorized representations of the agent. These principles find ample illustrations in the elementary books, and in decided cases. 1 Parsons on Cont. 44, 45; 2 Kent 620, 621; Mechanics Bank *v.* N. Y. & N. H. R. R. Co., 3 Kernan, p. 632, per Comstock, J.; F. & M. Bank of Rens. Co. *v.* Butchers' and Drovers' Bank, 16 N. Y. (2 Smith) 125; Story on Agency, § 127; Dunning *v.* Roberts, 35 Barb. 463; Thurman *v.* Wells, 18 Barb. 500; 1 Am. Leading Cases, 567 (fourth edition).

Where an agent is entrusted with the possession of goods, with an unrestricted power to sell (Higgins *v.* Moore, 6 Bosw. 344), or payments are made over the counter of the principal's store to a shopman accustomed to receive money there for his employer (Kaye *v.* Brett, 5 Exch. 269),[1] the authority to receive payment will be implied in favor of innocent persons, because the principal, by his own act, gives to the agent an apparent authority to receive such payment. But if the principal forbids such payments, and requires all payments to be made to himself personally, or to a

[1] "If a shopman, who is authorized to receive payment over the counter only, receives money elsewhere than in the shop, that payment is not good. The principal might be willing to trust the agent to receive money in the regular course of business in the shop, when the latter was under his own eye, or under the eyes of those in whom he had confidence, but he might not wish to trust the agent with the receipt of money elsewhere." Kaye *v.* Brett, 5 Ex. 269, 274.

"The usual employment of a clerk in a retail store is to sell goods to customers or purchasers, and it is implied from such employment that he has authority to receive pay from them on such sale. But there is no implication from such employment that he has authority, after goods are delivered and taken from the store, to present bills and collect money due to his employers, because it is not in the scope of the usual employment of such clerks." Hirshfield *v.* Waldron, 54 Mich. 649, 651.

cashier, and gives a customer notice thereof, the customer would have no right to insist upon the apparent rather than the real authority of the agent.

In the case now before the court, Sheriden had not the possession of the goods. The sale was made on a credit, and the payment was made to him, not over the plaintiff's counter, at his place of business, but at the defendant's hotel. In most respects, the case is similar to that of Seiple *v.* Irwin, where the payment to the agent was not sustained. He had no express authority to collect the debt in question, nor was there any evidence that the plaintiff held him out to the public, or to the defendant, as having such authority. The letter of the plaintiff expressly directs that the money for this bill should be remitted directly to him. That letter, it is said, was never received by the defendant. The weight of the evidence is that that letter was sent and was received before the payment was made to Sheriden. But independent of that, the evidence on the part of the defendant shows that the bill which was produced by him at the trial was received before the goods were unpacked, and that his son, who was his bookkeeper, and had charge of receiving those goods, ticked off the goods on the bill, and told the defendant that it was correct.

The defendant testified that he never saw the bill until after the payment was made to Sheriden, and the son says that he did not read the heading of the bill — that he had not time to do it. The plaintiff did all that prudence and good faith required of him to prevent the defendant falling into an error in regard to his salesman. Immediately upon the shipment of the goods, he wrote the letter to the defendant, requiring him to remit direct to him, and enclosed in it the bill of the goods, on the face of which was printed a notice, that salesmen were not authorized to collect. That bill, at least, was in the hands of the defendant's son, who was his bookkeeper, and authorized to pay bills, and had charge of comparing the goods with the bill, and who was present when the money was subsequently paid to Sheriden. Not to have seen the directions on the bill-head was the grossest negligence, and to permit a party to defend under the protection of his own carelessness, would be to offer a premium for negligence, and open the door to fraud, especially so when the party is himself bound to see to it that the person with whom he transacts business, as an agent, has the authority which he assumes. Capel and another *v.* Thornton, 3 C. & P. 352, is not a parallel case with this. In that case the defendant dealt with Ellsworth, the agent, as principal, without any knowledge of his agency. The coal, for the price of which the suit was brought, was ordered of Ellsworth, and the defendant paid Ellsworth. The only evidence of notice of his agency, before the bill was paid, was the vendor's ticket, sent with the coal, and delivered to the defendant's footman,

and not shown to have reached the defendant. After the payment was made, a notice was sent to the defendant, by the plaintiffs, to pay the amount to them, or to their clerk, and not to Ellsworth. The defendant had no knowledge of the agency, and the footman was not her agent in relation to that business, and the notice which the defendant did receive came after the payment was made. These circumstances render that case wholly unlike the case now before the court. . . .

The verdict is against the evidence, and contrary to law, and should be set aside and a new trial granted; costs to abide the event.

McKINDLEY *v.* DUNHAM.

55 Wis. 515. 1882.

ACTION to recover the purchase price of 1,000 cigars sold and delivered to the defendant. The answer alleged payment in full. There was a verdict for the defendant and from a judgment thereon, the plaintiffs appealed.

ORTON, J. A short time before August 11, 1879, one W. L. Kilbourn called upon the defendant at Berlin, Wisconsin, exhibited the cards of the plaintiffs' house in Chicago, and solicited and obtained from the defendant an order for 1,000 cigars of a certain brand upon, and sent the same to, the plaintiffs, and the plaintiffs on that day shipped the cigars and sent the bill thereof (of $30 at sixty days) to, and they were duly received by, the defendant. About thirty days thereafter the said Kilbourn called upon the defendant and asked him "if he would just as soon pay him for these cigars as not," and the defendant replied "that he would as soon pay it then as any other time," and paid the same, and said Kilbourn receipted the original bill produced by the defendant in the firm name of the plaintiffs by himself. Kilbourn's real authority as agent of the plaintiffs was to solicit from country merchants orders on them for goods, and if such orders were accepted and filled Kilbourn was entitled to a small commission thereon. We have no evidence of what the terms of this order were, and are left to presume that it was a mere order or request by the defendant to the plaintiffs for 1,000 cigars, and perhaps at a certain price. The main question in the case is the authority of Kilbourn to receive payment of this bill. There is no proof of numerous or indeed of any other acts done by this agent of this character, with the express or tacit consent of the plaintiffs, or of any general habits of dealing or of any other transaction between these parties of any kind, or that the real scope of his authority beyond what appeared was dis-

closed at this time. There is nothing besides this one transaction from which his authority and the full scope of his authority can be implied or inferred. It is his *apparent* or *ostensible* authority in this one act to do another act of the same kind, and nothing more.

The only question here is, what was his apparent or ostensible authority in this one act? "His implied agency cannot be construed to extend beyond the obvious purposes for which it was *apparently* created." "The intention of the parties, deduced from the nature and circumstances of this particular case, constitutes the true ground of exposition of the extent of his authority." Story on Ag. § 87; Wright *v.* Hood, 49 Wis. 235. A principal is responsible for any act of his agent which justifies a party dealing with him in believing that he has given the agent his authority to do such act (1 Parsons on Con. 44; Kasson *v.* Noltner, 43 Wis. 647); or, as POTHIER says, "if the agent does not exceed the power with which he was *ostensibly* invested." This agent did not appear or pretend to have any other authority from the plaintiffs than to solicit orders for goods, and send them to the plaintiffs. This is all he did in this case, and all he pretended he had authority to do. In this he could not possibly do his principal any harm. To this extent they authorized him and trusted him; but they might not have been willing to trust him further with the large and dangerous power of receiving payments, and they did not, so far as is possible to infer from this transaction.

But it is said by the learned counsel of the respondent the agent Kilbourn *sold* the goods to the defendant, and in this power to sell is implied the further power to receive the consideration or payment therefor, and the learned judge of the circuit court in effect so charged the jury, as follows: "Presumptively, Mr. Dunham had the right to pay this bill to the person *from whom he purchased the goods*" (meaning Kilbourn, the agent); and again: "The plaintiffs sending the goods to Dunham upon that *sale* or order, presumptively Kilbourn had the right to collect that debt." If what Kilbourn did could properly be called a sale of the goods, even then his instruction is questionable as an abstract statement of the law; for it does not always, as a general rule, follow that the power to collect the moneys upon them is included in the power of an agent to make contracts for his principal. Story on Ag. § 98; Higgins *v.* Moore, 34 N. Y. 417; Mynn *v.* Joliffe, 1 Moody & R. 326.

But the agent did not sell the goods, or even contract to sell them. When the defendant had completed his transaction with Kilbourn, there had been no binding contract made, or any sale, absolute or conditional. The defendant could have countermanded his order at any time before the goods were shipped, and the plaintiffs could have refused to accept the order. Neither party had become bound by

anything then done. The order of the defendant was a mere *proposal,* to be accepted or not, as the plaintiffs might see fit, and he could have withdrawn it before its acceptance. The minds of the parties had not met, and there had been no mutual assent or *aggregatio mentium.* Benj. on Sales, §§ 40, 70; Johnson *v.* Filkington, 39 Wis. 62. Even as a broker (and he was less rather than more in the authority he exercised in this instance) he need not even see to the delivery of the goods (Story on Sales, § 85); and if his negotiation had been broken off, and the contract not finally completed, he would not be entitled to his commissions. Story on Sales, § 86. As is said in Higgins *v.* Moore, *supra:* "The duty of a broker, in general, is ended when he has found a purchaser and has brought the parties together. He is a mere negotiator or middle-man between the seller and purchaser." It is only in cases where the broker has possession of the goods that he can sell, and in that case, even, if he parts with the securities he receives on the sale to his principal, his implied authority to receive payment, if he had any, ceases with their possession. Strachan *v.* Muxlow, 24 Wis. 1. Aside from the clear and obvious reason from the general principles of bargain and sale, and principal and agent, why Kilbourn was not authorized to receive payment as the agent of the plaintiffs in this case, the four following cases, all of them closely analogous, and two of them precisely parallel, are abundant authority: Barring *v.* Corrie, 2 Barn. & Ald. 137; Higgins *v.* Moore, *supra;* Korneman *v.* Manegan, 24 Mich. 36; and Clark *v.* Smith, 88 Ill. 298.

It follows, therefore, that so far the circuit court committed two flagrant errors: *First,* in ruling and instructing the jury that Kilbourn, as agent of the plaintiffs, made a sale of the goods to the defendant, and was authorized so to do; and, *secondly,* that if he did sell the goods, he had, therefore, authority to receive payment therefor. We omit to consider whether, admitting both of these propositions, he could have received payment before it was due according to the terms of the assumed sale, or whether the fact of his proposing payment so long before due did not cast suspicion upon his act, especially as he had not been entrusted with the bill of the goods even, and did not pretend that he had authority to receive the payment; leaving to the defendant the merely voluntary act of payment, in answer to the request "if he would just as soon pay *him* for those cigars as not." . . .

By the Court. The judgment of the circuit court is reversed and the cause remanded for a new trial therein.[1]

[1] Accord: Butler *v.* Dorman, 68 Mo. 298; John Matthews Apparatus Co. *v.* Renz, 61 S. W. (Ky.) 9.

In Crawford *v.* Whittaker, 42 W. Va. 430, the plaintiffs, partners, sued the defendant for the purchase price of goods sold to the defendant by a travelling salesman of the plaintiffs. The defendant pleaded payment to the travelling salesman. He admitted notice not to pay salesmen, but contended that he had made the pay-

TRAINER *v.* MORISON.

78 Me. 160. 1886.

HASKELL, J. Assumpsit to recover the price for merchandise sold. Defence, payment to the plaintiff's general agent.

The plaintiff employed an agent to "sell" his goods "by sample." The agent took an order from the defendants for oil, and directed the same forwarded to them, saying that it would arrive by next boat, and that "he came round once a month," when the defendants engaged to pay him. The goods were delivered as agreed, accompanied by a bill, with the words, "all bills must be paid by check to our order, or in current funds at our office," printed in red at the top. In two weeks after the delivery of the oil, the agent called for, and received from the defendants pay for the same, and gave to them a bill receipted in the plaintiff's name by himself, that bore the same notice in red letters that was printed upon the bill sent with the goods. The agent embezzled the collection. The case comes up on report.

The agent contracted a sale of the goods to be delivered, and to be paid for to himself at his next call. The goods were delivered according to contract, thereby giving the defendants reason to be-

ment relying upon the representation of the salesman that he was a member of the firm. The court, in overruling this defence, said "The burden of showing that a salesman not in possession of the goods had authority to receive payment therefor is on the purchaser or the party making payment. The defendant knew that Conroy was a salesman, and, as such, was without authority to receive payment; yet he accepts his misrepresentations as to being a member of the firm, although the style thereof was Crawford Bro's. This alone should have put him upon inquiry as to the truth of the representations. There is nothing to show that Crawford Bro's were advised of, or had any knowledge of, these misrepresentations, or that they ratified them in any manner. They had taken sufficient steps for their own protection when they notified their customers not to make payments to salesmen; and they could not foresee or protect themselves against the false representations of their agents as to their relation to the firm. The name of the firm, together with notice not to pay salesmen, was sufficient to put the purchaser on his guard and inquiry as to the truth of the representations of the salesman. Instead of making inquiry, he took the risk of the salesman's integrity, and must bear the loss which his false representations, clearly beyond the scope of his authority, have imposed. It would be a harsh rule, indeed, to require wholesale dealers to notify their customers that their travelling salesman were not members of the firm, and for this reason not authorized to receive payment for goods sold. The presumption is that they are not members of the firm they represent as salesmen, in the face of notice not to pay salesmen; and the burden is on the person alleging the contrary to show the relationship, and destroy this presumption, which can not be done by the mere declarations of the salesman made without the knowledge of the firm. It is an established rule of the mercantile law that a travelling salesman who is merely authorized to take orders for goods has no implied authority to receive payment or make collections. Clark *v.* Smith, 88 Ill. 298; 1 Am. & Eng. Enc. Law, 1036. To hold that such salesmen can empower themselves to make such collections by merely falsely representing themselves to be members of the firm for which they are making sales is placing it within their power to entirely abrogate the rule, and destroy its efficacy. Wholesale merchants would be entirely at the mercy of their salesmen."

A travelling salesman, known in modern business parlance as a "drummer" derives no implied authority from the nature of his employment to sell the samples with which his principal intrusts him as an aid to the discharge of the duties he engages to perform. Hibbard *v.* Stein, 45 Or. 507.

lieve that the agent had authority to contract for their sale. An agent who has authority to contract for the sale of chattels, has authority to collect pay for them (at the time, or as a part of the same transaction), in the absence of any prohibition known to the purchaser. Capel *v.* Thornton, 3 Car. & Payne, 352; Greely *v.* Bartlett, 1 Maine, 173; Goodenow *v.* Tyler, 7 Mass. 36; Story on Agency, § 102.

Knowledge of this prohibition by the purchaser may be inferred from particular circumstances of the sale, or from customary usages of trade with which he is familiar, as well as by direct notice, that the authority of the agent is limited in this particular. Persons dealing with an agent have a right to assume that his agency is general, and not limited, and notice of the limited authority must be brought to their knowledge before they are to regard it. Methuen Co. *v.* Hayes, 33 Maine, 169. A travelling agent, who assumes only to solicit orders for goods to be sold at the option of his principal, as in McKindley *v.* Dunham, 55 Wis. 515, may well be held unauthorized to make collections. So a broker, not intrusted with the article sold, may not be authorized to receive the purchase money. Higgins *v.* Moore, 34 N. Y. 417; Barring *v.* Corrie, 2 B. & Ald. 137; Story on Agency, § 109.

In this case, the agent assumed to complete a contract of sale, specific in its terms, stipulating that payment was to be made to himself. After the goods had been delivered he presented for payment a bill, made upon a genuine "bill head" of his principal. He assumed general authority, and no facts are proved that curtail or limit it. The plaintiff seeks to charge the defendant with knowledge that payment was required to be made, according to the terms of the notice in red letters upon the bill sent with the goods. The defendants did not see the notice, nor, taking into consideration the care ordinarily exercised by prudent men, are they at fault for not observing it.

It is not so prominent upon the bill as to become a distinctive feature of it; one that would be likely to attract attention in the hurry of business, and that ought to have been seen by the defendants. It would have been an easy matter for the plaintiff to have inclosed the bill in a letter of advice, calling the attention of the defendants to the fact that he was unwilling to intrust collections to his agent. Kinsman *v.* Kershaw, 119 Mass. 140; Putman and Co. *v.* French et al. 53 Vt. 402; Wass *v.* M. M. Ins. Co. 61 Maine, 537. *Plaintiff nonsuit.*[1]

PETERS, C. J., DANFORTH, VIRGIN, EMERY and FOSTER, JJ., concurred.

[1] *Contra:* Simon *v.* Johnson, 105 Ala. 344.

HARRIS *v.* SIMMERMAN.

81 Ill. 413. 1876.

APPEAL from a judgment in favor of defendant.

Mr. Justice SCHOLFIELD delivered the opinion of the court:

The suit is for the balance due for a safe sold and delivered by the plaintiff to the defendants. Proof is made of payment to one Cochnower, the agent of plaintiff, by whom the sale was effected, and the only question is, whether this payment is good as against the plaintiff.

Plaintiff testifies that Cochnower was only authorized to take orders for safes, and that he had no authority to receive payment.

The general rule is that a person dealing with an agent constituted for a special purpose, does so at his peril, where the agent passes the precise limits of his power, though, if he pursues the power as exhibited to the public, his principal is bound, even if private instructions had still further limited this special power. 2 Kent's Coms. 8th ed., p. 806, side p. 621.

In the case before us, the agent received, at the time he sold the safe, an old safe, which he and defendants agreed should go in payment of $50 on the safe to be delivered by the plaintiff. Plaintiff accepted the old safe at this estimate and sent the new safe, and gave defendants no notice, until after they had paid Cochnower, that he had no authority to collect the balance due.

We think this transaction was a recognition of a right in the agent to receive payment — a holding of him out to the public as authorized to collect, as well as to sell. If he was authorized to receive old safes in part payment, fixing and agreeing upon their value, the inference would be that he might also receive money.

Plaintiff should, at once, upon the receipt of the old safe, which was express notice to him that his agent was exceeding what he says was the authority confided to him, have notified the defendants that the agreement was beyond his authority, and that he was not authorized to receive payment. By the acquiescing of the plaintiff in the arrangement the agent made, defendants were justified in assuming that the agent had the power to collect, as he represented he had, and not being otherwise informed until after they had made payment, the plaintiff should be bound by the payment.

We consider it of no special significance that the order for the safe, and agreement of price to be paid, were in writing and not verbal. The writing was delivered to the agent, and there was

nothing in it which precluded payment to be made to an agent, instead of the plaintiff.

The judgment is affirmed. *Judgment affirmed.*[1]

DAYLIGHT BURNER CO. *v.* ODLIN.

51 N. H. 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

[1] In Meyer, etc., Co. *v.* Stone & Co., 46 Ark. 210, 215, it was held that full validity may also "be given to the act of the agent in receiving payment if there be a known usage of trade or course of business to justify the purchaser in making it. . . . In that case the presumption is that the agency was created with reference to the custom or course of business, and the ordinary reach of the agent's authority is thereby enlarged so as to cover the usual incidents of such an agency.

"The proof in this case developed the fact that it was a general custom for commercial agents, travelling like Barry, to solicit orders, to collect the purchase money for the goods sold by them, for their principals, and the proof was specifically directed to the custom of St. Louis agents (the principals were St. Louis merchants). Isolated exceptions to the rule were proved, but in such instances the firm making the limitation indicated the fact in their bill or letter heads that payment must be made to them directly. Proof was had of the fact of two other of appellants' salesmen traveling at the same time as Barry, both of whom were in the habit of making collections as Barry did, in this instance, and remitting to the appellants. Barry, himself, it appears, made collections from other customers of this house, and remitted the money to his principals from time to time, and no complaint was made by them of this exercise of authority, until his failure to remit the money paid him by the appellees. They did not before that time inform him or any one else that he had no authority to collect. Proof of the custom as referred to was admissible, not for the purpose of enlarging the scope of Barry's agency, but in order to interpret his power under it, and the specific acts of payment by other merchants to Barry and the appellants' other agents, tended to show their usual course of dealing with this class of agents, and to establish an actual knowledge on their part of the usage in this respect."

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, § 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.*

PAYNE *v.* POTTER.

9 Iowa, 549. 1859.

REPLEVIN for a horse alleged to be of the value of one hundred dollars. The court charged the jury, that "if the defendant justified his possession by virtue of a purchase from the agent of the plaintiff having authority to sell, he must show that the agent in making the sale complied substantially with the authority conferred. That an authority to sell the horse did not confer upon the agent authority to sell him upon time, and if the defendant in justification shows simply an authority to sell, he must in addition show that the sale was for cash; and it is not sufficient to show a sale upon time." Judgment for plaintiff, and defendant appeals.

STOCKTON, J. The first assignment of error is upon the charge of the court. The rule of law is that no man is bound by the act of another, without or beyond his consent; and where an agent acts under a special or express authority, whether written or verbal, the party dealing with him is bound to know at his peril what the power of the agent is, and to understand its legal effect; and if the agent exceed the boundary of his legal power, the act, as concerns the principal, is void. Delafield *v.* State of Illinois, 26 Wend. 193; Story on Agency, § 165. The power must be pursued with legal strictness, and the agent can neither go beyond nor beside it. The act must be legally identical with that authorized to be done, or the principal is not bound. 1 Am. Lead. C. 544, 545, note to Rossiter *v.* Rossiter. So it is held that an agent to whom a horse is given to sell for the principal, cannot deliver him in payment of his own debt, and the owner may recover the horse from a purchaser to whom he has been so delivered. Parsons *v.* Webb, 8 Greenl. R. 38.

And it is held that a special authority or direction to sell does not authorize a sale on credit, unless commercial custom has given rise to such an understanding in some particular business. The question whether in such a case a discretion to sell on credit is given must depend on the authority in the particular case. In May *v.*

Mitchell, 5 Humph. 365, a principal delivered to an agent three mules to be taken to the southern market, and to be sold for the best price that he could get, and the proceeds to be returned; the agent took them to the south and sold them on credit, and the purchaser proved insolvent; it was held that the agent was vested with a discretionary power to sell upon the best terms that could be procured according to the course of trade in that part of the country to which the mules were carried, and as this was proved to be on credit, the agent was held not to be liable to the principal.

Every general power necessarily implies the grant of every matter necessary to its complete execution. Peck *v.* Harriott, 6 Serg. & R. 146. In the absence of special instructions to the contrary, and in the absence of such prescription as to the manner of doing the act, as implies an exclusion of any other manner, an authority or direction to do an act, or accomplish a particular end, implies and carries with it authority to use the necessary means and inducements, and to execute the usual legal and appropriate measures proper to perform it. And not only are the means necessary and proper for the accomplishment of the end included in the authority; but also, all the various means which are justified or allowed by the usages of trade. Thus (says Judge STORY) if an agent is authorized to sell goods, this will be construed to authorize the sale to be made on credit as well as for cash, if this course is justified by the usages of trade, and the credit is not beyond the usual period. Story on Agency, § 60.

We think it results from the rules above laid down that the burden lay upon the defendant to show that the sale by the agent on credit was justified by the usages of trade, and that the credit given was not unreasonable. Without such proof the authority of the agent could only be construed into an authority to sell for cash; and in this view there was no error in the charge of the court to defendant's prejudice. . . . *Judgment reversed on another point.*

BRITTAIN *v.* WESTALL.

137 N. C. 30. 1904.

ACTION to recover a balance claimed to be due for lumber sold and delivered by plaintiff to the defendant through one J. A. Townsend, who, the plaintiff alleged, was the agent of defendant to buy the lumber. Defendant denied this allegation, and he also denied that he was indebted to plaintiff in any amount. From a judgment in favor of plaintiff, defendant appeals.

WALKER, J. This case was before us at the last term upon an appeal by the plaintiff from a judgment of nonsuit, which the court

rendered on motion of the defendant at the close of the testimony. 135 N. C. 492. We then held there was some evidence that Townsend was the agent of Westall to buy the lumber for him, and, although it was a restricted agency, and Townsend could only buy for cash, yet, if Townsend bought lumber from the plaintiff on Westall's credit, and the latter received and appropriated it to his own use, knowing at the time it had been so bought, he would be liable for its value. In order that this phase of the case might be submitted to the jury, the judgment was set aside, and a new trial awarded. . . . There was evidence at the last trial that the defendant had supplied Townsend with sufficient funds to buy the lumber. In Patton *v.* Brittain, 32 N. C. 8, it appeared that an agent was given authority to purchase personal property for his principal, but only so far as he had cash of his principal with which he was to pay for it. The agent purchased on the credit of the principal without paying any money, and the property was delivered to the principal, who received and converted it to his own use. The court held that, when the agent violated his express instructions, and bought on credit instead of for cash, the principal had the right to repudiate the contract, and to refuse to receive the articles, but, having received and used them with knowledge that they had been purchased for him and upon his credit, the vendor could recover from him the price of the goods. It was said that the same result would follow whether the agent acted contrary to his authority, exceeded it, or had none at all; it being the simple case of the goods of one man coming to the use of another, which he knows are not intended as a gift, but are sent to him upon the expectation that he will receive and pay for them. A mere agency to purchase does not always and necessarily imply authority to pledge the credit of the principal, and when the agent is furnished with funds for the purpose of making purchases on his principal's account he cannot bind the latter by a purchase on credit, unless, perhaps, such is the well-known custom of trade, or unless the principal, with notice of the facts, ratifies the transaction. This is substantially the principle which is involved in this case, and it is sanctioned by the best authorities. See 1 Am. & Eng. Enc. of Law (2d ed.), pp. 1020, 1021, where the cases on the subject are collated. This court has said that when the authority to buy or to sell is given in general terms, it is clear, in the absence of any restriction to the contrary, that the agent has the power to buy for cash or on credit, as he may deem best, and to sell in the same way. Ruffin *v.* Mebane, 41 N. C. 507. It may be taken, then, as a settled principle in the law of agency, that, if express authority to buy on a credit is not given to an agent, but he is authorized to make the purchase, and no funds are advanced to him to enable him to buy for cash, he is by implication clearly authorized to purchase on the credit of his principal, because when an agent is authorized to do an act for his

principal all the means necessary for the accomplishment of the act are impliedly included in the authority, unless the agent be in some particular expressly restricted. Sprague *v.* Gillett, 50 Mass. (9 Metc.) 91. The case of Komorowski *v.* Krumdick, 56 Wis. 23, is much like ours. The court there held that an agent to purchase property must, in order to bind his principal, who furnishes in advance the funds to make the purchase, buy for cash, unless he has express power to buy upon credit, or unless the custom of the trade is to buy upon credit; and in the absence of such express authority or of such a custom the agent cannot bind his principal by a purchase, upon a credit, of a person who is ignorant of his real authority as between himself and his principal, unless the property so bought is delivered to the latter, and he receives it knowing that his agent actually bought on credit, or that he had no funds in his hands at the time with which to buy the same. See, also, Jaques *v.* Todd, 3 Wend. 83; Willard *v.* Buckingham, 36 Conn. 395; Proctor *v.* Tows, 115 Ill. 138; Paine *v.* Tillinghast, 52 Conn. 532; Mechem on Agency, § 364. While these principles seem not to have been seriously questioned by the defendant, he contended that Townsend was not his agent, and that, even if he was, he had been supplied by him with more than sufficient cash with which to buy the lumber afterwards received by the defendant, and that Townsend had no express authority to buy on credit.

In order to present these questions, and have the jury pass upon them, the defendant's counsel requested the court to give certain instructions to the jury; and among others the following one, which was the subject of the defendant's second prayer: "The written contract introduced in evidence constituted Townsend the agent of Westall, with limited authority only. As such agent, Townsend had authority to buy lumber for cash, with money furnished him by Westall, but he did not have authority under said written contract to buy lumber on Westall's credit." We do not see why defendant was not entitled to this instruction. On the face of the contract it appeared that Townsend was directed to buy only for cash, and, this being so, he could not, of course, buy on credit, contrary to the instructions of his principal. Whether the defendant subsequently ratified what he did, and is therefore liable to the palintiff, is quite another and different question.

The instruction requested in the defendant's sixth prayer was a proper one, and should have been given. It was as follows: "Although the identical lumber in controversy came into possession of defendant, and was appropriated by him, he would not be liable to plaintiff for its value unless he had authorized Townsend to buy on his credit, or accepted and appropriated the lumber with notice of the fact that Townsend had bought it on his [defendant's] credit." The contract expressly required Townsend to buy for cash, and the

only possible ground of defendant's liability is that he received and appropriated the lumber to his own use, knowing that his agent had bought it on his credit, or that he had not provided his agent with the cash to buy lumber, in which case he would have implied authority to buy on credit, and that fact would also be some evidence of notice to defendant that his agent had so bought. 1 Am. & Eng. Enc. of Law, 1021, and notes.

There was error in the refusal to give the instructions contained in the second and sixth prayers of defendant, for which there must be another trial. *New trial.*

TAYLOR *v.* STARKEY.

59 N. H. 142. 1879.

TROVER, for an organ. Facts found by the court. The organ was delivered by the plaintiffs to one Davis, under a contract, in writing, in which it was, among other things, stipulated that Davis should make efforts to sell it for them, and pay over the proceeds less his commissions. It was agreed that the plaintiffs should not part with their title until they were paid. The contract was admitted in evidence, subject to the defendant's exception.

The defendant received the organ of Davis in exchange for a buggy and $40 cash. When the exchange was made, Davis informed the defendant that he was the plaintiff's agent. The organ was demanded before this suit was brought.

STANLEY, J. The contract between the plaintiffs and Davis was properly admitted. It was evidence of the agreement under which Davis was in possession, and tended to show that his authority was to sell, and not to exchange. In the absence of evidence to the contrary, to sell means to sell for cash. Davis, having no authority except to sell for cash, could not lawfully exchange for other property, either in whole or in part (Story on Agency, § 78), and if he did the title would not pass, for the plaintiffs did not hold Davis out, or authorize him to hold himself out, as owner of the organ. Holton *v.* Smith, 7 N. H. 446; Burnham *v.* Holt, 14 N. H. 367; Towle *v.* Leavitt, 23 N. H. 360. *Judgment for plaintiffs.*

CLARK, J., did not sit; the others concurred.

WARD *v.* SMITH.

7 Wall. (U. S.) 447. 1868.

ERROR to the circuit court of Maryland.

In August, 1860, William Ward, a resident of Alexandria in Virginia, purchased of one Smith, of the same place, then administrator of the estate of Aaron Leggett, deceased, certain real property situated in the state of Virginia, and gave him for the consideration-money three joint and several bonds of himself and Francis Ward. These bonds, each of which was for a sum exceeding four thousand dollars, bore date of the 22d of that month, payable, with interest, in six, twelve, and eighteen months after date, "at the office of discount and deposit of the Farmers' Bank of Virginia, at Alexandria."

In February, 1861, the first bond was deposited at the bank designated for collection. At the time there was indorsed upon it a credit for over five hundred dollars; and it was admitted that, subsequently, the further sum of twenty-five hundred dollars was received by Smith, and that the amount of certain taxes on the estate purchased, paid by the Wards, was to be deducted.

In May, 1861, Smith left Alexandria, where he then resided, and went to Prince William County, Virginia, and remained within the confederate military lines during the continuance of the Civil War. He took with him the other two bonds, which were never deposited at the Farmers' Bank for collection. While he was thus absent from Alexandria, William Ward deposited with the bank to his credit at different times, between June, 1861, and April, 1862, various sums, in notes of different banks of Virginia, the nominal amount of which exceeded by several thousand dollars the balance due on the first bond. These notes were at a discount at the time they were deposited, varying from eleven to twenty-three per cent. The cashier of the bank indorsed the several sums thus received as credits on the first bond; but he testified that he made the indorsement without the knowledge or request of Smith. It was not until June, 1865, that Smith was informed of the deposits to his credit, and he at once refused to sanction the transaction and accept the deposits, and gave notice to the cashier of the bank and to the Wards, obligees of the bond, of his refusal. The cashier thereupon erased the indorsements made by him on the bond.

Smith now brought the present action upon the three bonds to recover their entire amount, less the sum credited on the first bond when it was deposited, the sum of twenty-five hundred dollars, subsequently received by the plaintiff, and the amount of the taxes paid by the defendants on the estate purchased.

The court below instructed the jury, that if they found that the defendants executed the bonds, the plaintiff was entitled to recover their amounts, less the credit indorsed on the first one, and the taxes paid by the defendants, and the subsequent payment to the plaintiff with interest on the same. The plaintiff recovered, and the defendants brought the case to this court by writ of error.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

The defendants claim that they are entitled to have the amounts they deposited, at the Farmers' Bank in Alexandria, credited to them on the bonds in suit, and allowed as a set-off to the demand of the plaintiff. They make this claim upon these grounds: that by the provision in the bonds, making them payable at the Farmers' Bank, the parties contracted that the bonds should be deposited there for collection either before or at maturity; that the bank was thereby constituted, whether the instruments were or were not deposited with it, the agent of the plaintiff for their collection; and that as such agent it could receive in payment, equally with gold and silver, the notes of any banks, whether circulating at par or below par, and discharge the obligors.

We do not state these grounds in the precise language of counsel, but we state them substantially.

It is undoubtedly true that the designation of the place of payment in the bonds imported a stipulation that their holder should have them at the bank, when due, to receive payment, and that the obligors would produce there the funds to pay them. It was inserted for the mutual convenience of the parties. And it is the general usage in such cases for the holder of the instrument to lodge it with the bank for collection, and the party bound for its payment to call there and take it up. If the instrument be not there lodged, and the obligor is there at its maturity with the necessary funds to pay it, he so far satisfies the contract that he cannot be made responsible for any future damages, either as costs of suit or interest, for delay. When the instrument is lodged with the bank for collection, the bank becomes the agent of the payee or obligee to receive payment. The agency extends no further, and without special authority an agent can only receive payment of the debt due his principal in the legal currency of the country, or in bills which pass as money at their par value by the common consent of the community. In the case at bar only one bond was deposited with the Farmers' Bank. That institution, therefore, was only agent of the payee for its collection. It had no authority to receive payment of the other bonds for him or on his account. Whatever it may have received from the obligors to be applied on the other bonds, it received as their agent, not as the agent of the obligee. If the notes have depreciated since

in its possession, the loss must be adjusted between the bank and the depositors; it cannot fall upon the holder of the bonds.

But even as agent of the payee of the first bond, the bank was not authorized to receive in its payment, depreciated notes of the banks of Virginia. The fact that those notes constituted the principal currency in which the ordinary transactions of business were conducted in Alexandria cannot alter the law. The notes were not a legal tender for the debt, nor could they have been sold for the amount due in legal currency. The doctrine that bank bills are a good tender, unless objected to at the time, on the ground that they are not money, only applies to current bills, which are redeemed at the counter of the bank on presentation, and pass at par value in business transactions at the place where offered. Notes not thus current at their par value, nor redeemable on presentation, are not a good tender to principal or agent, whether they are objected to at the time or not. . . .

That the power of a collecting agent by the general law is limited to receiving for the debt of his principal that which the law declares to be a legal tender, or which is by common consent considered and treated as money, and passes as such at par, is established by all the authorities. The only condition they impose upon the principal, if anything else is received by his agent, is, that he shall inform the debtor that he refuses to sanction the unauthorized transaction within a reasonable period after it is brought to his knowledge. Story on Promissory Notes, §§ 115, 389; Graydon *v.* Patterson, 13 Iowa, 256; Ward *v.* Evans, 2 Lord Raymond, 930; Howard *v.* Chapman, 4 Carrington & Payne, 508. . . . *Judgment affirmed.*

SWEETING *v.* PEARCE.

7 C. B. (N. S.) 449. 1859.

THE plaintiff, a ship-builder in London, employed Walton & Sons, insurance brokers, to effect a policy upon a ship at Lloyd's, and, after the happening of a loss, gave the brokers the ship's papers for the purpose of enabling them to adjust the loss with the underwriters. The policy was effected in the brokers' name, and they retained possession of it. An adjustment having taken place, the loss was settled by the underwriters setting off the amount payable by them upon the policy against the balance due to them from the brokers for premiums on other policies effected by them. Plaintiff, claiming that the brokers had no authority to settle in this manner, sued the defendant on the policy. The jury found that the settlement was made in accordance with a usage prevailing at Lloyd's, which was found to be generally known to merchants and shipowners, but which the

jury found was not known to the plaintiff, who had merely left the policy in the hands of the brokers for safe custody.

The court directed a verdict for plaintiff for the amount claimed, and defendant moved to set aside this verdict.

BYLES, J. I entirely accede to the proposition that, when Walton & Sons were intrusted with the policy, they were entitled to receive the money under it from the defendant.[1] The policy was the title-deed, which they had no authority to hand over to the defendant without receiving payment. On that point, I agree with the view taken by the defendant's counsel. But, on the other hand, I think the plaintiff gave Walton & Sons no authority to settle the loss in the way they did. It is not disputed that the general rule of law is, that an authority to an agent to receive money implies that he is to receive it in cash. If the agent receives the money in cash, the probability is that he will hand it over to his principal; but, if he is to be allowed to receive it by means of a settlement of accounts between himself and the debtor, he might not be able to pay it over: at all events, it would very much diminish the chance of the principal ever receiving it; and, upon that principle, it has been held that the agent, as a general rule, cannot receive payment in anything else but cash. Unless, therefore, there is some usage to control it, payment to the agent must be made in money. Then, what is the usage relied on to take this case out of that general rule? It is not the usage of London, but the practice of keeping accounts adopted at a particular place. It does not fall within the description of a general custom or usage, but it is only the usage at a particular place, — of a particular counting-house, I may say. Independently, therefore, of any authority upon the subject, I should have thought it would have been necessary to have brought knowledge of such usage home to the plaintiff before he could have been affected by it. In addition to the authorities which have been cited, I may observe that Mr. Smith, in his work on Mercantile Law, 6th ed., p. 347, says, "The usage of Lloyd's, being *prima facie* only the usage of a single house, will not be binding upon one who cannot be shown to be acquainted with it." Then there have been three cases at least, Todd *v.* Reid, 4 B. & Ald. 210; Scott *v.* Irving, 1 B. & Ad. 605; and Gabay *v.* Lloyd, 3 B. & C. 793, in which it has been held that the principal is not affected unless he be shown to have been cognizant of the usage. Upon principle, therefore, as well as upon authority, I think that the brokers in the present case had authority from the plaintiff to receive the loss only in cash. It was urged by Mr. Wilde in the course of his argument, that there was here an apparent authority for the brokers to receive a settlement in the way they did. The

[1] COCKBURN, C. J. . . . "I quite concur in the first point contended for by the defendant's counsel, that, the policy remaining in the hands of the brokers, the plaintiff is estopped from saying that it was not in their hands with authority to collect."

apparent authority, however, must be derived from the principal: and it still brings it back to the question whether the latter ever knew, or was blameable for not knowing, the usage. Upon principle and authority equally, I think this rule ought to be discharged.

Rule discharged.[1]

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3. *Special Forms of Agency.*

a. Factors.

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 sends 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 sends it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one sends goods to an auction-room, can it be supposed that he sent them thither merely for safe custody? Where the commodity is sent in such a way and to such a place as to exhibit an apparent purpose of

[1] Affirmed, 9 C. B. (N. S.) 534.

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 pledgor of the goods had no authority to pledge them, being a mere factor for sale; and yet since the case of Paterson *v.* Tash,[1] that doctrine has never been overturned.[2] 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.

LEBLANC, 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

[1] 2 Stra. 1178.

[2] For changes in common law doctrines effected by the Factors' Acts, see *post*, pp. 507–519.

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]

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b. Brokers.

HIGGINS *v.* MOORE.

34 N. Y. 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.

[1] See also Daylight Burner Co. *v.* Odlin, 51 N. H. 56, *ante*, p. 350; and Baxter *v.* Sherman, 73 Minn. 434, *post*, p. 432.

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.* Thompson, 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 confessedly 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 Graves *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 by 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.*

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c. AUCTIONEERS.

PAYNE *v.* LORD LECONFIELD.

51 L. J. Q. B. (N. S.) 642. 1882.

RULE for a new trial, on the ground that the judge misdirected the jury, in directing them to find a verdict for the defendant.

The action was for damages for a breach of warranty on the sale

of a horse. At the trial before Bowen, J., and a special jury, evidence was given that the mare Polyxo was sent by the defendant to the horse depository of Messrs. Tompkins & Sons, at Reading, for sale by public auction. At the time the mare was sent a form supplied by Tompkins was partially filled up on the defendant's behalf and returned.

Evidence was given that on the day of the sale the mare, when brought out, was observed by a bystander to have a discharge from her nostrils, whereupon Tompkins, the auctioneer, said, in the plaintiff's hearing, "You need not be afraid. The mare comes from Lord Leconfield; she has only got a cold upon her, and I shall sell her as only having a cold." The mare was knocked down to the plaintiff for eight and a half guineas. The mare was subsequently pronounced to be suffering from chronic glanders, and, with other horses belonging to the plaintiff, and alleged to have been infected by her, was eventually shot under an order of the local authority. The learned judge left certain questions to the jury; but they were unable to agree on their verdict. Whereupon he directed a verdict to be entered for the defendant, on the ground that there was no evidence of authority by the defendant to warrant the horse.

GROVE, J. The only question upon which there is any doubt in my mind in this case is whether the judge ought to have directed a verdict. I should have had no hesitation in discharging the rule if the question had been left to the jury. The question is whether an auctioneer, in the absence of express authority from his principal, or even in spite of his authority, can warrant an article sold at a sale. In regard to that naked proposition, I say he cannot. I do not say that there may not be cases or circumstances in which he would have authority, but no case goes the length contended for. The only authority is a passage from Story, in regard to representations, and he says that the question has never been decided as to a warranty. There may be hardships in deciding either way. A person who goes to a sale has no means of testing the authority of the auctioneer to make statements, so that there is some hardship in this case. It is not very great, because the auctioneer may be sued. There is still greater hardship on the vendor. If a picture were sent without any authority to warrant the painter, and the auctioneer warrant it, the owner might be involved in enormous liability. The rule, if it existed, would be a very formidable rule, and there would be examples of it. It has been held at *nisi prius* that a servant going to a fair to sell a horse has authority to warrant it; but in Brady *v.* Todd, 9 Com. B. Rep. (N. S.) 592; 30 Law J. Rep. C. P. 223, a servant of the owner of a horse entrusted to sell it on that occasion only was held not to bind his master. It is different in the case of dealers' servants. An auctioneer receives miscellaneous articles of all descriptions to sell for others. He is *simpliciter* an agent to sell. His

duty would be to inquire of his principal if it were desirable that a warranty should be given. The auctioneer is naturally anxious to sell and to enhance the price. In this case there was no complete delegation of authority, but there was enough to show an intelligent auctioneer that he had no authority to warrant. The form was filled up as to color, age, and sex, and the horse is described as a kennel hack. The answers to all the other questions are left blank, meaning that as to them the owner says nothing. He filled up what he gave authority to warrant, he omitted what he did not give authority to warrant. It was not argued that the auctioneer could warrant so as to bind the defendant, in spite of a refusal on the part of the defendant to warrant; but the argument if good at all must go as far. *Rule discharged.*[1]

BELL *v.* BALLS.

[1897] 1 Ch. 663.

THIS was an action by the plaintiffs as vendors of certain freehold property known as "The Riddings," for specific performance of an alleged agreement by the defendant to purchase the same. The plaintiffs caused the property in question to be put up for sale by auction by Messrs. Herring, Son & Daw, a firm of auctioneers, upon the terms expressed in printed particulars and conditions of sale, at the end of which was a memorandum of agreement in blank. The defendant attended the sale. Upon Mr. Daw, a member of the firm of auctioneers, entering the room a short conversation took place with reference to "The Riddings" between him and the defendant, who was known to him personally, and just before he entered the rostrum he asked the defendant to "give him a bid." The sale was then begun of five different properties, among which "The Riddings" came third. The reserve price was £1,600. The defendant bid £1,550, and, after communications had passed between Mr. Daw and the vendors, the property was knocked down to the defendant at that price. The sale of the two remaining properties was then proceeded with, and at the close the defendant left the room. Upon the auctioneer's clerk calling Mr. Daw's attention to the circumstance that the defendant had not signed the memorandum of agreement, a messenger was sent after him, and he returned. He was then asked to sign the memorandum, but refused, on the ground that he had made the bid for Mr. Daw in compliance with his request, and not for himself. The auctioneer's clerk had in the meantime filled up the memorandum of agreement on a copy of the printed particulars and conditions of sale in the appropriate manner. This memo-

[1] MATHEW, J., delivered a concurring opinion.

randum was not signed either by the defendant, the auctioneer, or his clerk. A week later, however, on December 2, 1895, Mr. Daw, at the instance of the vendors, filled up and signed, in the name of his firm, and as agent for the defendant, another copy of the memorandum, striking out, however, all reference to the deposit which the defendant had not paid. The defendant persisted in his refusal to complete the purchase, and the action was brought to compel him to do so, the plaintiffs relying upon both the above mentioned documents as memoranda of the contract sufficient to satisfy the requirements of the Statute of Frauds.

STIRLING, J. (after stating the facts): The first question is whether the defendant really bid for the property, as he alleges, in the belief that he was bidding for Mr. Daw, or in other words acting as puffer at the sale. The story is a strange one; but I am bound to say that, having seen the defendant in the box and heard his evidence and that of his friend, Mr. Wyatt, and seen the memoranda which he produced, I believe that he did act under the belief which he professes. On the other hand, I think that the defendant had no reasonable ground for so acting; and that what passed between him and Mr. Daw, as told by himself, ought not to have misled him into the belief which he entertained. Under these circumstances, what is the legal result? It seems to me that, assuming a memorandum to exist which satisfies the requirements of the Statute of Frauds, there is a contract between the plaintiffs and defendant which is enforceable at law, and that the mistake at most constitutes a defence only so far as the action seeks specific performance; and, as was laid down by the Court of Appeal in Tamplin *v.* James, 15 Ch. D. 215, the Court is now bound in such a case to consider the question of damages. The validity of the second defence must therefore be considered.

First, with reference to the memorandum filled up by the auctioneer's clerk. It has been decided that upon a sale by auction the auctioneer is the agent of the purchaser as well as of the seller, and has authority to sign a memorandum of the sale so as to bind both parties; and if the memorandum on a copy of the particulars has been filled up by the auctioneer with his own hand in the same way as the memorandum now in question was filled up by the clerk, it would have been sufficient. An agent, however, cannot as a rule delegate his authority. The law as to that in the case of an auctioneer and his clerk is laid down in Pierce *v.* Corf, L. R. 9 Q. B. 214, where BLACKBURN, J., said: "I take it as quite clear that the auctioneer's clerk has no authority to sign by the general custom; although, as Bird *v.* Boulter, 4 B. & Ad. 443, decided, there may be special circumstances to show that an auctioneer's clerk had authority to sign; where the bidder, that is, the person to be charged, by word or sign authorizes the auctioneer's clerk to sign on his be-

half, he makes him his agent to sign, although by the general custom the auctioneer's clerk would not be the bidder's agent." In the present case the defendant did not by word, sign, or otherwise authorize the auctioneer's clerk to sign on his behalf, and the case of Bird *v.* Boulter, *supra,* has no application. It was, however, urged that the exigencies of the case require that on sales by auction at the present day the auctioneer's clerk sitting publicly beside him should be held authorized to sign memoranda on behalf of purchasers. The ordinary practice at the present time with reference to sales of real estate was stated by Mr. Daw, the plaintiffs' own witness, to be that an auctioneer, after he has knocked down a particular lot, proceeds with the sale of the following lots and leaves it to the clerk to find out the name of the purchaser and to prepare a record of the contract, which he does by filling up the memoranda appended to two copies of the particular sale, one for signature by the purchaser, the other for signature by the auctioneer. Some convenience, no doubt, attends such a practice, and I do not desire to question its validity, but the mere statement of it appears to me to show that there is no ground for the contention that the exigencies of the case require that the auctioneer should be held entitled to delegate his authority to his clerk. The practice contemplates that one part of the memorandum should be signed by the auctioneer; and if this be consistent with the requirements of business, why should not the signature of the other by him be also? I say this quite irrespective of what was urged in argument that there is no difficulty in the auctioneer writing down at the time the name of the purchaser on a copy of the particulars and conditions of sale, which was held to be sufficient in White *v.* Proctor (1811), 4 Taunt. 209, and Kemeys *v.* Proctor (1813), 3 V. & B. 57; (1820) 1 Jac. & W. 350. I come, therefore, to the conclusion that the memorandum filled in by the clerk does not satisfy the requirements of the Statute of Frauds.

Secondly, as to the memorandum signed by the auctioneer on December 2, 1895. It was contended that at the time when the auctioneer signed it he had no authority so to do — first, because the authority conferred by the purchaser on the auctioneer at the time of the sale had expired long before December 2, 1895, or, at all events, could not be exercised at that date; and, secondly, because the purchaser had actually revoked the authority.

The first decision that, on a sale by auction of an interest in land the auctioneer is authorized by the purchaser to sign a memorandum of the contract, is Emmerson *v.* Heelis, 2 Taunt. 38, 47. There the auctioneer signed by entering the purchaser's name opposite a particular lot in a specially prepared catalogue. MANSFIELD, C. J., says: "This memorandum is more particular than most memorandums of sale are; and upon it the auctioneer writes down the purchaser's name. By what authority does he write down the purchaser's name?

By the authority of the purchaser. These persons bid, and announce their biddings, loudly and particularly enough to be heard by the auctioneer. For what purpose do they do this? That he may write down their names opposite to the lots; therefore he writes the name by the authority of the purchaser, and he is an agent for the purchaser." In Earl of Glengal *v.* Barnard (1836), 1 Keen, 769, Lord LANGDALE, M. R., 1 Keen, 788, thus explains the ground of his decision: "The nature of the proceeding by auction — the bidding for the purpose of making the purchase — the necessity of making a statement of the bidding — the direction to the auctioneer to write down the bidding, which is perhaps involved in the very process of bidding, and some other circumstances afford intelligible ground for the decision in Emmerson *v.* Heelis, *supra,* and the approbation which has since been bestowed upon it." These cases appear to show that the authority which the purchaser confers upon the auctioneer is to write down the bidding — that is, to make a minute or record of it at the time and as part of the transaction, and such a record is held a memorandum sufficient to satisfy the statute. I do not see that the nature of the proceeding justifies the implication of an authority to make a memorandum, except at a time when the writing down can fairly be held to be a part of the sale. If the auctioneer were allowed to record the bidding at a later time evils might arise similar to those which the Statute of Frauds was intended to prevent.

Such authority as there is appears to me to favor this view. I am not sure how far the case of Mews *v.* Carr, 1 H. & N. 484, can really be so regarded, for though the learned judges speak of the auctioneer ceasing to be agent for the purchaser "so soon as the sale is over," their remarks were directed to the case of a sale made through the auctioneer not at the auction but several days afterwards. The point, however, was raised in Buckmaster *v.* Harrop (1807) 13 Ves. 456, 473. There the auctioneer was one of the vendors, and apparently did not make his entry of the bidding at the time of the sale, and objection was taken on that account. Lord ERSKINE, L. C., thus deals with it: "The only evidence that I can receive is the written memorandum itself, unless it is lost; and it must be a contemporary memorandum, especially in this case: as the auctioneer, being himself the vendor, though only as a trustee, could not in strictness be the agent of the purchaser." By a contemporary memorandum I understand one made at the time and as part of the transaction of sale. If in the present case the auctioneer had proceeded to sign a memorandum immediately on the conclusion of the auction I should have been slow to hold that to be beyond his power; but I think that the memorandum of December 2, 1895, was signed at a time when the auctioneer's authority had ceased. It becomes unnecessary, therefore, to consider the question whether the purchaser could revoke the authority conferred by him on the auctioneer. I content

myself with saying that I share with Lord Romilly his reluctance to hold that upon a sale by auction under ordinary circumstances the vendor or the purchaser can say after a lot has been knocked down, "I am not satisfied with the price and withdraw the authority given to the auctioneer": see Day *v.* Wells, 30 Beav. 220.[1]

The result, therefore, is that the action fails, and must be dismissed with costs.

WHITE *v.* DAHLQUIST MFG. CO. ET AL.

179 Mass. 427. 1901.

BILL in equity to compel the conveyance of a parcel of real estate sold to plaintiff at auction. From a decree for plaintiff, defendants appeal. Defendants contend that the memorandum of sale was insufficient to bind them.

HAMMOND, J. . . . It is still further objected that, as to the Third street estate, the memorandum was not signed until the next day, and that the auctioneer had no authority at that time to bind the defendants. The general rule is that the memorandum may be signed at any time subsequent to the formation of the contract, at least before action brought. Browne, St. Frauds, § 352a, and cases cited; Lerned *v.* Wannemacher, 9 Allen, 412, 416; Sanborn *v.* Chamberlin, 101 Mass. 409, 416. And this rule is applicable where the contract is made by an agent, and the subsequent memorandum is signed by him during the existence of his agency. It has been sometimes thought that there is an exception to this rule in the case of auctioneers (see the authorities referred to in Browne, St. Frauds, § 353); but the exception is more apparent than real. The question does not turn upon the fact that the agent is an auctioneer, but upon the scope and duration of the agency. While it is said that an auctioneer is the agent of both seller and purchaser for signing the contract, it does not follow that his agency for the one is co-extensive in its nature and duration with that for the other. The word "auctioneer" is sometimes used to designate the crier who simply calls for bids and strikes the bargain at an auction sale. His connection with the sale may begin with calling for bids, and end with striking the bargain. If that be the only authority given him by seller and purchaser, it may be said that, while the power to strike the bargain fairly imports authority to make his work effectual by signing the memorandum necessary to bind the parties, it also implies that that act shall be substantially contemporaneous with the sale, and as a part of it. In such a case the agency of the auctioneer is substantially ended with the auction, and his authority to bind either party

[1] See Van Praagh *v.* Everidge, [1902] 2 Ch. 266; reversed in [1903] 1 Ch. 434.

by a memorandum would not extend beyond that time. And, so far as respects the purchaser, the authority of the auctioneer, as a usual rule, is confined to the actual time of the auction. It is conferred by the bid when accepted, and therefore begins with the fall of the hammer. The technical ground is that the purchaser, by the very act of bidding, "calls upon the auctioneer or his clerk to put down his name as a bidder, and thus confers an authority on the auctioneer or his clerk to sign his name, and this is the whole extent of his authority." Shaw, C. J., in Gill *v.* Bicknell, 2 Cush. 355, 358. Such an authority must be exercised contemporaneously with the sale. See Browne, St. Frauds, § 353, and cases cited in the notes.

But, primarily and actively, the auctioneer, as a rule, is the agent of the seller, and as to him his authority is generally more extensive, and may cover a time both before and after the sale. Frequently the property is put into his hands for sale, and all the details are left entirely to him. He is expected to make all the arrangements by way of public advertisement and otherwise, and to act fully at the sale, to receive the deposit from the purchaser, and to carry the transaction to the end. Such authority from a seller to an auctioneer does not end with the auction sale, but extends beyond it, and until it is revoked the auctioneer may properly bind the seller by a memorandum signed within a reasonable time. He does this, not simply because he is the crier at the sale, but because his agency, by the fair understanding between him and the seller, extends to the final consummation of the contract, and is not affected by the fact that he also acts as crier.

In the present case Hogan, the auctioneer, testified that he was in the real-estate and insurance business, and had been for several years; that a week or ten days before the sale Dahlquist "placed the property with me for sale." Hogan advertised it by means of handbills and newspapers, and seems to have been given full authority to sell the property, subject to instructions as to price. He received and kept after the auction the deposits made by the purchasers, and the evidence would fully warrant a finding that the understanding was that his agency for the defendants should continue until the sale was completed, and that it had not been revoked at the time Hogan signed the memorandum. Upon such a finding the general rule applies, and, since Hogan was acting during the continuance of his agency, he could properly bind his principals by signing the memorandum. *Decree affirmed.*

PINCKNEY *v.* HAGADORN.

1 Duer (Superior Ct. of the City of N. Y.) 89. 1852.

ACTION to enforce specific performance of an agreement to sell real estate. The land was sold at public auction to the plaintiff. The terms of sale called for ten per cent. of the purchase money to be paid on the day of sale, but the plaintiff did not pay it to the auctioneer until three days after the sale. The evidence was conflicting as to whether the auctioneer had been forbidden by the defendant to receive the ten per cent. prior to its actual payment by the plaintiff. The referee, to whom the case was referred, reported in favor of the plaintiff, and defendant now moves to set aside the report.

By the court. SANDFORD, J. . . . The defendant's next point is, that the auctioneer was an agent, with limited power, and had no authority to extend the time for the payment of the ten per cent., nor to receive it, or give a receipt for it three days after the sale.

The power of an auctioneer is, no doubt, special and limited. His authority to receive the stipulated deposit, which in this case was ten per cent., is not, nor could it be questioned. He receives the deposit not merely as the agent of the seller: he is bound to keep it for the indemnity of the purchaser, until the latter is enabled to look into the title proposed to be conveyed to him, and decide on its sufficiency, or until the lapse of the time limited for the purpose in fixing the day for the payment and security of the residue of the price.

The terms of sale in this case, as is customary, provided that the purchaser should pay ten per cent. on the day of sale. Was the auctioneer's authority limited to receiving it on that very day? His entry in his sales book had made a complete contract, by which the purchaser was bound, at all events, to take the lot at the price there set down. The seller had a right, undoubtedly, to make time of the essence of the contract, if he chose to do so. As a general rule, time is not so essential in executory contracts for the sale of land as to work a forfeiture on the omission to pay at the day stipulated, Edgerton *v.* Peckham, 11 Paige, 352, 363, and until the seller does some positive act to make it essential, the buyer is at liberty to pay after the day. We find no warrant for the doctrine that the auctioneer's authority to receive the deposit on a sale made by him, on the terms here expressed, "ten per cent. on the day of sale," is limited to receiving it on that day and on that day alone. Until notified to the contrary by the seller, and his authority to receive it thereby revoked, we see no good reason why it does not continue after the day of sale. We do not perceive that it differs in this respect from the authority

of other agents empowered to receive money on the sales of land or other executory contracts. It is a very common occurrence that executory contracts are made for the sale of lands, and left in the hands of agents to receive payment. They provide for payment on fixed days, and almost universally they make the execution of a conveyance dependent upon the payment of the price at the times and in the manner stipulated. We venture to say it was never heard of that the principal in such contracts could refuse to convey because the agent had received a payment after the day stipulated, there having been no notice to him not to receive it, or other revocation of his authority.

The power of an auctioneer, in receiving the ten per cent., does not fall short of that of such agents for the collection of contracts made on private sales, and we think we are holding the rule quite strict enough in favor of sellers at auction, when we decide that, until notified by the seller after the day of sale that he repudiates the contract and revokes the auctioneer's authority to receive the deposit, that authority continues in full force.

The stipulation for the payment of a percentage, by way of deposit, on the day of sale, is for the benefit of both the buyer and seller. The buyer, by complying with those terms literally, will put it out of the seller's power to revoke the sale on the ensuing day by recalling the auctioneer's authority to receive the deposit. If the buyer postpones the payment of the deposit till the next or a subsequent day, he does it at the peril of that contingency. The seller may in the meantime forbid the auctioneer to receive the deposit, and on a tender of it to himself personally, he may refuse it, on the ground that he was entitled to have it received by the auctioneer on the day of sale. But we cannot hold that the auctioneer's authority to receive it terminates absolutely on the day of sale, nor that it differs in this respect from the power of other agents authorized to receive money payable at a fixed day.

The convenience of business, a circumstance which courts should always regard where no principle of law interferes, seems to require an authority in the auctioneer even more extended than that we have expressed. The quantity of real estate sold at public auction in this city is immense. A great many parcels are sold by one auctioneer in a single day; and when, as the fact sometimes occurs, he sells a hundred or more distinct parcels at a single sale, it is manifestly impracticable that all or even a major part of the purchasers can pay their deposit to him on the day of sale. The convenience of all concerned in this great and increasing department of business would be subserved by holding that each purchaser may pay his deposit in twenty-four hours after the sale. When judicial sales are made, there is a propriety in requiring an immediate deposit, so as to preclude sham bids made for the sake of delay.

Whether the principles of law will authorize the latitude we have suggested, we need not now decide. We are very clear, however, that they do warrant us in deciding, that until prohibited by the seller, the auctioneer's authority to receive the deposit continues after the day of sale. Its limit would probably be the time fixed for the completion of the purchase, for if the buyer neglect to pay the deposit after that period, the purchase may be deemed abandoned, and the auctioneer's authority to act for the seller thereby terminated. There was no such lapse of time in this case as would impair his authority to receive the deposit.

The only remaining question is then presented: Did the defendant revoke the auctioneer's authority before he received the deposit? This was a point to be determined on the evidence. . . . Forming our opinion on the printed testimony alone, we should probably have decided that the notice was given the day after the sale, but the preponderance in that direction is not so great as to justify us in overruling the report of the referee made with the advantage of the personal examination of the witnesses; and as he has decided that the notice was not given till after the payment of the deposit, the motion to set aside his report must be denied, and the judgment must be affirmed.

WOOLFE *v.* HORNE.

2 Q. B. D. 355. 1877.

[Reported herein at p. 565.]

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d. Attorneys-at-law.

MOULTON *v.* BOWKER.

115 Mass. 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.

OHLQUEST *v.* FARWELL & CO. ET AL.

71 Iowa, 231. 1887.

DEFENDANT Becker was a party to two suits involving substantially the same question. The attorneys for plaintiffs and defendants in these suits entered into a stipulation that only one of the cases should be tried, and that the judgment resulting from such trial should determine the kind of judgment to be entered in the other case. The case tried resulted in a judgment for plaintiffs, and thereupon judgment was also entered for plaintiffs in the other case, in accordance with the stipulation. The defendant Becker filed his motion to set aside this judgment, on the ground that the stipulation therefor by the attorneys representing him was made without his authority or consent. The motion was overruled, and Becker appeals.

BECK, J. . . . It is undoubtedly true that an attorney cannot consent to a judgment against his client, or waive any cause of action or defence in the case; neither can he settle or compromise it without special authority. But he is, by his general employment, authorized to do all the acts necessary or incidental to the prosecution or defence which pertain to the remedy pursued. The choice of proceedings, the manner of trial, and the like, are all within the sphere of his general authority, and, as to these matters, his client is bound by his action. These rules are conceded by counsel in this case. It

cannot be doubted that under them counsel for parties in several suits, involving the same issues, may, in the exercise of their general authority, consent to the consolidation of all for trial, or stipulate that the trial of one shall determine the others. This pertains to the remedy pursued, — to the manner of trial, — and is not an agreement for judgment or a compromise. The parties are not deprived of a trial, nor is judgment rendered by consent. The counsel simply assent to a trial in a particular manner; that one trial shall settle the same issue in several cases. This is just what was done by counsel for Becker in this case. The form of the agreement is that judgment in his case should follow a trial in another action. This is not an agreement for a judgment, but in effect an agreement for a manner of trial. No question is presented in the case involving the skill, diligence, or good faith of Becker's attorneys in assenting to one trial in the several cases. The authority to do so is alone brought in question.

We need pursue the case no further. The familiar and undisputed principles we have stated, applied to the admitted facts in the case, demand that the judgment of the district court be *Affirmed.*[1]

LEVY, SIMON & CO. *v.* BROWN.

56 Miss. 83. 1878.

CHALMERS, J., delivered the opinion of the court.

This is a suit on an injunction-bond, which originated under the following circumstances: Levy, Simon & Co. (afterwards Levy,

[1] In Neale *v.* Gordon-Lennox, the plaintiff in an action for defamation of character authorized her counsel to consent to a reference on condition that all imputations on her character were publicly disclaimed in court. Her counsel, who did not make this limitation of his authority known to the defendant's counsel, agreed with the latter to refer the action without any disclaimer of imputations, and when the case was called on for trial an order for a reference was accordingly made. Upon an application to Lord Alverstone, C. J., to rescind the order, the order was set aside and the case restored to the jury list. Upon appeal, the Court of Appeal held that "the general authority of counsel . . . includes the power to refer the action," and accordingly reversed the decision of the Lord Chief Justice on the ground that the limitation of counsel's ostensible authority having been unknown to the other side, the mere fact that the plaintiff's counsel had, in agreeing to the reference, exceeded the authority actually given to him did not, in the absence of mistake or anything analogous thereto, afford any ground for setting aside the order of reference. [1902] 1 K. B. 838. The House of Lords reversed this decision of the Court of Appeal and restored the case to the jury list for trial. Lord LINDLEY, delivering one of the opinions for the House of Lords, said: "It appears to me that the Court of Appeal inadvertently, or for some reason which I do not understand, omitted to take into account the duty and function of a court in a matter of this kind. The judgment of the Court of Appeal proceeds upon the ordinary doctrines of agency; but the ordinary doctrines of agency are only half of what is to be considered in a matter of this kind. . . . It would be absolutely wrong, to my mind, for the court to allow that order to be acted on and to take effect the moment it is judicially ascertained and brought to its attention that it is an order which the court never would have dreamt of making if the court had known the facts. That view of the case seems to me to have been overlooked by the Court of Appeal, and to be fatal to the validity of the order." [1902] A. C. (H. L.) 465.

Scheur & Co.), of New Orleans, placed in the hands of H. H. Miller, a lawyer of Vicksburg, a claim for collection against the estate of Isaac Lowenhaupt, deceased. Suit was promptly brought, and resulted in the recovery of a judgment against Catherine Lowenhaupt, executrix of said estate, for $2,020.87. An execution on this judgment having been returned *nulla bona,* Miller caused writs of garnishment to be issued, which were served on Bodenheim & Co. and Louis Hoffman. Judgment by default was obtained against Hoffman, which was subsequently reversed, on appeal, in this court, and the writ quashed for some informality. Bodenheim & Co. answered the writ served on them, admitting an indebtedness to the estate of Lowenhaupt greater than the judgment against the principal debtor, and, therefore, judgment was entered against them as garnishees. Some months afterwards Bodenheim & Co. filed their bill in the Chancery Court of Warren County, enjoining an execution which had been issued on this judgment, and setting forth that they had discovered, since the rendition of said judgment, that they had been mistaken in answering that they were indebted to the estate of Lowenhaupt, and had now ascertained that their note, which they supposed was payable to Catherine Lowenhaupt as executrix, was really payable to said Catherine individually, and that she claimed that the same was her separate property. They prayed that Levy, Simon & Co. and the said Catherine might be compelled to interplead and settle the true ownership of said note, and that, pending said litigation, the execution of the judgment against themselves might be enjoined. The injunction-bond now in suit was tendered with the bill, and the writ granted and served on Miller as the attorney of Levy, Simon & Co.

Miller notified his clients of the pendency of this new proceeding, and of his attention to it. By their silence and acquiescence they recognized his authority to represent them, so that there is no ground for doubting that, as to the new litigation, his employment was as complete as in the original suit. Before the filing of any answer or other pleading by him, however, a written agreement of compromise and settlement of the injunction suit was entered into between all the parties thereto, to wit, Miller as the representative of Levy, Simon & Co., Mrs. Catherine Lowenhaupt, Bodenheim & Co., and Isaac Brown and Joseph Bazinsky, the two latter being the sureties on the injunction-bond, and the defendants in the present litigation. By this arrangement, the injunction proceedings were to be dismissed, and all liability on the bond to be released and discharged, in consideration of which Brown, one of the sureties, was to pay to Miller, within ninety days, $713, to be credited on the judgments held by his clients; and it was further agreed that Brown should realize as rapidly as possible, upon certain collaterals which had been placed in his hands by Bodenheim & Co., and should apply the pro-

ceeds to the extinguishment, in full, of said judgments, and then pay over the excess, if any, to Mrs. Lowenhaupt. This agreement was carried out. The bill for injunction was dismissed; a written release was given by Miller to the sureties on the bond; the money agreed to be paid was by the sureties paid to Miller.

Miller died without having communicated to his clients any information of these transactions. Several months after his death Levy, Simon & Co. brought this suit against Brown and Bazinsky, the sureties on the injunction-bond, seeking to recover from them the penalty thereof, which had become apparently due by the dismissal of the bill. Plaintiff had no knowledge of the facts above detailed until they were disclosed by the pleas here interposed. Do these facts constitute a defence to this action?

This depends upon whether Miller, the attorney of plaintiffs, by reason of his general authority as such, had the power to make the compromise and release the sureties on the injunction-bond without the knowledge or assent of his clients. This case, therefore, involves a consideration of the powers of attorneys in dealing with claims in their hands for collection or suit.

In England it is broadly laid down that the attorney is the general agent of his clients in all matters that may be deemed likely to arise in the progress of the cause or the collection of the claim, and hence it is held that he may compromise by accepting less than the full sum due; or, where the demand is for the price of goods sold, by receiving back the goods in satisfaction. If he acts without the instructions of his client, he will not be liable to him if his acts have been *bona fide,* and marked with reasonable care and skill. If he acts in violation of express instructions, he will be liable to his client; but the latter will be bound by his action, so far as the opposite party is concerned, unless that party was cognizant of the violated instructions. Cheron *v.* Parrot, 14 C. B. (N. S.) 74; Fray *v.* Voules, 1 El. & El. 839; Prestwick *v.* Poley, 18 C. B. (N. S.) 806; Strauss *v.* Francis, L. R. 1 Q. B. 379.

In the elaborate note to Story on Agency, sec 24, and also in Wharton on Agency, sec. 592, it is said that the American rule is the same as the English. If these learned authors mean to say that a majority of the American courts recognize an inherent right in the attorney to compromise the original demand placed in his hand, so as to receive in full satisfaction less than the amount due, or to substitute claims upon other parties, or to take property in satisfaction of a money demand, or to release any security existing when he received the claim, we cannot agree with them. That there are cases going to this extent is true, but we think that the decided weight of authority in this country is the other way. Unquestionably, such a rule has been repeatedly repudiated by this court. Holker *v.* Parker, 7 Cranch, 436; Abbe *v.* Rood, 6 McLean, 106; Derwort *v.* Loomer,

21 Cow. 245; Nolan *v.* Jackson, 16 Ill. 272; Doub *v.* Barnes, 1 Md. Ch. 127; Langdon *v.* Potter, 13 Mass. 320; Davidson *v.* Rozier, 28 Mo. 287; Filby *v.* Miller, 25 Pa St. 264; Vail *v.* Jackson, 15 Vt. 314; Lockhart *v.* Wyatt, 10 Ala. 231; Jones *v.* Ransom, 3 Ind. 327; Stackhouse *v.* Reese, 15 Iowa, 122; Succession of Weigel, 18 La. An. 49; Maddox *v.* Bevan, 39 Md. 485; Smith's Heirs *v.* Dixon et al., 3 Metc. (Ky.) 438.

It is quite generally held, however, even by those courts which deny to the attorney the right to compromise a claim placed in his hand, that he has full control over the litigation necessary to insure its collection, and in the conduct and progress of it may take such action as he deems proper. The reason for the distinction is obvious: the owner of the claim must always be the proper judge of its value, and of the terms upon which he is willing to extinguish it, or to release any of the securities by which it was protected when he placed it in the hands of the attorney; and the latter, therefore, must consult him before taking any step which is likely to produce these results. But the client cannot know as well as his lawyer the steps necessary to insure its collection, or estimate so accurately the value of the legal securities which may be evolved in the course of the litigation. It is because of his ignorance of these matters that he employs an attorney, and submits to his superior judgment the conduct of the litigation.

To impose upon the attorney the necessity of consulting with his client whenever propositions are made to him with regard to these matters, which in his judgment are advantageous, would so embarrass and thwart him as in a great measure to destroy his usefulness; hence it is that the courts quite generally concede to the attorney unlimited authority over the conduct of the litigation, including the power to control all legal process, and to compromise or release all attachment or other liens which have accrued in the progress of the cause, as collateral thereto, and not belonging to the original demand. Commissioners *v.* Younger, 29 Cal. 147; Phillips *v.* Rounds, 33 Me. 357; Gailard *v.* Smart, 6 Cow. 385; Ford *v.* Williams, 13 N. Y. 577; Pierce *v.* Strickland, 2 Story, 292; Monson *v.* Hawley, 30 Conn. 51; Moulton *v.* Bowker, 115 Mass. 36; Gordon *v.* Coolidge, 1 Sumn. 536; Jenney *v.* Delesdernier, 20 Me. 183. Some of the cases cited extend to the attorney a wider latitude than could be sanctioned in this state, where, by a series of adjudications, his authority has been confined within narrower limits. Thus, it has been held that he cannot release a levy on personalty, Banks *v.* Evans, 10 Smed. & M. 35; nor grant a stay of execution, Reynolds *v.* Ingersoll, 11 Smed. & M. 249; nor assign a judgment to a stranger who has paid him the amount due on it, Walk. 431 (we do not commit ourselves to an indorsement of this decision to its full extent); nor compromise in any manner the claim placed in his hands, Fitch *v.* Scott, 3 How.

314; nor receive anything save lawful money in satisfaction of it, Garvin *v.* Lowry, 7 Smed. & M. 24. All of these decisions relate to the dealings of the attorney with the original claim placed in his hands, and the liens which, by operation of law, follow upon its reduction to judgment. They are believed to announce a rule more stringent than that which prevails elsewhere in so far as they deny authority to release levies and stay executions. But even if we concede that the principle inculcated by them would forbid the release by the attorney of any security acquired during the litigation, either against the original debtor or against any person who may have made himself liable for the debt, and if we admit that the attorney is compelled to maintain inviolate and unimpaired both the claim placed in his hand and the liability of all who have become answerable for it, this does not necessitate a repudiation of the act of the attorney in this case; and while we are not called upon to depart from the principle of these decisions, neither do we propose to extend it further. The bond here sued upon was not given in any proceeding against the original debtor, Lowenhaupt, nor had these defendants in any manner made themselves liable for his engagements.

In releasing them, therefore, the attorney was neither diminishing the original value of the claim placed in his hands, nor extinguishing any security which had accrued to his clients in the litigation with their debtor.

Their judgment against that debtor, as well as their judgment against the garnished debtors of that debtor, stand yet in full force and unimpaired. The garnishees had filed a bill which, upon its face, afforded good ground of injunction, and which, if established, would have resulted in a vacation of the judgment against themselves. To avoid the doubtful result of this litigation, the attorney of plaintiffs agreed that if the sureties on the bond would pay to him for his clients a certain sum, to be credited upon the judgments which he had obtained against the garnishees, and would devote to the same end the collaterals which had by the garnishees been placed in their hands to save them from loss, he would release and discharge the bond executed by them. Mrs. Lowenhaupt agreed to postpone her claim to that of plaintiffs. Bodenheim & Co. agreed to dismiss their bill. All this was carried out in good faith. Now, when years have elapsed, when Bodenheim & Co. have become insolvent, when the collaterals which were placed in the hands of the defendants to indemnify and protect them have either been collected or proven worthless, this suit is brought to assert against defendants a liability on their bond, which became absolute by reason of the dismissal of the bill in accordance with the agreement made with plaintiffs' lawyer. It is true that plaintiffs had no knowledge of this agreement; but it is also true that but for the agreement the bill would not have been dismissed, and the absolute liability would not have accrued.

Plaintiffs cannot take advantage of the dismissal of the bill, induced by their attorney, and repudiate the release of the sureties on the injunction-bond, which was the price of said dismissal.

Our conclusion is that the agreement entered into by Miller was within the scope of his authority, and therefore obligatory on his clients. *Judgment affirmed.*

TYRREL *v.* HAMMERSTEIN.

33 Misc. (N. Y. Sup. Ct., Trial T.) 505. 1900.

McADAM, J. The plaintiff sues to recover $147.75 for printing the cases and points on appeal in Gallinger *v.* Hammerstein, in which the latter had been defeated in the lower court. Hammerstein, who is defendant here as well as there, instructed his attorneys, Wise & Lichtenstein, to take an appeal from the Gallinger judgment. Such authority carried with it everything necessary to effectuate its purpose, including the printing of the appeal-book and points, without which there could be no appeal that an appellate court would hear.

The defendant claims that because the order for the printing was given by his attorneys they, and not he, are liable to the printer for the bill. The law is the other way. Attorneys-at-law, like other agents, are ordinarily exempt from liability to third persons for what they do in the name and on behalf of their principals. Wells Attys., § 127; Robins *v.* Bridge, 3 M. & W. 119; Judson *v.* Gray, 11 N. Y. 408; Covell *v.* Hart, 14 Hun, 252. The only exceptions are for fees to public officers (Campbell *v.* Cothran, 56 N. Y. 279; Judson *v.* Gray, *supra;* Reilly *v.* Tullis, 10 Daly, 283),[1] or on obligations on which the attorney has pledged his personal credit. An

[1] "The point is taken by the defendant that assuming that the sheriff is entitled to his fees on the whole sum directed to be levied by the execution, his remedy is against the plaintiff in the judgment, and that an action cannot be maintained therefor against the defendant, who acted as his known agent and attorney in issuing the execution. This question was decided by the Supreme Court in 1810, in the case of Adams *v.* Hopkins, 5 J. R. 252, in an action brought against an attorney to recover sheriff's fees for arresting a defendant on a *ca. sa.*, and the court held that the attorney who issued the execution was liable. This decision has been followed in subsequent cases. Ousterhout *v.* Day, 9 J. R. 114; Trustees of Watertown *v.* Cowen, 5 Paige, 510; Camp *v.* Garr, 6 Wend. 535. It may well be doubted whether the rule laid down in Adams *v.* Hopkins, can be maintained upon principle, or is consistent with the general current of judicial authority elsewhere (Judson *v.* Gray, 11 N. Y. 408). But it has been for more than sixty years the law of this State. No practical injustice results from enforcing it, as attorneys act in view of the liability they incur in issuing executions, and it ought not now to be disturbed." Campbell *v.* Cothran, 56 N. Y. at pages 280, 281.

The court, in Judson *v.* Gray, 11 N. Y. at page 412, said: "It is clear, therefore, that the decisions in this State, in which attorneys and solicitors have been held liable for the fees of the officers of the court, upon a promise implied from their acts done as attorneys merely, are in conflict with principle, and with the whole current of authorities elsewhere on the subject." See cases in Chapter XV.

attorney, in the management of his client's case, has authority to make whatever necessary disbursements the case requires. This is implied from the relation between attorney and client, from which a request upon the part of the latter is presumed. Packard *v.* Stephani, 85 Hun, 197;[1] Brown *v.* Travelers' L. & A. Ins. Co., 21 App. Div. 42.[2] The client, as the party benefited, is therefore liable for referee's fees (Nealis *v.* Meyer, 21 Misc. Rep. 344; Harry *v.* Hilton, 11 Daly, 232) and stenographer's fees (Coale *v.* Suckert, 18 Misc. Rep. 76), while the attorney is neither liable for the former (Judson *v.* Gray, 11 N. Y. 408) nor the latter. Bonynge *v.* Water-

[1] This was an action brought to recover upon a *quantum meruit* the reasonable value of the services of a physician for testifying as an expert witness before a commission appointed to examine into the sanity of the defendant, and upon the trial of the defendant for murder. The trial judge directed a verdict for the defendant on the ground that the physician had notice before he testified that the defendant did not desire his attendance. In denying a motion for a new trial, the General Term said:

"There can be no doubt of the authority of an attorney in the conduct and management of his client's case to make such necessary and proper disbursements as the case shall require. This authority can be implied merely from the relation between attorney and client, from which a request on the part of the latter would be presumed. And we think it equally true that, however necessary the services might be regarded by the attorney in the client's interest, the latter has a right to refuse to incur them, and the attorney could not charge the client, except in favor of some one who acted upon the presumed authority with which such attorney was clothed. Where, however, the person seeking to recover upon the implied or presumed authority which grows out of the client's relation to the attorney, is notified that the attorney has no right to incur the expense, he cannot hold the client responsible. Were it otherwise, an attorney might compel the client to pay any and all sums, however much beyond the means or inclination of the client in a particular case, and notwithstanding the person towards whom the obligation was incurred had notice of the restricted or questionable right of the attorney." Packard *v.* Stephani, 85 Hun, at p. 199.

[2] In this case it was held that an attorney employed on a salary by a foreign corporation engaged in the city of New York, where it has an office and general manager, in insuring employers against liability for injuries to employees or third parties, and which is entitled, by the terms of its policies, to control the defence of actions brought against its policy-holders, has authority, upon being notified by the general manager of the fact that a building which the holder of one of its policies was engaged in constructing had collapsed, occasioning loss of life and injuries to persons, to employ an engineering expert to examine the building, although no action has as yet been commenced against the policy-holder, it being admitted that the attorney was the attorney for the company in the particular matter in which the expert was employed and was called upon by its general manager to act therein. The court said: "Had there been at the time a suit pending against the defendant, it would seem settled by authority that Johnson would have had power to employ the plaintiff for the purpose of making the examination, and testifying upon the trial, without any special authority to that effect. . . . Does the fact that no action had been instituted at the time make his principle inapplicable? We think not. Where the case is that of the prosecution of a claim, it is clear that the authority of the attorney must precede the commencement of the action, and begin at the time of his retainer. The rule should be the same where an attorney is retained to defend an expected suit. By the Code, evidence can be perpetuated for use in an anticipated litigation as well as in a pending suit. Often evidence, if not obtained at the time of the occurrence, cannot be subsequently procured. This was especially true of that which it was expected the plaintiff might be able to give. We do not say that Johnson, by virtue only of his general employment as legal adviser, might incur this liability for the defendant, but the admission is that he was the attorney of defendant in this particular matter, and he was called upon to act by the New York manager. Now the particular matter was the expected actions against the Cornells against which the defendant had agreed to indemnify the Cornells, and the defence of which the defendant was entitled to control. It is, therefore, the same as if Johnson had been retained to defend a particular suit. His authority would be as great in one case as in the other, and sufficient to render his client liable for any reasonable expenditure." Brown *v.* Travellers' Life Ins. Co., 21 App. Div. at pages 43 and 44.

bury, 12 Hun, 534; Bonynge *v.* Field, 81 N. Y. 159; affg., 44 N. Y. Super. Ct. 581, and see 22 Moak Eng. Rep. 505, and notes. The defendant certainly owed the bill sued for, and there is no allegation that it was paid to anyone. . . . *Judgment for plaintiff.*

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e. Bank Cashiers.

MERCHANTS' BANK *v.* STATE BANK.

10 Wall. (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 Parson'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 commerical 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. Monroe, 171. . . . *Judgment reversed, and a venire de novo awarded.*[1]

[1] In Matthews *v.* Mass. Nat. Bank, 16 Fed. Cas. (U. S. Cir. Ct., Dist. Mass.) 1113, the defendant bank had loaned money to one Coe upon a forged certificate of stock. Upon repayment of the loan the cashier of the bank returned to Coe the certificate with the usual printed form of transfer on the back thereof, signed by the cashier of the bank in blank. Later, the plaintiff loaned money to Coe upon the same certificate. The signature of the cashier was well known to the plaintiff who correctly supposed the signature on the blank assignment to be genuine. The plaintiff recovered judgment against the bank on this endorsement. The court said in part: "The real question presented in the case is, whether the bank by signing the blank transfer has so far warranted the genuineness of the certificate that it is estopped from setting up the forgery as a defence to this action. Defendant denies that the cashier had authority or right to bind the bank by the contract declared on. Cashiers of a bank are held out to the public as having authority to act according to the general usage, practice, and course of business conducted by the bank. Their

Mr. Justice CLIFFORD (with whom concurred Mr. Justice DAVIS) read a dissenting opinion.

acts within the scope of such usage, practice, and course of business, will in general bind the bank in favor of third persons possessing no other knowledge. Morse *v.* Mass. Nat. Bank (Case No. 9,857); Minor *v.* Mechanics' Bank, 1 Pet. (U. S.) 70; Merchants' Bank *v.* State Bank, 10 Wall. (U. S.) 604. One of the ordinary and well known duties of the cashier of a bank is the surrender of notes and securities upon payment; and his signature to the necessary transfers of securities or collaterals, when in the form of bills of exchange, choses in action, stock certificates, or similar securities for loans, which are personal property, is an act within the scope of the general usage, practice, and course of business, in which cashiers of a bank are held out to the public as having authority to act. Undoubtedly the ordinary duties of a cashier do not comprehend the making of a contract which involves the payment of money, without an express authority from the directors, unless it be such as relates to the usual and customary transactions of the bank. But the transfer of certificates of stock held as collateral is certainly one of the usual and customary transactions of banks, and the public would be no more likely to require evidence of a special authority to the cashier to make such transfer than of a special authority to draw checks on other banks, or to perform any other of the daily duties of his office."

CHAPTER X.

Contract of Agent in Behalf of Undisclosed Principal.

1. *Liability of Undisclosed Principal: General Rule.*

KAYTON *v.* BARNETT.

116 N. Y. 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.

HUBBARD *v.* TENBROOK.

124 Pa. St. 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.*

WATTEAU *v.* FENWICK.

[1893] 1 Q. B. 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.

CITY TRUST, ETC., CO. *v.* AMERICAN BREWING CO.

174 N. Y. 486. 1903.

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 17, 1902, sustaining plaintiff's exceptions, ordered to be heard in the first instance by the Appellate Division, and granting a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

PARKER, Ch. J. Upon this review the complaint must be accepted as true and from it it appears that plaintiff became surety on a bond executed by John M. Kurtz to the People of the state of New York in the sum of $1,000, the condition being that if a liquor tax certificate should be granted to Kurtz he would not permit any gambling upon the licensed premises, etc. The certificate was issued to Kurtz, and subsequently a judgment was entered against Kurtz and this plaintiff as principal and surety on the bond for a breach of the condition in that Kurtz had maintained on the licensed premises a nickel-in-the-slot machine, which was there used for gambling purposes.

Before the trial in that action this plaintiff discovered that defendant herein was the real owner of such liquor tax certificate and of the nickel-in-the-slot machine and it demanded that defendant assume the defence of the action, which it refused.

After satisfying said judgment plaintiff brought this action, alleging in the complaint, in substance, in addition to the facts already stated, that defendant was the real owner of the certificate and the proprietor of the business, employing Kurtz, paying his compensation, furnishing the articles sold, bearing all losses, and pocketing the profits, when there were any; that Kurtz was but the representative and servant of the defendant when he applied for the certificate and when he applied to plaintiff to become surety; that plaintiff supposed he was the principal — having, therefore, an incentive to obey the law — whereas defendant controlled the business and premises and maintained therein a nickel-in-the-slot machine, operated by its direction and for its profit.

Defendant, therefore, had the benefit of plaintiff's suretyship — for without some surety a certificate could not have been issued — and to its conduct, solely, it was due that plaintiff was compelled to pay the penalty of the bond, for it maintained the gambling device which constituted a breach of the condition of the bond; and the inquiry is, can plaintiff recover from defendant the loss which the latter has cost it?

Plaintiff could recover of Kurtz, and probably would were he responsible; but why may he not recover from the party which, while benefiting by the suretyship, committed the injury? — from the hidden principal that by a wrongful act, prohibited by the conditions of the bond and forbidden by statute, caused a loss to this defendant?

Ever since JUSTINIAN said, "The maxims of law are these: to live honestly, to hurt no man and to give every one his due," it has been a leading object of jurisprudence to compel wrongdoers to make reparation. Now, it is a general rule of law that a person commits a tort and renders himself liable for damages who does some act forbidden by law if that act causes another substantial loss beyond that suffered by the rest of the public; and that rule covers this case.

Defendant through its agent, Kurtz, induced plaintiff to become a surety on the bond for Kurtz and then, in violation of the statute, it conducted a nickel-in-the-slot machine on the premises, by means of which misconduct the surety was compelled to pay the penal sum of the bond. In other words, defendant committed an act forbidden by law and the direct effect of its act was to cause plaintiff a substantial loss beyond that suffered by the rest of the public; and for the damage thus sustained it should respond to plaintiff.

The order should be affirmed, and judgment absolute ordered for plaintiff on the stipulation, with costs.

GRAY, BARTLETT, HAIGHT, MARTIN and VANN, JJ., concur; O'BRIEN, J., not voting. *Order affirmed, etc.*

KEIGHLEY *v.* DURANT.

[1901] A. C. 240 (H. L.).

[Reported herein at p. 64.]

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2. *Same: Exception as to State of Accounts.*

IRVINE *v.* WATSON.

5 Q. B. D. (C. A.) 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.*

LAING *v.* BUTLER.

37 Hun (N. Y. S. C.) 144.[1] 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.

[1] Affirmed in 108 N. Y. 637, no opinion.

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 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.[2]

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3. *Same: Exception Based on Election.*

BEYMER *v.* BONSALL.

79 Pa. St. 298. 1875.

ASSUMPSIT for breach of contract to deliver a quantity of petroleum. Judgment for plaintiff. Defendant brings error.

[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.

[2] "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." Fradley *v.* Hyland, 37 Fed. 49.

Plaintiff made the contract with brokers who were acting for defendant as undisclosed principal. The defendant was not a party to the original agreement, but the brokers (his agents) gave him notice of it on the day it was made, and he accepted the liability as his own. The demand for the petroleum was made on both the defendant and his brokers.[1] 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.*

KINGSLEY *v.* DAVIS.

104 Mass. 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

[1] The facts in this and the preceding sentence do not appear in the original report, but are given in the case as reported in *The Law and Equity Reporter*, vol. i, p. 75.

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.*

LINDQUIST *v.* DICKSON.

107 N. W. (Minn.) 958. 1906.

START, C. J. Action to recover from the defendant, as an undisclosed principal, for labor and material performed and furnished by the plaintiff in decorating and repairing her house, pursuant to an alleged contract made for her by her husband, Joseph M. Dickson. The complaint alleged, in effect, that at the time the contract was entered into with the husband he was in fact acting as agent for his wife, the defendant, but he failed to disclose to the plaintiff the fact of such agency, or the fact that she was the real party in interest and owned the house, the decorating and improvement of which was the subject-matter of the contract; that the plaintiff performed the contract on his part; that he was not paid therefor; and that he commenced an action against the husband to recover the balance due him on the contract, and on August 29, 1904, he recovered judgment against him for the sum of $273.68, no part of which has been paid; and further that thereafter (in the month of October, 1904) the plaintiff learned for the first time that the defendant was the real party in interest, and that the contract was made for her by her husband as her agent. This action was commenced in the month of June, 1905. The defendant by her answer denied that she ever made the contract alleged in the complaint, and alleged as a defence the recovery of a judgment by the plaintiff against her husband, Joseph M. Dickson. The trial resulted in a verdict in favor of the plaintiff for the amount stated, and the defendant appealed from an order denying her motion for a new trial. . . .

It is the contention of the defendant that such judgment is a bar to this action. The general rule is that, where a simple contract, by parol or writing, is made by an authorized agent without disclosing his principal, and the other contracting party subsequently discovers the real party, he may abandon his right to look to the agent personally and resort to the principal. Lindeke Land Co. *v.* Levy, 76 Minn. 364, 79 N. W. 314. But whether the creditor can proceed against the undiscovered principal after he has obtained a judgment on his claim against the agent is a question as to which the adjudged cases are conflicting. In the case of Kingsley *v.* Davis, 104 Mass. 178, the creditor, after being fully informed that the party with whom he made the contract was acting for an undiscovered principal, brought an action against the agent and recovered judgment for his claim. Afterwards he brought an action against the principal to recover for the same claim, and the court held that the action against the principal could not be maintained for the reason that: "The general principle is undisputed that, when a person contracts with another who is in fact an agent of an undiscovered principal, he may upon the 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 resort to the principal." In Beymer *v.* Bonsall, 79 Pa. 298, it was held that nothing short of satisfaction of the judgment against the agent would discharge the principal. The case of Kingsley *v.* Davis suggests the true basis for solving the question. It is a question of election. Election implies full knowledge of the facts necessary to enable a party to make an intelligent and deliberate choice. Pederson *v.* Christofferson, 97 Minn. 491. We therefore hold upon principle, and what seems to be the weight of judicial opinion, that: If a person contracts with another, who is in fact an agent of an undisclosed principal, and, after learning all the facts, brings an action on the contract and recovers judgment against the agent, such judgment will be a bar to an action against the principal. But an unsatisfied judgment against the agent is not a bar to an action against the undiscovered principal when discovered, if the plaintiff was ignorant of the facts as to the agency when he prosecuted his action against the agent. Kingsley *v.* Davis, 104 Mass. 178; Steel-Smith Grocery Co. *v.* Potthast, 109 Iowa, 413, 80 N. W. 517; Coleman *v.* Bank, 53 N. Y. 388; Wharton on Agency, § 472; 1 Enc. of Law, 1139; Mechem on Agency, § 699. . . . *Order affirmed.*[1]

[1] Accord: Greenburg *v.* Palmieri, 71 N. J. L. 83.

BROWN *v.* REIMAN.

48 N. Y. App. Div. 295. 1900.

APPEAL by the defendant, David F. Reiman, from a judgment of the Municipal Court of Buffalo in favor of the plaintiffs, rendered upon the decision of the court.

ADAMS, P. J. The plaintiffs bring this action to recover the purchase price of two sealskin garments which it is contended were purchased of the plaintiffs by the defendant's daughters and duly authorized agents.

Upon the trial the plaintiffs' right to recover was sharply contested upon the ground, among others, that the garments were not of the quality and character guaranteed by the plaintiffs when the contract for their manufacture was entered into. That issue, however, was decided adversely to the defendant's contention upon conflicting evidence, and for that reason, probably, it has been abandoned upon this review. It is urged, nevertheless, that the plaintiffs' judgment should be reversed, and the principal reasons assigned for this contention are: (1) That the evidence fails to show that at the time the garments were ordered the relation of principal and agent existed between the defendant and his daughters; and (2) that the plaintiffs, having elected to treat the daughters as principals, cannot now be permitted to claim that they were not such in fact.

It is not denied that the plaintiffs, in the first instance, negotiated with and gave credit to the daughters in their individual capacity, nor that they subsequently brought suit and obtained a judgment against each of them, and made diligent effort to collect the same. Neither is it claimed that the defendant's liability grows out of any parental obligation, for, although his daughters lived with and were supported by him, it is conceded that they were both of full age, to the knowledge of the plaintiffs at the time when the garments were purchased; but this action is sought to be maintained upon the theory that the purchase of the garments in question was expressly authorized by the father, which fact was not discovered by the plaintiffs until after they had exhausted their remedy against the daughters.

It seems that Mrs. Brown, one of the plaintiffs, had some acquaintance with the defendant and his daughters. At least she knew that they were reputed to be people of some considerable means, and during the preliminary negotiations which led up to the ordering of the garments one of the daughters informed her that the father had told her and her sister that if they would select two sealskin coats which suited them, he would give his check for the cost thereof. The information thus imparted to the plaintiffs was not necessarily

of such character as to warrant them in assuming that the daughters were authorized to purchase the coats upon the credit of their father; for it was, at the most, but the declaration of a third party, and as such was not binding upon the alleged principal. The plaintiffs, consequently, treated the daughters as their debtors, and, when the latter refused to pay for the coats, brought two separate actions, which, after a trial in the Municipal Court, resulted, as before stated, in favor of the plaintiffs. In the meantime, each of the young women had affixed her name, by means of paint or some other indelible substance, in four or five different places, to the inside of the coats, and had worn the garments on several occasions; but becoming dissatisfied with the quality or workmanship thereof, they returned, or offered to return, the same to the plaintiffs. When, however, it became probable that the actions were likely to result adversely to them, the daughters obtained possession of the coats and, by the procurement or advice of the defendant, sold them to certain relatives for fifty dollars each, and with the money thus obtained they immediately commenced proceedings in the bankruptcy court to relieve themselves from the payment of the judgments obtained against them by the plaintiffs, which constituted their entire indebtedness. During the progress of the bankruptcy proceedings the defendant was sworn as a witness and testified that he told his daughters that they might have their coats made by the plaintiffs, provided the latter would give a written guarantee for the best of seal, the best of workmanship, and the best lining, but that he was subsequently informed that Mrs. Brown said no contract was necessary. One of the daughters also testified that after she and her sister had ordered their coats, her father gave her a blank check with which to pay for them, saying that as he might not be at home when the coats were satisfactory, he would leave it to her to use her own judgment in regard to them.

This evidence, which was read upon the trial of the present action, when taken in connection with the defendant's subsequent acts and declarations, was sufficient, we think, to sustain the conclusion reached by the trial court, that not only had the defendant authorized his daughters to purchase the garments in question, but that he had ratified their action after learning that the purchase had been made, and that his instructions had not been literally followed. (Bliss *v.* Sherrill, 24 App. Div. 280; Bliven *v.* Lydecker, 130 N. Y. 102.)

This being the case, the relation of principal and agent becomes established; and when it is further made to appear, as it is by the plaintiffs' testimony, that the existence of this relation was not fully disclosed until after the commencement of the bankruptcy proceedings, it cannot be said that the plaintiffs have elected to rely solely upon the responsibility of the agents, nor that they were con-

cluded by reason of the actions which were brought against such agents from pursuing the principal when his existence became known; for it is a well-settled rule that a creditor cannot make an election either of remedies or parties without first realizing that the opportunity of exercising his preference is afforded him. (Remmel *v.* Townsend, 83 Hun, 353; Coleman *v.* First Nat. Bank of Elmira, 53 N. Y. 388; Kayton *v.* Barnett, 116 id. 625.)

The views above expressed lead to the conclusion that the judgment appealed from should be affirmed.

All concurred. *Judgment affirmed, with costs.*

E. J. CODD COMPANY *v.* PARKER.

97 Md. 319. 1903.

FOWLER, J., delivered the opinion of the court.

This is a suit by the E. J. Codd Company of Baltimore City on an open account against Walter W. Parker. . . .

The question is whether having sued the principal and recovered judgment, the plaintiff can now sue the defendant who was the agent.

It was said in Henderson *v.* Mayhew, 2 Gill, 408, that if the principal be not known at the time of the sale, when he is discovered either he or the agent may be sued at the election of the vendor. Mayhew *v.* Graham, 4 Gill, 363. And the general principle appears to be established that where an agent contracts in his own name, without disclosing his interest, though in fact for the exclusive benefit of another person, who is afterwards discovered, the creditor may sue either, but after he has elected whom to sue and has sued either the agent or the principal to *final judgment,* he cannot after that sue the other, whether the first suit has been successful or not. Poe Pl., § 378; Priestly *v.* Fernie, 3 Hurlstone & C., 977; Curtis *v.* Williamson, L. R., 10 Q. B. 57; Fowler *v.* Bowery Sav. Bk., 113 N. Y. 450; Loge *v.* Weinstein, 35 Misc. Rep. 298. There are exceptions to this general rule, but the facts here involved do not require us to consider them. . . . *Judgment affirmed.*

BARRELL *v.* NEWBY.

127 Fed. (C. C. A.) 656. 1904.

ACTION against defendant to recover money advanced by plaintiffs as brokers in a stock transaction. The answer alleged facts

tending to establish that plaintiff had elected to hold defendant's agent. A demurrer to the answer was overruled.

The answer alleged in substance that plaintiffs, brokers in New York, were directed on May 7, 1901, by one Todd, a broker in Indianapolis, to sell short 100 shares of Northern Pacific Railway stock at $145 a share; that plaintiffs sold the stock as directed and according to custom borrowed the stock for delivery; that the stock rose rapidly and plaintiffs on May 9th were obliged to pay $700 a share for stock with which to replace the borrowed stock, and that the total loss upon the transaction was about $55,000; that on May 10th Todd informed plaintiffs that he was acting for defendant, who had placed the order with Todd; that thereafter plaintiffs sued Todd in Illinois and garnished a debt there due to him, and also sued Todd in New York and attached a debt there due him, and that they also applied toward this claim a sum of money in their hands due to Todd.

Before JENKINS, GROSSCUP, and BAKER, C. J.

BAKER, C. J. Plaintiffs question the adequacy of the allegations of their knowledge of defendant's principalship before they took steps against Todd; but we think the answer avers their knowledge with sufficient certainty.

What were plaintiffs' rights when on May 10th, after having executed Todd's order of May 7th, and incurred the loss by reason thereof, they learned that defendant was principal?

If a merchant parts with his goods to one whom he knows to be an agent, fails to require a disclosure of the principal, and charges the account to the agent, ordinarily the question might be raised whether the merchant has not deliberately chosen the agent for his debtor, and thereby precluded himself from afterwards pursuing the principal. Patapsco Ins. Co. *v.* Smith, 6 Har. & J. (Md.) 166, 14 Am. Dec. 268; Ins. Co. of Pa. *v.* Smith, 3 Whart. 520. But the ninth averment of the answer, to the effect that, though plaintiffs knew Todd was acting as an agent for an undisclosed principal, the custom of the trade authorized them to look to him in the first instance, prevents defendant from claiming that the suggested question is available here, and leaves plaintiffs in a position as advantageous as that of a merchant who sells on credit in the belief that the purchaser is acting for himself.

Plaintiffs' contention is that such a seller, on discovering the principal, is never required to elect whom he will consider his debtor; that he has concurrent rights of action against both; and that nothing short of a satisfaction by one, or at least a judgment against one (according to English cases, which seem to be based on the English rulings that a judgment against one joint tort feasor is a satisfaction as to all), will exhaust his right to pursue the other.

In support of this proposition, and of collateral arguments, plaintiffs adduce many cases.[1]

On the other hand, defendant insists that such a seller, on discovering the principal, may take a reasonable time to investigate and compare the standings of principal and agent, and thereupon must choose whom he will hold as his debtor and abandon his right to choose the other; and that he cannot hold both. And defendant cites numerous authorities as a basis for his argument.[2]

If Todd, when placing the order with plaintiffs, had informed them that he was simply acting as agent for defendant, plaintiffs could have accepted the order as defendant's, and Todd would have incurred no liability; or they could have refused to take defendant as their debtor, and have informed Todd that they would look to him, and, if Todd had made no objection, he would have been bound and defendant not; but, in dealing with the agent of a disclosed principal, they could not have held both without an agreement to that effect. It is true that plaintiffs could have declined to take the order except on the joint and several contract of Todd and defendant; but there is no pretense of such a contract, for the averment of the complaint is that they accepted and acted on defendant's order; and the bare transaction of a merchant's selling to the agent of a known principal does not establish a joint and several, or several liability of agent and principal, but evidences only one contract, one liability, one credit, one debtor, whose identity is determined by the seller's election, which he must make at the time.

Respecting election, what difference in reason does it make whether the seller ascertains the identity of the principal before he delivers the goods and extends the credit, or after delivery but before he seeks to exact payment? In the first case, we understand plaintiffs to agree that the seller must elect. In the second, the seller manifestly has passed on the credit of but a single person. If, before payment, he finds out who the principal is, it is just that he should be able to hold the agent, for the agent offered his own credit and it

[1] The following are most strongly relied on: Youghiogheny Iron Co. *v.* Smith, 66 Pa. 340; Conro *v.* Port Henry Iron Co., 12 Barb. 53; Beymer *v.* Bonsall, 79 Pa. 298; Maple *v.* Rld. Co., 40 Ohio St. 313; Cobb *v.* Knapp, 71 N. Y. 348; Knapp *v.* Simon, 96 N. Y. 284; American Trading Co. *v.* Thomas Wilson's Sons & Co., 37 Misc. (N. Y.) 76; McLean *v.* Sexton, 44 N. Y. App. Div. 520; Irvine *v.* Watson, L. R., 5 Q. B. D. 414; Barker *v.* Garvey, 83 Ill. 184; Mattlage *v.* Poole, 15 Hun, 556; Baltimore, etc., Tel. Co. *v.* Interstate Tel. Co., 54 Fed. 50; First National Bank *v.* Wallis, 84 Hun, 376.

[2] Tuthill *v.* Wilson, 90 N. Y. 423; Ranger *v.* Thalmann, 84 App. Div. 341, affirmed 178 N. Y. 574; Cook on Corporations (4th ed.) § 454; Paley on Agency, pp. 246, 247; Paterson *v.* Gandasequi, 15 East, 62; Addison *v.* Gandasequi, 4 Taunton, 573; Thomas *v.* Davenport, 9 B. & C. 78; Ford *v.* Williams, 21 How. 287; Insurance Co. of Pennsylvania *v.* Smith, 3 Whart. 520; Patapsco Insurance Co. *v.* Smith *et al.*, 6 Har. & J. (Md.) 166; French *v.* Price, 24 Pick. 13; Raymond *et al. v.* Proprietors of Crown & Eagle Mills, 2 Metc. 319; Paige *v.* Stone *et al.*, 10 Metc. 160; Silver *et al. v.* Jordan *et al.*, 136 Mass. 319; Meeker *v.* Claghorn, 44 N. Y. 349; Perth Amboy Man. Co. *v.* Condit *et al.*, 21 N. J. Law, 659; Borcherling *v.* Katz, 37 N. J. Eq. 150; Elliott *v.* Bodine, 59 N. J. Law, 567; Fowler, Extr., *v.* Bowery Sav. Bank, 113 N. Y. 450; McLean *v.* Ficke *et al.*, 94 Iowa, 283; Mechem on Agency, §§ 695–698.

was accepted. It is also just that the seller should be permitted to abandon the right that he had in the first instance to pursue the agent, and to hold the principal, for the contract of purchase was in reality the principal's. When, after delivery, but before seeking to exact payment, the seller learns the identity of the principal, he has an opportunity for investigating and comparing the standings of agent and principal, just as he would have had if he had known the principal before delivery. We apprehend no rule of law that warrants the conclusion that the seller must elect in the one case and not in the other. We perceive no solid reason why the law, in behalf of the seller, who in both cases has really contemplated and contracted for a single credit only, should in the one case more than the other create a contract under which the agent and principal stand as joint and several, or several, obligors. The decision in Beymer *v.* Bonsall, 79 Pa. 298, and expressions in some other cases, to the effect that one who sells to the agent of an undisclosed principal may, on discovery of the principal, pursue either or both until he has obtained satisfaction (as though they were joint tort feasors), do not meet our approval.

Objection is made to the answer on the ground that the issue of election or no election is one that must be determined by the jury from the evidence and the instructions of the court. If it were permissible for a defendant to tender the issue by the naked averment that plaintiff elected to hold the contract as the agent's, and if, under such an answer, the uncontradicted evidence established acts of the plaintiff from which but one conclusion could legally be deduced, then the court would have the right to direct the verdict; and, if the same acts be set forth in an answer and confessed, we think the court may likewise draw the conclusion.[1]

Do plaintiffs' acts constitute an election? In two instances plaintiffs procured conditional executions in advance on their solemn declaration to the courts that the broken contract was Todd's — not Todd's and the defendant's, but Todd's. In another instance plaintiffs acted as court and sheriff, and turned Todd's money into their own till. Now they declare with equal solemnity that the same broken contract was defendant's — not defendant's and Todd's, but defendant's. We do not mean to assert that the mere bringing of an action against Todd would be inconsistent with their proceeding later against defendant. If the action were begun before they learned of defendant's principalship, certainly they should be permitted to dismiss, and sue defendant. And if they proceeded against Todd by reason of mistake or fraud or the like, they might seek relief from

[1] See Emery's Sons *v.* Traders' Bank (Ky.) 6 S. W. 582; Curtis *v.* Williamson, L. R. 10 Q. B. 57; Sessions *v.* Block, 40 Mo. App. 569; Kingsley *v.* Davis, 104 Mass. 178; Bauman *v.* Jaffray (Tex. Civ. App.), 26 S. W. 260; Booth *v.* Barron, 29 N. Y. App. Div. 66; Stuart *v.* Hayden, 72 Fed. 402, 18 C. C. A. 618; Silver *v.* Jordan, 136 Mass. 319.

their act, give up the chase they had entered upon, and return to the cross-roads. But here, under no misapprehension of comparative standings, but with full knowledge of the whole truth of the situation, plaintiffs not merely seized Todd's money on the basis that the contract was his, but they insist upon their right to retain it, and to say that the contract is Todd's, throughout the time in which they assert that the contract is defendant's. To our minds but one interpretation can be given to this conduct.

Plaintiffs urge that, inasmuch as the answer fails to aver that defendant settled with Todd before they sued defendant, it would be no hardship to require defendant to pay them. It seems to us that plaintiffs are confusing election with equitable estoppel. Election, whether of remedies or of defendants,[1] has no regard to the situation of the defendant, but is founded on a public policy that forbids a plaintiff to trifle with the courts. Equitable estoppel, on the other hand, grows out of consideration of the defendant's state. They are distinct defences, and he who pleads election need not show that it would be inequitable to permit the plaintiff to recover; it is enough if he shows that the plaintiff, having by law the right to take either of two courses, has taken and holds to the one that leads away from him.

The judgment is affirmed.

BROWN *v.* TAINTER AND LANPHER.

114 N. Y. App. Div. 446. 1906.

ACTION to recover against defendant Lanpher, as undisclosed principal, for a loan of money to defendant Tainter, who gave plaintiff his note therefor indorsed by defendant Lanpher. (The action on the note was abandoned and plaintiff elected to rely upon the action against defendant Lanpher as undisclosed principal.) Judgment for plaintiff against defendant Lanpher, who appeals.

LAUGHLIN, J. . . . The facts connected with that transaction are the following: Charles Davies Tainter, a son of the defendant Lanpher, applied to Mrs. Brown, the plaintiff, for a loan of $1,000. He made the application on his own behalf, and the plaintiff declined to loan him the money on his own responsibility, but agreed to do so if his mother, the defendant Lanpher, would indorse his note for the amount of the loan. Thereupon, according to his testimony, he reported that to his mother, who agreed to and did indorse a note,

[1] Fowler *v.* Bowery Savings Bank, 113 N. Y. 450; McLean *v.* Ficke, 94 Iowa, 283; Beach *v.* Ficke, *Id.*; Terry *v.* Munger, 49 Hun. 560, aff'd 121 N. Y. 161.

being the same note referred to in the second cause of action set forth in the complaint, and upon that note being delivered to the plaintiff she loaned the sum of $1,000 to Charles Davies Tainter. In the negotiation which resulted in the loan of the money and the giving of the note, Charles Davies Tainter made no reference to his desire to borrow the money on behalf of his mother, but he testified on the trial that he was authorized by his mother and on her behalf to apply to the plaintiff for a loan of money. Mrs. Lanpher contradicts that statement, but the jury have found the fact so to be. When the note matured it was not protested and, hence, no notice of protest was given to Mrs. Lanpher, the indorser. The plaintiff recovered in the court below on the theory that Mrs. Lanpher was an undisclosed principal.

The rule respecting the liability of an undisclosed principal is very plain. Where there is in fact an agency, and that fact is concealed, the person dealing with the agent may, upon discovering the principal, proceed against the latter and not against the agent (Kayton *v.* Barnett, 116 N. Y. 625; Brown *v.* Reiman, 48 App. Div. 295); and the rule has been carried so far that, notwithstanding there is a written agreement by which the agent appears as a principal, the true relation may be established by parol evidence and the real principal made liable (Coleman *v.* First Nat. Bank of Elmira, 53 N. Y. 388); but all the cases in which the liability of an undisclosed principal has been enforced contain the feature that the person sought to be held liable was an unknown party to the transaction whose relationship to it was not discovered or disclosed until after it was completed. In the case before us Mrs. Lanpher was not an undisclosed principal. She was an open, declared and active participant in the transaction. She came into it in the manner and form and relationship invited by the plaintiff herself; she became liable precisely as the plaintiff requested and required, and entered into direct contract relations with her. The plaintiff would not loan the money without Mrs. Lanpher becoming liable for it, and the loan was made directly upon the credit both of the son and the mother. None of the cases bearing upon the subject of an undisclosed principal has changed the relations established between parties by their direct personal contracts, of such a character as to exclude the idea of agency. In the transaction with the plaintiff Mrs. Lanpher acted for herself. The plaintiff was willing to loan the money only upon Mrs. Lanpher becoming liable to her for it. We think, therefore, the case does not present the feature of an undisclosed principal, and that the plaintiff was not entitled to recover against the appellant upon the first cause of action.

The judgment and order denying the motion for a new trial must, therefore, be reversed and a new trial ordered, with costs to appellant to abide the event.

PATTERSON and MCLAUGHLIN, JJ., concurred; O'BRIEN, P. J., and HOUGHTON, J., dissented.

HOUGHTON, J. (dissenting): I do not think the plaintiff has lost her right to hold the defendant Lanpher as an unknown principal simply because she happened to name her as the party whom she wished to indorse the defendant Tainter's note. The defendant Lanpher, by such indorsement, it is true, became identified with the transaction of the loan of the money, but only through her contingent liability as indorser. This indorsement did not disclose to the plaintiff that Lanpher was the principal and that Tainter was a mere agent concealing the name of his principal. If the defendant Lanpher was in fact the principal and the money was borrowed for her as the jury has found, notwithstanding the giving of the note, the plaintiff has a right to recover from her on her direct liability for borrowed money. If the plaintiff cannot recover on the theory that the agent borrowed for an undisclosed principal she cannot recover at all, because the note was not protested and the defendant Lanpher refused to renew it. The fact that an undisclosed principal has something to do with the transaction short of making himself absolutely liable, does not release him from liability for the acts of his agent. It was not the fact that the plaintiff knew or suspected that the money was being borrowed for the mother that led her to ask for the mother's indorsement.

The theory upon which one is precluded from asserting liability against an undisclosed principal who has participated in the transaction is that the undisclosed principal has made himself absolutely liable, as though his principalship had been disclosed.

The liability of an indorser is contingent upon presentation of the note and notice of dishonor. In that sense it is contingent, and in that sense it is not as absolute as a direct liability for borrowed money.

If the money was in fact borrowed for the mother through the agency of the son, her indorsement was not a fulfillment of her obligation to repay because of the undisclosed agency.

The motions were finally properly disposed of, and I think the judgment should be affirmed instead of reversed.

O'BRIEN, P. J., concurred.

Judgment and order reversed, new trial ordered, costs to appellant, to abide event. Order filed.

4. *Same: Exception as to Sealed Instruments.*

BRIGGS *v.* PARTRIDGE.

64 N. Y. 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 this 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.*[1]

DENIKE *v.* DE GRAAF.

87 Hun (N. Y. S. C.) 61. 1895.

CULLEN, J. This is an appeal from a judgment in favor of the plaintiff entered on the verdict of the jury at circuit, and from an order denying defendant's motion for a new trial.

The action is to recover damages for deceit in the contract for the exchange of lands. The complaint alleges that one Burnham, acting for the plaintiff, entered into an agreement with the defendant under their hands and seals for the exchange of certain lands, and that the plaintiff was induced to enter into such contract and carry it out by the false representation of the defendant that the land he agreed to convey had cost him $125,000 in trade. The written agreement produced on the trial was between Burnham individually and the defendant, and was under seal.

[1] It is also held in New York that this rule applies although the seal is superfluous. Spencer *v.* Huntington, 100 App. Div. 463, affirmed on opinion below in 183 N. Y. 506.

The first question presented is whether the plaintiff can maintain this action. That he could have maintained no action on the contract is unquestionable, because as to agreements under seal it is not permitted to show that any of the parties acted as agent for a principal not named in the instrument. (Briggs *v.* Partridge, 64 N. Y. 364; Schaefer *v.* Henkel, 75 id. 378.)

The plaintiff concedes this proposition, but contends that the rule only applies when the action is brought directly on the sealed instrument, and that this action is not on the contract, but for fraud in inducing him to enter into the contract. We are referred to no authority in support of this claim, nor can we find any. The plaintiff was not in law a party to the contract. Though Burnham was his agent the plaintiff was no wise bound in the contract or liable for its non-performance. In Squier *v.* Norris (1 Lans. 282) the husband, with the authority of his wife, made a contract under seal in his own name for a sale of the wife's land and she received a sum of money on account of the sale. Yet it was held that a performance of the contract by the wife could not be enforced. We cannot see how a party can be defrauded by the execution of a contract between strangers, and such in law were the parties to the contract to this plaintiff. Upon discovery of a fraud the party defrauded has two remedies. He may disaffirm the contract, and, tendering the return of what he has received under it, may compel the other party to restore what he has obtained from it. Or he may affirm the contract, stand on his bargain and recover as damages the difference between the actual value of what he has received and what would have been its value had the fraudulent representations been proved. (Vail *v.* Reynolds, 118 N. Y. 297.)

As Burnham was the only party who could have enforced the contract it would seem clear that he was the only person who could disaffirm it. The right to disaffirm could not well vest in one person and a right to recover damages in another. Further, as said in Vail *v.* Reynolds, the action for deceit is an affirmance of the contract; the action is in fact based on the contract. Practically the representation is a warranty which the law incorporates into the contract on account of the fraud of the defendant. It is impossible to separate the title to a right of action for such damages from the title to the contract itself, except by an assignment.

The judgment and order denying motion for a new trial should be reversed and the complaint dismissed, with costs.

BROWN, P. J., concurred; DYKMAN, J., not sitting.

Judgment reversed and complaint dismissed, with costs.[1]

[1] Affirmed on opinion below in 152 N. Y. 650.

VAN DYKE *v.* VAN DYKE.

123 Ga. 686. 1905.

THE husband of defendant borrowed of plaintiff $1,400 and gave plaintiff therefor his note under seal. Later plaintiff discovered that the husband was acting for his wife (defendant) and that she had the benefit of the loan.

On motion the court dismissed the action on two grounds: first, that the declaration set out no cause of action, for the reason that the allegations disclosed that it was based on a contract under seal, and in such a case the law would not permit the plaintiff to proceed against the undisclosed principal when discovered; and second, that the allegations of the petition disclosed that the plaintiff parted with her money on an express contract under seal, and no action can be maintained against the defendant for money had and received. The plaintiff excepted.

LUMPKIN, J. (after deciding that an undisclosed principal is not liable upon a sealed instrument). . . . It is contended, however, that whether the plaintiff can recover on the note or not, she has a cause of action against the defendant aside from the note under the facts alleged. The case of Farrar *v.* Lee, 10 N. Y. App. Div. 130, was very similar to that now under consideration. It is there said, "That the liability rested entirely upon the bond in which any preliminary contract was merged; that, as the bond was signed by Tanner [the agent] in his own name, and not as agent for Lee [the principal], it was not competent to transfer by parol evidence, or in any other way, from Tanner to Lee, the obligation which Tanner had assumed personally." In the case of Lenney *v.* Finley, 118 Ga. 718, it was contended that if the concealed principal was not liable on the contract by reason of its being under seal, nevertheless, having occupied the premises and used them for the purpose of conducting business, she was liable to the plaintiff. This contention was denied by the court. In the case of Maddox *v.* Wilson, 91 Ga. 39, no opinion was written. The third headnote appears to conflict with the ruling here made. The decision was made by two justices, and not by a full bench; and was disapproved in Lenney *v.* Finley, *supra*. Under the allegations of the petition the trial court committed no error in sustaining the demurrer.

Judgment affirmed. All the justices concur, except SIMMONS, C. J., absent.

J. B. STREETER, JR., CO. v. JANU.

90 Minn. 393. 1903.

COLLINS, J. In this action the plaintiff corporation is attempting, as vendor, to enforce payment of an amount due in accordance with the terms of a written executory contract for the purchase and conveyance of real estate. The defendant was not named in the contract, nor did he execute it. The claim is that defendant is an undisclosed principal and the real vendee, and that the person named in the instrument as vendee was simply acting as defendant's agent when he made the purchase and executed the contract. It stands admitted that plaintiff had no knowledge that this defendant was the principal until long after the contract was entered into. At the close of plaintiff's testimony, and upon motion of defendant, the court instructed the jury to find a verdict in favor of the latter, which was done, and the appeal is from an order refusing to grant plaintiff's motion for a new trial.

The record shows that in the year 1902 defendant's son, a young man, entered into a contract under seal with the plaintiff, whereby the latter agreed to sell and convey to the former some 1,500 acres of land in North Dakota, the agreed consideration being $13,525. Of this amount, $75 was paid down, $3,450 was to be paid in installments prior to November 1st following, and the balance in yearly payments of $1,025, evidenced by the son's promissory notes. $285 was afterwards paid to plaintiff. The son having refused to make further payments, this action was brought against the father on the ground before mentioned; the allegations in the complaint being that he was the real vendee, that the contract was actually made for him and in his behalf, and that of these facts the plaintiff was not informed until after the writing had been executed. The answer put in issue these allegations. Testimony was introduced at the trial in the nature of admissions made by the defendant father tending to show that he sent his son into Dakota to buy this land, that the purchase was made by the latter for him, and that the money which had been paid by the son and received by the plaintiff belonged to him, and not to the son. . . .

We have heretofore stated that this executory contract related to Dakota land, and was under seal. We assume, in the absence of allegations or proof to the contrary, that this instrument was executed and delivered within the state of Minnesota; and we also assume that the rules of law herein prevailing alone control. It was executed in behalf of the corporation by its president, who attached a private seal — a scroll of the pen — and also the corporate seal. Annexed to the signature of the vendee was his seal — a scroll of the

pen. Under the common-law rule, these seals made the instrument a specialty, and removed it from that class of writings known as "simple contracts." It is the contention of defendant's counsel that when a contract becomes a specialty, because executed under seal, an undisclosed principal cannot be bound or held by its terms, unless he has in some manner ratified the act of the agent, or received the benefit of the performance by the other party, neither of which appear in this case.

The common-law rule in respect to the liability of an undisclosed principal upon a written instrument is concisely stated in 1 Amer. & Eng. Ency. Pl. & Pr. (2d Ed.) 1139, etc., and cases are cited which fully support the text. From these citations it appears that, if this instrument is nothing but a simple contract, the right to pursue the undisclosed principal is absolute and unrestricted. If, upon the other hand, the common-law distinction between sealed and unsealed instruments remains, and it is a specialty, an undisclosed principal cannot be shown, or held liable. No one but the party signing can be bound by it. But the distinction between sealed and unsealed private contracts has been abrogated by Laws 1899, p. 88, c. 86, whereby the use of private seals on written contracts is abolished, and it is expressly declared that the addition of a private seal to an instrument in writing "shall not affect its character in any respect." The result of this legislation is that all differences heretofore existing in the law between simple contracts and specialties, executed by private parties, and which had long prevailed, are discarded. They are alike in all respects, for the unequivocal language used must be given its full effect. See Noyes *v.* French Lumbering Co., 80 Minn. 397, 83 N. W. 385. Statutes of this import prevail in a large number of states, but the one in question is much like those of Tennessee (Shannon's Code, 1896, § 3213) and Washington (Ballinger's Ann. Codes & St. 1897, § 4523). We find no cases in these states which bear upon the exact question now presented.

With the distinction abolished, it follows that testimony tending to show that the act of the alleged agent was within the limits of the power delegated, and that defendant was an undisclosed principal, was competent, and in this instance a *prima facie* case had been made against him. The cause should have been submitted to the jury on this question.

Order reversed and a new trial granted.[1]

[1] In Sanger *v.* Warren, 91 Tex. 472 (1898), the court, after applying the common law rule that an undisclosed principal cannot be sued on a sealed instrument, said (DENMAN, Associate Judge, at p. 483): "We are of opinion that the result is not affected by the following statute: 'No private seal or scroll shall be necessary to the validity of any contract, bond, or conveyance, whether respecting real or personal property, or any other instrument of writing, whether official, judicial, or private, except such as are made by corporations, nor shall the addition or omission of a seal or scroll in any way affect the force and effect of the same.' Rev. Stats., art. 4862. It is true the statute renders it unnecessary to place a seal upon a deed,

5. *Same: Exception as to Negotiable Instruments.*

MANUFACTURERS & TRADERS BANK *v.* LOVE.

13 N. Y. App. Div. 561. 1897.

THE action was brought to recover of the defendant upon a promissory note which read as follows:

$201.93. BUFFALO, N. Y., May 3, 1895.

Two months after date I promise to pay to the order of Rice-Blake Lumber Company, two hundred one and 93-100 dollars, at Bank of Buffalo, here. Value received.

(Signed) J. W. JOHNSTON, Agent.

This note was executed by Johnston to the payees therein named for lumber purchased of them. Johnston was conducting a lumber business in Buffalo. The payee indorsed and transferred this note to the plaintiff for value before it was due. The defendant resided in Elmira and was a stepdaughter of Johnston's. Johnston and defendant had executed and filed an instrument declaring that Johnston was defendant's agent, but the payee of the note had no notice of it. An instrument had later, and before the delivery of the note, been executed revoking the agency, but this was not filed. (See L. 1893, c. 708, § 363a.)

Judgment for defendant. Plaintiff appeals.

but it does not undertake to give one executed without a seal a different status from what it would have had before if executed with a seal. On the contrary, it provides that the addition or omission of a seal shall not 'in any way affect the force and effect of the same.' In order for the omission of the seal not to in any way affect its force or effect the deed must be allowed to retain the only status it had before. When we adopted the common law its settled rules relating to the construction and effect of deeds became a part of our system. To them we were compelled to resort to determine the nature and extent of the estate conveyed by the deed as well as of the covenants therein contained, and who were bound or benefited thereby. It was not the intention of said statute to abolish them. As said in Jones *v.* Morris, 61 Ala. 524, in discussing a more comprehensive statute than ours, 'though a seal may not now be necessary to a conveyance of a legal estate in lands, yet, the instrument, the deed of conveyance, which it must still be termed, though shorn of its dignity of a seal, retains all the operation and effect of a deed sealed at common law. Its covenants may be as comprehensive, and whatever they may be, are as obligatory, and its recitals are as incapable of being gainsaid, as if it were sealed with the greatest formality. The estoppel which a sealed instrument, or its covenants, created at common law, is now claimed by the appellee shall be attached to the conveyance by the agents of the appellant. And we can not doubt that the estoppel which at common law grew out of the covenants or the recitals of a sealed instrument, attaches now to an unsealed conveyance of the legal estate in lands. The statute is not so broad in its sweep as to blot out the common law principles which give security to conveyances of real estate. It would be fearful, indeed, if this was the operation of the statute, and the freehold in lands was not invested with greater dignity than the fleeting ownership of chattels.' Delvin on Deeds, sec. 249, says: 'The effect of these statutes is simply to dispense with the necessity of affixing a seal to a deed; but in other respects, as for instance with reference to the doctrine of estoppel, the deed retains the incidents it possessed as a sealed instrument at common law.' The effect of the statute is different as to other contracts, for the placing of the seal thereon at common law raised them from parol to specialty contracts which cannot be done under the statute."

WARD, J. Whatever may be the rule as to other contracts, not under seal, the law is firmly established in this state as to commercial paper that 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. Briggs *v.* Partridge, 64 N. Y. 363, and cases there cited; Cortland Wagon Co. *v.* Lynch, 82 Hun, 173; 31 N. Y. Supp. 325; Casco National Bank *v.* Clark, 139 N. Y. 307.[1]

It is also held that the negotiable instrument binds only the ostensible maker, though the word "agent" is attached to his signature, no principal being named in the body of the instrument, or indicated by the signature. (See the last two cases cited.)

The law merchant surrounds the negotiable paper in the hands of a *bona fide* holder with a credit not given to other contracts, and protects him against hidden equities of which he has no notice, and permits him to recover against the party whose name is signed to the instrument though there be attached to his name the word "agent," and he is not bound to search for a principal unknown to the instrument itself. Nor can he do so. The rights of the holder are confined to the parties to the instrument, and he must rely upon them alone, except that he can establish that the name used as the signature to the instrument has been adopted by the assumed principal or by the person not named in the instrument as his own in transacting the business. This may be done. A person may become a party to a bill or note by any mark of designation he chooses to adopt, provided it be used as a substitute for his name and he intends to be bound by it. De Witt *v.* Walton, 9 N. Y. 574; Daniels on Neg. Inst. § 304. The last quoted authority says: "But such liability exists only where it is affirmatively and satisfactorily proved that the name or signature thus used is one which has been assumed and sanctioned as indicative of their contracts, and has been, with their knowledge and consent, adopted as a substitute for their own names and signatures in signing bills and notes."

No authority is given in the written instrument filed from the defendant to use the signature of J. W. Johnston, Agent, as and for the defendant. Nor is there any proof that, in fact, the defendant had authorized the use of that name as representing her in the business, and the case seems to stand upon the bare proposition that, although neither the plaintiff nor the lumber company had knowledge of the instrument filed in the clerk's office, and in no manner relied upon it, and had no knowledge, in fact, that the signature to the note in any manner represented the defendant, still the plaintiff had a right to go outside of the instrument and explore for some

[1] See also Ranger *v.* Thalmann, 84 App. Div. 341, affirmed 178 N. Y. 574, on opinion below.

undiscovered principal that the simple addition of "Agent" to Johnston's name might indicate, and having found this instrument on file, could stand upon that and recover.

We cannot concur in this view. . . .

We have reached the conclusion that the decision of the trial court was right and that the judgment should be affirmed.

All concurred. *Judgment affirmed, with costs.*

HARPER *v.* BANK.

54 Oh. St. 425. 1896.

PETITION by Bank for allowance of claim against insolvent estate of Harper. Demurrer to petition overruled. Harper's trustee appeals.

Harper procured one Matthews to execute a note signed by Matthews and payable to order of Moreland, a broker, and secured by stock owned by Harper. Moreland negotiated it to plaintiff and turned over the proceeds to Harper. Matthews acted only as agent for Harper, but plaintiff was ignorant of this fact when it discounted the note. Matthews is irresponsible and the stock worthless.

MINSHALL, J. The objection to a recovery on the petition is, that Harper's name nowhere appears on the note, and that no recovery can be had against him, nor his assignee, for this reason, although the money was thus raised for his use, and he in fact received it; and authorities are cited to show that parties cannot be added to and made liable on instruments of this kind by parol. This is conceded to be the rule, particularly where there is a disclosed principal. In such cases the presumption is that the paper was taken on the credit of the parties to it. But such is not this case, and the objection to the petition on this ground misapprehends its character. The action is not on the note signed and indorsed by Matthews, but on the special facts of the case, of which the making of the note is but a part. It is a settled principle of the law founded on the plain principle of justice that where one received money that in equity and good conscience belongs to another, the latter may recover it as money had and received to his use. This was the phraseology of the common law, used for the sake of the remedy, *assumpsit*. Under the code the fiction of a promise is not required — is, in fact, contrary to its rules. By it, where the statement of the facts shows a duty neglected on the part of the defendant, and of which the plaintiff has the right to require performance, the petition states a cause of action.

The facts disclosed by the petition are, in substance, that Harper

procured Matthews to make and indorse a promissory note for six thousand dollars, payable at the office of a broker, and also transferred to Matthews fifty shares of the stock of the Fidelity National Bank to be, and which were attached to the note as, collateral security. On this note the broker obtained the money from the plaintiff and turned it over to Harper. Matthews is irresponsible, and neither the note nor the stock is worth anything. Harper's connection with the matter was nowhere disclosed, although the entire transaction was directed by himself and was for his sole benefit. Good conscience certainly required Harper to pay back this money as a loan to himself; and, being insolvent, it should be accepted as a valid claim against his estate.

The cases and the books fully support a recovery in such a case. As observed before, it is not a case where it may be presumed that the plaintiff elected to rely on the credit of the names of the parties to the paper and the collateral security; for the name of the real party in interest was not disclosed, so that there could have been no election, and the action is not on the note, but against an undisclosed principal upon the special facts of the case, making it inequitable and unjust for him to retain the money, or, in other words, not to pay the note he procured to be made and on which he got the money. Pentz *v.* Stanton, 10 Wend. 271; Allen *v.* Coit, 6 Hill, 318; Kayton *v.* Barnett, 116 N. Y. 625; Lovell *v.* Williams, 125 Mass. 439; Chemical National Bank *v.* City Bank (Ill.) 40 N. E. Rep. 328; 1 Randolph Com. Paper, 180; 1 Parson's N. & B. 93, note 1.

The case of The Chemical National Bank *v.* The City Bank is quite similar in its facts to the case before us, but not more so, on principle, than the other cases cited. . . .

The case of Peterson *v.* Roach, 32 Ohio St. 374, is relied on by the plaintiff in error as applicable. We do not think so. It was simply a case where one member of a firm borrowed money on his individual credit and that of a surety, and afterwards applied it to the use of the firm; and such was his purpose at the time he borrowed the money. But there was nothing to show that the loan was made on the procurement of the firm, or that the other member was undisclosed. The member borrowing the money acted for himself, and not for the firm, nor at its instance.

In the case of Bank *v.* Hooper, 5 Gray, 567, also relied on, it was held that a bank which had discounted bills drawn in his own name by the agent of a *disclosed* principal, could not sue the latter, nor prove against his estate in insolvency, although the proceeds were applied by the agent to the use of the principal. This is on the principle before stated, that when the principal is known to the creditor, credit is presumed to have been given to the agent by accepting his paper instead of that of the principal; and, in such case, when the suit is on the paper, new parties cannot be added to

it by parol. As pointed out by counsel, the rule in Massachusetts applicable to the case before us is stated in the later case, Lovell *v.* Williams, 125 Mass. 430, where it is held: "If a person sells goods to another, who is an agent of an undisclosed principal, and takes the note of the purchaser in ignorance of such fact, the presumption that the note was taken in payment is rebutted, and the seller may resort to the undisclosed principal." This rule seems so agreeable to the ordinary notions of justice that it is quite difficult to perceive why it should ever have been questioned.

Judgment affirmed.

RENDELL *v.* HARRIMAN.

75 Me. 497. 1883.

[Reported herein at p. 543.]

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6. *Rights of Undisclosed Principal: General Rule.*

HUNTINGTON *v.* KNOX.

7 Cush. (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 *prima 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, *prima facie,* a promise to the agent; yet it is only *prima 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.

POWELL *v.* WADE.

109 Ala. 95. 1895.

ACTION by P. P. Powell upon a written contract for the sale of trees from his land made between R. L. Powell and Wade, and an account stated thereunder. The plaintiff separately excepted to the action of the court in giving each of the following written charges, requested by the defendant: (1) "In order for the plaintiff to recover on the stated account, the jury must be satisfied from the evidence that on the 10th day of August, 1891, the account was stated between P. P. Powell and defendant, and not between R. L. Powell and defendant." (2) "The burden of proof is on the plaintiff to show that the contract was made by R. L. Powell as agent for his father, and not for himself." (3) "If the jury find from the evidence that the contract was made between R. L. Powell and defendant, and that R. L. Powell undertook to sell the timber as his own, then — it matters not whom the timber really belonged to — the plaintiff cannot recover in this action." From a judgment for defendant, plaintiff appeals.

BRICKELL, C. J. A principal, whether disclosed or undisclosed, is bound by the acts or contracts of the agent, within the scope of the authority conferred. As he is bound by the contracts, whether oral or written, though made by and with the agent, in his own name, he may, in his own name, maintain an action thereon. If the contract is in writing, in the name of the agent alone, it is permissible by parol to show that in the making of the contract the agent was acting for the principal. Such proof does not contradict the writing; it only explains the transaction. Ford *v.* Williams, 21 How. (U. S.) 287; Bishop on Contracts, § 1080; Mechem on Agency, § 769. In such action, the burden of proof lies on the principal to show the agency, and that in the making of the contract the agent was acting for him. This is the proposition asserted in the second instruction given at the instance of the defendant, and in the giving of it there was no error.

But the first instruction was erroneous. A count upon an account stated may be supported by evidence that the account was stated with the agent of the plaintiff, or by admissions made to an agent. 2 Green. Ev. § 126.

The third instruction contravenes the principle we have stated — that the plaintiff, though undisclosed as the principal and though the agent may have contracted in his own name, may, in his own name, maintain an action on the contract. The instruction was erroneous.

For the errors pointed out, the judgment must be reversed, and the cause remanded.

MANKER *v.* WESTERN UNION TELEGRAPH CO.

137 Ala. 292. 1902.

THE plaintiff was the sendee of a message, which was sent to her by her brother, Frank Lash, telling her of the dying condition of her father, and summoning her to his bedside. There was evidence introduced on the part of the plaintiff tending to show that Frank Lash, the sender of the message, was acting as agent of the plaintiff, and for her benefit. The facts of the case and the substance of the portions of the court's oral charge to which exceptions were reserved are sufficiently set forth in the opinion.

The plaintiff requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(1) If the jury believe the evidence they will find for the plaintiff. (2) The court charges the jury that it was not the duty of Frank Lash to inform the defendant company of the fact that in sending the message described in the complaint, if from the evidence you believe that he was acting as the agent of plaintiff, that he was the agent of plaintiff, in order to make the defendant liable to plaintiff in this cause."

There were verdict and judgment for the defendant. The plaintiff appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

DOWDELL, J. This was an action by the sendee of a telegraphic message. The complaint contained four counts. A demurrer was sustained to the third and fourth counts for a failure to aver in said counts that the sender of the message acted as the agent, or for the benefit of the plaintiff. The counts were then amended by averring the agency, after which the demurrer, being renewed, was overruled.

The facts averred in the complaint set up a contract between the plaintiff and the defendant, and the plea was non-assumpsit, and issue was taken on this plea. Whether the alleged breach was willful or the result of negligence would not change the character of the action from one *ex contractu* to one *ex delicto.* Moreover, the parties tried the case, and the trial court so understood it and treated it, as an action *ex contractu.* The plaintiff, having tried her case on one theory in the court below, will not be permitted, on appeal for the purpose of putting the trial court in error, to try her case on an entirely different theory.

The action being considered as one *ex contractu,* the only question raised by the assignments of error upon exceptions to parts of the oral charge of the court and on refusal to charge as requested by plaintiff in writing is whether the principal may maintain an action for breach of contract made by the agent, the principal not having

been disclosed at the time of the making of the contract. In the cases of Western Union Telegraph Co. *v.* Allgood, 125 Ala. 712, 27 South. 1024, and Lucas *v.* So. Ry. Co., 122 Ala. 529, 25 South. 219, it was held that an undisclosed principal could not recover damages for breach of contract made by the agent. These cases followed and were based upon expressions contained in Daughtery *v.* A. U. Tel. Co., 75 Ala. 168, 51 Am. Rep. 435; W. U. Tel. Co. *v.* Henderson, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; Kennon & Bro. *v.* Tel. Co., 92 Ala. 399, 9 South. 200; and Tel. Co. *v.* Wilson, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23. A review of these later cases leads us to the conclusion that what was stated in those cases with regard to showing by the proof that the agency was disclosed was nothing more than dictum. Upon more mature consideration, we are now unable to see any sufficient reason for holding that a principal may not maintain an action on a contract made by his agent, though such principal be not disclosed in the making of the contract. The above cases are in conflict, in principle at least, with the cases of Bell *v.* Reynolds, 78 Ala. 511, 56 Am. Rep. 52; City of Huntsville *v.* Huntsville Gas Co., 70 Ala. 191, and McFadden & Bro. *v.* Henderson *et al.*, 128 Ala. 229, 29 South. 640. These latter cases, we think, assert the correct rule, and the one which we are disposed to adhere to. This doctrine seems to be not only the more reasonable rule, but also well supported by authority. We are, therefore, of the opinion that what was said in the cases of Daughtery, Henderson, Kennon & Bro., and Wilson, *supra,* upon this question, should be disapproved, and the cases of Allgood and Lucas, *supra,* should be overruled.

It follows from this conclusion that the court below erred in those portions of the general charge excepted to wherein the court instructed the jury that, unless tne agency was disclosed to the defendant at the time of the making of the contract, the plaintiff could not recover; and also in refusing to give written charge No. 2 requested by the plaintiff. The judgment of the lower court will be reversed.

Reversed and remanded.

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7. *Same: Exception as to State of Accounts.*

MONTAGUE *v.* FORWOOD.

[1893] 2 Q. B. (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 *bona 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.

BELFIELD *v.* NATIONAL SUPPLY CO.

189 Pa. St. 189. 1899.

DICKSON & Kerr sometimes dealt as principals or jobbers and sometimes as agents or brokers, and they had dealt in both ways with defendant. They had previously sold to defendant goods which they purchased of plaintiff and which were shipped to defendant from plaintiff's works. As a result of various transactions they owed defendant about $1,500. In this state of affairs defendant gave Dickson & Kerr an order for certain goods. They ordered plaintiff to supply the goods and charge the same to defendant, intending to receive from plaintiff a selling commission as agents. Plaintiff sent the goods in different shipments, and after a part were delivered notified the defendant that the goods were charged to it. Defendant replied that the goods had been ordered of Dickson & Kerr, not of plaintiff, but nevertheless retained the goods and received and retained the subsequent shipments, and credited Dickson & Kerr's account with the full amount. Plaintiff sued for the price of the goods and obtained a judgment in full.

Opinion by Mr. Justice MITCHELL. That defendant deal with Dickson & Kerr as principals is clear from the whole course of their previous transactions. The fact that Dickson & Kerr also did business as brokers was immaterial unless defendant gave orders to them as such. One who gives an order for goods to A. cannot have it transferred by A. to B. without the buyer's knowledge and consent. And even if it turns out that A. was all the time only agent for B. as an undisclosed principal, yet B.'s rights under the contract will be limited by the rights which the buyer has in good faith acquired against A. while dealing with him as principal. Frame *v.* Coal Co., 97 Pa. 309. Whether, therefore, Dickson & Kerr be regarded as

dealers on their own account who turned over defendant's order to plaintiff, or as agents of the plaintiff, an undisclosed principal, the rights of the parties were fixed by the original contract growing out of the order, and could not be changed without the introduction of new facts and circumstances. Dickson & Kerr being in debt to defendant on the previous dealings, defendant had the right as against them to get its debt paid and the accounts balanced by ordering goods from them in the regular course of their prior business, and if the goods were sent, received and charged by defendant before knowledge of any other title than that of Dickson & Kerr, the transaction was closed, and defendant was not liable to plaintiff. That is a risk which every undisclosed principal runs as against those who deal with his agent as the real owner.

But if before the goods were received, the defendant had notice of plaintiff's ownership, then defendant was bound to elect either to refuse the goods or to take them as the property of plaintiff, and keeping them would be an assumption of the liability to pay plaintiff for them, whether it be regarded as a ratification of the transfer of the order from Dickson & Kerr or an acknowledgment of the plaintiff as the true principal now disclosed.

The exact date of such notice to defendant and the precise status of the goods and accounts at that time are not clear on the evidence as it now stands. Each party asked a direction for a verdict as matter of law; plaintiff on the ground that the orders had been given to him by Dickson & Kerr as brokers, and the goods shipped to and received by defendant, and being plaintiff's property in fact, must be paid for by defendant without reference to its dealings with Dickson & Kerr; defendant on the other hand standing on the state of the case at the time it ordered the goods from Dickson & Kerr without reference to the time of delivery. Both claims were too broad. Defendant was right as to its original status on its order to Dickson & Kerr, and as to all goods received, receipted for, or credited to Dickson & Kerr before notice of plaintiff's title. But such notice terminated its rights in that aspect, and, as already said, it was bound to refuse all goods subsequently delivered or account for them to plaintiff. The time of notice being received, and the deliveries of the goods before and after, were the crucial points of the case. Some of the goods appear to have been received before notice, some admittedly after it, some of the acts and correspondence of defendant look like ratification of the order as coming directly from defendant to plaintiff, some of them tend to the contrary. These questions therefore should have been sent to the jury.

Judgment reversed and venire de novo awarded.

BAXTER *v.* SHERMAN.

73 Minn. 434. 1898.

ACTION for purchase price of goods. Judgment for defendant. From an order denying a motion for a new trial plaintiffs appeal.

MITCHELL, J. One Shea was, to the knowledge of the defendant, a commission merchant or factor, who sold, on account of the consignors, fruit and produce consigned to him by others; but, at the same time, he dealt on his own account in the same kind of property. The defendant was a dealer on his own account in the same city, in the same kind of property. The plaintiffs were engaged in the fruit and produce business at Nauvoo, Ill., and had for years been in the habit of shipping such property to Shea as their agent, to be by him sold on their account, and to remit to them the proceeds, less his commissions. For this purpose, in August, 1896, they shipped to him a consignment of fruit. Shea sold the fruit to the defendant on August 21st. There was no express agreement between Shea and the defendant for any credit, but the purchase price was not paid at the time of the delivery of the fruit, the custom of those in the trade in Minneapolis being to settle accounts between themselves once a week. On August 22d, Shea and defendant had a settlement, in which the price of plaintiffs' fruit was applied upon or offset against an individual debt due from Shea to the defendant, contracted on August 18th or 19th. This debt had no sort of connection with the sale of plaintiffs' fruit. On August 26th, Shea, being insolvent, made an assignment for the benefit of his creditors. He has never accounted to the plaintiffs for the proceeds of their fruit, and defendant has never paid for the same unless by applying the price, as above stated, upon the debt which Shea owed him. Plaintiffs brought this action to recover the price of the fruit.

As factors or commission merchants may sell in their own name the goods of their principals, we shall assume, although there is no express finding to that effect, that Shea sold this fruit without disclosing the name of his principal or stating whether this property belonged to himself or to another. The evidence, as well as the finding, is to the effect that defendant knew that, while Shea sold fruit and produce on his own account, he was also engaged in the business of selling it as factor or agent for others who consigned it to him for sale on their account. Therefore, under the circumstances, a sale by Shea in his own name to the defendant was not the equivalent of a statement that he was selling on his own account. On the contrary, it amounted only to an assurance that the fruit was either his own property or the property of some principal who had employed him to sell. With this knowledge of the equivocal relation of Shea

to the property, and with actual knowledge that it had been shipped to Shea by somebody (for defendant himself took the fruit out of the car in which it had been transported from Nauvoo, and paid the railroad freight), the defendant, so far as appears, made no inquiry whatever of Shea or any one else as to whose property it was, or whether Shea was acting for himself or for a principal.

The court found that defendant had no knowledge or information of any claims of plaintiffs in or to the property until after the settlement with Shea. This may be, and probably is, technically and literally supported by the evidence, but, as will be seen hereafter, is wholly insufficient to entitle the defendant to offset his debt against Shea against plaintiffs' demands for the price of their property.

It is not important that the purchaser from a factor did not know who the principal was if he knows, or is chargeable with notice, that the property belongs to a principal, and not to the factor. It is well settled by an almost unbroken line of authorities, from George *v.* Clagett, 7 Term R. 359, down, that if the owner of goods intrusts them to an agent with authority to sell in his own name, without disclosing the name of his principal, and the agent sells in his own name to one who knows nothing of any principal, but honestly believes that the agent is selling on his own account, he may set off any demand he may have on the agent against the demand for the goods made by the principal. This set-off need not exist at the time of the sale. It is sufficient if it arise before notice of the real ownership of the goods.

As applied to factors, this rule might seem at first to be inconsistent with the equally well settled doctrine, so much relied on by the plaintiffs, that a factor or commission merchant has no power to pledge his principal's goods for his own benefit; that such an act is tortious and void as against the principal; and that, too, without regard to the pledgee's ignorance of the fact that the factor was not the real owner of the property. See Wright *v.* Solomon, 19 Cal. 64.

But both rules are equally well settled; and we apprehend that the distinguishing feature between the two is that a sale of the principal's goods in the name of the factor is within the implied actual authority of the latter, while a pledge is not. The rule referred to in the case of sale rests upon the doctrine of equitable estoppel, and is merely an application of the familiar principle that, where one of two innocent persons must suffer by the fraud of a third, the loss should fall upon him whose act or negligence enabled the third person to commit the fraud.

But this rule should not be extended beyond the reason or principle upon which it is founded. It was never intended to be used as a shield, so as to make every right of the real owner subordinate to the right of a third party, dealing with the agent, to gain every possible advantage of the transaction. Hence, where an agent sells in

his own name for an undisclosed principal, and the principal sues the buyer for the price, the buyer cannot set off a debt due from the agent unless in making the purchase he was induced by the conduct of the principal to believe, and did in fact believe, that the agent was selling on his own account. The rule of George *v.* Clagett does not obtain where the purchaser knows that the agent is not the owner of the goods or when circumstances are brought to his knowledge which ought to have put him upon inquiry, and by investigating which he would have ascertained that the agent was not the owner. Where, as in this case, the character of the selling is equivocal, and, as was known to the defendant, Shea was in the habit of selling, sometimes on his own account, and sometimes as agent, it was incumbent on defendant, if he desired to avail himself of a set-off, to inquire in what character Shea was acting in that particular transaction, and if he chose to make no inquiry, and it turned out, as it did, that he bought of an undisclosed principal, he ought not to be allowed the benefit of any set-off.

Defendant had sufficient information to advise him that it was quite as likely that Shea was acting as factor as that he was acting for himself. This was of itself enough to put him upon inquiry, not as to Shea's authority to sell, but as to his own right of set-off if he desired to buy with a view of covering his own debt or availing himself of a set-off. Presumably, if he had inquired of Shea, he would have been informed that Shea was acting merely as agent for another. Should Shea have refused to inform him whether he was acting for himself or for a principal, defendant could have declined to make the purchase. Knowing what he did, and having entered into the transaction without inquiry, defendant could have had no honest or reasonable belief one way or the other as to the ownership of the property; and under these circumstances he can have no right, as against the demand of the plaintiffs, to insist on a set-off or upon the attempted application of the purchase price of their fruit on his claim against Shea.

Without attempting to cite or review the authorities on this subject, we merely refer to the notes to George *v.* Clagett, 2 Smith, Lead. Cas. 1359, where most of the authorities, both American and English, are referred to; and to Cooke *v.* Eshelby, 12 App. Cas. 271, where the subject is fully discussed and all the English cases reviewed.

Our conclusion is that the findings of fact were not sufficient to justify the conclusions of law, and that the evidence would not have justified any findings which would have entitled the defendant to prevail.

The defendant was permitted, under the objection and exception of the plaintiffs, to introduce evidence of a local custom in Minneapolis among those engaged in the fruit and produce business, such as Shea and defendant were engaged in, of running weekly accounts

on cash sales, instead of paying spot cash on each transaction, and then making weekly payments and settlements, in which they allowed and offset against each other all bills accruing during the past week, and, in short, having a sort of weekly clearance between themselves, in which they balanced and offset all outstanding bills between themselves, without regard to whether such bills were due to or from them as factors or principals.

This evidence was clearly immaterial and incompetent for any purpose. This so-called "custom" was an arrangement among the local dealers solely for their own convenience, which they acted on entirely in reliance upon the financial responsibility of each other. If, in the absence of any such custom, defendant would have no right to apply the price of plaintiffs' fruit on the individual debt of Shea, the custom could give him no such right; for the effect of such a custom would be to permit an agent to appropriate his principal's property to the payment of his own debt, which would be contrary to well-established principles of law as well as good morals. Therefore such a custom would be void.

Moreover, no evidence was introduced or offered that plaintiffs had any knowledge of the alleged custom; and nothing is better settled than that a local custom, even if valid, is operative only in respect to those who are shown to have knowledge of it; and there can be no presumption that a stranger living in Illinois had any knowledge of a local custom in Minneapolis. It is doubtless true that, where the owner of property consigns it for sale to a factor, it is within the implied or apparent authority of the factor to conform to any general and uniform custom of the place to which the property is consigned as to the terms or conditions of sale, whether the consignor knew of the custom or not; but the custom here sought to be proved does not come within any such principle.

Order reversed, and a new trial granted.

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8. *Same: Exception where Exclusive Credit is given to Agent.*

WINCHESTER *v.* HOWARD.

97 Mass. 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, 2 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.

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9. *Same: Exception as to Varying Written Instrument.*

HUMBLE *v.* HUNTER.

12 Q. B. 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 at first to think 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 principle 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.*

ABBOTT *v.* ATLANTIC REFINING CO.

4 Ont. L. Rep. 701. 1902.

ACTION on the following guarantee by defendants addressed to George A. Abbott: "We hereby guarantee that *your* roof, completed under instructions from us by Mr. S. D. Eplett of *your* town, will remain waterproof for a period of five years from date. In the event of said roof leaking at any time within the above mentioned time, we hereby agree to repair same at our expense."

The action was first brought by George A. Abbott, but Mary S. Abbott, his wife, as owner of the building, was afterwards joined as co-plaintiff. Judgment was given for both plaintiffs for $200 with leave to divide it as they might think proper, or, if they could not agree, one-third to the husband and two-thirds to the wife. George A. Abbott occupied a portion of the building as tenant of his wife for a barber shop; she occupied another portion for a shop; and both occupied another part as a dwelling. The building, and goods belonging to each plaintiff, were damaged by water from the defective roof. Other facts appear in the opinion.

STREET, J. Mrs. Abbott was erecting the building in question upon her own land for herself; her husband was acting as her agent in making the contracts for its erection, and superintending the work done on her behalf, but had no personal interest in it.

The defendants became aware that a roof was to be put on, and wrote the husband that in order to introduce their roofing material into "your town," they would put on "your roof" for a fixed price. To this he replied in his own name, accepting their offer to put on "my roof;" and thereupon they gave the guarantee now sued on, in which they refer to the roof as "your roof;" again, as it happens, also speaking in the same sentence, of "your town."

It is argued that to permit evidence showing that the husband was acting merely as agent for the wife would be to allow him to contradict the writings in which he describes the roof as his.

The case certainly comes very near to the decisions of Lucas *v.* De la Cour (1813), 1 M. & S. 249, and Humble *v.* Hunter, 12 Q. B. 310, but I do not think it comes within them.

In Lucas *v.* De la Cour there was an absolute statement that the goods in the question were the sole property of one partner, and that he had acquired the interest of his co-partners in them, and it was held that this statement prevented them from asserting a joint ownership as against the other party to the contract.

In Humble *v.* Hunter there was a written statement on the face of the charter-party that the plaintiff's son was "owner" of the good ship *Ann,* and it was held that the plaintiff could not, in an action for freight and demurrage under the charter-party, give evidence that she, and not her son, was "owner" of the vessel, and that he had only entered into the contract as her agent.

In the present case, which is brought for damages upon an executed contract, there is no unambiguous assertion of ownership in the husband. The roof in question is referred to by the defendants in the first place in their letter to him as "your roof," and he refers to it in a reply as "my roof;" but these expressions do not necessarily imply the representation on his part that he was owner of the roof or of the building; they seem to be used merely as conveniently descriptive of the subject-matter under discussion. When the defendants in the next line of the correspondence refer to the town in which the husband lives as "your town," it is not to be inferred that they meant to imply that he was the owner of the town; they merely used the expression as meaning the town with which he was at the time connected.

He was managing the erection of this building for his wife at the time, and might, without being taken to assert ownership in it, adopt the defendants' reference to the roof as "your" roof, particularly as the defendants in the same letter use the word "your" in the other sense. Therefore, I think it was competent for the wife to show that her husband had entered into the contract as her agent, and to recover damages from the defendants for the breach of it.

The breach seems to me well established: the roof leaked badly, and in the end became practically almost useless, in spite of the

defendants' efforts to repair it. I do not see why the damages should be confined to the cost of repairs of the roof. It was well within the contemplation of the parties that if the roof leaked the building and its walls and its contents would suffer.

No one but a party or privy to the contract could recover for its breach; the husband was neither party nor privy; it was not in contemplation of the parties, so far as appears, that he should have goods there, and he cannot recover, and the action against him should be dismissed.

The wife is entitled to recover for the loss of the roof, because she will have to replace it, and to the damage to the walls, carpets, etc. These damages will easily mount up to the sum at which the learned junior judge has assessed them, namely, $200.

As the result of the appeal, there will therefore be judgment for the plaintiff Mary S. Abbott for $200, with costs from the time she was made a party; and the action, so far as the husband is concerned, will be dismissed with the costs of the defendants as against him down to, but not inclusive of, notice of trial. No costs of the appeal to either party.

FALCONBRIDGE, C. J. I agree in the result.

BRITTON, J., concurred.

CHAPTER XI.

Admissions and Declarations of Agent.

GUNTER *v.* STUART.

87 Ala. 196. 1888.

Action upon stated accounts for goods sold and delivered for the use of defendants' boats. Plaintiff produced statements of accounts at the foot of each of which was written "This statement is correct. J. B. McKee, Clerk." Defendants offered evidence to show that McKee had quit their employment before these statements were signed by him, and asked the trial court to charge that if McKee was not in their employment at the time he stated the accounts they were not bound thereby. This charge was refused and defendants excepted.

Stone, C. J. Part of Stuart's evidence, on which he relied for recovery against the steamboat company, the appellants, consisted in certain stated accounts, certified to be correct by one McKee, styling himself clerk. These certificates, several of them bear date in October, 1885, and some of the items appear to be later than this. There was testimony tending to show that McKee ceased to be clerk or agent of the appellants about June 1, 1885, and that he was not afterwards in their employment. It is too clear to admit of argument, that after McKee ceased to be clerk and agent of appellants, he could neither do any act, state an account, or make an admission that would bind them. While the relation of principal and agent exists, the agent can bind his principal by any act done within the scope of his authority, and by any admission made contemporaneous with, and explanatory of the act of agency so done. 3 Brick. Dig. 25, §§ 107, 108. And it may be that, acting as clerk of the boat, it was within the purview of his duties to make purchases for the boat, and to state accounts. All these powers, however, would necessarily terminate when his connection with the boat was severed. To obtain, after that time, any information he might possess, he must needs have been made a witness. Charges 2 and 3 asked by appellants ought to have been given. *Reversed and remanded.*[1]

[1] After a corporation has filed an answer to a complaint, the power of the president or superintendent to make any further admission or declaration which could bind the company in reference to the cause of action has passed. McEntyre *v.* Levi Cotton Mills, 132 N. C. 598.

WHITE *v.* MILLER.

71 N. Y. 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 [one of the trustees] 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 declarations were 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.*

JONES *v.* HARRELL.

110 Ga. 373. 1900.

ACTION against defendant on a draft claimed to have been signed by her husband as her agent. Judgment for plaintiff.

SIMMONS, C. J. . . . The plaintiff was allowed, over the objection of the defendants, to testify that Jones, the husband, had told him that he (Jones) was the agent of his wife. It is a well-settled rule that the declarations of an alleged agent are not admissible to prove his agency. The agency should be first proved; then the declarations, if made as to matters within the scope of the agency, would be admissible to show that the agent was acting as agent and for the principal. "The agent certainly can not confer authority upon himself. Evidence of his own statements or admissions, therefore, is not admissible against his principal for the purpose of establishing, enlarging, or renewing his authority; nor can his authority be established by showing that he acted as agent or that he claimed to have the powers which he assumed to exercise." Mechem, Agency, § 100. See also Small *v.* Williams, 87 Ga. 681; Johnson *v.* R. Co., 90 Ga. 810; Abel *v.* Jarratt, 100 Ga. 732. . . .

(Judgment reversed because of error in the admission of the above testimony, and because of other errors not material here.)

LAWALL *v.* GROMAN.

180 Pa. St. 532. 1897.

ACTION against attorney for damages for negligence. Nonsuit.

Edgar J. Lawall, a witness for plaintiff, in his examination in chief was asked the question:

"Were you authorized by your sister to pay it (the money) over without your sister's consent?"

Objected to.

By the Trial Court: The objection will have to be sustained, his authority will have to be found from what was said; his opinion cannot be given by plaintiff while he is being examined in chief.

Plaintiff excepts and bill sealed. [4]

OPINION BY MR. JUSTICE MITCHELL.

. . . The fourth assignment however must be sustained. The authority of Edgar Lawall from his sister to pay over the money was a fact to which he could testify. Though agency cannot be proved by declarations of the alleged agent yet he is a competent witness to prove it, and his testimony cannot be restricted to the mere words used by the principal, but is admissible generally on the whole subject.

Judgment reversed and precedendo awarded.

WICKTORWITZ *v.* FARMERS' INSURANCE CO.

31 Or. 569. 1897.

ACTION on insurance policy. Judgment for plaintiff. Defendant appeals, contending that there was no legal evidence that notice of the fire or proof of loss had been given to the defendant, as required by the terms of the policy.

BEAN, J. The evidence is that, after the fire, Lewis was notified thereof, and proceeded to effect an adjustment of the loss, proof of which was furnished to him within the time required by the policy. The objections to the admission of the testimony, as well as the motion for a nonsuit on this branch of the case, are all based upon the hypothesis that there was no competent evidence to show that Lewis was in fact an agent of the company, with authority to settle and adjust losses, and receive notice and proof thereof, at the time of the fire. The only testimony bearing on the question of his agency and authority in this regard, aside from his assuming to act for the company, is that of himself and Judge Hewitt. Lewis, whose evidence was taken by deposition in New York, testified that for some time prior to October 22, 1889, he had been in the habit of procuring policies of insurance from the defendant company by correspondence, and that the policy in suit was so procured, but that, on the day named, he entered into a written agreement to represent the defendant as its agent in issuing policies, collecting premiums, adjusting losses, and otherwise representing it, east of the Rocky Mountains, and that he acted under this authority in adjusting the loss and receiving and forwarding notice and proof thereof. Being asked to produce and deliver his commission to the officer taking his deposition, so that it could be made a part thereof, he refused to part with the original, but delivered a copy, which was attached to and made a

part of his deposition. Upon the objection of the defendant, however, the court refused to permit this copy to be read in evidence, on the ground that it was incompetent. Judge Hewitt testified that he was one of the attorneys who commenced this action; that after its commencement, in the course of a general conversation with Mr. Elderkin, the secretary and general manager of the defendant company, in the city of Albany, Elderkin said that Lewis was the agent of the defendant in the city of New York, and that a certain paper which the witness then exhibited to him was a copy of his commission. This paper was offered and received in evidence, over the objection of the defendant that it was incompetent, and not the best evidence, and that no proper foundation had been laid for the introduction of secondary evidence of the contents of the original commission.

The objection urged to the testimony of Lewis is based upon the well-established rule that the mere declarations of an agent are not competent testimony to prove the fact of agency. But this rule does not prevent him from testifying in court upon the subject. It has reference only to proof of the declarations of an alleged agent, made out of court, and not to such as he may make under oath as a witness.[1] The testimony of an agent as to the nature and extent of his authority, when it rests in parol, is as competent as the testimony of any other witness who may have knowledge on the subject. "It is competent to prove a parol agency, and its nature and scope," says Mr. Justice VALENTINE in Machine Co. *v.* Clark, 15 Kan. 494, "by the testimony of the person who claims to be the agent. It is competent to prove a parol authority of any person to act for another, and generally to prove any parol authority of any kind, by the testimony of the person who claims to possess such authority. But it is not competent to prove the supposed authority of an agent, for the purpose of binding his principal, by proving what the supposed agent has said at some previous time. Nor is it competent to prove a supposed authority of any kind, as against the person from whom such authority is claimed to have been received, by proving the previous statements of the person who it is claimed had attained such authority." It is clear, therefore, that Lewis was a competent witness; but, as it appears and is admitted that his authority at the time of the fire was conferred by a written instrument, the writing is, of course, the best evidence of the nature and extent of his agency, and, in accordance with the familiar rules of evidence, must be produced, or, if not, its absence must be satisfactorily accounted for, before parol evidence of its contents is admissible; and hence his oral testimony as to the nature and extent of his authority was incompetent. It might be suggested, however, in this connection, that his refusal to permit his original commission to be made a part of his deposition

[1] Van Sickle *v.* Keith, 88 Iowa, 9.

is a sufficient showing of diligence on the part of the plaintiffs for the admission of secondary evidence of its contents. But that question is not before us, because the court below ruled out the copy annexed to the deposition, and it is not a part of the record here.

The paper introduced in evidence as a copy of his commission was not shown to be such except by the admissions of Elderkin, the general manager of the company, made to Judge Hewitt, and such admissions were incompetent as evidence to bind the defendant. The rule is well settled that the admissions of an agent to bind his principal must be made at the time and as a part of some act in the execution of his authority. 1 Greenl. Ev. § 113; Cunningham *v.* Cochran, 52 Am. Dec. 230, and note. There is no evidence that Elderkin was doing any act within the scope of his authority at the time he made the alleged admissions. They were made in the course of a general conversation with Judge Hewitt about the agencies of the company, and we know of no rule of law that will justify the admission in evidence of the declarations or admissions of the general manager of a corporation to charge the company simply because he is such. If, in the performance of some act within the scope of his authority, he makes an admission which is part of the *res gestæ,* such admission is admissible in evidence against his principal, because it is a part of the act; and it is only when the acts of an agent will bind his principal that his representations, declarations, and admissions respecting the subject-matter become competent evidence for that purpose. North Pac. Lumber Co. *v.* Willamette Steam Mill Lumbering & Manuf'g Co., 29 Or. 219, 44 Pac. 286. Eliminating from this case the oral testimony of Lewis as to the nature and extent of his agency, and what purports to be a copy of his commission, introduced in evidence, all of which, as we have said, is incompetent, there remains no evidence whatever showing or tending to show that Lewis had authority to adjudicate losses or accept notice and proof thereof; and for this reason the judgment of the court below must be reversed, and the cause remanded for a new trial.

WOLVERTON, J., being interested in the result, took no part in this decision. *Reversed.*

BLACKMAN *v.* WEST JERSEY AND SEASHORE RAILROAD CO.

68 N. J. L. 1. 1902.

ON rule to show cause why verdict for plaintiff should not be set aside.

Before GUMMERE, Chief Justice, and Justices VAN SYCKEL, GARRISON, and GARRETSON.

The opinion of the court was delivered by

GUMMERE, Chief Justice. The plaintiff was injured by a fall received by her while alighting from a trolley car of the defendant company. At the trial she offered herself as a witness in her own behalf, and having stated that her fall was caused by the sudden starting of the car while she was on the running-board, and that it was stopped again as soon as possible after she was thrown, and that the conductor then came to her and helped her up, was then asked what the conductor said to her, if anything. The question was formally objected to but was permitted, upon the ground that what the conductor said was part of the *res gestæ*. The answer was: "'It is too bad,' he says; 'are you hurt?' I said to him, 'I signaled you to let me off and you answered me.' He said, 'I know I did, but I forgot you. It is entirely my fault.'"

The rule, with relation to the admission of declarations upon this ground, is that where the declaration is concomitant with the main fact under consideration and is so connected with it as to illustrate its character, it may be proved as part of the *res gestæ;* but where it is merely narrative of past occurrence it cannot be received as proof of the character of that occurrence. Greenl. Evid. § 108; Castner *v.* Sliker, 4 Vroom, 95, 97. Tested by this rule we think the question should have been excluded. If the words attributed to the conductor had been exclamatory and coincident with the happening of the accident, they would undoubtedly have been illustrative of its character, and proof of them would have been admissible. They were, however, not spoken until after the accident had occurred, and, although the time which had elapsed between the happening of the accident and the making of the declaration was very short, still the words were merely narrative of the conditions which had brought it about.

It is suggested that the testimony was competent, as the admission of an agent of the defendant company, which bound the principal. The allowance of the question cannot be supported on this ground. It is only words which are spoken, or acts which are done, by an agent in the execution of his agency which are admissible in evidence against the principal. Ashmore *v.* Pennsylvania Steam Towing Co., 9 Vroom, 13. The admission of the conductor was, manifestly, not made in pursuance of his duty to his employer, and cannot bind the latter.

The admission of this testimony was error. . . .

The rule to show cause will be made absolute.

WILLIAMSON *v.* CAMBRIDGE RAILROAD COMPANY.

144 Mass. 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.

ELLEDGE *v.* RAILWAY COMPANY.

100 Cal. 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 roadmaster), 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.[1]

[1] 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, it 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 Agent.

CONGAR *v.* CHICAGO AND NORTHWESTERN RY. CO.

24 Wis. 157. 1869.

The plaintiff shipped, by defendant's road, trees and other nursery stock from Whitewater, in this state, directed to "Iuka, Iowa," the consignees being resident in a village of that name in Tama County, Iowa. At Chicago, the goods were shipped by defendant's agents, by the Chicago, Burlington and Quincy Railroad Company, and, at Quincy, were transferred to the Quincy and Missouri Railway, by which they were transported to Iuka, in Keokuk County, Iowa. In consequence of this mistake, they are alleged to have become worthless, and this action was brought to recover damages. Certain averments of the complaint and answer will be found recited in the second paragraph of the opinion, *infra*. A demurrer to the answer was sustained, and defendant appealed.

Dixon, Ch. J. The decision of the court below, as shown by the written opinion of the learned judge found in the printed case, turned upon the point that, for the purpose of charging the company with negligence in shipping the goods over the wrong road, notice to any of its agents was notice to the company. In other words, the court held, that the knowledge of the agents residing in the state of Iowa, and transacting the business of the company there, of a place in that state named Iuka, and that goods destined for that place were to be deposited at the nearest station on the line of the company's road, called Toledo, was the knowledge of the company, so as to make the company responsible for any injury resulting from the mistake of its agents residing and transacting its business at the city of Chicago, in the state of Illinois, in forwarding the goods from the latter place by another railroad, instead of over the company's own road, although such mistake occurred without any negligence whatever on the part of the agents making it; but, after they had taken reasonable and proper care to ascertain the route by which the goods should be forwarded, and had forwarded them in accordance with the information so obtained. This, we think, was an erroneous application of the doctrine that notice to the agent is notice to the

principal. Such notice, to be binding upon the principal, must be notice to the agent when acting within the scope of his agency, and must relate to that business, or, as most of the authorities have it, the *very* business, in which he is engaged, or is represented as being engaged, by authority of his principal. It must be the knowledge of the agent coming to him while he is concerned for the principal, and in the course of the very transaction which is the subject of the suit, or so near before it that the agent must be presumed to recollect it. Story on Agency, § 40, and 2 Kent's Com. 630, and note, and cases cited. Notice, therefore, to the agent in Iowa, distant some two or three hundred miles from the city of Chicago, who had distinct duties to perform, and were not at all concerned in the business of forwarding the goods from Chicago, was not such notice as will bind the company in relation to that business, the same having been transacted by other agents, who had no such notice. This seems very clear, when we consider the reason and ground upon which this doctrine of constructive notice rests. The principal is chargeable with the knowledge of his agent, because the agent is substituted in his place, and represents him in the particular transaction; and it would seem to be an obvious perversion of the doctrine, and to lead to most injurious results, if, in the same transaction, the principal were likewise to be charged with the knowledge of other agents, not engaged in it, and to whom he had delegated no authority with respect to it, but who are employed by him in other and wholly different departments of his business.

The complaint charges that the place called Iuka, in Tama County, Iowa, to which the goods were intended to be sent, was known to the agents of the company residing and doing business along the line of its road in the state of Iowa, and that the station where the goods were to be deposited was Toledo. The answer alleges that the same place was unknown to the officers and agents of the company at Chicago; that they were informed that said Iuka was situated in Keokuk County, in the state of Iowa, and near the line of the Burlington and Missouri Railroad; that they examined a map of Iowa used by shippers, and kept in the office of defendant, for the purpose of ascertaining where said Iuka was situated; and that said map represented said Iuka as being in Keokuk County aforesaid. The answer further alleges that the goods were directed to "C. E. Cox, Iuka, Iowa," without giving the name of the county, or other directions to indicate to what part of the state, or to what railroad station in the state, the same were consigned, or by what line of railroad the same were to be forwarded. It appears to this court, therefore, upon the pleadings, that no cause of action for negligence is stated against the company, but that, if there was negligence on the part of any one, it was upon the part of the plaintiff in not having marked the goods with the name of the county, or otherwise with that

of the railway station, or with the line of road by which they were to be sent. The demurrer to the answer should, therefore, have been overruled; and the order sustaining it must be reversed, and the cause remanded for further proceedings according to law.

BY THE COURT. So ordered.

THE DISTILLED SPIRITS.

11 Wall. (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 undoubtely 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.

HOUSEMAN *v.* GIRARD MUTUAL BUILDING AND LOAN ASS'N.

81 Pa. St. 256. 1876.

THE association intending to loan money to one Leslie upon his property authorized Leslie to procure from Houseman, Recorder of Deeds, a search of the property. Houseman negligently certified that there were no incumbrances. The association thereupon made the loan to Leslie, and afterward discovered that at the time of the search there were outstanding recorded mortgages from Leslie to other parties. The association sues Houseman for the loss occasioned by the false certificate. The trial judge refused Houseman's request to charge as follows:

"If C. M. S. Leslie was employed by the plaintiffs to procure certificates of search, and did so procure them for the plaintiffs, then the knowledge of Leslie of the existence of the uncertified mortgages was imputed to the plaintiffs and is their knowledge."

The trial judge directed a verdict for the association. Houseman appeals.

Mr. Justice SHARSWOOD delivered the opinion of the court.

This was an action instituted in the court below by the defendants in error to recover from the plaintiff in error, who was formerly recorder of deeds for the county of Philadelphia, damages for a false certificate of search issued by him, or by his authority. That such a certificate was issued false in fact; that it was ordered and paid for by the defendants, and that in consequence they suffered damages, were points not in dispute. That the recorder is *prima facie* liable to respond in damages for such false search, has been settled in McCaraher *v.* Commonwealth, 5 W. & S. 21, and is no longer an open question.

It was decided by the present Chief Justice at *nisi prius*, in Commonwealth *v.* Kellogg, 6 Phila. R. 90, that this liability is to the party who asks and pays for the search, and does not extend to his assigns or alienee.

The contention here all grows out of the fact that the search in this case, by the request of the conveyancer of the defendants, was ordered and paid for by the owner of the premises, in order that he might obtain a loan of money on mortgage from the defendants, and the certificate was so used, and the money so obtained.

It is urged, that by the employment of the owner as the agent for this purpose, the defendants are affected with this knowledge of the existence of the mortgage, which was omitted in the certificate. This is a very familiar principle and well settled. But it is equally well settled that the principal is only to be affected by knowledge acquired in the course of the business in which the agent was employed. This limitation of the rule is perfectly well established by our own cases, and it was not necessary to look further: Hood *v.* Fahnestock, 8 Watts, 489; Bracken *v.* Miller, 4 W. & S. 110; Martin *v.* Jackson, 3 Casey, 508. It is a mistake to suppose that it depends upon the reason that no man can be supposed to always carry in his mind a recollection of former occurrences, and that if it be proved that he actually had it in his mind at the time, the rule is different. It may support the reasonableness of the rule to consider that the memory of men is fallible in the very best, and varies in different men. But the true reason of the limitation is a technical one, that it is only during the agency that the agent represents, and stands in the shoes of his principal. Notice to him is then notice to his principal. Notice to him twenty-four hours before the relation commenced is no more notice than twenty-four hours after it had ceased

would be. Knowledge can be no better than direct actual notice. It was incumbent on the plaintiff to show that the knowledge of the agent, to use the accurate language of one of our cases, "was gained in the transaction in which he was employed." There was not only no evidence of this offer by the plaintiff, but it was plain that it had been gained before, and in an entirely different transaction. It is not necessary to consider in this view of the matter whether the alleged agent was really such, or only the servant or clerk of the conveyancer.

It is urged that the conveyancer of the defendants, in the employment of the owner, who was the applicant for the loan, and interested, therefore, to obtain clear searches, was guilty of negligence, which is imputable to his constituents, and will, therefore, bar their recovery. But this is to maintain that a man is to presume fraud or forgery in one, whose character is good, and that if he does not he is *prima facie* negligent. When the scrivener received a clear certificate under the undoubted official seal of the recorder, he surely was not bound to presume that a fraud had been committed on the recorder or his clerk, nor was there any evidence from which such fraud could be inferred. If there was no such presumption, neither would there arise any presumption beforehand, that the owner would succeed in corrupting or deceiving the clerk or servant of the plaintiff. Without some such presumption, how can it be said that it was *prima facie* evidence of negligence? that the owner was employed in the mere ministerial service of ordinary paying for and procuring the certificate?

We are of opinion that the learned judge was right in directing a verdict for the plaintiffs below. *Judgment affirmed.*

McCORMICK *v.* JOSEPH.

83 Ala. 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.

CONSTANT *v.* UNIVERSITY OF ROCHESTER.

111 N. Y. 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). From all these various cases it will be seen that the farthest that has been gone in the way of holding a principal chargeable with knowledge of facts communicated to his agent, where the notice was not received, or the knowledge obtained, in the very transaction in question, has been to hold the principal chargeable upon clear proof that the knowledge which the agent once had, and which he had obtained in another transaction, at another time, and for another principal, was present to his mind at the very time of the transaction in question. . . . 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 had 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 to it 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 to it 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.[1]

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.*

CRAFT *v.* SOUTH BOSTON RAILROAD COMPANY.

150 Mass. 200. 1889.

ACTION to recover damages for refusal of defendant company to recognize as valid certain shares of stock held by plaintiff. Judgment for defendant.

FIELD, J. . . . In the second case,[2] the plaintiff was a stockholder of the defendant, and, having money to invest, in January, 1882, applied to Reed as a broker to buy for her eight additional shares of the stock of the defendant. Reed informed the plaintiff that he had bought the shares for her, and she in good faith paid him for them, and received from him a certificate in her name of eight shares of stock in the usual form, under the seal of the corporation, signed by its president and by Reed as its treasurer. He obtained the certificate by filling up one of the blanks which the president had signed

[1] If it would be a breach of duty for the agent to disclose, the doctrine of constructive notice is not applicable. Melvin *v.* Pabst Brewing Co., 93 Wis. 153.

[2] The other case entitled Allen *v.* South Boston Railroad, and included in the same opinion, is omitted.

and left with him. Before doing this, he entered on the transfer-book of the defendant a transfer of eight shares to the plaintiff from himself as agent; but he in fact had no stock as agent or otherwise, and he bought no stock for the plaintiff, and the corporation had already issued all its capital stock. The plaintiff's name as holder of these shares was entered on the dividend sheets of the company, and semi-annual dividends were paid to her, and her name was also regularly entered as owner of these eight shares in the annual returns made by the commissioner of corporations until 1886, when this and many other frauds of Reed were discovered.

The agreed facts in both cases show gross carelessness on the part of the president in signing certificates in blank, and negligence on the part of the directors in not examining the books and discovering the fictitious transfers of stock made by Reed. In both cases, after the frauds were discovered, the defendant refused to recognize the certificates of stock as valid, and refused to allow them to be transferred, or to issue new certificates. . . .

In the second case, the plaintiff received from Reed, as broker, a certificate, in her name, of the stock which he said he had bought for her, and there is nothing to show that this was not the usual way in which brokers transacted such business. Apparently Mrs. Craft acted as a purchaser though a broker usually acted, and we see no want of due care on her part.

Another question arises in her case from the fact that Reed, who committed the fraud upon the defendant, was also her agent in the transaction. If he be regarded as acting in two capacities, and as having committed the fraud in his capacity as treasurer, he yet as her agent knew of and participated in it. Is this knowledge to be imputed to her in determining her rights against the defendant?

The general rule is, that notice to an agent, while acting for his principal, of facts affecting the character of the transaction, is constructive notice to the principal. Suit *v.* Woodhall, 113 Mass. 391; National Security Bank *v.* Cushman, 121 Mass. 490; Sartwell *v.* North, 144 Mass. 188; The Distilled Spirits, 11 Wall. 356. There is an exception to this rule when the agent is engaged in committing an independent fraudulent act on his account, and the facts to be imputed relate to this fraudulent act. It is sometimes said that it cannot be presumed that an agent will communicate to his principal acts of fraud which he has committed on his own account in transacting the business of his principal, and that the doctrine of imputed knowledge rests upon a presumption that an agent will communicate to his principal whatever he knows concerning the business he is engaged in transacting as agent. It may be doubted whether the rule and the exception rest on any such reasons. It has been suggested that the true reason for the exception is that an independent fraud committed by an agent on his own account is beyond the scope of

his employment, and therefore knowledge of it, as matter of law, cannot be imputed to the principal, and the principal cannot be held responsible for it. On this view, such a fraud bears some analogy to a tort wilfully committed by a servant for his own purposes, and not as a means of performing the business intrusted to him by his master. Whatever the reason may be, the exception is well established. Kennedy *v.* Green, 3 Myl. & K. 699; Espin *v.* Pemberton, 3 De G. & J. 547; Rolland *v.* Hart, L. R. 6 Ch. 678; In *re* European Bank, L. R. 5 Ch. 358; Cave *v.* Cave, 15 Ch. D. 639; Kettlewell *v.* Watson, 21 Ch. D. 685, 707; Innerarity *v.* Merchants' National Bank, 139 Mass. 332; Dillaway *v.* Butler, 135 Mass. 479; Atlantic Cotton Mills *v.* Indian Orchard Mills, 147 Mass. 268; Howe *v.* Newmarch, 12 Allen, 49.

This case seems to us to fall within this exception. Although the fraudulent act of Reed may not have been committed with the intention of cheating the plaintiff, yet that was its legal effect, and it was a fraudulent act committed by him for his own benefit, the actual effect of which would have been wholly to avoid the transaction if the plaintiff had known of it.

The present cases, we think, fall within the principle, that, where one of two innocent persons must suffer a loss from the fraud of the third, the loss must be borne by him whose negligence enabled the third person to commit the fraud.

The defendant cannot be compelled to issue new certificates, or to recognize the old ones as valid, because to do so would cause an overissue of its capital stock, but it is liable in damages. In assessing damages the superior court has taken the value of the stock to be its market value at the time when the defendant first refused to recognize the stock as valid and to permit a transfer of it. This would be the rule of damages if the certificates were valid. Sargent *v.* Franklin Ins. Co., 8 Pick. 90; Wyman *v.* American Powder Co., 8 Cush. 168. We think that the same rule of damages applies to these certificates. In *re* Bahia & San Francisco Railway, L. R. 3 Q. B. 584.

The cases having been submitted on agreed statements of fact, no question arises as to the form of actions. Upon the plaintiffs severally filing in the superior court the certificates properly assigned to the defendant, judgments may be entered for the plaintiffs.

So ordered.[1]

[1] In Brookhouse *v.* Union Pub. Co., 73 N. H. 368, at pages 374, 375, the court said: "The plaintiff further says that the defendants had notice of the fraud through Moore himself, their treasurer and general manager. It is true that a principal is ordinarily chargeable with the knowledge acquired by his agent in executing the agency, and is subject to the liabilities which such knowledge imposes. But there is a well-established exception to this rule, by which the principal is not charged with the knowledge of his agent when the latter is engaged in 'committing an independent, fraudulent act on his own account, and the facts to be imputed relate to this fraudulent act.' Allen *v.* Railroad, 150 Mass. 200; Indian Head

CARPENTER *v.* GERMAN AMERICAN INSURANCE CO.

135 N. Y. 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

Nat'l Bank *v.* Clark, 166 Mass. 27; Produce, etc., Co. *v.* Bieberbach, 176 Mass. 577, 588; Camden, etc., Co. *v.* Lord, 67 N. J. Eq. 489; 58 Atl. Rep. 607; Gunster *v.* Company, 181 Pa. St. 327; Frenkel *v.* Hudson, 82 Ala. 158; American Surety Co. *v.* Pauly, 170 U. S. 133; 2 Pom. Eq. Jur. (3d ed.), s. 675, and authorities cited in notes; 1 Am. & Eng. Enc. Law (2d ed.), 1145, and authorities cited in notes. This exception was recognized in this state in Clark *v.* Marshall, 62 N. H. 498, 500. Mr. Pomeroy suggests a doubt whether it applies to the managing officers of a corporation 'through whom alone the corporation can act.' Sect. 675, note 1. He gives no reason for the doubt, and the cases which seem to have raised it — Holden *v.* Bank, 72 N. Y. 286, and First Nat'l Bank *v.* New Milford, 36 Conn. 93 — were decided upon an application of the general rule to the facts, without any allusion to the exception, and of course without any allusion to a distinction in the application of the exception when the principal is a corporation instead of a natural person. In both cases the principals were seeking to hold an advantage acquired through the fraudulent acts of their agents, and were chargeable with the fraud by virtue of the familiar principle, that a person cannot ratify acts and disaffirm the fraud that is a constituent part of them. In the case at bar, the defendants do not set up any claim to the funds in dispute. The funds have passed beyond their reach without being of any advantage to them. In many of the cases cited, the principals were corporations which acted solely through the officers who committed the fraud. Whatever be the true reason for the exception, — whether it be the presumption that the agent would not communicate knowledge of his fraud to his principal, or the consideration that the fraudulent acts are not within the scope of the agent's employment and are wholly for his benefit, — it is not perceived how the fact that the principal is a corporation instead of a natural person affects the application and force of the reason. The knowledge of a corporation, whether actual or imputed, must necessarily be that of its officers; but this circumstance does not transform the officers into principals. The stockholders of a corporation like that of the defendants furnish the capital and presumably carry on its business. The principalship of the corporation is embodied in them. The officers and agents of the corporation exercise only delegated authority — delegated by virtue of their election to office under the law of the state, or by virtue of a by-law or rule of the corporation, or by virtue of its habitual manner of doing business. If, as the plaintiff argues, the assistant treasurer represented the defendant in the receipt of the deposits, Moore was not the only officer of the corporation through whom the corporation could act relating to the matter. The facts would not admit of the application of the rule to which Mr. Pomeroy's doubt relates."

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.

WHEATLAND *v.* PRYOR, ET AL.

133 N. Y. 97. 1892.

PLAINTIFF having a claim against Pryor, a member of defendant firm, drew a draft upon him and indorsed it to the International Trust Co. of Boston. The Trust Co. sent it to the Bank of the Republic, New York, for collection. The latter presented it and took in payment a check drawn by Pryor in the firm name. In an action by plaintiff against the firm for a balance due him on various transactions, the latter claims that plaintiff had notice that the firm funds were used to pay Pryor's individual debt and therefore the amount of this check should be refunded by plaintiff to the firm. This claim was disallowed.

EARL, Ch. J. . . . If we assume that the plaintiff employed the Boston trust company to collect the draft on Pryor, and that the trust company thus became his agent for that purpose, then the Bank of the Republic became the agent of the trust company and not of

the plaintiff. Allen *v.* Merchants' Bank of New York, 22 Wend. 215; Commercial Bank of Penn. *v.* Union Bank of New York, 11 N. Y. 203; Ayrault *v.* Pacific Bank, 47 Id. 570. The Bank of the Republic did not become responsible to the plaintiff, and the plaintiff could not in any way control or direct its conduct in the discharge of the duty which it had assumed to the trust company. Therefore, if upon the facts assumed, it knew that the draft drawn on Pryor individually was paid with firm funds, while that knowledge could be attributed to its principal, the trust company, it could not be attributed to the plaintiff who was not its principal. The reason for the rule which imputes knowledge of an agent to his principal is thus stated in Story on Agency (§ 140): "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 entrusted the agent with the particular business, the other party has a right to deem his knowledge and acts obligatory upon the principal, otherwise the neglect of the agent, whether designed or undesigned, might operate most injuriously to the rights of such party." Now, within the reason of this rule, could the constructive or imputed notice to the Boston trust company — it having no actual notice — be imputed to the plaintiff? There can be no presumption that it communicated to the plaintiff knowledge which it did not have; and in omitting to communicate to the plaintiff knowledge which it did not have, it was guilty of no wrong and no neglect of duty. The rule of constructive notice to a principal can have no operation whatever in a case where the agent himself has not received actual notice. There are undoubtedly cases where an agent is authorized by his principal to employ sub-agents, and where the nature of the business entrusted to the agent is such that it must be assumed he was authorized to employ sub-agents for the principal; and in such cases it is frequently true that both the agent and the sub-agents are the representatives of the principal, and the knowledge which either of them acquired in the business may be imputed to the principal. But here it is settled upon abundant authority that the agent employed by the Boston trust company to collect this draft had no relation whatever to the plaintiff, and owed a duty — not to the plaintiff — but solely to the trust company. So in any view of the case, the knowledge acquired by the Bank of the Republic when it received the firm check in payment of the draft upon Pryor individually, cannot be imputed to the plaintiff. The plaintiff in the end, in some form, received his money from the Boston trust company in good faith, without notice, and he cannot be made to account for it to the defendants. Stephens *v.* Board of Education, 79 N. Y. 183.

The judgment should be affirmed with costs.

All concur. *Judgment affirmed.*

HAINES *v.* STARKEY.

82 Minn. 230. 1901.

ACTION to recover for goods sold and delivered. Verdict for plaintiffs. From an order granting a new trial, plaintiffs appeal.

COLLINS, J. The plaintiffs, co-partners, were non-residents. The witness Berkemeyer resided at Minneapolis, was doing business under the name of the Northwestern Slate Company, and for some time had been the undisclosed agent of a number of eastern concerns selling slate in this state, among them the plaintiffs. In selling for others, Berkemeyer had acquired a knowledge of the partnership which had existed between these defendants for some years prior to February, 1896, and had made sales to them as such co-partners. The sale in question was made by Berkemeyer in September, 1897, the plaintiffs relying upon his statements that the defendants were co-partners, and having no knowledge to the contrary. There had never been any prior dealings between the parties, nor did plaintiffs know of the existence of such a firm prior to this sale. An issue was made at the trial as to whether Berkemeyer had been given actual notice, or had knowledge amounting to actual notice, of the dissolution of the partnership prior to the sale, but on this question the jury evidently found for the plaintiffs. As the latter had not dealt with the defendants in any manner prior to the dissolution, and knew nothing of the firm, it was not necessary that actual notice of such dissolution should be given to them, nor was constructive notice required. This rule is clearly stated in Swigert *v.* Aspden, 52 Minn. 565, 54 N. W. 738, and would control this case, were it not that the goods were sold through Berkemeyer, agent of plaintiffs, who were undisclosed to the defendants or either of them.

As stated by respondents' counsel in their brief, the plaintiffs were not entitled to any notice of the dissolution. They were bound to know to whom the sale was made, and cannot avail themselves of the fact that a partnership had previously existed, unless the knowledge of Berkemeyer, acquired while acting as agent for other parties, is available to them, and through his knowledge they were placed on the same footing as those who had formerly dealt with the partnership, and had no notice of its dissolution. If plaintiffs were not entitled to the benefit of Berkemeyer's knowledge, acquired as before stated, it is manifest that they cannot recover in an action brought against defendants as such partners.

In Lebanon Sav. Bank *v.* Hollenbeck, 29 Minn. 322, 13 N. W. 145, the rule was announced that knowledge of an agent acquired previous to the agency, but actually present in his mind during the agency, and while acting for his principal in a particular transaction or

matter, will, as respects such transaction or matter, be notice to the principal, and will bind him as fully as if originally acquired by him. It was there said that the rule was a salutary one, well calculated to promote justice and fair dealing, if carefully applied. See, also, 1 Am. & Eng. Enc. Law (2d Ed.) 1150. Notice or knowledge of the agent of facts which enter into and give character to acts done for the principal affect the latter. He cannot accept the act of the agent so far as it is advantageous, and reject any infirmity which attaches to it. If the principal is bound by notice to or knowledge of his agent, it would seem to follow that he is also entitled to the benefit of notice to, or knowledge of, the agent in respect to any particular transaction. Let us suppose that after the dissolution, but with full notice thereof, Berkemeyer had continued to sell to defendants for principals who had previously known of the co-partnership, but were not advised of its termination. Berkemeyer's knowledge of the dissolution would certainly be imputable to his principals, and their personal ignorance of the fact would not avail. If his principals in such a case would be bound by his knowledge, it must be that they may avail themselves of his knowledge of the existence of the firm, although obtained in prior transactions.

The Bank Case and the rule therein stated were discussed in Trentor *v.* Pothen, 46 Minn. 298, 49 N. W. 129, in which it was said that the rule applies only to cases where the knowledge is possessed by an agent within the scope of whose authority the subject-matter lies. The facts of which the agent had notice must be within the scope of the agency, so that it becomes his duty to act upon them and communicate them to his principal. Whether the principal is bound by contracts entered into by the agent depends upon the nature and extent of the agency. The effect upon the principal of notice to, or knowledge of, his agent must depend upon the same conditions. This must also be true when ascertaining whether the agent's previously acquired knowledge is available to his principal. So that, in either case, it becomes of primary importance to ascertain the exact scope of the agency.

In the case at bar the agent was authorized to sell the plaintiffs' merchandise upon credit to parties who chose to buy. He had full authority to deal with reference to the property, and to ascertain to whom he was selling, whether a co-partnership or a corporation. In these respects the plaintiffs conferred full power upon him. It was his duty to ascertain — to act upon — what he learned, and to communicate to his principals whether the sale was made to the two defendants as co-partners or to some other concern. Berkemeyer had authority to deal with reference to the matters affected by his prior knowledge that a partnership had existed between the defendants a few months before. He might have inquired as to whether it still continued, but surely nothing of this kind would have been demanded

if the sale had been on his own account, or for a concern which had previously sold to defendant firm. Why should more be demanded because the sale was for another party, new to defendants, and unacquainted with their business relations or connections? We are of the opinion that the plaintiffs were entitled to the advantages and benefits of knowledge previously acquired by their agent as to the existence of the firm of Starkey & Tyra, obtained, as it was, by actual dealing with the firm, and said knowledge having actually entered into, and become a part of, the transaction. Story, Ag. § 418.

It is obvious that if Berkemeyer, an undisclosed agent, had brought action upon this claim in his own name, he could have recovered upon the ground that he had not been notified of the dissolution, nor had he actual knowledge which could be held equivalent to notice. It is equally as obvious that in this respect plaintiffs stand in Berkemeyer's shoes. This disposes of the case, and we need not consider more particularly the assignments of error.

BROWN, J. I dissent. *Order reversed.*

CHAPTER XIII.

Liability of Principal for Torts of Agent.

1. *Liability for Torts Generally.*

HANNON *v.* SIEGEL-COOPER CO.

167 N. Y. 244. 1901.

Appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Cullen, J. The complaint charged that the defendant, a corporation, conducting a department store in the city of New York, represented and advertised itself as carrying on the practice of dentistry in one of its departments; that the plaintiff employed the defendant to render the necessary professional labor in the treatment of her teeth and paid therefor; that the defendant's servant performed said work so carelessly, negligently and unskilfully that plaintiff's jaws and gums were injured, for which malpractice she claimed damages. The answer in substance was a general denial. Plaintiff had a verdict at the Trial Term and the judgment on that verdict has been unanimously affirmed by the Appellate Division.

The Public Health Law, by § 164, makes it a misdemeanor for any person to practise or to hold himself out to the public as practising dentistry in any county in this state without being licensed to practise as such and registered in the office of the clerk of the county, and it would seem that the action of the defendant in assuming to carry on the business of dentistry was illegal and *ultra vires*. But though it was beyond the corporate powers of the defendant to engage in the business this does not relieve it from the torts of its servants committed therein (Bissell *v.* Mich. Southern R. R. Co., 22 N. Y. 258) and the unanimous affirmance of the Appellate Division is conclusive to the effect that it either practised dentistry or held itself out as practising dentistry. The only question cognizable by us arises upon the

appellant's exception to the following charge of the trial court: "If the defendants in this case made representations to the plaintiff, on which she relied, that they were conducting a dentist business in their store, and if she, because of those representations, hired the workman in the store of the defendants, with no knowledge that the business was conducted by Mr. Hayes individually, you may find the defendants responsible for the acts of the dentist who treated the plaintiff, even though Mr. Hayes, as a matter of fact, was the real owner of that department of the defendants' store." The appellant's counsel does not deny the general doctrine that a person is estopped from denying his liability for the conduct of one whom he holds out as his agent against persons who contract with him on the faith of the apparent agency, but he insists that the doctrine does not apply to the present case, because the action is brought in tort and not on contract. It may very well be that where the duty, the violation of which constitutes the tort sued for, springs from no contract with, nor relation to, the principal, a party would not be estopped from denying that the wrongdoer was his agent, even though he had held him out as such. In such a case the representation of the principal would be no factor in producing the injury complained of. But whenever the tort consists of a violation of a duty which springs from the contract between the parties, the ostensible principal should be liable to the same extent in an action *ex delicto* as in one *ex contractu*. It is urged that the representation that the operating dentists were the defendant's servants did not mislead the plaintiff to her injury and, therefore, should not estop the defendant from asserting the truth. There is no force in this claim. If A contracts with the ostensible agent of B for the purchase of goods, he relies not only on the business reputation of B, as to the goods he manufactures or sells, but on the pecuniary responsibility of B to answer for any default in carrying out the contract. So here the plaintiff had a right to rely not only on the presumption that the defendant would employ a skilful dentist as its servant, but also on the fact that if that servant, whether skilful or not, was guilty of any malpractice, she had a responsible party to answer therefor in damages.

The judgment appealed from should be affirmed, with costs.

O'BRIEN, BARTLETT, MARTIN, VANN and LANDON, JJ., concur; PARKER, Ch. J., takes no part. *Judgment affirmed.*

SINGER MANUFACTURING CO. *v.* RAHN.

132 U. S. 518. 1889.

[Reported herein at p. 7.]

DEMPSEY *v.* CHAMBERS.

154 Mass. 330. 1891.

[Reported herein at p. 119.]

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2. *Fraud for Benefit of Principal.*

BARWICK *v.* ENGLISH JOINT STOCK BANK.

L. R. 2 Ex. (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: —

[1] WILLES, BLACKBURN, KEATING, MELLOR, MONTAGUE SMITH, and LUSH, JJ.

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 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 im-

prison 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.*

HASKELL *v.* STARBIRD.

152 Mass. 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.*

BENNETT *v.* JUDSON.

21 N. Y. 238. 1860.

COMPLAINT that the defendant, for the purpose of effecting a sale to the plaintiff of certain lands in the states of Indiana and Illinois, made false and fraudulent representations in respect to their location, proximity to a river and railroad, their agricultural qualities, etc.; that the plaintiff, confiding in such representations, bought the land, paid for it and incurred expenses in removing his family to the same and bringing them back after he discovered that the representations were false and the lands comparatively worthless. Upon the trial at the Steuben circuit before Mr. Justice Johnson, it appeared that the sale of the lands was negotiated by one Davis, an agent of the defendant; that neither the defendant nor Davis had any personal knowledge in respect to the lands, but that the representations made by the latter were but a repetition of statements made to him by a brother of the defendant who had formerly owned the lands, and who had made such statements from information derived by him from persons residing in the states of Indiana and Illinois, and whom he had employed as agents for the payment of taxes. The statement was made in general terms, without referring to any other person as authority for its truth. The defendant had never been in the vicinity of the land sold by Davis in his behalf. The defendant's brother had, several years before, been upon lands which were pointed out to him as those which were conveyed to the plaintiff, and the land which he saw justified the description which he furnished to Davis, and which

was repeated in substance to the plaintiff. That description was grossly inaccurate in particulars material to the value of the land, but the evidence tended to prove that the defendant, his brother and Davis were all, and alike, ignorant that such description was false. The defendant insisted that there was no evidence of fraud on his part, or that of his agent, to be submitted to the jury, and requested the judge to direct a verdict in his favor. The judge refused and the defendant excepted. The judge submitted it to the jury as a question of fact whether the defendant's agent or agents had practised a fraud in making a bargain with the plaintiff; and charged them that if such was the fact, the defendant having received the fruits of the bargain was liable to the plaintiff for the fraud, although he did not authorize such statement or know that it was made, or at the time know whether it was true or false. The defendant excepted. The plaintiff had a verdict and judgment, which having been affirmed at general term in the seventh district, the defendant appealed to this court.

COMSTOCK, Ch. J. There is no evidence that the defendant authorized or knew of the alleged fraud committed by his agent Davis in negotiating the exchange of lands. Nevertheless, he cannot enjoy the fruits of the bargain without adopting all the instrumentalities employed by the agent in bringing it to a consummation. If an agent defrauds the person with whom he is dealing, the principal, not having authorized or participated in the wrong, may no doubt rescind, when he discovers the fraud, on the terms of making complete restitution. But so long as he retains the benefits of the dealing he cannot claim immunity on the ground that the fraud was committed by his agent and not by himself. This is elementary doctrine and it disposes of one of the questions raised at the trial.

The complaint, in setting forth the cause of action, counts upon false representations made by the defendant, without any reference to the agent. This mode of stating the case we think was proper under any system of pleading. The same rule of law which imputes to the principal the fraud of the agent and makes him answerable for the consequences, justifies the allegation in pleading that the principal himself committed the wrong. If this were otherwise, the pleading was nevertheless amendable at the trial. The allegation might have been made to conform to the proof, and where this might properly be done at the trial, it can be done even after the judgment. This court in such cases never reverses a judgment, although the amendment has not actually been made. Lounsbury *v.* Purdy, 18 N. Y. 515.

The question of fact litigated at the trial was, whether the representations of Davis, the agent of the defendant, concerning the western lands, were fraudulently made. The defendant claimed

a non-suit; one of the grounds of his motion being that the evidence wholly failed to show that either the agent or the principal knew that the representations were false. According to the testimony on the part of the plaintiff, certain statements were made by Davis, of a very direct and positive character, concerning the quality and advantages of the defendant's land situated in Indiana and Illinois. These statements were so minutely descriptive of the land that on their face they clearly imported a knowledge of the facts on the part of the person making them, and they were not materially qualified by a reference to any other person as the source of information. The evidence on the part of the defendant gave a somewhat different complexion to the case, but the question of fact was fairly submitted to the jury. The question of law was whether the representations could be deemed fraudulent unless they were known to be false. In regard to this we entertain no serious doubt. Mr. Justice STORY thus states the rule: "Whether a party misrepresenting a material fact know it to be false, or make the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false." (1 Story Eq. § 193, and see note.) In the case before us the representations of the defendant's agent were proved to be grossly false, and they could not be honestly made when he had not the slightest knowledge of the subject to which they related. The plaintiff knew nothing of the lands which he was about to buy. If these statements as to the situation and characteristics of those lands were made with an intent that he should rely upon them, and if he did rely upon them, it was as much a fraud as if they were known to be untrue. The law is not so unreasonable as to deny redress in such a case. Stone *v.* Denny, 4 Metc. 161; Buford *v.* Caldwell, 3 Missouri, 477; Thomas *v.* McCann, 4 B. Monroe, 601; Parham *v.* Randolph, 4 Howard (Miss.), 435.

The case does not present any other questions requiring a particular consideration. We think the judgment must be affirmed.

SELDEN, J., expressed no opinion; all the other judges concurring. *Judgment affirmed.*[1]

[1] "It must be observed, however, that even this responsibility for instrumentalities does not extend to collateral contracts made by the agent in excess of his actual or ostensible authority, and not known to the principal at the time of receiving the proceeds, though such collateral contract may have been the means by which the agent was enabled to effect the authorized contract, and the principal retains the proceeds thereof after knowledge of the fact. Smith *v.* Tracy, 36 N. Y. 79; and see Hammond *v.* Michigan State Bank, Walker's Ch. R. 214; Young *v.* White, 7 Beav. 506. A party dealing with an agent is bound to inquire as to the extent of his authority; but he cannot always protect himself against his frauds." — Baldwin *et al. v.* Burrows *et al.*, 47 N. Y. 199, 215.

WHEELER AND WILSON MFG. CO. *v.* AUGHEY.

144 Pa. St. 398. 1891.

[Reported herein at p. 84.]

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3. *Fraud for Benefit of Agent.*

BRITISH MUTUAL BANKING CO. *v.* CHARNWOOD FOREST RAILWAY CO.

18 Q. B. D. (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 misrepresenta-

tion 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 plaintiff's 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.*

FIFTH AVENUE BANK *v.* FORTY-SECOND STREET AND GRAND STREET FERRY CO.

137 N. Y. 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, etc. 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 *bona 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.*[1]

[1] In Clarkson Home *v.* Mo., K. & J. R. Co., 182 N. Y. 47, at pp. 57, 58, the court said: "There are but two other cases to which we deem it necessary to refer, in one of which the principal was held liable for the acts of defendant's agent, and in the other the principal was held not liable. The first case is that of Fifth Avenue Bank of New York *v.* Forty-second Street and Grand Street Ferry Railroad Company (137 N. Y. 231), and the other is that of Manhattan Life Insurance Company *v.* Forty-second Street and Grand Street Ferry Railroad Company (139 N. Y. 146). The opinion in each case was written by the same judge, who, after considering many authorities upon the subject, has carefully drawn the distinction between the two classes of cases, upon which the liability of the principal depends. In the first case, one Allen was the defendant's secretary, treasurer, and transfer agent. He filled out a blank certificate of stock taken from defendant's certificate book, forged the name of the president thereto, signed his own name as treasurer, then countersigned it as transfer agent and impressed the seal of the corporation thereon. He then procured from the plaintiff a loan upon his promissory note secured by a pledge of the certificate. The certificate upon its face was regular in every respect, and the secretary was the transfer agent of the company, duly authorized to issue stock. It was, therefore, held that he acted within the scope of his employment, and that he was held out by the plaintiff as a competent and fit person to be trusted for that purpose. In the next case, the president of the railroad company had signed certain certificates of stock in blank which were left with other officers of the bank, to be used in case a stockholder desired to transfer his stock during the absence of the president. The same secretary and transfer agent referred to in the former case obtained possession of one of these certificates. He filled up the blank, inserting his own name as stockholder, forging the name of the treasurer and signed his own name as transfer agent. He then pledged the same as collateral security for a loan. In the meantime he had become president of the company, and his authority as transfer agent had ceased to exist. So that at the time that he issued the certificate he was not acting within the scope of any general authority conferred upon him by defendant to issue stock certificates; and it was held that the company was not bound by any representations made by him as to the genuineness of the certificate,

FRIEDLANDER *v.* TEXAS & PACIFIC RAILWAY CO.

130 U. S. 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

and that the company was not liable therefor. It thus appears that the test as to the liability of the principal for the acts of his agent is as to whether the acts were committed in the course of his employment and within the scope of his agency."

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 *bona 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.*

BANK OF BATAVIA *v.* NEW YORK, L. E., & W. R. COMPANY.

106 N. Y. 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

inquire, 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.

M'CORD *v.* WESTERN UNION TELEGRAPH COMPANY.

39 Minn. 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, etc., Tel. Co. *v.* Dryburg, 35 Pa. St. 289, 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', etc., 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', etc., 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, etc., 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 busi-

ness 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', etc., 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 proximate 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.

CHAPTER XIV.

Liability of Third Person to Principal.

1. *Liability upon Contracts.*

HUNTINGTON *v.* KNOX.

7 Cush. (Mass.) 371. 1851.

[Reported herein at p. 422.]

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2. *Liability in Quasi-contract for Money paid under Mistake, Duress, or Fraud.*

STEVENSON *v.* MORTIMER.

Cowp. (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. Plaintiff's 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.

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3. *Liability in Tort for Property Diverted by Agent.*

a. General Rule.

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.

FARQUHARSON BROS. & CO. *v.* KING & CO.

[1902] A. C. 325 (H. L.).

THE appellants were timber merchants and warehoused in the Surrey Commercial Docks the timber which they imported. In 1895 they wrote to the secretary of the dock company: "We have made arrangements whereby in future Mr. Capon will sign delivery orders on behalf of and in addition to the other members of the firm, and inclose our written authority for same." The inclosed authority ran thus: "We hereby authorize you to accept all transfer or delivery orders which shall be signed on our behalf by Mr. H. J. Capon, whose signature is subjoined, the company acting also on our signature as before. This authority is to remain in force until expressly revoked in writing by us." Capon was a confidential clerk of the appellants who had authority to sell to certain recognized customers of the appellants timber at prices and up to limits fixed by the appellants, and occasionally to make other sales.

In 1896 Capon began a series of frauds. He obtained an address at Battersea under the name of Brown, and from that address and under that name offered to sell and sold to the respondents, who were packing-case manufacturers, parcels of the appellants' timber and appropriated the proceeds. In these sales he represented himself as a commission agent acting on behalf of Messrs. Bayley, fire-escape makers. He carried out the sales by signing orders in his own name to the dock company to transfer or deliver timber to the order of Brown, the timber being transferred in the dock company's books into the name of Brown. Then in the name of Brown he signed

orders to the dock company to transfer or deliver the timber to the order of the respondents. In the appellants' stock-books Capon made alterations and false entries of fictitious sales so as to account for the diminution of stock. The respondents knew nothing of the appellants, and nothing of Capon except under the name of Brown. They bought in good faith in ignorance of the frauds. The frauds having been discovered in 1900, the appellants brought an action against the respondents claiming delivery of the timber or its value. The action was tried before MATHEW, J., who left to the jury the question, Did the plaintiffs so act as to hold Capon out to the defendants as their agent to sell goods to the defendants? The jury answered, No. The learned judge refused to put to the jury a question pressed upon him by the defendants' counsel, namely, whether the plaintiffs had by their conduct enabled Capon to hold himself out as owner of the goods or as entitled to sell them. Upon the finding of the jury MATHEW, J., entered judgment for the plaintiffs for £1,200. The Court of Appeal (A. L. SMITH, M. R., and VAUGHAN WILLIAMS, L. J.; — STIRLING, L. J., dissenting) reversed that decision and entered judgment for the defendants. [1901] 2 K. B. 697. Against this decision the present appeal was brought.

EARL OF HALSBURY, L. C. My Lords, in this case I hesitate to speak all that is in my mind out of respect to the learned judges who have taken a different view; but for that I should have said that this was a particularly plain case in which no difficulty whatever arises. I think it might be stated compendiously in two sentences. A servant has stolen his master's goods, and the question arises whether the persons who have received these goods innocently can set up a title against the master. I believe that is enough to dispose of this case.

That it was stealing there cannot be the smallest doubt, and indeed I feel great hesitation in treating seriously the argument that it was not. What possible difference is there between what was done here by Capon and the act of taking a pocket handkerchief out of a man's pocket by a thief in the street? The man who steals is a servant: his possession is the possession of the master. It is not denied that he had no actual authority to dispose of these goods, and because by a circuitous process he allows an innocent agent (for all the persons who acted under his directions were perfectly innocent) to remove the goods from the place where they had been stored by the master, that, forsooth, is said not to be an *asportavit!* Why not? Assuming always the element of fraud, the intention to commit a crime, which is not denied, what element is there wanting to make that a stealing? I confess I am puzzled at the notion that anybody could entertain the smallest doubt in the world that that was a stealing.

Well, if it was a stealing, how has the person who has received

the goods acquired a right to those goods which, it is equally not denied, originally belonged to the appellants in this case? When has the property been changed, and by what circumstances? It is impossible, I think, to answer that question except in one way. There has been no property changed: the thief could give no title whatever. The circumstances of this case show conclusively that there is nothing to prevent this being a theft, and, it being a theft, the thief could convey no title. That disposes of the case.

My Lords, but for the respect I entertain for the learned judges who have taken a different view from myself, I should leave the case there, because I think it is too plain for argument; but a great deal has been said upon the subject of the right arising from estoppel. I really do not understand what estoppel has to do with this case. The mode by which the goods were removed and the *asportavit* incident to the felony accomplished was, as a matter of fact, carried out by the innocent act of the dock company; but it is a mistake to talk of the relations between the dock company and the appellants here as if there was any question of estoppel. It would not be true to say, even as regards the dock company, that there was an estoppel: there was no estoppel at all. Estoppel arises where you are precluded from denying the truth of anything which you have represented as a fact although it is not a fact: but no such question arises here. All that the dock company did they were expressly authorized to do by the appellants; there would not, therefore, be an estoppel as between them and the dock company at all; it would be that they had acted in pursuance of the real and direct authority of the appellants, and, after the letter of authorization, what they did was expressly authorized by the appellants. If it could be argued here that the appellants had represented their clerk Capon to be invested with what, over and over again with a degree of reiteration somewhat wearisome, last night we heard called a "disposing power," "perfect dominion," and "control," and such words as those, which are ambiguous in themselves unless you explain what the disposing power and what the dominion and control mean — I say, if they had represented their clerk Capon to be invested with disposing power, and (note the importance of the next sentence) if anybody, supposing Capon to be invested with that power, had acted upon it to his own prejudice, then undoubtedly estoppel would have arisen; the person who had improperly and negligently allowed Capon to be apparently so invested with authority would be estopped from denying that Capon had authority.

So far the matter would be quite clear; but when we come to look at what the facts of this case are, what in the world has that to do with the question that arises here? Capon was unknown; the appellants were unknown; nobody dreams of suggesting that the respondents here acted upon the faith of Capon being invested with

that authority. They never heard of Capon, they never heard of the appellants, but the clerk who has committed the fraud, ingeniously availing himself of his power of signing orders for delivery, gave a delivery order to change the name in which the goods were stored in the dock company's books to the name of Brown. Professing to be Brown, and professing to act on behalf, not of the appellants, but of a third person named Bayley, he procures the removal of these goods by innocent agents, as I have described them, under the authority of Brown, he having fraudulently transferred the goods in the dock company's books from the name of his master to that of Brown — a fictitious person — and Brown in his turn procures these goods to be delivered to the present respondents; and, forsooth, it is said that that establishes an estoppel. My Lords, I am bewildered at the absurdity of such a suggestion; I really do not understand in what possible way it can arise. That, I should have thought, was quite enough to dispose of this case.

My Lords, so far as I am concerned I really am not concerned to defend, if it were attacked, the language which I appear to have used in Henderson *v.* Williams, [1895] 1 Q. B. 521. I adhere to every word of the judgment I then delivered. It is not a question of whether I am prepared to affirm the words which were quoted or not. I speak of it, I hope, impartially; if I thought the words were incautious I should not hesitate to correct them now; but I do not know now what it is I am supposed to have said that can have led to this misapprehension. I believe the proposition of law which I then gave is accurate, and I am prepared to adopt it; but what application has it to this case? Curiously enough, the only passage which has been assailed as giving rise to the difficulty here is not my own language at all, but the language of an American judge, though it is true I quoted it with approval. Let us see what the language is: I believe it to be accurate. I observe that a few words seem to have been omitted from the consideration of the learned judges who commented on this matter. The language of the learned judge (SAVAGE, C. J.) quoted by me is this: Speaking of a *bona fide* purchaser, who has purchased property from a fraudulent vendee and given value for it he says: "He is protected in doing so upon the principle just stated, that when one of two innocent persons must suffer from the fraud of a third, he shall suffer who, by his indiscretion, has enabled such third person to commit the fraud." Those words "who by his indiscretion" appear not to have made much impression upon those who were commenting upon this matter. What indiscretion did the appellants here commit? They entrusted their clerk with the delivery orders. It is said that in some exceptional cases he was allowed to make a contract; but what has that got to do with it? No one knew that outside of the firm themselves; and you might just as well say in the case of a shopman in a furni-

ture broker's shop, that because he is there, because he habitually delivers goods to the orders which his master receives, that gives him to all the world the power of giving a title if he steals his master's tables and chairs and delivers them to somebody else.

My Lords, I confess I am a little surprised that two of the learned judges seem to be under the impression that my proposition, quoted, as I have said, from an American judge, was that any person who has enabled another by any means to commit a fraud must be the person to suffer when two innocent persons are in question. Of course it depends on the sense in which you are to understand the word "enabled." As I put it to the learned counsel yesterday, in one sense every man who sells a pistol or a dagger enables an intending murderer to commit a crime; but is he, in selling a pistol or a dagger to some person who comes to buy in his shop, acting in breach of any duty? Does he owe any duty to all the world, as is suggested here, to prevent people taking advantage of his selling pistols or daggers in his business, because he does in one sense enable a person to commit a crime? It seems to me that the moment you analyze what is intended by this argument the answer is plain; and when you analyze what is the only function which this man Capon is entitled to perform it is simply this — that he was a delivery clerk. But, say the learned counsel for the respondents, not only was he a delivery clerk, but sometimes he had power and authority to make a contract. Suppose he had — what then? Was anybody misled by that? Did anybody act upon that belief? No one. Therefore, any notion of anybody acting upon something that was held out and represented is entirely out of the question.

My lords, it appears to me when one analyzes the matter it comes to this broad proposition — that because you have given authority to your clerk to deliver goods, for that is the sole thing that could be established by looking at the books either of the firm or of the dock company, therefore, if any person in the employment of that master takes advantage of that for the purpose of committing a felony, thereupon that person is invested with the power to give the receiver a good title.

My lords, I think the state of the law would have been perfectly clear without it; but the Sale of Goods Act has disposed of any such question, because it says, "Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying" — what? — "the seller's authority to sell." Now, where comes in here the operation of that saving clause? What authority was there to sell? None. What representation was there of Capon's authority to sell? None. Therefore, when one analyzes

this case the two sentences with which I commenced my judgment appear to me to entirely dispose of it. This was a theft, and the thief could give no better title than he himself had, which was none. Therefore, it seems to me *luce clarius* that the appellants are entitled to succeed, and I move your Lordships to reverse the order appealed from with costs.

LORD LINDLEY. My lords, I also think this case is extremely plain when it is understood.

Capon sold the plaintiffs' timber without their authority, and sold it to the defendants. The defendants honestly bought the timber, and they had no notice that Capon had no right to sell it; but there was no sale in market overt, and the Factors Acts do not apply. The mere fact, therefore, that the defendants acted honestly does not confer upon them a good title as against the plaintiffs, the real owners of the timber. The plaintiffs are entitled to recover the timber or its value, unless they are precluded by their conduct from denying Capon's authority to sell. (Sale of Goods Act, 1893, s. 21, and see s. 61.) Capon sold under the name of Brown, representing himself to be an agent of some persons named Bayley, who were well known in the timber trade. The defendants bought on the faith of his being what he pretended to be. What have the plaintiffs done which precludes them from denying, as against the defendants, Capon's right to do what he pretended he was entitled to do? Putting the question in another form. What have the plaintiffs done to preclude them from denying, as against the defendants, Capon's right to sell to them? To answer those questions it is necessary to consider what the plaintiffs did.

Capon was the plaintiffs' confidential clerk; they gave him a limited power of sale to certain customers, and a general written authority to sign delivery orders on their behalf; and the plaintiffs sent that written authority to the dock company which stored the plaintiffs' timber. This authority would, of course, protect the dock company in delivering timber as ordered by Capon, however fraudulently he might be acting, if the dock company had no notice of anything wrong. By abusing his authority Capon made timber belonging to the plaintiffs deliverable by the dock company to himself under the name of Brown. In that name he sold it, and procured it to be delivered to the defendants. What is there here which precludes the plaintiffs from denying Capon's right to sell to the defendants?

What have the plaintiffs done to mislead the defendants and to induce them to trust Capon? Absolutely nothing. The question for decision ought to be narrowed in this way, for it is in my opinion clear that, when section 21 of the Sale of Goods Act has to be applied to a particular case, the inquiry which has to be made is not a general inquiry as to the authority to sell, apart from all reference to the

particular case, but an inquiry into the real or apparent authority of the seller to do that which the defendants say induced them to buy.

It was pointed out by Parke, J., afterwards Lord Wensleydale, in Dickinson *v.* Valpy, [1829] 10 B. & C. at p. 140; 34 R. R. 355, that "holding out to the world" is a loose expression; the "holding out" must be to the particular individual who says he relied on it, or under such circumstances of publicity as to justify the inference that he knew of it and acted upon it. The same principle must be borne in mind in dealing with cases like the present. I do not myself see upon what ground a person can be precluded from denying as against another an authority which has never been given in fact, and which the other has never supposed to exist.

It was urged that the dock company were led by the plaintiffs to obey Capon's orders and to deliver to Brown, and that the defendants were induced by the dock company to deal with Brown, or at all events to pay him on the faith of his being entitled to the timber; so that in fact the plaintiffs, through the dock company, misled the defendants. This is ingenious, but unsound. Except that delivery orders were sent in the name of Brown to the defendants, and were acted on by the dock company, there is no evidence connecting the dock company with the defendants in these transactions; and the answer to the contention is that the defendants were misled, not by what the plaintiffs did nor by what the plaintiffs authorized the dock company to do, but by Capon's frauds.

It is, of course, true that by employing Capon and trusting him as they did the plaintiffs enabled him to transfer the timber to any one; in other words, the plaintiffs in one sense enabled him to cheat both themselves and others. In that sense, every one who has a servant enables him to steal whatever is within his reach. But if the word "enable" is used in this wide sense, it is clearly untrue to say, as Ashhurst, J., said in Lickbarrow *v.* Mason, [1787] 2 T. R. 63; 1 R. R. 425, "that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." Such a doctrine is far too wide; and the cases referred to in the argument and commented on by Vaughan Williams, L. J., show that it cannot be relied upon without considerable qualification.

Lamb *v.* Attenborough, 1 B. & S. 831, which is very like this, is a good illustration of the unsoundness of the doctrine in question, if taken literally. Johnson *v.* Credit Lyonnais Co., 3 C. P. D. 32, is another illustration to the like effect. So far as I know, the doctrine has never been judicially applied where nothing has been done by one of the innocent parties which has in fact misled the other; see Story on Agency, s. 133.

In Vickers *v.* Hertz, L. R. 2 H. L. Sc. 113, the defendant acted

on the faith of a document signed by the plaintiff. So in Babcock *v.* Lawson, 4 Q. B. D. 394. In Brocklesby *v.* Temperance Building Society, [1895] A. C. 173, the bank advanced money on the faith of the document signed by the plaintiff, and the defendants who had paid off the bank were entitled to the benefit of the bank's security. In Henderson *v.* Williams, [1895] 1 Q. B. 521, the defendant acted on orders given by the owner of the goods; the action was defended on his behalf, and he had entrusted the goods to Fletcher, to whom the defendant had attorned. These cases do not really assist the defendants. Nor does Dyer *v.* Pearson, 3 B. & C. 38; 27 R. R. 286.

In the present case, in my view of it, Capon simply stole the plaintiffs' goods and sold them to the defendants, and the defendants' title is not improved by the circumstance that the theft was the result of an ingenious fraud on the plaintiffs and on the defendants alike. The defendants were not in any way misled by any act of the plaintiffs on which they placed reliance; and the plaintiffs are not, therefore, precluded from denying Capon's authority to sell.

The question which the defendants pressed Mathew, J., to leave to the jury, and which the late Master of the Rolls and Vaughan Williams, L. J., thought ought to have been left to them — namely, "Did the plaintiffs by their conduct enable Capon to hold himself out as the owner of the goods or as having the power to dispose of them?" would, in my opinion, have been seriously misleading unless accompanied by explanations which would have taken out of it the element of error introduced by the word "enable." I feel very strongly the observation that if the defendants are right the Factors Acts would never have been wanted.

In my opinion MATHEW, J., was quite right in leaving to the jury the question as he framed it: "Did the plaintiffs so act as to hold Capon out to the defendants as their agent to sell goods to the defendants?" The verdict is unimpeachable, and it is fatal to the defendants.

The appeal ought to be allowed with costs both here and below.

Order of the Court of Appeal reversed and judgment of Mathew, J., restored with costs here and below.

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b. EXCEPTION: INDICIA OF OWNERSHIP.

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 think 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.[1]

[1] An instructive case on the indicia of ownership exception is Nixon *v.* Brown, 57 N. H. 34. In this case the plaintiff employed one M to buy a horse for him. M bought the horse, paying for it with the plaintiff's money, and took a bill of sale

PICKERING *v.* BUSK.

15 East (K. B.) 38. 1812.

[Reported herein at page 361.]

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c. Exception: Factors Acts.

STEVENS *v.* WILSON.

3 Denio (N. Y.) 472. 1846.

On error from the Supreme Court. Wilson brought replevin against Stevens, in the Superior Court of the city of New York, for a quantity of feathers. Verdict and judgment for plaintiff; which judgment was affirmed on error in the Supreme Court. The question in the case was whether the defendant, who had made advances upon the feathers to one Colgate, the plaintiff's factor, with knowledge that he was not the owner of the property, was entitled to hold it for such advances.

The Chancellor.[1] Upon the charge of the judge the jury must have decided that the goods did not belong to Colgate, the factor or agent of the defendants in error, but were in his hands for sale as the factor of the real owners. And I think the judge who tried the cause, as well as the Supreme Court, was right in supposing that the Act of 1830, for the amendment of the law relative to principals and factors or agents (1 R. S. 762, tit. 5 of 2d ed.), does not authorize the agent or factor for the purposes of sale, to pledge the goods to a person who knows the character in which the pledgor holds the same. Mr. Justice Bronson, who delivered the opinion of the Supreme Court in this case, has correctly stated the rule of the common law, that an agent or factor, intrusted with the goods of his principal to sell, could not pledge the same so as to authorize the pledgee to hold them for advances made thereon to the factor or agent, even if he supposed the latter to be the real owner of the goods. Paterson *v.* Tash, 2 Strange, 1178; Daubigny *v.* Duval, 5 T. R. 604. Even where the principal had drawn upon the factor in anticipation of the sale of the goods, it was held in the cases of Fielding *v.* Kymer, 2 Brod. & Bing. 639, and Graham *v.* Dyster, 6 Maule & Sel. 1, that

in his own name. Afterwards he informed plaintiff of what he had done, and showed him the bill of sale; but the plaintiff permitted him to go away with the horse *and the bill of sale* still in his possession. M thereupon went to the defendant, who had no knowledge of the agency, *showed him the bill of sale*, sold him the horse for cash, and absconded. *Held*, that the plaintiff could not recover in an action of trover for the horse.

[1] Walworth.

the factor was not authorized to pledge the goods. In this last case, Mr. Justice Abbott, afterwards Lord Chief Justice Tenterden, said it had been established by many decisions, and might be considered as a settled principle of law, that a factor could not pledge so as to transfer his lien to the pawnee. This rule of the common law was founded upon the principle that he who deals with one acting *ex mandato,* can obtain from him no better or different title than that which his mandate authorizes him to give.

The statute 4 Geo. IV., c. 83, passed in July, 1823, altered the common-law rule in England in this respect, as to persons dealing with the consignees of factors intrusted with goods for the purpose of sale, so far as to protect the rights of the pledgee to the extent of the advances he had made, or the liabilities he had incurred, upon the faith of the pledge and the supposition that the nominal consignor, the factor, was the owner of the goods. But this statute contained an express exception of cases where the consignee was aware of the fact that the nominal consignor was not the real owner of the goods. It also contained a provision that the deposit or pledge of goods by the consignee thereof should give the person with whom they were deposited or pledged the same right, and no other, that the consignee himself possessed. The provisions of that act appear to have been confined to consignees of goods, and persons dealing with them, where the consignees supposed the consignors were the real owners of such goods, when in fact such consignors had only been intrusted with the goods for the purpose of sale. The first section of the Act of 6 Geo. IV., c. 94, passed about two years afterwards, contained but a very slight modification of the previous act, so as to protect the consignee without notice, and others dealing with him, before they had notice that the person in whose name the goods were shipped, with the assent of the owner, was not himself the real owner. But the second section of that act extended the protection to persons dealing with an agent or factor who had in his possession documentary evidence showing him *prima facie* to be the owner of the goods, and where the persons so dealing with him were ignorant of his fiduciary character, and had bought the goods or advanced money or negotiable securities upon the deposit or pledge of the goods and upon the faith of such *prima facie* evidence of ownership. The third section declared that persons taking such goods in deposit or pledge for an antecedent debt, even without notice of the fiduciary character of the agent or factor having in his possession such *prima facie* evidence of ownership, should acquire no other right or interest therein, as against the owner, than the agent or factor himself possessed; but might acquire, possess, and enforce the right to that extent. And the fifth section expressly authorized the taking of such goods in pledge from the agent, or broker, having such *prima facie* evidence of title, even with notice of his fiduciary character;

but the pledgee was only to obtain such right or interest therein as the pledgor himself possessed.[1]

Our act relative to principals and factors or agents, in the first and second sections, protects consignees of merchandise shipped in the name of a person who is not the real owner, where they are ignorant of the fact that such consignor is not the owner. The third section then provides that "Every factor or other agent intrusted with the possession of any bill of lading, custom-house permit, or warehouse-keeper's receipt for the delivery of any such merchandise, and every such factor or agent, not having the documentary evidence of title, who shall be intrusted with the possession of any merchandise for the purposes of sale, or as a security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person for the sale or disposition of the whole or any part of such merchandise, for any money advanced, or negotiable instrument or other obligation in writing given by such other person upon the faith thereof." (1 R. S. 762, tit. 5, § 3, of 2d ed.) It is perfectly evident from the whole of this section, taken in connection with the second section and the previous law upon the subject, that the words, *on the faith thereof*, refer to the ownership of the goods; so as to protect the purchaser, or pledgee, who has advanced his money or given his negotiable note or acceptance or other written obligation, upon the faith or belief of the fact that the person with whom he dealt was the real owner of the property. Any other construction of the statute would do great injustice to the legislature who passed the Act of 1830. For it would authorize the agent or factor to commit a fraud upon his principal, with the connivance of the purchaser or pledgee who had notice of the fiduciary character of the vendor or pledgor. It would also be in direct conflict with the seventh section of the same statute, which makes such a fraud an indictable offence, not only against the agent or factor, but also against every person who shall knowingly connive with or aid him in the commission of the fraud.[2]

Our statute does not, as in the fifth section of the 6 Geo. IV., c. 94, authorize the agent or factor to pledge the goods of his principal to the extent of his lien, to persons who are aware of his fiduciary character, and without any authority for that purpose from his principal. But even under the British statute it has been held that the mere liability of the agent or factor, upon acceptances for his principal, is not sufficient to give such agent or factor a lien which will authorize him to pledge the goods to a third person without the con-

[1] See Navulshaw *v.* Brownrigg, 2 DeG. M. & G. 441, and Cole *v.* N. W. Bank, L. R. 9 C. P. 470, for valuable discussions of common law principles and the earlier English Factors Acts.

[2] Repealed by L. 1886, Ch. 593.

sent of his principal. In Fletcher *v.* Heath, 7 Barn. & Cress. 517, and Blandy *v.* Allan, Danson & Lloyd's Merc. Cas. 22, the factor was under acceptances for his principal at the time he pledged the goods for advances thereon, but which acceptances the principal afterwards duly paid or provided for. And it was held that the pledgee could not hold the goods to the amount of the acceptances for which the factor was liable at the time the goods were pledged, but which he was not afterwards compelled to pay.

Here the judge who tried the cause not only gave to the defendant in the court below all his legal rights, but protected him so far as any equity existed as between the factor and his principals, if not much further. I therefore think the judgment of the Supreme Court should be affirmed.

LOTT, Senator. . . . It was a well-settled rule of common law, that a factor had no authority to pledge the property of his principal for his own debt, either by an actual deposit thereof with the pawnee, or by placing in his hands the bill of lading or other indicia of ownership; and the rule appears to have been enforced with equal stringency in cases where advances had been made either to pay the duties chargeable on such goods, or for some other purpose connected with the sale thereof, and indeed when they had been made to meet bills drawn by the principal on the factor, for the whole or part of the price of the goods pledged; at least, if the pawnee knew or had the means of knowing that he was dealing with a factor and not with the principal. Russell of Factors and Brokers, 116 to 122, and cases cited.

The expediency of this rule was doubted by judges, and in the mercantile community it was considered a matter of superior justice and wisdom that a factor or commercial agent who was intrusted with the apparent evidence of ownership of the property should be deemed the true owner in respect to third persons dealing with him *fairly*, in the course of business, as purchasers or mortgagees, and *in ignorance* of his real character. The attention of Parliament was finally given to the subject, and an act was passed, in 1823 (4 Geo. IV., c. 83), modifying, to a great extent, this rule of the common law. But not proving adequate to the object intended, a further act was passed in 1825 (6 Geo. IV., c. 94). . . .

A statute similar in its general objects was passed by our legislature in 1830. (Laws of 1830, c. 179, p. 203.) . . . There is nothing in this section[1] which, in my judgment, countenances the idea that a factor can misapply the property intrusted to his possession, and confer on a party who is privy to such misapplication, a right by purchase or pledge, superior to the rights of the true owner. As a general rule, the rightful owner of the property is entitled to recover

[1] Section 3, quoted in Chancellor WALWORTH'S opinion.

it from any person in whose possession it may be, whether obtained by the latter under color of purchase or otherwise. This, strictly applied, was calculated to lead to embarrassments, and fetter commercial dealings. Possession is *prima facie* evidence of title; and when goods are intrusted by the real owner with an agent for the purposes of sale or security, it is consistent with justice and equitable principles that a party should be protected who, on the faith of such possession, makes a purchase of the goods or an advance or loan thereon. It was doubtless with a view to this salutary object, that the statutory provision above recited was made. It certainly could not have been the intention of the legislature to divest the actual owner of his property in cases where a party dealing with an agent, in fraud of the rights of his principal, acquires the possession. Even in the case of negotiable paper, where possession is evidence of ownership, it is held that a transfer, in derogation of the right of the true owner, is unavailable unless it is received fairly and *bona fide*, in the usual course of business, and for a valuable consideration. Stalker *v.* McDonald, 6 Hill, 93. The statute was designed to facilitate commercial transactions, by protecting persons trading and transacting business with agents in the fair and ordinary course of business, but not to legalize a fraudulent violation of duty. . . .

If we look at the occasion and the history of the passage of the law of 1830, I think the legislature will not be considered chargeable with the injustice of declaring that an agent, by a breach of duty and in violation of good faith, can confer on a privy to the fraudulent transaction a right to the property of his principal paramount to that of the owner himself. It was passed on the petition of sundry merchants and others in the city of New York, representing that the rule of the commercial law invalidating all pledges by factors of the goods or property of their principals, "even where the lender advanced his money in ignorance that the goods were held on consignment," was in their opinion unjust and impolitic; and in urging the propriety of its passage they expressly disclaim the wish of protecting agents in the misapplication of goods intrusted to them, and suggest a penal remedy to prevent it. A report was made favorable to the general objects contemplated by the petitioners, but not, in my opinion, affording any pretext of right in the factor to deal with the property intrusted to him as his own absolutely. (See Senate Doc. of 1830, Vol. 1, Nos. 46 and 55.) . . .

Full effect and operation can be given to the law and to the terms, "on the faith thereof," particularly relied on by the plaintiff in error, by protecting those who *bona fide* contract with a factor or agent, as owner, on the faith of the possession of the goods intrusted to him, or the documentary evidence of the title thereto specified in the act. Such a construction will, I am satisfied, carry out all

the objects contemplated by the lawmakers at the time of its passage. If it is not sufficiently comprehensive, it is the province of the legislature to apply the remedy, as was done in England by the act of 1842 (5 & 6 Vict. c. 39); but the courts cannot extend its provisions.

Entertaining these views, I am of opinion that the judgment of the supreme court should be affirmed.

JOHNSON, Senator, dissented on the ground "that the words 'upon the faith thereof' can apply to no other antecedent than 'merchandise.'" [1]

FOERDERER *v.* TRADESMEN'S NAT. BANK OF NEW YORK.

107 Fed. (C. C. A. 2d Ct.) 219. 1901.

IN error to the Circuit Court of the United States for the Southern District of New York.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. Error is assigned of the ruling of the trial judge in directing a verdict for the defendant.

The action was in trover, brought to recover for the conversion of certain bales of wool; and the facts proved upon the trial, so far as they are material for present purposes, were these: The plaintiff made an agreement with the Keen-Sutterle Company, a corporation doing business as commission merchants at Philadelphia, by which the corporation was to import and sell wool on his account for a stated commission; the wool to be bought abroad upon a credit to be provided at London by the plaintiff. The wool in controversy (277 bales) arrived at Philadelphia in September, 1895, and was delivered into the possession of the Keen-Sutterle Company; the bills of lading and invoices for the same having been indorsed to that corporation. Shortly afterwards the Keen-Sutterle Company consigned the wool for sale to Jagode & Co., commission merchants doing business at Philadelphia; the latter making advancess to the Keen-Sutterle Company on the wool at the time it was delivered into their possession for about 75 or 80 per cent. of its value. In taking the consignment and making the advances, Jagode & Co. acted in good faith, and without any notice, by document or otherwise, that the Keen-Sutterle Company was not the real owner of the wool. Subsequently the Keen-Sutterle Company failed, and thereafter Jagode & Co. sold the wool and shipped it to purchasers

[1] The view of Johnson, Senator, was approved by the Supreme Court of Wisconsin in Price *v.* The Wisconsin Marine and Fire Ins. Co., 43 Wis. 267 (1877).

in Massachusetts. While the wool was in transit it was seized by a writ of replevin in an action brought by the defendant, the Tradesmen's National Bank of New York; the latter claiming title thereto under certain warehouse receipts. Jagode & Co. interposed an answer in the action setting up their title, but before the action came to trial the bank ascertained that its receipts did not cover the bales in controversy, and thereupon entered into a stipulation with Jagode & Co. that judgment be entered in the action for the return of the goods described in the writ of replevin, and in lieu thereof for the payment to Jagode & Co. of the value of the wool, with damages for detention. Judgment was accordingly entered to that effect by the court. The Tradesmen's National Bank elected to retain the wool, and paid to Jagode & Co. the sum of $25,105, — the stipulated value and damages. Thereafter the bank sold the wool, and the present action was brought.

Were it not for the Factor's Act of the state of Pennsylvania, it would be entirely clear that neither Jagode & Co. nor the defendant could be protected under any title derived from the Keen-Sutterle Company. A factor is an agent for the owner of the goods consigned, and must observe the instructions of his principal in respect to them, whether express or implied, and cannot deal with the property as his own. In the absence of instructions to the contrary, he is empowered to sell the goods of his principal according to the usage of the trade. Upon a sale made by the factor conformably to his authority, the principal is devested of his title in the goods, and the title passes to the purchaser. He has a lien upon the goods while they are in his possession for his advances and commissions, and upon the proceeds of the sale. He has no authority to use or pledge them for his own benefit, except for the purpose of reimbursing himself when the principal, after reasonable notice and demand, fails to repay his advances. He cannot ordinarily bind his principal by a disposition of the goods not made in the usual course of business. Bank *v.* Heilbronner, 108 N. Y. 439, 15 N. E. 701; Easton *v.* Clark, 35 N. Y. 225; Romeo *v.* Martucci (Conn.) 45 Atl. 1. He must sell in the market where he transacts business. Catlin *v.* Bell, 4 Camp. 183; Marr v. Barrett, 41 Me. 403. He cannot sell by way of barter. Guerreiro *v.* Peile, 3 Barn. & Ald. 616–618; Biggs *v.* Evans [1894] 1 Q. B. Div. 88; Machine Co. *v.* Heller, 44 Wis. 265; Potter *v.* Dennison, 10 Ill. 590. If he makes an unauthorized disposition of the goods, his lien is lost; and such a disposition of them does not transfer any right as against the principal, even to the extent of the lien. McCombie *v.* Davies, 7 East, 5; Graham *v.* Dyster, 6 Maule & S. 1. As Chancellor KENT says: "The principal is not even obliged to tender to the pawnee the balance due from the principal to the factor; for the lien which the factor might have had for such balance is personal, and cannot be

transferred by his tortious act in pledging the goods for his own gain." 2 Kent, Comm. (12th ed.) 626.

As persons dealing with an agent are bound to take notice of the extent of his powers, a transfer of property by a factor not authorized by the powers delegated to him by the principal creates no right in the person dealing with him, as against the principal. It follows that innocent purchasers or pledgees, who, relying upon the indicia of title afforded by his possession of the goods, have dealt with the factor, supposing him to be the actual owner, acquire no title to the property where the transfer is unauthorized by the express or implied terms of the principal's instructions. Applying these rules to the present case, inasmuch as the Keen-Sutterle Company, the factor of the plaintiff, transcended its authority in consigning the wool upon advances to Jagode & Co., the latter, except for the provisions of the factor's act, would have acquired no title to the property as against the real owner, the plaintiff; and, as Jagode & Co. could not transfer a better title than they had themselves, the defendant could not have acquired any title to the wool through Jagode & Co. as against the plaintiff.

The Factor's Act of Pennsylvania is designed to remedy the hardship of the common law whereby "factors authorized to sell the goods of their principal, and who are held out to the world as the owners thereof, have no power to pledge the goods in their possession for advances made by persons who have reason to believe that they are the actual owners." See Mackay *v.* Dillinger, 73 Pa. 90. Unlike cognate legislation in some of the other states, the act does not purport to give validity to all contracts made by a factor in respect to the disposition of the goods with innocent third persons who advance money therefor, but it is limited to the protection of third persons who advance money or negotiable instruments upon a deposit or pledge of the goods by the factor. The third section of the act provides as follows:

"Whenever a consignee or factor, having possession of merchandise, with authority to sell the same, . . . shall dispose of or pledge such merchandise or any part thereof, with any person as a security for any money advanced or negotiable instrument given by him upon the faith thereof, such other person shall acquire by virtue of such contract the same interest in and authority over the said merchandise as he would have acquired thereby if such consignee or factor had been the actual owner thereof: provided, that such person shall not have notice by document or otherwise, before the time of such advance or receipt, that the holder of such merchandise or document is not the actual owner of such merchandise." P. L. 1833–34, p. 376.

This statute, being in derogation of the common law, is to be strictly construed. Shaw *v.* Railroad Co., 101 U. S. 557, 25 L. Ed. 892; Machine Co. *v.* Heller, *supra;* Bank *v.* Shaw, 61 N. Y. 283.

But, upon the most literal construction, the terms of the section

protect a factor who has received from another factor a consignment of merchandise in the possession of the latter, and made advances thereon, without notice by document or otherwise that the consigning factor was not the actual owner. The factor thus receiving a consignment and making advances thereon acquires, by the explicit language of the section, the same "interest in and authority over" the merchandise as though the consigning factor were at the time its actual owner. Until his lien is satisfied he has the same right to sell or dispose of the merchandise that he would have had if it had been consigned to him by the actual owner, and any sale or transfer of it made by him conformably with a factor's duty to his principal will devest the title of the real owner. Unless he can sell the merchandise, his lien would be of no value, and the statute would be merely an illusory protection to him. The terms of the section apply to and control the transaction between the Keen-Sutterle Company and Jagode & Co. The Keen-Sutterle Company, being in possession of the wool, consigned it to Jagode & Co., and the latter made the advances without notice that the Keen-Sutterle Company was not the actual owner. Consequently Jagode & Co., by force of the statute, became entitled to deal with the wool exactly as though the Keen-Sutterle Company had been the owner, and had consigned it to them as its own factors.

We are of the opinion that the defendant acquired a valid title to the wool under the arrangement made by Jagode & Co. in the replevin suit. Jagode & Co. sold the wool, as factors, in the ordinary course of business, to a Massachusetts purchaser. If the goods had been delivered to this purchaser, the title of the Keen-Sutterle Company, and consequently the plaintiff's title, would have been completely devested. The sale, being authorized by the implied powers of Jagode & Co. as factors, would have passed the title of their consignor as that of "the actual owner" of the wool; and thereafter all right of the plaintiff in the wool would have been gone, and in lieu thereof he would have been relegated to his claim upon Jagode & Co. for the price, less their advances to the Keen-Sutterle Company and their commissions. Before the wool was actually delivered to the purchaser it was taken from the possession of Jagode & Co., in Massachusetts, by the proceedings in the replevin action brought by the present defendant. The law authorized the bringing of such an action, and compelled Jagode & Co. to accept the bond given at the institution of the action in lieu of the possession of the goods. According to the rule which obtains in some jurisdictions, the bond becomes a substitute for the property, and the plaintiff in such an action acquires a title to the property in dispute, which he may dispose of before the decision of the cause. Stewart *v.* Wolf (Pa. Sup.) 7 Atl. 165; Fisher *v.* Whoolery, 25 Pa. 197. This rule does not obtain in Massachusetts. Lockwood *v.* Perry, 9 Metc. (Mass.)

440; White *v.* Dolliver, 113 Mass. 400. The judgment in such an action is conclusive between the parties, both as to the value and the ownership of the property, if the ownership is in issue. Leonard *v.* Whitney, 109 Mass. 267. When in such an action judgment is rendered for the defendant for the return of the property, or in the alternative a recovery of its value, the payment of the recovery by the defendant operates to transfer to him all the right and interest of the plaintiff in the property. Hunt *v.* Bennett, 4 G. Greene, 512; Pickett *v.* Bridges, 10 Humph. 171; Brinsmead *v.* Harrison, L. R. 6 C. P. 584; Thayer *v.* Manley, 73 N. Y. 305; Lovejoy *v.* Murray, 3 Wall. 1, 18 L. Ed. 129; Howard *v.* Smith, 12 Pick. 202; Holmes *v.* Wilson, 10 Adol. & E. 503. In defending the replevin action and consenting to the stipulation made therein, we do not doubt that Jagode & Co. were acting within the scope of their implied authority as factors. The goods, without fault on their part, had been transferred from the market where they were originally to be sold to another state. They had a large interest in them, growing out of their advances, — an interest larger than that of their consignor. The consignor had failed. To have brought the wool back to Philadelphia and resold it there would have entailed a considerable expense, and they had an opportunity to obtain from the defendant its full value where it was. Having made these large advances, they were clothed with the right to sell the wool, in the exercise of a sound discretion, not inconsistent with their duties to their principal. Under the circumstances, the arrangement made with the defendant, and which was, in substance, a sale of the wool, was one for the best interests of their consignor, and one, therefore, which they had a right to make. Their consignor being bound by the arrangement, the plaintiff has no remedy against the defendant, because, as between them and their consignor, the latter was, pursuant to the terms of the Factor's Act, the owner of the wool, and the defendant consequently acquired the owner's title by the purchase.

We conclude that the trial judge properly directed a verdict for the defendant, and that the judgment should be affirmed.

BIGGS *v.* EVANS.

[1894] 1 Q. B. 88.

ACTION to recover possession of personal property, intrusted to one Geddes, and by Geddes sold to defendant; 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,

[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.

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 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 instrusted 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. IV., 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.*

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4. *Liability for Collusive Fraud.*

MAYOR, ETC., OF SALFORD *v.* LEVER.

[1891] 1 Q. B. (C. A.) 168.

ACTION for damages for fraud, or, in the alternative, for money had and received. Judgment for plaintiffs.

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 be-

yond 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 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.[1]

HEGENMYER *v.* MARKS.

37 Minn. 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

[1] Accord: Grant *v.* Gold, etc., Syndicate, 1900, 1 Q. B. 233; Hovenden *v.* Millhoff, 83 L. T. Rep. 41. In the latter case ROMER, L. J., says: "Without attempting an exhaustive definition I may say that the following is one statement of what constitute a bribe. If a gift be made to a confidential agent with the view of inducing the agent to act in favor of the donor in relation to transactions between the donor and the agent's principal and that gift is secret as between the donor and the agent — that is to say, without the knowledge and consent of the principal — then the gift is a bribe in the view of the law. If a bribe be once established to the court's satisfaction, then certain rules apply. Amongst them the following are now established, and, in my opinion, rightly established, in the interests of morality with the view of discouraging the practice of bribery. First, the court will not inquire into the donor's motive in giving the bribe, nor allow evidence to be gone into as to the motive. Secondly, the court will presume in favor of the principal and as against the briber and the agent bribed, that the agent was influenced by the bribe; and this presumption is irrebuttable. Thirdly, if the agent be a confidential buyer of goods for his principal from the briber, the court will assume as against the briber that the true price of the goods as between him and the purchaser must be taken to be less than the price paid to, or charged by, the vendor by, at any rate, the amount or value of the bribe. If the purchaser alleges loss or damage beyond this, he must prove it. As to the above assumption, we need not determine now whether it could in any case be rebutted. As at present advised, I think in the interests of morality, the assumption should be held an irrebutable one; but we need not finally decide this, because in the present case there is nothing to rebut the presumption."

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.

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5. *Liability in Equity for Trust Funds diverted by Agent.*

BAKER *v.* NEW YORK NATIONAL EXCHANGE BANK.

100 N. Y. 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 *bona 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 to 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 *cèstui 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.*

RIEHL *v.* EVANSVILLE FOUNDRY ASSOCIATION.

104 Ind. 70. 1885.

ACTION to have defendant declared a trustee of certain real estate for benefit of plaintiff. Judgment for plaintiff.

ELLIOT, 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.*

KROEGER *v.* PITCAIRN.

101 Pa. St. 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 privi-

lege 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 *bona 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, *bona fide*, believing he has 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 *bona 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 reserved.

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.[1]

[1] Accord: Collen *v.* Wright, 7 E. & B. 301, 8 E. & B. 647. But if the third party knows that the agent has not authority there is no warranty. Halbot *v.* Lens, [1900] 1 Ch. 344, where KEKEWICH, J., says: "In order to maintain such an action there must be misrepresentation in fact trusted by the person to whom it is made, and I cannot myself see how a man can be properly said to have made such a representation when in truth and substance he has said, 'Although I will, if you wish it, sign this on behalf of the alleged principal, I tell you plainly that I have no authority from him to do so, and have every reason to believe that such authority will not be forthcoming.' A man, of course, might say, 'I have no authority, and probably cannot obtain such authority, but yet I will contract to obtain it, and run the risk of damages.' Such a contract is conceivable, and would be good in law, but ought not, I think, to be inferred except from facts leading directly to that conclusion."

BALTZEN *v.* NICOLAY.

53 N. Y. 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;[1] 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

[1] See Cochran *v.* Baker, 34 Or. 555; Anderson *v.* Adams, 43 Or. 621; Farmers', etc., Trust Co. *v.* Floyd, 47 Oh. St. 525.

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 plaintiff's 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.[1]

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2. *Liability of Agent who Acts for Incompetent Principal.*

PATTERSON *v.* LIPPINCOTT.

47 N. J. L. 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

[1] An agent of a corporation does not warrant that the contract made in its name is not *ultra vires*. "The implied warranty of the agent does not relate to the power of the principal to enter into the particular contract. He simply covenants that he has authority to act for his principal, not that the act of the principal is legal and binding." Thilmany *v.* Iowa Paper-Bag Co., 108 Iowa, 357, 361–362.

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.

3. *Liability of Agent who Acts for Fictitious Principal.*

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]

[1] See also *In re* Northumberland Ave. Hotel, L. R. 33 Ch. D. 16, *ante*, p. 57; McArthur *v.* Times Printing Co., 48 Minn. 319, *ante*, p. 59; Western Pub. House *v.* District Tp. of Rock, 84 Iowa, 101, *ante*, p. 62.

4. *Rights and Liabilities of Agent where Credit is extended to him exclusively.*

KELLY *v.* THUEY.

102 Mo. 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 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.), § 160 a; Whart. on Agents, § 403; Fry on Spec. Perf. § 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, § 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. § 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.[1]

CLEVELAND *v.* PEARL & CO.

63 Vt. 127. 1890.

ASSUMPSIT for the price of wool. The wool was sold to defendants who directed that it be delivered to one Hoyt, and gave Hoyt the money with which to pay for it. Upon delivery to Hoyt, he paid plaintiff part cash and gave his own check for the balance. The check was dishonored. Meantime defendants had settled various accounts with Hoyt paying him a balance greater than the amount of this check. Judgment for plaintiff.

ROWELL, J. It not having been found how it was in fact, this was in law a sale for cash on delivery. And it is manifest that the parties so understood it; for the defendants put Hoyt in funds wherewith to pay on delivery, and the plaintiff called for payment in money when he delivered. And when he found that he could not get cash in full according to his right he had an option not to deliver at all. But he chose to deliver notwithstanding, and take Hoyt's check, payable to himself, for the unpaid balance, in the giving of which Hoyt was not defendant's agent, for he was acting outside the scope of his authority, which was, to pay cash down, and the plaintiff ought to have known it; but if he did not, the law will treat him just as though he did, for he who deals with an agent having only a special and limited authority, is bound at his peril to know the extent of his authority. White *v.* Langdon, 30 Vt. 599; Sprague *v.* Train, 34 Vt. 150.

By taking the check in the circumstances disclosed, agreeing for his own convenience for delay in presenting it, and subsequently parting with it in payment of his debt, the defendants having been prejudiced, if liable here, by paying their debt to Hoyt in the meantime, when, had they known how it was they could have paid the

[1] In Heffron *v.* Pollard, 73 Tex. 96, it was held that where a contract was made in the name of John W. Fry (a real person) and was signed "John W. Fry, per Heffron," parol evidence would not be heard to show that Heffron signed for his own benefit and intending to bind himself.

plaintiff and saved themselves, — the plaintiff must be deemed to have made the check his own, and to have accepted the credit and responsibility of Hoyt instead of that of the defendants, and to have discharged the latter. In other words, Hoyt's check paid the debt as between these parties.

The plaintiff stands no better than he would had he taken the check in preference to the money, or had given a receipt acknowledging payment, when he would certainly have discharged the defendants, for so are all the authorities.

The case is not like those in which the plaintiff had no option and could do no better than to take a bill or a note, and no injury resulted to the defendant in consequence of taking it. In such case the check is a conditional and not an absolute payment. Robinson *v.* Read, 9 B. & C. 449, is of that class.

But here was no antecedent debt, and the plaintiff had the staff in his own hands, and might have kept his wool; but he chose to deliver it and to take Hoyt's check for it, without authority from the defendants or notice to them, and he has no standing to claim that the check was only conditional payment.

Judgment reversed and cause remanded.[1]

ROYCE, C. J., being indisposed, did not sit.

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5. *Liability of Agent who Acts for a Foreign Principal.*

KAULBACK *v.* CHURCHILL.

59 N. H. 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

[1] See Paige *v.* Stone, 10 Met. (Mass.) 160; Merrell *v.* Witherby, 120 Ala. 418; Gates *v.* Brower, 9 N. Y. 205; Coleman *v.* Bank, 53 N. Y. 388; Atlas S. S. Co. *v.* Columbian Land Co., 102 Fed. Rep. 358.

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, § 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.

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6. *Liability of Agent who Contracts in his own Name in an Instrument under Seal.*

BRIGGS *v.* PARTRIDGE.

64 N. Y. 357. 1876.

[Reported herein at page 410.]

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7. *Liability of an Agent who Contracts in his own Name in a Negotiable Instrument.*

a. Construction from Signature Alone.

RENDELL *v.* HARRIMAN ET AL.

75 Me. 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-hundreths dollars, in one year from date, with interest.

OTIS HARRIMAN, *President.*
R. M. TREVETT, *Directors of*
L. MUDGETT, *Prospect and Stockton*
W. H. GINN, *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.

KEIDAN *v.* WINEGAR.

95 Mich. 430. 1893.

McGRATH, J. Plaintiff had judgment upon the following promissory note:

"$336.96–100. GRAND RAPIDS, MICH., December 22, 1887.

"Ninety days after date, I promise to pay to the order of Geo. Keidan three hundred thirty-six and 96–100 dollars at the Old National Bank of Grand Rapids, Mich., value received, with interest at the rate of eight per cent. per annum until paid.

"W. S. WINEGAR, *Agt.*"

Defendant, with his plea, filed an affidavit setting forth —

"That the note, a copy of which is attached to the declaration in said cause, and served upon said deponent with a copy of said declaration, is not the note of this deponent, defendant as aforesaid; and he denies the same and the execution thereof, and says that he, said defendant, is not indebted to said plaintiff upon said note, nor for any part thereof, nor is he indebted to said plaintiff in any sum whatever, nor in any manner whatever."

Upon the trial defendant offered to show that in 1884, before plaintiff had any dealings with defendant, plaintiff was informed that defendant was carrying on business as the agent of Maggie G. Winegar, and was not doing business for himself; that business relations were then established between plaintiff and said Maggie G. Winegar; that said business relations continued from the early part of 1884 to and including the year 1887, and embraced many transactions between plaintiff and Maggie G. Winegar; that many instruments were made between the parties, which were signed exactly as the note sued upon is signed, and that this form of execution had come to be recognized and adopted between the parties as binding Maggie G. Winegar; that during that time no business was transacted by the defendant in his individual capacity, and all the business done was that of his principal, and known and understood to be such by plaintiff; that the said note was given and accepted as the obligation of Maggie G. Winegar; that the note was given for due-bills and goods furnished by plaintiff to Maggie G. Winegar, and such due-bills and goods were by plaintiff charged to said Maggie G. Winegar on the books of plaintiff; that the taking of these notes did not in the least change the character of the indebtedness; and that defendant never received any benefit or consideration for said note. The court refused to admit the testimony, and directed a verdict for the plaintiff.

The clear weight of authority is that the promise in the present case is *prima facie* the promise of William S. Winegar, and, as be-

tween one of the original parties and a third party, the addition of the word "agent" is not sufficient to put such third party upon inquiry. The question here, however, is whether, as between the immediate parties to the instrument, parol evidence is admissible to show the real character of the transaction.

[The court then quotes § 443 of Mechem on Agency, cites 1 Amer. & Eng. Enc. Law, 390, 391, and cites and quotes from Metcalf *v.* Williams, 104 U. S. 93, 98, and Kean *v.* Davis, 21 N. J. L. 683, 687.]

In Hicks *v.* Hinde, 9 Barb. 528, where an agent drew a bill on his principal for a debt due from the principal to the payee, adding the word "agent" to his signature, and the payee knew that the drawer was authorized by his principal to draw the bill as his agent, and it was the understanding of all parties that the drawer had signed only as agent, and not with a view of binding himself, it was held that the drawer was not personally liable on the bill.

To the rule that extrinsic evidence cannot be received to contradict or vary the terms of a valid instrument, there are many exceptions. As between the original parties, the consideration may be impeached; fraud or illegality in its inception may be shown. It may be shown that the note was delivered conditionally, or for a specified purpose, only; that it was made for accommodation, merely. And it has been held that if, by mistake, one party indorses before another, such mistake may be shown to relieve him from his apparent liability; that a party who indorses his name upon the back of a note may be maker or indorser, dependent upon parol proof as to when he placed his signature; that, although the legal effect of successive indorsements is to make the indorsers liable to each other in the order of time in which they signed their names, yet such legal effect may be rebutted by parol proof that all were accommodation indorsers, and, by agreement among themselves, co-sureties; that the fact of a note being joint and several does not exclude proof that one of the signers was a surety, merely, and, where the creditor knew of the fact of suretyship, an extension of time, for a consideration, without the consent of such surety, released the surety. Stevens *v.* Oaks, 58 Mich. 343; Farwell *v.* Ensign, 66 Id. 600.

In Hubbard *v.* Gurney, 64 N. Y. 463, Chief Justice CHURCH says [quoting a passage]:

As is so often said, it is the intent of the parties which is to be carried out by the courts. The rule that rejects words added to the signature is an arbitrary one. Its reason is not so much that the words are not, or may not be, suggestive, but that they are but suggestive, and the instrument, as a whole, is not sufficiently complete to point to other parentage. The very suggestiveness of these added words has given rise to an irreconcilable confusion in the authorities as to the legal effect of such an instrument. Extrinsic

evidence, therefore, is admissible in such case, between the immediate parties, to explain a suggestion contained on the face of the instrument and to carry out the contract actually entered into as suggested, but not fully shown, by the note itself. The presumption that persons dealing with negotiable instruments take them on the credit of the parties whose names appear should not be absolute in favor of the immediate payee, from whom the consideration passed, who must be deemed to have known all the facts and circumstances surrounding the inception of the note, and with such knowledge accepted a note containing such a suggestion.

In the case of Tilden *v.* Barnard, 43 Mich. 376, under a state of facts similar to those offered to be shown here, it was held that defendants were not liable.

We think that in the present case defendant was entitled to make the showing offered. Under the general issue, defendant was entitled to give in evidence any matter of defence going to the existence of any promise having legal force, as against him. 1 Shinn, Pl. & Pr. § 740.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.[1]

WESTERN WHEELED SCRAPER CO. *v.* MCMILLEN, 71 Neb. 686. 1904. Action on a note signed "J. M. McMillen, G. W. Miller, G. L. Matthews, Directors of Thedford Irrigation & Power Co." and reading "we promise to pay to the Western Wheeled Scraper Co., or order."

DUFFIE, C. . . . It is undoubtedly true that the modern cases are more liberal than was formerly the case in allowing one who signs a negotiable instrument, designating himself as agent or trustee, to show by parol evidence that he was acting for another, who received all the benefits of the consideration for which the note was given. Keidan *v.* Winegar, 95 Mich. 430, 54 N. W. 501, 20 L. R. A. 705, is a case in point, and other cases referred to in the notes of the editor will furnish examples of the relaxation of the rule adopted by the courts at an earlier date upon this question. If this court had not put itself on record, we should be disposed to follow the modern decisions, but as early as 1886, in Webster *v.* Wray, 19 Neb. 558, 27 N. W. 644, 56 Am. Rep. 754, the court, after a full review of the authorities, held that "no party can be charged as principal upon a negotiable note or bill of exchange unless his name is thereon disclosed;" and it was further held in that case that parol evidence was not admissible to show that one who appeared upon the face of the notes to be the maker was in fact acting as agent for another, or as the officer of some corporation who had received the benefit of the consideration. This case was followed

[1] This case is quite fully annotated in 20 L. R. A. 705.

by Andres *v.* Kridler, 47 Neb. 585, 66 N. W. 649, where suit was brought upon a note made and signed substantially in the manner of those in suit, and it was held that, "where the pleadings disclose a cause of action against a defendant personally, superadded words, such as 'agent,' 'executor,' or 'director,' should be rejected as *descriptio personæ*." We think this court is now fully committed to the doctrine that, in order to exempt an agent from liability upon an instrument executed by him within the scope of his agency, he must not only name his principal, but he must express by some form of words that the writing is the act of the principal, though done by the hand of the agent. If he expresses this, the principal is bound, and the agent is not. But a mere description of the general relation or office which the person signing the paper holds to another person or to a corporation without indicating that the particular signature is made in the execution of the office and agency, is not sufficient to charge the principal or to exempt the agent from personal liability. . . .

KANSAS NATIONAL BANK *v.* BAY.

62 Kans. 692. 1901.

ACTION on a negotiable promissory note payable to the order of W. W. Graves & Co., and signed "H. R. Sloan, by C. M. Bay, attorney in fact." The plaintiff was informed when it first discounted the note that Bay was doing business in the name of Sloan under a power of attorney; that he could not do business in his own name because of indebtedness held against him. Upon a renewal the bank tried to induce Bay to assume personal responsibility on the note by signing his own name, but Bay refused to do so. There is no question but that the transaction for which the note was given was Bay's individual business. Judgment for defendant.

DOSTER, C. J. . . . The plaintiff in error contends that Bay is liable, because, as it says, the name of Sloan was a trade name adopted by Bay for the transaction of his own business, and, inasmuch as the giving of the note was his own business, he is liable on it as though executed in his own name. There are authorities to the effect that one who, for his own purposes, adopts the name of another, will be held liable in a transaction of his own conducted thereunder. We have no occasion to question the soundness of these authorities. We think, however, that they are limited to cases where it appeared that, under the name of another as a trade name, the party contracted to bind himself and not the other; and, in some of them, the party using the name of another was held liable, not on the contract, but upon the transaction out of which the contract grew. It may be that

Bay is liable in an action charging him upon the original transaction, but he is not liable upon the promissory note. He is not liable because he never made that note his contract. He never agreed to be bound upon it, but, on the contrary, refused to sign it as his contract or bind himself by it as an instrument of writing.

No cases precisely in point have been cited to us, nor in considerable research among the authorities have we been able to find one entirely similar in its facts. We think, however, that the case is covered by the general principle of law, and that these are well stated and elucidated in Bartlett *v.* Tucker, 104 Mass. 336, 6 Am. Rep. 240, the opening paragraph of the opinion in which case reads: "It is well settled that any person taking a negotiable promissory note contracts with those only whose names are signed to it as parties, and cannot therefore maintain an action upon the note against any other person. That rule, of course, does not preclude charging a party who, instead of the name by which he is usually known, signs, with intent to bind himself thereby, his initials, or a mark, or any name under which he is proved to have held himself out to the world and carried on business."

The judgment of the court below is affirmed.

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b. Construction from Signature aided by Recitals in the Instrument.

BRADLEE *v.* BOSTON GLASS MANUFACTORY.

16 Pick. (Mass.) 347. 1835.

Assumpsit on the following promissory note: —

"Boston, January 13, 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.

FRANKLAND *v.* JOHNSON.

147 Ill. 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 (Frankland) appeals.

Mr. Justice WILKIN. . . . 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 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 asssumed 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, *prima 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. § 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 intention 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.

[1] But see Baltzen *v.* Nicolay, ante, p. 533. The decision may be approved without assenting to this line of argument.

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.

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c. Construction from Signature aided by Marginal Headings or Memoranda.

MECHANICS' BANK OF ALEXANDRIA *v.* THE BANK OF COLUMBIA.

5 Wh. (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.

HITCHCOCK *v.* BUCHANAN.

105 U. S. 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 $^{13}/_{100}$ 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, §§ 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.

CHIPMAN *v.* FOSTER ET AL.

119 Mass. 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.

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.

FOSTER & COLE, General Agents for the New England States, 15 Devonshire Street, Boston.

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.*

CASCO NATIONAL BANK *v.* CLARK ET AL.

139 N. Y. 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 *bona 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 signatures 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.

SOUHEGAN NATIONAL BANK *v.* BOARDMAN.

46 Minn. 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 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 con-

struction 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 *prima 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 *prima 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 *prima 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 *prima 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.

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8. *Liability of Agent who Contracts in his own Name for an Undisclosed Principal.*

HORAN *v.* HUGHES.

129 Fed. (Dist. Ct. S. D. N. Y.) 248. 1903.

In admiralty.

Holt, District Judge. Hughes made the contract with Horan. He is therefore presumably responsible on it. His defence is, in substance, that he was acting as agent for a principal. To maintain such a defence, he must prove that he disclosed the name of his prin-

cipal. It is not sufficient that he was acting as agent, or that the other party to the contract supposed he was acting as agent, if he did not know who the principal was. De Remer *v.* Brown, 165 N. Y. 419; Tew *v.* Wolfsohn, 174 N. Y. 272. The evidence in this case, in my opinion, preponderates that Hughes either chartered Horan's boat himself, or that, if Horan supposed Hughes was acting as agent, he did not know who Hughes' principal was.

There should be a decree for the libellant for the amount demanded in the libel, with costs.

De Remer *v.* Brown, 165 N. Y. 410, 419. Martin, J. A person, even though making an agreement for another, makes himself personally liable thereon if he contracts in his own name without disclosing his principal, although the other party to the contract may suppose that he is acting as agent. Mills *v.* Hunt, 17 Wend. 333; Newman *v.* Greeff, 101 N. Y. 663; Kernochan *v.* Murray, 111 N. Y. 306; Argersinger *v.* Macnaughtan, 114 N. Y. 535; Welch *v.* Goodwin, 123 Mass. 71; Worthington *v.* Cowles, 112 Mass. 30; Blakely *v.* Bennecke, 59 Mo. 193; Eichbaum *v.* Irons, 6 Watts & Serg. 67; McClure *v.* Central Trust Co. of N. Y., 165 N. Y. 108; Mechem on Agency, § 555; Dunlap's Paley on Agency, 368.

Nor is it sufficient to exonerate the agent from liability that the seller has means of ascertaining the name of the principal. He must have actual knowledge. Holt *v.* Ross, 54 N. Y. 472, 475; Cobb *v.* Knapp, 71 N. Y. 348, 352. In the Holt case Judge Earl said: "Knowledge in plaintiffs that defendant might have acted as agent was not enough, and it was not the duty of the plaintiffs to inquire, before paying, whether the defendant was acting as principal or agent. It was the duty of defendant, if it desired to be protected as agent, to have given notice of its agency." In Cobb *v.* Knapp, Church, Ch. J., said: "It is not sufficient that the seller may have the means of ascertaining the name of the principal. If so, the neglect to inquire might be deemed sufficient. He must have actual knowledge. There is no hardship in the rule of liability against agents. They always have it in their own power to relieve themselves, and when they do not, it must be presumed that they intend to be liable." [1]

[1] The use of the name Campbell & Co. does not necessarily disclose any agency. Amans *v.* Campbell, 70 Minn. 493.

9. *Liability of Agent who Contracts in his own Name in a Simple Contract.*

HIGGINS *v.* SENIOR.

8 M. & W. (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.*

BRIGGS *v.* PARTRIDGE.

64 N. Y. 357. 1876.

[Reported herein at page 410.]

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10. *Liability of Agent Arising from Interest in Subject-matter.*

WOOLFE *v.* HORNE.

2 Q. B. D. 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.*

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11. *Where neither Principal nor Agent is Bound.*

LONG *v.* THAYER.

150 U. S. 520. 1893.

[Reported herein at p. 185.]

WILSON *v.* SMALES.

[1892] 1 Q. B. 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.

BALTZEN *v.* NICOLAY.

53 N. Y. 467. 1873.

[Reported herein at page 533.]

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12. *Liability of Agent for Money Received through Mistake or Fraud.*

LA FARGE *v.* KNEELAND.

7 Cow. (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.

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13. *Liability of Third Person to Agent.*

KELLY *v.* THUEY.

102 Mo. 522. 1890.

[Reported herein at page 539.]

BRIGGS *v.* PARTRIDGE.

64 N. Y. 357. 1876.

[Reported herein at page 410.]

ROWE *v.* RAND.

111 Ind. 206. 1887.

[Reported herein at p. 166.]

STEVENSON *v.* MORTIMER.

Cowp. (K. B.) 805. 1778.

[Reported herein at page 496.]

CHAPTER XVI.

Torts between Agent and Third Party.

1. *Liability of Agent for Non-feasance.*

LOUGH *v.* JOHN DAVIS & CO. et al.

30 Wash. 204. 1902.

Action by Mona Gertrude Lough, by her guardian *ad litem,* Frederick Lough, against John Davis & Co., a corporation, and another. From a judgment sustaining a demurrer of defendant corporation to the complaint, plaintiff appeals.

Dunbar, J. This is an action against an agent, who was authorized to rent and repair the tenement house described in the complaint, for permitting the house to become unsafe for want of repairs, from which cause the plaintiff was injured. Paragraph 2 of the complaint is as follows:

"That at all said times, and for a long time before, the above-named defendant, Sheldon R. Webb, has been and still is the owner of that certain real property known as lots 8 and 9, in block 38, of A. A. Denny's addition to the city of Seattle, and of the buildings thereon situated, and that the above-named defendant John Davis & Co. has had, and still has, sole and absolute control and management of said real property as the servant and agent of said Sheldon R. Webb, with full power, authority, and direction from their said principal to rent and repair the same, and to keep the same in repair and safe condition for tenants."

The other pertinent allegations are to the effect that a wide veranda, extending along two sides of the building about 15 feet from the ground, was used in common by all of the tenants, and was inclosed by a railing; that the railing was allowed to become old, rotten, and unsafe through the negligence of the defendants, and that, while the plaintiff was playing on said veranda, by reason of the unsafe condition, the railing gave way, and she fell from said veranda from a height of 15 feet and more from the ground, and was injured, etc. To this complaint the defendant John Davis & Co. interposed a demurrer on the ground that it did not state facts sufficient to constitute a cause of action against it, the demurring defendant. There was no appearance by Sheldon R. Webb. The demurrer was sustained, and,

the plaintiff electing to stand on her complaint, judgment was entered on the demurrer. From such judgment sustaining the demurrer this appeal was taken. . . .

It is the contention of the respondent that the law is well settled that for a misfeasance the agent is personally liable, but that he is never liable for a mere non-feasance; and that, the respondent being charged only with a non-feasance or neglect to do its duty, and not with any misfeasance or act which it ought not to do, the complaint on its face shows that it is not liable, and that the demurrer was therefore properly sustained. This rule is announced by some of the law writers and many of the courts. One of the leading cases sustaining this doctrine is Delaney *v.* Rochereau, 34 La. Ann. 1123, where it was held that under the doctrine of both the common and civil law agents are not liable to third persons for non-feasance or mere omissions of duty, being responsible to such parties only for the actual commission of those positive wrongs for which they would be otherwise accountable in their individual capacity under obligations common to all men. In this case a balcony which needed repairs fell, fatally injuring the plaintiff; and, while the agent was not responsible for the injured party's being in the house at that particular time, — he having obtained entrance by means of a key obtained from some one else, — the case is discussed and the judgment based upon the doctrine above announced. This is also the established doctrine in New York. The case of Carey *v.* Rochereau (C. C.) 16 Fed. 87, is a Louisiana case, and bases its decision on Delaney *v.* Rochereau, *supra,* without discussion. Labadie *v.* Hawley, 61 Tex. 177, held, in accordance with the same rule, that an agent renting his principal's house with authority to construct a cooking range was not liable for injury to an adjoining proprietor, caused by the use of the range; citing Story, Ag. 309, and other authorities. In Feltus *v.* Swan, 62 Miss. 415, it was held that an agent in charge of a plantation was not liable to the owner of an adjoining plantation for damage resulting from the malicious neglect and refusal of the agent to keep open a drain which it was his duty as such agent to keep open. The announcement of this doctrine is accredited by many of the courts indorsing it to the opinion in Lane *v.* Cotton, 12 Mod. 472, but it was, as a matter of fact, announced only incidentally in that case in a dissenting opinion. The question of the responsibility of the agent could not have been before that court, for the action was against a postmaster for the loss of a letter which was taken from the mail by a clerk, and it was only the responsibility of the master, and not that of the servant or agent, which was under discussion.

The reason assigned to sustain this rule is that the responsibility must arise from some express or implied obligations between the particular parties standing in privity of law or contract with each other. If this be true, it is difficult to see what difference there is

in the obligation to their principal between the commission of an act by the agents which they are bound to their principal not to do and the omission of an act which they have obligated themselves to their principal to do. They certainly stand in privity of law or contract with their principal exactly as much in the one instance as in the other, for the obligation to do what ought to be done is no more strongly implied in the ordinary contract of agency than is the obligation not to do what ought not to be done. This reason for the rule not being tenable, and no other reason being obvious, the rule itself ought not to obtain; for jurisprudence does not concern itself with such attenuated refinements. It rests upon broad and comprehensive principles in its attempt to promote rights and redress wrongs. If it takes note of a distinction, such distinction will be a practical one, founded on a difference in principle, and not a distinction without a difference; and there can be no distinction in principle between the acts of a servant who puts in motion an agency which, in its wrongful operation, injures his neighbor, and the acts of a servant who, when he sees such agency in motion, and when it is his duty to control it, negligently refuses to do his duty, and suffers it to operate to the damage of another. There is certainly no difference in moral responsibility; there should be none in legal responsibility. Of course, if the omission of the act or the non-feasance does not involve a non-performance of duty, then the responsibility would not attach. If it does not involve a non-performance of duty to such an extent that the agent is liable to the principal for the damages ensuing from his neglect, there is no hardship in compelling him to respond directly to the injured party. Such practice is less circuitous than that which necessitates first the suing of the master by the party injured, and then a suit by the master against the servant to recoup the damages.

But the honorable judge who wrote the opinion in Delaney *v.* Rochereau, *supra,* was mistaken in his announcement that the civil law indorsed the distinction upon which his decision was based, for, while the doctrine is stated in the Justinian Code that no man could usually be made liable for a mere omission to act, it was otherwise when the omission to act involved a negligence of duty. Domat argues that, as an agent is at liberty not to accept the order and power which are given him, so he is bound, if he does accept the order, to execute it; and, if he fail to do so, he will be liable for the damages which he shall have occasioned by his not acting. Under the Aquilian law the distinction between omission and commission was not recognized under such circumstances. In the ninth Digest of the Aquilian law the following instance is given: One servant lights a fire, and leaves it to another. The latter neglects to check the fire at the proper time and place, and a villa is burned. The first servant was charged with no negligence, because it was his duty to light the fire, and it is argued, very sensibly, that, if the second could not be charged be-

cause not putting out the fire was simply an omission of duty, there would be a miscarriage of justice. Is the keeper of a draw-bridge, whose duty it is to close the draw after a ship passes through, and who negligently fails to perform that duty, allowing a car loaded with passengers to be hurled into the river below, to escape responsibility to the injured, while the man who attempts to operate it, but, in so attempting, operates it negligently and unskilfully, is held responsible? Instances in the ordinary transactions of life might be multiplied almost without end, the very statement of which shows conclusively the fallacy of the rule.

The attempt by the courts to maintain this indistinguishable distinction has led to many inconsistent decisions. Thus, in Albro *v.* Jaquith, 4 Gray, 99, the plaintiff was not allowed to recover of the superintendent of a canal company for damages caused by negligence in the management of the apparatus used for the purpose of generating, containing, and burning inflammable gas; the superintendent being the agent of the company, and being charged with carelessly, negligently, and unskilfully managing the business. It was held that he was not charged with any direct act of misfeasance, but only with non-feasance, and that there was no redress, because, as the court said, the obligation to be faithful and diligent was founded in an express contract with his principal. As we have before indicated, this would be equally true of the acts of commission or misfeasance in his stewardship. But in Bell *v.* Josselyn, 3 Gray, 309, — also a Massachusetts case, and decided the same year, — it was held that an agent who negligently directed water to be admitted to a water pipe was liable to a third person, because such action was misfeasance. In that case it was not claimed that the admission of water to the pipe was negligent or wrongful, but the negligent act or omission was in allowing the pipe to become obstructed, — certainly as pure an omission or non-feasance as could be conceived of. But the court, in order to maintain the distinction which it deemed itself bound by precedent to do, virtually obliterated the distinction by the following circuitous reasoning: "The defendant's omission to examine the state of the pipes in the house before causing the water to be let on was a non-feasance. But if he had not caused the water to be let on, that non-feasance would not have injured the plaintiff. If he had examined the pipes, and left them in a proper condition, and then caused the letting on of the water, there would have been neither non-feasance or misfeasance. As the facts are, the non-feasance caused the act done to be a misfeasance. But from which did the plaintiff suffer? Clearly, from the act done, which was not less a misfeasance by reason of it being preceded by a non-feasance."

Much more cogent and judicial is the reasoning of the same court many years after in Osborne *v.* Morgan, 130 Mass. 102, 39 Am. Rep. 437, where an agent of premises was held responsible to a third person

for suffering to remain suspended from a room a tackle block, which fell upon and injured the plaintiff. The court, speaking through Chief Justice GRAY, said: "The principal reason assigned was that no misfeasance or positive act of wrong was charged, and that for non-feasance, — which was merely negligence in the performance of a duty arising from some express or implied contract with his principal or employer, — an agent or servant was responsible to him only, and not to any third person. It is often said in the books that an agent is responsible to third persons for misfeasance only, and not for non-feasance. And it is doubtless true that, if an agent never does anything towards carrying out his contract with his principal, but wholly omits and neglects to do so, the principal is the only person who can maintain any action against him for the non-feasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway, and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not non-feasance, or doing nothing; but it is misfeasance, doing improperly."

There is still another class of cases which hold what seems to us to be the correct doctrine, viz., that the obligation, whether for misfeasance or non-feasance, does not rest in contract at all, but is a common-law obligation devolving upon every responsible person to so use that which he controls as not to injure another, whether he is in the operation of his own property as principal or in the operation of the property of another as agent. One of the leading cases maintaining this view is Baird *v.* Shipman, a case decided in 1890, and reported in 132 Ill. 16. There it was held that an agent who has complete control of a house belonging to an absent principal, and who lets the house in a dangerous condition, promising to repair it, is responsible to the third person injured by an accident caused by want of such repair. There is nothing to distinguish this case from the case at bar excepting the promise to repair, and that does not seem to have been deemed by the court an important feature; but the case was decided upon the broad principle above announced. Said the court: "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. . . . 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," — citing approvingly Osborne *v.* Morgan, *supra.* To the same effect is Mayer *v.* Building Co., 104 Ala. 611. The court there, after noticing the doctrine that the agent can be held liable to third persons for misfeasance only, says: "It is difficult to apply the same principles which govern in matters of contract between an agent and third persons to the torts of an agent which inflict injury on third persons, whether they be of misfeasance or non-feasance, or to give a sound reason why a person who, while acting as principal, would be individually liable to third persons for an omission of duty, becomes exempt from liability for the same omission of duty because he was acting as servant or agent. The tort is none the less a tort to the third person whether suffered from one acting as principal or agent, and his rights ought to be the same against the one whose neglect of duty has caused the injury." In that case Baird *v.* Shipman, *supra,* is cited approvingly, with the remark that the rule laid down in that case is the better rule. So, in Ellis *v.* McNaughton, 76 Mich. 237, it was held that an agent who had entire control of premises was liable for injuries resulting from the removal of a walk on the premises by one of his employees, contrary to his orders, if, after such removal, he knew of the dangerous condition of the premises, and allowed them to remain in that condition. It would seem that, if there is anything in definitions, this was a pure non-feasance, and yet the court, in trying to harmonize the distinction with the general rule announced and above discussed, said, speaking of the agent's duty in relation to the work: "Every day it was so permitted to remain, when the defendant had the entire control of it, and the authority, without question, to replace it, was a wrong and a misfeasance." It is also said that, irrespective of his principal, the agent was bound while doing the work to so use the premises. including the sidewalk, as not to injure others. Misfeasance, said the court, may involve the omission to do something which ought to be done, — as when an agent engaged in the performance of his undertaking omits to do something which it is his duty to do under the circumstances, as when he does not exercise that degree of care which due regard for the rights of others required. To the same effect, Campbell *v.* Sugar Co., 62 Me. 552. In Lottman *v.* Barnet, 62 Mo. 159, it was held that one having the general charge and superintendence of the construction of a building was responsible for the killing of a workman caused by the falling of a wall, which resulted from the giving way of supports on which the wall rested under the working of a jackscrew, although the appliance was put to work under the immediate direction of another person, employed by the owner of the building, and while the architect was absent, where it appeared that the manager of the jackscrew was employed under the advice of the architect, and subject to his discretion, and that he knew and approved of the method

adopted for effecting the raising. Whether the wall fell because the plan for raising it was a bad one, or because the supports were inadequate, it was held that in either case the disaster was attributable to positive misfeasance for negligence in a work which the architect had undertaken, but in which he failed to exhibit the care and skill which the law imposed upon him.

To make this distinction more shadowy, if possible, Mr. Mechem, in his work on Agency (sect. 572), after announcing the general rule, says: "Some confusion has crept into certain cases from a failure to observe clearly the distinction between non-feasance and misfeasance. As has been seen, the agent is not liable to strangers for injuries sustained by them because he did not undertake the performance of some duty which he owed to his principal, and imposed upon him by his relation, which is non-feasance. Misfeasance may involve, also, to the same 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." The author then quotes approvingly the language of Chief Justice Gray in Osborne *v.* Morgan, *supra*, and of Judge Metcalf in Bell *v.* Josselyn, *supra*, so that it will be seen that, even according to Mr. Mechem, a lack of care and a lack of precaution, when once the duty is assumed, are as much misfeasance as an active misdoing. The irresistible logic of his statement is that the agent is responsible to third persons when he is negligent in the performance of the duties which he undertakes, whether such act be termed misfeasance or non-feasance.

The rule is thus announced in 1 Am. & Eng. Enc. Law (1st ed.), p. 407: "Where a principal engages an agent to do a certain work, and to take entire control over it, while the principal does not interfere, but leaves it entirely with the agent, the agent, and not the principal, will be liable to third parties for injuries or damages sustained by the negligence or unskillful manner in which the work is done." The question of whether or not the principal is liable is not under discussion here. In the same section, and in another paragraph, that author announces that an agent is, in general, not liable to third parties for acts of negligence for non-performance of duty; that as such he is only responsible to the principal, and the principal to the third party. So that in the mind of the author the distinction must have been established between an agent that did not have complete or entire

control and one who did. There is no other way of harmonizing the two statements.

This is, in effect, the same rule enunciated by Mr. Wharton in his work on Agency (sect. 538). Under the announcement that "wherever there is liberty there is liability," it is said: "Hence, to strike at the general principle that lies at the basis of the adjudication we have just noticed, wherever the agent is at liberty to choose his own mode of action, then he is distinctively liable in damages, if by such mode of action he invades another's rights." The same doctrine is announced in section 537, where it is said: "Where an agent, who has general liberty of action, injures a third person, there the agent is personally liable for negligent as well as for malicious acts." The author here discriminates between an agent and a servant, holding that a servant is a part of the machinery by which the master works, and there is no emancipation or liberty of action; but that this reasoning does not apply to agents who have complete control, and therefore perfect liberty of action. Doubtless much of the mist and fog which have enveloped the decisions on this subject is due to confusing the omission of an act which one is not bound to perform with the imperfect performance of an act to which he is bound. In other words, whoever undertakes a duty, and is clothed with authority to perform that duty, is responsible to the party injured for negligent imperfection in the discharge of such duty, on the broad doctrine announced above that he is obligated in transacting business to so transact it that his neighbor shall not thereby be injured; but there is no liability for the non-performance of a duty not assumed, or not independently controlled. But for neither the non-performance nor mal-performance of a positive duty can one escape responsibility, whether that duty is imposed by contract or by general obligation, for under any and all circumstances it is the essence of negligence to omit to do something which ought to be done. While some detached expressions of Mr. Wharton have been quoted in support of the distinction contended for by the respondent, that author puts the question at rest in his work on the Law of Negligence (2d ed., sect. 539), where he says: "The mere fact that I am the agent, in doing the injurious act of another, does not relieve me from liability to third persons for hurt this act inflicts on them. Judge Story, indeed, tells us that for omissions of the agent the principal alone is liable, while for misfeasances the agent is also liable; but this distinction, as has been already shown, can no longer be sustained. 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 casual relation between the agent and the person hurt is broken by the inter-

position of the principal as a distinct centre of legal responsibilities and duties. But wherever there is no such interruption of casual connection, — in other words, wherever 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."

There is some contention in respondent's brief on the alleged barrenness of the allegations of the complaint, but we think the allegations were ample to show that the respondent was authorized to keep the building in repair; that it undertook that office or duty, and was in complete control of the work. It is alleged that it was in absolute control and management, with full power, authority, and direction to repair, and to allege that it agreed to do so would only be to allege the agreement to do the duty which the law imposed upon it after it had assumed the control and management which is alleged.

Our conclusion is that the complaint states a cause of action against the respondent. The judgment is therefore reversed, with instructions to the lower court to overrule the demurrer to the complaint.

REAVIS, C. J., and ANDERS, MOUNT, and FULLERTON, JJ., concur.

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2. *Liability of Agent for Misfeasance.*

WEBER *v.* WEBER.

47 Mich. 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 representations 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 wrongdoer. 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 wrongdoers. 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.

SWIM *v.* WILSON.

90 Cal. 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 employee, 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 wrongdoer, the agent is a wrongdoer 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 plaintiff'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 inno-

cent 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.

OSBORNE *v.* MORGAN.

130 Mass. 102. 1881.

[Reported herein at p. 816.]

GREENBERG *v.* WHITCOMB LUMBER CO.

90 Wis. 225. 1895.

[Reported herein at p. 819.]

VAN ANTWERP *v.* LINTON.

89 Hun (N. Y.) 417. 1895.

[Reported herein at p. 821.]

BOOK II.

MASTER AND SERVANT.

PART I.

WHO IS A SERVANT?

CHAPTER XVII.

Independent Contractors.

ATLANTIC TRANSPORT CO. *v.* CONEYS.

82 Fed. (C. C. A., 2d Ct.) 177. 1897.

In Error to the Circuit Court of the United States for the Southern District of New York.

This writ of error was brought to reverse a judgment for $2,034.85 rendered upon a verdict of the jury in favor of Michael Coneys, the plaintiff below, in an action to recover damages for personal injuries caused by the negligence of persons alleged to be the servants of the defendant, a steamship company having a line of steamers running to and from New York, and engaged in the transportation from New York to London of cattle, horses, grain, and general merchandise. The plaintiff was an employee of an elevator company, and at the time of the accident was at work upon a canal boat alongside of the defendant's steamer *Mississippi*, and between it and a grain elevator from which the steamer was loading. He was injured by the fall upon him of a wooden shutter which was used for closing a gangway at the side of the top deck of the steamer, and was a part of the fittings of the vessel for the carriage of cattle, and which was being handled by carpenters in the employment of H. P. Kirkham & Son, a firm of carpenters, who were repairing the cattle stalls. The accident happened through the negligence of the carpenters. The defendant relied upon the position that the workmen were in the employment of independent contractors, and were not its servants, and, in various forms, requested the trial court to thus instruct the jury. The court charged the jury that the evidence showed they were not the servants of an independent contractor, but that they were doing the ship's work at the request of, and under the direction of, the ship's officers. To this charge the defendant excepted, and the assignments of error relate to this exception, and to the various refusals of the trial judge to direct otherwise. The facts

in regard to the course of business of the defendant with the firm of H. P. Kirkham & Son are given in the opinion.

Before PECKHAM, Circuit Justice, and WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts as above). The fact of a distinction between the liability of an employer for an injury caused by the negligence of his employee or his servant, and the liability of an owner for an injury caused by the negligence of an independent contractor who undertakes to execute specified work upon the owner's property, was formerly not well recognized (Bush *v.* Steinman, 1 Bos. & P. 404), but is now distinctly understood (Hilliard *v.* Richardson, 3 Gray, 349). If any confusion now exists, it is in regard to the controlling tests that determine the character of the particular contract which is under examination. The two kinds of employment are frequently close to each other, and, while it is often not difficult to appreciate and understand the difference between the two classes of contracts, it is sometimes difficult to express the distinctions with exactness of language. The cases of Casement *v.* Brown, 148 U. S. 615, and Railroad Co. *v.* Hanning, 15 Wall. 649, illustrate that, while two contracts may apparently be similar in phraseology, yet their nature and subject-matter may place the respective contracting parties in different relations to each other. The tendency of modern decisions is not to regard as essential or controlling the mere incidentals of the contract, such as the mode and manner of payment (Corbin *v.* American Mills, 27 Conn. 274), or whether the owner can discharge the subordinate workmen, and not to regard as essential, or an absolute test, so much what the owner actually did when the work was being done, as what he had a right to do. Many circumstances may combine, as in Butler *v.* Townsend, 126 N. Y. 105, which show that the relation of an independent contractor exists, but the significant test, which courts regard as of an absolute character, has been variously expressed by them as follows: "The test, I think, always is, had the superior control or power over the acting or mode of acting of the subordinates? . . . Was there a control or direction of the person, in opposition to a mere right to object to the quality or the description of the work done? . . . On the other hand, if an employer has no such personal control, but has merely the right to reject work that is ill done, or to stop work that is not being rightly done, but has no power over the person or time of the workman or artisan employed, then he will not be their superior, in the sense of the maxim, and not answerable for their fault or negligence." Lord GIFFORD in Stephen *v.* Commissioners, 3 Sess. Cas. (4th Series Scot.) 535, 542.

In Linnehan *v.* Rollins, 137 Mass. 123, 125, the instruction of the trial judge, which was adopted by the appellate court, was:

"The absolute test is not the exercise of the power of control, but the right to exercise power of control."

In Hexamer *v.* Webb, 101 N. Y. 377, the court said: "The test to determine whether one who renders service to another does so as a contractor or not is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished."

In Casement *v.* Brown, *supra*, the court, by Mr. Justice BREWER, said: "The will of the companies [the owners] was represented only in the result of the work, and not in the means by which it was accomplished. This gave to the defendants the status of independent contractors, and that status was not affected by the fact that, instead of waiting until the close of the work for acceptance by the engineers of the companies, the contract provided for their daily supervision and approval of both material and work."

Whereas, in Railroad Co. *v.* Hanning, *supra*, the court found that the essence of the contract to rebuild an old wharf, and "make it as good as new," was a reservation of the power, "not only to direct what shall be done, but how it shall be done."

In the case now under consideration the contract was not in writing, but was manifested by the course of business between the parties, and the witnesses are not at variance as to its terms. There was no question before the jury as to the evidence, but the plaintiff in error insists that it was entitled to a ruling that the legal conclusions from the evidence must be that the firm of carpenters stood in the position of independent contractors, or at least that the question of the character of the contract was one for the jury. The members of the court concur in the opinion that the facts did not entitle the plaintiff to the absolute ruling which was asked for, and the majority are of opinion that the only just inferences from the testimony are that the relation between the shipowners and the carpenter was that of master and servant. The dissenting judge thinks that the inferences might be twofold, and that the question should have been submitted to the jury.

The steamship company had for four years before the accident been operating a line of steamers carrying horses, cattle, and general cargo from New York. Whenever a steamer arrived in port, its fittings for cattle and other equipments for the carriage of freight required repairs, which were uniformly made by Kirkham & Son, who charged for work by the hour, and for material by the foot. The dock superintendent of the steamship company, in reply to the question, "Describe to us how the work is done; who gives the directions?" said: "There are hardly any directions to be given. Mr. Kirkham has a foreman there, and he goes to work, — being used to this work, he knows just what is to be done; and he goes ahead and does this work regularly each week, excepting possibly when we

have horses. When we have horses, then I counsel him how many horses."

In reply to the question, "What kind of work do they do on the ship, and how long are they there generally each trip?" he said: "Some of them are there most all the time while the ship is in port. There is so many things to be done—fitting up the boat for grain, and tinkering around, one thing and another; fixing up the cattle fittings; fixing up for the horses — that it takes a larger or smaller gang, according to the amount of work, most of the time the ship is in port."

The carpenters' foreman testified that he goes over every vessel of the steamship company as it arrives, and reports the result of his inspection to the superintendent, who tells him to go ahead with the work; that when the *Mississippi* came in, the superintendent being absent, the assistant gave orders to go ahead and see to the repairing the same as usual; that in practice the witness got instructions from the captains once in a while, "in the nature of alterations, or any thing that way"; and that it was a part of his general duty to do any repairing that he sees is needed, and asked for by the captain or by the dock superintendent. Kirkham & Son are the jobbing carpenters customarily employed by this steamship line. Their experience has been such that their ascertainment of the necessary amount of repairs is relied upon. They are told to do the work, and, as a rule, need no other directions. But both the captains and the superintendent have the right to direct the extent and the manner of the alterations and repairs. It is a right not often exercised, for the carpenters apparently had the confidence of the superintendent, but the right existed. But it may be said that, while it is true that the officers of the defendant had some general power to direct how alterations and repairs should be made, they had no particular power "to direct and control the manner of performing the very work in which the carelessness occurred," and that the existence or nonexistence of such kind of power is the real question in the case, which is true. Charlock *v.* Freel, 125 N. Y. 357; Vogel *v.* Mayor, 92 N. Y. 18. The subject-matter to which the course of business related — that of a series of minor jobbing repairs — tells with a good deal of clearness what the rights of the respective parties were. The contract of the superintendent was not analogous to that of a householder's occasional contract with a tinman to tin a roof, or with a painter to paint a house. It was analogous to that of the owner of a house who customarily calls in the jobbing carpenter whom he is in the habit of employing, and starts him in the work of "tinkering around, one thing after another," and doing the various jobs of repairs which time has shown to be necessary. The manner in which the work shall be done, and the dangers to be avoided, as well as the extent to which the work shall be carried on, are under the control and guidance of the owner. In this case separate bills were made out for the separate kinds of work upon

each vessel, and for the materials furnished for each job; and, while the mode of payment is not essential, it was not in harmony with the usual incidents of the contract of an independent contractor. Inasmuch as, in our opinion, the only inference that can fairly be drawn from the testimony is that the steamship company and the carpenters were in the usual relation of master and servant, the judgment of the circuit court is affirmed.

WALLACE, Circuit Judge (dissenting). I think that the evidence upon the trial presented a question of fact for the determination of the jury, — whether Kirkham & Son were contractors, exercising an independent calling, and delegated with the responsibility of deciding how the carpenter work which they were to do for the defendant should be done, subject to the right of the defendant to object to the quality of the work, or whether the relation between their subordinates and the defendant was that of master and servant. Unless the defendant, pursuant to the understanding or course of business between it and Kirkham & Son, had the right to direct and control the manner of performing the very work in which the carelessness occurred by which the plaintiff was injured, the employees of Kirkham & Son were not its servants. In my opinion, the trial judge erred in taking this question from the jury, and deciding as matter of law that these employees were the servants of the defendant. I therefore dissent from the opinion of the court.

LINNEHAN *v.* ROLLINS.

137 Mass. 123. 1884.

ELSTON had a contract with defendants to take down the latter's building "all said work to be done carefully, and under the direction and subject to the approval of the trustees." There was also evidence that one or more of the defendants were present nearly every day, and gave directions as to the work being performed; and evidence contradicting this. Plaintiff was injured by the negligence of a workman employed by Elston.

The judge instructed the jury upon the effect of said contract as follows: "So far as Elston is concerned, the relation in which he stood to the defendants at the outset is a matter of written contract, and, where there is a written contract between parties, the construction of that written contract is a matter of law. This contract implies in substance that Elston is to take down the entire building known as the Adams House, or so much thereof as the trustees may request; and, in conclusion, that all of the work is to be done carefully, and under the direction and subject to the approval of the trustees. This contract gives the defendants the right to con-

trol and direct the action of Elston. It is not simply a provision that the work must finally meet their approval before they pay him, but it is a provision that, in the first instance, he is to take down just so much of it as they may desire, and that he is to do the work of taking down under their direction. There is no other mode of construing it than so as to mean that he, by this contract, was subject to their orders as to the time and manner and mode of doing the work; that they had the right to step in and say to him, 'You are not doing this as we directed you to do it. We direct you to do thus and so, and we direct you to do this in the other way.' That seems to me, as far as the contract is concerned, to bring the case within the relation of master and servant, so far as Elston and the defendants are concerned.[1] You will observe that, although there has been evidence introduced upon the one side and the other, as to the actual control which the trustees, through one of their number, exercised over the work, and that is all proper and competent evidence for you in considering the matter, yet that the absolute test is not the exercise of power of control, but the right to exercise power of control. If, for instance, there was nothing in the case but this contract, and there were no question that the parties were acting under it, if that is the view you take of it, and that the injury was occasioned by the negligence of Elston, then, although the trustees should be across the Atlantic, nevertheless, under the instructions I give you, if they retained the power to control and direct the work, they would be liable; because it is the possession of the right of interference, the right of control, that puts upon a party the duty of seeing that the person who stands in that relation does his duty properly. If they have retained to themselves the right of directing the mode of doing the work, then, if the work is done wrong, the simple principle is that they are responsible."

The jury returned a verdict for the plaintiff, in the sum of $5500; and the defendants alleged exceptions.

FIELD, J. Whether an owner of a building retains such control over work to be done and the manner of doing it as to render himself responsible for injuries occasioned by the negligence of a contractor and his employees in the performance of the work, depends upon the construction to be given to the contract. Erie *v.* Caulkins, 85 Penn. St. 247; Railroad *v.* Hanning, 15 Wall. 649; Eaton *v.* European & North American Railway, 59 Maine, 520; Cincinnati *v.* Stone, 5 Ohio St. 38; Newton *v.* Ellis, 5 El. & Bl. 115; Blake *v.* Thirst, 2 H. & C. 20.

[1] "If the contract, for example, is to build a wall, and the builder 'has a right to say to the employer, "I will agree to do it, but I shall do it after my own fashion; I shall begin the wall at this end and not at the other"; there the relation of master and servant does not exist, and the employer is not liable.' (BRAMWELL, L. J., Emp. L. 1877, p. 53: an extra-judicial statement, but made on an occasion of importance by a great master of the common law.)" Pollock on Torts, 6th ed., p. 78.

In this case, for the reasons given in the instructions, we think the defendants are liable for injuries occasioned by the negligence of Elston and his employees in doing the work which the defendants requested Elston to do. Railroad *v.* Hanning, *ubi supra;* Clapp *v.* Kemp, 122 Mass. 481; Brackett *v.* Lubke, 4 Allen, 138; Brooks *v.* Somerville, 106 Mass. 271; Forsyth *v.* Hooper, 11 Allen, 419; Kimball *v.* Cushman, 103 Mass. 194. *Exceptions overruled.*[1]

KELLY *v.* THE MAYOR, ETC., OF NEW YORK.

11 N. Y. 432. 1854.

THE action was brought by Kelly in the New York common pleas against the mayor, aldermen and commmonalty of the city of New York, to recover for an injury to his horse, alleged to have been caused by the negligence of the defendants or their servants in blasting rock, in the opening and excavating of Seventy-first street, in the city of New York. The defendants had contracted with one Quin for the doing of this work. On the trial it was proved that all the blasting was done by and under the immediate charge of one Ford, who was employed by Quin, the contractor, and that Ford set off the blast that caused the injury. The plaintiff claimed that the clause in the contract with Quin, quoted in the opinion, made Quin the servant of the defendants.

Judgment for plaintiff. Defendants appeal.

SELDEN, J., delivered the opinion of the court.

The written agreement between the defendants and John Quin, the immediate employer of the persons through whose carelessness

[1] "When a contractor takes entire control of the work, the employer not interfering, the employer — supposing there was no negligence in the selection of the contractor, and that the work contracted for was lawful — is not liable to third persons for injuries to such parties by the contractor's negligence, or the negligence of his subordinates. But any interference, assumption of control or directions given by the owner of buildings, being erected for him by contractors, under a special agreement, may render him personally liable for injuries caused to third persons by the negligent conduct of such contractors, in work done in obedience to such directions. (Heffernan *v.* Benkard, 1 Robt. 432.) In other words, the employer may make himself liable by interfering with the contractor and assuming control of the work, or some part of it, so that the relation of master and servant arises, or so that an injury ensues which is traceable to his interference. But the mere fact that the employer retains a general supervision over the work for the purpose of satisfying himself that the contractor carries out the stipulations of his contract, does not make him responsible for the negligence of the contractor. (2 Thomp. Neg. 913.)

"If the injury occurred in consequence of the negligent or unskilful performance of the work, the employer is not liable, provided he did not interfere with, and assume control of, and actually control, the work and the method and means of its performance. It is true that it is not the fact of actual interference and control, but the right to interfere, which makes the difference between an independent contractor and a servant or agent. But when, as in this case, the relation is the former, it is then correct to say that the liability of the employer, in such cases, arises from the fact of actual interference and control." (Norwalk Gaslight Co. *v.* Norwalk, 63 Conn. 495, 525.)" Hawke *v.* Brown, 28 N. Y. App. Div. 37, 43.

the injury to the plaintiff was occasioned, contained the following clause: "The whole work to be done under the direction, and to the entire satisfaction of the commissioner of repairs and supplies, the superintendent of roads, and the surveyor having charge of the work: and the certificate of the superintendent of roads and the surveyor, to that effect, will be a condition precedent to the acceptance of the work and payment for the same." It is claimed that this clause distinguishes this case in principle from those of Blake *v.* Ferris, 1 Seldon, 48, and Pack *v.* The Mayor, etc., of New York, 4 Selden's Rep. 222.

In the last of these cases the contract contained a clause by which the contractor engaged *to conform the work* to such further directions as might be given by the corporation or its officers. It was claimed that this clause distinguished the case from that of Blake *v.* Ferris, *supra*. But the court held, that the effect of this clause was to give to the corporation power to direct as to the results of the work merely; that is, its condition, when completed; that it gave them no control over the contractor or his workmen, as to the *manner* of performing it, and had no tendency therefore to create the relation of master and servant, or of principal and agent, between the corporation or its officers, and the contractor or the workmen employed by him.[1] In the case at bar the language is somewhat broader and more comprehensive. "The whole work" is to be done "under the direction and to the entire satisfaction," etc. Still I think the reasoning of the court in the case of Pack *v.* The Mayor, etc., applies equally to this. The clause in question clearly gave to the corporation no power to control the contractor in the choice of his servants. That he might make his own selection of workmen will not be denied. This right of selection lies at the foundation of the responsibility of a master or principal, for the acts of his servant or agent. In the case of Pack *v.* The Mayor, etc., *supra*, JEWETT, J., says: "The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders, should be responsible for an injury resulting from the want of skill, or want of care, of the person employed." As a general rule, certainly, no one can be held responsible as principal, who has not the right to choose the agent from whose act the injury

[1] "It (the clause referred to) does not, as the court below held, make Riley the immediate servant of the defendants or give to them any control over him as to the manner or otherwise in which he should conduct the blasting. The defendants may change the grade by new specifications from that provided in the contract, and the duty is then imposed upon Foster to make his grade accordingly; but as to the manner in which he shall proceed in his blasting to make the grade, or do the work, he is as perfectly independent of the defendants as a man ever was while engaged in doing his own work. They could not control Green in any respect, if he should proceed in a negligent manner to conduct this blasting. They could neither dismiss him nor control him in his work. The court below erred in giving such effect to this provision of the contract, and their judgment should be reversed and a new trial granted." Pack *v.* The Mayor, etc., 8 N. Y. 222, 227.

flows. There may be exceptions, as in the case of Bailey *v.* The Mayor, etc., of New York, 3 Hill, 531. The principle of that case, however, has no application to this. But the corporation, in addition to its want of power to protect itself by the employment of suitable workmen, had no power to direct in this case, any more than in that of Pack *v.* The Mayor, etc., as to the particular manner of performing the work. The object of the clause relied upon, was not to give to the commissioner of repairs, and the other officer named, the right to interfere with the workmen, and direct them in detail *how* they should proceed, but to enable them to see that every portion of the work was satisfactorily completed. It authorized them to prescribe *what* was to be done, but not *how* it was to be done, nor *who* should do it. This case, therefore, cannot be distinguished in principle from those already decided by this court; and it would be a work of mere supererogation to repeat the reasoning in those cases.

The judgment of the common pleas must be reversed and a new trial ordered, with costs to abide the event.

Judgment accordingly.[1]

DUTTON *v.* AMESBURY NAT. BANK.

181 Mass. 154. 1902.

LATHROP, J. This is an action of tort for injuries sustained by the plaintiff in consequence of the negligence of persons alleged to be the servants of the defendant. In the superior court the case was sent to an auditor, who found certain facts, and further found for the plaintiff in the sum of $123.75. The case was then heard by a judge of the superior court upon the report of the auditor, whose findings were agreed to be true, and a finding was made for the plaintiff in the same amount. The case comes before us on the

[1] "The claim made by the defendant the Builders' Exchange, the owner of the building, that Neff and the Baileys were independent contractors, seems to us well founded. It is true that in their contracts it is provided that the work is to be performed under the direction and to the satisfaction of the architects, acting as agents of the owner, but it is entirely certain from the whole contract that this is simply a reservation of the right of inspection. It is not a reservation of power to control the manner of the work, to change materials to be used, or prescribe ways and methods in which the work is to be carried out. The contractors have agreed to build the building according to fixed plans and specifications, and of certain materials. They can do the work in their own manner and with their own machinery, providing they comply with their contract. The architect can only require that the building be such as the contract demands. He has no control for any other purpose. We do not regard this reservation of the right of inspection of the work as changing the character of the contract. Hughbanks *v.* Investment Co. (Iowa) 60 N. W. 640." Smith *v.* Milwaukee Builders', etc., Exchange, 91 Wis. 360.

For other cases construing similar provisions in contractors' contracts, see Norwalk Gaslight Co. *v.* Borough of Norwalk, 63 Conn. 495, particularly at p. 524; Harding *v.* Boston, 163 Mass. 14; Uppington *v.* City of New York, 165 N. Y. 222; City of Erie *v.* Caulkins, 85 Pa. St. 247.

defendant's exceptions to the refusal of the judge to give two rulings requested. Before stating them, it will be necessary to set forth the facts found by the auditor, which are, in substance, these:

The plaintiff was the occupant of a store on the westerly side of Main street, in Amesbury, separated from the defendant's building by a passageway about six feet wide. The division line between the two estates ran through the centre of the passageway. In March, 1890, the defendant found that water was coming into its cellar through the wall next to the passageway; and the cashier of the defendant went to the place of business of one Sawyer, to get him to repair the cellar wall and stop the water from running into the cellar. Sawyer was not in, but the cashier found one Grenier, who was in Sawyer's employ, and who had charge of the business in the absence of Sawyer, and requested him to go to the place and stop the water from running into the cellar. Grenier went to the building, employed help, and dug up the earth in the passageway in order to reach the leak in the defendant's wall. The earth dug up was thrown in a pile across the passageway from the plaintiff's store to the defendant's building. The pile remained there about a week, when there came a snowstorm, followed by rain. The water ran down the passageway until it was stopped by the pile of dirt, when it ran into a window of the plaintiff's store, — the sill being at about the level of the surface of the passageway, — and did the injury complained of.

The plaintiff knew that the pile of earth was across the passageway for a week before the water ran into the store. As soon as the plaintiff found that the water was running into the store, he dug away the pile of earth, and stopped the water from coming in. The auditor found that the plaintiff was not guilty of negligence in not removing the pile of earth before the storm.

In answer to the contention of the defendant that Sawyer was a contractor, the auditor reported as follows: "I do not find that said Sawyer made any contract with the defendant to stop the water from running into its cellar, but I find that said Sawyer did the work under a general employment, and was to receive a reasonable compensation therefor." In this connection, also, the following appears in the report: "It did not appear that the defendant gave any directions about the work done by Grenier, but left the method of doing the work and stopping the leak to his judgment."

The requests asked for and refused were as follows: "(1) On the evidence as agreed, the relation of master and servant did not exist between Sawyer and the defendant, and the plaintiff cannot recover. (2) The plaintiff having seen the earth piled upon his own land at least a week before the injury complained of, it was his duty to remove it, or to so arrange it as to prevent its being the cause of further damage, and, not having done so, did not comply with the

law, which requires every one to use reasonable care to protect his own property against what may cause injury to it, and to prevent unnecessary damage."

The principal question in the case arises on the first request for instructions, and is, whether the relation of master and servant existed between the defendant and Sawyer. To establish the liability of one person for the negligence of another, it is not enough to show that the person whose negligent action caused the injury was at the time in the employment of the person sought to be charged, but it must also be shown that the relation of master and servant existed between them. This distinction sometimes has been lost sight of. Until the case of Hilliard *v.* Richardson, 3 Gray, 349, was decided, our decisions were in a somewhat anomalous state. Compare Sproul *v.* Hemmingway, 14 Pick. 1, 5, with Stone *v.* Codman, 15 Pick. 297. In Hilliard *v.* Richardson it was held that where the owner of land employed a carpenter, for a specific price, to repair a building thereon, and to furnish all the materials for the purpose, he was not liable for injury to a third person caused by the negligence of a teamster employed by the carpenter in depositing boards in the highway in front of the house. See, also, Linton *v.* Smith, 8 Gray, 147; Conners *v.* Hennessey, 112 Mass. 96; Boomer *v.* Wilbur, 176 Mass. 482.

It so happened, in Hilliard *v.* Richardson, that the price to be paid was a specific sum, and it is not surprising that at first this fact was seized upon as the turning point in determining whether the relation was that of master and servant, or of contractor and contractee. See Brackett *v.* Lubke, 4 Allen, 138; Forsyth *v.* Hooper, 11 Allen, 419. Later the method of payment was held to be not the test, but whether the person employed "was in the exercise of a distinct and independent employment, using his own means and methods for accomplishing his work, and not being under the immediate supervision and control of his employer." Morgan *v.* Sears, 159 Mass. 570, 574. See, also, Dane *v.* Chemical Co., 164 Mass. 453, 456; Harding *v.* City of Boston, 163 Mass. 14; Hexamer *v.* Webb, 101 N. Y. 377, 385; Corbin *v.* American Mills, 27 Conn. 274; Murray *v.* Currie, L. R. 6 C. P. 24.

In the case at bar the burden of proof was upon the plaintiff to show that the relation of master and servant existed between the defendant and Sawyer. This was not shown. The language of the auditor, when he says, "I do not find that said Sawyer made any contract with the defendant to stop the water from running into its cellar," would seem to mean "no contract in writing." But this is not important. There was clearly a verbal contract either to stop the water from running into the cellar, or to try to stop it, — and it is immaterial which, — for which Sawyer was to have a reasonable compensation. In carrying out this contract, the plaintiff was in-

jured by the negligence of the servants of Sawyer, who were hired by his representative, Grenier. The defendant neither hired these servants, nor was under any obligation to pay them. It exercised no control over them, nor, so far as appears, had any right to exercise such control. The method and manner of doing the work were left entirely to the skill and judgment of Sawyer, who, on the facts found, does not appear not to have been an independent contractor, for the negligence of whose servants the defendant is not shown to have been responsible. The first instruction requested should therefore have been given, at least in substance.

The second instruction requested was properly refused. The auditor did not find that the plaintiff was guilty of negligence in not removing the pile of earth before the storm. We cannot say, as matter of law, that the plaintiff was not in the exercise of reasonable care.

Exceptions sustained.

KNOWLTON, J. I do not agree to the opinion of the majority of the court. I cannot make plain the reasons for my dissent without stating propositions which seem to me elementary. If the cashier had directed the janitor of the bank to dig up the earth and stop the opening in the wall, I think no one would doubt that the janitor would have been the servant of the bank in doing the work. The same result would as certainly have followed if the cashier had found a laborer waiting for a job at the corner of a street, and had employed him to do the work under the same general direction. In each case, irrespective of the amount or mode of payment, the employee would be the servant of the bank in such a sense as to create a liability from the bank to third persons for the consequences of his negligence. This is because the business that would be going on in making the repairs would be the bank's business, of which it would have a perfect legal right of control. It could at any time suspend or continue the work, and the employee would be all the time subject to any direction that it might choose to give. He would have no right for a moment to do anything against the will of the bank, and in everything he did he would be the representative of the principal proprietor. Under such circumstances, the proprietor is justly held accountable to third persons for that which is done. One working in such a way is, in reference to persons affected by his work, the servant of the proprietor.

If the work is done by an independent contractor under an agreement which makes him accountable only for the result to be produced, and which gives him a right to determine how the result shall be accomplished, and to control the persons and instrumentalities employed to accomplish it, this contractor becomes the proprietor of the business included in the contract; and the owner with whom he contracts is not responsible for his methods, or for those of

his servants. But so long as the owner makes no contract that divests him of the proprietorship of the business as it goes on, and of the legal right to control it, his rights and liabilities are not affected by the fact that he chooses to intrust the management to a servant who is an expert. It often happens that a servant is a person of great skill and experience in the business in which he is engaged, and that the master is entirely incompetent to do the work with his own hands, or even to give intelligent directions about the details. It never was held that the legal relations of the parties are any different in cases where the master tells the servant what he wants done, and leaves to him the method of doing it, from their relations in those where the master gives personal directions in every detail. The proposition that liability to third persons depends, not upon the exercise of control by the owner, but upon the right to exercise it, was elaborately stated in the charge to the jury in Linnehan *v.* Rollins, 137 Mass. 123, and the instructions were approved by this court. The principle is familiar law, and has been applied in many cases. . . .

The present seems to me an ordinary case of one who procures from another, to do certain work, servants who are supposed to know how to do it. It does not appear, nor is it material, whether the first part of the first instruction requested properly could have been given, namely, that "the relation of master and servant did not exist between Sawyer and the defendant"; for, so far as appears, Sawyer did not serve personally in the business, but did the work only in the sense that he furnished his servants to do it, and was to receive a reasonable compensation for their services. This he did through his foreman, who received the order and acted under it. The defendant all the time had the legal right to control all the work in every particular. There was no contract to prevent the defendant from suspending it at any time, or from making any change that it chose in regard to it. The fact that the defendant chose to leave the method of doing it to Sawyer's foreman is immaterial.

The case is identical in its legal principles, and almost identical in its facts, with Stone *v.* Codman, 15 Pick. 297, which is discussed and approved by Mr. Justice Thomas in Hilliard *v.* Richardson, 3 Gray, 349–351. In my judgment, it is impossible to make a legal distinction between the two cases. In Hilliard *v.* Richardson many other cases are considered, and among them Sadler *v.* Henlock, 4 El. & Bl. 570, which is also very similar to the case at bar.

I am of opinion that the auditor and the judge of the superior court were right in their rulings.

LAWRENCE *v.* SHIPMAN.

39 Conn. 586. 1873.

THE following opinion was given by Hon. O. S. Seymour, Judge of the Supreme Court, in two cases in the Superior Court in Hartford County, submitted to him as an arbitrator, under a rule of court, by William T. Lawrence, plaintiff in the one, and Peter Lux, plaintiff in the other, and Nathaniel Shipman and George M. Bartholomew, defendants in both cases, the defendants being trustees. The questions of law considered and decided make the opinion one of interest to the profession and the public. The facts are sufficiently stated by the judge.

JUDGE SEYMOUR'S OPINION. These two cases have been submitted to me as arbitrator under a rule of court. The two are substantially alike. The plaintiffs were respectively tenants of the defendants, occupying a brick building called the Russ Place, which the defendants owned as trustees in fee, situate on the west side of Main street, in the city of Hartford. The plaintiffs aver that while they were thus occupying the tenement on the 13th day of July, 1869, and for several days next previous thereto, the defendants carelessly and negligently excavated and removed, and caused to be excavated and removed, the earth and foundation from under the south wall of said tenement and did thereby remove the necessary support of said wall, and on said day had negligently and carelessly made and caused to be made the excavation and removal aforesaid, without providing other necessary support of said wall, and had negligently omitted to shore up said wall as aforesaid, although warned by the plaintiffs of the danger, whereby the wall sank and fell and the whole building was demolished, and the plaintiffs' goods of great value were destroyed.

There is no serious conflict of testimony. Indeed most of the facts are agreed to. The relation of the parties to each other is as stated in the writ. One Duffy owned the premises south of and adjoining those of the defendants, and he had pulled down a tenement on his lot in order to rebuild. Neither building had a cellar. Duffy had made considerable progress in digging a cellar on his lot, when he had a communication with the defendants proposing that they should join him in building a party wall of stone under the south wall of the defendants' tenement. Duffy's proposition was favorably entertained, and resulted in a verbal contract with a builder and mason by trade, to remove the earth from under the south wall of the defendants' tenement and underpin it with stone. He was to furnish everything needed for the job. The stone structure was to be laid eight feet below the sidewalk and was to extend the depth of the defendants' building, and was to be two and a half feet in

thickness, nine inches being on Duffy's land and one foot nine inches on the defendants' land. The price agreed on was $500, one-half to be paid by Mr. Duffy and one-half by the defendants. The defendants and Mr. Duffy were the contracting parties on one side and the mason on the other. The defendants did not have, now were they by the terms of the contract to have, any oversight or direction of the job. They relied on the skill and experience of the mason to do the work properly, carefully, and according to his contract.

The contractor commenced his work about the 12th of July, undermining at first about nine feet of the defendants' wall and immediately began filling up the gap with stone. On the 13th he continued the stone work, but unfortunately and unadvisedly he undermined the wall at another place before the first gap was filled and thus weakened the foundation, so that at about half-past three o'clock in the afternoon of the 13th of July, the whole building tumbled into a mass of shapeless ruins. The occupants barely escaped with their lives, saving none of their property.

The principal question of law raised in the case arises out of the foregoing facts. Some other facts, however, appeared in evidence which will be hereafter noticed, as bearing upon the question of the defendants' liability. The first question suggested is, whether this negligence of the mason can in law be imputed to the defendants. If he was their servant his carelessness is in law theirs. If, on the other hand, he was merely a contractor, acting as such in an independent business, they are not under the general rule of law liable. though they may even then under certain circumstances be held responsible. Whatever obscurity may heretofore have rested upon the distinction between servant and contractor, it is now established law that such a distinction exists, and the elements which distinguish one from the other by the modern decisions have been determined with considerable approach to exactness and accuracy, though it must be admitted that in some instances the distinction is nice and difficult. In this case it is to be noticed:

1. That the mason was employed in a single transaction at a specified price for the job.

2. By the terms of the contract he was to accomplish a certain specified result, the choice of means and methods and details being left wholly to him.

3. The employment was of a mechanic in his regular business, recognized as a distinct trade, requiring skill and experience, and to which apprenticeships are served.

4. The contractor's duty was to conform himself to the terms of the contract, and he was not subject to the immediate direction and control of his employers.

These circumstances by all the authorities indicate a contractor in contradistinction from a mere servant, and the defendants cannot in

my judgment be subjected for the negligence of the contractor, upon the basis of the relation of master and servant. But it was suggested in the argument that as the contractor was at work upon the defendants' property, by their procurement and for their benefit, and being selected by them, natural justice requires that they should bear the consequences of his negligence rather than the plaintiffs, who are innocent sufferers, having had no agency whatever in the transaction which caused the loss.

These suggestions are not without a show of reason, and their force is fully admitted in the law as applicable to a certain class of cases.

1. If a contractor faithfully performs his contract, and a third person is injured by the contractor, in the course of its due performance, or by its result, the employer is liable, for he causes the precise act to be done which occasions the injury; but for negligences of the contractor, not done *under* the contract but in *violation* of it, the employer is in general not liable. It is not claimed here that the injury to the plaintiffs arose from the due *performance* of the contract. On the contrary, it resulted from the *breach* of the contract, by the contractor not doing his work with suitable care.

2. If I employ a contractor to do a job of work for me which in the progress of its execution obviously exposes others to unusual peril, I ought, I think, to be responsible upon the same principle as in the last case, for I cause acts to be done which naturally expose others to injury. The case now before me could not, however, I think, come under this head. The peril, whatever it was, was mainly to the defendants' own tenement, and cannot be treated, notwithstanding the unfortunate event, as one at all imminent to the plaintiffs.

3. If I employ as a contractor a person incompetent and untrustworthy, I may be liable for injuries done to third persons by his carelessness in the execution of his contract. This, too, has no application to the case before me. But the plaintiffs claim that the same principle is applicable to the employment of a person pecuniarily irresponsible, and evidence was received, subject to objection, that the contractor was destitute of property; and I am called upon to decide the effect of this fact. I am not prepared to say that this fact may not be one of some weight where the work to be done is hazardous to others. If a person having an interest in a job which naturally exposes others to peril, should attempt to shield himself from responsibility by contracting with a bankrupt mechanic, I think the employers might be subjected for damages done by the contractor, but, as before stated, the work to be done by the contractor involved no peril in its usual performance, and I cannot hold the defendants liable under this claim.

4. The employers may be guilty of personal neglect, connecting

itself with the negligence of the contractor in such manner as to render both liable. I find no precedents to guide me under this head, but the principles of law lead inevitably to this conclusion.

[Here follows an examination of the evidence on this point, which is omitted by the reporter; the conclusion of the judge being that the defendants had not been guilty of any personal negligence.]

I therefore award that the defendants are not guilty in manner and form as alleged.

There are other cases than those mentioned in which the employer is liable for the negligence of his contractor, but they have no special application to the matter before me. I will barely allude to them. It has always been understood that if the negligence creates a nuisance the employer is liable, though in a late English case this seems to be somewhat doubted. Overton *v.* Freeman, 11 C. B. 867. So if the contract is to do an unlawful thing, the employer as well as the contractor is liable for the damage done in the execution of the contract. There was formerly a doubt whether the owner of real property could be protected from liability caused by work upon it by a contractor, but it is now settled that real and personal property stand upon the same footing in this respect.

These cases are submitted to me as an arbitrator, with full power, as I understand, upon questions of law and fact. The plaintiffs are innocent sufferers to a large amount by the fall of this building. The suits have been very fairly conducted with a view to a full investigation of the facts and the law applicable to the facts. There are circumstances connected with the case which I think justify me in making the matter so far a matter of mere arbitration as to award that no costs be taxed against the plaintiffs, and that the arbitrator's fees be paid half by the plaintiffs and half by the defendants.[1]

O. S. SEYMOUR.

[1] Accord: Engel *v.* Eureka Club, 137 N. Y. 100. In this case the defendant had contracted with a builder to alter defendant's building. In making the alterations a wall of the building fell, killing the plaintiff's wife. In an action brought to recover damages for her death the court, after stating the general rule as to the exemption from liability of an employer for the acts of an independent contractor, said:

"There are well-understood exceptions to this rule of exemption. Cases of statutory duty imposed upon individuals or corporations; of contracts which are unlawful, or which provide for the doing of acts which when performed will create a nuisance, are exceptions. In cases of the first-mentioned class the power and duty imposed cannot be delegated so as to exempt the person who accepts the duty imposed, from responsibility, and in those of the second class exemption from liability would be manifestly contrary to public policy, since it would shield the one who directed the commission of the wrong. (Storrs *v.* City of Utica, 17 N. Y. 104; Lowell *v.* L. & B. R. R. Co., 23 Pick. 24; Hole *v.* S. S. R. Co., 6 H. & N. 488; Butler *v.* Hunter, 7 Id. 826.) There are cases of still another class, where the thing contracted to be done is necessarily attended with danger, however skilfully and carefully performed, or, in the language of Judge DILLON, is 'intrinsically dangerous,' in which case it is held that the party who lets the contract to do the act, cannot thereby escape from responsibility for any injury resulting from its execution, although the act to be performed may be lawful (2 Dillon on Mun. Corp. § 1029, and cases cited). But if the act to be done may be safely done in the exercise of due care, although in the absence of such care injurious consequences to third persons would be likely to result, then the contractor alone is liable, provided it was his

BOOMER *v.* WILBUR ET AL.

176 Mass. 482. 1900.

TORT for personal injuries occasioned to the plaintiff by the fall of brick and mortar from a chimney on the house of the defendants upon the plaintiff while she was passing below on the sidewalk. There was a judgment for plaintiff, and defendants except.

HAMMOND, J. The court instructed the jury, in substance, that where, under a contract between the owner of a house and the person doing the work, work is done upon the house, and the owner retains the right of access to and the control of, the premises, and such work is ordinarily attended with danger to the public unless proper precautions are taken to avoid it, the owner is bound to the exercise of due care to see that such precautions are taken for the safety of the public; and if, by reason of the failure to take such precautions, a person lawfully on the street and in the exercise of due care is injured, the owner is answerable notwithstanding the work is being done under a contract between him and the contractor.

Having stated this as a general rule, the court applied it to this case as follows: "If the defendants employed a person to repair the chimneys on their buildings adjoining the highway under the contract, to repair them for a fixed sum, and the defendants retained the right, retained control, and the right of access to the building, and such work on the chimneys would ordinarily be attended with danger to the public, unless proper precautions to avoid it were taken, the defendants were bound to take proper precautions, or to see that proper precautions were taken, for the safety of the public; and, if the plaintiff was injured while she was lawfully on the street adjoining the defendant's premises, and in the exercise of due care, by reason of the failure of the defendants to take proper precautions, or by reason of their failure to see that proper precautions were taken, to avoid such injury, then the defendants are liable for the injury."

We understand these instructions to mean that, even if the defendants employed a competent independent contractor to repair these chimneys, who was to do the work without any dictation or supervision on the part of the defendants over the details of the

duty under the contract to exercise such care. (McCafferty *v.* L. D. & P. M. R. R. Co., 61 N. Y. 178; Conners *v.* Hennessey, 112 Mass. 96; Butler *v.* Hunter, *supra*.)

"The application of these principles to this case exonerates the defendant from liability. The taking down of the wall was not intrinsically dangerous. The only danger to be apprehended was in doing it carelessly or unskilfully. It was in the manner of doing it and not in the thing itself. The danger of leaving the wall without support was obvious, and could have been easily avoided, and the usual method required that precautions should be taken. It was the duty of the contractor to take such precautions, because it was implied in his contract that he should take down the wall in a careful and proper manner (POLLOCK, C. B., Butler *v.* Hunter, *supra*)." Pages 104, 105.

work, or the manner in which it should be done, the defendants would be answerable for the failure of the contractor to take proper precautions to protect travellers upon the highway from falling bricks.

While the master is liable for the negligence of the servant, yet when the person employed is engaged under an entire contract for a gross sum in an independent operation, and is not subject to the direction and control of his employer, the relation is not regarded as that of master and servant, but as that of contractor and contractee; and in such case the general rule is that the negligence of the contracting party cannot be charged upon him for whom the work is to be done; and this rule is applicable even where the owner of the land is the person who hires the contractor, and for whose benefit the work is done. Hilliard *v.* Richardson, 3 Gray, 349; Forsyth *v.* Hooper, 11 Allen, 419; Conners *v.* Hennessey, 112 Mass. 96; Harding *v.* City of Boston, 163 Mass. 18. There are, however, some well-known exceptions to the rule. If the performance of the work will necessarily bring wrongful consequences to pass unless guarded against, and if the contract cannot be performed except under the right of the employer who retains the right of access, the law may hold the employer answerable for negligence in the performance of the work.

Woodman *v.* Railroad Co., 149 Mass. 335, was such a case, and the defendant was held liable for the act of an independent contractor hired by it to dig up and obstruct the streets for the purpose of laying down the track, upon the ground that the contract called for an obstruction to the highway which necessarily would be a nuisance unless properly guarded against.

The same principle is further illustrated in Curtis *v.* Kiley, 153 Mass. 123, and Thompson *v.* Railway Co., 170 Mass. 577.

Again, if the contract calls for the construction of a nuisance upon the land of the employer, he may be held answerable for the consequences. In Gorham *v.* Gross, 125 Mass. 232, the defendant had caused to be constructed by an independent contractor a party wall, half on the defendant's land and half upon adjoining land; and after it was completed and accepted it fell, causing damage to the property of the adjoining landowner. There was evidence that the fall of the wall was occasioned by negligence in its construction. The court said that the wall as constructed was a nuisance "likely to do mischief," and held the defendant answerable for the damage caused by its fall. To the same effect is Cork *v.* Blossom, 162 Mass. 330.

The instructions to the jury allowed them to find a verdict for the plaintiff, not upon the ground that the chimney was a nuisance "likely to do mischief," but upon the ground that the work of repair called for by the contract was necessarily a nuisance, within the rule stated in Woodman *v.* Railroad Co., *ubi supra*, and other similar cases.

The work called for was the repair of chimneys. At most, the brick were to be taken off for a few feet, and relaid. The work which was to be done was not such as would necessarily endanger persons in the street. It did not involve throwing the brick into the street, or causing or allowing them to fall so as to endanger persons travelling therein. It is plain that, unless there was negligence in the actual handling of the brick, there could be no injury to the passing traveller. The case very much resembles Pye *v.* Faxon, 156 Mass. 471. The plaintiff in that case, being the tenant of a house, sued the owner of an adjoining lot for trespasses alleged to have been committed upon the plaintiff's estate by the defendant while engaged in constructing a large building on his lot. It appeared from the testimony that the wall next to the plaintiff's house was not built on the boundary line, but was several inches from it, and that the staging used in building it was placed upon the inside; that the brick, when laid, pressed out the mortar, which was then scraped off by the trowels of the masons, and some of it dropped upon the plaintiff's land, upon her rear windows, and upon the clothes hanging in her back yard. At the trial the presiding judge instructed the jury that, if the dropping of the mortar was from the carelessness of the workmen, the defendant was not liable, but, if it was something necessarily involved in the building of the wall, then he might be liable; and these instructions were held to be correct.

This is not a case where the work, even if properly done, creates a peril, unless guarded against, as in the cases relied upon by the plaintiff. The accident was caused by the act of the contractor in doing what it was not necessary for him to do, what he was not expected to do, and what he did not intend to do. If it had been necessary for him to topple the chimney over into the street, or to remove the bricks by letting them fall into it, or the contract had contemplated such action, the instructions would not have been objectionable; but, as this was not necessary or intended, the work could not be classed as work which, if properly done, was ordinarily attended with danger to the public.

The negligence, if any, was in a mere detail of the work. The contract did not contemplate such negligence, and the negligent party is the only one to be held. The case is clearly distinguishable from Woodman *v.* Railroad Co. *ubi supra*, and others of a like character, and must be classed with Conners *v.* Hennessey, *ubi supra*, and others like it. . . . *Exceptions sustained.*

BERG *v.* PARSONS.

156 N. Y. 109. 1898.

APPEAL from a judgment of the late General Term of the Supreme Court in the first judicial department, entered November 20, 1895, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

This action was brought to recover damages alleged to have been sustained by plaintiff by reason of the carelessness of a contractor employed by the defendant to blast out a cellar upon his premises, which were adjacent to those of the plaintiff.

The facts are stated in the dissenting opinion.

MARTIN, J. The doctrine of *respondeat superior* is based upon the relation of master and servant or principal and agent. As no such relation existed between the parties, I find no ground upon which the judgment in this action can be sustained.

The rule that where the relation of master and servant or principal and agent does not exist, but an injury results from negligence in the performance of work by a contractor, the party with whom he contracts is not responsible for his negligence or that of his servants, is well established by the authorities in this state. (Blake *v.* Ferris, 5 N. Y. 48; Pack *v.* Mayor, etc., 8 N. Y. 222; Kelly *v.* Mayor, etc., 11 N. Y. 432; McCafferty *v.* S. D. & P. M. R. R. Co., 61 N. Y. 178; King *v.* N. Y. C. & H. R. R. R. Co., 66 N. Y. 181; Town of Pierrepont *v.* Loveless, 72 N. Y. 211; Ferguson *v.* Hubbell, 97 N. Y. 507; Herrington *v.* Village of Lansingburgh, 110 N. Y. 145; Roemer *v.* Striker, 142 N. Y. 134.) . . .

It seems to me that the principle of these decisions is decisive of the case at bar, and is directly adverse to the contention of the respondent. . . .

There are certain exceptional cases where a person employing a contractor is liable, which, briefly stated, are: Where the employer personally interferes with the work, and the acts performed by him occasion the injury; where the thing contracted to be done is unlawful; where the acts performed create a public nuisance; and where an employer is bound by a statute to do a thing efficiently and an injury results from its inefficiency. Manifestly, this case falls within none of the exceptions to which we have referred. There was no interference by the defendant. The thing contracted to be done was lawful. The work did not constitute a public nuisance, and there was no statute binding the defendant to efficiently perform it. In none of those exceptional cases does the question of negligence arise. There the action is based upon the wrongful act of the party, and may be maintained against the author or the person performing

or continuing it. In the case at bar the work contracted for was lawful and necessary for the improvement and use of the defendant's property. Consequently no liability can be based upon the illegality of the transaction, but it must stand upon the negligence of the contractor or his employee alone. It seems very obvious that, under the authorities, the defendant was not responsible for the acts of the contractor or his employees, and that the court should have granted the defendant's motion for a nonsuit. If a contrary rule were established it would not only impose upon the owners of real property an improper restraint in contracting for its improvement, but would open a new and unlimited field for actions for the negligence of others which has not hitherto existed in this state, and practically overrule a long line of decisions in this court which firmly establish a contrary doctrine.

It follows that the judgment should be reversed.

GRAY, J. (dissenting). The question is whether, in a case like the present one, where the work contracted for is obviously and necessarily hazardous, it is an assumption inconsistent with the doctrine of exemption for the acts of an independent contractor that a legal duty is imposed upon him who employs the contractor to use a reasonable amount of care, in the selection of one who is both competent and careful, and that for a failure to perform that duty he may be held for the damages occasioned by negligence.

The plaintiff and the defendant were owners of adjoining pieces of real estate in the city of New York. Upon the plaintiff's property there was a dwelling-house. The defendant's property was vacant and was covered with a mass of rock, which extended above the curb. The defendant made a contract with one Tobin to excavate his plot to the depth of ten feet below the curb line, preparatory to building thereon. In the performance of the contract, Tobin appears to have proceeded unskilfully and with considerable recklessness and, in the work of blasting, he caused some damage to the plaintiff's house, both within and without. For the damage so sustained the plaintiff brought the present action. The complaint charged, and the case went to the jury upon the theory, that the defendant had failed to exercise proper care, or a due regard, for the safety of the plaintiff's premises in the selection of a competent and careful contractor to do the dangerous work of excavating the earth and rock. The defense was, in substance, that the person employed by the defendant for the purpose was an independent contractor, having the entire control and management of the work, and that as the result of inquiries, showing him to be a competent, skilful, and careful contractor, the defendant had made the contract with him. Upon the trial, the evidence showed that the defendant had committed to one Squier the supervision of the construction of the building upon his land and that he acted for him in all per-

tinent matters. Squier was a builder of very considerable experience and had had much to do with contracts in the building of houses in the city. He had never heard of Tobin, before giving him the contract for the work in question. That work was shown to have been plainly of a hazardous nature; inasmuch as it necessitated the blasting out of a ledge of rock, which extended close up to the wall of the plaintiff's adjoining house. There was evidence to the effect that it was quite possible to do this work of excavation without causing injury to the adjoining building, and that work of that description was being constantly done in the city, with safety to adjoining premises. The way that Tobin performed his contract warranted a belief that he was incompetent and reckless. He was the lowest bidder for the work. The evidence showed him to be an illiterate person and of intemperate habits; whose appearance and surroundings might permit inferences adverse to his fitness to do responsible work of such a nature. There was testimony concerning two previous jobs of a similar nature, from which it might be inferred that Tobin was either reckless, or lacked skill. Squier testified, for the defendant, to having inquired of the representative of a real estate operator about Tobin; who spoke of him as a good and careful blaster, and he visited two places, to which Tobin had referred him, to see work that he had done. That inquiry satisfied him. He denied any knowledge of Tobin's habits; but he made no inquiry concerning them. A witness testified to having employed Tobin upon rock excavation and to having found him satisfactory in his work. While there was evidence of some care having been exercised by the defendant's agent, was it of that conclusive nature which precluded criticism? As the case stood, it could not be said as matter of law that the defendant had discharged his whole duty towards the plaintiff, in the matter of the selection and employment of a proper person to perform the required work. There was a fair question upon the evidence, whether, in initiating a work which, under the particular circumstances, was necessarily fraught with some danger to the adjoining property, the defendant had exercised a reasonable degree of prudence in the employment of Tobin. The plaintiff was not obliged to show that the defendant knew about the characteristics and previous conduct of Tobin; but, there being evidence, in the testimony of the witnesses, affecting his capacity and habits, previously to the employment, it became a question whether defendant's inquiries were sufficient and such as a prudent man would have made, who realized the hazards involved to the adjoining property and who intended to proceed about the employment of a contractor, as he would have expected to be done by if the positions were reversed. The plaintiff recovered a verdict for the amount of the expense to which he had been put in repairing the damage done to his house. It is, of course, evident from that ver-

dict that the evidence had failed to satisfy the jury that the defendant had proceeded in the matter with a due regard for his neighbor's rights, or that Tobin was the kind of man to be intrusted with a job demanding both skill and a sense of responsibility.

If there was evidence raising a question as to whether the defendant had exercised reasonable care in contracting out this work to Tobin, then I think it was properly submitted to the determination of the jury. What is there in the doctrine, behind which the defendant seeks to shelter himself, which should interfere with the trial and submission of the issue which was tendered by the complaint and accepted by the answer; namely, whether proper care had been exercised by the defendant in committing the work to Tobin? The argument for the defendant is, as Tobin was performing his work as an independent contractor, that he and his men were not under the supervision or control of the defendant and that, as no relation of master and servant existed, the defendant could come under no liability for Tobin's negligent acts.

The doctrine, which exempts a person from liability for damages caused by the negligence of an independent contractor employed by him, is well established in this state. It rests upon a basis of justice and of reason and was a departure from the general doctrine of the responsibility of the master for the servant's acts; which the courts, both in England and this state, have agreed upon within comparatively recent years. (Quarman *v.* Burnett, 6 M. & W. 499; Reedie *v.* Railway Co., 4 Exch. 254; Blake *v.* Ferris, 5 N. Y. 48; Storrs *v.* City of Utica, 17 ib. 104.) Formerly, the rule *respondeat superior* was deemed controlling and the legal relation of master and servant, to which it was applicable, received the broad extension, within which the employer of another became responsible for the other's acts, upon the principle *qui facit per alium facit per se.* That, as a maxim, handed down from the Roman Code, meant that the agency of the servant was an instrument of his employer. Any man having authority over another's actions, who commands him to do an act, or who may be deemed to have impliedly commanded him, in the ordinary course of his employment, or business, becomes responsible for his acts, as for his own. The injustice, however, of applying this principle to a situation where a person is engaged in doing a piece of work, under an employment or a contract, in the performance of which he uses his own means and his own servants, without any control upon the part of the general employer, became apparent. It was evident that the relation of master and servant did not exist, when the relation between the parties was governed by such an engagement or contract. Whereas, under the operation of the rule, *respondeat superior*, the injured person might hold the master responsible and disregard the servant, who was the immediate author of the injury; under the introduction of the reasonable modification

of that rule, the independent contractor, and not the general employer, became responsible for negligent acts, committed in person, or by those under his orders.

The principle of the decision below, in the present case, in my judgment, in no respect weakens the doctrine of the exemption of the general employer from liability for damages caused by the negligence of the independent contractor; nor, in any wise, threatens its stability. Nor does it affect it, otherwise than by establishing a reasonable safeguard against too broad a claim for exemption. It seems to me a proposition, as clear as it is reasonable, that the assumption that there has been an exercise of due care in the selection of a competent and careful contractor, is a part of the foundation for the doctrine. I do not think that it would do to hold that a person, by the mere act of employing a contractor to do some work of a nature in itself obviously hazardous to others, thereby discharges himself of all responsibility. Something more is required of him. With that due regard for his neighbor's rights, which is obligatory upon all, in the use which they make of their own property, he should be held to the exercise of reasonable care and of some deliberation in the selection of a contractor. We are referred to decisions of the courts of other states, where this duty on the part of a general employer seems to have been distinctly recognized (Norwalk Gaslight Co. *v.* Borough of Norwalk, 63 Conn. 495; Brannok *v.* Elmore, 114 Mo. 55), and while precisely a similar case to this may not be found in our reports, the reasonableness of the proposition commends and sustains it. As I have suggested, it may be assumed as an inherent element of the employer's claim for exemption. (See Wharton on Negligence, sec. 181; Story on Agency, 9th ed., sec. 454a, at p. 556, note; Cuff *v.* R. R. Co., 35 N. J. Law, 17; Ardesco Oil Co. *v.* Gilson, 63 Pa. St. 146; Sturgis *v.* Theological Educational Society, 130 Mass. 414). In the text books and cases just referred to, it will be observed that the assumption I mention is recognized as one associated with the employment of an independent contractor. I do not think it needs much argument to vindicate the entire propriety of the assumption. The exemption from liability should not be so broad as to exclude the consideration of the manner in which the independent contractor was selected for the particular work. When we consider the hazards incident to the work of blasting, in a city block, there ought to be no question, where the work is obviously and necessarily of a dangerous nature, as to the propriety of imposing upon the owner of the property to be improved thereby a legal duty to exercise proper care in the selection of his contractor. If that be true, then the question of the exercise of due care becomes one of fact upon the evidence. If there is evidence proving, or tending to prove, that the contractor was an incompetent, or a reckless, or an unfit person to be entrusted with the job and that it was possible for the defendant

to have discovered these facts by inquiry; then it is for the jury to render their verdict upon the issue between the parties. It is not essential that the defendant be shown to have known of the acts of incompetency, or of the conduct from which unfitness may be inferred. It is sufficient if it appear that no sufficient inquiry had been made, and that a careful inquiry might have revealed the incompetency or the unfitness. The circumstances of the selection of the contractor might be such as to justify a belief that there was a failure to exercise care and prudence in the matter.

The conclusion, therefore, which I reach after a careful consideration of the question is that the defendant, in employing a contractor to blast out the rock upon his premises, a work obviously dangerous to the adjoining owner, owed a legal duty to the plaintiff to carefully select one who was both competent and careful, and that for a failure to perform that duty, under the circumstances of this case, he became responsible for any injury to the plaintiff's property resulting from the contractor's negligence. I think that there was evidence adduced, from which the jury might infer that the defendant had not proceeded with that care and due regard for the plaintiff's rights, which were incumbent upon him. It may not have been very strong; but it cannot be said that there was none giving rise to inferences. Minds might differ upon the question; but that only goes to show the necessity of leaving it to the arbitrament of a jury. The learned justices below have thought that there was a question for the jury upon the evidence. I think that they were right and that there are no errors calling for a reversal of this judgment.

PARKER, Ch. J., O'BRIEN and VANN, JJ., concur with MARTIN, J., for reversal; BARTLETT and HAIGHT, JJ., concur with GRAY, J., for affirmance.

Judgment reversed and a new trial granted, with costs to abide the event.[1]

DEMING *v.* THE TERMINAL RAILWAY OF BUFFALO, ET AL.

169 N. Y. 1. 1901.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 28, 1900, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

[1] On the point discussed in the dissenting opinion, see Hawke *v.* Brown, 28 N. Y. App. Div. 37.

PARKER, Ch. J. The Terminal Railway of Buffalo, a corporation duly organized under the laws of this state for the purpose of constructing a railroad to form a connecting link between the Lake Shore and Michigan Southern and the New York Central and Hudson River railroads, was in 1897 engaged in constructing its road from Depew to Blaisdell, to which end it entered into a contract with the firm of Smith & Lally by the terms of which that firm was to perform the entire work of construction in accordance with certain plans and specifications which were made a part of the contract. By the order of the Supreme Court made in pursuance of statute defendant was permitted to construct its road across the White Corners road, a public highway extending from the city of Buffalo to the village of Hamburg, a condition imposed by the order being that it should comply with the statute and restore the highway to such state as not to impair its usefulness. The plans and specifications required that such highway should be lifted eight feet and five inches above its original grade and that the railroad track should be depressed about twelve feet below the original grade, the highway then to be carried across the track by means of an overhead bridge.

About the seventh of September work was begun at this point, and the contractors in the course of their operations removed the earth from the west to the east side of the highway resulting in the formation of an embankment covering a little over one-half of the highway for a distance of about six hundred feet north of the proposed crossing, and it extended up to within fifty or one hundred feet of the temporary track. It was about twelve feet wide on top, the sides sloping gradually and its maximum height was seven feet. When completed it was designed to serve as the roadbed of the northerly approach to the bridge over the tracks. The highway at this point was four rods wide, and the presence of the embankment left a space of about thirty feet in width upon the west side thereof for the passage of teams, but only about twelve or fifteen feet of this space was used by the travelling public.

During the evening of September 16th, 1897, the plaintiff and her husband, in company with some ten or twelve other people, while going from Hamburg to Buffalo in a four-seated drag drawn by four horses, in charge of a competent driver, who was ignorant of the existence of the embankment, struck it with the drag, which immediately tipped over, throwing the plaintiff to the ground, from which she received severe injuries. There were no lights upon or in the vicinity of the embankment to warn passers-by of the interference with, and dangerous condition of the highway, and the night was dark and rainy.

The plaintiff had a recovery which the Appellate Division affirmed and afterwards allowed an appeal to this court. Through requests to charge, which were refused, and exceptions taken to the charge as

made appellant is enabled to present in this court the question whether it is liable because of the omission to properly guard the embankment on the night in question. Its claim is that having let the contract of constructing the entire road to competent and skilful independent contractors, it is not liable for any failure on their part to protect passers-by upon the highway by placing lights upon the embankment and otherwise guarding it.

The first authority cited by it in support of its position is the well-known case of Blake *v.* Ferris (5 N. Y. 48) wherein it was held that "where persons having a license or a grant to construct at their own expense a sewer in a public street engage another person to construct it at a stipulated price for the whole work they are not liable to other persons for any injuries resulting from the negligent manner in which the sewer may be left at night by the workmen employed in its construction." In that case the license or grant given by the city authorities contained a provision "that the grantees should cause proper guards and lights to be placed at the excavation and should be answerable for damages or injuries which might be occasioned to persons, animals or property in the construction of the sewer." But the court after a very able discussion of the doctrine of *respondeat superior*, reached the conclusion that only an immediate employer of the agent or servant who neglected to properly guard the sewer on the night when the injuries occurred was responsible for that negligent act. It must be conceded, if that case was properly decided, that the defendant is not liable for the failure of the contractors, their agents or servants, in this case to properly guard the embankment for the protection of the passers-by upon the highway during the night in question.

The discussion of the doctrine of *respondeat superior* in that case was an exhaustive one, and, indeed, it may be said to be a leading case upon that subject, for it has been cited with approval many times by the courts of this state, and in this court in the following, among other cases: Pack *v.* Mayor etc., of N. Y. (8 N. Y. 222); Kelly *v.* Mayor, etc., of N. Y. (11 N. Y. 432, 433); McCafferty *v.* Spuyten Duyvil & P. M. R. R. Co. (61 N. Y. 178); Herrington *v.* Village of Lansingburgh (110 N. Y. 145); Charlock *v.* Freel (125 N. Y. 357); Butler *v.* Townsend (126 N. Y. 105); Berg *v.* Parsons (156 N. Y. 109, 112); Uppington *v.* City of New York (165 N. Y. 222, 232).

Reference will be made to all of these cases in detail later, but for the present I pass to the first case in this court which challenged the correctness of the decision in Blake *v.* Ferris upon the ground that the doctrine of *respondeat superior* was not applicable to the situation presented in that case, namely, Storrs *v.* City of Utica (17 N. Y. 104). Judge COMSTOCK, in writing the opinion in that case, conceded that the opinion in Blake *v.* Ferris contained a correct exposition of the

doctrine of *respondeat superior,* in which view this court has to this day steadily agreed, but he contended in effect that the doctrine was not applied with strict accuracy to the facts in Blake *v.* Ferris, because the injury did not result from negligence in the actual performance of the work, that is, in the manner in which the work was carried on by the laborers, but that the accident was the result of the work itself, however skilfully performed. He said: "A ditch cannot be dug in a public street and left open and unguarded at night without imminent danger of such casualties. If they do occur, who is the author of the mischief? Is it not he who causes the ditch to be dug, whether he does it with his own hands, employs laborers, or lets it out by contract? If by contract, then I admit that the contractor must respond to third persons if his servants or laborers are negligent in the immediate execution of the work, but the ultimate superior or proprietor first determines that the excavation shall be made, and then he selects his own contractor. Can he escape responsibility for putting a public street in a condition dangerous for travel at night by interposing the contract which he makes as made for the very thing which creates the danger? . . . What then is the obligation of a city corporation when it undertakes to construct a sewer in a public street? Can it in that undertaking, and in any mode of providing for the execution of the work, throw off the duty in question and the responsibilities through which that duty is to be enforced? Although the work may be let out by contract, the corporation still remains charged with the care and control of the street in which the improvement is carried on. The performance of the work necessarily renders the street unsafe for night travel. This is a result which does not at all depend upon the care or negligence of the laborers employed by the contractor. The danger arises from the very nature of the improvement, and if it can be averted only by special precautions, such as placing guards or lighting the street, the corporation which has authorized the work is plainly bound to take these precautions." The reasoning in that case led to the decision, from which only one member of the court dissented, that the city of Utica, because it owed to the public the duty of keeping its streets in a safe condition for travel, was liable to plaintiff for the injuries received owing to the neglect to keep proper lights and guards around an excavation which it had caused to be made by an independent contractor.

In Brusso *v.* City of Buffalo (90 N. Y. 679) the plaintiff, while attempting to cross the street in the night time, fell into an unguarded excavation and received injuries for which the jury awarded him damages. One of the defences was that, while the excavation was made under the direction of a department of the city government, the performance of the work was let to an independent contractor, and the city denied liability for his failure to properly guard the excavation. This court said, Judge EARL writing: "The city was

under an absolute duty to keep its streets in a safe condition for public travel, and was bound to exercise a reasonable diligence and care to accomplish that end, and when it caused the excavation to be made in the street it was bound to see that it was carefully guarded, so as to be reasonably free from danger to travellers upon the street. It is not absolved from its duty and its responsibility because it employed a contractor to make the excavation. This is settled by a long line of decisions in this and several other states." (Citing Storrs *v.* City of Utica, *supra,* and authorities from other jurisdictions.)

Vogel *v.* Mayor, etc., of N. Y. (92 N. Y. 10), presents a very different question from that discussed in the case already referred to, for there the injury was occasioned to plaintiff's lands by the accumulation of surface water owing to the excavations in the street, which were made under a contract with the city in 1858, partly performed and abandoned in 1859. It was not until 1873 that the city employed another person to complete the work, and the city's liability was predicated upon the ground that it permitted this excavation to remain during this long period when it had the power and right to take charge and complete the work, and thus protect the plaintiff's property from injury. In the course of the opinion, Blake *v.* Ferris was held not to be in point, and the court referred with approval to the fact that that case was criticized and questioned in the case of Storrs *v.* City of Utica in that it correctly expounded but improperly applied the doctrine of *respondeat superior.*

In Turner *v.* City of Newburgh (109 N. Y. 301) the city had employed a contractor to do certain work upon a sewer. He had completed his work at that part of the street where the plaintiff fell, owing to a loosened stone which had been undermined by recent rains, leaving it insecure. The city had not yet accepted the work of the contractor, although the street was open at that point for public travel, and on that ground it denied responsibility, and it was held, Judge GRAY writing: "The duty of the city to keep its streets in safe condition for public travel is absolute, and it is bound to exercise a reasonable diligence and care to accomplish that end, and in cases like the present, where it has employed a contractor to do work involving excavation on its streets, it is not absolved from its duty and responsibility." (Citing Storrs *v.* City of Utica and Brusso *v.* City of Buffalo, *supra.*)

In Pettengill *v.* City of Yonkers (116 N. Y. 558) the excavation in the street which occasioned the injury to the plaintiff, owing to the fact that it was not properly guarded at night, was made by a board of water commissioners. The court held the board was a department of the city government, and, therefore, that case did not present the question whether the city would have been liable had the work been done by an independent contractor. In the course of

the opinion, however, it was stated that "a municipality is not absolved from liability because the injury results from the negligence of a contractor with the city who by his contract is bound to properly guard an excavation or to place warning lights." (Citing Turner *v.* City of Newburgh, *supra,* and other cases.)

These cases, as we have seen, recognize the principle that inasmuch as a municipality owes to the public generally the duty of keeping the streets in a safe condition for public travel, although it may temporarily interfere with the streets for the public good by constructing sewers therein, laying water mains and making such other excavations from time to time as the public needs require, it still owes the public the duty of protecting them from falling or driving into such excavations, which in some cases can only be performed by constructing barriers across the streets to prevent their use by the public temporarily, and in others may be fully accomplished by properly lighting such excavations in the night time, and otherwise guarding them so as to permit, without danger to the passer-by, the free use of that portion of the street which has not been interfered with. And this obligation it cannot escape by letting the work of excavation to an independent contractor, although it is legally absolved from injuries resulting from the negligent acts of the servants of the contractor in the prosecution of the work.

Attention will now be given to the leading cases in this court, citing Blake *v.* Ferris, which are claimed by appellant's counsel to fully sustain that case, and also to be in hostility to the decision in Storrs *v.* City of Utica.

(The court then discusses the following cases: Pack *v.* Mayor, 8 N. Y. 222; Kelly *v.* Mayor, 11 N. Y. 432; McCafferty *v.* S. D. & P. M. R. R. Co., 61 N. Y. 178; Herrington *v.* Lansingburgh, 110 N. Y. 145; Charlock *v.* Freel, 125 N. Y. 357; Butler *v.* Townsend, 126 N. Y. 105; Berg *v.* Parsons, 156 N. Y. 109; Uppington *v.* New York, 165 N. Y. 222.)

I have thus called attention to the principal authorities relied upon by the appellant in support of his contention that Blake *v.* Ferris is still the law for every question decided by it, and have pointed out the fact that not one of those cases presents one of the questions decided by the Blake case, namely, that a party having authority to make the public streets dangerous for passers-by may be relieved from the burden of guarding the place of danger in the street by letting the work to an independent contractor. On the other hand, it has been observed that so much of the decision in Blake *v.* Ferris as so decided was distinctly overruled in the Storrs case, the doctrine of which, in that respect, has since been followed in several cases where the question was up for decision. From the time of the decision in the Storrs case until now this court has consistently recognized the distinction between the two cases, rightly treating

Blake *v.* Ferris as the leading case so far as it involves a consideration of the general principles of *respondeat superior*, and the Storrs case as establishing that such rule is not applicable to a case where the injury results from a failure on the part of the municipality to properly guard an excavation or obstruction authorized by it in a public street committed to its care.

Now, dominion over the highway was, by the operation of the statute, upon the order of the Supreme Court, for the purpose of carrying the highway over the railroad tracks, vested in the defendant railroad company, which, having accepted the privileges and benefits conferred upon it by statute, necessarily took with them all the obligations and liabilities in respect to the highway, which its absolute dominion over it for the purpose of carrying it across the railroad track made necessary, among which was the duty of so guarding the obstructions to the highway which were made under its direction as to save passers-by from injury.

The judgment should be affirmed, with costs.

GRAY, O'BRIEN, HAIGHT, LANDON, CULLEN, and WERNER, JJ., concur. *Judgment affirmed.*

CHAPTER XVIII.

TRANSFER OF SERVICE.

DONOVAN *v.* LAING, ETC., SYNDICATE.

[1893] 1 Q. B. (C. A.) 629.

ACTION for damages for personal injury. Appeal from a judgment entered for defendants by the trial judge. The injury to plaintiff was due to the negligence of one Wand who was operating a crane belonging to defendants but which, with the man (Wand) to operate it, had been lent to Jones & Co.

LORD ESHER, M. R. In this case the plaintiff brings an action against the defendants to recover damages for injuries sustained through the negligent act of a man who is said to have been, at the time of committing the negligent act, a servant of the defendants, for whose negligence the defendants are liable. The facts are undisputed. A firm, Messrs. Jones & Co., were engaged in loading a ship from a quay. They had no crane which they could use for that purpose; but the defendants had one, which they were in the habit of lending out with a man in charge of it. On this occasion they lent the crane, with the man in charge, to Jones & Co., for the purpose of assisting in loading the ship. The ordinary mode of using a crane for loading a ship is well known. The goods to be loaded are fastened to the chain and raised, and then the arm of the crane is swung round, so as to bring the goods over the part of the ship where they are to be placed, which is determined by the people who have the control of the loading. How far the crane is to be swung, and how much the chain is to be lowered, depends on what part of the ship the goods are to be placed in, and every act in connection with the working of the crane must be done according to the orders of those who are directing the loading.

In this case the crane and the man to work it were lent by the defendants to Jones & Co., for a consideration, and to be used in the manner I have described. For some purposes, no doubt, the man was the servant of the defendants. Probably, if he had let the crane get out of order by his neglect, and in consequence any one was injured thereby, the defendants might be liable; but the accident in this case did not happen from that cause, but from the manner of working the crane. The man was bound to work the crane according to the orders and under the entire and absolute control of Jones & Co.

That being so, whose servant was the man in charge of the crane as to the working of it? It is true that the defendants selected the man and paid his wages, and these are circumstances which, if nothing else intervened, would be strong to show that he was the servant of the defendants. So, indeed, he was as to a great many things; but as to the working of the crane he was no longer their servant, but bound to work under the orders of Jones & Co., and, if they saw the man misconducting himself in working the crane or disobeying their orders, they would have a right to discharge him from that employment. This conclusion hardly requires authority; but there is authority for it, without going back to an earlier date, in the case of Rourke *v.* White Moss Colliery Co., 2 C. P. D. 205.

There one of the questions was, whose servant a man called Lawrence was. He was the general servant of the defendants, but he was hired out to another person, and so far as concerned the operation which he performed for that person, and in which he was negligent, he was held not to be the servant of the defendants. COCKBURN, C. J., in that case said: "It appears to me that the defendants put the engine and this man Lawrence at Whittle's disposal, just as much as if they had lent both to him. But when one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him." Nothing can be clearer than that. The man was the servant of the defendants; but he was lent to Whittle, and was negligent in the operation in which Whittle employed him, and he was held, so far as that operation was concerned, to be in the employment of Whittle who had the control of the matter on which he was engaged, over which his general master had no control.

The passage referred to from the judgment of Lord Watson in Johnson *v.* Lindsay & Co., [1891] A. C. 371, at p. 382, seems to me to be exactly to the same effect. I only notice the case of Jones *v.* Mayor of Liverpool, 14 Q. B. D. 890, because Grove, J., seems to have thought there was a difference between the cases of a master lending a general servant for a consideration and lending him gratuitously. It seems to me impossible to say that the consideration has anything to do with the principle on which the servant must be held to be in the employ of one or the other. In the present case, so far as the working of the crane went and so long as he was working it, the man in charge was the servant of Jones & Co., and was not the servant of the defendants. The appeal must be dismissed.

BOWEN, L. J. . . . The principal part of the argument for the plaintiff was founded on what may be called the carriage cases: Laugher *v.* Pointer, 5 B. & C. 547, and Quarman *v.* Burnett, 6 M. & W. 499; but they really have nothing to do with the point pre-

sented in this appeal. If a man lets out a carriage on hire to another, he in no sense places the coachman under the control of the hirer, except that the latter may indicate the destination to which he wishes to be driven. The coachman does not become the servant of the person he is driving; and if the coachman acts wrongly, the hirer can only complain to the owner of the carriage. If the hirer actively interferes with the driving, and injury occurs to any one, the hirer may be liable, not as a master, but as the procurer and cause of the wrongful act complained of.

In the present case the defendants parted for a time with control over the work of the man in charge of the crane, and their responsibility for his acts ceased for a time.

I have only to add, that I agree that no difference can arise whether the lending of the servant to another person is in consideration of some reward or not. Such a distinction obviously cannot affect the reasoning on which I have based my judgment.

LINDLEY, L. J., concurs. *Appeal dismissed.*

JONES *v.* SCULLARD.

[1898] 2 Q. B. 565.

ACTION for damages for negligent driving. It appeared that the brougham, the horse, the harness, and the suit of livery which the driver was wearing were the property of the defendant; but the driver, a man named Loveday, was a coachman in the employment of a livery-stable keeper named Walker, at whose stable the defendant kept the brougham and horse. The defendant had kept his horses and carriage at livery at Walker's stable since January 3, 1897. He first began to be driven by Loveday on May 10; but from that date down to the time of the accident Loveday invariably drove for him. After Loveday had driven for him a short time, between May 24 and May 31, the defendant supplied him with a suit of livery which he was wearing at the time of the accident. The particular horse which caused the accident had only been recently purchased by the defendant in the country, and was first brought up to London on June 14, between which date and June 22 it was driven by Loveday at most some three or four times.

LORD RUSSELL OF KILLOWEN, C. J. . . . What control had the livery-stable keeper over the driver while driving the defendant's horse? Absolutely none. The whole control was in the defendant, who could have ordered the driver to go fast or slow, or stop or go on, just as he pleased, or to keep the horse without food, or otherwise manage the horse as he directed. . . . The principle, then, to be extracted from the cases is that, if the hirer simply ap-

plies to the livery-stable keeper to drive him between certain points or for a certain period of time, and the latter supplies all necessary for that purpose, the hirer is in no sense responsible for any negligence on the part of the driver. But it seems to me to be altogether a different case where the brougham, the horse, the harness, and the livery are the property of the person hiring the services of the driver. And in such a case, especially if, as here, the driver has driven the hirer for a considerable period of time and been approved by him, and the horse is one the characteristics or peculiarities of which neither the livery-stable keeper nor his driver have had any practical opportunity of becoming acquainted with, there is, it seems to me, evidence upon which a jury would be justified in coming to the conclusion that the driver was upon the occasion in question acting as the servant, not of the livery-stable keeper, but of the person who hired him. I have come to that conclusion. There must be *Judgment for the plaintiff.*

DRISCOLL *v.* TOWLE.

181 Mass. 416. 1902.

HOLMES, C. J. This is an action for personal injuries caused by the plaintiff's being struck in the street by a horse or wagon driven by one Keenan. At the trial the judge directed a verdict for the defendant, and the plaintiff excepted. The only question is whether there was any evidence that Keenan was the defendant's servant.

The defendant "was engaged in general teaming business in Boston." He owned the horse and wagon, and employed Keenan and paid him his wages. Keenan's only contract of employment was with him. For some time, however, Keenan had been carrying property for the Boston Electric Light Company, under some arrangement between the latter and the defendant. The general course of business, or at least that adopted on the day of the accident, was this. Early in the morning Keenan took the horse and wagon from the defendant's stables and reported to the electric light company. An employee of that company would give him his orders as to what to do and where to go, and he spent the day in carrying these orders out. Sometimes he would help pull up arms on the poles, or pull up machinery, and the like. In driving, if he was directed to drive fast, he would drive fast, and if told that he had time enough, he would take his time, but he chose his own route and had exclusive management of his horse. At night he returned to the defendant's stables. He harnessed and unharnessed the horse, and fed it at noon. At the moment of the accident he was going to get some arms in

pursuance of an order from the foreman of the electric light company.

We are of the opinion that these facts are at least evidence that Keenan was the defendant's servant.

It is true, of course, that a person admitted to be in the general employment of one may be lent to another (with his own consent, Delaware, Lackawanna & Western Railroad *v.* Hardy, 30 Vroom, 35), in such a way as to become the servant of that other for the occasion or for the time. Many cases have been decided on this ground. They generally depend upon the nature of the contract or arrangement, express or implied, between the general master and the third person. Linnehan *v.* Rollins, 137 Mass. 123; Hasty *v.* Sears, 157 Mass. 123; Coughlan *v.* Cambridge, 166 Mass. 268, 277, 278; Samuelian *v.* American Tool & Machine Co., 168 Mass. 12; Donovan *v.* Laing, Wharton & Down Construction Syndicate, [1893] 1 Q. B. 629; Rourke *v.* White Moss Colliery Co., 2 C. P. D. 205; Higgins *v.* Western Union Telegraph Co., 156 N. Y. 75. But the mere fact that a servant is sent to do work pointed out to him by a person who has made a bargain with his master does not make him that person's servant. More than that is necessary to take him out of the relation established by the only contract which he has made and to make him a voluntary subject of a new sovereign, — as the master sometimes was called in the old books. Dutton *v.* Amesbury National Bank, 181 Mass. 154.

In this case the contract between the defendant and the electric light company was not stated in terms, but it fairly could have been found to have been an ordinary contract by the defendant to do his regular business by his servants in the common way. In all probability it was nothing more. Of course in such cases the party who employs the contractor indicates the work to be done and in that sense controls the servant, as he would control the contractor if he were present. But the person who receives such orders is not subject to the general orders of the party who gives them. He does his own business in his own way, and the orders which he receives simply point out to him the work which he or his master has undertaken to do. There is not that degree of intimacy and generality in the subjection of one to the other which is necessary in order to identify the two and to make the employer liable under the fiction that the act of the employed is his act.

Of course the chances are that some orders will be given which are not strictly within the contract of the master. That is to be expected from the relative positions of the servant and the other party. If the latter has something that he wants done and sees a working man at hand, he is likely to ask him to do it, and if it is within the penumbra of his business the servant is likely to obey. While he thus goes outside his master's undertaking and his own

contract with his master, he ceases to represent him, Brown *v.* Jarvis Engineering Co., 166 Mass. 75, and he may make the other liable for his acts, Kimball *v.* Cushman, 103 Mass. 194, but he does not on that account become the servant of the master's contractee for all purposes, or when he returns to the work which his master has agreed to perform. The fact that Keenan sometimes gave help outside of loading or unloading his wagon could not be more than evidence, if it is that, of an arrangement giving the company more than ordinary control over him. At the most it was for the consideration of the jury and did not justify directing a verdict for the defendant as matter of law. Preston *v.* Knight, 120 Mass. 5; Jones *v.* Scullard, [1898] 2 Q. B. 565.

In cases like the present, there is a general consensus of authority that, although a driver may be ordered by those who have dealt with his master to go to this place or that, to take this or that burden, to hurry or to take his time, nevertheless in respect to the manner of his driving and the control of his horse he remains subject to no orders but those of the man who pays him. Therefore he can make no one else liable if he negligently runs a person down in the street. Huff *v.* Ford, 126 Mass. 24; Reagan *v.* Casey, 160 Mass. 374, 379; Jones *v.* Liverpool, 14 Q. B. D. 890; Waldock *v.* Winfield, [1901] 2 K. B. 596; Quarman *v.* Burnett, 6 M. & W. 499; Laugher *v.* Pointer, 5 B. & C. 574, 558; Murray *v.* Dwight, 161 N. Y. 301; Lewis *v.* Long Island Railroad, 162 N. Y. 52, 66; New York, Lake Erie & Western Railroad *v.* Steinbrenner, 18 Vroom, 161; Joslin *v.* Grand Rapids Ice Co., 50 Mich. 516; Little *v.* Hackett, 116 U. S. 366.

Exceptions sustained.

MURRAY *v.* DWIGHT.

161 N. Y. 301. 1900.

APPEAL from an order of the Appellate Division in the third judicial department, reversing a judgment in favor of defendant, entered upon a dismissal of the complaint at a Trial Term, and granting a new trial.

O'BRIEN, J. The plaintiff, a young man about twenty years of age, received a personal injury from the falling of a pulley block at the defendant's warehouse on the 24th day of March, 1894. The evidence tended to show that the block fell by reason of the negligence of the defendant's general employees, or some of them, and the question presented at the trial was whether the plaintiff was a co-servant with them within the rule that relieves employers from liability in cases of accidents of this character. The trial court held that the plaintiff was a co-servant of the person whose negligence caused

the injury, and the complaint was dismissed. On appeal to the Appellate Division this judgment was reversed and a new trial granted, and in this condition the case comes here.

The opinion of the learned court below contains a clear and concise statement of the facts concerning the accident, the substance of which we may safely adopt. The defendant was the owner of a warehouse in which there was a hoisting apparatus for the purpose of hoisting and lowering heavy articles from one story to another. There is a projection at the roof in which there is an iron wheel over which a chain passes down in front of the building and about a foot and a half therefrom. This chain at the roof passes into the building and around a drum and thence to the back part of the building. An endless rope is attached to the drum, by means of which a man in the building may operate it and hoist or lower the chain outside. If it is desired to use horse power in hoisting, a pulley block is attached to the door-post in the lower story and another pulley block with tackle is hooked on the chain and drawn up to the top of the building. A rope connected with the upper block passes down and over the lower pulley and thence into the building, and to this a horse is attached. In operating the tackle the horse moves forward and backward within the building.

The plaintiff was the servant of a truckman and was sent by his master with a horse to hoist at the defendant's warehouse. The goods to be moved from the first to a higher floor in the warehouse were barrels of lime. The plaintiff, on arriving at the warehouse with his horse, stopped near the curbstone in front of the door while other men in the employ of the defendant were putting in place the pulley blocks and tackle. The upper pulley block was hooked on to the chain and was being drawn up to its place by one of the men operating the drum inside. When the block was nearly up the plaintiff was told to go in, and as he started to do so, the block fell upon the plaintiff. He had not worked there before and, as the testimony tended to show, knew nothing about the apparatus for hoisting. He had nothing to do with placing it in position. The horse belonged to the truckman, the plaintiff's master, and the plaintiff was paid by him. The work of moving the barrels of lime from the lower to a higher story was under the direction of the defendant's foreman.

The question when and under what circumstances the servant of a general master becomes the servant of another is often difficult of solution. There is some apparent conflict in the authorities, due more to the difficulty of applying the legal principle to ever-varying facts than to any discord with respect to the principle itself. Moreover, the rule is subject to some distinctions that are not always easy to state in such a way as to render the results in every case so plain as to command acquiescense, or to give to the decision the character of a conclusive authority. Counsel upon both sides have, in the

argument of this case before us, subjected the leading authorities to a very careful and able examination that has thrown so much light upon the question that we have been greatly aided in arriving at what appears to us to be the proper conclusion. We think the judgment of reversal in the court below is correct. The opinion of Judge MERWIN contains such a clear statement of the law as deduced from the numerous cases, and such a judicious application of it to the facts, that we would not attempt to add anything to his reasoning but for the fact that the learned counsel for the defendant has attempted to prove by an argument, which bears all the marks of industry and discrimination, that it is in conflict with two or three recent cases in this court. Before referring to these cases, it may not be amiss to point out a feature of the controversy peculiar to this case and which distinguishes it from many, if not all of those cited.

The relation of master and servant is often confused with some other relation. The mere fact that one person renders some service to another for compensation, express or implied, does not necessarily create the legal relation of master and servant. There are many kinds of employment which are peculiar and special, where one person may render service to another without becoming his servant in the legal sense. A servant is one who is employed to render personal services to his employer otherwise than in the pursuit of an independent calling. The truckman who transports the traveller's baggage or the merchant's goods to the railroad station, though hired and paid for the service by the owner of the baggage or the goods, is not the servant of the person who thus employs him. He is exercising an independent and *quasi* public employment in the nature of a common carrier, and his customers, whether few or many, are not generally responsible for his negligent or wrongful acts, as they may be for those of other persons in their regular employment as servants. A contract, whether express or implied, under which such special jobs are done or such special services rendered, is not that of master and servant within the law of negligence. (Jackson A. Iron Works *v.* Hurlbut, 158 N. Y. 34; 1 Parsons on Contracts, 101-109.)

The plaintiff beyond all doubt was in the general service of the truckman and so was his general servant. In that capacity he represented his master and, hence, was a truckman himself. In the pursuit of that calling he was directed by his master to render special services to the defendant, not in moving goods from the store or warehouse to a place of shipment, but from the lower floor of the warehouse to an upper floor. It so happened that in this particular job it was not necessary to use the truck, but it was necessary to use the horse in order to furnish power to hoist the goods. Neither the time, nor duration of employment, nor the rate of compensation, was the subject of any express contract with the defendant, and from the nature of the case there could not well have been any well-defined

agreement on the subject. The employment in its scope and character was in no respect essentially different from that which every truckman enters into with his numerous customers in the course of a day as a carrier of baggage or goods. The fact that the plaintiff detached the truck and performed the job with a horse alone did not change the character of the employment, nor the legal relation that exists between an ordinary truckman and his customers. The goods were moved, it is true, not by the truck, but by another contrivance, and the plaintiff's duty was to manage and guide the horse, which was the real power behind the pulleys and tackle, as it would have been when hitched to the truck. In this capacity the plaintiff represented his general master, the truckman, and was all the time his servant, and did not become in any legal sense the servant of the defendant any more than he would if employed to move the goods to a railroad station on the truck, and if not such servant he could not, of course, have become the co-servant of the defendant's regular workmen.

The recent cases in this court cited by the learned counsel for the defendant, and to which we will now briefly refer, differ widely from this in the nature of the employment and in the legal relations held by the person guilty of the wrong or negligent act and the party sought to be charged with its consequences.

In Wyllie *v.* Palmer (137 N. Y. 248) the defendant sold fireworks to an organized committee in a city for the purpose of a celebration. They agreed to, and did, send to the committee at its own expense a competent man, who was their general servant, to set off these fireworks under the direction of the committee, and this man brought with him a boy, also in the general service of the defendants, as a helper. In the course of the display the committee virtually separated the boy from the control of the man and set him at firing rockets, a work which he was not competent to do and which neither his general master nor the man intended that he should do. One of these rockets was discharged into a crowd through his negligence, and the plaintiff, a bystander, was injured. This court held that if his negligent act was to be imputed to any third party it should be imputed to the committee giving the order to the boy to do something for which he was incompetent, rather than to his general master who was not present and who had sent him there for a different purpose.

In Higgins *v.* W. U. T. Co. (156 N. Y. 75) the plaintiff was injured by the negligent act of a person operating an elevator and who was the general servant of the defendant. The plaintiff was the servant of the contractor for the repair of the building, including the furnishing of the elevator itself. The contractor had placed the elevators in the building some time before the accident and they were in use at times by the defendant to carry passengers and by the contractor for

purposes of his own. But he had not completed the contract and had not turned over the building, with the elevators, to the defendant. They were still, for all practical purposes, under the control of the contractor, who had a right to use them for the purpose of carrying materials and workmen from the lower to the higher floors. The plaintiff's master wanted to use the elevator on the day of the accident as a platform upon which to stand while plastering the shaft in which it had been placed, and procured the defendant's general servant to operate it by moving it up and down through the shaft for the convenience of the plaintiff engaged in the work of plastering. The injury to the plaintiff occurred while the elevator was being used for this purpose, and, as the proof tended to show, by the negligent act of the operator. This court held that the operator, at the time of the accident, was not engaged in his general master's work, but was acting under the orders of the plaintiff and in a different capacity. It is apparent, I think, that the plaintiff in that case occupied a different relation to the person moving the elevator than he would had the injury occurred while being conveyed as a passenger in the elevator to his place of duty on an upper floor, and while the elevator was being used as a passenger elevator, and while it was in law the defendant's elevator and in charge and control of its servants.

In McInerney *v.* D. & H. C. Co. (151 N. Y. 411) the question that we are now concerned with was not involved, as will be seen by the opinion, which expressly disclaims any intention to deal with the question whether the plaintiff in that case was injured by the act of a fellow servant. So we think that the case at bar is not governed by these decisions, since there is a material difference in the facts, as we have attempted to point out.

The judgment of the court below should, therefore, be affirmed, and judgment absolute ordered for the plaintiff, with costs.

GRAY, J. (dissenting). While it is true that a variance in the facts of a case of negligence may vary the application of established rules, courts should aim at consistency and, where the facts do not materially differ, apply them strictly. This case, in my opinion, falls clearly within certain recent authoritative decisions in this state; as it does within recent decisions in Massachusetts and in England.

A general principle of the law of master and servant is that, among the risks which the employee assumes upon entering an employment, is that of injury caused by the negligence of his fellow servants, engaged in the same employment. Where one servant is injured by the negligence of a fellow servant, the master, if the negligence was with respect to a duty pertaining to a workman and not to some duty owing from the master, is not liable for the injury. (Crispin *v.* Babbitt, 81 N. Y. 522.)

The facts of this case are clear and undisputed. The defendant dealt in building materials and owned two warehouses, into and from

which it was frequently necessary that the materials should be hoisted, or lowered. Hoisting tackle, made fast to chains running through the upper part of the warehouses and over a drum within them, was used upon these occasions. The drum was worked by an endless rope in the hands of a man within the building and, as it was made to revolve, caused the chain to descend to the street, or to be pulled up, as it was required. To the end of the chain was attached the hoisting tackle and, when it was necessary to hoist materials, the chain was pulled up and ropes, running over pulleys upon the tackle, fell down and passed over a pulley fastened at the entrance to the warehouse. A horse would be attached to one of the ropes and, as he was driven forwards or backwards, within the basement of the warehouse, the article would be hoisted up, or lowered. A foreman of the defendant supervised the workmen, when engaged in the work of hoisting articles in or out, and it was customary, at the time, to employ a man and horse to aid them. The plaintiff was in the general employment of a truckman, named McManus, who was not usually resorted to by the defendant for this assistance; but, upon this occasion, he was applied to and the plaintiff was sent with a horse, as he says, "to hoist at Dwight's," meaning the defendant. He went to one of the defendant's warehouses and, under the directions of the latter's foreman, in common with the other employees upon the premises, took part in the work of hoisting up barrels of lime into the lofts, by driving the horse forwards or backwards in the basement, as he was bidden. After the hoisting was completed at that warehouse, he, with the other men, went off to do similar work at the other warehouse near by. Until the hoisting tackle was made fast and the chain drawn up, preparatory to the hoisting of the barrels, the plaintiff, instead of going within the building, remained outside, upon the street and under the tackle. Owing to the carelessness of one of the men, who was stationed in the doorway to signal another man, who was operating the drum through the endless rope, the hoisting tackle was allowed to strike with force against the wheel, or frame, over which the iron chain passed and, breaking thereby, fell upon and caused the injuries to the plaintiff for which this action was brought.

I had supposed that the principles of law, which were applicable to the facts of such a case, and which were to determine the relative rights of the plaintiff and defendant, were well settled by recent cases and that their doctrine was well applied by the learned trial judge, when he dismissed the plaintiff's complaint. The question is, was the plaintiff, while engaged with the defendant's servants in doing the work described, for the time being, in the service of the defendant? That he was, and that he was in nowise acting independently in the matter, or as a stranger to the defendant, seems to

me to be a very plain proposition, in view of what this court and other courts have laid down as guiding principles. If I read these cases right, they sustain the doctrine that one who is the servant of the general master may, if employed elsewhere temporarily, *ad hoc*, become the servant of the special master and it is of no consequence whether he is loaned for the purpose, or whether he is hired, not directly, but through his general master. If the particular employment subjects him to the directions and orders of another than his general master, he ceases to be the latter's servant for the time; whose responsibility for his acts, also, ceases. (Wyllie *v.* Palmer, 137 N. Y. 248; McInerney *v.* D. & H. C. Co., 151 ib. 411; Higgins *v.* W. U. Tel. Co., 156 ib. 75; Hasty *v.* Sears, 157 Mass. 123; Donovan *v.* Laing, L. R. [1 Q. B. Div.] 629; Rourke *v.* Colliery Co., L. R. [2 C. P.] 205.) In the case of Higgins *v.* Western Union Telegraph Company (*supra*), this court passed upon a state of facts which cannot be distinguished, in the principle of the decision, from those in the case before us. The telegraph company had contracted with a contractor to restore its building and to replace the elevators within it. Before the completion of the contract, the contractor was making use of the elevator as a platform upon which the plaintiff, one of his men, might stand in doing some plastering upon the shaft. It was necessary to move the elevator up and down for the work to be done and the contractor, instead of making use of one of his own men, procured from the defendant one of the men in its regular service for the purpose of running the elevator. The defendant was using the elevator for the purpose of carrying passengers up and down during portions of the day; but, on the day of the accident in question, the elevator ceased carrying passengers about noon and after that time was made use of by the contractor for the rest of the day. The conductor of the elevator was negligent and allowed the car to start up without signal from, or warning to, the plaintiff, who was at work upon it, with the result of causing serious injury to the latter. The judgment, which the plaintiff had recovered below, was reversed here, upon the theory that the relation of master and servant between the conductor of the elevator and the defendant was suspended during the time he was doing the work for the contractor, in moving the plaintiff up and down in the shaft. In the opinion, which was delivered by my brother O'BRIEN, who now differs with me in his view of this case, the question of the responsibility of the defendant for the negligence of its servant was carefully considered in the light of the authorities in this state and in England, and the principles there laid down seem to me to be strictly apposite to the discussion here. It was observed that there was no question with respect to the fact that the conductor of the elevator, whose negligence caused the accident, was in the general service and pay of the defendant; but the question was whether, at the time of the

accident, he was engaged in doing the defendant's work, or the work of the contractor, and that, as he was not at the time taking any orders from the defendant, but was directed by the contractor's servant in moving the elevator up and down, he became the servant of the contractor, engaged for the time being in doing his work and subject to his orders. The general proposition was advanced that servants who are employed and paid by one person may, nevertheless, be *ad hoc* the servants of another in a particular transaction and that, too, when their general employer is interested in the work. He quotes the remark of Lord COCKBURN, in Rourke *v.* White Moss Colliery Co. (*supra*), that, "when one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him." The conclusion that was reached by Judge O'BRIEN, that the conductor of the elevator had become, at the time, the servant of the contractor, fits exactly the facts of this case; inasmuch as this plaintiff, like the conductor of the elevator, was, for the time being, engaged in the employment of another than his general employer in the common work which was being done and, therefore, was the servant of the defendant. If we apply the test, which was believed in the Higgins case to be the true one in such cases, namely: who directs the movements of those who are engaged in the work, we see that the plaintiff was, in the performance of his work, at the time, solely under the direction of the defendant, or his foreman. As cases supporting and justifying his conclusions, Judge O'BRIEN, very properly, relied upon Wyllie *v.* Palmer (*supra*) and McInerney *v.* D. & H. C. Co. (*supra*), which illustrated how the servant of a general employer may be, for a particular employment, the servant of another and dealt with accordingly. In the Wyllie case, the defendants, with whom a contract had been made to furnish fireworks for an exhibition in the city of Auburn, sent with the articles contracted for two of their servants to render aid in the exhibition. An accident occurred, due to the negligence of one of these servants, while obeying an order of a member of the committee having in charge, for the city, the exhibition of the fireworks, and the plaintiff was injured. He sued the contractors to recover for the injury inflicted by their servant's carelessness; but a judgment of nonsuit was affirmed in this court, upon the ground that the plaintiff was not engaged in the defendants' business at the time, but was a servant of the committee. In the McInerney Case the defendant railroad company had furnished an engine and a crew, which Willard, an owner of a lumber yard, had requested for the purpose of moving cars, which were being loaded in his yard. When they arrived at his yard, Willard assumed direction and ordered the moving of the engine, until the cars were all

attached, which were to be moved out. The plaintiff was one of Willard's servants and upon the occasion in question, not having been warned by any one, was caught between two cars and injured, by the backing down of the engine. He brought an action against the railroad company, and a judgment of nonsuit was affirmed in this court, upon the theory that the crew of the engine were under Willard's orders; who was held to be, as to them, as well as to his own men who were engaged in the work, their common master.

If Higgins and the conductor of the elevator were fellow servants under the contractor, although the telegraph company had merely loaned the conductor, was not this plaintiff quite as much a fellow-servant with the employees of this defendant? If McInerney and the crew of the railroad engine were fellow servants while doing the work of moving cars in Willard's yard, although the railroad company had furnished its own men to operate the engine, how can it be fairly said that this plaintiff was not a fellow servant with the defendant's employees?

The doctrine laid down by the Supreme Court of Massachusetts, in Hasty *v.* Sears (*supra*), is exactly applicable. There the plaintiff, who was a carpenter in the employ of N. & Co., was sent by them to do some work for the defendant upon his building. The defendant's superintendent directed him to do work upon the elevator shaft. The conductor of the elevator had received orders not to run down below the second floor, until the plaintiff had finished his work. He disobeyed the order and, in consequence, the plaintiff received injuries, for which he sued the defendant, who was the owner of the building. It was held that he and the elevator conductor were both servants of the defendant at the time of the injury and, as their employment was a common employment, the negligence of the conductor was an obvious risk which the plaintiff assumed and for which the defendant was not answerable to him.

The English cases fully recognize the rule that a man may be a general servant of one person and yet, at the same time, be the servant of another in relation to a particular matter. They hold that the important element, in determining whose servant for the time being he is, is, which of the two persons had the control of him in the conduct of the particular business. (Jones *v.* Scullard, L. R. [1898], 2 Q. B. Div. 565; Donovan *v.* Laing, L. R. [1893], 1 Q. B. Div. 629). In Donovan *v.* Laing, we find a situation which is not to be distinguished from the one in the present case. . . . Whether, therefore, we regard the recent authorities in this state, or in Massachusetts, or in England, we find the doctrine to be well settled, that one who is the general servant of a master, who employs and pays him, may, nevertheless, become the servant of another in a special employment and that it is immaterial that he does not enter the

special employment by any direct hiring, or contract. In the Higgins Case, the telegraph company loaned its servant to the contractor, and in other cases, from our and from other courts, payment for the services of the servants was made to their general master.

The plaintiff in this case was as much in the defendant's employment and under his direction and orders, as though the latter has engaged him, individually, to come in and assist in the work which was to be done in his building. That the plaintiff was in the general employment of a truckman, having an independent business, cannot, possibly, affect the question of the relation which he bore towards the defendant, or the servants of the defendant, when he entered upon the performance of the particular work under the directions of the latter, or his foreman. In all the cases, the existence of the relation of fellow servants, between the plaintiffs and those from whose negligence their injuries were received, depended upon the sole question of whether, at the time, they were under the direction and control of the temporary employer in performing the special work for which they were loaned, or contracted for. In no essential respect can the position of this plaintiff be regarded as differing, essentially, from that in any one of the cases referred to; where the plaintiffs, though in the service of a general master, were held, for the time being, to become the servants of other masters. Of course, cases of independent contractors, where the contracts of the parties have fixed their relative obligations, including the furnishing of men and defining their duties, are, mostly, inapplicable.

Nor do I consider it to be any answer to the proposition, that the plaintiff was injured by the act of a fellow servant and, therefore, cannot hold the defendant liable, that, at the particular moment when the accident happened, the plaintiff was not at work. His engagement was "to hoist" at the defendant's warehouses and his employment in that respect was continuous from the time when he reported for duty. The preliminary work of hoisting the tackle, which was necessary to be done at the second building before the plaintiff could go on with his part of the work, was being done by the defendant's servants with whom he was engaged in the same employment, namely: to hoist bags of lime from the street into the upper lofts of the warehouses. He was as much, at the time, under the control and direction of the defendant, or his foreman, as he had been at any time during the day. If the defendant did not direct him to take part in the hoisting up of the tackle, that was a mere matter of the division of labor and it seems to me to be the purest kind of technical reasoning to say that, because at the moment the plaintiff was at rest and not actually driving his horse to and fro, or helping in getting up the tackle, he was, therefore, withdrawn, *pro tanto* from the defendant's employment.

I think that the judgment of nonsuit at the Circuit was correct, and in accordance with the principles of the adjudged cases.

All concur with O'BRIEN, J., for affirmance, except PARKER, Ch. J., not sitting, and GRAY, J., who reads dissenting opinion.

Order affirmed, etc.

CHAPTER XIX.

Compulsory Employment or Service.

HOMER RAMSDELL TRANSPORTATION COMPANY *v.* LA COMPAGNIE GÉNÉRALE TRANSATLANTIQUE.

182 U. S. 406. 1901.

Action at law for damages caused to plaintiff's pier by defendant's steamship. The steamship was in charge of a Sandy Hook pilot licensed under the laws of the state of New York and the collision was due solely to his negligence. Judgment for defendants.

The Circuit Court of Appeals certified to the Supreme Court the questions whether the New York State pilotage statutes impose compulsory pilotage and whether in an action at common law a shipowner is liable for injuries inflicted exclusively by the negligence of a pilot accepted by the vessel compulsorily.

Mr. Justice Gray (after deciding that the New York statutes impose compulsory pilotage).

This action is at common law. It is not, and, being for damages inflicted on land, could not be, in admiralty. *The Plymouth* (1865), 3 Wall. 20. At common law, no action can be maintained against the owner of a vessel for the fault of a compulsory pilot. [Citing and discussing Carruthers *v.* Sydebotham (1815), 4 M. & S. 77, 85; Attorney-General *v.* Case (1816), 3 Price, 302, 322; *The Maria* (1839), 1 W. Rob. 95, 106; Lucey *v.* Ingram (1840), 6 M. & W. 302, 315; *The Halley* (1868), L. R. 2 P. C. 193, 201.]

There is no occasion to refer further to the English cases in admiralty, because in England it is held that the ship is not responsible in admiralty, where the owner would not be at common law, differing in that respect from our own decisions. *The China*, 7 Wall. 53; Ralli *v.* Troop (1894), 157 U. S. 386, 402, 420; *The John G. Stevens* (1898), 170 U. S. 113, 120–122; *The Barnstable* (1901), 181 U. S. 464.

In *The China*, affirming the decision of the circuit court in admiralty, the liability of a vessel *in rem* for a collision from the fault of a compulsory pilot was put upon the maritime law, the court saying: "The maritime law as to the position and powers of the master, and the responsibility of the vessel, is not derived from the civil law of master and servant, nor from the common law." "According to the admiralty law, the collision impresses upon the wrongdoing

vessel a maritime lien. This the vessel carries with it into whosesoever hands it may come. It is inchoate at the moment of the wrong, and must be perfected by subsequent proceedings." "The proposition of the appellants would blot out this important feature of the maritime code, and greatly impair the efficacy of the system. The appellees are seeking the fruit of their lien." 7 Wall. 68.

Such was the view of that case taken by the whole court in Ralli *v.* Troop, in which the majority of the judges said of it: "That decision proceeded, not upon any authority or agency of the pilot, derived from the civil law of master and servant, or from the common law, as the representative of the owners of the ship and cargo"; "but upon a distinct principle of maritime law, namely, that the vessel in whosesoever hands she lawfully is, is herself considered as the wrongdoer liable for the tort, and subject to a maritime lien for the damages." 157 U. S. 402. And the dissenting judges said that in *The China* "this court held, contrary to the English, but conformably to the continental authorities, that a vessel was liable for the consequences of a collision through the negligence of a pilot taken compulsorily on board, although it was admitted that, if the action had been at common law against the owner, and probably also *in personam* in admiralty, there could have been no recovery, as a compulsory pilot is in no sense the agent or servant of the owner." 157 U. S. 423.

In none of the cases in which actions at law have been maintained against the owner of a ship for the fault of a pilot was the owner compelled to employ the pilot. [Citing and discussing Bussy *v.* Donaldson (1800), 4 Dall. 194; Cooley *v.* Board of Wardens (1851), 12 How. 299; Flanigen *v.* Washington Ins. Co. (1847), 7 Penn. St., 306, 312; *The Creole* (1853), 2 Wall. Jr., 485, 516, 517; Williamson *v.* Price (1826), 4 Martin (N. S.) 399; *The Merrimac* (1871), 14 Wall. 199, 203; Yates *v.* Brown (1829), 8 Pick. 22; Martin *v.* Hilton (1845), 9 Met. 371, 373; Denison *v.* Seymour (1832), 9 Wend. 1; Atlee *v.* Packet Co. (1874), 21 Wall. 389; Sherlock *v.* Alling (1876), 93 U. S. 99.]

The liability of the owner at common law for the act of a pilot on his vessel is well stated by Mr. Justice STORY in his Treatise on Agency (2d ed.), § 456a: "The master of a ship, and the owner also, is liable for any injury done by the negligence of the crew employed in the ship. The same doctrine will apply to the case of a pilot, employed by the master or owner, by whose negligence any injury happens to a third person or his property; as, for example, by a collision with another ship, occasioned by his negligence. And it will make no difference in the case, that the pilot, if any is employed, is required to be a licensed pilot; provided the master is at liberty to take a pilot, or not, at his pleasure; for, in such a case, the master acts voluntary, although he is necessarily required to select

from a particular class. On the other hand, if it is compulsive upon the master to take a pilot, and, *a fortiori*, if he is bound to do so under a penalty, then, and in such case, neither he, nor the owner, will be liable for injuries occasioned by the negligence of a pilot; for, in such a case, the pilot cannot be deemed properly the servant of the master or the owner, but is forced upon them, and the maxim, *Qui facit per aliam facit per se*, does not apply."

The answer to the second question must therefore be that in an action at common law the shipowner is not liable for injuries inflicted exclusively by negligence of a pilot accepted by a vessel compulsorily.

Answer to the first question in the affirmative; to the second in the negative.[1]

BOSWELL *v.* BARNHART.

96 Ga. 521. 1895.

SIMMONS, C. J. Louise Barnhart sued Boswell for damages for the homicide of her husband, who, she alleged, had been convicted of a misdemeanor, and sentenced to labor in the chain gang, and while in the charge of Boswell, who for private gain had established a convict camp, had been subjected to cruel treatment, exposure, neglect, excessive and unreasonable tasks, etc., by reason of which he died. There was a verdict for the plaintiff for $750, and the defendant made a motion for a new trial, which was overruled, and he excepted. . . .

It is complained that the court erred in charging: "If the deceased worked under the direction of one Culbertson, as the employee of defendant, then the acts of Culbertson, while acting in behalf of defendant, and within the scope of his employment, would be, in law, the acts of the defendant, and he, the defendant, would be liable therefor to the plaintiff, if they were wrongful acts, and resulted in injury to Barnhart, and caused his death, provided the death of Barnhart resulted in pecuniary damage and loss to the plaintiff, and provided, further, such acts were sued on and set out in the declaration." It was contended that Culbertson and the deceased were fellow servants, and, consequently, there could be no

[1] "It is a matter of dispute between the parties as to whose agent the pilot was, the libellant contending that the respondent should be liable for his negligence. At common law no action can be maintained against the owner of a vessel for the fault of a compulsory pilot — Homer Ramsdell Co. *v.* Comp. Gen. Trans., 182 U. S. 406, 21 Sup. Ct. 831, 45 L. Ed. 1155 — and it does not appear how an action *in personam* in admiralty differs in principle, there being no question of a fault of the ship or of a lien upon her. Even, therefore, if the pilot was the respondent's agent, his negligence is not imputable to it and the responsibility for the loss is to be determined by the agreement of the parties, as expressed in the charter party." Crisp *v.* United States & Australasia S. S. Co., 124 Fed. 748, 749.

recovery of the master for the wrongful acts of Culbertson. There is no merit in this contention. Where the service is made compulsory by law, the relation of fellow servant does not exist. See McKinney, Fellow Serv. § 20; Smith *v.* Steele, 32 Law T. (N. S.) 195. The ground upon which a master is relieved from liability to a servant for injuries resulting from the negligence of a fellow servant is that the servant, when he enters the employment of the master, impliedly contracts to assume the risk of such negligence, as one of the risks incident to the service, and that his compensation is fixed with reference to this; and, clearly, this reason cannot apply in the case of one not voluntarily in the service, but merely a prisoner, serving out his sentence for a violation of the law. Indeed, it can hardly be seriously contended that a chain-gang "boss" is in any sense a fellow servant of a prisoner working under him. The "boss," while acting in that capacity, is the *alter ego* of his employer, and the latter is responsible for any wrongful or negligent acts on the part of such employee by which a prisoner is deprived of his life. . . .

Judgment affirmed.

CHAPTER XX.

Sub-Servants and Volunteers.

HALUPTZOK *v.* GREAT NORTHERN RAILWAY COMPANY.

55 Minn. 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 Co. and the Western Union Telegraph Co. 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 Co., 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, subcontractor, 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 nui-

sance on his own premises. See Lougher *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.

CHURCH *v.* CHICAGO, M. & ST. P. RY. CO.

50 Minn. 218. 1892.

ACTION by Charles Church, an infant, against the Chicago, Milwaukee & St. Paul Railway Co., to recover for personal injuries. From a judgment for defendant, plaintiff appeals.

MITCHELL, J. Taking the admissions in the pleadings, the evidence admitted, and accepting as true all that plaintiff offered to prove, the facts in this case were as follows:

Plaintiff had been in the employment of the defendant as a brakeman on a freight train running east of Calmar, Ia. Having been taken ill, he had gone, on a leave of absence, to his home in Northfield, Minn. On the day in question he went down to defendant's depot in Northfield, for the purpose of writing or telegraphing to Austin for a pass over defendant's road to go back to his work. While he was at the depot a wrecking train came into the station in charge of a conductor, and with an engineer, fireman, and two brakemen, one of whom is called "head brakeman." This train was on its way to pick up a wreck, and, in addition to an engine and tender, consisted of two or more flat cars, upon one of which was loaded a derrick, and on another two pair of heavy car trucks. After the train pulled into the station, the trainmen proceeded to switch the cars and transpose them so as to put the "derrick car" in the rear, and place the "truck car" next in front of the derrick. On its arrival the conductor left the train to attend to his other usual duties at the station while this switching was being done, the head brakeman being in charge of the switching movements of the train.

While this switching was going on, the head brakeman being on the cars and the other brakeman at the switch, and a third man being necessary (as plaintiff offered to prove) to do the switching, the head brakeman, seeing plaintiff standing by, requested him to get onto the cars and assist. The plaintiff did so, and while thus engaged sustained the injuries complained of, caused, as is claimed, by reason of the trucks on the flat car not being properly blocked.

It was necessary for the plaintiff to establish, as the essential foundation of his right to recover, the existence of the relation of master and servant between himself and the defendant company, and this in turn depended upon the authority of the head brakeman to employ him to assist in the switching.

In our opinion, none of the evidence introduced or offered had any tendency to prove any such relation between plaintiff and defendant, or any such authority on the part of the head brakeman. The fact that plaintiff had been or was in the employment of the

defendant elsewhere is wholly unimportant. He was not at the station on defendant's business. He was not an employee of defendant at that place or as to the switching of that wrecking train. The case stands precisely as if the head brakeman had called on any other bystander at the station to assist. While the head brakeman had charge of the movements of the train in doing this switching during the temporary absence of the conductor from the cars on other business, yet this was the entire scope and extent of his authority. The conductor had not abdicated the general charge and control of the train, or turned it over to the brakeman. The latter had no authority, actual or apparent, express or implied, either from custom or from any present pressing emergency, to employ additional brakemen, either permanently or temporarily. It was wholly immaterial whether two brakemen were or were not sufficient to do the switching. Even if they were not, that fact would not, under the circumstances, give a mere brakeman authority to employ an additional force. If any one on the ground had any implied authority to do so it was the conductor, who had charge and control of the train. In doing what he did the plaintiff was, therefore, a mere volunteer, and, as such, assumed all the risks incident to the position. The defendant did not bear to him the relation of master or employer, and owed him no duty as such. Flower *v.* Railroad Co., 69 Pa. St. 210; Sherman *v.* Railroad Co., 72 Mo. 62; Sparks *v.* Railway Co., 82 Ga. 156; Everhart *v.* Railway Co., 78 Ind. 292; Rhodes *v.* Banking Co., 84 Ga. 320; Railway Co. *v.* Lindley, 42 Kan. 714.

Counsel for plaintiff has cited no case which sustains his contention in this case. Many of those which he cites have no bearing whatever upon the question here involved. There are cases which hold that, where a regular brakeman is absent, and the proper and safe management of the train so requires, the conductor in charge has authority to supply the place of the absent brakeman. Such, for example, are the cases of Sloan *v.* Railway Co., 62 Iowa, 728, and Railway Co. *v.* Propst, 83 Ala. 518. And if any sudden or unexpected emergency should arise, such that the safety of the train demanded an extra force of brakemen, probably it would be held that it was within the implied authority of the conductor to employ them. But such cases are clearly distinguishable from the present, where a mere brakeman, without the knowledge of and without authority from the conductor in charge of the train, and in the absence of any sudden emergency, assumed to call upon a bystander to assist in switching.

Another line of cases cited by counsel is also clearly distinguishable from the present one. They are those where one assists the servants of another at their request for the purpose of expediting his own business or that of his master. Such is the case of Eason

v. Railway Co., 65 Tex. 577. The case of Railway Co. *v.* Bolton, 43 Ohio St. 224, is also referable to the same class. See, also, Holmes *v.* Railway Co., L. R. 4 Exch. 254, affirmed L. R. 6 Exch. 123. The decisions in this class of cases are placed upon the ground that, though performing a service beneficial to both, the party is doing so in his own behalf, and not as the servant of the company, and is entitled to the same protection against its negligence as if attending to his own private affairs. See, also, Thomp. Neg. 1045, and cases cited.

Neither is the case of Johnson *v.* Water Co., 71 Wis. 553, so much relied on by counsel, particularly in point. The question there arose merely on demurrer to the complaint, and the decision is merely made to rest upon the fact that the complaint alleged that the person who employed the plaintiff to assist was at the time the superintendent having charge and control of the work.

There was no error in excluding the evidence offered by plaintiff, and consequently the order appealed from must be affirmed.

STREET RAILWAY COMPANY *v.* BOLTON.

43 Oh. St. 224. 1885.

On the 28th of April, 1879, the McIntire Street Railway Co., the plaintiff in error, was the owner of, and operating a street railroad in the city of Zanesville. The railroad was constructed of a single track, with occasional side tracks, whereby cars drawn by horses moving in opposite directions were enabled to pass. On the day named the defendant in error was a passenger on one of the cars going northward. This car having been driven past the side track, where it should have passed the south-bound car of plaintiff in error, it became necessary to push the north-bound car backward to the side track so that the south-bound car could pass, and thus enable each car to proceed to its destination. At the request of the driver of the north-bound car, on which Benjamin Bolton, the defendant in error, was a passenger, he assisted the driver to push the car backward on the side track, and while so engaged he, defendant in error, was injured by the carelessness and negligence of the driver of the south-bound car, while engaged in the business of the plaintiff in error, and without any fault or negligence of the defendant in error.

For this injury the defendant in error brought this action against plaintiff in error in the court of common pleas of Muskingum county, and recovered a verdict and judgment.

On the trial the court refused to instruct the jury that, "if they find that the plaintiff, without the knowledge or consent of the

defendant, volunteered to assist the driver of the north-bound car in the performance of his duties as such driver, the plaintiff thus volunteering to assist, whether with or without request of such driver, would for the time being stand in no better relation with respect to defendant's liability, than would a servant of the defendant, and would assume the risks incident to such service; and that the plaintiff, while thus assisting such driver, cannot recover damages resulting to him from the negligence of the driver he is assisting, or from the negligence of the driver of the south-bound car, provided they were persons possessing ordinary care and skill in their employment, and one not superior in authority to the other; that an employer is not liable in damages to an employee for injuries resulting to such employee from the negligence of a co-employee not superior in authority, and to whom the employee injured did not owe obedience, if such employees possessed ordinary care and skill in their employment; and, if the plaintiff volunteered to assist the driver, as before stated, and while so assisting was injured by the negligence of either of said employees, he cannot recover, for he assumes the risks incident to such undertaking, and does not stand in any better position in respect to defendant's liability than did the employee he was thus assisting." But did instruct as follows:

"That if the plaintiff was requested by the driver of the north-bound car to assist in pushing it back, and he did so assist, and in doing so was injured by the carelessness or negligence of the driver of the north-bound car or of the south-bound car, he can recover, if such assistance was apparently necessary. Or if there was an actual necessity for him to assist the driver in pushing back the north-bound car, and he did so assist, and while doing so was injured by the negligence of the driver of either car, he can recover, whether he was requested by the driver to assist or not."

The district court affirmed the judgment of the common pleas.

This proceeding is prosecuted to reverse the judgments of the courts below.

In refusing to give the instructions requested and in the charge as given, the plaintiff in error alleges the court of common pleas erred, and that the district court erred in affirming the judgment below.

McIlvaine, C. J. It is undoubtedly a well-established principle of law that a master who is guilty of no carelessness in employing servants is not liable to one for injuries caused by the carelessness of a fellow servant, while both are engaged in the common service, and no relation of subordination exists between them. In such case each servant assumes the risk of injuries from the carelessness of fellow servants.

It is also well settled that a person who without any employment

voluntarily undertakes to perform service for another, or to assist the servants of another in the service of the master, either at the request or without the request of such servants, who have no authority to employ other servants, stands in the relation of a servant for the time being, and is to be regarded as assuming all the risks incident to the business.

But it does not follow that under all circumstances a person who assists the servants of another in the discharge of their duties, without employment by the master, is to be regarded as voluntarily assuming the relation of a fellow servant, or the risks pertaining to that relation. To illustrate: suppose a servant in driving his master's team on the highway founders in such a manner as to prevent the use of the highway by others for the time being. Another person, who is thus impeded in the use of the road, assists the servant, either with or without request, to remove the impediments to travel from the highway. Such other person does not thereby become the fellow servant of the driver. Indeed, in no just sense has he voluntarily entered the service of the master. And the rule of law first above stated does not apply to the case supposed, and therefore it was not error in the court of common pleas to refuse it.

The law of the case was properly given in the charge.

The plaintiff in the court of common pleas was not a mere volunteer, within the meaning of the rule or law contended for by the plaintiff in error, but, as a passenger on the north-bound car, was interested in having it driven to its destination. To this end it was necessary to pass the south-bound car. This could only be accomplished by pushing the north-bound car back upon the siding. In doing this, although it may not have been absolutely necessary for the passenger to assist the driver, it was a prudent and reasonable act, justified by the circumstances of the case; not a wrongful interference and intermeddling with business in which he had no concern. It was not, in fact or in law, an assumption of risk from the carelessness of the defendant or any of its servants.

The law in this case is well stated in Wright *v.* The London & N. W. R. R. Co., 1 Q. B. Div. 252.

That case was this: "The plaintiff sent a heifer (which was put into a horse-box) by defendants' railway to their P. station. On the arrival of the train at the station, there being only two porters available to shunt the horse-box to the siding, from which alone the heifer could be delivered to the plaintiff, in order to save delay he assisted in shunting the horse-box, and while he was so assisting he was run against and injured through a train being negligently allowed by the defendants' servants to come out of the siding. There was evidence that the station-master knew that the plaintiff was assisting in the shunting, and assented to his doing so: *Held*, affirming the decision of the queen's bench, that the plaintiff was not a

mere volunteer assisting the defendants' servants, but was on the defendants' premises, with their consent, for the purpose of expediting the delivery of his own goods; and the defendants were therefore liable to him for the negligence of their servants, according to the principle of Holmes *v.* North Eastern Ry. Co., L. R. 4 Ex. 254; 6 Ex. 123." *Judgment affirmed.*

PART II.

LIABILITY OF MASTER FOR TORTS AND CRIMES OF SERVANT.

CHAPTER XXI.

Liability of Master to Third Persons for Torts of Servant.

DEMPSEY *v.* CHAMBERS.

154 Mass. 330. 1891.

[Reported herein at p. 119.]

HANNON *v.* SIEGEL-COOPER CO.

167 N. Y. 244. 1901.

[Reported herein at p. 470.]

McCORD *v.* WESTERN UNION TEL. CO.

39 Minn. 181. 1888.

[Reported herein at p. 492.]

HALUPTZOK *v.* GT. NORTHERN RAILWAY CO.

55 Minn. 446. 1893.

[Reported herein at p. 635.]

COSGROVE *v.* OGDEN.

49 N. Y. 255. 1872.

The action was brought to recover damages for injuries resulting from the alleged negligence of defendants' servant.

Defendants at the time stated in the complaint, were co-partners

in the lumber business, having a lumber yard in New York, located on Thirteenth Street, east of Avenue C, which was in charge of Walter S. Brown, as the foreman and agent of the defendants.

In hauling lumber belonging to this yard up from the dock, where it had been discharged from the vessels, Brown piled a large quantity of heavy timbers in Thirteenth Street on the sidewalk, west of Avenue C, and nearly opposite the house where the plaintiff's parents resided, more than a block from defendants' yard.

On the 9th day of September, 1866, this timber, which had been piled one upon the other to the height of several feet, fell down as the plaintiff was passing by on the sidewalk, and greatly injured him.

Brown had been instructed by defendants not to pile the lumber there. Plaintiff, who was about six years old, was out playing, unattended, and was in the habit of so doing. The street was a quiet one, but little travelled upon. At the close of plaintiff's evidence, defendants moved for a nonsuit upon the ground that it appeared that plaintiff and his parents had been guilty of negligence which caused or contributed to the injury, which motion was denied and defendants excepted.

Verdict for plaintiff; affirmed at General Term.

GROVER, J. The case shows that Brown was employed by the defendants as superintendent of a lumber yard owned by them. That in the prosecution of this business he had the entire charge of removing timber and lumber from the dock to the yard, piling it upon the yard, and of selling and delivering it to customers. That in the prosecution of this business he caused a large quantity of timber to be hauled to and piled upon or near the sidewalk of Thirteenth Street, west of Avenue C, in the city of New York, and nearly opposite the house where the plaintiff's parents resided, at the distance of about a block from the yard. Brown testified that he piled it there because it was more convenient than it was to pile it upon the yard. That he had no direct authority from either of the defendants to pile it there. That he had asked one of the defendants whether he might pile it there, and he had told him not to do it, but that he did, notwithstanding, because of the greater convenience and facility of so doing. The defendants were responsible for this act of Brown. It was an act done by him in the prosecution of their business, and they are not relieved from responsibility therefor by his departure from their instructions in the manner of doing it. The test of the master's responsibility for the act of his servant is not whether such act was done according to the instructions of the master to the servant, but whether it was done in the prosecution of the business that the servant was employed by the master to do. If the owner of a building employs a servant to remove the roof from his house and directs him to throw the materials upon his lot, where no one would be endangered, and the servant, disregarding this direction, should

carelessly throw them into the street, causing an injury to a passenger, the master would be responsible therefor, although done in violation of his instructions, because it was done in the business of the master. But should the servant, for some purpose of his own, intentionally throw material upon a passenger, the master would not be responsible for the injury, because it would not be an act done in his business, but a departure therefrom by the servant to effect some purpose of his own. Weed *v.* The Panama Railroad Co., 17 N. Y. 362; Mali *v.* Lord, 39 id. 381, and cases cited. The remark cited by the counsel from the opinion in the latter case, to the effect that it cannot be presumed that a master by entrusting his servant with his property and conferring power upon him to transact his business, thereby authorizes him to do any act for its protection that he could not lawfully do if present, must be construed in reference to the facts of that case and of the point to which it was applied. So considered, it is obvious that a master by employing a servant to protect his property did not thereby authorize him illegally to arrest and search one that he suspected had stolen and secreted upon his person a portion of such property, for the reason that such arrest and search was not embraced in the business of guarding and protecting the property.

The judge was right in refusing to hold as a legal conclusion that the plaintiff's parents were guilty of negligence in permitting him to go in the street unattended. The case shows that they lived in a part of the city occupied principally by laborers living in tenement houses, where but few vehicles were passing in the street, where there was but little if any more danger to be apprehended than upon an ordinary country road. The plaintiff was a lad nearly six years of age. The law cannot assume that such boys are incapable of protecting themselves from any danger to be apprehended in such streets and roads. The question as to the negligence of the parents was fairly submitted to the jury, and their verdict clears them from such an imputation. The judgment appealed from must be affirmed, with costs.

All concur. *Judgment affirmed.*

COHEN *v.* DRY DOCK & C. R. R. CO.

69 N. Y. 170. 1877.

APPEAL from order of the General Term of the Superior Court of the city of New York, reversing a judgment in favor of defendant, entered upon an order nonsuiting plaintiff on the trial, and granting a new trial. (Reported below, 8 J. & S., 368.)

This action was brought to recover damages alleged to have been sustained by reason of the negligence of defendant's servant. On

April 27, 1872, plaintiff was driving along Catharine Street, in the city of New York, in a buggy. He had crossed the track of defendant's road, but before the rear part of the buggy was far enough from the track, so that a car could pass without striking it, his further progress was arrested by a blockade of trucks and other vehicles, and he was unable to move forward, and by other vehicles he was prevented from moving in any direction. A car approached on defendant's road, the driver of which, as plaintiff testified, after waiting a moment or two, told the plaintiff to "get off the track." The plaintiff asked him to wait until the trucks moved, promising then to move. The driver said, "Damn you, if you don't get off here — I am late — I will get you off some other way." The plaintiff said, "You wait a moment; I guess the trucks are moving, and I may go." The trucks started, and as the plaintiff prepared to move on, the driver started his horses, and the platform of the car struck the hind wheels of the buggy and overturned it, thus causing the injury complained of.

Defendant's counsel moved for a nonsuit on the ground, among others, that the car-driver's act was not within the scope of his authority, but was an unlawful and unauthorized act, for which defendant was not responsible.

PER CURIAM. The general rule of law contended for by the appellant, that a master cannot be held liable for the wilful, intentional, and malicious act of his servant, whereby injury is caused to a third person, is not disputed. Many limitations and illustrations of the rule will be found in reported cases, and it is not always easy to apply the rule. It has recently been under consideration in this court in the case of Rounds *v.* The Delaware, Lack. & Western R. R. Co., 64 N. Y. 129, and in the opinion of ANDREWS, J., in that case, is found a very thorough and satisfactory consideration of the rule, and the principles upon which it is founded. The general principles there announced are as follows: To make a master liable for the wrongful act of a servant to the injury of a third person, it is not necessary to show that he expressly authorized the particular act. It is sufficient to show that the servant was engaged at the time in doing his master's business, and was acting within the general scope of his authority, and this, although he departed from private instructions of the master, abused his authority, was reckless in the performance of his duty, and inflicted unnecessary injury. While the master is not responsible for the wilful wrong of the servant, not done with a view to the master's service, or for the purpose of executing his orders; if the servant is authorized to use force against another, when necessary, in executing his master's orders, and if, while executing such orders, through misconduct or violence of temper, the servant use more force than is necessary, the master is liable.

The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another.

The master is not exempt from responsibility in all cases on showing that the servant, without express authority, designed to do the act or the injury complained of. But if the servant, under guise and cover of executing his master's orders, and executing the authority conferred upon him, wilfully and designedly, for the purpose of accomplishing his own independent, malicious, or wicked purposes, does an injury, then the master is not liable.

When it is said that the master is not responsible for the wilful wrong of the servant, the language is to be understood as referring to an act of positive and designed injury not done with a view to the master's service, or for the purpose of executing his orders.

The application of these principles to the facts of this case leaves no doubt that the case was properly disposed of by the General Term of the Superior Court. The driver was driving this car for the defendant, and in its business. As the car could only run upon the railroad track, it was his duty, so far as he reasonably and peaceably could, to overcome obstacles on the track in the way of his car; and in driving his car and overcoming these obstacles, he was acting within the general scope of his authority. If he acted recklessly (and that is the most that can be said here), the defendant was responsible for his acts. He was not seeking to accomplish his own ends. He was seeking to make his trip on time, and for that purpose, and not for any purpose of his own, sought to remove plaintiff's buggy from the track. It cannot be said to be clear, upon the facts proved, that the act of the driver was done with a view to injure the plaintiff, and not with a view to his master's service. He may have supposed that the plaintiff would get off from the track in time, or that he could crowd him off without injury. The evidence should at least have been submitted to the jury. They were the proper judges of the motives and purposes of the driver, and of the character and quality of his acts.

The order must be affirmed and judgment absolute ordered against the defendant with costs.

All concur. *Order affirmed and judgment accordingly.*

SCHMIDT *v.* VANDERVEER.

110 N. Y. App. Div. 758. 1906.

APPEAL by the defendants, John Vanderveer and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings, upon the verdict of a jury for $4,500, and also from an order entered in said clerk's office denying the defendants' separate motions for a new trial made upon the minutes.

GAYNOR, J. The defendant Brown was employed by the defendant Vanderveer to keep trespassers off his land, and finding the plaintiff there crabbing committed a severe battery on him with a club. The court correctly charged in substance, that if the servant committed the battery in the course of his duty to put trespassers off, the master was liable, even though the battery was wanton or vindictive. The plaintiff's counsel had claimed in summing up that the motive for the battery was that a week previously a trespasser who had been put off by the servant had enraged him by calling him names (and this appeared from the servant's testimony), and that when he saw the plaintiff he mistook him for the previous trespasser, and committed the battery on him out of revenge. This caused the defendants' counsel to make the following request to charge, viz.: "If the jury believe, as the counsel for the plaintiff has said, that the reason why the assault was committed by Brown was that Brown was then revenging himself for the calling him of opprobrious names by plaintiff or by a person supposed by Brown to be the plaintiff, the jury cannot find a verdict against the defendant Vanderveer."

Now, as the learned trial judge perceived, if the battery were committed in putting the plaintiff off, that the "reason" for it was revenge would not exonerate the master. It would still have been done in his service. If the defendant was in fact putting the plaintiff off by the battery, that he adopted that way out of private revenge did not exonerate the master. The request therefore lacked an essential, and the refusal of it was not error. But if the battery was not committed in putting or to put the plaintiff off, or, if you will, to give him at the same time a good drubbing for coming on and teach him not to come again (for all of which the master would be liable), but on the contrary was done solely as an independent and disconnected act of revenge of the servant, the master would not be liable for it (Girvin *v.* N. Y. C. & H. R. R. R. Co., 166 N. Y. 289; Cohen *v.* Dry Dock, E. B. & B. R. R. Co., 69 id. 170).

If, therefore, the request had been that if the battery was not committed in putting or to put the plaintiff off, or because he came on, or to teach him to stay off, and the "reason" of it was revenge for

the opprobrious names, the refusal would have been a different matter. The learned trial judge's response to the request was that he could not charge it "in that form," which warned counsel that it lacked something, or else contained too much; and when counsel, not content with a fair charge, resort to requests of exact nicety, they must abide to be judged by that same standard.

The learned trial judge did not charge that the jury could not find against the servant only, but must render a joint verdict, as is claimed, but the contrary. Mere flaws should not be picked in a judge's charge. If he had ruled that to be the law of the case, the question whether the acts were done in the master's service would not have been submitted to the jury at all.

The judgment and order are affirmed.

Present — JENKS, HOOKER, GAYNOR, RICH, and MILLER, JJ.

Judgment and order unanimously affirmed, with costs.

EVERS *v.* KROUSE.

70 N. J. L. 653. 1904.

GUMMERE, C. J. The plaintiff in error (the defendant below) resides at No. —— Park Place, in the city of Passaic. On the 24th of July, 1901, his minor son was directed by Mrs. Krouse, the wife of the defendant, to sprinkle the lawn in front of the house with water from the garden hose. While he was engaged in his work, a Mrs. Glazier, who had borrowed from Mr. Evers, the plaintiff below, his horse and wagon, drove down Park Place to her own home, which was nearly opposite the Krouse residence, tied the horse to a hitching post along the curb, and left it standing there while she went into her house. During her absence young Krouse turned the hose upon the horse, frightening him so that he broke loose and ran away. Before being caught, he had so injured himself that it was found necessary to destroy him. The wagon was practically demolished. This suit was brought to recover the value of the horse and wagon, and resulted in a verdict and judgment for the plaintiff.

The only error assigned which requires consideration is directed at the charge of the judge to the jury in dealing with the question of the liability of the defendant. The instruction complained of was as follows: "The boy was engaged in sprinkling the lawn. He was accustomed to do it. It was his father's lawn. Was he, then, in his father's service while he was doing that? Was that his father's business? If he was, then, for the misconduct of the boy in the use of these things which he was using about his father's business, the father would be responsible, just as if the father himself had done it. So, if you find that the boy was in his father's service, and, through neglect,

through lack of ordinary care, or from a mischievous disposition, threw this water upon or over the horse in such a way as was likely to frighten the horse, then both father and son would be responsible." It is contended that it was erroneous to instruct the jury that the father would be liable to the plaintiff if they found that the boy, "through a mischievous disposition, threw this water upon or over the horse."

The general rule as to the question of the master's liability for the wrongful acts of his servant is thus stated by Mr. Justice FORT, speaking for this court, in the case of Holler *v.* Ross, 68 N. J. Law, 324. "The servant cannot bind the master to respond in damages to the plaintiff unless it be shown that the act which the servant did, which caused the injury, was an act which was expressly or by necessary implication within the line of his duty under his employment. . . . For a wilful act done by a servant, not within the scope of his employment, no liability attaches to the master."

A reference to the text-books which deal with this subject shows that the rule laid down in Holler *v.* Ross has been generally accepted in other jurisdictions, notwithstanding there has been much contrariety of result reached in the application of the rule; and this, it would seem, is due to the assumption in some jurisdictions that the act done by a servant while engaged in the master's work is necessarily an act done within the scope of the former's employment. But this is conspicuously a *non sequitur*. An act done by the servant while engaged in the work of his master may be entirely disconnected therefrom — done, not as a means or for the purpose of performing that work, but solely for the accomplishment of the independent malicious or mischievous purpose of the servant. Such an act is not, as a matter of fact, the act of the master, in any sense, and should not be deemed to be so as a matter of law. As to it, the relation of master and servant does not exist between the parties, and for the injury resulting to a third person from it the servant alone should be held responsible. Aycrigg's Ex'rs *v.* New York & Erie R. R. Co., 30 N. J. Law, 460; Rounds *v.* Del., Lack & West. R. R. Co., 64 N. Y. 129; Bowler *v.* O'Connell, 162 Mass. 319.

The decision of this court in the case of Bittle *v.* Camden & Atlantic R. R. Co., 55 N. J. Law, 615, is in no wise opposed to this view. In that case the defendant company was held responsible to the plaintiff for injuries received by him through the running away of his horse, the animal having been frightened at the blowing of the whistle upon one of the defendant company's locomotives by the engineer. The statute of the state in force at the time of the accident required that a whistle should be blown or a bell rung upon the engine whenever a train reached a point 300 yards distant from a highway crossing. The defendant company's train was approaching a highway crossing at the time when the whistle was blown, and the opinion

states (page 620, 55 N. J. Law) that, "upon review of this case, the conclusion is that, under the statute authorizing the points and distances at and for which either a whistle shall be blown or a bell rung, the defendant had a right to blow the whistle at this point." Manifestly, if the defendant had this right, it was because the statute imposed upon it the duty of doing so, and the performance of that duty rested upon the agent of the company who was operating the engine. The plaintiff's claim was, and his proofs showed, that the company's engineer, having observed that the plaintiff's horse had become frightened and almost unmanageable at the approach of the train, wantonly and maliciously blew an extraordinarily loud and shrill blast upon the whistle, for the purpose of still further frightening the animal. The conclusion reached, that the company was responsible, was the necessary result of the application of the first branch of the rule laid down in Holler *v.* Ross, namely, that the master is responsible for injuries resulting from an act done by his servant within the scope of the latter's employment, without regard to whether the act was done negligently or even maliciously. The blowing of the whistle at the point where the company's engineer blew it was a part of the duty which he was employed to perform, and it was because of that fact that the rule of *respondeat superior* was applicable. If the engineer, in the case referred to, had maliciously increased the fright of the plaintiff's horse by throwing lumps of coal at him from the tender while the train was passing by, this act would as plainly not have been within the scope of his employment (notwithstanding that the coal was furnished him by the employer to be used in the employer's business), as his act in blowing the whistle was within it. For the one act the master would not be responsible; for the other, he would be.

Turning again to the case now under review: If the act of the defendant's son in throwing water upon the plaintiff's horse was not the result of his careless handling of the garden hose while sprinkling his father's lawn, but was deliberately done by him, purely out of a spirit of mischief, for the purpose of frightening the animal, the fact that he used the tool supplied to him for the doing of his father's work for the accomplishment of his own mischievous purpose did not make it an act within the scope of his employment, and did not render the defendant liable for the injury resulting therefrom.

The instruction complained of was erroneous, and for this reason the judgment under review should be reversed.

ALSEVER v. MINNEAPOLIS & ST. L. R. CO.

115 Iowa, 338. 1902.

ACTION to recover damages for personal injuries. From a judgment for plaintiff, defendant appeals.

LADD, C. J. The defendant's train had stopped at Burnside shortly after 12 o'clock m., May 25, 1899. Attached to the engine was a device known as the "McIntosh Blow-Off Cock," used for the purpose of cleansing the boiler of sediment by forcing water through it from the bottom at great pressure. At that time the plaintiff, then eight years old, was standing, with other children, on the side of the corncrib, about 7 feet above the ground, and some 20 feet from the engine, looking at it through an opening. In operating the blow-off cock, hot steam or spray was thrown on the crib, and possibly on plaintiff, thereby so frightening her that she fell, breaking a leg. Her screams immediately brought her father, Cox, and the engineer. The father testified. . . . "Q. What, if anything, was said by the engineer at that time in reference as to how the accident happened? A. He says, 'I was only having a little fun with the children.' . . . He said he had no idea of hurting the children, — just for the idea of having a little sport with them, or fun; that he was just going to have a little sport with the children. . . . The evidence of Cox was to the same effect. . . .

The engineer testified that ordinarily he operated the blow-off cock ten times a day, and that in doing so on this occasion he did not notice the children. The defendant requested the following instruction, which was refused: "If you find from the evidence that the defendant's servants were not using the blow-off cock for the purpose of cleansing the boiler of defendant's engine, but solely for a purpose of their own, — for their own amusement, and for the purpose of frightening the plaintiff and the other children with her — the plaintiff cannot recover in this action."

The engineer was in charge of the engine, and had control of the blow-off cock. How often and when to make use of it was necessarily left to his judgment. All that was exacted of him was that in doing so he exercise ordinary care. In blowing off the steam he was acting within the scope of his employment. The negligence consisted in the manner and place of doing so. There was no departure from his employment, — merely failure to exercise care in doing what he was authorized to do. Says Prof. Wharton: "It may have contravened the master's purposes or direction; but a master who puts in action a train of servants, subject to all the ordinary defects of human nature, can no more escape liability for injury caused by such defects than can a master who puts machinery in motion escape liability, on the

ground of good intentions, from injuries occurring from defects of machinery. Out of the servant's orbit, when he ceases to be a servant, his negligences are not imputable to the master; but within that orbit they are so imputable, whatever the master may have meant." Whart. Neg. § 160.

In Railway Co. *v.* Shields, 47 Oh. St. 387, an employee placed torpedoes, used for signals, on the track in front of the wheels of the caboose in which lady passengers were riding, with the purpose of frightening them by their explosion when being passed over. One of them was afterwards found on the track by some boys, who caused it to explode by hitting it, and injured one of them. In the course of the opinion, affirming the company's liability, the court said: "It is necessary in this and all similar cases to distinguish between the departure of a servant from the employment of the master, and his departure from or neglect of a duty connected with that employment. A servant may depart from his employment without making his master liable for his negligence when outside of the employment of the master, and he so departs whenever he goes beyond the scope of his employment and engages in affairs of his own, but he cannot depart from the duty intrusted to him when that duty regards the rights of others in respect to the employment of dangerous instruments by the master in the prosecution of his business, without making the master liable for the consequences; for the first step in that direction is a breach of the duty intrusted to him by the master, and his negligence in this regard becomes at once the negligence of the master. Otherwise the duty required of the master in respect to the custody of such instruments employed in his business may be shifted from the master to the servant, which cannot be done so as to exonerate the master from the consequences of neglect of duty."

In Andrews *v.* Railway Co., 77 Iowa, 669, a fireman had been left to watch the engine, and while doing so unnecessarily blew off the steam; and an instruction that if, "while so in charge or while employed in the discharge of his duties as fireman, he negligently or wilfully let off steam, and thereby frightened plaintiff's horses, and injured plaintiff, the defendant was liable," was approved. See, also, Railway Co. *v.* Boettcher, 131 Ind. 82; Brendle *v.* Spencer, 37 S. C. 194; Cobb *v.* Railway Co., 125 N. C. 474; Railroad Co. *v.* Dickson, 63 Ill. 152.

In Railroad Co. *v.* Harmon, 47 Ill. 299, the plaintiff checked his team to allow the locomotive to pass, but, instead, it stopped; and, though the engineer noticed the horses were afraid, he unnecessarily and wantonly let off steam. It was contended in that case, as in this, that the act was wanton and wilful and outside of his authority, and that the company was not liable. Answering this contention, the court said: "He was their servant, — was engaged in the performance of the duty assigned to him; and if, while so engaged, he used the

engine put into his possession and under his control to accomplish the wanton or wilful act complained of, why should not the company be held liable? It is said that he was not employed for the purpose, nor directed to perform the act; and it is equally true that they do not employ engineers to inflict injuries through negligence or incompetency, and yet these bodies are held liable for such acts of their servants. . . . But when employed in the discharge of his duty, or while engaged in operating their engines and machinery on their road, if he uses such agencies in an unskilful manner or so negligently as to occasion injury to another, or even if while so engaged he wilfully perverts such agencies to the purpose of wanton mischief and injury, the company should respond in damages. They should not be permitted to say, 'It is true he was an agent, was authorized by us to have possession of our engines, was engaged in carrying on our business, and while so engaged he wilfully perverted the instruments which we placed in his hands to something more than that designed or authorized, and therefore we should not be liable for the injury thus inflicted.' In this case, so far as the record discloses, the engineer was properly engaged in the use of the machinery of the company; and it can make no difference whether the escape of steam was negligently permitted or wilfully done by the engineer, any more than if he had wilfully run his engine against appellee's wagon and team, and thus produced the injury. The question whether or not it was negligently done can, we think, make no difference in the results."

If the company may be held liable for an injury caused by the engineer blowing off steam or a whistle to purposely frighten a team, as many authorities hold, it is not perceived on what principle such liability shall be denied when this is done to frighten children. See 2 Thomp. Neg. § 1910 *et seq.*

We think the true test that stated by Judge Cooley in his work on Torts (page 536): "The test of the master's liability is not the motive of the servant, but whether that which he did was something which his employer contemplated, and something which, if he could do it lawfully, he might do in the employer's name."

It was part of the engineer's duty to use this blow-off cock. For all the record discloses, he may then have been operating it to cleanse the boiler. There is no evidence to the contrary. Whether incidentally to cleansing it he engaged in the diversion of frightening the children, or blew off the steam or spray for that express purpose, however, we think, can make no difference. The company had placed in his charge an instrumentality requiring care in its operation and management. He was doing precisely what the company contemplated he should do when it employed him, *i.e.* operating the blow-off cock. When this was to be done, and how, as said, was left to his discretion, the use of which was also contemplated in his employment; and the

company was as responsible for a mistake or wilful perversion of judgment in its operation, if within the compass of what he was to do, when amounting to negligence, as for his negligence in doing that which may be conceded to have been necessary. Rounds *v.* Railway Co., 64 N. Y. 129; Cooley, Torts, p. 534.

This is well illustrated by the case of Cobb *v.* Railway Co., 37 S. C. 194, 15 S. E. 878, where the company was declared liable for the misconduct of the engineer in wilfully or wantonly blowing off steam so as to scare a horse and cause it to run away, but not for the misconduct of the trainmen, contributory thereto, by shouting. The engineer was doing that which he might, but for the proximity of the horse, lawfully do within the scope of his employment. Trainmen were under no circumstances engaged to do what they did. The one thing was done within the master's business; the other, without. And on this principle Kincade *v.* Railway Co., 107 Iowa, 682, and Marion *v.* Railway Co., 59 Iowa, 430, are to be distinguished from the case at bar.

Stephenson *v.* Southern Pac. Co., 93 Cal. 558, relied on by appellant, is not in harmony with the authorities heretofore cited, and does not meet our approval.

We think the instruction properly refused, and that the judgment should be affirmed.

WEAVER, J., took no part.[1]

[1] "So the situation to be considered upon the motion is this: The defendant placed these dangerous explosives in the custody of its servant, to be placed on the track in certain contingencies as a warning to approaching trains. The servant, however, placed one on the track when not contemplated by the employer, evidently for his own amusement, and in dangerous proximity to third persons, and moved the engine over it, causing it to explode, and inflict injury on one of such persons; and the question is whether a verdict for the injured person against the principal can be sustained under such circumstances. We think this question must be answered in the affirmative. The principle that a master is not responsible for the torts of his servant when the servant has departed from his employment is well understood. If this principle were as easy of application as it is of statement, we should have little difficulty; but, like many another simple and plain principle, its application to concrete facts is sometimes very difficult. The question, generally, is whether the servant has departed from his employment, or whether he has departed from or neglected a duty in the line of that employment. In the first case the principal is not responsible for his acts, and in the second case he is. Applying the principle to the present case, supposing that the jury had found that the engineer placed the torpedo on the track, it seems quite plain that a verdict for the plaintiff might be sustained. The engineer's duty was to operate the engine; to take care of the torpedoes, and see that they were used only at proper times and places. The company had placed in his charge these dangerous agencies, and authorized him to use them at proper times. In placing one of them upon the track as he did, he was doing what the company had directly authorized him to do; but he was not doing it at the time or place authorized by the master. He was not beyond the scope of his employment, but he was wilfully or wantonly violating a duty resulting from his employment, namely, his duty to safely keep and properly use the torpedoes. There have been many cases involving the application of this principle, and they cannot be said to be entirely harmonious; but the principle above stated is believed to be substantiated by the great weight of authority." Euting *v.* Chicago & N. W. R. Co., 116 Wis. 13, 17, 18.

OBERTONI *v.* BOSTON & MAINE RAILROAD.

186 Mass. 481. 1904.

TORT, by a boy eight years old when injured, for personal injuries caused by the alleged negligence of the defendant and its servants in leaving a signal torpedo on the public crossing of the defendant's railroad on Furness Street in North Adams, where it was found by the plaintiff, who, believing it to be harmless, took it home and cracked it with a rock, receiving the injuries alleged.

At the trial, there was a verdict for the plaintiff; defendant alleged exceptions.

LORING, J. The evidence in this case warranted a finding that the plaintiff, a boy of eight years of age, found a signal torpedo on the planking of a railroad, at a grade crossing of a highway; that he took it home and, not knowing the danger, cracked it with a rock and was hurt. In addition there was the testimony of one Paris that "a brakeman threw the torpedo to the flagman at the crossing and it dropped at his feet as he did not catch it; that the flagman threw it back to the brakeman and he did not catch it and the torpedo dropped to the ground"; that "after the train went by, the flagman went back to his covered station without picking it up."

The defendant contends that there was no evidence of negligence on its part, and we are of opinion that in this contention it is right.

The plaintiff's position is that if the story told by Paris was believed the defendant was liable, and he relies on Harriman *v.* Railway Co., 45 Ohio St. 11, in support of that contention, to which may be added the subsequent case of Railway Co. *v.* Shields, 47 Ohio St. 387, as cases of the highest court of another state.

But we are of opinion that if the torpedo came to and was left on the planking in the way testified to by Paris the defendant is not liable, and for the reason that the jury were not warranted in finding that the brakeman and flagman in throwing the torpedo back and forth and leaving it on the crossing were acting in the course of their employment. There is nothing in the evidence in this case, or in the common knowledge of mankind, as to railroad signal torpedoes, which would make it the duty of the brakeman to throw a torpedo to a flagman. All that was declared as to the use of railroad torpedoes in evidence in this case was that "signal torpedoes were used by railroads in signalling, being fastened upon the rails and containing an explosive." There was nothing in the evidence showing that it belonged to a flagman at a railroad crossing to signal trains by torpedoes or otherwise, much less is that within the common knowledge of mankind. If the use of railroad torpedoes is a fact within such common knowledge at all, the flagman has nothing whatever to do

with signalling trains or with torpedoes. The case comes within the rule laid down in Howe *v.* Newmarch, 12 Allen, 49, which was applied in Hankinson *v.* Lynn Gas & Electric Co., 175 Mass. 271, and Brown *v.* Boston Ice Co., 178 Mass. 108. See, also, McCarthy *v.* Timmins, 178 Mass. 378.

The two cases from Ohio relied on by the plaintiff in the case at bar are entitled to great consideration as cases of the highest court of another state; but after a careful consideration of them, we are of opinion that they are not in accordance with the settled law of this Commonwealth and should not have been followed by the judge presiding at the trial.

[The court then holds that the fact that the torpedo was found on the planking was not presumptive evidence of negligence.]

Exceptions sustained.

CHAPTER XXII.

Liability of Public Agencies or Public Charities for Torts of Servants.

KEENAN *v.* SOUTHWORTH.

110 Mass. 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 this 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.*

ELY *v.* PARSONS.

55 Conn. 83. 1887.

ACTION for trespass to land and cutting trees and shrubs growing thereon.

The defence set up was — 1. A general denial; 2. That the land upon which the entry was made was a public highway, which it was the duty of the selectmen of the town of Enfield to keep in repair, and commodious and safe for public travel; that the highway was defective by reason of certain small trees and shrubs which grew in or overhung the travelled path, so as to annoy and endanger public travel upon the highway; and that the defendant as a selectman, and in the line of his duty, directed the cutting and trimming of all such small trees and shrubs within the limits of the highway as might be necessary to render it reasonably safe and convenient for public travel, but did not authorize or direct or himself commit any other acts whatever upon the land.

Judgment for defendant, and plaintiff appeals.

LOOMIS, J. The acts constituting the trespass complained of were committed by one Button, by order of the defendant as a selectman of the town of Enfield, and consisted of the cutting of certain trees and brush along an alleged highway of the town. . . .

But another claim of law remains to be considered — whether the defendant was liable for the unnecessary cutting by Button. The defendant directed Button "to cut the brush and trees and make the road passable at as little expense as possible." . . .

The defendant invokes for his protection the rule that a public officer or agent is responsible only for his own misfeasance or negligence, and not for the negligence of his subaltern, provided the latter is competent for the work. Story on Agency, § 321; Wharton on Agency, § 550.

Although the general language in which the rule is stated in the books may at first seem decisive of this question, yet we think it is not applicable to this case. In stating the proposition that the principal is not liable, a qualification stated in Story on Agency (*supra*), should always be understood — that is, that he is not liable unless he directed or authorized the wrong. Then there is another very important distinction, to the effect that if the inferior or sub-agent holds not an office known to the law, but his appointment is private and discretionary with the officer, the principal is responsible for his acts. This distinction is more fully stated in a note to the case of Wilson *v.* Peverly, in 1 American Leading Cases, 5th edition, side p. 651, top p. 785.[1] . . .

[1] "With regard to the responsibility of a public officer for the misconduct or negligence of those employed by or under him, the distinction apparently turns

In the case at bar, upon the finding, we do not think Button should be regarded as an inferior public officer or agent, but rather as acting solely under the defendant, so that the question we are considering turns on the authority given by the defendant to Button. There was of course no express authority as the court finds to do unnecessary cutting, but there was express authority "to cut the brush and trees and make the road passable." No trees were pointed out, no limits given, no restriction of any kind was mentioned, no indication was given as to the defendant's own judgment, but the work was all committed to the judgment and discretion of Button as to what should be cut. There is no claim or suggestion that Button acted maliciously or wantonly, but he acted on his own judgment, just as in effect he was told to do, and so we may say he acted within the scope and course of his employment, so that his act was the defendant's act. . . .

We conclude that there was error in holding the defendant not liable for the unnecessary cutting, which would give the plaintiff a new trial if the court had not found that the damage from the unnecessary cutting was merely nominal.

(From certain considerations arising out of the fact that the damages were merely nominal, the court refused to grant a new trial and, accordingly, affirmed the judgment of the court below.)

CULVER *v.* CITY OF STREATOR.

130 Ill. 238. 1889.

Mr. Justice Bailey delivered the opinion of the court: We are of the opinion that the several counts of the amended declaration, though differing somewhat in the character of their averments, all call for the application of the same principles. The fourth count, which is fullest in its allegations, shows that the injury complained of was caused by the negligent act of a party employed by the city of Streator to enforce a municipal ordinance forbidding the running at large of dogs in said city without being muzzled, and providing that all dogs running at large contrary to said ordinance should be destroyed. This was clearly an ordinance passed by the city in the exercise of its police powers, and the injury was caused by the party employed to enforce such police regulations.

The third count alleges that the injury was caused by the negligent

upon the question whether the persons employed are his servants appointed voluntarily and privately, and paid by him, and responsible to him, or whether they are his official subordinates, nominated perhaps by him, but officers of the government; in other words, whether the situation of the inferior is a public office or a private service. In the former case the official superior is not liable for the inferior's acts; in the latter he is." 1 Am. Lead. Cases, 651.

and careless acts of the servants of the city while destroying dogs running at large contrary to a city ordinance; and the first and second counts allege, in substance, that the injury was caused by the negligent and careless acts of servants hired and employed by the city to shoot and kill dogs at large in the city, and which had not been by it duly licensed. The matter of regulating and restraining the running at large of dogs by a municipal corporation manifestly pertains to the police power. That power may be defined, in general terms, as comprehending the making and enforcement of all such laws, ordinances and regulations as pertain to the comfort, safety, health, convenience, good order and welfare of the public, and all persons officially charged with the execution and enforcement of such police ordinances and regulations are, *quoad hoc*, police officers.

The pleader, in drafting the declaration, seems to have endeavored to obviate the conclusions to be drawn from the character of the duties which the officer in question was performing at the time the plaintiff was injured, by designating and describing him as a servant or employee of the city, and alleging that he was hired and employed by the city to perform said duties. Merely denominating him a servant or employee does not make him such in a sense calling for an application of the maxim, *respondeat superior;* whether he was a servant or employee in that sense depends mainly upon whether he was employed to perform acts which the corporation could do in its private or corporate character, or acts which the corporation was empowered to do in its public capacity as a governing agency, and in discharge of duties imposed for the public or general welfare. Acts performed in the exercise of the police power plainly belong to the latter class.

Police officers appointed by the city are not its agents or servants so as to render it responsible for their unlawful or negligent acts in the discharge of their duties. Accordingly it has been held that a city is not liable for an assault and battery committed by its police officers, though done in an attempt to enforce an ordinance of the city: Butterick *v.* City of Lowell, 1 Allen, 172; nor for illegal and oppressive acts of officers committed in the administration of an ordinance: Board of Trustees *v.* Schroeder, 58 Ill. 353; nor for an arrest made by them which is illegal for want of a warrant: Pollock's Administrators *v.* City of Louisville, 13 Bush, 221; Cook *v.* City of Macon, 54 Ga. 468; Harris *v.* City of Atlanta, 62 id. 290; nor for their unlawful acts of violence, whereby, in the exercise of their duty in suppressing an unlawful assemblage, an injury is done to the property of an individual: Stewart *v.* New Orleans, 9 La. Ann. 461; Dargan *v.* City of Mobile, 31 Ala. 469.

Upon the same principle it has been held that a city having power to establish a fire department, to appoint and remove its officers, and to make regulations in respect to their government and the management of fires, is not liable for the negligence of the firemen appointed

and paid by it, who, when engaged in the line of their duty, upon an alarm of fire, run over the plaintiff, on their way to the fire: Hafford *v.* New Bedford, 16 Gray, 297; Wilcox *v.* City of Chicago, 107 Ill. 334; nor for an injury to the plaintiff caused by the bursting of a hose of one of the engines of the city, through the negligence of a member of the fire department: Fisher *v.* City of Boston, 104 Mass. 87; nor for negligence whereby sparks from the fire engine of the city caused the plaintiff's property to be burned: Hays *v.* City of Oshkosh, 33 Wis. 314. In like manner it is held that where a city, under authority of law, establishes a hospital, it is not liable to persons injured by the misconduct of its agents and employees therein: City of Richmond *v.* Long's Administrators, 17 Gratt. 375. See also 2 Dillon on Municipal Corporations, secs. 973-975, and authorities cited in notes.

The ground upon which the foregoing cases, and many others of like nature, are admitted as exceptions to the general rule of corporate liability, is, that in those matters the city acts only as the agent of the state, in the discharge of duties imposed by law for the promotion and preservation of the public and general welfare, as contradistinguished from mere corporate acts, having relation to the management of its corporate or private concerns, and from which it derives some special or immediate advantage or emolument in its corporate or private character.

The police regulations of a city are not made or enforced in the interest of the city in its corporate capacity, but in the interest of the public. A city, therefore, is not liable for the acts of its officers in attempting to enforce such regulations. Caldwell *v.* Boone, 51 Iowa, 687; Prather *v.* Lexington, 13 B. Mon. 559; Elliott *v.* Philadelphia, 75 Pa. St. 347; Board of Trustees *v.* Schroeder, *supra.*

The injuries complained of in the declaration having been caused by the negligence of an officer or employee of the city while attempting to enforce a police regulation, the maxim *respondeat superior* does not apply, and the demurrer to the declaration therefore was properly sustained. The judgment of the Appellate Court will be affirmed. *Judgment affirmed.*[1]

WELSH *v.* VILLAGE OF RUTLAND.

56 Vt. 228. 1883.

ACTION on the case to recover damages for injuries received by Mary Welsh, the wife of the plaintiff, Michael Welsh, caused by slipping down upon the ice in the village of Rutland. The jury failing to agree, the court directed a verdict for the defendant.

[1] Accord: Whitfield *v.* City of Paris, 84 Tex. 431.

The opinion of the court was delivered by

ROYCE, Ch. J. By its charter the village of Rutland is empowered: "To provide for the preservation of buildings from fires by precautionary measures and inspections, and to establish and regulate a fire department and fire companies"; also "to provide a supply of water for the protection of the village against fire and for other purposes, and to regulate the use of the same." Charter, s. 11. . . .

In pursuance of this authority the village, by ordinance, established a fire department. . . .

Under the authority of its charter, as amended, and by vote of the village, the village provided for a supply of water, for public and private use, laid water-pipes through the streets and supplied them with hydrants for use in case of fire.

The declaration in this case sets forth the authority of the village to "construct, maintain, increase, improve, repair, and keep in repair reservoirs, aqueducts, water-courses, and water-pipes for public and private uses in said village": and counts upon an injury to the female plaintiff by reason that the defendant did "carelessly and negligently maintain, amend, and repair said aqueduct, water-pipe, and water-course, and carelessly and negligently leave the same out of repair."

The facts, so far as material, appear to be that a certain hydrant, connected with the aqueduct pipe, having become frozen, one Davis, who was first assistant engineer of the fire department, acting under the direction of the chief engineer, reported its condition to the village trustees and was by them directed to thaw out the same at the expense of the village. This he proceeded to do, using for the purpose the steam fire-engine belonging to the fire department and with the aid of assistants, all being paid by the village for their services. The water, which was allowed to escape from the hydrant in order to clear it of broken ice, froze in the street, and the female plaintiff, falling thereon, sustained the injuries complained of. It further appeared that the water-works and fire departments are distinct and are managed by different officers. The former is a source of large revenue, paid by individuals for the use of the water, and is in charge of water commissioners, who defray the expenses from this revenue, the works being the property of the village; the latter has no income, but is a source of expense which is paid by the village, under the general authority and direction of the board of trustees.

The evidence having been closed, the defendant moved for a verdict on the grounds (1) that the plaintiffs upon their declaration could not recover; . . . and (3) that whatever act was done, was done by the fire department of said village, for the acts of which the village was not liable. The court overruled this motion so far as to submit the question of negligence to the jury, and if negligence was found, the amount of damages. The jury failing to agree, the court there-

upon directed a verdict for the defendant, to which the plaintiffs excepted, as also to the overruling of their motion to set aside the verdict and for a new trial. Upon these exceptions the case comes to this court. . . .

We therefore come to the question raised by the first and third grounds of the motion, namely, whether or not the defendant is liable in this action. In considering this, the state of the case, of course, requires that we treat as established the plaintiff's allegation that the repairing or thawing out of the hydrant was done in a careless and negligent manner.

The question of the liability of *quasi* corporations for the negligence, non-feasance or misfeasance of the officers and agents through whose instrumentality their various functions are performed, is one of some difficulty and delicacy, and is obscured by a great number of decisions, particularly in this country, which are at least apparently conflicting and irreconcilable. This conflict, however, will be found due, upon closer examination, not so much to any ambiguity in the legal principles which it is our duty under the system of jurisprudence which obtains in this state to apply, as to the fact that while some courts have followed the doctrines of the common law, others have leaned more to the civil law; or else their decisions have been based on statutory provisions, or some analogy to the local organic law or custom.

At common law it has been a settled principle ever since the leading case of Russell *v.* Men of Devon, 2 Term, 667, decided by Lord Kenyon in 1788, that an individual cannot sustain an action against a political subdivision of the state based upon the misconduct or non-feasance of public officers. The reasons assigned in the earlier cases were that the maxim which declares it better for the individual to suffer than for the public to be inconvenienced, is stronger than the other principle, that for every injury the law gives a remedy, and that the plaintiff might levy his execution upon the property of any individual inhabitant — the organization having no fund legally applicable to its payment — thus giving rise to multiplicity of actions to enforce contribution and great public annoyance. But the more modern and broader ground is said to be, that these *quasi* corporations are mere instrumentalities for the administration of public government and the collection and disbursement of public moneys, raised by taxation for public uses, and which cannot lawfully be applied to the liquidation of damages caused by wrongful acts of their officers. Riddle *v.* Proprietors, 7 Mass. 187; Mower *v.* Leicester, 9 Id. 247; Coolidge *v.* Brookline, 114 Id. 596; Com'rs *v.* Mighels, 7 Ohio St. 109; Findlater *v.* Duncan, McL. & R. 911.

This rule of exemption extends, necessarily, to municipal corporations so far as the reason of it applies, and that is so far as the acts done are governmental and political in their character and solely

for the public benefit and protection; or the negligence or non-feasance are in respect of the same matters. Instances of this non-liability may be found in 2 Thompson on Negligence, 731, and in numerous cases. The immunity goes a step farther and protects such corporations in a total *neglect* to perform certain functions which are concededly for the public benefit and convenience. No action can be maintained against a municipal corporation by an individual, no matter how great an injury he might be able to show, for the neglect to build sewers or water-works, or for defects or insufficiencies in the plans adopted for these or other public improvements; and this is upon the ground that in such matters the corporation is discharging a legislative or *quasi* judicial function, and its action is not reviewable by the law courts. If the plan adopted for the construction of such public works is not *necessarily* injurious or dangerous to private interests, and is executed with reasonable skill and prudence, the protection against liability is absolute. Lansing *v.* Toolan, 37 Mich. 152; 35 Id. 296; 34 Id. 25; Merrifield *v.* Worcester, 110 Mass. 216; 104 Id. 15; 4 Allen, 41; 6 Gray, 546; 13 Id. 194; Van Pelt *v.* Davenport, 42 Iowa, 308; Carr *v.* Northern Liberties, 35 Pa. St. 324. And the same rule applies to the action of municipal corporations in changing or grading their streets. 2 Dill. Mun. Cor. ss. 781, 798; Sherm. & Red. Neg. s. 370; 2 Thomp. Neg. 747; Mills Em. D. s. 195; Perry *v* Worcester, 6 Gray, 546; City of Shawneetown *v.* Mason, 82 Ill. 337; Scovil *v.* Geddings, 7 Ohio, 562; Hickox *v.* Cleveland, 8 Id. 543.

When, however, municipal corporations are not in the exercise of their purely governmental functions, for the sole and immediate benefit of the public, but are exercising, as corporations, *private franchise* powers and privileges, which belong to them for their immediate corporate benefit, or dealing with property held by them for their corporate advantage, gain, or emolument, though enuring ultimately to the benefit of the general public, then they become liable for *negligent* exercise of such powers precisely as are individuals. Hill *v.* Boston, 122 Mass. 344; 102 Id. 499; Eastman *v.* Meredith, 36 N. H. 284; Providence *v.* Clapp, 17 How. 161. So, of the construction and maintenance of water-works: Murphy *v.* Lowell, 124 Mass. 564; 122 Id. 344; 102 Id. 489; City of Dayton *v.* Pease, 4 Ohio St. 80; Gibson *v.* Preston, L. R. 5 Q. B. 219; Southcoat *v.* Stanley, 1 Hurlst. & N. 247; 2 Id. 204; 4 Id. 67; of ditches or drains: Chicago *v.* Langlass, 66 Ill. 361; 44 Id. 295; of bridges or culverts, and in respect of structures which may obstruct the flow of natural water-courses and of the pollution of them by sewage and the like; Hill *v.* Boston, *supra;* Wheeler *v.* Worcester, 10 Allen, 591; 4 Id. 41; Parker *v.* Lowell, 11 Gray, 353; Conrad *v.* Ithaca, 16 N. Y. 158; Merrifield *v.* Worcester, *supra;* Hazeltine *v.* Case, 46 Wis. 391; Hig. Waterc. 96; Wood Nuis. s. 688; and public works and improve-

ments generally: Lyme Regis *v.* Henley, 3 B. & Ad. 77; Nebraska City *v.* Campbell, 2 Black, 590; 1 Id. 39; Dayton *v.* Pease, 4 Ohio St. 80; Bigelow *v.* Randolph, 14 Gray, 543; Child *v.* Boston, 4 Allen, 41. This rule has been held to apply to the discharge of sewage or other noxious substances in such manner as to pollute the surface water and damage the property of individuals. Winn *v.* Rutland, 52 Vt. 481; Gale Eas. 308; Merrifield *v.* Lombard, 13 Allen, 16; Johnson *v.* Jordon, 2 Met. 234; and if a plan adopted for public works must *necessarily* cause injury or peril to private persons or property, though executed with due care and skill, the law regards the execution of such a plan as negligence. 2 Thomp. Neg. 742; Haskell *v.* New Bedford, 108 Mass. 208; 30 Ind. 235; 35 Mich. 296; 33 Ala. 116; 3 Comst. 463.

The case at bar is grounded solely upon the application of the doctrine *respondeat superior,* and can be maintained only by establishing the relation of master and servant, and the further proposition that the acts done were of such a character that for a negligent doing of them the village can be made liable. The acts done were done by and under the direction of the officers of the fire department and in pursuance of the duty imposed upon them by s. 4 of the ordinance establishing a fire department "to examine into the condition of all reservoirs, hydrants and wells, and of the engines and all other fire apparatus, ... and to take a general supervision and care of the same." They performed a further duty prescribed by that section in reporting the condition of these hydrants to the trustees, and were by said trustees directed to go on and thaw them out, and informed that the village would pay the expense of so doing. The question of *payment* seems to be about all that the trustees have to do with such matters, under the charter and ordinances. It was the duty of the fire department officers to perform the service, if it was necessary; and neither this duty nor the mode of its performance could be affected in one way or another by the fact that payment of the expense was assured by the officers through whom *all* the expenses of the fire department must be paid. The propriety and necessity of thawing out the hydrants is not disputed; and putting them in condition for effective service in case of a fire, which was liable to occur at any moment, was not only directly in the line of duty prescribed by the ordinance just quoted, but also as important a part of the general duty to protect from and extinguish fires, as would be the laying of hose or hauling of fire apparatus while a conflagration was in actual progress.

The fire department and its service are of no benefit or profit to the village in its corporate capacity. They are not a source of income or profit to the village, but of expense, which is paid — not out of any special receipts or fund, nor defrayed, even in part, by assessment upon particular persons or classes benefitted, as in case of sewers or

water-works — but from the general fund raised by taxation of all the inhabitants. The benefit accrues, not in any sense to the corporation, as such, but directly to the public; and the members or employees of the department, whether acting as an independent, though subordinate organization, or under the direct authority of the general officers of the corporation, are, while acting in the line of duty prescribed for them, not agents of the corporation in the sense which renders it liable for their acts, but are in the discharge of an official duty as public officers. To such it is held in many cases that the doctrine of *respondeat superior* does not apply, and for their acts no liability can be imposed upon the corporation except by statute. Dill. Mun. Corp., (1st ed.) s. 774; Hafford *v.* New Bedford, 16 Gray, 297; Fisher *v.* Boston, 104 Mass. 87; Maxmilian *v.* Mayor, 62 N. Y. 160; Smith *v.* Rochester, 76 Id. 513; Jewett *v.* New Haven, 38 Conn. 368; Ogg *v.* Lansing, 35 Iowa, 495; Field *v.* Des Moines, 39 Id. 575; Heller *v.* Sedalia, 53 Mo. 159; Howard *v.* San Francisco, 51 Cal. 52.

In the recent case of Wilcox *v.* The City of Chicago, decided by the Illinois Supreme Court, in September, 1883, 16 Reporter, 652, which was an action for damages sustained by the plaintiff by reason of a collision between his carriage and a hook and ladder wagon, while in service at a fire, it was strongly urged that the city having *voluntarily* undertaken to organize a fire department, which was under its full control, it was unlike the case of a compulsory legislative requirement, and the doctrine of *respondeat superior* applied. But the court held otherwise, upon the grounds above indicated, and upon the further and in itself, as it seems to us, unanswerable ground of public policy and necessity. Judge WALKER, in delivering the opinion of the court, thus tersely and forcibly states these reasons: "If liable for neglect in this case the city must be held liable for every neglect of that department, and every employee connected with it, when acting within the line of duty. It would subject the city to the opinions of witnesses and jurors whether sufficient dispatch was used in reaching the fire after the alarm was given; whether the employees had used the requisite skill for its extinguishment; whether a sufficient force had been provided to secure safety; whether the city had provided proper engines and other appliances to answer the demands of the hazards of fire in the city; and many other things might be named that would form the subject of legal controversy. To permit recoveries to be had for all such and other acts would virtually render the city an insurer of every person's property within the limits of its jurisdiction. . . . To allow recoveries for the negligence of the fire department would almost certainly subject property holders to as great, if not greater, burdens than are suffered from the damages by fire. Sound public policy would forbid it, if it was not prohibited by authority."

If the defendant were held liable in this case, it would be impossible

to avoid a similar conclusion in case of a negligent or careless act in putting the hydrants in order for efficiency, or in the use or repair of any of the fire apparatus, or indeed any negligence or carelessness of firemen while in active service at a fire; and that would be a state of law which it must readily be seen cities and villages could not live under. It would make them virtually insurers of all property within their limits, and of their citizens, not only against damage by fire, but against all injuries to persons or property by reason of the efforts used to stay or extinguish fires, provided any negligence or want of due care and skill could be established to the satisfaction of a jury.

We find no error, and the judgment of the County Court is affirmed.

FIRE INSURANCE PATROL *v.* BOYD.

120 Pa. St. 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 employees. 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 liability 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, specially 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 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; Maxmilian *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 trusts 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.*

PARKS v. NORTHWESTERN UNIVERSITY.

218 Ill. 381. 1905.

APPEAL from Appellate Court, First District.

Action by Robert Smith Parks against the Northwestern University. From a judgment of the Appellate Court, affirming a judgment of dismissal, plaintiff appeals.

BOGGS, J. The declaration in this case, after alleging that the appellee undertook for hire to teach the appellant the science of dentistry, dental surgery, etc., charged that the appellant received injuries resulting in the loss of an eye through the negligence of one of the professors employed by the appellee while the appellant was in his charge as a student in a classroom or laboratory of the appellee. A demurrer was sustained to the declaration by the Superior Court of Cook County, and the cause dismissed; and this is an appeal from the judgment of the Appellate Court for the First District, affirming the judgment entered in said superior court.

The ground of the demurrer was that the appellee university is a charitable institution organized for the purpose of disseminating education and professional learning, and that the doctrine that the employer shall be liable to respond for the negligent act of the employee, has no application to it.

The question as to whether the defence should be raised by demurrer or plea was waived by counsel, and by agreement the charter of the university was produced, and it is agreed that the cause should be considered as if the charter of the appellee was fully pleaded and the issue of law made thereon.

The appellee university was created by a special charter granted to its trustees by the Legislature of the state of Illinois (Priv. Laws 1851, p. 20), and is being operated under that charter and the amendments thereto passed in 1855, 1861, and 1867. By section 2 of the charter (Priv. Laws 1851, p. 21) it is provided that the appellee shall have perpetual succession, "and shall hold the property of said institution solely for the purpose of education, and not as a stock for the individual benefit of themselves, or any contributor to the endowment of the same." Section 9 (page 23) provides for a forfeiture, should "the corporation at any time act contrary to the provisions of its charter or fail to comply with the same." Appellee is required also, by the terms of said charter, to accept all persons who may apply to it for education, provided they meet the necessary educational requirements and are of good moral character. Many other broad and extensive powers are granted to the appellee university, but they are all conferred to enable it to so manage its property that it

may the more effectively carry out the main purposes of its creation — education — and for that purpose alone.

It is clear from the reading of this charter that the appellee's entire funds, whether from tuition fees received from students or other sources, must be used solely for educational purposes. The appellee corporation has no capital stock, it cannot declare dividends or share profits, and everything that it has is held in trust to be applied in such manner as to best accomplish the purpose for which it was created, viz., the diffusion of knowledge and learning.

In the statute of charitable uses (St. 43 Eliz. c. 4), which is a part of the common law of this state (Heuser *v.* Harris, 42 Ill. 425; Andrews *v.* Andrews, 110 Ill. 223), "schools of learning, free schools," etc., are mentioned as charitable objects, and the fact that the appellee requires its students to pay tuition does not change its character as a charitable institution. 6 Cyc. 974; Andrews *v.* Andrews, *supra.*

The appellant insists that the appellee university is not a public charity, within the meaning of the rule that exempts such institutions from liability for the negligent acts of its servants. He first argues that the principle of exemption applies only to involuntary corporations, such as counties, towns, charitable institutions conducted by the state or general government, etc., which are a part of the government of the state, and the exemption exists because they are acting as agencies of the state, but that it does not apply to corporations accepting private charters, and that the appellee is liable upon the same principle that cities and villages are held liable for the negligent failure to properly maintain streets, sidewalks, etc., in a reasonably safe condition. Counties and towns under township organization are created as agencies of the state for the purpose of exercising locally certain governmental functions, and in the performance of duties of that character neither the state nor any of its agencies are liable to respond in damages for the negligent acts of any of its servants. An incorporated city or village may have, and usually has, cast upon it authority to perform certain public or governmental duties, and in the performance of such functions these municipalities are not subject to the doctrine of *respondeat superior* for the delinquencies of their agents or officers, for the reason, before given, that in such matters they are but arms of the state, and the non-liability of the sovereign covers and shields the acts of its agencies. City of Chicago *v.* Chicago Ball Club, 196 Ill. 54. An incorporated city or village voluntarily accepts a charter granting to it certain private or proprietary powers — that is, powers to be exercised for the benefit of its citizens — and a duty is thereby imposed upon them to properly exercise those powers without injury to others, and for the negligent breach of that duty by their servants they are liable to the injured party. But the exemption accorded to charitable institutions

does not rest alone on the doctrine that the state or the sovereign is not liable for the acts of its servants. The doctrine of *respondeat superior* does not extend to charitable institutions for the reasons, "first, that if this liability were admitted the trust fund might be wholly destroyed and diverted from the purpose for which it was given, thus thwarting the donor's intent, as the result of negligence for which he was in nowise responsible; second, that, since the trustees cannot divert the funds by their direct act from the purposes for which they were donated, such funds cannot be indirectly diverted by the tortious or negligent acts of the managers of the funds or their agents or employees." 5 Am. & Eng. Ency. of Law (2d ed.) 923. These reasons for exemption apply as well to private as to public charitable corporations.

The appellee university is a private corporation, but is organized for purely charitable purposes. It declares no dividends, and has no power to do so. It depends upon the income from its property and the endowments and gifts of benevolent persons for funds to carry out the sole object for which it was created — the dissemination of learning. Its charter secures to all persons of good moral character who have made sufficient preliminary advancement the benefits of the university, and all of its funds and property, from whatever source derived, are held in trust by it, to be applied in furtherance of the purpose of its organization and increasing its benefits to the public. The funds and property thus acquired are held in trust, and cannot be diverted to the purpose of paying damages for injuries caused by the negligent or wrongful acts of its servants and employees to persons who are enjoying the benefit of the charity. An institution of this character, doing charitable work of great benefit to the public without profit, and depending upon gifts, donations, legacies, and bequests made by charitable persons for the successful accomplishment of its beneficial purposes, is not to be hampered in the acquisition of property and funds from those wishing to contribute and assist in the charitable work by any doubt that might arise in the minds of such intending donors as to whether the funds supplied by them will be applied to the purposes for which they intended to devote them, or diverted to the entirely different purpose of satisfying judgments recovered against the donee because of the negligent acts of those employed to carry the beneficent purpose into execution.

That the appellee, though a private, and not a public, corporation, being a purely charitable institution, it not answerable for the negligent acts of its employees, is held but with little diversity of opinion. 5 Am. & Eng. Ency. of Law (2d ed.) 923, and many judicial decisions cited in the note. The only case we find in this country expressing a contrary view is Glavin *v.* Rhode Island Hospital, 12 R. I. 411; and since that decision the Legislature of Rhode Island has by appropriate enactment created the exemption here contended for by the appellee

university as to all hospitals whose funds are exclusively devoted to charitable purposes. Gen. Laws R. I. 1896, c. 177, § 38.

The ruling of the superior court of Cook county in sustaining the demurrer to appellant's declaration was correct. The judgment of the Appellate Court must be, and is, affirmed.

Judgment affirmed.

ADAMS *v.* UNIVERSITY HOSPITAL.

99 S. W. (Kan. City Ct. App. Mo.) 453. 1907.

ELLISON, J. The plaintiff was a patient at the defendant's hospital whither he had gone to have a surgical operation performed upon him. While yet under the influence of an anesthetic administered for the purpose of the operation and after the performance of the operation, he was placed in the charge and care of one or more of defendant's nurses, who, it is charged, were not competent, and by reason thereof they permitted him to be severely burned on the legs by rubber bottles filled with hot water, whereby he was painfully and permanently injured. He brought the present action against the defendant for damages and prevailed in the trial court.

Serious injury to plaintiff was shown, and the defendant's main contention is that it is a benevolent or charitable institution and as such is not liable to an action for damages caused by the acts of its employees; that, as such an institution, it is exempt from application of the doctrine of *respondeat superior*. Defendant insists that it is neither liable for the negligence of its servants, nor for its own negligence, if any, in undertaking to select competent servants. Upon the other hand, the plaintiff contends that there is liability, if there was negligence either of the servant or of the defendant in selecting a competent servant. . . .

The question as presented here relates to the liability of a private, or *quasi* private, charity for damages caused by the negligent acts of its employees, or by its own negligent act in employing incompetent employees. We will assume that the evidence tends to show the plaintiff was injured either by the negligence of one of defendant's nurses or by her incompetence. If by the latter, we will assume, for the purpose of disposing of the case, that there is enough in the record to justify a verdict that the defendant was careless in selecting her. But as, in our opinion, the defendant is neither liable for the negligence of one of its employees, nor for its own negligence in selecting an incompetent employee, it can make no difference which of the two acts caused the injury.

Every member of the public is interested in the building up and maintenance of a charitable institution designed for the alleviation

of human suffering, and every one may be supposed to be concerned in such institution, and to be a party to a line of action or conduct which would disable every other from doing anything which has a tendency to prevent the institution from performing the functions intended by its founder. The state itself is concerned that its citizens may be restored to health, and to that end may have places always open where those in need may obtain relief. So it may be said that any citizen who accepts the service of such institution (it making no difference whether in any special instance he pays his way) does so upon the ground, or the implied assurance, that he will assert no complaint which has for its object, or perhaps we should say, for its result, a total or partial destruction of the institution itself.

If an organization for charitable purposes founded upon the bounty of others who supply funds for the purpose of administering relief to those in need of relief, and of extending aid, care, and protection to those who have no one to call upon by the ties of nature, may have its funds diverted from such kindly purpose, would it not inevitably operate to close the purses of the generous and benevolent who now do much to relieve the suffering of mankind? Let us see what the practical result might be. With a view to supplying care, protection, and education to dependent children without parents, some good man puts in trust for building an orphans' home the sum of $25,000, and for its perpetual maintenance the further sum of $100,000, to be put at interest or otherwise invested. The trustees may unfortunately, without proper inquiry or care, employ an incompetent servant. That servant, in the first year's existence of the home, may, from ignorance, or from negligence, do, or omit to do, something causing damage which, under our liberal measure of compensation for personal injuries, would be sufficient to take up the whole fund, and thus, for a single mishap, the generous object of the donor would be thwarted, and what was intended as perpetual relief to succeeding generations of helpless children would be wiped out. That funds supporting organizations for charity cannot be thus diverted, in other words, that charitable institutions or corporations are not liable for the negligence of an employee, nor for the want of care in the selection of an employee, is sustained by authority and by reason.

The question arose in England, and was decided in the House of Lords. Heriot's Hospital *v.* Ross, 12 Clark & F. 507. In that case Heriot, a jeweler, by his will, in the year 1623, left a large part of his estate to certain officers of the city of Edinburgh in perpetuity for founding and maintaining a hospital for the "maintenance, relief, bringing up, and education of so many poor fatherless boys, freemen's sons of that town, as the means which I give, and the yearly value of the lands so purchased shall amount and come unto." The hospital was to be governed by rules formulated by a certain doctor named in the will. The rules, as framed, admitted to the

hospital boys between certain ages. More than 200 years after it was founded, a boy, alleging that he was wrongfully excluded, brought his action against the feoffees of the hospital in their official capacity, for damages. Opinions of Lords Cottenham, Brougham, and Campbell are reported which are remarkable for the vigor with which they assail the proposition that the funds of a charity may be diverted to the payment of damages for malfeasance of the trustees. Lord CAMPBELL pronounced the suggestion that persons damaged could be indemnified out of the trust fund to be "contrary to all reason, and justice, and common sense." He stated that there was "not any authority, not a single shred to support" such view of the law. In reversing the decree of the lower court he further stated that "it is to be hoped that we shall never again hear of a decision like the present, contrary to reason, sense and justice." In the course of their opinions, the judges refer as authority to the case of Duncan *v.* Findlater, 6 Clark & F. 894. That case has been overruled in Mersey Docks *v.* Gibbs, L. R. 1 H. L. 117 (same case in 11 H. L. Cas. 720; 1 Eng. and Irish Appeal Cas. 93), and was, therefore, not followed in as late a case as that of Gilbert *v.* Corporation of Trinity House, L. R. 17 Q. B. 795.

From the fact that Duncan *v.* Findlater was stated to be authority supporting the holding in Heriot's Hospital *v.* Ross, and that the former was afterwards overruled, the notion came to prevail, in some quarters, that the latter case was also discredited. But an examination of the cases, and others of similar character, will disclose that they belong to different classes and that the principle or foundation upon which they rest is radically unlike. One class involves the right to divert charity funds from the object of the donor by appropriating them in payment of damages caused by the neglect of the trustees; the other involves the liability of public corporations (not charitable) for the negligence of trustees or other officers in charge thereof. It is not necessary to refer to the rule as to liability of corporations in this country, or to differences which may exist between the rule adopted in this state and that applied in England, whether such corporations be private trading corporations, or governmental, or partly both. It is sufficient for present purposes to know that Heriot's Hospital *v.* Ross, involving a case of a distinct and wholly different class, has not had its value at all abated by the other cases. Duncan *v.* Findlater was an action against the trustees of a public road (appointed under a statute) and was for injury to one travelling at night, by reason of defects in the highway. The decision was that the road fund was not to be subject to such damages. It was overruled, as above stated, in Mersey Docks *v.* Gibbs, a case where trustees, who were by statute in charge of a harbor and docks, suffered them to become obstructed with mud so that a ship and cargo were damaged. It was decided that the corporation was liable for the

negligence of the trustees, and Duncan *v.* Findlater was overruled.

But the ground of objection to Duncan *v.* Findlater was not a ground which can apply to the reason for the rule which supports the exemption of charities. The Mersey Docks were authorized by act of Parliament, and were entitled to receive port dues and apply the same to the improvement of the harbor and maintaining the docks, to the payment of debts, and, after such debts were paid, the trustees were required to lower and reduce the rates "as far as can be done, leaving sufficient for defraying all charges of management and other concerns of the docks, etc., and improving, repairing, and maintaining the same, and for carrying into execution the provisions of this act and former acts." While, in the course of the opinion, strong objection is taken to Duncan *v.* Findlater in deciding no liability existed for negligently permitting a defective highway, yet the ground upon which the case is put turned upon a construction of the acts of Parliament authorizing the trustees to take charge of the harbor and docks (see pages 104, 107, 118). At page 107, Justice BLACKBURN said: "Corporations, like the present, formed for trading and other profitable purposes, though such corporations may act without reward to themselves, yet in their very nature they are substitutions on a large scale for individual enterprise, and we think that, in the absence of anything in the statutes (which creates such corporations) showing a contrary intention in the Legislature, the true rule of construction is that the Legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds, be co-extensive with that imposed by the general law on the owners of similar works." The case decided in Queen's Bench (Gilbert *v.* Corporation of Trinity House, *supra*) is decided on the same principle as that which governed the Mersey Docks Case. It was a case where the care and management of all lighthouses and beacons in England and adjacent seas were vested in Trinity House, and the corporation was held to be liable for the negligence of one it licensed to remove a partially destroyed beacon.

It seems clear to us that those cases, and others of like character, should not be thought to be in conflict with those which have steadily maintained the rule exempting the diversion of funds set apart for the support of charitable institutions. We have not been advised of any case in England which has doubted the authority of Heriot's Hospital *v.* Ross. And, though it was cited in Mersey Docks *v.* Gibbs, it is not questioned or mentioned by the court, undoubtedly upon the ground that it did not depend upon like considerations. Indeed, afterwards, in a case in the House of Lords, involving the liability of the Mersey Docks to be rated for taxation, Justice BLACKBURN, who delivered the opinion in the case of Mersey Docks *v.* Gibbs, disclaimed that that case involved considerations applicable to charities.

In the course of his opinion, at page 465 of the report, he said that there were "several cases relating to charities which were mentioned at your Lordships' 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 exemption of property occupied for charitable purposes, it is clear that the docks in question can come within no such exemption." Mersey Docks *v.* Cameron, 11 H. L. Cas. 443.

In this country whatever conflict in the authorities may appear has arisen from applying rules to charities which, as we have just seen, were laid down as governing an entirely different class of cases — cases clearly involving governmental function, or substitutes for private enterprise. A fund arising from charges against shipowners for use of docks for landing, unloading, and storing freight, a fund arising from toll taken of those using a public highway, and the like, are matters of business, or are of *quasi* governmental concern, which bear no likeness to the funds which are provided by the generosity of donors for the perpetual alleviation of suffering and for the betterment of the health and moral being of mankind. In the former class, it may be well enough to say that the law intended the fund to make good an injury which its managers may inflict. But in the latter, it would be against every principle of right and an outrage on justice to deplete a fund set aside for perpetual charity, by using it in paying damages caused by the acts of those engaged in administering the trust. Charity funds are things apart from ordinary matters of business or trade. In the thoughts and consciences of men, charities are not loaded with the burdens put upon other matters. Charity suggests different considerations and treatment from matters of ordinary business, and hence there has arisen out of the conscience, a principle which protects it in its beneficent and perpetual purpose. The greatest authority has said that, though prophecies shall come to naught, and tongues shall cease, and knowledge shall vanish away, yet "charity never faileth." That and other statements of like tenor, though perhaps referring to mental conditions, have doubtless done much to foster the privileges which have ever been accorded to material benevolence.

To repeat a thought already suggested, every one, in the present or the future, coming within the object of a charity, has a right to the enjoyment of its benefits, and no one has a right to appropriate to himself in settlement of claims, the fund whereby those benefits are secured. To permit it to be done would be not only setting aside the purpose of the donor, but would, in its results, allow the claim of one person to exclude the rights of all others who may come after him. It would be a matter of grave concern and regret if funds set apart for support of our charitable institutions should be made subject to the assaults of the damage claimant, and be called upon, not only for compensatory recompense, but to stand for punishment in the way of exemplary damages. Especially would it strike one as

unfortunate, when it is realized that such claimant has his primary right to hold to the strictest accountability the individual who does him the injury for which he makes complaint, and that in denying him the right to impoverish benevolence we do not deny him a remedy against the actual wrongdoer.

So the weight of authority in this country supports Heriot's Hospital *v.* Ross as being the rule which commends itself, not only because it carried out the donor's intention, but because it is more reasonable and just, and better subserves an enlightened public policy. Parks *v.* University, 218 Ill. 381; Fire Ins. Patrol *v.* Boyd, 120 Pa. 624; Williamson *v.* Louisville Reform School, 95 Ky. 251; Perry *v.* House of Refuge, 63 Md. 20; Maia *v.* Eastern Hospital, 97 Va. 507; Downes *v.* Harper Hospital, 101 Mich. 555; McDonald *v.* Hospital, 120 Mass. 432; Benton *v.* Trustees, 140 Mass. 13.

We have found but one case (Glavin *v.* Rhode Island Hospital, 12 R. I. 411) which takes ground against the view we have endeavored to set forth, and that does not do so in such pronounced way as has been said. It is there conceded (page 428 of 12 R. I.) that only the income of the institution could be held. But whatever breadth the case may be thought to have, we learn from Parks *v.* University, *supra,* that the Legislature of the state of Rhode Island has since nullified the effect of the decision. In the two cases last cited from the Supreme Court of Massachusetts, that court, while upholding the doctrine as stated by us, yet makes use of language in the opinions which leaves room for an inference that a liability might attach if the corporation had been negligent in selecting its surgeons in the one case and its superintendent in the other. The case of Hearns *v.* Waterbury Hospital, 66 Conn. 98, 123–127, seems to concede that there would be a liability for negligence in selecting employees, but no liability for the negligence of the employees themselves, if selected with due care. But it is manifest that, if we uphold a rule which would make an institution of charity liable to a patient who has been injured by an incompetent servant, negligently selected, we destroy the principle we have endeavored to make plain, that charitable trust funds cannot be diverted from the purposes of the donor. For it can make no difference, so far as the integrity of the fund is concerned, whether it be sought after by one who is injured by the negligence of a servant, or the negligent selection of such servant. . . .

Plaintiff refuses to concede that the defendant is a charity hospital. If it is not, it would be liable to this action though such institutions were exempt. We are, however, of the opinion that it is a charitable institution. . . .

Concluding, as we have, that the defendant is not liable to the action, and that plaintiff's remedy is against those who may have inflicted the injury upon him, we reverse the judgment. The other Judges concur.

HEARNS *v.* THE WATERBURY HOSPITAL.

66 Conn. 98. 1895.

DEFENDANT is a charitable corporation having no capital stock and its members derive no profits from it. Plaintiff applied for treatment for a fractured knee-cap and agreed to pay therefor the usual compensation. He brings an action to recover damages for injuries caused, as he claims, by the unskilful or negligent treatment he received at the hospital from attending surgeons and nurses. Judgment on the pleadings was given for the defendant. On the appeal the court considers only the question of whether the negligence alleged in the complaint entitles the plaintiff to a recovery; it is stipulated that the court should assume that the defendant exercised due care in selecting the surgeons and nurses.

HAMMERSLEY, J. (after discussing a large number of English and American cases). It is apparent that there are marked differences in these cases, both as to results and the process by which results are reached. These differences mainly appear in the tests adopted for ascertaining in each case what is a corporate duty and what is a corporate neglect; in the confusion of the *quasi* trust arising from the restriction which binds every corporation to apply its corporate funds to the purposes for which it was organized, with the relation of a strictly legal trustee to his trust funds; and especially in the various means by which courts have sought to escape the patent injustice of applying the extreme doctrine of *respondeat superior* to the personal defaults of employees of charitable institutions. But we think the drift of all the cases clearly indicates a general conviction that an eleemosynary corporation should not be held liable for an injury due only to the neglect of a servant, and not caused by its corporate negligence, in the failure to perform a duty imposed on it by law; and we are satisfied that this general conviction rests on sound legal principles.

The law which makes one responsible for his own act, although it may be done through another, and which is expressed by the primary meaning of the maxim *qui facit per alium facit per se,* is based on a principle of universal justice. The law which makes one responsible for an act not his own, because the actual wrongdoer is his servant, is based on a rule of public policy.

The liability of a charitable corporation for the defaults of its servants must depend upon the reasons of that rule of policy, and their application to such corporation. The rule is distinguished as the doctrine of *respondeat superior.* . . .

The reasons for the rule have been differently stated by others. In Maxmilian *v.* Mayor, etc., 62 N. Y. 160, the rule is based upon

the right which the employer has to select his servants, to discharge them if not competent, and to control them while in his employ.

In Dicey on Parties to Actions, Rule 102, 445, the liability is stated as "analogous to the liability of an owner for injuries committed by animals belonging to him. Neither the master nor owner is liable because he has himself done the particular act complained of. He is responsible because the wrong is the result of his having in the one case employed the incompetent servant, and in the other kept an animal of habits injurious to his neighbors." Here the policy stated seems to be that the master should not only be liable for his negligence in the employment of servants, but should be held as a guarantor that none employed by him should abuse their opportunities. And a similar notion is expressed in Wood on Master and Servant, § 277, *i.e.*, that the penalty of liability is imposed in order to secure in the master "the exercise of proper care and diligence in the selection and retention of his agents." Wharton, Law of Negligence, § 157, gives as the reason of the policy, that "he who puts in operation an agency which he controls, while he receives its emoluments, is responsible for the injuries it incidentally inflicts"; relying on Lord BROUGHAM'S statement in Duncan *v.* Findlater, 6 Clark & F. 894, "I am liable for what is done for me under my orders by the man I employ, for I may turn him from that employ when I please: and the reason that I am liable is this, that by employing him I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it."

This defendant does not come within the main reason for the rule of public policy which supports the doctrine of *respondeat superior;* it derives no benefit from what its servant does, in the sense of that personal and private gain which was the real reason for the rule. Again, so far as the persons injured are concerned, especially if they be patients at the hospital, the defendant does not "set the whole thing in motion" in the sense in which that phrase is used as expressing a reason for the rule. Such patient, who may be injured by the wrongful act of a hospital servant, is not a mere third party, a stranger to the transaction — he is rather a participant. The thing about which the servants are employed is the healing of the sick. This is set in motion, not for the benefit of the defendant, but of the public; surely those who accept the benefit, contributing also by their payments to the public enterprise (and not to the private pocket of the defendant), assist as truly as the defendant in setting the whole thing in motion.

But the practical ground on which the rule is based is simply this: On the whole, substantial justice is best served by making a master responsible for the injuries caused by his servant acting in his service, when set to work by him to prosecute his private

ends, with the expectation of deriving from that work private benefit. This has at times proved a hard rule, but it rests upon a public policy too firmly settled to be questioned.

We are now asked to apply this rule, for the first time, to a class of masters distinct from all others, and who do not and cannot come within the reason of the rule. In other words, we are asked to extend the rule and to declare a new public policy and say: On the whole substantial justice is best served by making the owners of a public charity, involving no private profit, responsible not only for their own wrongful negligence, but also for the wrongful negligence of the servants they employ only for a public use and a public benefit. We think the law does not justify such an extension of the rule of *respondeat superior*. It is perhaps immaterial whether we say the public policy which supports the doctrine of *respondeat superior* does not justify such extension of the rule; or say that the public policy which encourages enterprises for charitable purposes requires an exemption from the operation of a rule based on legal fiction, and which, as applied to the owners of such enterprises, is clearly opposed to substantial justice. It is enough that a charitable corporation like the defendant — whatever may be the principle that controls its liability for corporate neglect in the performance of a corporate duty — is not liable, on the grounds of public policy, for injuries caused by personal wrongful neglect in the performance of his duty by a servant whom it has selected with due care; but in such case the servant is alone responsible for his own wrong.

This result is justified by the opinions in Hall *v.* Smith, 2 Bing. 156; Holliday *v.* St. Leonard's, 11 C. B., N. S. 192; and Union Pac. Ry. Co. *v.* Artist, 60 Fed. Rep. 365, substantially on the grounds above stated; and is reached, for one reason or another, by the greater number of courts that have dealt with this particular liability of a corporation for public or charitable purposes.

There is no error in the judgment of the Superior Court.

In this opinion the other judges concurred.[1]

[1] "This hospital was maintained and the physician provided for the sole purpose of relieving the sick and injured employees without expense to them and without any intention on the part of the company of making any profit out of the undertaking. It was, therefore, a charitable institution, and it was supported by the contributions of employees, and carried on in their interests. And if the company did employ the physician, as claimed by respondent, to look after and treat the sick and injured, it is not liable for his negligence, but is responsible only for want of ordinary care in selecting him. McDonald *v.* Hospital, 120 Mass. 432, 21 Am. Rep. 529; Van Tassell *v.* Hospital, 15 N. Y. Supp. 620; Fire Ins. Patrol *v.* Boyd, 120 Pa. St. 624, 15 Atl. 553; Laubheim *v.* Steamship Co., 107 N. Y. 228, 13 N. E. 781, 1 Am. St. Rep. 815; U. P. Ry. Co. *v.* Artist, 60 Fed. 365. And it is not shown that the company was derelict in that particular." Richardson *v.* Carbon Hill Coal Co., 10 Wash. 648, 655, 656.

BRUCE *v.* CENTRAL METHODIST EPISCOPAL CHURCH.

110 N. W. (Mich.) 951. 1907.

CARPENTER, C. J. Defendant is a Methodist Episcopal Church, incorporated under Act No. 11, page 10, of the Public Acts of 1899. It is charged in plaintiff's declaration that while he (plaintiff) was at work for a contractor tinting the ceiling of defendant's church edifice, the scaffolding upon which he stood, and which was furnished by defendant, and which was defective owing to defendant's negligence, broke, and that he was thrown to the floor and injured. Defendant demurred to this declaration upon the ground that it "is not liable for any neglect or default of any agent or servant having the care and custody of its property," and upon other grounds which need not be mentioned. This demurrer was sustained, and judgment entered in defendant's favor. Plaintiff asks us to reverse that judgment.

I agree with my Brother OSTRANDER that we should decide this case upon the assumption that defendant's property "is not held subject to any express trust created by the grantor or vendor of the property," and that "we should proceed upon the theory that the defendant may not devote its property to the use of any other religious denomination or to other than religious purposes." The principle of *respondeat superior* — that one is responsible for the acts of his agent — applies, and makes defendant liable for the wrong done to plaintiff, unless defendant is exempt from the operation of that principle because it is administering a charitable trust. The claim is made that it is so exempt by reason of Downes *v.* Harper Hospital, decided by this court in 1894, and reported in 101 Mich. 555. See, also, Pepke *v.* Grace Hospital, 130 Mich. 493. In Downes *v.* Harper Hospital this court held, as correctly stated in the headnote to that case: "A corporation organized and maintained for no private gain, but for the proper care and medical treatment of the sick, and to that end to manage a trust fund donated for that purpose, cannot be made liable for injuries sustained by a patient by reason of the negligent acts of its managers or employees."

It is urged that that case does not apply, because a church fund which is a fund devoted to religious purposes is not — like a fund devoted to the care and medical treatment of the sick — a charitable trust fund. . . . We are compelled to hold that funds devoted to a religious purpose are charitable trust funds. I conclude, therefore, that we cannot hold the principle of the decision in Downes *v.* Harper Hospital, *supra,* inapplicable, upon the ground that the funds of the church are not charitable trust funds.

This leads us to the inquiry: Is there any other ground upon which we should hold Downes *v.* Harper Hospital inapplicable? There is this distinction between Downes *v.* Harper Hospital and this case, viz., in the Downes Case plaintiff was a patient in defendant's hospital, and, therefore, a beneficiary of the charitable trust administered by the hospital corporation, while in this case he was an employee of defendant's contractor, and not a beneficiary of the trust administered by defendant. If we hold that the principle of the Downes Case applies to the case at bar, we must declare that that principle exempts a corporation administering a charitable trust from all liability for the torts of its agents, and, as a corporation can act only by and through its agents, that it is exempt from all liability whatsoever for torts. What is the principle underlying the Downes Case? Does it exempt a corporation administering a charitable trust from all liability for torts? Those who answer this question in the affirmative cannot support their position by appealing to the reasoning of the opinion in that case. While that opinion says, "The law jealously guards the charitable trust fund, and does not permit it to be frittered away by the negligent acts of those employed in its execution," the pith of its reasoning in my judgment is contained in the following words: "It certainly follows that the fund cannot be indirectly diverted by the tortious or negligent acts of the managers of the fund, or their employees, though such acts result in damages to an innocent beneficiary. Those voluntarily accepting the benefit of the charity accept it upon this condition."

Let us determine the principle underlying the Downes Case. In this undertaking we are not aided by cases like Fire Insurance Patrol *v.* Boyd, 120 Pa. 624, which held that a principal is not liable for the negligence of one acting in the capacity of a governmental agent — for neither the Harper Hospital nor its offending servants were acting in that capacity — but we do receive aid, and great aid, by examining decisions similar to that of Downes *v.* Harper Hospital made by other courts. Among those decisions are: Feoffees of Heriot's Hospital *v.* Ross, 12 C. & F. 506; McDonald *v.* Mass. General Hospital, 120 Mass. 432; Williams *v.* Industrial School, 95 Ky. 251; Perry *v.* House of Refuge, 63 Md. 20; Richmond *v.* Long's Adm'rs, 17 Grat. (Va.) 375; Hearns *v.* Waterbury Hospital, 66 Conn. 98; Eighmy *v.* U. P. Ry. Co., 93 Iowa, 538; Joel *v.* Women's Hospital, 89 Hun (N. Y.), 73; Van Tassel *v.* Eye and Ear Hospital (Sup.), 15 N. Y. Supp. 620; Collins *v.* Medical School and Hospital (Sup.), 69 N. Y. Supp. 106; Connor *v.* Sisters of the Poor, 70 N. P. 514, 10 S. & C. P. Dec. 86; Glavin *v.* Rhode Island Hospital, 12 R. I. 411; Union Pacific Ry. Co. *v.* Artist, 60 Fed. 365; Powers *v.* Mass. Homeopathic Hospital, 47 C. C. A. 122. In each of these cases, except that of Glavin *v.* Rhode Island Hospital, it was held, as held in the Downes Case, that the beneficiary of the charitable trust could

not recover for injuries resulting from the torts of the agents of the trustee corporation. Inasmuch as this court is committed to this doctrine, we need not consider the decision of Glavin *v.* Rhode Island Hospital, which denies it. We are endeavoring to ascertain, not whether the doctrine is sound, but its true underlying principle. Decisions denying a doctrine afford no aid in construing it. In the latest of these cases (Powers *v.* Mass. Homeopathic Hospital) — the opinion is exhaustive and elaborate, and discusses nearly all the authorities — it is held that the ground upon which liability is denied is that of assumed risk. The court saying: "One who accepts the benefit of a public or of a private charity, enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity, at any rate if the benefactor has used due care in selecting those servants." If this is correct, it is scarcely necessary to say that that principle has no application to the case at bar. Is it correct? The ground upon which liability is denied in nearly all the foregoing cases is that stated in the Downes Case, viz., that it would thwart the purpose of the trust; that is, it would oppose the will of the founder of the trust to pay from the trust funds damages caused by an agent's torts. It is entirely logical to say that this will must be recognized by beneficiaries of the trust. It may justly be said that the benefit of the trust is extended to them and accepted by them upon the implied condition that they shall recognize that will. By becoming beneficiaries they agree to recognize it. But I can see no ground upon which it may be held that the rights of those who are not beneficiaries of a trust can in any way be affected by the will of its founder. The rights of such persons are those created by general laws, and the duties of those administering the trust to respect those rights are also created by general laws. The doctrine that the will of an individual shall exempt either persons or property from the operation of general laws is inconsistent with the fundamental idea of government. It permits the will of the subject to nullify the will of the people. Nor can I conceive any ground upon which a court can hold that effect can be given to that will when it relates to property devised or conveyed for the purpose of a charitable trust. Such a holding must rest upon the argument that the advantages reaped by the public from such trusts justify the exemption; that is, as applied to this case, the advantages to the public justify defendant's exemption from liability for wrongs done to individuals. If this argument is sound — and its soundness may be questioned, for there are those who will deny that the advantages to the public justify the wrong to the individual — it should be addressed to the legislative, and not to the judicial, department of the government. It is our duty as judges to apply the law. We have no authority to create exemptions or to declare immunity.

It is true that in many of the cases above cited, it is stated that

those administering a trust fund are not responsible for the torts of their agents, because damages for such torts cannot be paid from the trust fund. This statement was first made by the House of Lords of England in 1839 in deciding the case of Duncan *v.* Findlater, 6 C. & F. 894. In a subsequent case (Mersey Docks *v.* Gibbs, 11 H. of L. Cases, 686) the same tribunal said that this statement was unnecessary to the decision of the case in which it was announced, and that it was an incorrect statement of the law. Precisely the same may be said of the repetition of that statement in the foregoing cases. We are justified in saying that the statement was unnecessary to their decisions, because, in determining the noncontract obligation of a trustee toward the beneficiaries of his trust (and that was the question involved in each of these cases), it was not necessary to determine his obligation to others.

It is equally true that the proposition that trust funds cannot be used to compensate wrongs committed by the agent of the trustee is not a correct statement of the law. That proposition, in my judgment, must rest on the principle — which I have heretofore endeavored to prove unsound — that the will of an individual exempts property from the operation of the general laws of the land. It should also be said that, if the trustee be an individual, he is, like other individuals, personally responsible for wrongs committed by his agents (Powers *v.* Mass. Homeopathic Hospital, *supra;* Shepard *v.* Creamer, 160 Mass. 496; Baker *v.* Tibbetts, 162 Mass. 468; Bennett *v.* Wyndham, 4 De Gex, F. & J. 259), and, if he is adjudged liable therefor, though an execution will not run against the trust funds, because the judgment is against him personally, he may discharge that liability, or reimburse himself if he has discharged it, from the trust funds. Powers *v.* Mass. Homeopathic Hospital, *supra,* and cases therein cited. Parmenter *v.* Barstow, 22 R. I. 246, is not opposed to this principle. That case holds no more than this: that trust property may not "be impaired or dissipated through the negligence or improvidence of trustees." This does not mean that the trustee may not reimburse himself for liability occasioned, not by his own, but by his servant's negligence. The circumstance that the trustee is a corporation instead of an individual cannot affect the question of liability. If authority is needed to justify this statement — which necessarily follows from the elementary principle of law that corporations, like individuals, are amenable to the law of the land — it is found in the following cases: Gilbert *v.* Trinity House, L. R. 17 Q. B. Div. 795; Foreman *v.* Mayor of Canterbury, L. R. 6 Q. B. 214; Mersey Docks, etc., *v.* Gibbs, *supra.* The circumstance that the trustee is a corporation and not an individual may, however, affect the method of satisfying a judgment in favor of a plaintiff who has been wronged by an agent's torts. I can see no reason why the execution issued in such a case may not be levied upon the trust

property, particularly if that constitute the entire property of the corporation.

It has been suggested (see Hearns *v.* Waterbury Hospital, 66 Conn. 125), that the true principle underlying the Downes and similar cases is that the "defendant does not come within the main reason for the rule of public policy which supports the doctrine of *respondeat superior.* It derives no benefit from what its servant does in the sense of that personal and private gain which was the real reason for the rule." This suggestion — which is not a necessary part of the reasoning in the decision of that case — is without force, unless it may be said that the doctrine of *respondeat superior* has no application where the business in which an agent is employed is not carried on for the purpose of profit. I think one cannot carefully read the elaborate opinion in the Hearns Case and examine the authorities therein cited (see, particularly, Foreman *v.* Mayor of Canterbury, L. R. 6 Q. B. 214; Gilbert *v.* Trinity House, L. R. 17 Q. B. Div. 795; Levingston *v.* Guardians, etc., 2 I. R. c. f. 202; and Mersey Docks *v.* Gibbs, *supra*) without reaching the conclusion that the doctrine of *respondeat superior* does apply, though the business is not carried on for the purpose of profit.

I conclude from this reasoning that corporations administering a charitable trust, like all other corporations, are subject to the general laws of the land, and cannot, therefore, claim exemption from responsibility for the torts of their agents, unless that claim is based on a contract with the person injured by such a tort, and that Downes *v.* Harper Hospital and other similar cases are consistent with this rule. They rest upon the principle correctly stated in Powers *v.* Mass. Homeopathic Hospital, *supra,* viz., that the beneficiary of such charitable trust enters into a contract whereby he assumes the risk of such torts. It is not surprising that years should have elapsed before the correct legal principle governing these cases was announced in Powers *v.* Mass. Homeopathic Hospital. The discovery of correct legal principles, like the discovery of scientific and social truths, requires time and patient investigation. . . .

The judgment of the court below sustaining the demurrer is reversed, and the defendant will be given 20 days in which to plead to the declaration.

McAlvay, Grant, Hooker, Montgomery, and Moore, JJ., concurred.

Ostrander, J., also wrote an opinion in which Blair, J., concurred.

BRILL *v.* EDDY.

115 Mo. 596. 1893.

ACTION to recover damages for personal injuries. From a judgment for plaintiff, defendants appeal.

McMahan was employed by defendants as day watchman, and it was his duty to keep boys out of the yards and away from the cars. The plaintiff, a boy under the age of eighteen, was stealing a ride on one of defendants' trains when McMahan pulled him off, thus occasioning the injury complained of. A city ordinance read in evidence made it a misdemeanor for a boy under the age of eighteen years to hang to a moving car.

BLACK, P. J. The plaintiff, a minor suing by his next friend, brought this action against the defendants, who are the receivers of the Missouri, Kansas & Texas Railway Company, to recover damages for the loss of an arm. The chief complaints made in this court, are: first, that there is no evidence of negligence on the part of McMahan; second, if McMahan was guilty of negligence the defendants are not liable because he was acting in the capacity of a police officer. . . .

The evidence on the other issue discloses the following facts: Some three or four months before the accident the mayor of the city of Sedalia, at the request of some of the railroad officials, appointed McMahan a special policeman. The appointment was in writing signed by the mayor. McMahan had been appointed for a like purpose and in a like manner in the spring of every year for a period of eight or nine years. During all that time he was employed by the railroad company as a watchman until it passed into the hands of the receivers, and then by them. He wore a policeman's star, but he did not wear the uniform prescribed for regular police officers and did not report to any city officer. It seems he had made some arrests prior to his last appointment. During the eight or nine years it was his duty to keep trespassers out of the yards, to prevent persons from interfering with the men while at work, to see that the shops were properly closed at night, and to carry the shop mail. It was also his duty to drive boys out of the yards and keep them off the cars.

The ordinance above mentioned provides that any minor under the age of eighteen years who shall, without authority to do so, climb upon, enter or hang to any car while in motion, shall be deemed guilty of a misdemeanor; and by another ordinance it is provided that the police officers shall, without warrant, arrest any one found guilty of violating the city ordinances.

It is no uncommon thing for corporations and individuals to

employ duly appointed police officers to watch their property; and if such an officer so employed make an arrest for disorderly conduct, the presumption is that he acted in his official capacity as the agent of the state, and not as the agent of his employer. Being an officer whose duties are prescribed by law, it should be presumed, until the contrary is made to appear, that his employment contemplates only the exercise of such powers as the law confers upon him. 2 Wood's Railway Law, 1212; Tolchester Beach Improvement Co. *v.* Steinmeier, 20 Atl. Rep. 188; Jardine *v.* Cornell, 14 Atl. Rep. 590. The presumption is, however, one of fact, and it may be shown that in making the arrest he acted under orders of his employer, in which event the employer would be liable for the unlawful acts of the officer. Under the ordinance before mentioned McMahan as a police officer had a right to arrest the boy on view for hanging to the car; and if the evidence tended to show that he committed the negligent act when making or attempting to make the arrest, it would follow from what has been said that the question whether he acted under the orders of defendant or their authorized agent would be one for the jury.

But there is no such evidence. His evidence as well as the circumstances in the case show that he did not intend to arrest the boy. His only purpose was to take the boy off the car and to drive him out of the yards, a thing not within the line of his duties as a police officer, but a duty devolved upon him by the defendants. He was their paid servant, and as such charged with the performance of duties other than those pertaining to the office of a policeman. At the time of the accident he was engaged in enforcing the rules and regulations prescribed by the defendants. In attempting to remove the boy from the car he was not doing, or intending to do, any act devolved upon him as an officer of the law, and the fact that he had been appointed a special policeman has nothing whatever to do with this case. . . . *Judgment affirmed.*[1]

[1] "But it is said that John M. Kiley was a policeman, and therefore appellants are not responsible for his attack upon appellee. Whether, at the time of the injuries complained of, Kiley was acting as a policeman or as agent of appellants must depend upon the acts done by him. Because he was a police officer, it does not follow that all his acts were those of a policeman; and because he was an agent of appellants, it does not follow that all his acts were those of such agent. Even if he were a regular patrolman, called in off the street by appellants or their agents to aid in enforcing the regulations of the theatre, he would, for such purpose, be only an agent of appellants, and for his conduct as such agent, within the scope of his employment, appellants would be responsible. If, however, after entering the theatre he should discover appellee in the act of violating a criminal law of the state or a penal ordinance of the city, and should proceed to arrest him for it, such act of arrest would be that of a police officer. And if such arrest were made on the officer's own motion, without direction, express or implied, on the part of appellants, then appellants would not be responsible. Jardine *v.* Cornell, 50 N. J. L. 485." Dickson *v.* Waldron, 135 Ind. 507, 521.

See, also, Sharp *v.* Erie R. Co., 184 N. Y. 100, and Tyson *v.* Bauland Co., 186 N. Y. 397.

CHAPTER XXIII.

Liability of Master for Penalties and Crimes.

COMMONWEALTH *v.* NICHOLS.

10 Metc. (Mass.) 259. 1845.

At the trial of the defendant, in the court of common pleas, before Cushing, J., upon an indictment on Rev. Sts. c. 47, § 2, for selling spirituous liquor without license, a witness testified that he called at a grocery shop in Lowell, kept by the defendant; that the defendant was not present, but that he found a man there who sold him a glass of spirituous liquor, to be used in the shop; but that he did not know whether the man was in the defendant's employ or not. Another witness testified that he knew the shop kept by the defendant, and that the defendant had a clerk in his employ; that he (the witness) once went into said shop, to purchase groceries, when the clerk alone was there, and that, after he had made his purchases, he went to a cask, drew a glass of liquor, and drank it, but did not pay for it, and was not charged for it, to his knowledge. On cross-examination, this witness said he had heard the defendant expressly forbid his clerk to sell any spirituous liquor in a less quantity than twenty-eight gallons.

The defendant's counsel requested the judge to instruct the jury, that if they doubted, upon the whole evidence, whether these sales were made by the authority of the defendant, or by his consent, they must acquit him. But the judge declined so to do, and instructed the jury, that if they were satisfied, beyond a reasonable doubt, that the sales were made by the defendant, or any person in his employ, and in his shop, they would be warranted in finding him guilty. The jury found the defendant guilty, and he alleged exceptions to the instructions.

Dewey, J. The question here raised as to the liability of the principal to be punished criminally for the acts of his agent or servant, in which he does not directly participate personally, is certainly not free from difficulty. As to civil liabilities, a broader and more general principle of responsibility applies, and the master or principal may be held to answer in damages for default and misdoings with which he had no other connection than that which arises from the fact that the injury was occasioned by one employed in his

service. As a general rule, something beyond this is necessary to charge the master criminally for the acts done by the servant. There must be such a direct participation in the act, or such assent and concurrence therein, as would involve him morally in the guilt of the action. Hence the cases are comparatively rare, and may be considered as exceptions to the general rule, where by legal rules a party is charged criminally for acts of his servant done without his knowledge and assent. The case of a bookseller, or publisher of a newspaper, is to some extent one creating such liability; to what precise extent is, perhaps, yet an unsettled question. Rex *v.* Almon, 5 Bur. 2686, a leading case on that subject, only carried the doctrine so far as to hold that such relation to the act of sale by a servant was *prima facie* evidence to establish the liability of the party, but was not conclusive and might be controlled. It was said by Lord MANSFIELD that he might avoid the effect of it by showing "that he was not privy nor assenting to it, nor encouraging it." So also it is said that the defendant, in such cases, may rebut the presumption by showing that the libel was sold contrary to his orders, or under circumstances negativing all privity on his part. 2 Stark. on Slander (2d ed.), 34.

The general rule, however, has been stated, I think, somewhat more broadly as to the liability of booksellers and publishers, respecting all publications issued from their establishments in the regular course of business; and they have been held answerable criminally in such cases, although the particular act of sale or publication was done without their knowledge. 1 Hawk. c. 73, § 10; Rex *v.* Walter, 3 Esp. R. 21. In the recent case of Rex *v.* Gutch and others, 1 Mood. & Malk. 437, where it appeared that Gutch was residing at a distance, was in ill health, and not interfering with the conducting of the paper, the rule is thus stated: "A person who derives profit from, and who furnishes means for carrying on the concern, and intrusts the conduct of the publication to one whom he selects, may be said to cause to be published what actually appears, and ought to be answerable, although you cannot show that he was individually concerned in the act of publication." But in that case, Lord TENTERDEN, in delivering the opinion of the court, says, "I do not mean to say, that some possible case may not occur, in which he would be exempt; but generally speaking, he is answerable."

Another class of cases, where the liability of the master for the criminal acts of the servant has been recognized, has arisen under revenue laws and police regulations. In Attorney General *v.* Siddon, 1 Crompt. & Jerv. 220, and 1 Tyrw. 41 (a case of concealing smuggled goods), it was held that a trader is liable to a penalty for the illegal act of a servant, done in the conduct of his business, with a view to protect the smuggled goods, though the master be absent at the time the act is done. It seems here again to have been held

only *prima facie* evidence, and that the master might have introduced evidence for the purpose of rebutting such *prima facie* case.

In Attorney General *v.* Riddle, 2 Crompt. & Jerv. 493, and 2 Tyrw. 523, which was an information under St. 1 Geo. 4, *c.* 58, prohibiting the delivery of paper not tied up and labelled, and requiring, before it is removed from the place of manufacture, that it be enclosed in a labelled wrapper, the evidence was, that the wife of the defendant, having authority from him to do certain acts in his trade of a paper manufacturer, pledged paper which had no wrapper or label on it, the court held that the authority of the wife was a question for the jury, and that it ought to have been left to the jury to decide whether or not the acts of the wife, under the circumstances stated, were done by the authority of the husband.

It seems to us that the case of a sale of liquors prohibited by law, at the shop or establishment of the principal, by an agent or servant usually employed in conducting his business, is one of that class in which the master may properly be charged criminally for the act of the servant. But in looking at the question presented by the bill of exceptions in the present cases, and considering what should be stated as the rule as to the responsibility of the principal or master in such cases, the court have come to the opinion that the law was stated too strongly, upon that point, against the defendant, inasmuch as the defendant, under the instructions given, might have been found guilty of the charge in the indictment, if a sale had been made in his shop by any person in his employment, without any reference to the circumstances under which the sale was made, and although against the will and in contravention of the orders of the defendant.

We think that a sale by the servant, in the shop of the master, is only *prima facie* evidence of such sale by the master as would subject him to the penalty for violating the statute forbidding the sale of spirituous liquors without license; that the relation of these parties, the fact that the defendant was in possession of the shop and was the owner of the liquor, and that the sale was made by his servant, furnish strong evidence to authorize and require the jury to find the defendant guilty. But we cannot say that no possible case can arise in which the inference from all these facts may not be rebutted by other proof. Unexplained, they would be sufficient to convict the party. So too it should be understood that merely colorable dissent, or a prohibition not to sell, however publicly or frequently repeated, if not made *bona fide,* will not avail. But if a sale of liquor is made by the servant without the knowledge of the master, and really in opposition to his will, and in no way participated in, approved or countenanced by him, and this is clearly shown by the master, he ought to be acquitted. *New trial granted.*

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 barkeeper, 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 et mandato equiparatur,* is inapplicable."

COMMONWEALTH *v.* KELLEY.

140 Mass. 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 barkeeper not to sell during those hours, and that the barkeeper

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 Mo. 398 (1892), holds that proof of sale by agent makes a *prima 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."

CARROLL *v.* STATE.

63 Md. 551. 1885.

APPEAL from the Circuit Court of Allegany County.

The appellant was indicted, tried, and convicted for selling whiskey to a minor, in violation of § 93 of Article 12 of the Revised Code.

IRVING, J., delivered the opinion of the Court.

The appellant, who was a licensed dealer in spirituous liquors, was indicted for unlawfully selling liquor to one William Miller, a minor under the age of twenty-one years. At the trial two exceptions were taken, which are intended to present the same question, and the only question, in fact, which is involved. The sale was made by appellant's bartender, out of the presence of the appellant, and without his knowledge of this particular sale. This was proved by

the purchaser who also proved he was a minor. In addition to these facts, the appellant offered to prove by the bartender, that the appellant had given him instructions not to sell to minors, and these instructions were understood by the bartender to be *bona fide,* and that he would not intentionally have violated them. He also offered to testify himself, that he had given these instructions to his barkeeper in good faith, and intended them to be obeyed, and that he had no idea of their violation in this or any other case. Both offers, on objection of the state, were refused, and the traverser excepted. A principal is *prima facie* liable for the acts of his agent done in the general course of business authorized by him, 1 Wharton's Crim. Law, § 247; and a vender of spirituous liquors is indictable for the unlawful sale by his agent employed in his business, because all concerned are principals. 2 Wharton's Cr. Law, 1503. This is conceded by appellant's counsel, and it is also conceded, that in the absence of evidence to the contrary, the authority to do the thing complained of may be inferred from the relations of the parties. If there be no authority, express or implied, of course the party indicted ought to be acquitted. The question here is, whether, when the agency for the transaction of the business of selling liquors generally, is established and admitted, and, in the conduct of that business, a prohibited sale is made by an agent to a minor, the principal may shield himself from liability, on the ground that his agent violated his general instructions, and did not inquire, or was deceived by the purchaser as to his age. The question is whether, while deriving the profit from the sale, the principal can delegate *his duty* to know that a purchaser is a lawful one to the determination of an agent, and be excused by the agent's negligence or error.

The law for the violation of which this appellant has been indicted is a police regulation of a very stringent character. It is in these words: "If any person shall sell any spirituous, or fermented liquors, or lager beer, to any person who is a minor, under twenty-one years of age, he shall, on conviction, pay a fine of not less than fifty dollars nor more than two hundred dollars, together with the costs of prosecution, and upon failure to pay the same shall be committed to gaol and confined therein until such fine and costs are paid, or for the period of forty days, whichever shall first occur; and it shall be the duty of the Court before whom said person shall be convicted to suppress his license." For the violation of a statute of this nature it is not necessary to allege the *scienter* in the indictment, because it is not made an ingredient, by the statute, that the thing shall be *knowingly* and *wilfully* done, to make the violation of the statute an offence. As ignorance of the existence of such law will not excuse, so also ignorance of a fact necessary to be known to avoid a violation of the law will not excuse. 3 Greenleaf on Evidence, §§ 20 and 21. Where an act, if done knowingly, would be *malum in se,* ignorance,

which excludes the idea of intentional wrong, it would seem will excuse; but Mr. Greenleaf says, in § 21 of vol. 3 of his work on Evidence, "where a statute commands that an act be done or omitted, which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse its violation." He adds: "Such is the case in regard to fiscal and police regulations, for the violation of which, irrespective of the knowledge or motives of the party, certain penalties are enacted; for the law, in those cases, seems to bind the party to know the facts and to obey the law at his peril." In the note to this section instances are given where such rule applies; and it is said to apply to the sale of any article the sale of which is prohibited, and, it has been held to be no excuse, that the vender did not know it was the prohibited article. 3 Greenleaf, § 21, note. The sale of spirituous liquors, where prohibited, is specially mentioned as within this rule; as also the allowance of minors to play billiards where that is prohibited. This doctrine is maintained in Commonwealth *v.* Emmons, 98 Mass. 6; McCutcheon *v.* The People, 69 Ill. 606; Barnes *v.* The State, 19 Conn. 398; State *v.* Hartfiel, 24 Wis. 60; Ulrich *v.* Commonwealth, 6 Bush (Ky.), 400; and in very many other cases in Massachusetts and other states. It is upon the ground, that intention is not an essential ingredient of the offence, that the principal is held bound for the act of his agent in violation of law whilst pursuing his ordinary business as such agent. Being engaged in business where it is lawful to sell to all persons except such as are by law excepted, it is his *duty* to know when a sale is made, that it is to a properly situated person. Therefore it is his duty to trust nobody to do his work but some one whom he can safely trust to discharge his whole duty, and if he does not do so, the law holds him answerable.

The leading case of Rex *v.* Gutch, Moody & Malk. 433, cited in 1 Taylor's Ev., 827, states the law as it is now generally received. The prosecution was for a libel. Lord TENTERDEN says: "A person who derives profit from, and who furnishes the means for carrying on the concern, and entrusts the business to one in whom he confides, may be said to have published himself, and ought to be answerable."

In The Queen *v.* Bishop, L. R., 5 Queen's Bench Div. (Crown Cases Reserved) 259, the defendant was convicted of receiving into her house two or more lunatics, not being a registered asylum or house duly licensed by law. The jury found specially that the defendant *honestly and on reasonable grounds believed,* that the persons received into her house were not lunatic; though the jury found they were lunatic. The point being reserved was heard before COLERIDGE, DENMAN, STEPHEN, POLLOCK, and FIELD, all of whom affirmed the conviction, holding that such belief was immaterial. The court held that to hold otherwise would frustrate the object of the statute.

In Redgate *v.* Haynes, L. R., 1 Q. B. Div. 89, the appellant was charged with *suffering gaming* to be carried on upon her premises. She had retired for the night, leaving the house in charge of the hall porter, who withdrew his chair to a part of the hotel remote from the guests, and did not see the gaming. It was held that the landlady was answerable. The same principle was maintained in Mullins *v.* Collins, L. R., 9 Q. B. 292, where a servant of a licensed victualler supplied liquor to a constable on duty without authority from his superior officer. The Court held that the licensed victualler was answerable, though he had no knowledge of the act of his servant. So also in a more recent case, in the Queen's Bench, Cundy *v.* Le Cocq (23 American Law Reg. 768), where a person was convicted under the Licensing Act of 1872, of having sold liquors to a drunken person, the question was reserved whether as it was proved that neither the defendant nor his servants knew the man was drunk, and there were no indications of his being intoxicated, and they had no means of knowing, he could be convicted. The Court, through Judge STEPHEN, affirmed the conviction, holding that it was no defence against conviction, and was only a ground for mitigation in punishment.

In McCutcheon *v.* The People, 69 Ill. 607, the indictment was for the same offence as that charged in this case, and the Court lay down the law as we think it is, and ought to be, as the logical result of the immateriality in such case of criminal intent, as all the cases we have cited establish. The Court says "this construction imposes no hardship on the licensed seller. If he does not *know* the party, who seeks to buy intoxicating liquors at his counter, is legally competent to do so, he must refuse to make the sale. If he violates either clause of the statute, he must suffer the penalty of its violation. It is no answer to this view to say the licensee may sometimes be imposed upon, and made to suffer when he had no intention to violate its provisions. This is a risk incident to the business which he undertakes to conduct, and as he receives the gains connected therewith he must also assume all the hazards." The Court adds that it is immaterial whether the sale was made by the appellant, or an agent, and that, if made by an agent, the presumption is conclusive that he acted within the scope of his authority. When the agent, as in this case, is set to do the very thing which, and which only, the principal's business contemplates, namely, the dispensing of liquors to purchasers, the principal must be chargeable with the agent's violation of legal restrictions on that business. His gains are increased, and he must bear the consequences. The fact that he has given orders not to sell to minors only shows a *bona fide intent* to obey the law, which all the authorities say is immaterial, in determining guilt. The Court may regard such fact, in graduating punishment, when it has a discretion.

The cases, therefore, which hold that such orders will exculpate the principal, are inconsistent with the rule, that, in such case intent is immaterial. If intent is not an ingredient in the offence, it logically follows, that it must be immaterial whether such orders are given or not, for he who does by another that which he cannot lawfully do in person, must be responsible for the agent's act. In fact it is his act. If the principal makes such sale at his peril, and is not excusable, because he did not know or was deceived, for the reason that he was bound to know, and if he was not certain should decline to sell, or take the hazard, it cannot be that by setting another to do his work, and occupying himself elsewhere and otherwise, he can reap the benefit of his agent's sales, and escape the consequences of the agent's conduct. It would be impossible to effectually enforce a statute of this kind, if that were allowed; and no license would ever be suppressed. The law would soon become "a dead letter." That this has been the accepted law in this state, in the opinion of the Legislature, is clearly shown by the special Act of 1876, chapter 273, for the City of Annapolis, whereby it is expressly provided that the seller of liquor to minors shall not be punishable if he has been honestly deceived as to the age of the party applying to buy, through the misrepresentations of the buyer; and the person making the purchase through misrepresentation is punishable instead of the seller; and further "that the act of any agent under this section shall not be binding on his principal, if the court or jury shall believe that said act was committed against the *bona fide* instructions of said principal."

It follows from what we have said that we think there was no error in the rulings of the Circuit Court.

Rulings affirmed, and cause remanded.

Judges ROBINSON and YELLOTT dissented.

NOECKER *v.* PEOPLE, 91 Ill. 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. . . ."

COMMONWEALTH *v.* MORGAN.

107 Mass. 199. 1871.

INDICTMENT for the publication of an alleged libel in a newspaper published by defendant. Jury returned a verdict of guilty. Defendant alleged exceptions.

COLT, J. . . . 4. The defendant then offered to prove that he had never seen the alleged libel, and was not aware of its publication till it was pointed out to him by a third party; and that an apology and retraction was subsequently published by the same newspaper.

When a libel is sold in a bookseller's shop, by a servant of the bookseller, in the ordinary course of his employment; or is published in a newspaper; the fact alone is sufficient evidence to charge the bookseller, or the proprietor of the newspaper, with the guilt of its publication. This evidence, by the earlier English decisions, was held not to be conclusive, but the defendant was permitted to show, in exculpation, that he was not privy, nor assenting to, nor encouraging, the publication. See 1 Lead. Crim. Cas. 145; notes to Rex *v.* Almon, 5 Burr. 2686. Afterwards, such evidence was held conclusive, upon the ground that it was necessary to prevent the escape of the real offender behind an irresponsible party. Rex *v.* Gutch, Mood. & Malk. 433; Rex *v.* Walter, 3 Esp. 21. In both these cases, the defendants offered to show that they were perfectly innocent of any share in the criminal publication, and that, although proprietors of the papers, they were living at a distance from London, the place of publication, taking no share in the actual publication, and in one case confined by illness when the paper complained of appeared. It was ruled by Lord KENYON and Lord TENTERDEN to be no defence. But now, by a recent English statute, a defendant is permitted to prove that such publication was made without his authority, consent, or knowledge, and did not arise from want of due care or caution on his part. St. 6 and 7 Vict. c. 96.

The rule thus made positive law is in strict accordance with those just principles which ought to limit criminal liability for the acts of another, and which have been recognized in the decisions of this court. Criminal responsibility on the part of the principal, for the act of his agent or servant in the course of his employment, implies some degree of moral guilt or delinquency, manifested either by direct participation in or assent to the act, or by want of proper care and oversight, or other negligence in reference to the business which he has thus intrusted to another. The rule of civil liability is broader, and the principal must respond in damages for the default or tortious act of the agent or servant in his employment,

although he had no knowledge of it, or had actually forbidden it in advance and had exercised due care to prevent it.

In Commonwealth *v.* Nichols, 10 Met. 259, it was held that a shopkeeper is criminally liable for an unlawful sale of spirituous liquor in his shop, made with his assent by a servant or agent employed in his business. But such sale is only *prima facie* evidence of assent. And it was said that "if a sale of liquor is made by the servant without the knowledge of the master, and really in opposition to his will, and in no way participated in, approved, or countenanced by him, and this is clearly shown by the master, he ought to be acquitted." It is to be remarked with reference to this case, that the question whether the sale was really against the defendant's will is for the jury upon all the evidence, and that the facts that the profits of the business were received by the defendant, and that there was an absence of proper precautions to prevent the illegal traffic, would justify an inference of his approval.

In The King *v.* Dixon, 3 M. & S. 11, the defendant was convicted of selling unwholesome bread, upon proof that his foreman had by mistake put too much alum in it. There was no evidence that the master knew of the quantity used in this instance. But BAYLEY, J., said: "If a person employed a servant to use alum, or any other ingredient, the unrestricted use of which was noxious, and did not restrain him in the use of it, such person would be answerable if the servant used it to excess, because he did not apply the proper precaution against its misuse."

It is the duty of the proprietor of a public paper, which may be used for the publication of improper communications, to use reasonable caution in the conduct of his business, that no libels be published. He is civilly responsible for the wrong, to the extent indicated; and he is criminally liable, unless the unlawful publication was made under such circumstances as to negative any presumption of privity, or connivance, or want of ordinary precaution on his part to prevent it. 3 Greenl. Ev. §§ 170, 178.

We are of opinion that the offer of the defendant did not go far enough, in view of the law thus stated, to rebut the presumption of guilt arising from the publication of this libel. The facts offered may be true, and yet entirely consistent with the fact that the conduct of the newspaper was under his actual direction and charge, at a time when he was neither absent from home nor confined by sickness, and when his want of knowledge would necessarily imply criminal neglect to exercise proper care and supervision over the subordinates in his employ. It is consistent also with such information in this instance, in regard to the proposed libellous attack, as should have put him on inquiry; and with the fact that the general management of the paper was of such a character as to justify the inference that the defendant approved of or connived at publi-

cations of this description, and had given his general assent to them. Under such circumstances, the defendant ought not to be permitted to escape on the plea that he had not seen the particular article and did not know of its publication.

As to the evidence offered of a subsequent apology and retraction, the answer is that it is only a matter in mitigation of sentence. The crime is not purged by it. . . . *Exceptions overruled.*

PART III.

LIABILITY OF MASTER FOR INJURIES TO SERVANT.

CHAPTER XXIV.

Liability of Master to One Servant for Torts of Another Servant.

1. *The Fellow Servant Rule.*

FARWELL *v.* THE BOSTON AND WORCESTER RAILROAD CORPORATION.

4 Metc. (Mass.) 49. 1842.

Action by an engineer against the railroad company employing him for injuries received by him, while running his locomotive, in consequence of the negligence of a switchman of the company in the management of the switches.

Shaw, C. J. This is an action of new impression in our courts, and involves a principle of great importance. It presents a case, where two persons are in the service and employment of one company, whose business it is to construct and maintain a railroad, and to employ their trains of cars to carry persons and merchandise for hire. They are appointed and employed by the same company to perform separate duties and services, all tending to the accomplishment of one and the same purpose — that of the safe and rapid transmission of the trains; and they are paid for their respective services according to the nature of their respective duties, and the labor and skill required for their proper performance. The question is, whether, for damages sustained by one of the persons so employed, by means of the carelessness and negligence of another, the party injured has a remedy against the common employer. It is an argument against such an action, though certainly not a decisive one, that no such action has before been maintained.

It is laid down by Blackstone, that if a servant, by his negligence, does any damage to a stranger, the master shall be answerable for his neglect. But the damage must be done while he is actually employed in the master's service; otherwise, the servant shall answer for his own misbehavior. 1 Bl. Com. 431; M'Manus *v.* Crickett,

1 East, 106. This rule is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another shall thereby sustain damage, he shall answer for it. If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the master, that the latter shall be answerable *civiliter*. But this presupposes that the parties stand to each other in the relation of strangers, between whom there is no privity; and the action, in such case, is an action sounding in tort. The form is trespass on the case, for the consequential damage. The maxim *respondeat superior* is adopted in that case from general considerations of policy and security.

But this does not apply to the case of a servant bringing his action against his own employer to recover damages for an injury arising in the course of that employment, where all such risks and perils as the employer and the servant respectively intend to assume and bear may be regulated by the express or implied contract between them, and which, in contemplation of law, must be presumed to be thus regulated.

The same view seems to have been taken by the learned counsel for the plaintiff in the argument; and it was conceded, that the claim could not be placed on the principle indicated by the maxim *respondeat superior,* which binds the master to indemnify a stranger for the damage caused by the careless, negligent or unskilful act of his servant in the conduct of his affairs. The claim, therefore, is placed, and must be maintained, if maintained at all, on the ground of contract. As there is no express contract between the parties, applicable to this point, it is placed on the footing of an implied contract of indemnity, arising out of the relation of master and servant. It would be an implied promise, arising from the duty of the master to be responsible to each person employed by him, in the conduct of every branch of business, where two or more persons are employed, to pay for all damage occasioned by the negligence of every other person employed in the same service. If such a duty were established by law — like that of a common carrier, to stand to all losses of goods not caused by the act of God or of a public enemy — or that of an innkeeper, to be responsible, in like manner, for the baggage of his guests; it would be a rule of frequent and familiar occurrence, and its existence and application, with all its qualifications and restrictions, would be settled by judicial precedents. But we are of opinion that no such rule has been established, and the authorities, as far as they go, are opposed to the principle. Priestley *v.* Fowler, 3 Mees. & Welsb. 1; Murray *v.* South Carolina Railroad Company, 1 McMullan, 385.

The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others. To say that the master shall be responsible because the damage is caused by his agents, is assuming the very point which remains to be proved. They are his agents to some extent, and for some purposes; but whether he is responsible, in a particular case, for their negligence, is not decided by the single fact that they are, for some purposes, his agents. It seems to be now well settled, whatever might have been thought formerly, that underwriters cannot excuse themselves from payment of a loss by one of the perils insured against, on the ground that the loss was caused by the negligence or unskilfulness of the officers or crew of the vessel, in the performance of their various duties as navigators, although employed and paid by the owners, and, in the navigation of the vessel, their agents. Copeland *v.* New England Marine Ins. Co., 2 Met. 440–443, and cases there cited. I am aware that the maritime law has its own rules and analogies, and that we cannot always safely rely upon them in applying them to other branches of law. But the rule in question seems to be good authority for the point, that persons are not to be responsible, in all cases, for the negligence of those employed by them.

If we look from considerations of justice to those of policy, they will strongly lead to the same conclusion. In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is, in truth, the basis on which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote the benefits of all persons concerned, under given circumstances. To take the well known and familiar cases already cited; a common carrier, without regard to actual fault or neglect in himself or his servants, is made liable for all losses of goods confided to him for carriage, except those caused by the act of God or of a public enemy, because he can best guard them against all minor dangers, and because, in case of actual loss, it would be extremely difficult for the owner to adduce proof of em-

bezzlement, or other actual fault or neglect on the part of the carrier, although it may have been the real cause of the loss. The risk is therefore thrown upon the carrier, and he receives, in the form of payment for the carriage, a premium for the risk which he thus assumes. So of an innkeeper; he can best secure the attendance of honest and faithful servants, and guard his house against thieves. Whereas, if he were responsible only upon proof of actual negligence, he might connive at the presence of dishonest inmates and retainers, and even participate in the embezzlement of the property of the guests, during the hours of their necessary sleep, and yet it would be difficult, and often impossible, to prove these facts.

The liability of passenger carriers is founded on similar considerations. They are held to the strictest responsibility for care, vigilance, and skill, on the part of themselves and all persons employed by them, and they are paid accordingly. The rule is founded on the expediency of throwing the risk upon those who can best guard against it. Story on Bailments, § 590, and *seq.*

We are of opinion that these considerations apply strongly to the case in question. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service, if the common employer will not take such precautions, and employ such agents as the safety of the whole party may require. By these means, the safety of each will be much more effectually secured, than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrongdoer. See Winterbottom *v.* Wright, 10 Mees. & Welsb. 109; Milligan *v.* Wedge, 12 Adolph. & Ellis, 737.

In applying these principles to the present case, it appears that the plaintiff was employed by the defendants as an engineer, at the rate of wages usually paid in that employment, being a higher rate than the plaintiff had before received as a machinist. It was a voluntary undertaking on his part, with a full knowledge of the risks incident to the employment; and the loss was sustained by means of an ordinary casualty, caused by the negligence of another servant of the company. Under these circumstances, the loss must be deemed to be the result of a pure accident, like those to which all men, in all employments, and at all times, are more or less exposed; and like similar losses from accidental causes, it must rest where it first fell, unless the plaintiff has a remedy against the person actually in default; of which we give no opinion.

It was strongly pressed in the argument, that although this might be so, where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security; yet that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree control or influence the conduct of another. But we think this is founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish, what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, how near or how distant must they be, to be in the same or different departments. In a blacksmith's shop, persons working in the same building, at different fires, may be quite independent of each other, though only a few feet distant. In a ropewalk, several may be at work on the same piece of cordage, at the same time, at many hundred feet distant from each other, and beyond the reach of sight and voice, and yet acting together.

Besides, it appears to us, that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability, because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer; but because the *implied contract* of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow servant, does not depend exclusively upon the consideration, that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability, when it does not arise from express or implied contract, or from a responsibility created by law to third persons, and strangers, for the negligence of a servant.

A case may be put for the purpose of illustrating this distinction. Suppose the road had been owned by one set of proprietors whose duty it was to keep it in repair and have it at all times ready and in fit condition for the running of engines and cars, taking a toll, and that the engines and cars were owned by another set of pro-

prietors, paying toll to the proprietors of the road, and receiving compensation from passengers for their carriage; and suppose the engineer to suffer a loss from the negligence of the switch-tender. We are inclined to the opinion that the engineer might have a remedy against the railroad corporation; and if so, it must be on the ground, that as between the engineer employed by the proprietors of the engines and cars, and the switch-tender employed by the corporation, the engineer would be a stranger, between whom and the corporation there could be no privity of contract; and not because the engineer would have no means of controlling the conduct of the switch-tender. The responsibility which one is under for the negligence of his servant, in the conduct of his business, towards third persons, is founded on another and distinct principle from that of implied contract, and stands on its own reasons of policy. The same reasons of policy, we think, limit this responsibility to the case of strangers, for whose security alone it is established. Like considerations of policy and general expediency forbid the extension of the principle, so far as to warrant a servant in maintaining an action against his employer for an indemnity which we think was not contemplated in the nature and terms of the employment, and which, if established, would not conduce to the general good.

In coming to the conclusion that the plaintiff, in the present case, is not entitled to recover, considering it as in some measure a nice question, we would add a caution against any hasty conclusion as to the application of this rule to a case not fully within the same principle. It may be varied and modified by circumstances not appearing in the present case, in which it appears, that no wilful wrong or actual negligence was imputed to the corporation, and where suitable means were furnished and suitable persons employed to accomplish the object in view. We are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether, for instance, the employer would be responsible to an engineer from a loss arising from a defective or ill-constructed steam engine; whether this would depend upon an implied warranty of its goodness and sufficiency, or upon the fact of wilful misconduct, or gross negligence on the part of the employer, if a natural person, or of the superintendent or immediate representative and managing agent, in case of an incorporated company — are questions on which we give no opinion. In the present case, the claim of the plaintiff is not put on the ground that the defendants did not furnish a sufficient engine, a proper railroad track, a well-constructed switch, and a person of suitable skill and experience to attend it; the gravamen of the complaint is, that the person was chargeable with negligence in not changing the switch, in the particular instance, by means of which the accident occurred, by which the plaintiff sustained a severe loss. It ought, perhaps, to

be stated, in justice to the person to whom this negligence is imputed, that the fact is strenuously denied by the defendants, and has not been tried by the jury. By consent of the parties, this fact was assumed without trial, in order to take the opinion of the whole court upon the question of law, whether, if such was the fact, the defendants, under the circumstances, were liable. Upon this question, supposing the accident to have occurred, and the loss to have been caused, by the negligence of the person employed to attend to and change the switch, in his not doing so in the particular case, the court are of opinion that it is a loss for which the defendants are not liable, and that the action cannot be maintained.

Plaintiff nonsuit.

COON *v.* THE SYRACUSE & UTICA RAILROAD CO.

5 N. Y. 492. 1851.

ACTION on the case, to recover for injuries sustained by the plaintiff in consequence of being run over by a train of cars on the defendant's railroad, through the negligence, as alleged in the declaration of the defendants. The plea was the general issue. The case was tried at the Oneida Circuit, in September, 1847, before PRATT, J.

It appeared that the plaintiff was employed by the defendants in keeping their road track in repair; his duties being, in part, to follow in a hand car, certain trains of passenger cars over a portion of their track, making such repairs as he could make, when required, reporting other defects, repairing fences, etc. While engaged in the discharge of this duty, following with his car a passenger train in the evening, he was run over and so severely injured as to be made a cripple for life, by a train of the defendants' cars called a stake train, used to carry materials for repairing the track. The train was without lights, did not usually pass at that hour, and the plaintiff had no notice that it was expected. A number of witnesses were examined, with a view of showing that the accident occurred in consequence of the improper running or management of the stake train; the running it immediately after the passenger train, when the track men were on the track with hand cars; its not being provided with lights, when running in the evening; the want of notice to the workmen on the line that it was expected, and other circumstances of like character. It did not, however, appear that any instructions were given in relation to the time or manner of running the train, by any persons connected with the company other than those engaged in running the train; except that when the train passed Rome, a station five or six miles east of the place where the

accident happened, the person who had the general charge of that part of the road informed the engineer on the train that Haskins, another trackman, was on the track, with a hand car without a light, and cautioned him to be careful. Haskins was on a route adjoining that of the plaintiff, and extending to the Rome station. He had been informed that the stake train was expected, and being on the lookout for it, discovered its approach in season to remove his car and allow it to pass a short time before it reached the plaintiff's route.

After the evidence on the part of the plaintiff was closed, the defendants' counsel moved for a nonsuit, which was granted by the court, on the ground, "that one servant could not sustain an action against his employer, for damages sustained in consequence of the negligence of another servant of the same employer, in the same general business." The plaintiff's counsel excepted to the decision, "and insisted that the defendants were not entitled to a nonsuit, and that the case should go to the jury upon the facts proved." The Supreme Court at a general term denied a motion for a new trial, and judgment was entered against the plaintiff, who prosecuted this appeal. (See 6 Barb. 231.)

GARDINER, J. It has been decided in England, and in Massachusetts and some other states of the Union, that, where different persons are employed by the same principal in a common enterprise, no action can be sustained by them against their employer, on account of injuries sustained by one agent through the negligence of another. Priestley *v.* Fowler, 3 Mees. & Welsb. 1; Farwell *v.* B. & W. R. R. Co., 4 Met. 49; Murray *v.* S. Carolina R. R. Co., 1 McMullan, 385.

In Brown *v.* Maxwell, 6 Hill, 594, the case from Massachusetts was cited and approved by the learned judge who delivered the opinion of the Supreme Court in that case. The good sense of the principle when applied to individuals engaged in the same service is sufficiently obvious. There may be more doubt of its justice, in reference to those whose employments are distinct, although both may be necessary to the successful result of a common enterprise.

The case before us cannot be distinguished from that in Metcalf. To the elaborate opinion of Chief Justice Shaw, nothing can be added without danger of impairing the force of his reasoning. It is only necessary to express my concurrence generally in the views there suggested, which, if adopted, must be held as decisive in this case.

The ground taken upon the argument by the counsel for the plaintiff, that there was testimony tending to show that the stake train, when the accident occurred, was running in accordance with the regulations of the defendants, and therefore the injury was the act of the corporation, and not of its agents, is not sustained by the evidence in the bill of exceptions; and if it was, the point was not made distinctly upon the trial. The judge put his decision in terms upon the ground that the defendants were not responsible to the plaintiff for the negli-

gence of the conductor of the stake train. If the plaintiff's counsel wished to submit to the jury the question now raised, that the conductor was merely complying with the commands of his principals, and that negligence was not to be imputed to him, but to the defendants themselves, a request to that effect should, under the circumstances, have been made to the judge. As it was, he was left to suppose that the cause was intended to be tried upon the grounds suggested by him in his decision.

I think that the judgment of the Supreme Court should be affirmed.

Foot, J. The decision of this case depends on a very important principle, one which has been unfolded and brought to view within the last twenty years, and principally by the new business commenced within that period and now extensively prosecuted, of transporting persons and property by steam on railways. It is this: that an employer is not liable to one of his agents or servants for the negligence of another of his agents or servants engaged in the same general business. Was this principle sought to be applied for the first time in the present action, I should deem it my duty, not only to examine it in all its bearings, test its soundness by all the means at my command, and endeavor to reach a correct conclusion, but also to assign in full my reasons. This duty has, however, been already performed, ably and learnedly, by three eminent judicial tribunals: viz., the Court of Exchequer in England, the Court of Appeals of South Carolina, and the Supreme Court of Massachusetts. Priestley *v.* Fowler, 3 Mees. & Welsb. 1; Murray *v.* S. Carolina R. R. Co., 1 McMullan, 385; Farwell *v.* B. & W. R. R. Co., 4 Met. 49. They all concur in sanctioning the principle, and I fully acquiesce in their judgment. Mr. Justice Beardsley has also expressed his approbation of it, in the case of Brown *v.* Maxwell, 6 Hill, 594. The Supreme Court of Massachusetts has re-affirmed it, in the case of Hayes *v.* The Western R. R. Corporation, 3 Cushing, 270, and the English Court of Exchequer, in the case of Hutchinson *v.* The York R. R. Co., 14 London Jurist. It must now be considered as settled, and hereafter to form a part of the common law of the country. *Judgment affirmed.*

THE PETREL.

[1893] P. 320.

The President (Sir Francis H. Jeune). . . . On January 5, 1893, the *Petrel* came into collision with the *Cormorant,* and the *Cormorant* was sunk. The owners of both vessels are the General Steam Navigation Company. It is admitted that the collision was caused by the negligence of those navigating the *Petrel,* and it is proposed

to pay into court the sum for which the owners of the *Petrel* are liable. The first question is whether the master, officers, and crew of the *Cormorant* can claim against this fund in respect of their effects lost in that vessel. It is said that they cannot, by reason of their common employment with the master, officers, and crew of the *Petrel.*

No doubt the captain and crew of the *Cormorant* had a common master with the captain and crew of the *Petrel;* but were they in common employment with each other?

It is remarkable that although propositions of law defining common employment and recognizing its limitations have more than once been laid down, and have been illustrated by instances in which common employment has been held to exist, there appears to be no decided case in the English courts (there are several in the Scotch courts) in which upon consideration of the tests of it common employment has been negatived. The general principles of the law of common employment were fully laid down in the first case on the subject, Priestley *v.* Fowler, 3 M. & W. 1. But I think that the most complete exposition of what constitutes common employment is to be found in the great judgment of Shaw, C. J., of Massachusetts, in Farwell *v.* Boston Railroad Corporation, 4 Metcalf, 49, quoted at length in 3 Macq. H. L. C. 316, which, no doubt, materially influenced the House of Lords in the case of Bartonshill Coal Co. *v.* Reid, 3 Macq. H. L. C. 266, in which, reversing the decision of the Court of Sessions, their Lordships held that a miner laboring in a mine was in common employment with an engine-driver by whom the cage was worked. Two phrases of Shaw, C. J., indicate his view of the test of common employment. One lays down that he who engages in the employment of another for the performance of specified services "takes upon himself the natural risks and perils incident to the performance of such services," and the other refers to the condition of the safety of each servant depending much on the care and skill with which each other shall perform his appropriate duty. This view was adopted by BLACKBURN, J., in a judgment affirmed by the Exchequer Chamber, Morgan *v.* Vale of Neath Ry. Co., 5 B. & S. 570, at p. 580; Law Rep. 1 Q. B. 149, in these words: "I quite agree that it is necessary that the employment must be common in this sense, that the safety of the one servant must in the ordinary and natural course of things depend on the care and skill of the others. This includes almost if not every case in which the servants are employed to do joint work, but I do not think it is limited to such cases. There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which are to be considered in his wages." On this principle, it having been previously

decided in Hutchinson *v.* York, etc., Ry. Co., 5 Ex. 343, that the engine-driver of a train and a servant of the company carried in the train were in common employment, it was held that a carpenter repairing a turntable was in common employment with shunters working traffic in connection with it. The view of Shaw, C. J., appears again to have been followed in Lovell *v.* Howell, 1 C. P. D. 161, in which the principle approved was that the servant accepts the ordinary risk incident to his service. The principle of safety being dependent "in the ordinary and natural course of things" on the skill and care of the fellow servant, and of "risk of injury being a natural and necessary consequence" of his want of skill or care, is consistent with, though perhaps more exact than, the test suggested by Lord Chelmsford in the case of Bartonshill Coal Co. *v.* McGuire, 3 Macq. H. L. C. 300, at p. 307, from the negative point of view, that common employment does not exist when injury happens to the servant "on occasions foreign to his employment," or to servants engaged "in different departments of duty."

It was suggested in argument before me with reference to the case of Charles *v.* Taylor, 3 C. P. D. 492, that the physical contiguity of the employments constitute a test. But, as Shaw, C. J., points out, this does not afford a distinction on which a practical rule can be established. In all cases the immediate instrument of the physical injury must be contiguous to the person injured, and in most cases the person who causes physical injury is not far from the person to whom it results. But I suppose that the signalman at one end of a rifle-range is clearly in common employment with the marker at the other, when the two have a common master; and, to give a stronger instance, a servant who unskilfully packs dynamite in a factory, and another who in unpacking it at a distant warehouse is injured by its explosion, are clearly in common employment. On the other hand, mere contiguity, if unusual or accidental, would not be consistent with common employment.

I doubt, also, if "one common object" — the phrase emphasized by Bramwell, B., in Waller *v.* South Eastern Ry. Co., 2 H. & C. 102, at p. 112, supplies an exact criterion. As Blackburn, J., points out, there may be common employment, though the immediate object of the labor of the two servants be very different, and if the common object be remote, such as that of making money for the employer (the sole nexus of employment suggested as existing between the two captains in this case), there may be no common employment. If a person carried on the occupation of a banker and a brewer in different localities, and his bill clerk was run over by his drayman, it would be strange to say that the two were servants in common employment. I think, therefore, that probably no more complete definition can be formulated than is afforded by the language of Blackburn, J. The consideration that the risk of injury to the one servant is the natural

and necessary consequence of misconduct in the other implies that the skill and care of the one is of special importance to the other by reason of the relations between their services.

Tried by this principle, can it be said that the safety of the captain of one ship of a company is in the ordinary and natural course of things dependent on the skill and care of the captain of another ship of the same company, or that injury by the negligence of one is an ordinary risk of the service of the other? In some cases it might perhaps; for example, it might if all the ships of the company were in the habit of meeting in the same dock, and the safety of each thus became, in the ordinary course of things, dependent on the skill with which the other was navigated. But in regard to navigation on the high seas, or in the estuary of the Thames, would a captain of one ship of the General Steam Navigation Company have more reason to be interested in the skill of a captain of another ship of the company than in that of the masters of the myriad other craft in whose vicinity he might happen to navigate? By no reasonable supposition can it be imagined that he would. I think, therefore, that these two captains were not in common employment. . . .

[Held, accordingly, that the master, officers, and crew of the *Cormorant* had a claim against the fund in respect of their effects lost in that vessel.]

McTAGGART *v.* THE EASTMAN'S COMPANY.

27 Misc. (City Ct. of N. Y., Gen. T.) 184. 1899.

APPEAL from a judgment in favor of plaintiff, entered upon a verdict, and from an order denying a motion for a new trial.

FITZSIMONS, Ch. J. The testimony clearly shows that, although the plaintiff and James Murphy were both employed by defendant, yet they were not in the same common employment; they were servants of defendant, but were not fellow servants; the defendant's driver, Murphy, was employed by it as a driver of one of the wagons used by it in the meat business which it carried on; desiring to extend their business premises, it employed masons and hod-carriers to erect the necessary brick walls of the new addition to its premises. Plaintiff was one of the hod-carriers so employed, and while employed in that work, he was, by the careless manner in which Murphy acted, thrown from a ladder which was used by him and others employed in the erection of a building mentioned, and severely injured.

Murphy drove his truck against the ladder while plaintiff was in the act of descending, causing it to fall as well as plaintiff; under the circumstances, to contend that these men were in the same common

employment and were fellow servants is an absurdity in our opinion. No error was committed at the trial, and judgment is affirmed, with costs.

McCarthy and Hascall, JJ., concur.

Judgment affirmed, with costs.[1]

UNION PACIFIC RAILROAD CO. *v.* ERICKSON.

41 Neb. 1. 1894.

Action by Lars Erickson against the Union Pacific Railroad Company. Judgment for plaintiff, and defendant brings error.

Irvine, C. Erickson was employed by the railway company as a section hand, and was engaged in his work repairing the roadbed of the railroad near Fremont, when a fast passenger train approached, and he stepped aside to let it pass. As the train passed him, a large piece of coal fell from the tender of the locomotive, struck the ground near him, and broke into smaller pieces, one of which flew towards him, striking him, and causing a fracture of the leg. He brought this action against the railroad company alleging as negligence that the piece of coal had been negligently allowed to fall from the tender while the train was running at a high rate of speed; that the coal had been negligently loaded and negligently permitted to remain on the tender in a position rendering it liable to fall and to be cast off by the motion of the train. The railway company answered, among other things denying any negligence upon its part. . . . There was a verdict and judgment for Erickson for $1,625. . . .

The next proposition is that Erickson was a fellow servant of whoever was guilty of negligence, and that the company is therefore not liable. Upon this subject elaborate briefs have been filed upon either side, reviewing nearly all the American authorities. We shall not here undertake such a review. We are aware of the hopeless conflict existing. In fact, a study of the question must convince any one that shortly after the introduction of railways the law entered upon a slow but marked period of transition upon the subject of fellow servants. No definite result has yet been reached. Probably the leading case both in America and in England applying the doctrine of fellow servants to all the employees of a common master is that of Farwell *v.* Railroad Corp., 4 Metc. (Mass.) 49. All the cases holding that broad doctrine seem to be based directly or indirectly upon the authority or the reasoning of Chief Justice Shaw in that case. It was decided in 1842 before the railway system of the country was developed, before the existence of other large corporations employing vast numbers of

[1] Affirmed, 28 Misc. 127.

men engaged in the pursuit of one general object, but performing different functions, and engaged in many distinct departments. This state of affairs was then just arising, and the vast change of conditions in the relations of master and servant was only then beginning to appear. The extent of that change, and the consequences of applying old rules to new conditions could not then be foreseen. In that case, as in all others upon the subject, the reasons for the rule exempting masters from liability to servants for injuries produced by the negligence of their fellow servants are stated as twofold: First, that such injuries must be presumed to be within the contemplation of the parties when they made their contract; and, second, that public policy requires the enforcement of such a rule, upon the theory that, by enforcing it, each servant is made closely observant of the acts of his fellow servants, and that the scrutiny of one another naturally tends to efficiency and care. The first reason given, where the rule is sought to be applied without discrimination to all servants of a common master, has already been completely set aside and disregarded, even by those courts in America most inclined to conservatism upon the subject. It is everywhere conceded that inasmuch as a corporation can only act through agents, and all agents are servants, the logical application of the rule would discharge a corporation entirely from liability to its servants; and this gives rise to a corollary that where the negligence is that of a vice principal, whose acts must be taken as those of the master, the rule does not apply. The recognition of this exception was necessary to preserve another rule, that, while a servant assumes the dangers incident to his employment, he does not assume dangers caused by the negligence of his master. There is as much reason for holding that a servant in entering an employment contracts with a view to possible negligence of the master, as to hold that he contracts with a view to possible negligence of the man who works beside him and upon the same footing. To illustrate by reference to railways, which probably afford as great a variety of grades in employment as any occupation, can it be logically said that a section man in the matters within the scope of his employment is less liable to err than a conductor, superintendent, or general manager with reference to his own duties? To the writer's mind, when the first distinction was drawn between grades of servants, the force of the general rule, so far as it was based upon contract, was destroyed.

As to the second reason — that founded upon public policy — there is much force in the observation of Mr. Justice Field in Railway Co. *v.* Ross, 112 U. S. 377: "It may be doubted whether the exemption has the effect thus claimed for it. We have never known parties more willing to subject themselves to dangers of life and limb because, if losing the one or suffering in the other, damages could be recovered by their representatives or themselves for the loss or injury. The

dread of personal injury has always proved sufficient to bring into exercise the vigilance and activity of the servant." Still, we concede that there may be some force to the rule so far as grounded upon public policy, and confined to servants who are, in the language of the Supreme Court of Illinois, "consociated by means of their daily duties, or co-operating in the same department of duty and in the same line of employment." Railroad Co. *v.* Moranda, 93 Ill. 302. Beyond this line we can see no force in it. When the authorities are examined, it is found that they range themselves in two general classes, — those following the opinion of Chief Justice Shaw, and those distinguishing between grades of employment and employees in distinct departments of service. The principal objection urged to the latter class is that, by adopting such distinction, the courts overthrow a general rule of easy application, and adopt one not susceptible of precise application, and uncertain in its results. Possibly this objection is well taken. If so, we can only say that it accords with the general spirit of the common law. Perhaps the main distinction between the civil law and the common law is that the civil law is based upon well-defined logical rules readily susceptible of ascertainment, while the common law is founded upon broader general principles, to be applied to the diversity of human affairs in such a manner as to favor individual liberty and to conform themselves to changed conditions. When the law of fellow servants was first announced, business enterprises were comparatively small and simple. The servants of one master were not numerous; they were all engaged in the pursuit of a simple and common undertaking. Now things have changed. Large enterprises are conducted by persons or corporations employing vast numbers of servants, divided into classes, each pursuing a different portion of the work, and each practically independent of the other. The old reasons do not apply to the new conditions. We are not prepared in this case to propose any set rule for always determining when two employees are fellow servants within the meaning of the law, and when they are not, nor are we required for present purposes so to do. Erickson was a section man. He was employed, with several others, to keep the roadbed and the track in repair. The fireman was employed to fire the engine, and perform certain duties in connection with the operation of trains. Some one was employed at Grand Island to load the tenders with coal. With either the fireman or this third person Erickson had nothing in common except that he drew his pay from a common source, and that, in a broad sense, they were all carrying out parts of a vast transportation business. Erickson had no control over either of the others, no opportunity of judging of their competency, no supervision of their specific acts, and only by adopting the broadest rule as announced by Chief Justice Shaw could we hold them to be fellow servants. This rule we are not prepared to adopt. We hold, on the contrary, that employment in the service of a com-

mon master is not alone sufficient to constitute two men fellow servants within the rule exempting the master from liability to one for injuries caused by the negligence of the other, and that to make the rule applicable there must be some consociation in the same department of duty or line of employment. For the purposes of this case we are content to follow the opinion of Mr. Justice Miller in Garrahy *v.* Railroad Co., 25 Fed. 258, where, in the light of quite recent decisions and of the mature judgment of the Supreme Court of the United States in Railway Co. *v.* Ross, *supra,* he held that persons occupying such relations were not fellow servants within the meaning of the rule. . . . *Judgment affirmed.*[1]

[1] In Louisville & N. R. Co. *v.* Dillard, 114 Tenn. 240, a brakeman on a freight train was injured in a collision between that train and a passenger train, and in an action brought against the railroad company to recover for the injuries thus received, the plaintiff relied in part upon the negligence of the conductor on the passenger train. In holding that the conductor and the brakeman were fellow servants, the court said: —

"Was the passenger conductor in charge of, or engaged in, a separate department of the master's business?

"In this state the departmental doctrine is recognized in railway cases. The grounds on which it rests are thus stated in Coal Creek Mining Company *v.* Davis, 90 Tenn. 711, 719, 720:

"'The doctrine rests upon the theory that the vast extent of the business of railway companies has led to the division of their business into separate and distinct departments; that by reason of this division a servant in one branch or department has no sort of association or connection with one in another department; that this absence of association gives the servant no opportunity of observing the character of a servant in another department of labor, and no opportunity to guard against the negligence of such servant. The want of consociation is the idea underlying this limitation. This rule has not been extended by us beyond railroad corporations, and we are not disposed to extend it further than to the class of employments to which it has been heretofore limited.'

"Under this doctrine it has been held that a track repairer was in a different department from, and hence not the fellow servant of, the crew of a train running upon the track (Haynes *v.* Railroad Co., 3 Cold. 222); for the same reason, that a section foreman was not the fellow servant of the train crew (Railroad *v.* Carroll, 6 Heisk. 347, 361); that a watchman was not the fellow servant of an engineer (Railroad *v.* Robertson, 9 Heisk. 276); a telegraph operator at a way station not the fellow servant of the conductor of a train (Railroad Co. *v.* De Armond, 86 Tenn. 73); a car inspector not the fellow servant of the crew of a switch engine (Taylor *v.* Railroad Co., 93 Tenn. 307); a depot agent not the fellow servant of the conductor of a train (Railroad Co. *v.* Jackson, 106 Tenn. 438); a bridge crew not the fellow servant of the crew of a freight train (Freeman *v.* Railroad, 107 Tenn. 340); and an engineer not the fellow servant of a telegraph operator (Railroad Co. *v.* Bentz, 108 Tenn. 670).

"We have no case holding that separate trains constitute separate and distinct departments of railway service, nor do we think they can be so treated on principle. The reason underlying the departmental doctrine resides in, as already stated, the need of consociation to enable co-employees to judge of the caution, diligence, and efficiency of each other, in order that they may properly protect themselves against negligence. In distinct departments of the service they are regarded as constantly working apart from each other, without the opportunity of mutual observation and criticism. This reason, however, cannot be held to apply to the crews of different trains running upon the tracks of the same company. It does not appear that such crews are permanently attached to any special trains. Moreover, even if not associated upon the same train, the crews of each train, in passing and repassing and in mingling with each other in the handling of traffic in the course of their work, necessarily have an opportunity of judging to some extent how the various trains are managed by the people who man them. At best, the amelioration of the dangers incident to a hazardous business cannot be very great for the servants of a common master, even when they work in the same department, where the number of such co-employees is great, as very often happens in the railway business, and in other kinds of business.

"If the conductor of the passenger train in question had no control over the

THE CHICAGO AND EASTERN ILL. R. R. CO. *v.* WHITE.

209 Ill. 124. 1904.

MR. JUSTICE CARTWRIGHT delivered the opinion of the court:

This is an appeal from a judgment of the Appellate Court for the First District affirming a judgment of the Superior Court of Cook county in favor of appellee, and against appellant, in an action on the case prosecuted to recover damages for the death of Samuel C. Woodward, a brakeman in the employ of appellant, who was killed in its railroad yard in Chicago on December 22, 1900.

At the conclusion of the evidence the defendant asked the court to instruct the jury to return a verdict of not guilty. The court refused to give the instruction, and the refusal is assigned as error and is the principal subject of argument by counsel on both sides.

It was proved, and is not denied, that the death of Woodward resulted from the negligence of other servants of the defendant, and it is contended that the negligent servants were fellow servants with Woodward. The declaration consisted of a single count, alleging that Woodward was employed by the defendant as a brakeman on a train of cars standing on the side-track of defendant in its railroad yard in Chicago; that the train had been made up and was headed south; that deceased went between cars to repair an air-brake, and that while there the defendant carelessly and negligently backed another train against his train and killed him. There was little or no controversy as to the facts, and the material facts proved are as follows: Woodward was head brakeman on a freight train which made daily trips between Chicago and Brazil, Indiana, leaving Chicago about twelve o'clock. The crew to which he belonged took the train out usually three times a week. The railroad yard in Chicago extended from Thirty-third to Thirty-seventh Street, and consisted of two divisions, known as the "new yard" and the "old yard." The old yard was on the west, and contained tracks numbered from 1 to 18. The new yard was on the east side, and contained tracks numbered 1 to 26, and all the tracks formed a continuous system, connected by lead tracks and switches and forming one yard. Defendant had two switching crews employed in this yard — one at the north end, which broke up and switched trains arriving in the yard

brakeman on the freight train, or was not charged with any duty of the master towards him, as in the furnishing of tools and appliances or a safe place to work, or was not in a different department of the master's service (and we have seen that he had no such powers and bore no such relation), which are the only exceptions our cases recognize as taking co-employees out of the class of fellow servants, then the said conductor and brakeman were fellow servants, and the master was not liable for the injuries inflicted upon one by the negligence of the other. This conclusion seems inevitable, on principle."

from the road, setting the cars on various tracks to go to other roads or to freight houses, and the other at the south end, which made up trains to go out on the road. When a freight train came in from the south it stopped on any track which was unoccupied, and the engine was detached and went to the roundhouse at the north end of the yard, and it was the duty of the head brakeman to accompany the engine for the purpose of throwing switches. Trains were generally made up to go out on the road by the south-end crew, and, when ready to go out, the engine was taken from the roundhouse to the head of the train, which was made up for departure, and it was the duty of the head brakeman to accompany it. It would take any track that might be unoccupied to the head of the train. In going to and from the roundhouse the engine was liable to traverse the whole length of the tracks in the yards, passing over the same tracks and through the same switches as the switching crews. In making up trains the crew at the south end would switch from one track to another, and in breaking up trains the switch crew at the north end used the various switch tracks in the same way. There was no dividing line between the switch crews, and they worked all over the yard, wherever their duties called them. On the day of the accident the train on which Woodward was head brakeman was made up as usual, consisting of about 20 coal cars, with a way car at the north end. The train was standing at the south end of the yard, and the crew to which Woodward belonged took the engine to the south end of the train and coupled to it; and Woodward commenced to examine the air brakes, starting from the engine, to see if they were in working order. There was a defect or leak in the air hose two or three cars from the engine, and Woodward went between the cars to fix the leak. While he was between the cars the switch crew at the north end kicked 13 cars from the north end of the yard upon the track, without a brakeman on them, and they ran rapidly down the track, striking the rear of Woodward's train with such force as to move it two or three car-lengths before it could be stopped, and he was run over and killed. He had been employed as brakeman for five or six months on this train, and before that had been a clerk in the office at the yard, and during all the time of his employment the manner in which trains were broken up and switched and made up was the same as at the time of his death. The switch crew in the yard were under the direction and control of the yardmaster, and the road crews, while in the yard, were also under his direction, but from the time the train was ready to leave until it returned to the yard they were under the direction and control of the trainmaster.

Woodward was a servant of the defendant, and, his death having been caused by the negligence of other servants of the same master, the request of defendant for the instruction raised the question whether there was any evidence fairly tending to prove that the

relations of the servants were such as to render the defendant liable, or, in other words, that they were not fellow servants. If the only conclusion to be drawn from the evidence was that they were fellow servants, the instruction should have been given; but, if different conclusions on that question might be reached from the evidentiary facts before the jury, it was not error to refuse the instruction. One of the things to be considered on that question is whether the servants were employed in the same or different departments of the service. The evidence was that the negligent switch crew and Woodward were not employed in the same department. The switch crews were under the control of the yardmaster, and performed all their work under his direction, while the road crew, in the general performance of their duties, were under the control of the trainmaster; and yet, when they were in the yard at Chicago, they were to some extent brought within the same department as the switch crews in handling their engine. Under the rule in this state relating to fellow servants, which is based so largely upon the doctrine of association in the performance of duties, the separation into different departments is not a conclusive test. In one sense, switching crews at different places remote from each other are in the same department; and yet, if they do not directly co-operate with each other, and their usual duties are not such as to bring them into habitual association, they are not fellow servants; and, on the other hand, where there is association between the servants in the performance of their duties, they are fellow servants, although in some sense employed in different departments. In Joliet Steel Co. *v.* Shields, 146 Ill. 603, the rule is stated as follows (page 609): "Persons may be fellow servants, although not strictly in the same line of employment. One person may be employed to transact one department of business, and another may be employed by the same master to transact a different and distinct branch of business; but if their usual duties bring them into habitual association, so that they may exercise a mutual influence upon each other, promotive of proper caution, such persons might be regarded as fellow servants. North Chicago Rolling Mill Co. *v.* Johnson, 114 Ill. 57." If servants are directly co-operating in the particular business in hand, they are fellow servants, although their ordinary duties are in different departments. Abend *v.* Terre Haute & Indianapolis Railroad Co., 111 Ill. 202. If, therefore, Woodward and the north-end switch crew were at the time of the accident directly co-operating in the particular business of the defendant then in hand, or if their usual duties were of such a nature as to bring them into habitual association, so that they might exercise an influence upon each other promotive of proper caution for their mutual safety, then they were fellow servants, notwithstanding their employment in different departments of the service.

Appellant claims that the particular business in hand when the

accident happened was the whole business of the railroad yard, which consisted of receiving trains from the road, breaking them up, and distributing cars for freight houses and other roads, making up freight trains and dispatching them on the road, and the moving of cars and trains for all these purposes. It is quite evident that direct co-operation in particular business does not mean the same thing as habitual association in the performance of duties, since, if that were so, there would be no occasion for stating two branches of the rule. Direct co-operation in a particular business is distinguished from indirect co-operation or co-operation in the general business of the master. Different persons employed in this extensive yard in some capacity, or who had occasion to be there in performance of different or separate duties, might be engaged in doing different parts of the same work, and promoting the general business of the master, and their duties be such as to bring them into habitual association, although not directly co-operating in a particular part of the work. The duties of the road crew respecting a train did not begin until the duties of the switch crew making it up ended, and the duties of the crew on the incoming train ceased before those of the switch crew began; and under the rule declared in Chicago & Alton Railroad Co. *v.* Hoyt, 122 Ill. 369, they could not be said, as a matter of law, to be directly co-operating in the particular business in hand. That question was properly submitted to the jury as one of fact.

On the question whether the duties of Woodward and the switch crew were such as to bring them into habitual association, so as to exercise an influence over each other, promotive of proper caution, the evidence was that the road crew, including the head brakeman, would take the engine, when uncoupled, and run over the track to the roundhouse, and would take it from the roundhouse and run over the tracks to couple on the outgoing train, and in doing so they ran through the yard over the tracks where the switch crews were working. It is contended by appellant that this fact established such habitual association between the two classes of servants as would make them fellow servants, in the law. Counsel for appellee says that they were not fellow servants, because Woodward was not even acquainted with the members of the north-end crew, and therefore the two could not have exercised an influence over each other promotive of proper caution. The fact of personal acquaintance does not determine the relation, but it depends upon the nature of the duties of the different servants, and the incidents of the employment. Whenever the requisite conditions are established, either by co-operation in a particular business then in hand, or duties which imply habitual association, that moment the relation commences, and under the law the servants are fellow servants. Whether they are fellow servants does not depend upon the accident of acquaintance or the length of time the men have worked together. World's Columbian Exposition *v.* Lehigh, 196 Ill. 612,

63 N. E. 1089. Any other rule would be vague, indefinite, and impracticable. It would be a question how long the servant must be employed before sufficient acquaintance would be established, and a sufficient opportunity given for advice, counsel, and caution, so that the servant would cease to have a right of action against the employer. The conclusion might depend upon friendship, which would induce friendly counsel and advice, or personal enmity, which would prevent or prohibit it. The fellow-servant rule rests both upon considerations of public policy, and upon the rule that when a servant enters the employment he assumes all the ordinary risks of such employment, including the negligence of fellow servants associated with him, and both reasons for the rule have been recognized by this court. He assumes the risks as to all those whose duties bring them into habitual association with him, or who may be directly co-operating with him in some particular business in hand at the time of an accident. There was evidence tending to prove that the duties of the road crew and switch crews while in the yard brought them into habitual association, but the evidence was not of such a nature that but one conclusion could have been drawn from it, and therefore the question was properly submitted to the jury. Whether the proper conclusion was drawn from the facts was finally settled by the Appellate Court, and is not subject to review here. . . . *Judgment affirmed.*[1]

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2. *Vice-Principal Doctrines.*

NEW OMAHA THOMSON-HOUSTON ELECTRIC LIGHT CO. *v.* BALDWIN.

62 Neb. 180. 1901.

ACTION by Charles Baldwin against the New Omaha Thomson-Houston Electric Light Company. Judgment for plaintiff, and defendant brings error.

[1] In Chicago & A. Ry. Co. *v.* Swan, 176 Ill. 424 (1898), the plaintiff, a baggageman on one of defendant's passenger trains, was injured through the negligence of the engineer of the train. In sustaining a judgment for plaintiff, the court, on appeal, said: —

"It is difficult to see upon what theory it can be held that a baggageman, as such, has any control over the movements of the train upon which he is employed, or anything to do with the running of the same. Proof that one was a baggageman and the other an engineer would, of itself, justify the inference that they were not directly co-operating with each other in the business of running the train, and hence not fellow servants, under our rule. But in this case the plaintiff testified that his duties as baggageman were to handle baggage and railroad letters, and anything of that kind pertaining to railroad business in his car; that he had nothing to do outside of the car, and that the conductor or engineer had no control over him in the performance of his duties; also that he was hired by the general baggage agent, and instructed that his place was in the baggage car; that he had never been required to get out and perform other duties for the trainmen, and that it was not

HASTINGS, C. As a large part of the discussion in this case will relate to instructions given and refused, in which the plaintiff in error is called "defendant," and defendant in error is called "plaintiff," the parties will be designated in the same manner here as at the trial below.

It appears that the plaintiff, Baldwin, in September, 1896, was employed by the defendant electric light company as a lineman; that he worked under the immediate supervision of a foreman, one James Brinkman; and that he was directed by such foreman on the morning of September 9, 1896, to remove the arc lamps on Sixteenth Street in Omaha, in connection with another workman, who is described as a "groundman." Plaintiff's duty was to ascend an extension ladder placed against the sustaining wire of the lamp, taking with him a rope, put the latter over the sustaining wire, and attach it to the lamp; and the groundman let it down by paying out the rope. They had reached the point on Sixteenth Street opposite the alley between Harney and Howard Streets, when the foreman, Brinkman, arrived, ordering the other workman to another service, and himself engaged in assisting plaintiff in the removal of the lamp. There is some discrepancy in the testimony as to the precise occurrence; plaintiff's evidence indicating that Brinkman assisted in bringing up the ladder and adjusting it for the removal of this last lamp, and Brinkman declaring that he came up after the ladder was adjusted, and while plaintiff was in the act of loosening the lamp from the sustaining wire. Each statement is to some extent corroborated. Plaintiff's evidence is to the effect that he objected to the shortness of the ladder, and asked that it be extended further, which could have been easily done, and was told by the foreman that it was high enough, and directed to ascend; that he went up, carrying a rope, passed the rope over the sustaining wire to which the lamp hung, tied it to the lamp, and loosened the lamp from its fastening, and the foreman, Brinkman, standing below and holding the rope, let it down; that when it reached the ground Brinkman untied the rope, but neglected to keep his hold upon it, and by the taking off of the lamp's weight the wire to which it had hung was allowed to spring up past the end of the ladder, and plaintiff and the ladder were precipitated to the pavement, with resulting injuries to plaintiff. The groundman had been instructed by this very foreman to keep hold of both ends of the rope till the lineman reached the ground, to avoid exactly this danger. The negligence asserted is that Brinkman, by his refusal to extend the ladder, and directing plaintiff to mount it, was negligent, and in untying the rope and leaving the end loose was again negligent, and that such negligence was the immediate cause of the injury.

the custom for baggagemen to do so. There was, as a matter of fact, no co-operation between him and the engineer. The declaration sustains the judgment, and the evidence supports the allegations of the declaration."

It is conceded that the evidence shows Brinkman to have been foreman. It was conceded on the argument that there is evidence of negligence on his part sufficient to uphold the verdict, if he is to be deemed throughout the transaction a vice-principal, and responsibility for all his acts imputed to his employer. It is contended on the part of the defendant that while Brinkman, in his general employment, may have had some of the duties of a vice-principal, yet, so far as his connection with this injury is concerned, he was acting simply as a fellow servant, and for any negligence committed in that capacity defendant is not liable, because plaintiff had assumed all such risks. The trial court, however, adopted the view (and so expressly instructed the jury) that Brinkman, being foreman, and intrusted with the control and management of the work in which plaintiff was employed, was so far identified with the defendant employer that his negligence was defendant's negligence. The giving of this instruction is the chief error complained of; the defendant asserting that it incorrectly states the law, because Brinkman, in his connection with this accident, was acting as a fellow workman, and because the question of whether or not he was a fellow servant is, at all events, not purely a question of law, but a mixed one of law and fact, and should have been submitted to the jury, as was specifically requested by defendant at the trial. The case seems to turn upon the question whether the court's view that Brinkman was a vice-principal throughout, and the sweeping instruction to that effect, can be sustained. In Railroad Co. *v.* Doyle, 50 Neb. 555, this is said to be not always a question of law, nor always a question of fact, but generally a mixed one, and ordinarily no set rule can be laid down. In this present case, however, there seems to have been no dispute in the testimony as to Brinkman's duties and authority. The plaintiff seems to have been contented to show that Brinkman was foreman, exercising general control and supervision over the work for which the plaintiff was employed as lineman. Defendant admits he was foreman, and shows clearly by its evidence that he had authority to "superintend, direct, and control" the work. It appears that he employed and discharged men, but usually on consultation with the manager. No statement of either party as to what his powers and duties were seems to be contradicted, even inferentially, by the other. Under such circumstances, it seems clear that it was the duty of the court to say whether the evidence made of Brinkman a vice-principal or a mere fellow servant. This responsibility the court took, and declared in the eighth instruction that he was not a fellow servant, and that defendant was chargeable with any negligence of his. Was this error?

Counsel say that to review all the cases on this question would be a useless and almost superhuman task. We shall not attempt it any more than they have. Judge Dillon, in his widely influential article

in 24 Am. Law Rev. 175, says that a commanding position and a telescope, and not a microscope, are what are needed to reach a correct rule in this matter. For our part, we would gladly use both, if they would lead to our better enlightenment. We think, however, that where the courts are widely disagreeing, and the same courts changing views from time to time, and legislatures frequently altering the rule, the safe course for us is to learn what our state has done, and follow it, if we can.

An examination of our own cases seems to justify the trial court. There are widely-different views as to what renders an employee such a vice-principal as to take his acts out of the rule that an employee assumes the risk from negligence of his co-employees. The English cases seem to hold that there is practically no such doctrine of vice-principalship; that there are absolute duties resting upon the master, whose nonperformance either by himself or by some one else will render him liable. They are apparently a duty of providing reasonably safe materials and appliances, which is a continuing duty, involving reasonably frequent inspections; the duty of providing a reasonably safe place to work; and the duty of giving or providing for reasonable instructions to inexperienced employees placed in dangerous positions. These duties being discharged, any injury that arises, in operation of the work, out of negligence of employees, imposes no liability upon the master. The English rule has been adopted in many of the states, with the proviso that, where the performance of any of these absolute duties is delegated to third parties, those parties become as to these duties vice-principals, and their negligence in respect to such duties is the negligence of the principal. Of this view of the principal's liability the courts of Massachusetts have been strong exponents, manifestly under the influence of Chief-Justice Shaw in Farwell *v.* Railroad Co., 4 Metc. 49, and the English decisions. The courts of Ohio, however, early adopted a different view, deriving the liability for the acts of a vice-principal not from the fact of absolute duties devolving upon him, but from the fact that he was given authority and control, and must be held in his actions to immediately represent the employer, and his negligence to be imputed to his principal. Railroad Co. *v.* Stevens, 20 Ohio, 416; Railroad Co. *v.* Keary, 3 Ohio St. 201; Whaalan *v.* Railroad Co., 8 Ohio St. 251; Stone Co. *v.* Kraft, 31 Ohio St. 287. This doctrine was, in the case of Railway Co. *v.* Lundstrom, 16 Neb. 254, expressly adopted in this state. In that case the railroad company was held liable for the negligence of one Carnes, the conductor of a construction train, in sending his men into a cut to clear away snow without maintaining a suitable watch, or giving any signal of an approaching train. For his negligence in that respect, resulting in injury to plaintiff's intestate, the railroad company was held liable. This holding has been uniformly adhered to. [After discussing Railroad Co. *v.* Crockett,

19 Neb. 138; Railroad Co. *v.* Smith, 22 Neb. 775; Railroad Co. *v.* Sullivan, 27 Neb. 673; Ice Co. *v.* Sherlock, 37 Neb. 19; Hammond *v.* Johnson, 38 Neb. 244; Railroad Co. *v.* Doyle, 50 Neb. 555; and Clark *v.* Hughes, 51 Neb. 780, the court continues:] From the foregoing cases it seems clear that, whatever may be the rule elsewhere, in this court the liability of the employer for the actions of a vice-principal grows out of the fact that he is directly intrusted with authority, that the movements of those under him are directed by him, and that he is held to be the direct representative of his principal. If in Clark *v.* Hughes the mere admission of the fact that the party in fault was conductor was sufficient to do away with all proof that he was a vice-principal, it would seem in this case that the same effect should be given to the admission that the party in fault was foreman, and to the uncontradicted evidence of his authority, and that the court was warranted in instructing that he was also a vice-principal. If this is conceded, we are of the opinion that all the other claims of error in this case fall to the ground with this one. Of course, if the learned trial judge was warranted in instructing that this foreman was a vice-principal, he was warranted in rejecting all instructions drawn from the point of view of his being anything else. . . .

The third claim of error is in instructions 13 and 14, endeavoring to apply to this case the rule that contributory negligence would not prevent recovery if reasonable care on the part of defendant would, after the discovery of such negligence of plaintiff, have prevented its consequences. These two instructions were apparently intended to inform the jury that, if they found plaintiff negligent in going up an insufficiently extended ladder, still, if Brinkman loosened the rope after plaintiff was up, and Brinkman knew it, and such act of Brinkman caused the injury, plaintiff could recover, if at that moment exercising due care. This was correct if we find the act of Brinkman in taking off the lamp and loosening the rope the act of the employer. It was not correct if we allow Brinkman a dual capacity, — a vice-principal when giving directions, and a mere fellow workman when taking off the lamp. There are many authorities for such a distinction, and for a dual capacity of vice-principal and workman on the part of one who both directs and assists. A notable recent case is Barnicle *v.* Connor (Iowa), 81 N. W. 452. Crispin *v.* Babbitt, 81 N. Y. 516, is another. Generally they will be found to be rendered by courts which adopt the restricted rule that vice-principalship depends upon the delegation of absolute duties. It is a doctrine that is evidently not compatible with the decisions in Railroad Co. *v.* Smith, Ice Co. *v.* Sherlock, Railroad Co. *v.* Crockett, and Railway Co. *v.* Lundstrom. In each of these cases the defendant employer was held liable for imputed negligence on the part of one to whom supervision and direction were intrusted in respect to other matters than the mere giving of such directions. In this state it is clear that the vice-

principal's character as such comes from his authority and his direct representation of his master. If that is the source of liability for his acts, evidently he represents the master as much in ordering away the cautious and instructed lineman and assuming his place as in anything else. We cannot distinguish this case from Ice Co. *v.* Sherlock, *supra*, where the injury came from the foreman's letting down a second piece of ice while the workman was in the chute loosening the lodged one; nor from Stone Co. *v.* Kraft, 31 Ohio St. 287, where the foreman's attaching the hard-stone grapple to the soft stone permitted the latter to slip and harmed the fellow workman.

What has just been said also disposes of the claim of contributory negligence. There are many cases holding that one who obeys the command of a superior, not evidently endangering life or limb, is not necessarily guilty of contributory negligence because the one issuing the command is. But plaintiff, if chargeable with contributory negligence in going up an insufficiently extended ladder, is not chargeable with helping to let loose the rope. If this was the act of a vice-principal, the question of contributory negligence should have gone, as it did, to the jury. We are thus again brought back to the fact that the instructions, in effect, tell the jury that the act of loosening the rope, if under all the circumstances they find it negligent, was imputable to the employer. The federal courts hold that this question of vice-principalship is a matter of general law, as to which they are not bound by state decisions. Hunt *v.* Hurd, 39 C. C. A. 226, 98 Fed. 683. It is therefore a matter of much regret that we should be compelled to recognize that in the federal courts, since the express overruling of Railroad Co. *v.* Ross, 112 U. S. 377, in Railroad Co. *v.* Conroy, 175 U. S. 323, an opposite conclusion to ours would be reached. In the case of Mining Co. *v.* Whelan, 168 U. S. 86, judgment for a miner who had been set to work, breaking ore at the head of a chute, by the mine foreman, and injured through the drawing, by order of the same foreman, of the gate of the chute, without the customary warning, was reversed, and the case dismissed, because the injury was due to the negligence of the foreman, and he was held to be a fellow servant. The uncertainties of law are great enough, without having one rule avowed and upheld in our United States courts, and another one here in the state capitol. We do not, however, in view of the legislative provisions which have so often followed the adoption of English rules in this matter, think it desirable to change the rule of this state, which is as stated by Mr. McKinney in his Law of Fellow Servants (ed. 1890, p. 136): "The Ohio cases are followed in this state, and the limitation, therefore, prevails to its fullest extent." The liability established in this case by the instructions, and the verdict under them, seem precisely what was intended to be fixed by § 2 of the English Employers' Liability Act. The Massachusetts act of 1893 seems to have intended a similar effect. Both seem to have been, in a

measure, defeated in their results by unfriendly action of the courts. But, while the current of legislation is steadily towards the position heretofore held by this court, there seems small reason to change it in the opposite direction. It is to be said, too, that the federal decisions are much weakened by the fact that they are obliged to admit that there is a degree of authority that makes the employee an *alter ego* for his principal; but they have set up no limiting principle to determine when this is and is not the case. Our court has said the satisfactory evidence of vice-principalship is his "supervision, control," and "subjection to his orders and directions." Railroad Co. *v.* Doyle, 50 Neb. 555. For these reasons it is recommended that the judgment below should be affirmed.

DAY and KIRKPATRICK, CC., concur.

Per curiam. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

CRISPIN *v.* BABBITT.

81 N. Y. 516. 1880.

APPEAL from judgment of the General Term of the Supreme Court, in the Fourth Judicial Department, affirming a judgment in favor of plaintiff, entered upon a verdict, and affirming an order denying a motion for a new trial.

This action was brought to recover damages for injuries alleged to have been sustained by defendant's negligence.

At the time of the accident, plaintiff was working as a laborer in the iron works of the defendant, at Whitesboro, Oneida County. Plaintiff had assisted to draw a boat into a dry dock connected with the works; after the boat was in the dry dock, it became necessary to pump out the water; this was done by means of a pump worked by an engine. While plaintiff, with others, was engaged in lifting the flywheel of the engine off its centre, one John L. Babbitt carelessly let the steam on and started the wheel, throwing the plaintiff on the gearing wheels, and thus occasioning the injuries complained of. Defendant lived in the city of New York, coming about once a month, for a day or two, to the iron works, of which, as the evidence tended to show, said Babbitt had general charge, being at one time the general superintendent and manager, at another time styled the "business and financial man."

RAPALLO, J. The liability of a master to his servant for injuries sustained while in his employ, by the wrongful or negligent act of another employee of the same master, does not depend upon the doctrine of *respondeat superior.*

If the employee whose negligence causes the injury is a fellow servant of the one injured, the doctrine does not apply. Conway *v.* Belfast, etc., Ry. Co., 11 Irish C. L. 353.

A servant assumes all risk of injuries incident to and occurring in the course of his employment, except such as are the result of the act of the master himself, or of a breach by the master of some term, either express or implied, of the contract of service, or of the duty of the master to his servant, viz.: to employ competent fellow servants, safe machinery, etc. But for the mere negligence of one employee, the master is not responsible to another engaged in the same general service.

The liability of the master does not depend upon the grade or rank of the employee whose negligence causes the injury. A superintendent of a factory, although having power to employ men, or represent the master in other respects, is, in the management of the machinery, a fellow servant of the other operatives. Albro *v.* Agawam Canal Co., 6 Cush. 75; Conway *v.* Belfast Ry. Co., *supra;* Wood's Master and Servant, § 438. See, also, §§ 431, 436, 437. On the same principle, however low the grade or rank of the employee, the master is liable for injuries caused by him to another servant, if they result from the omission of some duty of the master, which he has confided to such inferior employee. On this principle the Flike Case, 53 N. Y. 549, was decided. CHURCH, Ch. J., says, at page 553: "The true rule, I apprehend, is to hold the corporation liable for negligence in respect to such acts and duties as it is required to perform as master, without regard to the rank or title of the agent intrusted with their performance. *As to such acts* the agent occupies the place of the corporation, and the latter is liable for the manner in which they are performed."

The liability of the master is thus made to depend upon the character of the act in the performance of which the injury arises, without regard to the rank of the employee performing it. If it is one pertaining to the duty the master owes to his servants, he is responsible to them for the manner of its performance. The converse of the proposition necessarily follows. If the act is one which pertains only to the duty of an operative, the employee performing it is a mere servant, and the master, although liable to strangers, is not liable to a fellow servant for its improper performance. Wood's Master and Servant, § 438. The citation which the court read to the jury from 21 Am. Rep. 2, does not conflict with, but sustains this proposition; it says: "Where the master places the entire charge of his business in the hands of an agent, the neglect of the agent *in supplying and maintaining suitable instrumentalities for the work required is a breach of duty for which the master is liable.*" These were masters' duties. In so far as the case from which the citation is made goes beyond this, I cannot reconcile it with established principles. In England, by a late act of Parliament, the rules touching the point now under con-

sideration have been modified in some respects, but in this state no such legislation has been had.

The point is sharply presented in the present case, by the 13th, 14th, and 17th requests to charge. 13th. That although John L. Babbitt may, as financial agent or superintendent, overseer, or manager, have represented defendant, and stood in his place, he did so only in respect of those duties which the defendant had confided to him as such agent, superintendent, overseer, or manager.

This the court charged.

14th. That as to any other acts or duties performed by him in and about the defendant's works or business at said works, he is not to be regarded as defendant's representative, standing in his place, but as an employee or servant of the defendant, and a fellow servant of the plaintiff.

This the court refused to charge, but left as a question of fact to the jury, and defendant's counsel excepted. I think this was a question of law, and that the court erred in submitting it to the jury, but should have charged as requested.

The court was further specifically requested to charge that in letting on the steam John L. Babbitt was not acting in defendant's place. This, I think, was a sound proposition, as applied to the present case. It was the act of a mere operative for which the defendant would be liable to a stranger, but not to a fellow servant of the negligent employee. As between master and servant, it was servant's and not master's duty to operate the machinery.

The judgment should be reversed.

MAST *v.* KERN.

34 Or. 247. 1898.

THIS action is brought to recover damages for an injury alleged to have been sustained through defendant's negligence. At the time of the accident which caused his injury, the plaintiff was, and for some months prior thereto had been, working for the defendant in a stone quarry at Coos Bay, engaged with other employees in excavating and removing rock by blasting, under the direction and supervision of one West, who was the superintendent and manager, with power to hire and discharge employees. On the day of the accident the plaintiff and a fellow workman had drilled a hole in the rock, preparatory to putting in a blast; but, before loading it, the superintendent dropped in the hole two or three sticks of giant powder, which he caused to be exploded for the purpose of drying it out. After waiting a few minutes for any fire which the powder might leave in the hole to expire, West inquired of plaintiff whether he thought it was ready to load,

and the plaintiff replied, "I don't know whether it is or not." West then said, "I guess it is all right; we will try it," and poured some powder into the hole; and, as it did not take fire, he said he thought it was safe, and directed the plaintiff and his fellow workman to put in the black powder; and while they were engaged in doing so an explosion occurred, by which plaintiff received the injury for which he brings this action. The ground of recovery alleged in the complaint is that West was negligent in not waiting a sufficient length of time for the hole to cool after the giant powder had been exploded therein, and in not ascertaining whether there was any fire remaining in the hole, before directing the plaintiff and his fellow workman to put the black powder in. The court below directed a nonsuit, and plaintiff appeals.

BEAN, J. (after stating the facts). The motion for nonsuit was, it is stated in the briefs, allowed on the ground that when the plaintiff, with full knowledge of the situation, without protest or objection, undertook to load the hole as directed by West, he knowingly and voluntarily assumed the risks of a premature explosion; and we are not prepared to say at this time that the court was in error in so ruling. Brown *v.* Lumber Co., 24 Or. 315. But, however that may be, the judgment of nonsuit must be sustained for the reason that the negligence of West, if any, was, under the circumstances, the negligence of a co-servant, for which the defendant is not liable. It is familiar law that a servant assumes, as one of the incidents of his employment, all risks of injury from the negligence of a fellow servant, because the master cannot, by the exercise of the utmost care and caution, guard against such negligence. But the courts differ somewhat as to who is a fellow servant within the meaning of this rule. There are practically two lines of decisions upon the question. On the one hand it is held, adopting the superior servant criterion, that when the master has given to an employee supervisory control and management of his business, or some particular department thereof, such person, while so acting, stands in the place of the master, as to those under his direction and supervision, and for his negligence the master is liable. This is known in the books as the "Ohio doctrine," and was adopted in effect by the Supreme Court of the United States in Railway Co. *v.* Ross, 112 U. S. 377; but that case has been very much modified, if not in effect practically overruled, by the subsequent case of Railroad Co. *v.* Baugh, 149 U. S. 368.[1] Under this rule the liability of the master is made to depend upon the rank or grade of the person whose negligence caused the injury. On the other hand, the rule, and the one now unquestionably established and supported by the great weight of authority both in this country and in England, is that the liability of the master

[1] The Ross case was finally squarely overruled in New Eng. R. R. Co. *v.* Conroy, 175 U. S. 323.

depends upon the character of the act in the performance of which the injury arises, and not the grade or rank of the negligent employee. If the act is one pertaining to the duty the master owes to his servant, he is responsible for the manner of its performance, without regard to the rank of the servant or employee to whom it is intrusted; but, if it is one pertaining only to the duty of an operative, the employee performing it is a fellow servant with his co-laborers, whatever his rank, for whose negligence the master is not liable. McKinney, Fel. Serv. § 43 *et seq.*; Bailey, Mast. Liab. 226 *et seq.*; Wood, Mast. & S. § 438; 24 Am. Law Rev. 175; 25 Am. Law Reg. 481; Crispin *v.* Babbitt, 81 N. Y. 516; McCosker *v.* Railroad Co., 84 N. Y. 77; Hussey *v.* Coger, 112 N. Y. 614; Brown *v.* Railroad Co., 27 Minn. 162; Ell *v.* Railroad Co., 1 N. D. 336; Sayward *v.* Carlson, 1 Wash. St. 29. Many other authorities could be cited to the same effect, but these are sufficient to show the irresistible current of the decisions, as well as the ground upon which the doctrine rests, and its application to given facts.

And so is the logical result of the former decisions of this court, as the liability of the master for an injury to a servant, caused by the negligence of another employee, has always been made to depend upon the character of the act causing the injury, rather than the grade or rank of the offending employee. Anderson *v.* Bennett, 16 Or. 515; Hartvig *v.* Lumber Co., 19 Or. 522; Miller *v.* Southern Pac. Co., 20 Or. 285; Carlson *v.* Railway Co., 21 Or. 450; Fisher *v.* Railway Co., 22 Or. 533. It is the personal and absolute duty of the master to exercise reasonable care and caution to provide his servants with a reasonably safe place to work, reasonably safe tools, appliances, and instruments to work with, reasonably safe material to work upon, suitable and competent fellow servants to work with them, and to make needful rules and regulations for the safe conduct of the work; and he cannot delegate this duty to a servant of any grade so as to exempt himself from liability to a servant who has been injured by its nonperformance. Whoever he intrusts with its performance, whatever his grade or rank, stands in place of the master, and he is liable for the negligence of such employee to the same extent as if he had himself performed the act, or been guilty of the negligence. But when the master has performed his duty in this regard, and provided competent employees, a reasonably safe place to work, suitable materials, tools, and appliances to work with, and needful rules and regulations, and the like, he has discharged his whole duty in the premises, and is not liable to a servant for the negligence of another servant while engaged as an operative. It is true that from this doctrine results the conclusion that an employee may in certain cases occupy a dual position to his fellow workmen. He may be a vice-principal or the representative of the master as to all matters where he is intrusted with the discharge of duties which the master

himself is required to perform, and a co-servant in the discharge of duties not personal to the master. But this conclusion is a logical one, and has been recognized and applied under many varieties of facts. See McKinney, Fel. Serv. note to section 42.

The true test in all cases by which it may be determined whether the negligent act causing the injury is chargeable to the master, or is the act of a co-servant, is, was the offending employee in the performance of the master's duty, or charged therewith, in reference to the particular act causing the injury? If he was, his negligence is that of the master, and the liability follows; if not, he was a mere co-servant, engaged in a common employment with the injured servant, without reference to his grade or rank, or his right to employ or discharge men, or to his control over them. In short, the master is liable for the negligence of an employee who represents him in the discharge of his personal duties towards his servants. Beyond this he is liable only for his own personal negligence. "This," as said by Judge DILLON, "is a plain, sound, safe, and practical line of distinction. We know where to find it, and how to define it. It begins and ends with the personal duties of the master. Any attempt to refine based upon the notion of 'grades' in the service, or, what is much the same thing, distinct 'departments' in the service (which departments frequently exist only in the imagination of the judges, and not in fact), will only breed the confusion of the Ohio and Kentucky experiments, whose courts have constructed a labyrinth in which the judges who made it seem to be able to 'find no end in wandering mazes lost.'" 24 Am. Law Rev. 189. Now, under this rule it is clear that defendant is not liable for the act of West in directing the plaintiff to load the hole, even if it was neglect; for he was not then engaged in the discharge of any duty which the master owed to the plaintiff, but was a fellow servant, the risk of whose negligence was assumed by the plaintiff when he entered upon the employment. There is no pretence that West was not a fit and competent person to have charge of the work, or that the master was negligent in employing him, but the sole ground of liability alleged is the negligence of West in a matter not pertaining to any duty the defendant owed to the plaintiff. It follows from these views that the judgment of the court below must be affirmed, and it is so ordered.[1]

[1] For an excellent discussion of the various fellow-servant tests, see Jackson v. Norfolk and W. R. Co., 43 W. Va. 380.

CHAPTER XXV.

Liability of Master to Servant for his own Torts.

1. *The Non-Assignable Duties.*

FLIKE *v.* THE BOSTON AND ALBANY RAILROAD COMPANY.

53 N. Y. 549. 1873.

Appeal from order of the General Term of the Supreme Court in the Third Judicial Department, denying a motion for a new trial and ordering judgment for plaintiff on a verdict.

Church, Ch. J. The plaintiff's intestate was a fireman upon a freight train upon defendant's road, which left Albany at an early hour on a cold day. Some miles east of Albany eleven cars of another freight train, a short distance in advance, became accidentally detached and ran back and collided with the train on which the deceased was employed, by means of which he was killed. The evidence tended to show that the forward train was deficient in brakemen; that but two were aboard, when there should have been three, which was the usual number; and that if a third brakeman had been there he would have been stationed upon the eleven runaway cars, and with the brakeman on them could have controlled their impetus and prevented the accident. The company had at Albany an agent, called a head conductor, whose business it was to make up the morning trains, hire and station the brakemen, and generally to prepare and dispatch these trains.

The general rule that the employer is not liable to one servant or laborer for an injury resulting from the carelessness or negligence of another servant or co-laborer, has been recently so fully considered by this court in the two cases of Laning *v.* N. Y. C. R. R. Co., 49 N. Y. 521, and Brickner *v.* The Same, 49 Id. 672, that discussion is unnecessary except as far as may be pertinent to determine its application to the facts of this case. This doctrine was first promulgated in England in 1837 (3 M. & W. 1), in South Carolina in 1841 (1 McMullan, 385), and in Massachusetts in 1842 (4 Met. 49), and has been adopted in this and most of the other states in the Union. There has been a diversity of reasons given for its adoption, which have led to some confusion in its application. The reasons for the rule are well stated

by Pratt, J., in the first case in which it was applied in this state (6 Barb. 231), and were in substance that the rule *respondeat superior* does not itself spring directly from principles of natural justice and equity, but has been established upon principles of expediency and public policy for the protection of the community; and that, in view of the unjust consequences which may ensue from its application for injuries by co-servants, the same principles of public policy demand its limitation, and that while the general rule was demanded for the protection of the community, the exception is demanded for the protection of the employer, especially in view of the manner in which the principal business of the country is now transacted. This view evinces the flexibility of the principles of the common law, which are capable of adaption to new or changed circumstances, and enables courts to adjust the application of the principle not in obedience to a supposed arbitrary rule, but with such limitations and qualifications as best accord with reason and justice. In applying the rule we should be cautious not to violate the very principles upon which it is founded. While shielding the employer from unjust and burdensome liabilities, we should not withhold all redress from the employed for remissness and carelessness in respect to duties which fairly devolve upon the former as the principal, and over which the latter have no control. In 5 M., H. & G., 352, the court very justly said: "Though we have said that a master is not generally responsible to a servant for an injury occasioned by a fellow servant while they are acting in one common service, yet this must be taken with the qualification that the master shall have taken due care not to expose his servants to unreasonable risks."

The master is liable if his own negligence or want of care produces the injury, and this may be manifested by employing unfit servants or agents, or furnishing improper or unsafe machinery, implements, facilities, or materials for the use of the servant. (25 N. Y. 562; 39 Id. 468.) It was at first doubted by this court whether the exemption should not be limited to injuries by servants whose employment was the same (1 Seld. 492, per Gardiner, J.); but it has since been repeatedly held that injuries by servants or agents, engaged in the same general business or enterprise, are within the exemption. (Id.) Hence the difficulty of applying the rule in actions against corporations whose whole business can only be transacted by agents who are in some sense co-servants. In 39 N. Y. *supra,* the court decided that a corporation was liable if negligence causing an injury to a subordinate servant could be imputed to the directors, but did not establish any definite rule on the subject. The true rule, I apprehend, is to hold the corporation liable for negligence or want of proper care in respect to such acts and duties as it is required to perform and discharge as master or principal, without regard to the rank or title of the agent intrusted with their performance. As to such acts, the agent

occupies the place of the corporation, and the latter should be deemed present, and consequently liable for the manner in which they are performed. If an agent employs unfit servants, his fault is that of the corporation, because it occurred in the performance of the principal's duty, although only an agent himself. So in providing machinery or materials, and in the general arrangement and management of the business, he is in the discharge of the duty pertaining to the principal.

In the case before us it was clearly the duty of the corporation, in making up and dispatching the advance train, to supply it with suitable machinery and sufficient help for the business and journey which it was about to undertake; and if there was any want of care in these respects, which caused the injury, it is liable. Rockefeller had the general charge of this business, and, within the principle decided in the Laning Case, represented the corporation itself.

It is claimed by the counsel for the appellant, that the company are not liable, because the agent had, in fact, employed a third brakeman to go upon this train, who, by reason of oversleeping, failed to get aboard in time, and hence, that the injury must be attributed to his negligence, or, if attributable to the negligence of the general agent in not supplying his place with another man, such negligence must be regarded as committed while acting in the capacity of a mere co-servant, within the doctrine of irresponsibility. Neither of these positions is tenable. The hiring of a third brakeman was only one of the steps proper to be taken to discharge the principal's duty, which was to supply with sufficient help and machinery, and properly despatch the train in question, and this duty remained to be performed, although the hired brakeman failed to wake up in time, or was sick, or failed to appear for any other reason. It was negligent for the company to start the train without sufficient help. The acts of Rockefeller cannot be divided up, and a part of them regarded as those of the company, and the other part as those of a co-servant merely, for the obvious reason that all his acts constituted but a single duty. His acts are indivisible, and the attempt to create a distinction in their character would involve a refinement in favor of corporate immunity not warranted by reason or authority. As well might the company be relieved if the train was started without an engineer, or without brakes, or with a defective engine. The same duty rested upon the company, though every man employed had died or run away during the night, and if negligent in discharging it, either by acts of commission or omission, whether in employing improper help, or not enough of it, or in not requiring their presence upon the train, it is, upon every just principle, responsible for the consequences. Nor is the company relieved, although negligence may be imputed to the defaulting brakeman. The only effect of that circumstance would be to make the negligence contributory with the brakeman, but would

not affect the liability of the company. It is unnecesary, therefore, to inquire whether the sleeping brakeman was so engaged in the common service as that the defendants could be exempted from liability if the injury was solely attributable to his neglect.

Assuming that the facts are, as the jury must have found, the liability of the company is clear. These heavy freight trains were despatched only five minutes apart, and traversed a very heavy grade, and were liable, especially in cold weather, to precisely such accidents as did occur, in which event collisions with fatal results were almost certain to ensue. The principal protection in such cases is the prompt and efficient application of the brakes, and the utmost care should be exercised in providing a sufficient number of reliable men to perform this duty. If we were called upon to spell out a contract between the parties, it would be implied that the company agreed to use proper care not to expose the deceased to risks of this character. He was engaged upon another train in the discharge of his duty, and was not only in no way connected with the broken train, but he could neither know of nor provide against the defect.

No authority has been cited which would justify us in relieving the defendant from this liability, nor have I been able to find any. In 3 Cush. 270, the Supreme Court of Massachusetts intimate, although it was unnecessary to decide, that a railroad company is liable for an injury to an employee caused by a deficiency of help upon another train.

Mr. Redfield, in a note in a recent edition of his work on Railways, expresses the opinion that corporations should be regarded as constructively present in all acts performed by their general agents, within the range of their employment; and the tendency of judicial opinion, while it adheres to the general rule of irresponsibility, is against extending it.

The judgment must be affirmed.

PECKHAM, ANDREWS, and RAPALLO, JJ., concur.

ALLEN, GROVER, and FOLGER, JJ., dissent.

Judgment affirmed.

MALAY *v.* THE MOUNT MORRIS ELECTRIC LIGHT COMPANY.

41 N. Y. App. Div. 574. 1899.

THE plaintiff was employed by the defendant as a lineman and inspector. It was a part of his duty to hang lamps for the defendant company and the wires connecting these lamps with the defendant's power house. He brought this action against the defendant to recover damages for personal injuries sustained through the negligence of

one Matthews, a co-employee, who was in charge of the dynamo room of the power house at the time of the accident. The plaintiff's evidence tended to show either that Matthews was ignorant as to the duties of his position, or that he was careless or reckless in their performance. Judgment for plaintiff. Defendant appeals. Other facts appear in the opinion of the court.

INGRAHAM, J.: . . . It appeared from the plaintiff's evidence that on July 6, 1891, the plaintiff was ordered to hang a lamp at 103 Park Place; that he went to the station and got a lamp and there saw Matthews on duty; that plaintiff told Matthews that he was going to hang a lamp at 103 Park Place, and to be sure and not turn the current on until the plaintiff had notified him over the telephone that the lamp was hung, when he could give the circuit a test. Matthews said: "All right, Bill, starting time is not until seven forty-five," to which the plaintiff replied: "I don't know whether I will be done then or not, but I will telephone as soon as I get done." Matthews had full charge of the station at the time of this conversation. . . . The plaintiff went to the locality at which he was to hang the lamp, started to make the connection between the defendant's wires on one of the defendant's poles, standing on a ladder about ten feet from the ground, and while making this connection he received a charge of electricity over the wires. He fell backward from the ladder on which he was standing and struck upon the sidewalk, and sustained the injury to recover for which this action was brought. The accident happened some time between six and half-past six o'clock in the evening. Between six and half-past six o'clock, about twenty-five minutes after the plaintiff left the power house, Matthews started up the dynamos, closed the circuit upon circuit "15," upon which the plaintiff was working, so as to turn the current on this circuit, and it was in consequence of Matthews turning on this current while the plaintiff was at work connecting the wires that he received the shock which caused him to fall and sustain the injury. . . .

To entitle the plaintiff to recover, there must be evidence sufficient to sustain a finding of the jury that the accident was caused by the negligence of Matthews; that Matthews was not a competent man to perform the duties required of him by the defendant, and that the defendant, before the accident, had knowledge or notice of Matthews' incompetency. As was said by Judge BROWN in Coppins *v.* N. Y. C. & H. R. R. R. Co. (122 N. Y. 564): "The defendant's duty to the plaintiff, so far as reasonable care would accomplish it, was to employ only competent men in the management of its road. A competent man is a reliable man; one who may be relied upon to execute the rules of the master, unless prevented by causes beyond his own control. Hence, incompetency exists not alone in physical or mental attributes, but in the disposition with which a servant performs his duties. If he habitually neglects these duties, he becomes unreliable, and al-

though he may be physically and mentally able to do well all that is requested of him, his disposition toward his work and toward the general safety of the work of his employer and to his fellow servants makes him an incompetent man." And in Wright *v.* N. Y. C. R. R. Co. (25 N. Y. 565) it is stated that "The master is liable to his servant for any injury happening to him from the misconduct or personal negligence of the master; and this negligence may consist in the employment of unfit and incompetent servants and agents. . . . The employer does not undertake with each or any of his employees for the skill and competency of the other employees engaged in and about the same service, . . . since neglect and want of due care in the selection and employment of the agent or servant through whose want of skill or competency an injury is caused to a fellow servant, must be shown in order to charge the master." Applying this principle, we think the evidence justified the submission of the question as to the defendant's negligence to the jury. The plaintiff was employed to perform for the defendant a hazardous operation. In joining these two wires together he subjected himself to the effect of a current passing from one wire to the other. It was the defendant's duty to provide proper machinery, and to employ faithful and competent servants to prevent injury to the plaintiff when engaged in the performance of this duty. If the defendant employed an incompetent servant, and gave to him charge of the machinery by which the current would be turned on to these wires on which the plaintiff was sent to work, or if those servants that it had employed had shown by their previous conduct that they could not be relied upon to execute the rules of the master necessary for the protection of the other servants employed in their work, or that they recklessly and in disregard of ordinary rules of prudence and care exposed their fellow servants to unnecessary danger, and notice of such neglect or incompetency was brought home to the master, and an injury resulted from the act of this incompetent servant so employed, the master is liable. In this case, the evidence was sufficient to show that Matthews, either from ignorance or from recklessness, was an incompetent man and unfit to be intrusted with this dangerous machinery, and that knowledge of the fact had been brought home to the master.[1] It is true that the

[1] In many jurisdictions not only is evidence of specific acts of incompetency on the part of fellow servants admissible to charge the master, but "evidence of general reputation is admissible to prove the unfitness of a fellow servant, and ignorance of such general reputation on the part of the master may of itself, where it is his imperative duty to know the fitness of his servant, and where inquiry would have led to the knowledge, be such negligence as to charge the master." Western Stone Co. *v.* Whalen, 151 Ill. 472, 484. See, also, Norfolk and Western R. Co. *v.* Hoover, 79 Md. 253, and Handley *v.* Company, 15 Utah, 176.

In New York, however, evidence of general reputation is inadmissible. Thus, in Park *v.* N. Y. C. and H. R. R. R. Co., 155 N. Y. 215, at p. 218, HAIGHT, J., said: "We are aware that in some states the courts have permitted incompetency of servants to be shown by general reputation, but we have never gone to that extent in this state. It appears to us that the safer and better rule is to require incompetency to be shown by the specific acts of the servant, and then, that the master knew or

person charged with the duty of employing or discharging Matthews testified that he had investigated complaints and had satisfied himself that they were unfounded. That question was properly submitted to the jury to determine whether or not, as a matter of fact, Matthews was a competent man for the work that he was employed to do, and if he was incompetent, whether the defendant had such knowledge of his incompetency as made it negligent for it to retain him in its employ. The verdict of the jury is not unsupported by the evidence, and we should not be justified in reversing it upon that ground. After an examination of the whole record we see no reason for disturbing the verdict of the jury upon any question submitted to them. . . .

Upon the whole case we think the judgment was right and should be affirmed, with costs.

BARRETT, RUMSEY, and MCLAUGHLIN, JJ., concurred.

Judgment affirmed, with costs.[1]

ENGLISH *v.* AMIDON.

72 N. H. 301. 1902.

ACTION on the case by Henry P. English against Frank Amidon and another for personal injuries. Defendants' motion for a nonsuit was granted, and plaintiff excepted.

BINGHAM, J. It was the duty of the defendants, in the exercise of reasonable care and diligence, to provide and maintain a safe and suitable stairway by which the plaintiff, as their servant, could go to and from his place of work in the mill. Fifield *v.* Railroad, 42 N. H. 225; Jaques *v.* Company, 66 N. H. 482; Fitzgerald *v.* Company, 155

ought to have known of such incompetency. The latter may be shown by evidence tending to establish that such incompetency was generally known in the community." JENKS, J., in McCarthy *v.* Ritch, 59 N. Y. App. Div. 145, commenting upon the Park case and other cases, said: "My interpretation of those decisions is, not that evidence of specific acts opens the door for the admission of testimony as to mere general reputation, but of testimony that knowledge of such specific acts was general in the community" (p. 147). "The rule is as to such proof that the plaintiff must first show specific acts, and then the general knowledge in the community of such specific acts" (p. 149).

[1] "In actions of this character, where a servant sues his master for injuries resulting from the negligence of a fellow servant, the plaintiff, to succeed, must prove, not only that some negligence of the fellow servant caused the injury, but also that the master had himself been guilty of negligence, either in the selection of the negligent fellow servant in the first instance, or in retaining him in his service afterwards. Mere negligence on the part of the fellow servant, though resulting in an injury, will not suffice to support the action, because the master does not insure one employee against the carelessness of another. But he owes to each of his servants the duty of using reasonable care and caution in the selection of competent fellow servants, and in the retention in his service of none but those who are. If he does not perform this duty, and an injury is occasioned by the negligence of an incompetent or careless servant, the master is responsible to the injured employee, not for the mere negligent act or omission of the incompetent or careless servant, but for his own negligence in not discharging his own duty towards the injured servant." Norfolk and Western R. Co. *v.* Hoover, 79 Md. 253, 261, 262.

Mass. 155; Mahoney *v.* Dore, 155 Mass. 513. Inasmuch as the defendants operated their mill at night, it is claimed that the stairway should then have been lighted to render it reasonably safe. If the stairway was unsuitable for the use of the defendants' servants at night, because the plan of construction, taken in conjunction with the darkness, made it dangerous, it might be found to have been the defendants' duty, in the exercise of ordinary care, to make it reasonably safe either by suitably lighting it or by remedying the construction; and this was a personal duty, from which they could not relieve themselves by delegating its performance to another.

The evidence was that the plaintiff and seven other spinners, after finishing their work at nine o'clock in the evening, regularly came down the stairway from the third floor of the mill; that no other way was provided for them; that the stairway was winding, steep, narrow, and worn; that the treads of the stairs varied in width, being narrowest on the inside of the curve; and that the defendants had placed lamps, which were usually lighted at night, over the stairs. On the night in question, when the plaintiff and the other workmen had finished their labors, they put out the lights over their machines, as was their custom, and started to go out of the mill. On reaching the stairway they found it was dark, but proceeded to go down and out, the plaintiff going on the outside of the curve, where the treads of the stairs were widest, steadying himself with his hand against the wall, there being no railing on that side of the stairway. When part way down he slipped, fell, and was injured. Reasonable men could conclude from this evidence that the defendants required their servants to use this stairway at night; that its construction, in conjunction with the darkness, rendered its use dangerous; that the defendants themselves so regarded it; that their neglect to make the stairway safe for such use was the proximate cause of the plaintiff's injury; and that under the circumstances he was exercising due care in undertaking to use the stairway (the only means provided for leaving the mill) and in his conduct while using it.

Did the plaintiff voluntarily assume the risk of the defendants' negligence? "One does not voluntarily assume a risk, within the meaning of the rule that debars a recovery, when he merely knows there is some danger, without appreciating the danger." Mundle *v.* Company, 86 Me. 400, 405; Demars *v.* Company, 67 N. H. 404. One cannot be said, as a matter of law, to assume a risk voluntarily, though he knows the danger and appreciates the risk, if at the time he was acting "under such an exigency, or such an urgent call of duty, or such constraint of any kind, as in reference to the danger deprives his act of its voluntary character" (Mahoney *v.* Dore, *supra*); or if, after discovering the master's neglect, he "has no opportunity to leave the service before the injury is received." (Olney *v.* Railroad, 71 N. H. 427, 431.)

When the plaintiff went into the mill it was daylight. He knew that his work would not be finished before nine o'clock that night, and that it was the custom of the defendants to then have the stairway lighted. He had the right to believe they would perform their duty on the night in question, and to rely thereon. He entered the mill, worked until nine o'clock, and then went to the stairway to go out. On reaching it he found himself surrounded in darkness. Although he then knew the defendants had failed to perform their duty, yet in view of the fact that he then had no choice open to him, the only exit provided being over the dark stairway, and no opportunity to leave the defendants' service before his injury was received, it cannot be said, as a matter of law, that he voluntarily assumed the risk. It was for the jury to say whether the plaintiff, knowing the defendants' neglect of duty, fully appreciated the danger therefrom and voluntarily encountered it. Demars *v.* Company, *supra;* Whitcher *v.* Railroad, 70 N. H. 242; Dempsey *v.* Sawyer, 95 Me. 295; Mahoney *v.* Dore, *supra;* Fitzgerald *v.* Company, *supra;* 47 L. R. A. 161, 201, note. *Exception sustained.*

CHASE, J., was absent. The others concurred.

On Rehearing.

WALKER, J. The defendants' motion for a rehearing must be denied. It was their nondelegable duty to provide reasonably safe stairs for use in the night-time; that is, adequate instrumentalities or means for the reasonably safe exit of their men from the factory. If at the time of the accident light was essential to such use— if the danger incident to the defective stairs could have been obviated by artificial lighting — the duty to furnish the necessary light, or in some way to guard against the apparent danger, was no more a delegable duty than the duty to maintain stairs of sufficient strength to support the ordinary weight imposed upon them. The rule of ordinary care which requires the master to provide a safe structure for travel from an upper story to the ground might require him to furnish adequate light when the structure becomes unreasonably dangerous for use in the darkness, for the same reason that common prudence might require him to keep a defective underground passageway lighted in the daytime as well as in the night-time. The principle involved is not derived from exact or ingenious definitions of the words "place," "tools," or "appliances," however convenient and useful they may be in a particular case, but from considerations of the requirements of ordinary and reasonable care on the part of both the employer and the employee. If, as a matter of fact, a particular course of conduct on the part of the master toward his servant is unreasonable when measured by the conduct of men in general engaged in similar occupations, he cannot shield himself, as a matter of law, from the consequences of such conduct by a resort to verbal

distinctions which oftener serve to obscure than to elucidate legal principles. The law seeks to enforce as a duty the requirement of reasonable conduct; hence the rule of ordinary care, which determines the rights and duties of master and servant in negligence cases.

Whether ordinary care for the reasonable safety of their servants, in view of the contract of employment, required the defendants to remedy or remove the danger incident to the use of these stairs in the night-time, by repairing or reconstructing them or by lighting them, is a question of fact for the jury. This court cannot say upon the evidence reported that fair-minded men in the discharge of their duty as jurors, after having viewed the premises and heard the evidence, could not reasonably find that the defendants omitted to exercise the degree of care which common prudence required.

This case is clearly distinguishable from McLaine *v.* Company, 71 N. H. 294; for in that case the danger arose from the act of a fellow servant in the performance of the work, for which it was held to be unreasonable to hold the master responsible, and not from any defects in the instrumentalities provided by the master, for which he is liable if he does not exercise ordinary care in the premises. Manning *v.* Manchester Mills, 70 N. H. 582, is distinguishable for a similar reason. In other cases cited by the defendants (Mellen *v.* Wilson, 159 Mass. 88; Dene *v.* Print Works, 181 Mass. 560; Kaare *v.* Company, 139 N. Y. 369; New York, etc., R. R. *v.* Perriguey, 138 Ind. 414; Collins *v.* Railroad, 30 Minn. 31) the sole ground upon which negligence was claimed was the absence of light caused by the negligence of a fellow servant. The existence of light in those cases was not required to remedy or to obviate the danger arising from structural defects. Lamps for the production of light were regarded as a part of the properly constructed appliances or machines which it was the duty of the servant to operate. The question of their necessity and use to guard against the consequences of the master's negligence in unreasonably maintaining dangerously defective appliances was not considered. *Motion denied.*

PARSONS, C. J., and REMICK and BINGHAM, JJ., concurred. CHASE, J., doubted.

MADIGAN *v.* OCEANIC STEAM NAV. CO.

178 N. Y. 242. 1904.

APPEAL from an order of the Appellate Division of the Supreme Court in the First Judicial Department, which reversed an order of a Trial Term setting aside a verdict in favor of plaintiff and granting a new trial and directed judgment on the verdict.

GRAY, J. The plaintiff's husband was employed by the defendant

as one of a gang of stevedores and, while engaged upon the work of transferring coal from a barge into the steamship *Oceanic,* he was killed. The plaintiff has sued to recover damages for his death, charging that it was caused through the negligence of the defendant. The plaintiff obtained a verdict in her favor; but the trial court set it aside and ordered a new trial. The Appellate Division, reviewing this order upon an appeal, reversed it and directed judgment to be entered for the plaintiff, in accordance with the verdict rendered. In that determination the court was not unanimous and, upon this appeal by the defendant, the sole question actually is, whether it had fulfilled its whole duty to its employee with respect to providing a safe place for him in which to do his work. It was, and is, charged by the plaintiff that the defendant was negligent in the failure to supply lamps, or lights, to illuminate the interior of the coal barge, where the deceased was stationed upon the occasion in question. That omission, as it appears from the opinion of the majority of the Appellate Division justices, was regarded as having been the cause of the accident and because the coal foreman of the defendant was in charge of the work and represented the latter in that respect, his negligence in failing to provide the lights was to be attributed to the general employer.

The facts may be briefly stated. The coal barge lay between the steamship and the wharf, and a number of stevedores, of whom the deceased was one, were in the hold of the barge, engaged in shoveling coal into buckets, which were let down into the hold at the end of a rope, or "fall." When they were filled, they would be hoisted out and up the side of the steamship. The captain of the barge stood upon the barge's deck and, by the use of a guy rope attached to the "fall," he was able to control the rise of a bucket from, or its descent into, the hold. The importance of this was in the necessity of preventing the buckets from swinging to and fro and against the side of the vessel. Upon this occasion, work was commenced in the middle of the day and was continued until after sunset, when the hold had become darkened. McDonald was the defendant's coal foreman, who employed and directed the other stevedores, and it came within his duties to get out lamps, whenever the darkness made them necessary. He did not do so at this time, as he testified, because he "did not think it necessary." A bucket, which had been filled with coal on the side of the hold furthest away from the steamship, was being hoisted, when, from the failure of the barge's captain to properly secure the guy rope, it swung violently over and towards the steamship, striking the head of the deceased against a bolt, projecting from the barge's side, and killing him. The barge's captain testified that it was too dark to enable him to see into the hold and that he did not know the coal bucket was hooked on. As the case was submitted to the jury, it is clear that the verdict must have been reached

upon the theory that the defendant was liable for the foreman's neglect to supply the lights.

It was not disputed that the defendant had provided lamps, sufficient and quite available to the foreman for the men's use. They were in sheds on the wharf, and also upon the steamship, and if they were not used upon this occasion, it was simply because in the foreman's judgment they were not required. I cannot agree with the court below that the omission, or neglect, of this foreman was chargeable to the defendant. That he was so far the *alter ego* of the master, as to make the latter responsible for any failure to furnish a safe place to work in, or safe appliances to work with, may be readily admitted; but if, as to some detail of the undertaking, he was actually doing the work devolving upon a servant, the others took the risk of their fellow servant's performance. The defendant was not at fault in any of those general respects in which an employer is regarded as under obligations towards those whom he employs to work for him. The hold of the barge was a safe enough place to work in; the foreman was competent and no complaint is made as to the machinery or appliances used in the work. Whether a master shall be held to be liable when the negligent act, or omission to act, was that of one of his servants, depends usually, if not, indeed, always, upon the character of the act. That is to say, if the specific act is one the doing of which can be, properly and justly, regarded as within the personal duties of the master, whose performance he has delegated to another, and not some act within the line of a mere servant's duty, then the master is properly chargeable with the results of a negligent performance or omission. When McDonald, the defendant's coal foreman, in the exercise of his judgment omitted to get the lamps for the stevedores, which the defendant had been careful to provide, I think that it was the omission of a duty resting on the foreman as a fellow servant, having that detail in charge. It was, either, for him to judge when the lamps were needed, or it was for the others to demand them, if the place had become too dark to remain in at work. There is no evidence of their having made any request of the foreman; so that, if the conditions had become so changed as to render continuance in their work dangerous, they all erred in their judgment. As it was said in Kimmer *v.* Weber (151 N. Y. 417), where it was a question of sufficiently safe scaffolding, put up under the instructions of a foreman by the workmen, "it was, at most, but an error of judgment on the part of the foreman with respect to a detail of the work in which the masons (in that case) were engaged. He concluded, as the workmen themselves did, that the place was safe and, in determining that question, they were all co-servants." In Crispin *v.* Babbitt (81 N. Y. 516), the plaintiff, a laborer, was injured while engaged with others in lifting the fly-wheel off of an engine. The defendant in that case had intrusted

the conduct of his business to a general manager and he, upon the occasion in question, carelessly started the engine. It was held that, notwithstanding his position, he was not, in what he did, acting in the defendant's place. It was observed in the opinion, that "a superintendent of a factory, although having power to employ men, or represent the master in other respects, is, in the management of the machinery, a fellow servant of the other operatives." In Geoghegan *v.* Atlas Steamship Company (146 N. Y. 369), where it was claimed that the deceased had come to his death by reason of certain gangway doors in the side of the vessel having been carelessly left open, through which he had fallen, we held that the defendant was not liable for the failure of the officer, whose duty it was to close the doors, and that the negligence, which led to the result, was that of a co-servant. These cases, and others which might be cited, rest upon the principle that the liability of the master does not depend upon the grade or the rank of the servant, who represents him in the superintendence of the others in his employment, but the act which causes, or results in, an injury in the course of the work, must be of a character which the master, as such, should perform, and not one which would be expected of a servant, as such.

Here the defendant provided a supply of lamps for its servants and they could, and should, have taken and used them when they were required. To get them was a mere detail of the work which it was the foreman's duty, as one of a number of servants engaged in a common task, to execute.

I advise the reversal of the order of the Appellate Division and that a new trial be had, with costs to abide the event.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, CULLEN, JJ. (and MARTIN, J., in result), concur. *Order reversed, etc.*[1]

FULLER *v.* JEWETT.

80 N. Y. 46. 1880.

APPEAL from judgment of the General Term of the Supreme Court, in the Second Judicial Department, affirming a judgment in favor of plaintiff, entered upon a verdict.

This action was brought against the defendant as receiver, etc., of the Erie Railway, to recover damages for the death of Jefferson Fuller, plaintiff's intestate, alleged to have been caused by defendant's negligence.

ANDREWS, J. The plaintiff's intestate, an engineer on the Erie Railway, was killed on July 23, 1875, by the explosion of the

[1] See Vogel *v.* American Bridge Co., 180 N. Y. 373.

boiler of a locomotive engine, belonging to the company, which the intestate was running as engineer at the time of the accident. The engine was examined after the explosion, and it was found that a number of the stay-bolts in the left leg of the boiler were broken, and others were corroded by rust, and the outer sheet of the boiler through which the stay-bolts passed was eaten away by rust to the extent of from one-third to one-half its original thickness.

The evidence authorized the inference that the explosion was caused by the weakness of the boiler, resulting from the defective stay-bolts and the condition of the outer sheet. It did not definitely appear how long the defective condition of the boiler had existed. The ends of some of the broken stay-bolts, at the point where they were broken, were scaled over with rust, and experts testified that it would require some time for rust to eat away the iron to the extent disclosed by the examination. The engine was built in 1865 and had been in use on the railway from that time. In October, 1874, it was taken to the shops of the company for general repairs, and Van Vechten, the master mechanic in charge of the shops, gave directions for its thorough overhauling. The repairs were made by mechanics in the employment of the company, and in January, 1875, the repairs having been completed, the engine was again placed upon the road. But after this, the engine was frequently reported by Fuller, the engineer, to be out of order, and in each month subsequent to January, 1875, to the time of the explosion, except in June, repairs were made thereon. In April, the engineer reported that the stay-bolts in the right leg of the boiler were broken, which report on examination was found to be true, and the broken stay-bolts were replaced by new ones. When the general repairs were made in October, 1874, the mechanics who had charge of the repairs examined the boiler to ascertain whether any of the stay-bolts were defective, but they found none. This examination, however, was substantially confined to an inspection of the outer sheets of the boiler, to discover any indication of weakness and to hammering on some of the bolts to ascertain whether they were broken. But they made no examination of the interior of the legs of the boiler by the use of lights, as was practicable and usual in the case of general repairs, as some of the witnesses testified.

It is quite clear upon the evidence that the boiler was in a dangerous condition at and prior to the time of the explosion. The jury were authorized to find that the defects existed to a greater or less extent at the time the engine was taken to the shops in October, 1874, and that the mechanics to whom Van Vechten had committed the duty of making the necessary repairs, negligently omitted to use the usual and proper means to ascertain the existence of the defects, and that if such means had been used, the weakened and unsafe condition of the boiler would have been discovered. There was no

negligence on the part of Van Vechten, the master mechanic in charge of the shops. He gave proper instructions for the thorough examination and repair of the engine and boiler. It was impracticable for him to make personal examination of all the engines which came to the shops for repairs. The subordinates to whom he committed the duty in this case were competent from their character and experience to perform it. Nor was there any negligence on the part of the company in the employment of Van Vechten as general superintendent of repairs, or in omitting to make suitable regulations for the conduct of this business. Van Vechten was a man fully qualified for his position. The immediate negligence in this case was that of the mechanics, to whom the doing of the repairs was committed, in omitting the duty of thorough inspection and examination as directed by Van Vechten.

Upon this state of facts the question arises as to the liability of the defendant. It is claimed that the negligence of the mechanics was the negligence of co-employees with the intestate, in the service of the company, for which the defendant, the common employer, is not responsible.

We are of opinion that the cases of Flike *v.* Boston and Albany Railroad Company, 53 N. Y. 549; Booth *v.* Same, 73 Id. 38; and Mehan *v.* Syracuse, Bing. and New York Railroad Company, 73 Id. 585, are decisive against this contention. We understand the principle of these cases to be, that acts which the master, as such, is bound to perform for the safety and protection of his employees, cannot be delegated so as to exonerate the former from liability to a servant, who is injured by the omission to perform the act or duty, or by its negligent performance, whether the non-feasance or misfeasance is that of a superior officer, agent, or servant, or of a subordinate or inferior agent or servant to whom the doing of the act, or the performance of the duty, has been committed. In either case in respect to such act or duty the servant who undertakes, or omits to perform it, is the representative of the master, and not a mere co-servant with the one who sustains the injury. The act or omission is the act or omission of the master irrespective of the grade of the servant whose negligence caused the injury, or of the fact whether it was or was not practicable for the master to act personally, or whether he did or did not do all that he personally could do by selecting competent servants, or otherwise to secure the safety of his employees.

It is sometimes difficult to determine what is the master's duty within the rule. But when it is ascertained that the negligence by which an employee is injured relates to this duty, then there is no middle ground, and the case cannot be determined upon any distinction founded upon the particular grade, office, or function of the negligent servant or agent. In the Flike Case, it was probably

impracticable for Rockefeller to be present at the starting of each train, and to see personally that when it left the yard it had its full equipment of men. He appointed sufficient brakemen to go with the train which parted and caused the injury, and one of them neglected to go. The negligence of the company consisted in not seeing to it that the train was sufficiently manned when it started, and it did not excuse itself by showing that it had promulgated proper rules and appointed a head conductor of this business, or that the train would have been fully manned if Loftus, the brakeman, had performed his duty. In this case the neglect to maintain the engine in proper repair was the neglect of a duty devolving upon the master. The duty of maintaining machinery in repair for the protection and safety of employees is the same in kind as the duty of furnishing a safe and proper machine in the first instance. Ford *v.* Fitchburg R. R. Co., 110 Mass. 240.

But the duty of the master to furnish suitable and safe machinery, and to keep the same in repair, is relative and not absolute. He is only bound by himself and his agents to exercise due care to that end. In this case the jury have found upon sufficient evidence that there was negligence in respect to the inspection and repair of the boiler, and we think the judgment must be affirmed. . . .

We have examined the exceptions to evidence, and do not find any which call for a reversal of the judgment.

All concur except FOLGER, J., not voting.

Judgment affirmed.

MURPHY *v.* BOSTON AND ALBANY R. CO.

88 N. Y. 146. 1882.

THIS action was brought to recover damages for the alleged negligence of defendant causing the death of Francis Murphy, plaintiff's intestate. Judgment for defendant.

ANDREWS, Ch. J. The boiler of the defendant's locomotive "Sacramento" exploded while in the repair shop of the company, at East Albany, on the 6th of August, 1879, killing Francis Murphy, the plaintiff's intestate, and one Smith, who were engaged at the time, by the direction of the master mechanic of the shop, in setting the safety-valve, so as to allow a pressure in the boiler of one hundred and thirty-three pounds to the square inch, which was the highest limit of steam permitted in the use of locomotives on the road. The locomotive was taken to the shop for repairs about two weeks before the explosion, having been reported by the engineer as pounding in the driving boxes, leaking, etc. It was the rule of the shop, known to all the employees, that when an engine came into the shop

for repairs, all defects reported should be repaired and an examination made to see if any other defects could be discovered, and if there were any of a slight nature they should be repaired first, and reported afterwards; but if of a serious nature, they were to be reported first and repaired afterwards. In the ordinary course, a locomotive sent to the shop for repairs was first put into the hands of the boilermakers for the examination and repair of the boiler, then into the hands of the machinists, and finally into the hands of mechanics to set the safety-valve, which was the last thing to be done before the locomotive was sent on to the road. This last work was usually committed to the intestate and Smith, who were mechanics, and had for several years been employed in the repair shop, and who, when the particular work of setting the safety-valve of a locomotive was to be done, were assigned to this duty. On examination of the locomotive "Sacramento" after the explosion, it was found that twenty of the stay-bolts on the right side of the boiler were broken, the fractures being apparently old, and the right side sheet near the mud ring, which was originally five-sixteenths of an inch in thickness, had been channeled, or worn down to one-sixteenth of an inch. The evidence tended to show that the explosion was attributable to these defects, which rendered the boiler incapable of sustaining the pressure directed to be put upon it, and that the defects would have been discovered by the boilermakers, if they had performed their duty to make thorough inspection of the boiler with a view to ascertain whether any defects existed. The judge nonsuited the plaintiff, and it must be assumed that the negligence of the boilermakers was one of the efficient causes of the accident. The boilermakers were competent and skilled mechanics, and they had reported to the master-mechanic that the locomotive was "all right," before the intestate and Smith were directed to set the valve; the intestate and Smith had no notice of the defects in the boiler.

Upon these facts the question arises whether the company is liable for the death of Murphy, resulting from the negligence, primarily, of the boilermakers. They and the intestate were co-servants of the defendant, and it is the general rule of law that the master is not responsible to one servant for an injury occasioned by the negligence of a co-servant of the common employer. To this rule there are two well-defined exceptions: first, where the servant, whose negligence caused the injury, was an unfit and incompetent person to be intrusted with the duty to which he was assigned, and the accident resulted from his incompetency and unfitness. Laning *v.* N. Y. Central Railroad Co., 49 N. Y. 521; second, where the accident resulted from unsafe and imperfect machinery and appliances furnished for the use of the servant in the master's business. Laning *v.* N. Y. Central Railroad Co., *supra;* Flike *v.* Boston and Albany R. R. Co., 53 N. Y. 550; Fuller *v.* Jewett, 80 Id. 46.

These exceptions, however, are subject to the qualification that the duty imposed upon the master to employ competent servants, and furnish fit and safe machinery, is not absolute, but relative. The master does not guarantee either the competency of the co-servants or the safety of the machinery and appliances. He undertakes to use due and reasonable care in both respects, and that there shall be no negligence on his part or on the part of any person intrusted by him with the business of employing servants and providing safe machinery, etc. It is plain that the master's liability, if sustained in this case, rests upon the second exception stated, viz.: the negligent furnishing of an unsafe machine for the use of the intestate. The competency of the boilermakers and machinists employed in repairing the locomotive before it came to the hands of the intestate and Smith is not questioned. The rules of the shop were comprehensive, and required a full examination by the boilermakers and machinists to discover defects. Their negligence is not a ground of action against the master, unless, as between the intestate and the master, it was the master's duty to ascertain, before the intestate and Smith were put to setting the valve, that the boiler was safe and would bear the required pressure. We think this case is not within the principle which holds the master responsible for unsafe machinery furnished for the use of the servant. The case of Fuller *v.* Jewett, 80 N. Y. 46, is a distinct authority for the proposition, that if this locomotive had been sent out from the shop, and afterward exploded while in use on the defendant's road, injuring the engineer or other servants of the defendant, the company would have been responsible. The negligence of the boilermakers in the case supposed would be regarded as the negligence of the master. The risk of the negligence of the repairers and machinists would not be considered one of the risks which a servant in whose hands the machine was subsequently placed for use had assumed. The placing of the locomotive on the road for use would be an assurance that it was fit and safe; and an engineer, or other servant employed on the train, could not be supposed to have known the condition of the locomotive, or whether the men employed to make repairs were competent, or the manner in which the work had been done. In this case Murphy was not, we think, a servant in whose hands the locomotive was placed by the defendant for use within the principle of Fuller *v.* Jewett, and like cases. The locomotive was sent to the repair shop in order that it might be made fit for use. The mechanics in the repair shop, including the intestate, were employed for the purpose of repairing defective locomotives. The intestate and his co-laborers in the shop were engaged in the same department of service, worked under the same control, and in the case in question, the boilermakers and other mechanics were employed to effect the same object, viz.: the reparation of the "Sacramento." It is true that the work was done in

successive stages, and different parts of the work were intrusted to different persons. The refitting of the valve and its adjustment to the required pressure were the last things to be done. This work was, however, as necessary in fitting the locomotive for use, as the work of the boilermakers or machinists. The intestate had an opportunity to inform himself of the competency of his co-servants in the shop. He doubtless supposed that the boilermakers had performed their duty; unfortunately they had neglected it. But we think the risk of their negligence was one of the risks he assumed as incident to his employment in the common service. It would be too close a construction to hold that the repairs were completed when his work commenced, and that the setting of the valve was an independent and disconnected service in respect to a machine put into his hands by the company for use. This claim of the plaintiff's counsel would make the master responsible to each successive employee engaged on the repairs for any negligence of a co-employee, whose work was prior in point of time, although done in effecting the common purpose in which all were engaged. This would we think be extending the liability of the master further than is warranted by the adjudged cases.

The case is not free from difficulty, but we are of opinion that the nonsuit was properly granted, and the judgment should, therefore, be affirmed.

All concur, except TRACY, J., absent.

Judgment affirmed.[1]

CONE *v.* DELAWARE, L. & W. RAILROAD CO.

81 N. Y. 206. 1880.

APPEAL from judgment of the General Term of the Supreme Court, in the Fourth Judicial Department, affirming a judgment in favor of the plaintiff entered upon a verdict and affirming an order denying a motion for a new trial. (Reported below, 15 Hun, 172.)

This action was brought to recover damages for injuries alleged to have been occasioned by defendant's negligence.

The plaintiff was in the employment of the defendant as a car repairer. While engaged in examining a car, with a view to repairing it, which was standing on a side track of the defendant's at Richfield Springs, another car, which was also standing on the same track, a few feet distant from the car which the plaintiff was examining, and which was attached to an engine, took motion from the engine, and ran against him in such a manner that he was caught between the two cars and seriously injured. The evidence tended

[1] Accord: Neagle *v.* Syracuse, etc., R., 185 N. Y. 270.

to show that the engine took motion in consequence of steam escaping into the cylinder through a leaky valve, and that the defect in the valve, also the fact that the engine was much out of repair, had been known for some time by the defendant's superintendent and master mechanic, but was not known by the plaintiff. There was also evidence tending to show that the defendant's engineer, who was in charge of the engine, left it standing on the track while the plaintiff was examining the car, that he was aware of the defect in the valve, and omitted to open the cylinder cocks upon the engine, which if it had been done would have prevented the engine from taking motion in consequence of the leakage of steam. Further facts appear in the opinion.

DANFORTH, J. As between the plaintiff and the defendant, it was the duty of the latter to furnish its employees for use in the prosecution of its business good and suitable machinery, and keep it in repair. Wright *v.* N. Y. C. R. R. Co., 25 N. Y. 562; Laning *v.* N. Y. C. R. R. Co., 49 Id. 521; Flike *v.* B. & A. R. R. Co., 53 Id. 549; Corcoran *v.* Holbrook, 59 Id. 519. It was also its duty to furnish for the management of such machinery careful and trustworthy servants; and if these conditions were fulfilled, the plaintiff, although injured by the negligence of his fellow servant, could maintain no action against their common principal. Wright *v.* N. Y. C. R. R. Co., *supra;* Coon *v.* S. & U. R. R. Co., 5 N. Y. 492. But that is not the case here. The plaintiff was not injured by the negligence of his co-employee while managing good and suitable machinery. The defendant failed to supply machinery of that character. The engine in question was, in many important particulars, in bad condition; its fire-box was burned out; its stay-bolts had given way; its cylinders needed boring out; its valves facing; it leaked badly, and its flues were defective; and coming nearer to the immediate cause of the injury inflicted upon the plaintiff, it was found that its throttle-valve leaked and the thread upon the screw which serves to hold the reverse bar in place, and thus controls the motion of the engine, was so worn as to be useless. As a natural and necessary consequence of the defects last mentioned, the steam escaped from the boiler into the cylinders, the engine was put in motion, and as might have been expected, the accident occurred of which the plaintiff now complains. But more than this, the master mechanic, and also the general superintendent of the road, the superior officers directly representing the defendant, had been notified of these defects, but nevertheless directed the engine to be kept in use, "for" (as one of them said) "they were short of power and had nothing to put in its place." So far this is the plaintiff's case, and is conclusive against the defendant unless answered, and what is its defence? Why, as I understand it, it is that the engine was furnished with cylinder cocks; that these cocks, if opened, would have allowed the

steam to escape, thus preventing its accumulation in the cylinder and its pressure upon the piston; that the engineer omitted to open the cocks, and was, therefore, guilty of negligence; that it was this negligence which caused the injury, and so the defendant is exonerated! But the cylinder cocks were part of a perfect machine, they were not added to supply the defects, or any of them to which I have above called attention. Therefore the defendant's contention comes to this: We concede that we failed in our duty, we did not supply a suitable machine, but our servant, the engineer, could, notwithstanding, have so managed that the defect should have caused no harm.

If this doctrine is accepted it will loosen the rule of responsibility which now bears none too closely upon corporate conduct. It will seldom happen that unusual care on the part of an engineer would not prevent an accident. In this case he might have opened the cocks, or blocked the wheels, or with extreme care so separated the engine from its train that the two should occupy separate tracks. It now seems that it would have been well to have done one or the other of these things. His omission to do so may have been negligence toward the defendant, but it does not remove the responsibility which attached to it, to furnish good and suitable machinery, or place it upon a subordinate whose duty is to be measured by the degree of skill necessary for its management, and who is not called upon to make good the want of corporate care and attention.

The case is not one for the application of the doctrine of equivalents. Nor could the jury be permitted to inquire whether the exercise of extra diligence or skill on the part of the defendant's servant, the engineer, would not have neutralized the defendant's own negligence. This would require them to determine the "comparative negligence" of master and servant, and "strike a balance of negligence," which, even as between plaintiff and defendant, is not permitted. Wilds *v.* H. R. R. R. Co., 23 How. 492. Neither upon principle nor authority can it be held that negligence of the servant in using imperfect machinery excuses the principal from liability to a co-employee for an injury which could not have happened had the machinery been suitable for the use to which it was applied. Had the injury resulted solely from the servant's negligence the case would have been different. Wright *v.* N. Y. C. R. R. Co., *supra.* And so the trial judge held. But the jury found that it did not, and the judgment rendered upon the verdict was properly affirmed. . . .

Judgment affirmed.

CREGAN *v.* MARSTON.

126 N. Y. 568. 1891.

APPEAL from judgment of the General Term of the Supreme Court in the Second Judicial Department, entered upon an order which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

FINCH, J. The plaintiff's intestate was killed while loading coal into buckets, which were raised from the hold of a vessel by the aid of a derrick. The rope used for that purpose, and which lifted the loads to the control of the gaff, suddenly parted, and the falling mass crushed the deceased, who died almost immediately from his injuries. There is no question of contributory negligence in the case, and not the least doubt that the defendants did their full duty, so far as it consisted in the selection and supply of the rope used.

The controversy is thus narrowed by the facts to the single inquiry, whose duty it was to observe and examine the condition of the rope, and change it when so worn that it became unsafe. The lengths of rope used in the derrick were called "falls." The ordinary limit of safety in their use was proved to have been from 14 to 20 days; rarely less than that, and sometimes considerably more. Everybody connected with the business knew the consequences of excessive use, and the necessity of frequent changes of the falls, but at varying and uncertain periods of time. The fall, which was sound and safe in the beginning of a morning's work, might become frayed and dangerous before night, and if it did, would become so before the eyes of all the workmen dependent upon it for its use; and that is true, because the proof given by the plaintiff shows clearly that the rope which is sound originally becomes pulpy internally only when use has affected it externally.

Now, it is conceded that the defendants kept on hand, and ready for use, at any moment, an adequate supply of these falls, and of the best and most approved character. After purchasing a coil of rope measuring about 1000 feet in length, it was at once cut up into falls, the ends were tied to keep them from unraveling, each fall was marked with a tag stating its length, and they were then hung up in a dry storeroom, under lock and key, and so kept ready for immediate use, and meantime protected from the weather or from injury. If one was wanted, word was sent to the office, and the new fall at once supplied for use at the dock. Usually the engineer or his assistant made the application, but anybody engaged in the work could give the notice and get the new fall. It does not appear that any such application, coming from any of the workmen, was ever unheeded or refused. The workmen, therefore, were left in a position of perfect

safety as to the sufficiency of the falls, against everything save their own negligence or error of judgment. The rope was swinging before their eyes, and would disclose its approaching weakness on the surface before it became rotten or pulpy within, and they were able to know how long it had been used, and so whether prudence required it to be changed. They were at liberty, and knew they were at liberty, to supplant one which exhibited marks of weakness with another, both new and sufficient, from the supply kept on hand. They were in the daily habit of observing its condition, and it was specially the custom of the engineer to do so. He had examined it a day or two before the accident, and deemed it safe.

On this state of facts, the court charged that it was the duty of the master to the servants to watch the use of the rope by them, and its changes of condition, that the engineer was his agent and deputy for such purpose; and that the negligence of the engineer, if it existed, was that of the master. The doctrine at once renders unexplainable all the line of cases in which some defect in a machine has occurred from its use, and the master has been held freed from responsibility if the machine furnished was originally safe, and he neither knew nor ought to have known of the existence of the defect; for it puts the duty of daily watch and discovery on him, and so requires no notice or complaint or lapse of time to put him in default.

I think the doctrine asserted was an extension of the master's duty beyond its natural and proper limits. Probably the existing rule was founded upon the truth that certain things essential to the safety of the servants must necessarily, in the management of the business, emanate from the master, and remain in his absolute control, and so the servants should not be responsible to one another for defects which they could not repair for lack both of authority and means. The servant cannot furnish the machines. That is the master's right and duty. But the servant who uses them can and should keep them in order for their proper and safe daily use, when furnished with the necessary means of so doing, and when perfectly capable of correcting the defect.

It is undoubtedly true, as we have often said, that it is the duty of a master to keep a machine or appliance in order, and that he cannot delegate the duty so as to escape responsibility. But that is a general rule, and has its qualifications and limitations. One of those is that it is not the master's duty to repair defects arising in the daily use of the appliance, for which proper and suitable materials are supplied, and which may easily be remedied by the workmen, and are not of a permanent character, or requiring the help of skilled mechanics. An apt illustration will be found in the case of McGee *v.* Cordage Co., 139 Mass. 445. The machine was used for the passage of hemp over heckle pins. These sometimes became bent so that the fibre clogged, and then the machine was stopped,

and the workmen drove out the bent pin and inserted a new one from a supply furnished by the master for that purpose. The change was held to be, not the duty of the master, but that of the servants, and an ordinary detail of their daily duty. It would have been almost absurd to have held otherwise. So in Webber *v.* Piper, 109 N. Y. 496, the master had supplied the means of sharpening saws which had become dull, and duplicate saws to take their place when removed, and had assigned the duty of removal to one of his servants whose neglect, which resulted in an injury, was held to be that of a fellow servant. The same doctrine was declared in Johnson *v.* Tow-Boat Co., 135 Mass. 209, a case almost exactly like the one before us, and in which the injury resulted from the use by the servants of an unsound rope, instead of substituting a new one which the master had supplied. In that case it was said that, the master "having provided sufficient appliances, a part of which required occasional renewal from the wear and tear of the use for which it was intended, and provided sufficient means for such renewal, and employed Moore to have the superintendence of the workmen and the apparatus and appliances, the use of the means provided for keeping the tackle in suitable condition was as truly a part of Moore's duty as servant as was the use of the apparatus for the direct purpose of the business, and in performing that duty he was a fellow servant with the plaintiff." The doctrine thus declared was not at all repudiated, or even modified, by the later case of Daley *v.* Railroad Co., 147 Mass. 101, upon which the general term rely. In that case the operatives who managed the machine had no duty or responsibility as to a change of the ropes, but were dependent upon the judgment and consent of two other employees, who were not claimed to be fellow servants of the workmen; and that case draws clearly the distinctions between an original defect in the rope provided and one occurring from its use, and between the duty of ordinary repairs devolving upon the servants and those of a permanent or special character, which attach to the master. What was said as to the custody of the ropes had some force in that case, but has no application to the one before us. Here there does not appear to have been at the dock any suitable place for keeping the spare falls, and it was neither negligence nor imprudence to put them under cover, or protect them by a lock, so long as they were at all times subject to the needs or requirements of the workmen.

The cases cited, and their doctrine, appear to be founded upon what is determined to be the implied contract relation between the master and servant. Their mutual duties grow out of that relation, and change and vary as it is changed or varied by the facts which indicate and measure it. Where those facts show that, in the understanding of both parties, a class of ordinary repairs are to be made by the servants with materials furnished by the master for that

express purpose; that they and he regard it as a detail of their own work; that it is something entirely within their capacity and not dependent upon the skill of a special expert; and that the necessity springs from their daily use of the appliance, occurs at different and unknown periods in their service, and is open to their observation in the absence of the master, — the inference is inevitable that the contract relation between the parties makes it a duty of the servants, and a detail of their work, to correct the defect when it arises, with the materials furnished.

The cases cited by the respondent do not touch the question. In one the defect was in an engine, which only an expert could repair, and for which the servant was furnished with no materials. Fuller *v.* Jewett, 80 N. Y. 50. In one the chain of an elevator had grown thin, and no new one was supplied. Corcoran *v.* Holbrook, 59 N. Y. 518. In two the cars or the platform were defective when supplied by the master. Gottlieb *v.* Railroad, 100 N. Y. 462; Benzing *v.* Steinway, 101 N. Y. 547. And in one the master permitted the use of a rope which was rotten from a year's exposure to the weather, and without supplying a new one. Baker *v.* Railroad Co., 95 Pa. St. 211. In Cone v. Railroad Co., 81 N. Y. 208, the defect was in the engine which the servants using it could not be required or expected to repair, and in Murray *v.* Usher, 117 N. Y. 543, the platform fell from an original defect in construction.

In the present case the master exercised all the reasonable care required. The rope had not been in use so long as to charge the master with knowledge that it had become unsafe, and he had a right to assume that the servants would take no needless risks. So far, even, as the engineer is concerned, there seems to have been on his part an error of judgment, but not necessarily any negligence in the performance of his duty.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

All concur.

RINCICOTTI *v.* O'BRIEN CONTRACTING CO.

77 Conn. 617. 1905.

ACTION by Bianca Rincicotti, administratrix, against the John J. O'Brien Contracting Company. From a judgment in favor of plaintiff, defendant appeals.

The defendant was engaged in building a stone retaining wall along the Naugatuck river, in Ansonia. One Toole was the superintendent of the work, and had charge thereof and of the men employed upon it. The plaintiff's intestate was a mason so employed,

and foreman of the masons. For the prosecution of the work the defendant used a heavy steam-hoisting derrick, having a mast 50 feet in height and a boom 58 feet long, operated by what is known as a "bull wheel." By its use the defendant was enabled to lift the heavy blocks of stone, of which the wall was constructed, from the cars, and swing them into position upon the wall. The derrick rested upon a foundation prepared for it, and was supported in its upright position by twisted wire cables which radiated in various directions from the top of the mast to secure points, where they were fastened. As the construction of the wall progressed so far that the boom would no longer serve at the point where stones were desired to be placed, the derrick was moved and relocated. Work upon the wall had been in process for some time when the intestate received his injuries, and two such relocations had been made.

Toole was an expert derrick rigger, and it was a part of his duty, and his duty alone, to take care and charge of the derrick, including its locations, removals, and preparation for use. The masons had no duty in that regard.

At the time of the last location of the derrick, which, like the others, was made under Toole's direction, and about one month prior to the accident, it was supported in position by six cables, varying from 186 to 413 feet in length. One of them was 360 feet in length, and extended from the masthead across the river, where it was made fast to a tree. Owing to the distance which this cable had in the former locations of the derrick been required to span, Toole had spliced it. The new conditions necessitated the same extension, and the spliced cable was used, the point of splicing being about 15 or 20 feet from the tree and across the river. The splice was made by doubling back the end of each piece of the cable, inserting one of the loops thus formed into the other, and fastening each, and thus doubled back to the cable by iron clamps of approved design. Interlocked loops were thus made. As the result of the use of the derrick after the splicing, and the constant strain and friction at the points of contact within the loops, these parts of the cable had, before the accident, become chafed and worn, and some of the strands had parted.

At the time of the accident the derrick was being used to carry a stone into position. When the stone was in mid-air, said cable parted at the worn and weakened part within one of the loops. As a result, the derrick fell, striking the intestate.

Toole never at any time inspected the cable to ascertain its condition.

In making cable splicings such as have been described, it is customary and prudent to place a device called a "thimble" in each of the loops in such manner as to furnish the bearing in both directions. By the use of the thimbles the cables are prevented from

bending as sharply as they otherwise would, the tension is distributed, and the friction and chafing obviated. Added strength and durability are thus obtained.

There were suitable thimbles furnished by the defendant in a chest upon or near the premises, which fact was known to Toole.

PRENTICE, J. (after stating the facts). The plaintiff's intestate, while acting as the defendant's servant, received injuries, from which he died, by reason of the fall of an instrumentality used in the work upon which he was employed. The injuries were not occasioned by any negligence in the use of the instrumentality. The instrumentality was not one whose construction, preparation, adaptation for use, care, or inspection entered into the performance of the intestate's work or duty, or was an incident of it. Fraser *v.* Red River Lumber Co., 45 Minn. 235; Burns *v.* Sennett & Miller, 99 Cal. 363; Robinson *v.* Blake Mfg. Co., 143 Mass. 528; Richards *v.* Hayes (Sup.), 45 N. Y. Supp. 234; Labatt on Master & Servant, § 589. It was a mechanical apparatus furnished by the master to co-operate with and facilitate the intestate and his fellow masons in the work upon which they were engaged. The duty of the defendant as master, under such circumstances and in respect to such an instrumentality, was to use reasonable care to provide one which should be reasonably safe for the work to which it was to be put. McElligott *v.* Randolph, 61 Conn. 157; Gerrish *v.* New Haven Ice Co., 63 Conn. 16. This duty was a continuing one, and included that of maintenance. Hough *v.* Railway Co., 100 U. S. 213; Shanny *v.* Androscoggin Mills, 66 Me. 420; Ford *v.* Fitchburg R. Co., 110 Mass. 240; Tierney *v.* Minneapolis, etc., R. Co., 33 Minn. 311; Indiana Car Co. *v.* Parker, 100 Ind. 181; Moore *v.* Wabash, St. Louis & P. R. Co., 85 Mo. 588; Bailey *v.* Rome, W. & O. R. Co., 139 N. Y. 302. The duty of maintenance necessarily involved that of reasonable inspection and repair. Union Pacific R. Co. *v.* Daniels, 152 U. S. 634; Tierney *v.* Minneapolis, etc., R. Co., 33 Minn. 311; Armour *v.* Brazeau, 191 Ill. 117; Comben *v.* Belleville Stone Co., 59 N. J. Law, 226; Munch *v.* Great Northern Ry. Co., 75 Minn. 61; Louisville, etc., R. Co. *v.* Utz, 133 Ind. 265; Richmond & Danville R. Co. *v.* Burnett, 88 Va. 538.

The defendant says that the cause of the accident was the failure to insert thimbles in the loops made in splicing the cable, and argues therefrom that as their absence was due to the failure of Toole, the superintendent, to insert them, and as the defendant had provided sufficient thimbles to be used when needed, it had not failed in its duty as master, and the intestate's injuries were the consequence of the negligence of Toole in respect to his service as the intestate's fellow servant.

This contention is unsound in both its premise and the conclusions drawn therefrom. It is enough for our present purpose to pursue at length the first of these dual propositions. In thus limiting our dis-

cussion, however, we do not wish our silence to imply our assent to the legal principle which, in so far at least as maintenance and repair are concerned, is vigorously urged upon us, to wit, that a master upon whom rests the duty of using reasonable care to provide and maintain for the use of his servants in their work reasonably safe mechanical instrumentalities, may perform that duty by furnishing to a fit and competent agent the materials or parts out of or by means of which the instrumentality as a working entity can be either created or maintained, and that for the shortcomings of the agent in his utilization or failure to utilize this material or these parts the master assumes no responsibility. In so far as the defendant's contention assumes that there is a difference as respects the master's duty between construction and maintenance, it is without foundation. To whatever extent the contention is carried, it also involves principles which have had the repeated disapproval of this court. The master's duty requires performance. It may be performed in person, or by one delegated to that end. In either event, the thing required must be done. Delegation to a fit and competent agent is not sufficient. Wilson *v.* Willimantic Linen Co., 50 Conn. 433; McElligott *v.* Randolph, 61 Conn. 157; Gerrish *v.* New Haven Ice Co., 63 Conn. 16.

Let us return now to the defendant's premise that the proximate cause of the injury complained of was the superintendent's failure to place thimbles in the loops of the splice. It is doubtless true that had thimbles been inserted in making the splice, the cables would not by use have become so worn and defective at the points of tension that they would have parted when they did. To this extent the failure to insert the thimbles was without doubt the cause — but the remote one — of the accident. The proximate cause, however, was the worn and defective condition into which the cables had been suffered to lapse by being used for a considerable period of time without such repair or replacement as was necessary, in view of the way in which the splice was made, to maintain the requisite condition of strength. The cable as spliced was not able to stand as great a strain as one spliced with thimbles, but it does not appear that without them it was not originally sufficiently strong to do the work required of it. Its original strength became dissipated as the consequence of wear and tear and a failure in the duty of maintenance. The worn and weakened condition which resulted may not have been known to the defendant or its superintendent, and apparently was not, as it is found that no inspection was made. But that is of no legal consequence, since it is found that it was so apparent that an inspection would have revealed it. In other words, the failure which was the true proximate cause of the parting of the cable, and thus of the intestate's injuries, was one in the master's duty of reasonable inspection.[1] The manner

[1] See Koehler *v.* N. Y. Steam Co., 183 N. Y. 1.

of the splice was known, for Toole made it; the consequences thereon of wear were palpable, and therefore such as the defendant and Toole were bound to anticipate. The duty of inspection was one to be exercised in the light of these conditions. The facts, therefore, disclose a clear failure on the part of the defendant, as master, in the performance of its duty towards the intestate.

If it be suggested that the cable was by the manner of the splice inherently weak and thus defective, the master is not thereby exonerated. In that event, his failure in the duty of using reasonable care to provide reasonably safe instrumentalities only assumes a slightly different aspect; but it is the same duty. The duty of the master is the same in its essence whether it, in a given case, assumes the immediate form of original provision, maintenance, or inspection as an incident of maintenance. All are involved in the general duty of provision, which, as we have seen, is a continuing one and an unchanging one. . . . *Judgment affirmed.*

ABEL *v.* PRESIDENT, ETC., D. & H. C. CO.

103 N. Y. 581. 1886.

APPEAL from judgment of the General Term of the Supreme Court, in the Third Judicial Department, in favor of defendant, entered upon an order made December 2, 1885, which overruled exceptions and directed judgment on an order dismissing plaintiff's complaint on trial.

This was an action to recover damages for alleged negligence, causing the death of Perry Abel, plaintiff's testator.

Per Curiam. The plaintiff's testator was a car repairer in the employ of the defendant, and while under one of its cars standing upon a side track engaged in making repairs, its employees, using an engine, carelessly backed a car against it, and thus he came to his death.

The principal claim on the part of the plaintiff is that the evidence tended to show that the defendant had not made and promulgated proper rules for the government of its employees, and hence that its negligence in that respect should have been submitted to the jury.

The law imposes upon a railroad company the duty to its employees of diligence and care, not only to furnish proper and reasonably safe appliances and machinery and skilled and careful co-employees, but also to make and promulgate rules which, if faithfully observed, will give reasonable protection to the employees. Slater *v.* Jewett, 85 N. Y. 61; Besel *v.* N. Y. C. & H. R. R. R. Co., 70 Id. 171; Sheehan *v.* Same, 91 Id. 339; Dana *v.* Same, 92 Id. 639.

It appears that the managers of some railroads in this country have adopted a rule substantially like this: "A blue flag by day and

blue light by night, placed in the draw-head or on the platform or step of a car at the end of a train, or car standing on a main track or siding, denotes that car repairmen are at work underneath. The car or train thus protected must not be coupled or moved until the blue signal is removed by the repairmen." This is certainly a very efficient rule, and if faithfully and carefully observed would give reasonable protection to repairmen.

The plaintiff contends that it was, under the circumstances of this case, a question for the jury to determine whether the defendant, for the protection of its repairmen engaged in a peculiarly hazardous work, should not have promulgated such a rule or one substantially as efficient. The only rule the defendant had made bearing upon this case was as follows: "A red flag by day or a red lantern by night, or any signal violently given, are signals of danger, on perceiving which the train must be brought to a full stop as soon as possible, and not proceed until it can be done with safety."

This rule seems from its phraseology to have been mainly if not exclusively intended for the government of moving trains, and was not very well adapted for the protection of men under stationary cars, upon side tracks, engaged in making repairs. There was no rule prohibiting the removal of the signal, and the signal was not intended exclusively for the protection of such men, nor did it give notice that human life was in danger.

It matters not that there was a custom or rule among the repairmen in the employ of the defendant at Mechanicville that they should place a red flag at each end of the cars which they were repairing. It does not appear that that rule was regularly promulgated by the defendant, or that obedience to it was required by the defendant; nor does it appear that it was printed or generally known to the engineers engaged in running trains.

It appears that it was a common and frequent occurrence for engines and cars to be switched upon the side tracks at Mechanicville without any check or hindrance from any one having control of the tracks at that place, and thus the repairmen engaged under and about cars seem to have been exposed to constant peril.

We do not perceive how it was possible to say, as matter of law, that the rules of the defendant were proper and sufficient for the protection of its repairmen, and that it should not have taken greater precautions by rules or otherwise for their safety.

We think the facts should have been submitted to the jury and that the nonsuit was improper.

The judgment should be reversed and a new trial ordered, costs to abide event.

All concur, except EARL, J., not voting, and MILLER, J., taking no part. *Judgment reversed.*

EASTWOOD *v.* RETSOF MINING CO.

86 Hun (N. Y.) 91. 1895.

APPEAL by the defendant, the Retsof Mining Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Livingston, upon the verdict of a jury, rendered after a trial at the Livingston Circuit, and also from an order entered in said clerk's office, denying the defendant's motion for a new trial made upon the minutes.

Present — DWIGHT, P. J., LEWIS, and BRADLEY, JJ.

Judgment and order affirmed on opinion of RUMSEY, J., at Circuit.

The opinion was as follows:

RUMSEY, J. The plaintiff's intestate was a boy about fifteen years old, and at the time of his death was in the employ of the defendant, in a room known as the screening room. The business of the defendant was mining salt and preparing it for market.

Just off the room in which the plaintiff's intestate was at work was a large bin, holding many tons of salt, into which the salt of a certain grade was delivered from the machinery of the works. At certain times, when the bin became nearly full, it was necessary that some one should go into it for the purpose of freeing the mouth of the chute, through which the salt was delivered into the bin. To do this it was necessary to shovel away the salt which was accumulated at the mouth of the chute leading into the bin. When the bin became full, the salt was drawn off by three chutes in the bottom of it. The drawing off of the salt through these chutes caused the salt on the top to settle with more or less rapidity, depending entirely upon the manner in which it was drawn off. It appeared from the testimony, and was not disputed, that if one was in the bin at the time the salt was drawn off and his feet became entangled in the salt which was running down to the lower chutes, it was very difficult for him to free himself, and if he got into the salt above his knees it was almost impossible for him to get out unassisted. The chutes through which the salt was delivered out of the bin were situated in a row along one side of it at the bottom. Hanging from the top of the bin were ropes which one standing in the bin might seize if he was in danger of being engulfed in the salt, and thereby drag himself out. On two or three sides of the bin, and at a height at which it would be necessary for a man to stand in shoveling the salt, was a narrow platform of one plank a foot or so wide, upon which a man might stand when he shoveled the salt away from the mouth of the chute. It appeared in the evidence, however, that the men who were engaged in shoveling in the bin were not accustomed to stand upon this plank, which was not in every respect convenient for that purpose, but stood

upon the salt, and that there was no rule of the corporation forbidding them to do so if they saw fit. On the day on which the plaintiff's intestate met his death, so much salt was in the bin that the delivery from the chute into the bin was impeded by the accumulation of salt at its mouth, and the plaintiff's intestate, at his own request, was sent into the bin for the purpose of shoveling it away.

It appears that he had never been there before for that purpose. He went into the bin, remained there a few minutes, came out for some purpose, went back and went to work.

Shortly after he went back the second time directions were given by the proper person that the salt should be drawn off from the bin, and one or more chutes at the bottom of the bin were opened for that purpose. After this had been going on for a few moments the plaintiff's intestate was missed. Search was made for him, but he was nowhere to be found in the building. It was then surmised that perhaps he might have been engulfed in the salt, which was rapidly drawn off, and after a large portion of the salt in the bin had been drawn off, the plaintiff's body made its appearance at one of the chutes and he was taken out dead. . . .

There was some dispute upon the evidence whether the bin was sufficiently light for a person inside to see conveniently about it. It appears upon the testimony offered by the plaintiff that the bin was quite dark, while the testimony of the defendant tended to show that one standing in the bottom of the bin, on an ordinarily clear day, could read ordinary handwriting without difficulty. In discussing the case, however, it must be assumed that the jury might have found the fact in this regard to be as claimed by the plaintiff. It is thought, however, that the fact itself is not of much importance.

The foregoing are all the facts which it is thought necessary to advert to or which were material upon the claim of negligence of the defendant.

It is claimed by the plaintiff that this negligence consisted in the failure to make rules on the part of the corporation which would regulate the drawing off of the salt when the men were in the bin, or which would provide for the safety of men who had occasion to be there when that process took place.

The question was submitted to the jury whether the defendant was negligent in failing to provide rules upon that subject, which should protect the men who were in its employ. The defendant excepted to the submission of that question to the jury, but took no exception to the manner in which the submission was made. . . .

It is quite clear in this case that the question, whether or not the case was a proper one for requiring the defendant to establish rules for the government of its employees in drawing salt from this bin when men were engaged inside of it, was one as to which reasonable men might differ. The rule is well settled that it is the duty of all

persons and corporations having many men in their employ in the same business, to make and promulgate rules which, if observed, will afford protection to the employees. This is the more necessary where the manner of doing business is such that the danger or safety of an employee at any given time depends upon the way in which some other employee is engaged at the same time. In such a case, where the action of one employee may make that dangerous, which, if he took no action, would be safe, it is undoubtedly the duty of the common employer to make such rules as will enable the person whose safety is put at risk, to be advised of the danger and to avoid it. (Abel *v.* D. & H. C. Co., 103 N. Y. 581; Slater *v.* Jewett, 85 Id. 61; McGovern *v.* C. V. R. R. Co., 123 Id. 281, 289.) To be sure the company is only required to make rules to guard against such accidents and casualties as may reasonably be foreseen, and it is not bound to use more than reasonable care in deciding whether rules are necessary. (Berrigan *v.* N. Y., L. E. & W. R. R. Co., 131 N. Y. 582.) In every case its duty is performed by the exercise of reasonable care in deciding in the first place whether rules are necessary, and, in the second place, in making such rules as appear to be sufficient. But the question in either case may be for the jury, whether, in the first place, the company took reasonable care to conclude whether rules were necessary, or, in the second place, if they were, whether the rules thus made were proper for the purpose for which they were intended. When the question is, whether the case was one in which rules ought to have been made, the fact that other people or corporations engaged in the same business had or had not found it necessary to make rules upon that subject, is one which might well be considered. But the fact that no such rules had been made is not conclusive against the necessity of making them. It is simply a fact to be considered. Where the business is complicated, the circumstances are those which do not occur often and the danger is not serious, it may well be that the fact that other people engaged in the same business have found no necessity for making rules for the particular case may be almost conclusive that such rules are not necessary. But where the circumstances are such that any person can see what might happen in a given case, and the danger is plain and obvious, the jurors might be at liberty to infer that rules to protect the employee were necessary, although they had no experience in the particular business, and although there was no evidence that other corporations in the same business had made rules for such cases. (Morgan *v.* H. R. O. & I. Co., 133 N. Y. 666.)

In the case at bar, it is evident that if a man were in the bin at work, standing upon the salt, he might very easily be engulfed so as to be unable to extricate himself, if the chutes below were suddenly opened. Starting from that fact, which is undisputed, the inference might very well be drawn that a well-devised set of rules, giving

warning to the men who were in the bin, or forbidding the drawing off of salt when any one was in the bin, would conduce greatly to the safety of the men who had occasion to be there. There is nothing in the evidence which would lead the jury to believe that such a rule was impossible or even difficult to enforce, and it is quite clear that such a rule might be of great use in insuring the safety of the men who had occasion to be in the bin. For these reasons I think that it was proper for the jury to consider upon the question of the defendant's negligence, the failure to make rules for the government of its employees in this regard. . . .

I am of the opinion that upon the whole it was not error to submit the case to the jury, and that a new trial must be denied.

LOUISVILLE & N. R. CO. *v.* MILLER.

104 Fed. (C. C. A., 6th Ct.) 124. 1900.

In Error to the Circuit Court of the United States for the Middle District of Tennessee.

The defendant in error, J. E. Miller, recovered judgment against the plaintiff in error, the Louisville & Nashville Railroad Company, for an injury sustained while making a coupling. Miller was a switchman who had been in the service of the company but four days when he sustained the injury for which he sued. He had had no experience as a switchman prior to his employment, except five days of what is called "cubbing," by which is meant that he had been assigned, on his own application, and without pay, to a switching crew, as a volunteer who wished to learn and qualify himself for employment as a switchman. By importunity he induced two foremen of switching crews to recommend him by letters to the yardmaster as competent for service as a regular switchman. The yardmaster, with full knowledge of this limited experience, employed him as a switchman, and assigned him to duty in a switching crew without any other or further advice, warning, or instruction. Miller testified that, when he presented the letters of the foremen with whom he had cubbed to the yardmaster, the latter refused him employment, saying that he would not be qualified with less than a month's service as a cub, but that on the next day he was given the place of a man who had in the meantime been injured and disabled. The yardmaster denies this view of the matter, and says he accepted the certificates produced by Miller as evidence of his capacity, and employed him in good faith, as capable of fully understanding and appreciating the dangers usual and incident to the occupation. There was evidence tending to show that not less than four weeks' experience as a cub

or learner would acquaint one with the hazards and risks of such a position, and give him that degree of skill, judgment, and caution requisite to a full appreciation of the risks to be encountered, and how best to guard against them. The coupling which Miller undertook to make was, as he testifies, new to him, and could only be done safely in a particular way, about which he knew nothing. At the close of the evidence the plaintiff in error moved the court to instruct the jury to find for the defendant. This was overruled, and an exception saved. The court then submitted the case to the jury upon the single question as to whether the railroad company had been negligent in permitting the plaintiff to engage in so dangerous an occupation as that of a yard switchman, in view of the knowledge possessed by its representative, the yardmaster, as to the experience and training he had had, without further instruction concerning the risks incident to the occupation, and how best to make a coupling such as that he was making when injured. The charge upon this subject was full and clear, and no exception was taken. There were a verdict and a judgment against the railroad company, which has sued out this writ of error.

Before LURTON, DAY, and SEVERENS, C. JJ.

LURTON, C. J., after making the foregoing statement of the case, delivered the opinion of the court.

The case was submitted to the jury upon the theory that the plaintiff was inexperienced in the work of a switchman, and that this was known to the railroad company; that, having been employed as a switchman, and assigned to work in the general yard of the company, where he was likely to be required to handle foreign cars, with and without bumpers or deadheads, and having coupling apparatus of many styles, the company was bound to qualify him for such service by giving him instruction adequate to the hazards and risks incident to the occupation, and by which he might perform his duties in the way safest for himself. The instructions to the jury in respect to this issue were full and clear, and no exception was taken thereto. The learned counsel for plaintiff in error say, however, that no such issue should have been submitted, and that it was error to deny the request for a peremptory instruction for the defendant. This contention is primarily based upon the proposition that the plaintiff applied for employment as a switchman, and that he must be, therefore, taken to have assumed all the risks incident to the usual duties of a switchman, and that, even if the company knew of his inexperience, he cannot escape the consequences of his own ignorance or inexperience, having voluntarily solicited the particular employment in which he was injured. This view of the law is seemingly supported by the cases of Dysinger *v.* Railway Co., 93 Mich. 646, and McDermott *v.* Railroad Co., 56 Kan. 319. We do not assent to the reasoning of these cases, nor are they in accordance with the great weight of

authority. It is illogical to say that a servant impliedly assumes the hazards and risks of an occupation which are known to the master, but which the master knows are unknown to the servant, unless the dangers are so obvious that even an inexperienced man could not fail to escape them by the exercise of ordinary care. The law is now well settled that the duty of cautioning and qualifying an inexperienced servant in a dangerous occupation applies as well to one whose disqualification arises from a want of that degree of experience requisite to the cautious and skilful discharge of the duties incident to a dangerous occupation with safety to the operator, as when the disqualification is due to youthfulness, feebleness, or general incapacity. If the master has notice of the dangers likely to be encountered, and notice that the servant is inexperienced, or for any other reason disqualified, he comes under an obligation to use reasonable care in cautioning and instructing such servant in respect to the dangers he will encounter, and how best to discharge his duty. Shear. & R. Neg. (5th ed.) § 219 *a*; Brennan *v.* Gordon, 118 N. Y. 489; Whitelaw *v.* Railroad Co., 16 Lea, 391, 397; Sullivan *v.* Manufacturing Co., 113 Mass. 396; Railway Co. *v.* Frawley, 110 Ind. 18; Coombs *v.* Cordage Co., 102 Mass. 572, 597; O'Connor *v.* Adams, 120 Mass. 427; Reynolds *v.* Railroad Co., 64 Vt. 66; Railroad Co. *v.* Price, 72 Miss. 862; Hughes *v.* Railway Co., 79 Wis. 264; Campbell *v.* Eveleth, 83 Me. 50; Hull *v.* Hull, 78 Me. 114; Railway Co. *v.* Brick, 83 Tex. 598; Felton *v.* Girardy (decided by this court at this term), 104 Fed. 127.

Undoubtedly, when one of apparent maturity and of average capacity solicits a particular line of work, the master has the right, in the absence of information, to assume that the applicant is qualified for the particular work applied for. It is only where such facts are brought to his notice of the disqualification of the servant to safely encounter dangers known to him, and presumptively unknown to the servant, that the duty of cautioning and instructing the servant arises.[1] In the case at bar the plaintiff below gave notice that he had had no experience as a switchman. The yardmaster then undertook his instruction, and assigned him, as a learner, to a switching crew. In less than five days the foremen of these crews certified that he was qualified. The yardmaster, with full notice of this brief tutelage, assigned him to duty without further instruction. There was evidence from which the jury might infer that such an experience was wholly inadequate to fit him to encounter the dangers he was likely to meet. The particular coupling he undertook was one which he was likely to have to make, and was a risk which an experienced servant would assume as an ordinary hazard of the service. Tuttle *v.* Railway Co., 122 U. S. 189; Kohn *v.* McNulta, 147 U. S. 238. Yet the

[1] See Tompkins *v.* Machine Co., 70 N. J. L. 330.

plaintiff testified that he had had no instruction, and no caution in respect to such cars and such diverse coupling arrangements. The duty of qualifying a green or inexperienced servant for the safe performance of a new and dangerous duty is a personal duty of the master, and, if it be delegated, the delegate must be qualified, and should not discontinue the instruction until it is completed. The negligence of the servants who undertook to qualify Miller was the negligence of the master. Railroad Co. *v.* Fort, 17 Wall. 553; Brennan *v.* Gordon, 118 N. Y. 489.

We have carefully considered the entire evidence found in this transcript. It is enough to say that, while the case was a close one upon the facts as to the instruction received by Miller, yet there was such a conflict between his testimony and that of the other witnesses that we are content to hold that there was no error in refusing an instruction to find a verdict for the plaintiff in error. Neither are we prepared to say that the special dangers incident to the peculiar coupling which Miller undertook were so obvious as to constitute an assumption of the risk. That he could see that each car was supplied with a bumper or deadwood, and that one car was equipped with an automatic coupler and the other with a skeleton drawhead, is conceded. Still, it was a coupling which could be made safely if done in the right way. What the right way was, was not so obvious a matter as to justify the court in holding as matter of law that it was a situation about which Miller needed no caution and no instruction. . . .

The judgment is accordingly affirmed.

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2. *Assumption of Risk.*

FITZGERALD *v.* CONNECTICUT RIVER PAPER CO.

155 Mass. 155. 1891.

Tort for personal injuries occasioned to the plaintiff while employed by the defendant in its paper-mill, through an alleged defect in a stairway leading to and from the mill. At the close of the evidence, the judge ruled, at the request of the defendant, that the plaintiff could not maintain her action, and directed a verdict for the defendant; and the plaintiff alleged exceptions.

Knowlton, J. There was evidence proper for the consideration of the jury on the question whether the defendant corporation was negligent in permitting the steps on which the plaintiff was injured to be slippery and dangerous. It was its duty to provide on its premises a reasonably safe passage-way for the use of its employees in going to and from their work.

There was evidence that fifty women working in the same room with the plaintiff used the steps daily; and it was a question of fact for the jury whether the plaintiff was in the exercise of due care in trying to go down the steps as she did at the time of the accident. The fact that she knew them to be icy, and more or less slippery and dangerous, does not require us to hold as a matter of law that she was negligent in trying to go down them, holding by the rail, especially if she had no other way of getting from the mill.

The ground on which the ruling for the defendant was made was doubtless that the plaintiff, knowing the icy condition of the steps, assumed the risk of accident, and thereby precluded herself from recovering.

It is well settled that a servant assumes the obvious risks of the service into which he enters, even if the business be ever so dangerous, and if it might easily be conducted more safely by the employer. This is implied in his voluntary undertaking, and it comes within a principle which has a much broader general application, and which is expressed in the maxim, *volenti non fit injuria.* The reason on which it is founded is that, whatever may be the master's general duty to conduct his business safely in reference to persons who may be affected by it, he owes no legal duty in that respect to one who contracts to work in the business as it is.

In the present case it does not appear that the steps were icy, or that there was any reason to suppose that the business involved a risk in regard to them, when the plaintiff entered the defendant's service. It cannot be held that when she made her contract she assumed the risk of such an injury as she afterwards received. We therefore come to the question whether, by her conduct since, she has assumed such a risk.

The doctrine, *volenti non fit injuria,* has not been very much discussed in the cases in this commonwealth, but it is well established in the law, and it has been repeatedly recognized by this court. Horton *v.* Ipswich, 12 Cush. 488; Wilson *v.* Charlestown, 8 Allen, 137; Huddleston *v.* Machine-Shop, 106 Mass. 282; Mellor *v.* Manufacturing Co., 150 Mass. 362; Miner *v.* Railroad Co., 153 Mass. 398; Wood *v.* Locke, 147 Mass. 604; Lewis *v.* Railroad Co., 153 Mass. 73; Lovejoy *v.* Railroad, 125 Mass. 79; Yeaton *v.* Railroad, 135 Mass. 418; Scanlon *v.* Railroad Co., 147 Mass. 484. In England it has been much discussed, and the difficulties in the application of it have frequently been considered by the courts. The rule of law, briefly stated, is this: One who knows of a danger from the negligence of another, and understands and appreciates the risk therefrom, and voluntarily exposes himself to it, is precluded from recovering for an injury which results from the exposure. It has often been assumed that the conduct of the plaintiff in such a case shows conclusively that he is not in the exercise of due care. Sometimes it is

said that the defendant no longer owes him any duty; sometimes that the duty becomes one of imperfect obligation, and is not recognized in law. In one form or another the doctrine is given effect, as showing that, in a case to which it applies, there is either no negligence towards the plaintiff on the part of the defendant, or a want of due care on the part of the plaintiff.

In Thomas *v.* Quartermaine, 18 Q. B. Div. 685, BOWEN, L. J., says: "The duty of an occupier of premises which have an element of danger upon them reaches its vanishing point in the case of those who are cognizant of the full extent of the danger and voluntarily run the risk." It would be unjust that one who freely and voluntarily assumes a known risk for which another is, in a general sense, culpably responsible, should hold that other responsible in damages for the consequences of his own exposure. In Yarmouth *v.* France, 19 Q. B. Div. 647, LORD ESHER, M. R., expresses the opinion that in such a case it is incorrect to say that the defendant no longer owes a duty to the plaintiff, but that it should rather be said that the duty is one of imperfect obligation, performance of which the law will not enforce.

It may be said that the voluntary conduct of the plaintiff in exposing himself to a known and appreciated risk is the interposition of an act which, as between the parties, makes the defendant's act, in its aspect as negligent, no longer the proximate cause of the injury;[1] or, at least, is such participation in the defendant's conduct

[1] Prof. Francis H. Bohlen, in his article on Voluntary Assumption of Risk (20 Harvard Law Review, at page 16) says: "Where one voluntarily acts or enters into a relation contractual or otherwise with another, his knowledge of the risks inherent to his action or to the relation created, disproves the existence of any duty on the part of the creator of the danger to remove it, just as consent to suffer violence destroys the wrongfulness of its application. Neither knowledge of a danger voluntarily encountered nor consent is a defence which, while admitting the breach of a duty, justifies or excuses it, or which debars the plaintiff from recovering because himself a wrongdoer. Such is the view of Lord Justice Bowen in Thomas *v.* Quartermaine (18 Q. B. D. 685)." And in a note he continues as follows: "Knowlton, J., in Fitzgerald *v.* Conn. R. Paper Co., 155 Mass. 155, while expressing concurrence with this view, shows a confused leaning to other conceptions. At p. 159 he says: 'The plaintiff's conduct in voluntarily exposing himself is an act which as between the parties makes the defendant's act no longer the proximate cause of the injury.' Now legal proximity may be important in two ways: it may determine the defendant's duty to refrain from some particular act, or the extent of his liability for the consequences of an admitted wrong. See 40 Am. L. Reg., N. S., 79 and 148. If the defendant could not foresee that the plaintiff would probably expose himself to the danger, the defendant as to him is guilty of no wrong in creating it; if, though his act was wrongful, the plaintiff's exposure was not the natural consequence of it, the defendant is not liable for the ensuing injury. Now, while no one is legally bound to anticipate that others will officiously intermeddle or act wrongfully or recklessly, and so is not responsible for what they may do with opportunities or under temptations of the defendant's creation, where such other has the right or is bound by a legal or social duty to act as he does, or if he acts under the defendant's orders and for his benefit and just as he intended (the actor's sole freedom of volition being a legal right to refuse obedience and leave an employment in the course of which he is bound to obey), such action is more than natural and probable, it is actually induced and intended. Again, to say that an act is the proximate cause of an injury only as between the parties is to add a new element of confusion to a subject already difficult. If the act and the consequences are the same, the legal proximity of the one to the other, depending as it does on the foresight of the normal man or on the course of nature, cannot be

as to preclude the plaintiff from recovering on the ground of the defendant's negligence. Certainly it would be inconsistent to hold that a defendant's act is negligent in reference to the danger of injuring the plaintiff, and that the plaintiff is not negligent in voluntarily exposing himself when he understands the danger. It is to be remembered that, in determining whether a defendant is negligent in a given case, his duty to the plaintiff at the time is to be considered, and not his general duty, or his duty to others. Therefore, when it appears that a plaintiff has knowingly and voluntarily assumed the risk of an accident, the jury should be instructed that he cannot recover, and should not be permitted to consider the conduct of the defendant by itself, and find that it was negligent, and then consider the plaintiff's conduct by itself, and find that it was reasonably careful.

But this principle applies only when the plaintiff has voluntarily assumed the risk. As is said by BOWEN, L. J., in Thomas *v.* Quartermaine, *supra,* the maxim is not *scienti non fit injuria,* but *volenti non fit injuria.* The chief practical difficulty in applying it is in determining when the risk is assumed voluntarily. In the first place, one does not voluntarily assume a risk who merely knows that there is some danger, without appreciating the danger. On the other hand, he does not necessarily fail to appreciate the risk because he hopes and expects to encounter it without injury. If he comprehends the nature and the degree of the danger, and voluntarily takes his chance, he must abide the consequences, whether he is fortunate or unfortunate in the result of his venture. Sometimes the circumstances may show as matter of law that the risk is understood and appreciated, and often they may present in that particular a question of fact for the jury.

What constraint, exigency, or excuse will deprive an act of its voluntary character when one intentionally exposes himself to a known risk is a question about which learned judges differ in opinion. It has been held by some that where a man is not physically constrained, where he can take his option to do a thing or not to do it, and does it, he must be held to do it voluntarily. See opinion of Lord BRAMWELL in Membery *v.* Railway Co., L. R. 14 App. Cas. 179, and the dissenting opinion in Eckert *v.* Railroad Co., 43 N. Y. 502. But by the authorities generally, one who in an exigency reluctantly determines to take a risk is not held so strictly. There has been much difference among the English judges in regard to the

affected by the personality of the plaintiff, who, it is true, may for other reasons be barred by it. It is a confusing misuse of the word to say that if a servant voluntarily driving a known skittish horse is injured together with a stranger in the ensuing runaway, the master's act in supplying the horse is a proximate cause of the stranger's injuries, but not of the servant's. The same confusion of thought beclouds the subject of contributory negligence. See Bowen, L. J., in Thomas *v.* Quartermaine, 18 Q. B. D. 685. See an admirable treatise on Contributory Negligence by Charles H. Burr, Esq., of the Philadelphia bar."

question whether a servant who discovers a defect in machinery, not existing when he entered the service, which the master is bound to repair, and who works on, understanding the danger, rather than to lose his place by complaining of it or refusing to work until it is repaired, shall be held to have voluntarily assumed the risk. In Membery *v.* Railway Co., *supra*, Lord Bramwell expresses the opinion that the plaintiff cannot recover in such a case, while the Lord Chancellor and Lord Herschell, without expressing an opinion, prefer to keep the question open for future consideration. In Thrussell *v.* Handyside, 20 Q. B. Div. 359, the court of Queen's Bench held that a workman, by continuing to work under such circumstances, does not voluntarily assume the risk; and in Yarmouth *v.* France, 19 Q. B. Div. 647, a majority of the court of appeals are of the same opinion.

In Sullivan *v.* Manufacturing Co., 113 Mass. 396, is the following language: "Though it is a part of the implied contract between master and servant (where there is only an implied contract) that the master shall provide suitable instruments for the servant with which to do his work, and a suitable place where, when exercising due care himself, he may perform it with safety, or subject only to such hazards as are necessarily incident to the business, yet it is in the power of the servant to dispense with this obligation. When he assents, therefore, to occupy the place prepared for him, and incur the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such a place might with reasonable care, and by a reasonable expense, have been made safe. His assent has dispensed with the performance on the part of the master of the duty to make it so. Having consented to serve in the way and manner in which the business was being conducted, he has no proper ground of complaint, even if reasonable precautions have been neglected." In Goodnow *v.* Mills, 146 Mass. 261, it is said that "there was no danger which, in view of the plaintiff's knowledge and capacity, must not have been well understood by and apparent to him, and there was therefore no negligence on the part of the defendant in exposing him to it." In Leary *v.* Railroad Co., 139 Mass. 580, Mr. Justice DEVENS uses these words: "But the servant assumes the dangers of the employment to which he voluntarily and intelligently consents, and while ordinarily he is to be subjected only to hazards necessarily incident to his employment, if he knows that proper precautions have been neglected, and still knowingly consents to incur the risk to which he will be exposed thereby, his assent dispenses with the duty of the master to take such precautions."

In this commonwealth, as well as elsewhere, plaintiffs have been precluded from recovering, alike where their assumption of the risk grew out of an implied contract in reference to the condition of things

at the time of entering the defendant's service, and where they voluntarily assumed a risk which came into existence afterwards. Moulton *v.* Gage, 138 Mass. 390; Taylor *v.* Manufacturing Co., 140 Mass. 150; Wood *v.* Locke, 147 Mass. 604; Murphy *v.* Greeley, 146 Mass. 196; Huddleston *v.* Machine-Shop, 106 Mass. 282; Pingree *v.* Leyland, 135 Mass. 398; Gilbert *v.* Guild, 144 Mass. 601; Lothrop *v.* Railroad Co., 150 Mass. 423; Mellor *v.* Manufacturing Co., 150 Mass. 362; Minor *v.* Railroad Co., 153 Mass. 398; Lewis *v.* Railroad Co., 153 Mass. 73.

This court has recognized the doctrine that mere knowledge of a danger will not preclude a plaintiff from recovering unless he appreciates the risk. Scanlon *v.* Railroad Co., 147 Mass. 484; Linnehan *v.* Sampson, 126 Mass. 506; Ferren *v.* Railroad Co., 143 Mass. 197; Taylor *v.* Manufacturing Co., 140 Mass. 150; Williams *v.* Churchill, 137 Mass. 243; Lawless *v.* Railroad Co., 136 Mass. 1. See, also, Thomas *v.* Quartermaine and Yarmouth *v.* France, *supra.* Many other cases in which the plaintiff has not been precluded from recovering may be referred to this principle, and some of them more properly rest on the ground that there were such considerations of duty or exigency affecting him as to present a question whether the assumption of the risk was voluntary or under an exigency which justified his action, and induced him unwillingly to encounter a danger to which he was wrongfully exposed. Pomeroy *v.* Westfield, 154 Mass. 462; Mahoney *v.* Railroad, 104 Mass. 73; Lyman *v.* Amherst, 107 Mass. 339; Thomas *v.* Telegraph Co., 100 Mass. 156; Dewire *v.* Bailey, 131 Mass. 169; Looney *v.* McLean, 129 Mass. 33; Gilbert *v.* Boston, 139 Mass. 313; Eckert *v.* Railroad Co., 43 N. Y. 502. Whether the fear of losing one's situation would constitute such an exigency, where the place had become dangerous by reason of the negligence of the employer to repair it, especially if notice of the danger had been given by the servant, and there had been a promise speedily to repair it, we need not decide in this case. See Leary *v.* Railroad, 139 Mass. 580; Haley *v.* Case, 142 Mass. 316; Westcott *v.* Railroad Co., 153 Mass. 460.

We are of opinion that it cannot be said as a matter of law that the plaintiff in the present case, in attempting to go down the steps, voluntarily assumed a risk which she understood and appreciated, and which resulted in the accident. She knew that the steps were icy, and that there was some danger in passing over them. But the evidence tended to show that their condition in regard to slipperiness was constantly changing in different states of the weather, with the spray falling daily from steam-pipes and freezing upon them. Common experience tells us that the degree of slipperiness of ice is not always determinable from an occular inspection of it. If it were certain that the extent of the danger was obvious to one who saw the surface of the steps, the case would be different.

Besides, there was evidence tending to show that she had no way of leaving the defendant's mill except by going down the steps, and that was important to be considered in deciding whether she took the risk voluntarily.

Osborne *v.* Railroad Co., 21 Q. B. Div. 220, a case in which the plaintiff sued to recover for an injury received in going down some icy stone steps, is precisely in point. It is said in the opinion, referring to the language of the justices in Yarmouth *v.* France, and Thomas *v.* Quartermaine, *supra:* "Those observations go far to make it hard for a defendant to succeed on such a defence as that relied on here; for it is probable that juries would often find for plaintiffs on the ground that they had not full knowledge of the nature and extent of the risk. But that cannot be helped. . . . These judgments introduce an important qualification of the maxim, *volenti non fit injuria.* In the present case the plaintiff may well have misapprehended the extent of the difficulty and danger which he would encounter in descending the steps; for instance, he might easily be deceived as to the condition of the snow."

We are of opinion that the case should have been submitted to the jury. *Exceptions sustained.*[1]

GUNNING SYSTEM *v.* LAPOINTE.

212 Ill. 274. 1904.

RICKS, C. J. This action is brought to recover damages for injuries sustained by appellee through appellant's alleged negligence. On the trial in the Circuit Court of Cook county the jury returned a verdict in favor of the plaintiff (appellee here) for the sum of $13,250. The trial court, on motion for a new trial, directed a remittitur of $3,250, and judgment was entered for $10,000, which was affirmed by the Appellate Court for the First District, and a further appeal is prosecuted to this court.

[1] "In a very recent case in England (Smith *v.* Baker [1891], A. C. 325), it has been decided by the House of Lords that a servant who continues to work where he is exposed to a danger which he understands and appreciates, and which results from his employer's negligence, and which he did not assume by his implied contract when he entered the service, does not, as matter of law, voluntarily assume it by merely remaining in a place which is rendered unsafe by his master's fault. We are not aware of any adjudications in this commonwealth which are necessarily inconsistent with this just and reasonable doctrine, although different opinions have been expressed on this point by eminent judges both here and in England. Most of the cases in this state which relate to a servant's assumption of a risk refer to risks assumed on entering the service. Leary *v.* Boston & Albany Railroad, 139 Mass. 580. See Scanlon *v.* Boston & Albany Railroad, 147 Mass. 484; Fitzgerald *v.* Connecticut River Paper Co., 155 Mass. 155, and cases there cited. The tendency of recent decisions is to hold that, in regard to dangers growing out of the master's negligence, which are not covered by the implied contract between the master and servant when the service was undertaken, it is a question of fact whether a servant who works on appreciating the risk assumes it voluntarily, or endures it because he feels constrained to. Fitzgerald *v.* Connecticut River Paper Co., *ubi supra.*" Mahoney *v.* Dore, 155 Mass. 513, at p. 519.

The facts as shown by the record are, briefly, as follows: On February 23, 1901, Charles Lapointe (appellee) was working for the Gunning System (appellant) in Milwaukee, Wis., his business being that of a sign painter. The company had recently erected a bulletin board in Milwaukee, and appellee had been sent there from Chicago to assist a man by the name of Fromm in painting this board. Fromm had for 10 years been a foreman for the Gunning System and its predecessor. Appellee had worked for the company between two and three years, and had worked as sign painter for about 10 months. A few days before the appellee was injured he was directed by Mr. Reich, who was general foreman for the Gunning System, to go to Milwaukee and report there to Fromm, and was told that he would receive all his instructions from Fromm, who was to be his immediate foreman. Appellee and Fromm arrived in Milwaukee on Sunday, the 17th day of February, and on the following day they called at the office of one Fitzgerald, who was superintendent and manager for appellant in Milwaukee, and were by him directed to the place and informed as to the manner in which they should do their work. They went to the bulletin board on that day, and did some work, and discovered that the bulletin board was incomplete. On Tuesday they did some additional work, and on Tuesday evening went to Fitzgerald and made complaint about the weakness of the board. It appears from the evidence that the bulletin board was built with tongued and grooved planks one inch thick, set perpendicular, the upright boards being nailed onto two crosspieces about one inch thick and three inches wide, the upper crosspiece being about 2½ feet from the top, and the lower one about the same distance from the bottom of the boards. Braces extended from the crosspieces back of the boards to the ground. There was no crosspiece over the front of the billboard, nor was there a strip or board running across the top of the bulletin board, as is generally used in the construction of such boards. Fitzgerald directed them to return the following morning, which they did, and then Fromm, in the presence of appellee, told Fitzgerald that the bulletin board needed fixing; that it was shaky and weak, and that he did not think it was safe. He also stated it was not properly braced, and there was no board along on top of the signboard to protect the hook. Fitzgerald then said, "You are always kicking, anyway, every time you come up here, and you better go back and work." Fromm replied, "I will not till you fix that sign." Fitzgerald then said, "if that is all you want, go back to work and I will have that band put on for you." Then Fromm said to Lapointe, "We will go back to work." The two did return to work, and worked Wednesday and Thursday. Friday being a holiday, they did not work, and on Saturday Fromm returned to Chicago. Appellee remained at work, and in the afternoon, while he was upon the scaffold, one of the large hooks which were thrown over the top of

the boards to hold up the scaffold upon which he stood pulled through the top of the bulletin board, owing to the top band not having been put in place, allowing one end of the scaffold to fall, throwing Lapointe from the scaffold to the ground and severely injuring him.

Upon this state of facts plaintiff contends that the assumption of risk which would ordinarily bar his right of action was suspended during the running of the promise to repair, and for a reasonable time after the period when it could have been fulfilled. The defendant meets this argument with the assertion that such a promise, if made, would not suspend the risk assumed by the employee, because it was a promise that could have been fulfilled in an hour and a half's time, as shown by the evidence, and he, having continued in the work for three days after the promise to remedy the defect, thereby assumed the risk. . . .

The narrow and concrete question presented by these conflicting claims is whether such a promise as here made at once absolves the employee from the risk which he had theretofore voluntarily assumed, or whether the risk is continued until the time when the master's promise to repair is fulfilled, and what would constitute a reasonable time for the fulfillment of the promise to repair. We find that the authorities in this state all practically agree. While, as a broad, general proposition, the master is required to furnish the servant a reasonably safe place in which to work, it is also true that if the defect is so open and obvious that the servant does see and know of the existence of the defect, and the danger arising therefrom is apparent and known to him, or within the observation of a reasonably prudent man in his situation, and the servant enters upon and continues the work, he is held to assume the risks and hazards of the employment due to such conditions. The servant may, however, in some cases, suspend the operation or force of the rule of assumed risk as to such defects and dangers by complaining to or informing the master thereof and obtaining from him the promise to repair the defects and obviate the danger. It is not in all cases that the servant may relieve himself from the assumption of the risk incident to defects and dangers of which he has full knowledge by exacting from the master a promise to repair. The cases where the rule of assumed risk is suspended, and the servant exempted from its application under a promise from the master to repair or cure the defect complained of, are those in which particular skill and experience are necessary to know and appreciate the defect and the danger incident thereto, or where machinery and materials are used of which the servant can have little knowledge, and not those cases where the servant is engaged in ordinary labor, or the tools used are only those of simple construction, with which the servant is as familiar and as fully understands as the master. Webster Manf. Co. *v.* Nisbett, 205 Ill. 273; Illinois Steel Co. *v.* Mann, 170 Ill. 200; Meador *v.* Lake Shore & Michigan

Southern Railway Co., 138 Ind. 290; Marsh v. Chickering, 101 N. Y. 396; Power Co. v. Murphy, 115 Ind. 570; St. Louis, Arkansas & Texas Railway Co. v. Kelton (Ark.), 18 S. W. 933; Bailey on Master and Servant, § 3103; Barrows on Negligence, pp. 121, 122. If it be held that the case at bar is one that falls within the exception, and, pending the time for promised repairs, exempts the servant from the assumption of the risk, then it is proper to consider and determine the meaning and terms of the rule itself.

From a careful review of the authorities, we are disposed to the view that where the servant finds that the machinery with which he is to work is out of repair and dangerous to work with, or that the place in which he is to work is dangerous, he may complain to the master and exact from him a promise to repair, and, if the defect is not such that it so endangers the person of the servant that a reasonably prudent man would not continue to work with the machinery or in the place assigned, the servant may continue the work, under the promise to repair, without being held, as a matter of law, to have assumed the risk. If the promise is to repair by a fixed time, then, after the expiration of the time fixed, the servant assumes the risk from the defects complained of. If the promise to repair is without fixing the time within which the repairs shall be made, the servant may continue the work for a reasonable time, taking the character of the defects into consideration, within which the repairs could or ought to be made, and at and after the expiration of such reasonable time within which to make the repairs, if they are not made, and if the defects are open and known to the servant, and no new promise to repair is made, and the servant continues the work, he assumes the risks incident to the defects of which he complained. In Illinois Steel Co. v. Mann, 170 Ill. 200, we said (page 210, 170 Ill.): "While it is true some cases hold the rule to be that the servant, after having informed the master of any defects in machinery, tools, appliances, or surroundings of his work, and the master having promised to repair and make safe such defects, has the right to rely upon such promise and continue in the employ of the master, expecting such promise to be fulfilled, yet the rule in this state, and also in most other states, holds that such expectation on the part of the servant may continue only for a time reasonable for such repairs to be made or defects remedied, and, if not so made within a reasonable time, the servant, having full knowledge of such defects, will be considered to have waived the same, and subject himself to all the dangers incident thereto" — citing, also, Swift v. Madden, 165 Ill. 41; Counsell v. Hall, 145 Mass. 468; Missouri Furnace Co. v. Abend, 107 Ill. 44; Stephenson v. Duncan, 73 Wis. 404; Gowan v. Hardy, 56 Fed. 974; Corcoran v. Milwaukee Gaslight Co., 81 Wis. 191.

After the servant has discovered the defect and shown his appreciation of the danger by exacting from the master the promise to

repair, and continues in the employment after the expiration of the reasonable time for making the repairs without the same having been made, and without exacting or receiving a further promise to repair, it is neither unjust nor a hardship to the servant to hold that he assumes the risk, and the question of negligence is no longer in the case. In the case at bar the evidence discloses that there was no time fixed by the master in which to make the repairs complained of, and it is conceded, and the undisputed evidence shows, that to have made the repairs would not require to exceed two or three hours' time. Appellee not only continued to work a few hours, but continued to work for two days, took a holiday the third day, and resumed work the fourth day, and worked until after 4 o'clock of that day, when his injury was incurred — all after he had complained to the master, and the master had promised to repair the defect which caused the injury. The offering of the peremptory instruction, therefore, raises the question whether or not, as a matter of law, appellee assumed the risk by continuing at the work for a longer period than was necessary for the master to have made the repairs. Upon that question, and under the undisputed evidence appearing in this record, and under the view of the law as hereinabove expressed, we feel constrained to hold that the appellee, by continuing the work after the reasonable time within which the repairs could and ought to have been made, with full knowledge of the defect and thorough appreciation of the danger, must be held to have assumed the risk of the defect and danger which caused his injury, and that the peremptory instruction to find for appellant should have been given. . . .

The Appellate Court erred in not reversing the judgment of the Circuit Court. The judgments of the Appellate Court and of the Circuit Court are therefore reversed, and the cause remanded to the Circuit Court. *Reversed and remanded.*

McFARLAN CARRIAGE CO. *v.* POTTER.

153 Ind. 107. 1899.

HADLEY, J. Appellee brought this suit to recover damages for injuries received while operating a ripsaw as an employee of appellant. The complaint is in one paragraph, and in substance charges that the plaintiff, being in the employ of the defendant, by order of defendant was operating a ripsaw in the defendant's factory; that the table in which said saw was situate, and said saw, at the time the plaintiff received his injuries, were defective, and out of repair, in the following particulars: First. That the top of the table should have been level, but was not level on account of the floor on which it stood giving away, leaving the top of the table in a slanting position.

Second. The slot irons upon the table should have been smooth, and even with the top of the table, but had become raised one-fourth of an inch above the top of the table. Third. That said saw should have stood perpendicularly; that it did in fact stand one-fourth of an inch out of perpendicular; that the defendant knew said defects existed several days before the injury; that on account of said defects the hazard of operating said saw was greatly increased; that on the 12th day of December, 1895, while operating said saw by order of defendant, and by and on account of said defects in said saw and table, a piece of timber he was then cutting by said saw was caught by said saw in such manner as to turn it quickly over, and, being thus quickly and unexpectedly turned, the hand of the plaintiff was thereby thrown against the saw and destroyed. "Plaintiff further avers: That the defendant, from time to time, before he received said injuries, promised the plaintiff that it would cause said saw and table to be repaired. That the plaintiff had not been operating said saw for several days prior to the happening of the injuries complained of. That on the morning of said day the defendant promised the plaintiff that it would repair said saw and table as soon as the job of work that said company was then working on was completed; and that the plaintiff, relying upon said promise, by the order of the defendant commenced to operate said saw, and was injured within two hours thereafter, and before said job of work was completed. That the plaintiff, relying upon said promise to repair said saw and table, and at the request of the defendant, continued to operate the same until he received said injuries, believing that the defendant, in pursuance of its promises, would repair said defects in said saw and table. The plaintiff further avers that at the time he received said injuries he was operating said saw with due care, and was free from any fault or negligence on his part; that said injury was occasioned wholly by said defects in said saw and table and the negligence of the defendant."

A demurrer to the complaint was overruled. Trial upon the complaint and general denial, and verdict and judgment for $2,000. Error is assigned upon the overruling of the demurrer to the complaint and the overruling of appellant's motion for a new trial.

The point of attack upon the complaint is found in these words: "That the defendant, from time to time, before the plaintiff received his injuries, promised the plaintiff that it would cause said saw and table to be repaired; that on the morning of said day the defendant promised the plaintiff that it would repair said saw and table as soon as the job of work that said company was then working on was completed; and that said plaintiff, relying upon said promise, by order of the defendant, commenced to operate said saw, and was injured within two hours thereafter, and before said job of work was completed."

Appellant's learned counsel, in their brief, forcibly urge that the

above averments make the complaint insufficient for three reasons: First, because the promise to repair related to patent defects, — that is, such as were open and known equally to employer and employee; second, because the promise to repair was too indefinite and uncertain to justify reliance thereon; third, because it is shown that the injury was received before the time fixed for performance of the promise to repair. Appellee with equal vigor combats each proposition.

1. There are certain underlying principles about which courts and lawyers are agreed. Among them are: First. That in establishing the relation of employer and employee certain reciprocal duties are implied, namely: On the part of the employer, that he will furnish to the employee reasonably safe instrumentalities and place with which and in which to work; and, on the part of the employee, that he will render suitable service and obey the reasonable commands of his employer. Second. That the employee assumes all the known and usual dangers incident to the place and instrumentalities with which he works. Whether these mutual obligations are contractual, or spring from public policy, is not well settled, but that each is held to a strict accountability with respect to these requirements is a rule of universal application. Third. Another familiar rule is that during the employment, if the instrumentalities used get out of repair, either from natural wear, displacement, or breakage, thereby increasing the danger, and the employee knows of the defect, or by the exercise of reasonable caution might have known it, and he goes on without complaint or notice to his employer, he will be held to have assumed the augmented peril. This latter rule rests upon the principle that, while it is the duty of the employer to furnish reasonably safe machinery, and to make reasonable inspections for the discovery of defects, yet it is equally the duty of the employee to be vigilant for his own safety; and if he carelessly overlooks or silently acquiesces in a dangerous situation that results in his injury the fault is laid at his door, and he cannot recover therefor.

Upon the general rule of assumption of risk by an employee who, with notice, continues in the service, the courts have humanely and justly ingrafted an exception that is now as well established as the rule itself. The exception arises when, in the course of the employment, the employee discovers that the machine or implement with which he is required to work has become defective and more dangerous, and upon his notice to the employer the latter promises to make needed repairs. The exception is nowhere denied, but in its application there is some divergence. The doctrine of one class of instances is stated by Wharton as follows: "The only ground on which the exception before us can be justified is that in the ordinary course of events the employee, supposing the employer has righted matters, goes on with his work without noticing the continuance of the defect. But this reasoning does not apply, as we have seen, to

cases where the employee sees that the defect has not been remedied, and yet intelligently and deliberately continues to expose himself to it." Whart. Neg. (2d ed.) § 220. Or, in other words, that the exception prevails in cases where the defect promised to be repaired is latent, and does not prevail where it is patent.

Appellant earnestly insists that the ground here stated is the only rational and defensible basis for the exception, and that the complaint is bad for disclosing that the defects in the saw and table were clearly obvious; and the resumption of work by appellee, being an adult, and familiar with the saw, and the dangers likely to result from the situation, even after the promise of repairs when the job was completed, constituted contributary negligence. We are not able to yield our assent to the limitation of the exception thus contended for, nor do we believe that this limitation supplies the only rational and defensible ground for the exception. As we have seen, in a general employment the implied undertaking on the part of the employer is that he will furnish the employee with a reasonably safe place and appliances with which to work, and on the part of the employee that he will assume the risk of all ordinary and usual dangers incident to the use of such instrumentalities as are furnished him by his employer. Springing from the relation is also the equally incumbent duty on the part of the employer to be vigilant for the safety of his employee, and to make reasonable inspection for the discovery of defects in the machinery used. Within the chosen sphere of mutual duty during the progress of the employment, both employer and employee must be diligent, and co-operate to secure the employee against personal injury, — the employee to protect himself against all known and obvious dangers, and the employer to see to it that the instrumentalities furnished by him are reasonably safe, and free from lurking and unexpected peril. The failure to perform this reciprocal duty is negligence. Another kindred rule, promotive of safety to the employee, requires the employer, upon learning of any latent peril or defect in the place or appliances, to promptly notify the employee, that he may be on his special guard to avoid it. It is likewise the duty of the employee, upon learning of any such defect, promptly to notify his employer, that the latter may right himself by restoring the impaired machinery to the standard of his duty. And it is immaterial whether the defect of which the employee complains be latent or obvious, for after discovery the latent defect is as fully known to him as is the open one. If the employee has knowledge of the impairment of the place or machinery, so that danger is thereby increased, and he goes on without complaint or notice to his employer, he will, from his silence and want of diligence, be held to have assumed the augmented peril, however great, and, if injured thereby, is entitled to no relief. In such case the employee is the party at fault, and must take the consequences. When, however, the em-

ployee, in the line of duty, conveys to the employer notice that an impairment of the instrumentalities furnished him to work with has passed the stage of reasonable safety, and has increased the hazards of the employment beyond the limit of the risk assumed, and the employer, recognizing his default, to avoid an immediate suspension of work, requests and induces the employee to go on by a promise to repair, then the law charges the former with an assumption of the extraordinary risk pending his promise to repair. At this point the parties are no longer upon equal footing. The servant is without fault, and pursues the work with greater peril to himself than the relation requires; while the master, who is in default, requests and induces a temporary suspension of his duty, — a transient indulgence of his negligence, for his own pleasure or beneficial purpose.

A promise to repair is confession to a breach of duty; and when a master to right himself requests and induces a postponement, either for convenience or profit, no principle of justice will lay the burden of delay upon the unoffending servant. The whole question is bottomed upon the wrong of the master, and it is sophistry to argue that the servant, by confiding in the master's promise for a reasonable time in which to cure the defects, clearly obvious though they be, should be chargeable with having waived the master's duty to him, and assumed the additional risk himself. To this statement, however, it should be added that the employer's assumption of liability for injuries resulting from the increased risk does not extend to promises to repair or replace such simple implements as ladders, hoes, handsaws, and the like. Meador *v.* Railway Co., 138 Ind. 290.

2. It is insisted that the complaint is bad for disclosing that the promise to repair was too uncertain and indefinite as to time of performance to warrant a reliance upon it. The allegation is that "the defendant promised the plaintiff that it would repair said saw and table as soon as the job of work that said company was then working on was completed." It is true, we are not informed whether completion would "take a day, thirty days, or six months," but we must confine ourselves to a reasonable view, and presume that both parties knew the time necessary, and that the promise was made and acted upon with special reference to the time required. At any rate, the promise to repair is distinctly averred, and, if the time of performance was not satisfactorily shown, the defendant had its remedy by motion. It is sufficient to withstand a demurrer.

3. It is also insisted that the complaint is bad because it shows that the plaintiff's injury was received before the job was completed, and before the time for execution of the promise had arrived; the insistence being that the promise to repair, as made, did not begin to operate until the job was completed, and that the shielding period was the reasonable time the plaintiff might rely upon the performance of the promise after the completion of the job. We cannot approve

this view. We perceive no sound reason, and none has been suggested, for holding that such a promise has no force till the time arrives for its execution, and that it does not become effective until after it is broken. It is clear, and the view has the support of an overwhelming weight of authority, that a promise to repair is at its best the moment it is made and acted upon.

The law governing the foregoing points made on the sufficiency of the complaint is for most part clearly and succinctly stated in the following approved language: "A servant who learns of defects in machinery about which he is employed, and gives notice thereof, but is induced to remain in the service by a promise of the master to remedy the defect, may recover for an injury caused thereby, where it occurs within such time after the promise as would be reasonably allowed for its performance, and where it is not so imminently dangerous that a man of ordinary prudence would refuse to work about it." As sustaining these views in several jurisdictions, see Greene *v.* Railway Co., 31 Minn. 248; Eureka Co. *v.* Bass, 81 Ala. 200; Roux *v.* Lumber Co., 85 Mich. 519; Patterson *v.* Railroad Co., 76 Pa. St. 389; Graham *v.* Coke Co., 38 W. Va. 273; Foundry Co. *v.* Van Dam, 149 Ill. 337; Hough *v.* Railroad Co., 100 U. S. 213; Shear. & R. Neg. § 215; Cooley, Torts, § 559; Laning *v.* Railroad Co., 49 N. Y. 521.

In the first case above cited the court says: "Neither is there any warrant for the suggestion that the doctrine of these cases only applies where the servant, in reliance upon the promise, continues in the service, supposing that the defects had been already remedied. The statement to that effect in Whart. Neg. (2d ed.) § 221, finds no support whatever in the authorities." Further on in the same opinion the court adds: "But it is now almost equally well settled that if a servant, who has knowledge of defects in the instrumentalities furnished for his use, gives notice thereof to his employer, who thereupon promises they shall be remedied, the servant may recover for an injury caused thereby, at least when the master requested him to continue in the service, and the injury occurred within the time at which the defects were promised to be remedied."

In Eureka Co. *v.* Bass, *supra,* it is said: "We have said that the carrying of the risk by the employer will be implied to continue only for a reasonable time after the making of the promise by him to remove the danger producing it. The injury, in other words, must have occurred within the time at which the defects were promised to be removed."

We therefore hold that the complaint states a good cause of action, and appellant's demurrer thereto was properly overruled.

The case of Oil Co. *v.* Helmick, 148 Ind. 458, is urged upon our consideration as holding a contrary view. It should be noted that the question in that case related to the use of an ordinary crank,

applied in the usual way to a square shank on the end of a shaft which revolved a machine in the occasional discharge of candles. The defect complained of was the worn condition of the shank, which had been brought about gradually by friction in the use of the crank. The plaintiff put on the crank, and, while engaged in turning the machine, the crank slipped off, and precipitated him against a platform, whereby he was injured. The court assigned the Helmick Case to that class to which Meador *v.* Railway Co., *supra,* Power Co. *v.* Murphy, 115 Ind. 566, and Marsh *v.* Chickering, 101 N. Y. 396, belong, which hold that in the use of simple implements and devices a promise to repair is not available as a defence. What was there said contrary to the view herein expressed was unnecessary to a decision of the case, and cannot be accepted as authority in the case at bar. Some expressions in Burns *v.* Manufacturing Co., 146 Ind. 261, and probably other of our cases, may appear in conflict, but we are satisfied that the better reasons, and a decided weight of authority, support the law as above stated. . . .

Appellant also complains of instructions Nos. 10 and 11 given by the court. The substance of each is to the effect that, if the plaintiff was induced to continue in the use of the saw by the promise of the defendant to repair the same, the plaintiff was excused if he used care reasonably commensurate with the increased danger, and, if injured without any fault on his part, and within the limits of the promise to repair, he is entitled to recover, provided the danger was not so great that a reasonably prudent man would not have encountered it. We think the instructions were proper under the law as we have found it to be. . . .

We find no error in the record. *Judgment affirmed.*

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3. *Assumption of Risk as affected by Statute.*

NARRAMORE *v.* CLEVELAND, C., C. & ST. L. RY. CO.

96 Fed. (C. C. A., 6th Ct.) 298. 1899.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This writ is brought to review a judgment for the defendant in a suit to recover damages for personal injuries sustained by plaintiff while in defendant's employ as a yard switchman in its railroad yards at Cincinnati, Ohio. While plaintiff was attempting to couple two freight cars, his foot was caught in an unblocked guard rail, and in his effort to extricate the foot his right hand was crushed between the drawheads of the cars, and injured so badly as to require ampu-

tation. Plaintiff had been in defendant's employ seven months. About one-third of that time he was engaged during the daytime, and two-thirds during the night. He had had nine years' experience as a railroad man. A railroad man of experience can see at a glance whether a guard rail or switch is blocked or not. There were a great many guard rails and switches in the yards where plaintiff worked. With the exception of a few, where experimental blocks were used, the defendant did not use blocks in either its guard rails or switches. Plaintiff said he did not know that the guard rail in which his foot was caught was not blocked, and that he had not noticed whether the guard rails and switches of defendant generally were blocked or not. The plaintiff relied on the following statute of Ohio, passed March 23, 1888 (85 Ohio Laws, p. 105): "Every railroad corporation operating a railroad or part of a railroad in this state shall, before the first day of October, in the year one thousand eight hundred and eighty-eight, adjust, fill or block the frogs, switches, and guard rails on its tracks, with the exception of guard rails on bridges, so as to prevent the feet of its employees from being caught therein. The work shall be done to the satisfaction of the railroad commissioner. Any railroad corporation failing to comply with the provisions of this act, shall be punished by a fine of not less than one hundred dollars, nor more than one thousand dollars." It appeared from the evidence that the defendant company was operating this railroad at the time of the passage of the act, and has operated it ever since. At the close of the evidence the trial court directed the jury to return a verdict for the defendant on the ground that defendant's failure to block its rails and switches was obvious, and the plaintiff must be held, notwithstanding the statute, to have assumed the risk of injury therefrom, and upon such verdict entered judgment for the defendant.

Before TAFT and LURTON, C. J., and THOMPSON, D. J.

TAFT, C. J. (after stating the facts as above). In the absence of the statute, and upon common-law principles, we have no doubt that in this case the plaintiff would be held to have assumed the risk of the absence of blocks in the guard rails and switches of the defendant. His denial of knowledge of the fact that the particular guard rail causing the injury was unblocked is entirely immaterial. Nor is his vague statement that he was so busy as not to notice whether the rails and switches of plaintiff generally were unblocked in a yard where there were hundreds of guard rails and switches, and in which he was constantly at work for seven months, of more significance or weight. His evidence upon this point is not creditable to him. He could only have been ignorant of the admitted policy of the defendant in respect to blocks through the grossest failure of duty on his part in a matter that much concerned his personal safety and the proper operation of the road. In such a case the authorities leave no doubt that the servant assumes the risk of

the absence of the blocks, and the employer cannot be charged with actionable negligence towards him. Railway Co. *v.* Seley, 152 U. S. 145; Appel *v.* Railway Co., 111 N. Y. 550; Railway Co. *v.* Risdon's Adm'r, 87 Va. 335, 339; Wood *v.* Locke, 147 Mass. 604; Railway Co. *v.* McCormick, 74 Ind. 440; Railway Co. *v.* Ray (Ind. Sup.), 51 N. E. 920; Rush *v.* Railway Co., 36 Kan. 129; Mayes *v.* Railway Co., 63 Iowa, 562; Wilson *v.* Railroad Co., 37 Minn. 326; Railway Co. *v.* Baxter, 42 Neb. 793; Railway Co. *v.* Davis, 54 Ark. 389.

The sole question in the case is whether the statute requiring defendant railway, on penalty of a fine, to block its guard rails and frogs, changes the rule of liability of the defendant, and relieves the plaintiff from the effect of the assumption of risk which would otherwise be implied against him. We have already had occasion to consider in a more or less direct way the effect of the statute. Railway Co. *v.* Van Horne, 16 C. C. A. 182, 69 Fed. 139; Railway Co. *v.* Craig, 19 C. C. A. 631, 73 Fed. 642. In these cases we held that the failure on the part of a railway company to comply with the statute was negligence *per se.* A further consideration of the statute confirms our view. The intention of the Legislature of Ohio was to protect the employees of railways from injury from a very frequent source of danger by compelling the railway companies to adopt a well-known safety device. It was passed in pursuance of the police power of the state, and it expressly provided, as one mode of enforcing it, for a criminal prosecution of the delinquent companies. The expression of one mode of enforcing it did not exclude the operation of another, and in many respects more efficacious, means of compelling compliance with its terms, to wit, the right of civil action against a delinquent railway company by one of the class sought to be protected by the statute for injury caused by a failure to comply with its requirements. Unless it is to be inferred from the whole purview of the act that it was the legislative intention that the only remedy for breach of the statutory duty imposed should be the proceeding by fine, it follows that upon proof of a breach of that duty by the railway company, and injury thereby occasioned to the employee, a cause of action is established. Groves *v.* Lord Wimborne, [1898] 2 Q. B. 402, 407; Atkinson *v.* Waterworks Co., 2 Exch. Div. 441; Gorris *v.* Scott, L. R. 9 Exch. 125. In this case there can be no doubt that the act was passed to secure protection and a newly-defined right to the employee. To confine the remedy to a criminal proceeding in which the fine to be imposed on conviction was not even payable to the injured employee or to one complaining, would make the law not much more than a dead letter. The case of Groves *v.* Lord Wimborne involved the construction of a statute quite like the one at bar, and a right of action was held to be given thereby to the injured servant in addition to the criminal prosecution. The courts of Ohio have given the statute under discussion the same

construction. Railroad Co. *v.* Lambright, 5 Ohio Cir. Ct. R. 433, affirmed by the Supreme Court of Ohio without opinion, 29 Wkly. Law Bul. 359.

Do a knowledge on the part of the employee that the company is violating the statute, and his continuance in the service thereafter without complaint, constitute such an assumption of the risk as to prevent recovery? The answer to this question is to be found in a consideration of the principles upon which the doctrine of the assumption of risk rests. If one employs his servant to mend and strengthen a defective staircase in a church steeple, and in the course of the employment part of the staircase gives way, and the servant is injured or killed, it would hardly be claimed that the master was wanting in care towards the servant in not having the staircase which fell in a safe condition. Why not? Because, even if no express communication is had upon the subject, the servant must know, and the master must intend, that the dangers necessarily incident to the employment are to be at the risk of the servant, who may be presumed to receive greater compensation for the work on account of the risk. The foregoing is an extreme case, perhaps, but it fairly illustrates the principle of assumption of risk in the relation of master and servant. Assumption of risk is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk. In such cases the acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause the injury to himself; but the correct statement is that no right of action arises in favor of the servant at all, for, under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers the risk of which he agreed expressly or impliedly to assume. The master is not, therefore, guilty of actionable negligence towards the servant. This is the most reasonable explanation of the doctrine of assumption of risk, and is well supported by the judgments of Lord Justices Bowen and Fry in the case of Thomas *v.* Quartermaine, 18 Q. B. Div. 685, 695. See, also, language of Lord Watson in Smith *v.* Baker, (1891) App. Cas. 325, and O'Maley *v.* Gaslight Co., 158 Mass. 135. It makes logical that most frequent exception to the application of doctrine by which the employee who notifies his master of a defect in the machinery or place of work, and remains in the service on a promise of repair, has a right of action if injury results from the defect while he is waiting for the repair of the defect, and has reasonable ground to expect it. Hough *v.* Railway Co., 100 U. S. 213; Railroad Co. *v.* Babcock, 154 U. S. 190; Snow *v.* Railway Co., 8 Allen, 441; Gardner *v.* Railroad Co., 150 U. S. 349. From the notice and

the promise is properly implied the agreement by the master that he will assume the risk of injury pending the making of the repair.

If, then, the doctrine of the assumption of risk rests really upon contract, the only question remaining is whether the courts will enforce or recognize as against a servant an agreement express or implied on his part to waive the performance of a statutory duty of the master imposed for the protection of the servant, and in the interest of the public, and enforceable by criminal prosecution. We do not think they will. To do so would be to nullify the object of the statute. The only ground for passing such a statute is found in the inequality of terms upon which the railway company and its servants deal in regard to the dangers of their employment. The manifest legislative purpose was to protect the servant by positive law, because he had not previously shown himself capable of protecting himself by contract; and it would entirely defeat this purpose thus to permit the servant "to contract the master out" of the statute. It would certainly be novel for a court to recognize as valid an agreement between two persons that one should violate a criminal statute; and yet, if the assumption of risk is the term of a contract, then the application of it in the case at bar is to do just that. The cases upon the subject are by no means satisfactory, and, strange as it may seem, but few are in point. There is one English case which entirely supports our conclusion, and several *dicta* by English judges of like tenor. Several American cases on their facts also sustain the principle, though it must be confessed they do not very clearly state the true ground of their conclusion. There is one American case which is directly to the contrary, and possibly one other ought so to be regarded. There are several American cases that are said to be opposed to our view, but an examination of the facts in each will clearly distinguish them from the case at bar.

In the case of Baddeley *v.* Granville, 19 Q. B. Div. 423, the action was for the wrongful death of a miner, due to his employer's violation of a statute, and the defence of assumption of risk was set up. Section 52 of the coal mines regulation act of 1872 required a banksman to be constantly present while the men were going up or down the shaft, but it was the regular practice of the defendant, as the plaintiff's husband well knew, not to have a banksman in attendance during the night. The plaintiff's husband was killed, in coming out of the mine at night, by an accident arising through the absence of a banksman. It was held that the plaintiff's intestate did not, by continued service after he knew of the violation of the statute, thereby assume the risk of danger therefrom. The court say (p. 426):

"An obligation imposed by statute ought to be capable of enforcement with respect to all future dealings between parties affected by it. As to the result of past breaches of the obligation, people may come to what agreements they like, but as to future breaches of it

there ought to be no encouragement given to the making of an agreement between A. and B. that B. shall be at liberty to break the law which has been passed for the protection of A. If the supposed agreement come to this: that the master employs the servant on the terms that the latter shall waive the breach by the master of an obligation imposed on him for the benefit of others as well as of himself, such an agreement would be in violation of public policy, and ought not to be listened to."

The judges deciding the case of Thomas *v.* Quartermaine, 18 Q. B. Div. 685, 696, 703, had affirmed the view that assumption of risk did not apply to the neglect of a specific statutory duty imposed for the benefit of a class, but it was not the case before them. They said that the case of Clarke *v.* Holmes, 7 Hurl. & N. 937, 6 Hurl. & N. 349, proceeded on this ground, though it is difficult to find the ground stated in the opinions. Durant *v.* Mining Co., 97 Mo. 62; Grand *v.* Railroad Co., 83 Mich. 564; Coal Co. *v.* Taylor, 81 Ill. 590; and Boyd *v.* Coal Co. (Ind. App.), 50 N. E. 368, — were all cases where assumption of risk would have been a complete defence if applicable in case of a failure by the master to discharge a statutory duty to the servant, and the latter's express or implied acquiescence therein; and yet the servant was given judgment. The reasons stated in some of these cases for the conclusion are not entirely satisfactory, and in the cases from Illinois and Indiana no distinction is made between the doctrine of assumption of risk and of contributory negligence, but they are all authorities on their facts for our conclusion. The case of Knisley *v.* Pratt, 148 N. Y. 382, however, presented the precise question for decision, and the court of appeals held expressly that a servant, by continuing in the employment of a master who is violating a statute passed to protect the servant, does assume the risk of danger from such violation, and cannot make it the ground of recovery. This is followed by the circuit court of appeals for the Second Circuit in a New York case. Carpet Co. *v.* O'Keefe, 25 C. C. A. 220, 79 Fed. 900. The court of appeals of New York, in Huda *v.* Glucose Co., 154 N. Y. 474, 482, does not treat the question decided in the Knisley Case as controlling the case of servants acquiescing in and assuming the risk of a violation of a fire-escape statute by their master, and the court declined to decide it. The decision in the Knisley Case is largely based on the decision of O'Maley *v.* Gaslight Co., 158 Mass. 135, and Goodridge *v.* Washington Mills Co., 160 Mass. 234. We think the learned court of appeals of New York failed to observe that the O'Maley and Goodridge cases were not suits under a statute defining and enjoining a specific duty of a master for the protection of servants, but were suits under an employer's liability act, which relieved the servant from the burden of certain defences by the master in suits for injury sustained by him while in his master's employ,

but did not attempt to change the master's duty to the servant, or to change the standard of negligence between them as that was fixed at common law. Hence it was held by the Supreme Judicial Court of Massachusetts that the doctrine of assumption of risk applied to suits under the statute as at common law, and Thomas *v.* Quartermaine, 18 Q. B. Div. 685, which was also a suit under an employer's liability act, was much relied on. And yet in Thomas *v.* Quartermaine, as we have seen, the two lord justices, forming the majority deciding the case, expressly pointed out that in a suit under a statute positively fixing a standard of duty the doctrine of assumption of risk could not be applied. The distinction between the employer's liability act and acts for the protection of servants in the nature of police legislation, like the act under consideration, is clearly shown in Griffiths *v.* Earl of Dudley, 9 Q. B. Div. 357, where, though the court held that a servant might "contract the employer out" of liability under the former act, it was said that this could not be done in respect of a liability arising under a statute like the one at bar, passed for the protection of servants. The Knisley Case, which, in our judgment, was wrongly decided, and many others in which a right conclusion was reached, seem to us to confuse an agreement to assume the risk of an employment, as it is known to be to the servant, and his contributory negligence. That, under certain circumstances, the one sometimes comes very near the other, and cannot easily be distinguished from the other, may be conceded; but in most cases there is a broad line of distinction, and it is so in this case. For years employees worked in railroad yards in which blocks were not used, and yet no one would charge them with negligence in so doing. The switches and rails were mere perils of the employment. Assumption of risk is in such cases the acquiescence of an ordinarily prudent man in a known danger, the risk of which he assumes by contract. Contributory negligence in such cases is that action or nonaction in disregard of personal safety by one who, treating the known danger as a condition, acts with respect to it without due care of its consequences. The distinction has been recognized by the supreme court of the United States. In Railway Co. *v.* O'Brien, 161 U. S. 451, the court said:

"The second instruction was properly refused because it confused two propositions, — that relating to the risks assumed by an employee in entering a given service, and that relating to the amount of vigilance that should be exercised under given circumstances."

In Hesse *v.* Railroad Co., 58 Ohio St. 167, 169, Judge Shauck, speaking for the supreme court of Ohio, said:

"Acquiescence with knowledge is not synonymous with contributory negligence. One having full knowledge of defects in machinery with which he is employed may yet use the utmost care to avert the dangers which they threaten."

The distinction is exceedingly well brought out in Railway Co. *v.* Baker, 33 C. C. A. 468, 91 Fed. 224, by Judge Woods, speaking for the circuit court of appeals for the Seventh Circuit. There the action was for damages against a railroad company for injury sustained by reason of a breach of a federal statute requiring the company to furnish grab irons. The statute, out of abundant caution, expressly provides that the continued service of the employee with knowledge of the breach of statutory duty by the company should not be regarded as an assumption of the risk. The court held that this proviso did not prevent the company from successfully maintaining the defence of contributory negligence. Assumption of risk and contributory negligence approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom. But where the danger, though present and appreciated, is one which many men are in the habit of assuming, and which prudent men who must earn a living are willing to assume for extra compensation, one who assumes the risk cannot be said to be guilty of contributory negligence if, having in view the risk of danger assumed, he uses care reasonably commensurate with the risk to avoid injurious consequences. One who does not use such care, and who, by reason thereof, suffers injury, is guilty of contributory negligence, and cannot recover, because he, and not the master, causes the injury, or because they jointly cause it. Many authorities hold that contributory negligence is a defence to an action founded on a violation of statutory duty, and this undoubtedly is the proper view. Such is the case of Krause *v.* Morgan, 53 Ohio St. 26, where the employee, in spite of a warning from his superior, and in the face of the most palpable danger, exposed himself to certain injury, and then sought to hold his employer liable because he had not employed the statutory methods of protecting him from the danger. In Railway Co. *v.* Craig, 19 C. C. A. 631, 73 Fed. 642, we held that the Krause Case was one of contributory negligence, and followed it as such. The syllabus confuses the difference between assumption of risk and contributory negligence, but the syllabus and opinion are, of course, to be restrained to the facts. The following cases, relied on by counsel for the railway company, were also cases of contributory negligence in suits for violation of specific statutory duty: Coal Co. *v.* Estievenard, 53 Ohio St. 43; Coal Co. *v.* Muir, 20 Colo. 320; Holum *v.* Railway Co., 80 Wis. 299; Grand *v.* Railroad Co., 83 Mich. 564; and Taylor *v.* Manufacturing Co., 143 Mass. 470. In the last two cases the distinction between contributory negligence and assumption of risk is clearly referred to.

For the reasons given, we think the court below was in error in holding that the plaintiff assumed the risk of injury from the failure of the defendant to comply with the statute passed for his protection, and that the case should have been submitted to the jury on the issue

whether, assuming the unblocked guard rails and frogs as a condition of the situation, he used due care to avoid injury therefrom. Judgment reversed, at costs of the defendant, with directions to order a new trial.

KILPATRICK *v.* GRAND TRUNK RY. CO.

74 Vt. 288. 1902.

ACTION by Cornelius Kilpatrick against the Grand Trunk Railway Company. From a judgment in favor of the plaintiff, the defendant brings exceptions.

STAFFORD, J. The plaintiff is seeking to recover for injuries sustained by him, as an employee of the defendant, in consequence of the latter's running a car of its own, equipped with a side ladder instead of a ladder upon the end or inside, in contravention of the statute, and having a post dangerously near its track; whereby the plaintiff, using the ladder to mount the car while in motion, was knocked off by the post, and his foot run over by the wheels.

Statement of Facts and History of the Case. The Grand Trunk Railway runs through the village of Island Pond, where it has a large yard, fourteen or fifteen tracks wide. The tracks extend east and west. On the south side are freight sheds, — a long line of buildings. On the north side is a hotel. Connecting the sides is an overhead bridge, built by the railway company, some twenty feet above the tracks, and supported by eight or ten standards about twenty feet apart, each standard consisting of two posts strengthened by a brace, and framed at the bottom into a timber resting upon the ground. The passenger station is near the middle of the yard, dividing it into what are called the east end and the west end. The bridge is twenty-five or thirty feet west of the station. All but two of the tracks are on the north side of the station; those two are on the south side, and are, first from the station, the main line, and, second, the freight-shed track. A platform extends around the station and under the bridge. The freight-shed track is fifty or sixty rods long, and at each end joins the main line, having probably two-thirds of its length west of the bridge; and it runs so near one of the standards that the north rail is only forty-one inches from it; so that, when a freight car is on the track opposite the standard, the distance between the car and the post is only twenty inches.

The accident occurred on the 14th of October, 1898, and the foregoing description is to be understood as of that date. The location of the standards had not been changed since the bridge was built, in 1889, but the location of the freight-shed track had been changed, bringing it thus near the post, instead of, as before, at some consid-

erable distance from it. This change had been made about a year before the accident. No other standard or post in the yard stood so near the track by six inches, and most of them were still farther away.

Kilpatrick had worked for the company in this yard nearly all the time for eighteen years. From May until the September before his accident in October, he had been yard master. Now he was acting as switchman, and it was his duty to assist in shunting cars, making up trains, and letting them in and out of the yard under direction of the foreman.

The defendant introduced no testimony, and the only witnesses, aside from the physician, were the engineer of the train upon which the plaintiff was riding when the accident occurred and the plaintiff himself. The engineer did not see what happened, so that the case rested substantially upon the plaintiff's own story. There had been a previous trial resulting in a verdict and judgment for the plaintiff, which this court reversed on the ground that the plaintiff was guilty of contributory negligence as matter of law. Kilpatrick *v.* Railway Co., 72 Vt. 263. Upon the second trial, the evidence was so far varied that the question was submitted to the jury.

The plaintiff's story was that about one o'clock in the morning he started from a point near the west end of the yard, where he had been at work, and came to the passenger station on his way to do other work at the east end. As he came upon the platform, he saw approaching from the east, on the freight-shed track, a train of four box cars and one empty coal car, pushed by a backing engine attached to the east end. He knew that there were cars already standing on this same track farther west, beyond the bridge, and considering it his duty to be there when the train should come up to them, and thinking there was not time for him to walk or run ahead in the dark, and in order to be where he might the better signal to the engineer with the lantern he was carrying, and where he might put on the brake if necessary to prevent a too violent collision which might break the drawbars, or even throw the standing cars foul upon the main line, where they would be in the way of trains soon to be let in, he made up his mind to mount the first car. This was a Grand Trunk box car, and was equipped with a side ladder at the west end on the north side, the side towards him, and had no ladder on the end. So, having his left arm through the bail of the lantern and both hands free, he caught hold of a round of the ladder with his right hand, and stepped with his left foot upon the truck box under the car, the box that covers the end of the axle. His foot slipped from the box to the ground, and, running along a few steps beside the car, he tried again in the same way, and succeeded, drawing himself up so far on the ladder that his feet were on the bottom round and his head at the top of the car, when he struck against the post of the

standard, and was knocked off; and the wheels passed over his foot, inflicting the injury for which he claimed to recover. As to the speed of the train he had said on the first trial that he could not tell accurately, but, upon being pressed for an opinion, had estimated it at eight or nine miles an hour. Upon this trial he reduced his estimate to three or four miles, the rate at which the engineer, also, testified the train was running.

The Statutes Relied Upon. V. S. §§ 3886, 3887, declare that no railroad corporation shall run a car of its own with a ladder or steps to the top of the same on the side, but that the same shall be on the end or inside of the car; and that it shall forfeit $50 for each day's neglect to comply with this requirement, and be liable for damages and injuries to passengers and employees resulting from such neglect. This car was one of the defendant's own, and was being run in violation of the statute. The trial court correctly held that its action in that respect was negligence in law. Such was the holding of this court when this case was here the first time. (72 Vt. 263.)

The Questions Raised Below. At the close of the plaintiff's testimony, the defendant moved for a verdict on two grounds: (1) That the plaintiff was guilty of contributory negligence; (2) that he had assumed the risk. The court said it would hold *pro forma* that he did not assume the risk; that the defendant was guilty of negligence as matter of law; that it thought the only question, aside from damages, was that of contributory negligence, — which it thought should be submitted to the jury. To the ruling that the defendant was negligent as matter of law, and the ruling that the plaintiff did not assume the risk, the defendant excepted, and requested the court to hold, as matter of law, that the side ladder was not the proximate cause of the injury. It did not ask to have it left to the jury as a question of fact, and evidently did not desire that; for, although it excepted to the refusal of the court to hold that the side ladder was not the proximate cause, it did not except to its omission to submit the question to the jury, nor to the charge itself, wherein it was assumed that the injury resulted from the presence of the side ladder. In view of the attitude taken, the court had a right to understand that the defendant stood upon its point of law alone. So we think it is not open to it now to argue that the question was one of fact, and ought to have been submitted to the jury.

Proximate Cause. In refusing to hold, as matter of law, that the side ladder was not the proximate cause, there was no error. That certainly could not be ruled as matter of law. . . . We think the court was right in assuming that the side ladder was the cause of the injury, and that the defendant was liable, unless the plaintiff was guilty of contributory negligence, or had assumed the risk. . . .

Assumption of Risk. Did the court err in its *pro forma* ruling that the plaintiff did not assume the risk? The doctrine of assump-

tion of risk may be regarded as only one phase of the broader doctrine expressed by the maxim, *volenti non fit injuria.* One is not to be allowed to recover for an injury which he has voluntarily brought upon himself, and he has brought it upon himself voluntarily if it resulted from a course of action which he took with full knowledge and appreciation of the risk. Moreover, one who enters upon a regular employment is presumed to know and appreciate the risks ordinarily incident thereto, and he assumes them. And when, in the course of his employment, a special and obvious risk is presented to him, one not ordinarily incident to the business, he may, as a rule, refuse to accept it, and if he choose to encounter it he assumes that also. Carbine's Adm'r *v.* Railroad Co., 61 Vt. 348; Dumas *v.* Stone, 65 Vt. 442. The latter rule is subject to some exceptions, but they are not in point here, and we do not stop to notice them. But sometimes the legislature, in tenderness for a class liable to abuse or oppression, railroad or factory hands for example, forbids the use of a certain dangerous appliance, and gives an action to employees who may be injured as the result of using it. Such is this case. Now, it must be apparent to every one that the legislature understood perfectly well that the employees who might be injured by using the appliance would be using it knowingly and voluntarily. In the case of a side ladder, for instance, they could not have expected that employees would not know they were using a side ladder; still they give an action for the injury.

So we think the ordinary doctrine of assumption of risk does not apply to a case where the negligence of the employer consists in the disregard of a statutory duty imposed upon him for the protection of his employees; certainly not when an action is expressly given for the breach. And this is exactly the difference between cases of negligence arising from the disregard of a statutory obligation, like the present, and cases of negligence arising from the failure of the employer to fulfill his common-law duty of providing safe appliances, — that in the latter case the common-law duty is to be applied in connection with the common-law rule of the assumption of risk, while in the former the statutory rule is accompanied by the bestowal of a right of action for the breach of it, in favor of those who must necessarily be deprived of any action by the application of the common-law rule of the assumption of risk; and consequently the common-law rule is inconsistent with the statute, and falls to the ground. Baddeley *v.* Earl Granville, 19 Q. B. Div. 423.

On the other hand, the doctrine of assumption of risk may be regarded as purely a matter of contract, express or implied, between master and servant; and, when so regarded, the servant's inability to recover is put on the ground that he was hired to do that very thing, and paid for taking that very risk. If that theory should be adopted in this case, then the first question would be whether, in

view of the statute, the plaintiff could assume this risk as a part of his contract.

The statute is a criminal one to the extent that it imposes a penalty of $50 for each day's disobedience; and it also gives, as a still more efficient means of securing its observance, a private action in favor of the person injured. How plain it is that the act is an exercise of the police power of the state for the protection of life and limb among a large class of its people; and how easy it would be to thwart the whole purpose of the legislature by holding, as we are asked to do, that the class thus sought to be protected not only might formally contract away their protection, and relieve the road of its public duty thus imposed, but that the very fact of their using the ladder, seeing and knowing it was on the side of the car, constituted in law such a contract. We cannot adopt so bold a conception of judicial duty.

If the doctrine of assumption of risk is to be regarded as contractual, then we hold that the statutory protection cannot be bought and sold, but that the policy of the law forbids it in the interest of public welfare. This very question was thus decided in Narramore *v.* Railroad Co., 96 Fed. 298, where the judgment is laid down by Taft, J., with a breadth of view and vigor of reasoning that leaves little need or excuse for treating the subject further. There, too, the authorities on both sides are cited, criticised, and distinguished.

If it be objected that the statute when thus read deprives the laborer of his right to make his own contracts, the answer is to be found in the principle that the state has a right to protect its poor and helpless, even to that extent, if need be. Iron Co. *v.* Harbison, 183 U. S. 13. Such is the basis of the decisions that uphold the Utah labor law restricting the hours of mining work to eight per day (Short *v.* Mining Co., 20 Utah, 20; Holden *v.* Hardy, 169 U. S. 366), statutes that forbid the employment of children in certain callings, the store-order acts, and the long-standing statutes against usury, in defence of one of the last named of which this court held, some twenty years ago, that even a release under seal, given by the borrower at the time of the loan, did not bar his right to recover the unlawful rate, declaring that "the statute was intended for the protection of the weak against the strong, and public policy requires that it should not be evaded nor its force abated." Rowell, J., in Herrick *v.* Dean, 54 Vt. 568.

Everybody knows that there are large classes who get their living from day to day, in such service as that in which the plaintiff was engaged, who must work where they are working, and keep their job at all hazards, if they would not bring themselves and their families to want. To say to such men, "If you do not like the conditions, you may quit," is often only a heartless mockery. The legislature understood this; and the act we are considering was an attempt to better

the condition of that very class by compelling the employer to yield something of profit in the interest of humanity, and to save the lives and limbs of his workmen by adopting safer instruments of labor. It seems to us a court should be very slow to construe the beneficial purpose out of such a law, or make it of no effect. On broad lines of public good and social progress, it is plain that such legislation must be largely looked to if government is to remain firm and secure in the respect and affection of the people.

Contributory Negligence. Yet it does not follow that an employee who is injured, by reason of the neglect of his employer to comply with the statute, can recover under all circumstances. By the language of the statute, the right to recover is limited to injuries "resulting from such neglect"; and, as this court has once decided in this very case, that means resulting from such neglect alone; and the plaintiff must, as in other actions of this character, show that his own negligence did not contribute to the injury. But the doctrine of contributory negligence is entirely separate and distinct in theory from the doctrine of assumption of risk, although, as a practical matter, the fact that the employee knew and appreciated the risk he was running may, in the circumstances, justify or even require a finding that he was guilty of contributory negligence; or the negligence may consist entirely in the manner in which the risk is met.

To speak concretely, take this very case, — the use of a side ladder. They had been used by employees for years, and doubtless by such use the risk had been assumed. Now, by reason of the statute, the risk is not, and cannot be, assumed. Yet the use of it, under the given circumstances, may be negligence, and may even be so gross as to be negligence as matter of law.

The defendant here claimed that the plaintiff was guilty of contributory negligence as matter of law, and based the claim mainly upon the ground that the plaintiff knew the location of the post and the track, their nearness to each other, and the consequent danger to one riding by the post on a side ladder. The plaintiff admitted that he knew the location of the post and the rail in a general way, but denied that he knew the distance between the two, and testified that before the accident he did not know of any reason why one could not ride safely by the post on a side ladder; that he had never tried it or seen it tried, although he had ridden safely past other posts in the same yard. At the first trial he had testified as follows, referring to the post against which he struck: "Q. You knew the location of it; you had seen it there every day for years? A. Yes, sir. Q. But you forgot at that moment? You did n't think about it at that moment? A. I did n't think about it at that moment. Q. Ever think about that question of getting injured as you were riding along through on those cars anywhere, — about hitting those posts along there anywhere? A. No, sir. Q. Never thought of it? A. No, sir. Q. You knew

the danger if you did get hit? A. Yes, sir. Q. You knew, with respect to this one, that you were liable to get hit, if you had thought of it? A. Yes, if I had thought of it."

Upon this testimony, we are asked to say as matter of law that the plaintiff was guilty of contributory negligence. We think it was a question for the jury. Taking the plaintiff's testimony in the light most favorable to him, as we are bound to do, it means that, even if he had taken thought, he would not have known that he would be hit in the position in which he then was, but only that he might be, that he was "liable" to be; and that such thought, if it had occurred to him, would not have been the recollection of some danger which he had thought of before, for he says he had never thought of it, but would have been his opinion concerning the danger if it had occurred to him to form an opinion at that time. The fact that he did not do this at that time is not of itself negligence in law. It is a fact to be considered by the jury, with all the other facts. The law required of him the prudence of a prudent man. The prudent man is not the man who never forgets anything, who is never guilty of any inattention, who never fails to think of any possible danger to which he is exposed. That is the perfect, the infallible man. Circumstances may excuse ignorance, forgetfulness, inattention, whenever the jury may reasonably say that a man so placed might be so ignorant, or forgetful, or inattentive, without losing his right to be called a prudent man in the circumstances. And here the circumstances must be attended to. The plaintiff is attempting to mount the car to perform his duty. In his first attempt his foot slips from the box, and he finds himself in a position of danger. In the moment's struggle, his mind intent upon its object, he does not think of the post at all. Considering his situation at the instant, can it be said as matter of law that his failure to think of the post and of his liability to be struck by it was negligence? There may have been ample time for him to have reached a place of safety if his foot had not slipped. In his second attempt, we cannot expect of him quite the same calmness and deliberation as in his first. It is the miscarriage of the first attempt that has placed him in an unexpected and dangerous position, where he must decide and act quickly. . . .

In view of all the surroundings here, the duty of the plaintiff as the defendant's servant, the need, if need there was, to mount the car to set the brake or give the signals or be at the place of collision, the speed of the train, the darkness, the mischance of the plaintiff in his first attempt to get on, his knowledge of the post and track, his experience or want of experience in passing there, his position upon the ladder, the exigency, and his failure to think at that time of his liability to be struck, — in view of all this, we think it was fairly within the province of the jury to determine whether the conduct of the plaintiff deserved to be called negligent. The facts are not,

in our opinion, sufficiently decisive to make the question one of law.

The court submitted to the jury the question whether the plaintiff had been guilty of contributory negligence; and to its charge as given upon this subject no exception was taken. . . .

Judgment affirmed.

DAVIS COAL COMPANY *v.* POLLAND.

158 Ind. 607. 1901.

PLAINTIFF was working for the defendant as a miner in the defendant's coal mine. He brings an action against the defendant to recover damages for personal injuries resulting from the caving in of a part of the roof of the mine. Plaintiff claims that the accident was due to the negligence of the defendant in failing to comply with certain statutory provisions referred to in the opinion.

From a judgment for plaintiff, defendant appeals.

BAKER, J. . . . The parts of the statutes on mines that are pertinent provide: "Miners' bosses shall visit their miners in their working places at least once every day where any number not less than ten nor more than fifty miners are employed, and as often as once every two days when more than fifty miners are employed." Section 7447, Burns' Rev. St. 1901 (section 5472 a, Horner's Rev. St. 1901). "The owner, operator, agent, or lessee of any coal mine in this state shall keep a sufficient supply of timber at the mine, and the owner, operator, agent, or lessee shall deliver all props, caps, and timbers (of proper length) to the rooms of the workmen when needed and required, so that the workmen may at all times be able to properly secure the workings from caving in." Section 7466, Burns' Rev. St. 1901 (section 5480 g, Horner's Rev. St. 1901). "The mining boss shall visit and examine every working place in the mine at least every alternate day while the miners of such place are or should be at work, and shall examine and see that each and every working place is properly secured by props and timber and that safety of the mine is assured. He shall see that a sufficient supply of props and timber are always on hand at the miners' working places." Section 7472, Burns' Rev. St. 1901 (section 5480 m, Horner's Rev. St. 1901). "For any injury to persons or property occasioned by any violation of this act, or any wilful failure to comply with any of its provisions, a right of action against the owner, operator, agent, or lessee shall accrue to the party injured for the direct injury sustained thereby." Section 7473, Burns' Rev. St. 1901 (section 5480 n, Horner's Rev. St. 1901).

Two questions arise on the complaint, — assumption of risk, and contributory negligence.

First. The complaint does not negative the employee's knowledge of the employer's negligent failure to perform the duties imposed by statute, and of the dangers resulting therefrom.

If the cause of action in this case were based upon the employer's neglect to perform a common-law duty, or if there were no valid distinction between neglect of a common-law duty and neglect of a specific statutory duty, the complaint would be fatally defective. Ames *v.* Railway Co., 135 Ind. 363; Railroad Co. *v.* Kemper, 147 Ind. 561; Whitcomb *v.* Oil Co., 153 Ind. 513.

By the common law an employer is required to exercise that degree of care in providing his employee a safe working place and tools and appliances which a reasonably prudent person would exercise under like circumstances. The rule is general. There is no fixed quantum of care that must be exercised invariably in all cases. In each case the quantum of care required by the common-law rule is dependent largely upon the circumstances of that case, and, to quite an extent, upon what the jury and court may think a reasonably prudent person would have done under those circumstances. The manner of constructing the working place, and the selection of tools and appliances, and the keeping of them in proper repair, therefore, are left to the employer's judgment and discretion without limitation except this: that he must do what a reasonably prudent person would do in his place. Now, if the employer does what he thinks comes up to this general standard, and if the employee examines the place and appliances, adds his judgment to that of the employer, and agrees, as one of the terms of his contract of employment, that the employer has done all that a reasonably prudent person should do under the circumstances, and that he will notify the employer of after-occurring defects, the employee expressly assumes the risks that are known to him or might have become known by the exercise of ordinary care, of which he has made no complaint to the employer. So, also, the conditions being the same, except that the assumption of risk is not expressly included in the contract of employment, the law reads into the contract, from the employee's knowledge and silence, his agreement to assume all known and obvious risks. Whether express or implied, assumption of risk is a matter of contract. In either case the employee whose injury is due to a known or an obvious defect in place or appliances, which he has suffered to continue without objection, cannot hold the employer liable, — not because the employer was not in fact negligent, for he may not have exercised ordinary care; not because the employee was contributorily negligent, for at the time and under the circumstances of the accident he may have used due care to avoid injury; but because the employee has agreed for a sufficient consideration to absolve the employer, and to assume for himself the risk of such injury.

If a statute is a mere affirmation of the common-law duty of the

employer with respect to providing safe working places and tools, the rule as to assumption of risk remains in force. The standard of care continues to be the conduct of the reasonably prudent person under like circumstances, and the means of measuring up to it may still be the subject for the joint judgment and agreement of the employer and the employee.

If, however, the statute, as in this case, sets up a definite standard, and requires specific measures to be taken by the employer in providing safe working places and appliances, other considerations come into view. The very fact of such legislation indicates that the lawmakers believed that the operation of the common-law rules did not afford the employee sufficient protection; that, under the development of the modern industrial system, tending to centralization of capital and impersonal management, the employee did not stand upon a footing of equality with the employer in contracting for his safety; and that the necessity of earning the daily wage frequently constrained the employee to put up with defective place and tools without complaint, by reason of his fear of the consequences of complaining. From these conditions grew the necessity, or at least the propriety, of requiring certain specific measures to be taken for the protection of employees. The manner of constructing and maintaining the working places and appliances so as to measure up to the general standard of the reasonably prudent person was no longer left to the judgment of the employer. A definite standard was fixed by the legislature. It is the duty of the employer to use the very means named in the statute. He is not at liberty to adopt others, though, in his opinion, they are more efficacious than those prescribed by the lawmakers. How, then, can there be any lawful basis for an agreement, implied or express, that the employer shall violate the law, and that the employee shall be remediless?

The doctrine of assumed risk, in its essential nature, constitutes a defence. The employee brings his action for damages for personal injury. It is based upon the employer's negligent failure to discharge a duty owing to the employee. Duties and rights are correlative, — what is the duty of the employer to do for his employee, is the right of the employee to require of his employer. The employer says, "You have no right of action against me, because you contracted with me long before the accident happened that you would assume the very risk you are now complaining of." Such a contract, when the duty of the employer and the right of the employee are measured by the indefinite standard of care that a reasonably prudent person would have exercised under like circumstances, is enforceable. And so the heart of the present case is this: Is a contract enforceable by which the employee waives in advance his right of having, and relieves his employer of the duty of providing, the specific safeguards required by the statute?

The statute does not, in terms, forbid the making of such a contract; and it is said that the court should not hold it to be impliedly forbidden, because, for one thing, the statute provides a punishment by fine for the employer's violations, and a second punishment for the same offence is not permissible. The action of the employee is solely to recover compensation for actual damages. The payment of compensative damages is not punishment. The right of the state to recover a penalty and the right of an aggrieved party to recover compensation are not inconsistent. Indeed, the right to the penalty (in the form of punitive damages) as well as to compensation might have been given to the aggrieved party, — as in the telegraph cases. Telegraph Co. *v.* Henley, 157 Ind. 90. Since the two rights (or sanctions for enforcing observance) are independent of each other, the presence of the penal provision in the statute makes neither for nor against the right to compensation free from the defence of assumed risk. The case stands as if the employer's failure to comply with the requirements of the act had not been made a misdemeanor.

It is true, as propounded by counsel, that the state cannot compel an injured employee to bring an action for damages, nor prevent his settling or dismissing it if begun. But the legislature may well have believed that the natural desire of employees to recover compensation for injuries would lead employers to fulfil the law. At any rate, those employers who are brought into court to defend have nothing to complain of on this score. The employee's right to control his lawsuit, however, does not touch the question of his right to bind himself in advance to absolve the employer from the performance of specific statutory duties.

Freedom of contract should not be lightly interfered with. As a general rule, the right of contracting as one sees fit stands untrammelled. But the state has power to restrict this right in the interest of public health, morals, and the like. When, in the present case, it is pointed out that the legislature has failed in terms to deny the employee's right to assume the risks from his employer's disregard of the statute, the question is not ended. If the legislature has clearly expressed the public policy of the state on a matter within its right to speak upon authoritatively, and if that public policy would be subverted by allowing the employee to waive in advance his statutory protection, the contract is void as unmistakably as if the statute in direct words forbade the making of it. If mines and factories and stores and railroads were to stand vacant, were not to be operated by citizens in whose lives and limbs the state has an interest, it is inconceivable that the legislature would have spoken as it has, even if it had authority to do so. To promote safety to life and limb, as indisputably as to advance public health, education, and morals, to prohibit usury, to provide for exemption and stay of execution, the legislature has the right to act. . . .

The purpose of this statute to promote the safety of miners being clear, and the right of the legislature to pass it being unquestionable, the court should not declare it a dead letter. If the employer may avail himself of the defence that the employee agreed in advance that the statutes should be disregarded, the court would be measuring the rights of the persons whom the lawmakers intended to protect by the common-law standard of the reasonably prudent person, and not by the definite standard set up by the legislature. This would be practically a judicial repeal of the act. It is no hardship to the employer to disallow him a defence based on an agreement that he should violate a specific statutory duty. His sure protection lies in obedience to the law. The risks that still inhere in the business after this is done may be assumed by the employee. This is not the only instance in which the court has found a legislative limitation upon the right of contract, though not declared in terms. A contract by which a debtor undertakes in advance of judgment not to take a stay of execution or to claim exemption is held to be void, although the statute does not expressly forbid the making of such a contract. Maloney *v.* Newton, 85 Ind. 565. The lawmakers, in effect, said that it is contrary to public policy to allow a debtor to be stripped to nakedness. The state in many ways is interested in the debtor's being a self-respecting and self-sustaining citizen. Therefore the debtor is not permitted to barter away the state's interest in him. And though after judgment he is not compelled to take a stay or claim his exemption, the legislature deemed that the public policy would be amply enforced by his privilege to do so. Other examples of this kind might be cited.

The conclusion that the employer may not put upon the employee the risks that arise from the employer's disregard of specific statutory requirements is supported by the following authorities: Narramore *v.* Railroad Co., 96 Fed. 298; Durant *v.* Mining Co., 97 Mo. 62; Greenlee *v.* Railway Co., 122 N. C. 977; Baddeley *v.* Earl Granville, 19 Q. B. Div. 423; Groves *v.* Wimborne, [1898] 2 Q. B. 402; Curran *v.* Railway Co., 25 Ont. App. 407.

Second. As to contributory negligence: The complaint alleged that appellee used due care and caution to avoid injury. This is enough, unless the specific averments show this general allegation to be untrue. It sufficiently appears that appellee was an experienced miner, knew that appellant had failed to provide supports as required by statute, and with this knowledge continued at his work until injured. Appellant claims that this constituted such negligence as to preclude a recovery. Counsel are confusing the doctrines of contributory negligence and assumption of risk. Assumption of risk is a matter of contract. Contributory negligence is a question of conduct. If appellee were to be defeated by the rule of assumed risk, it would be because he agreed, long before the accident happened, that he would

assume the very risk from which his injury arose. If appellee were to be defeated by the rule of contributory negligence, it would be because his conduct, at the time of the accident and under all of the attendant circumstances, fell short of ordinary care. If the one circumstance of the employee's knowledge of the employer's failure to provide the statutory safeguards were held, as a matter of law, always to overcome the other circumstances characterizing the employee's conduct at the time of the accident, assumption of risk would be successfully masquerading in the guise of contributory negligence. If assumption of risk is the issue, knowledge of defective conditions and acquiescence therein are fatal. If contributory negligence is the issue, knowledge of defective conditions and acquiescence therein may be fatal, may be not; depending upon whether a person of ordinary prudence, under all the circumstances, would have done what the injured person did. If the risk is so great and immediately threatening that a person of ordinary prudence, under all the circumstances, would not take it, contributory negligence is established. If the risk is not so great and immediately threatening but that a person of ordinary prudence, under all the circumstances, would take it, contributory negligence is not established. Appellee alleges that there was nothing in the appearance of the mine's roof to indicate immediate danger, that he was unable to find any defect therein by the usual tests, and that he could and would have propped up the slate securely if appellant had not been derelict in supplying timbers. The specific averments do not overcome the general allegation of freedom from fault. . . . *Judgment affirmed.*

MARTIN *v.* CHICAGO, R. I. & P. R. CO.

118 Iowa, 148. 1902.

ACTION for damages. Judgment on directed verdict. The plaintiff appeals.

LADD, C. J. The freight train, composed of thirteen loaded cars, twenty-six empties, and the caboose, was made up at Rock Island, from which place it departed at five o'clock in the morning. When it reached Perry Street, in Davenport, a second engine or "helper" was attached, and together the two pulled the train west to Farnam, where the absence of the head brakeman was first discovered. Evidently he had fallen from the top of the train about fifteen or twenty feet west of Fillmore Street, in Davenport. . . . Opinions as to the speed of the train differ widely, but the jury might have found it anywhere between twelve and twenty-five or thirty miles per hour. All agree that it exceeded six miles an hour, the limit fixed by the ordinance of the city of Davenport. The defendant, then, was negligent in violat-

ing the ordinance, and the three grounds of the motion on which the jury were directed to return a verdict raise the questions: (1) Did such negligence occasion the injury to deceased? (2) Did deceased, by any fault on his part, contribute to his injury? And (3) had he assumed the risk of the high rate of speed at which the train was moving?

1. The ordinance of the city of Davenport prohibited trains from moving within the corporate limits at a speed exceeding six miles an hour. The evidence showed that it was customary on defendant's line for trains such as that in question to leave for the west at a much higher speed, in order to make the grade; and, as deceased had been engaged in work as brakeman something like seven months in all, he must have known of this practice. Of course, the mere fact that defendant habitually violated the ordinance does not relieve it from the imputation of negligence. Hamilton *v.* Railroad Co., 36 Iowa, 31; Beard *v.* Railway Co., 79 Iowa, 522; Weber *v.* City of Creston, 75 Iowa, 16; Conners *v.* Railway Co., 74 Iowa, 383. Nor can it be said that ordinances of this character have for their sole object the protection of those having occasion to go on or across the tracks. They are not thus limited in their terms. Their benefit may be claimed by any person coming within their protection. Railroad Co. *v.* Gilbert, 157 Ill. 354; Railway Co. *v.* Eggman, 170 Ill. 538; Railroad Co. *v.* Moore, 152 Ind. 345; Bluedorn *v.* Railway Co., 108 Mo. 439. Nevertheless, the evident purpose in their enactment is to guard against injury to those using the streets rather than the employees of the railroad engaged in operating the trains.

In undertaking the work of brakeman with knowledge that the ordinance was ignored by the railroad company, or continuing at work without complaint after ascertaining the fact, did deceased assume the risk of the danger incident to its violation? The authorities are in sharp conflict on this proposition. Those holding that such a risk is never assumed go on the theory that, as the assumption of risk is based on an implied contract, it would be opposed to sound public policy to permit one to agree in advance to a violation of a statute or city ordinance. (After quoting from a portion of the opinion of Taft, J., in Narramore *v.* Railroad Company, 96 Fed. 298, *ante*, p. 789, the court continues:) This is perhaps the clearest expression of the reasons persuading some courts to hold that in such cases the maxim, *volenti non fit injuria*, will not apply. The point appears to have been touched upon in several English cases. See Thomas *v.* Quartermaine, 18 Q. B. Div. 685; Baddeley *v.* Granville, 19 Q. B. Div. 423. In the latter, a statute required a banksman to be present at the mouth of a pit when miners were going up and down. During the night it was the defendant's practice to dispense with him, and of this the plaintiff was aware. The injury was in consequence of this omission. The court held that plaintiff could recover; WILLS, J.,

saying: "There ought to be no encouragement given to the making of an agreement between A. and B. that B. shall be at liberty to break the law which has been passed for the protection of A. Such an agreement might be illegal. . . . But it seems to me that if the supposed agreement between the deceased and defendant, in consequence of which the principle of *volenti non fit injuria* is sought to be applied, comes to this: that the master employs the servant on the terms that the latter shall waive the breach by the master of an obligation imposed on him by statute, and shall connive at his disregard of the statutory obligation imposed on him for the benefit of others, as well as of himself, — such an agreement would be in violation of public policy, and ought not to be listened to." A careful reading of the opinions in Durant *v.* Mining Co., 97 Mo. 62; Grand *v.* Railroad Co., 83 Mich. 564; Coal Co. *v.* Taylor, 81 Ill. 590, and Boyd *v.* Coal Co. (Ind. App.), 50 N. E. 368, cited in the Narramore Case, discloses that, although the question might have been raised, it was not in any of them. We think the learned judge, in writing that opinion, assumed too much in treating the assumption of risk as purely a matter of contract. True, the books speak of it as resting on an implied agreement between the employer and employee. It is more accurate to say that the services of the one are engaged by the other, and from the relationship the law implies certain duties, obligations, and disabilities. No mention is made of these, but they pertain to the relationship of the parties and the status then assumed.

Says Mr. Dresser, in his valuable work on Employers' Liability (section 82): "The contract of hiring depends upon the same principles as other contracts, yet it has one peculiarity, in that it creates a status or relationship between the parties, to which the policy of the law has affixed certain rights, duties, and disabilities to be observed by each, irrespective of any understanding or supposed agreement between them. These duties and disabilities arise when the relation is created, and continue until it ends, and for the most part are determined by the condition of affairs when the contract of hiring is made. It is usual and convenient to treat them as terms of an implied contract, but it is a contract implied from the relationship, and not from the agreement of the parties, and has none of the incidents of a technical contract." The author then points out that no consideration is essential, as a mere volunteer may be in the same position as though hired, and an infant whose agreements are voidable may assume disabilities as an adult. See Barstow *v.* Railroad Co., 143 Mass. 535. If based on contract alone, then an action for injury by the servant, resulting from a breach of a duty assumed by the master, should be *ex contractu*. As said in Jag. Torts, 23: "Such rights and duties are not properly contractual, nor is their breach a contract wrong." See Ames *v.* Railroad Co., 117 Mass. 541. The breach is of a duty which the law implies from their relationship, and is, like

any other omission of duty which the law exacts, negligence. The master's liability may be tested either by considering the employee's conduct, and answering whether, in view of his undertaking, he took his chance on the particular act of which complaint is made, or by ascertaining whether the employer owed the employee any duty in relation thereto. While the first may be the more convenient, the last is the more logical, as it would seem inquiry should be directed to ascertaining the existence of an obligation before investigating its possible breach. The employee undertakes the performance of duties and services for compensation, and in doing so takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and, in legal assumption, the compensation is adjusted accordingly. Farwell *v.* Corporation, 4 Metc. (Mass.) 49, 55. That is, he engages to perform work under certain conditions. If these are not changed, no duty on the part of the master has been omitted. For instance, if he undertakes to operate defective machinery, the master owes him no duty to repair. In such a case there is no waiver of liability, because none has arisen. But if he knew nothing of the defects, and they were not obvious, the law implies the obligation of the master to put it in safe condition for use. As said in O'Maley *v.* Gaslight Co., 158 Mass. 135: "The doctrine of assumption of risk of his employment by an employee has usually been considered from the point of view of a contract, express or implied; but, as applied to actions of tort for negligence against an employer, it leads up to the broader principle expressed by the maxim, *volenti fit non injuria.* One who, knowing and appreciating a danger, voluntarily assumes the risk of it, has no just cause of complaint against another who is primarily responsible for the existence of the danger. As between the two, his voluntary assumption of the risk absolves the other from any particular duty to him in that respect, and leaves each to take such chances as exist in the situation, without right to claim anything from the other. In such a case there is no actionable negligence on the part of him who is primarily responsible for the danger. If there is a failure to do his duty according to a high standard of ethics, there is, as between the parties, no neglect of legal duty."

Nor can we approve of the distinction attempted to be drawn between employment under conditions condemned as dangerous at the common law, and those prohibited by a city ordinance. In the absence of an assumption of the risk, an omission of a duty implied by law is precisely as effective in fixing liability as though enjoined by statute. The obligation of the employer to the servant is no greater in the one case than in the other, and we can discover no sound reason for the discrimination which declares the danger in the one case may be assumed, and in the other may not. That advanced in two cited cases, to the effect that permitting the employee to waive the protection of a statute would be in contravention of sound public policy, we regard

as untenable. The law implied is quite as much for his benefit, as that enacted by the city council. If he knows and appreciates the danger, and understands his rights under the statute, there is no more reason for putting him under guardianship, and prohibiting him from waiving lapses in duty of obedience to a rule established by an ordinance or statute, than to one which the principles of justice and public policy raise, independent of legislation, for his protection. Beyond the right of action accruing for the violation of the master's obligation, regardless of its source, is the punishment the state inflicts for the violation of the penal ordinance. The remedies are distinct, and the failure of the servant to demand his private remedy does not interfere with the exaction of a penalty by the state; nor, on the other hand, will the omission of the state to prosecute furnish the slightest obstacle to the maintenance of an action by the injured party. As said in the work from which we have already quoted: "It is difficult to see why, if the servant is given an action, he cannot barter it away before the cause of action accrues, as well as fail to bring it when he suffers injury. In neither case is the master's liability to the state affected, and the state ought not to call in the aid of an individual to enforce a policy it is competent itself to protect. For many reasons, the servant may prefer to forego the protection; and as this does not change the master's obligation under the statute, or affect the welfare of the state, it should be permitted. The means of protection, through information to the proper authorities, are at hand, if the servant or another chooses to avail himself of them; and, if he is content to work without safeguards which he has a right to expect, the loss should be his. . . . If the decisions quoted are to be followed, the odd state of affairs will exist, — of a man who is merely careless being barred, but one deliberately undertaking a dangerous work recovering."

Some stress is laid on the impolicy of allowing persons to waive obedience of an ordinance or statute. It would seem quite as inimical to the public good to permit a workman to take advantage of the master's failure to obey the law to which he has consented, as to permit the master to avoid liability because the servant connived with him in such disobedience, by agreeing to work with the conditions as they existed, and according to the method mutually adopted. In other words, it is quite as obnoxious to public policy, independent of the penalty imposed, for the employee to aid and encourage the employer in his disregard of an ordinance, as for the employer to violate it. Our study of the subject has led to the conclusion that, in the matter of assumption of risks, it is immaterial whether they arise from the violation of a common-law duty, or an obligation imposed by statute. As directly in point, see Knisley *v.* Pratt, 148 N. Y. 372; Carpet Co. *v.* O'Keefe, 79 Fed. 900; Keenan *v.* Illuminating Co., 159 Mass. 379; Dresser, Employers' Liab. § 116. Also see 13 Law

Mag. & Rev. 19; 3 Elliott, R. R. § 1345; Electric Co. v. Allen (Ala.), 13 South. 8, 20 L. R. A. 457; Ford v. Railway Co., 106 Iowa, 85.

In the first of the above cases, the court, speaking through Bartlett, J., in referring to the claim that public policy required the rigid enforcement of a particular statute, and that this would be contravened by permitting an employee by contract to waive its protection, said: "We think this proposition essentially unsound, and proceeds upon theories that cannot be maintained. It is difficult to perceive any difference in the quality and character of a cause of action, whether it has its origin in the ancient principles of the common law, in the formulated rules of modern decisions, or in the declared will of the legislature. Public policy in each case requires its rigid enforcement, and it was never urged in the common-law action for negligence that the rule requiring the employee to assume the obvious risks of the business was in contravention of that policy. . . . The rule as to risks of service or ordinary risks is entirely distinct from the rule of obvious risks, and, if the statute has added to the duties which the law enjoins upon the employer before the servant can be subjected to the rule of ordinary risks, then the default of the employer in the discharge of this statutory duty, resulting in the injury to the employee, would enable the latter to sue. Such a construction of the statute would not in any way limit the doctrine of obvious risks. . . . We are of opinion that there is no reason, in principle or authority, why an employee should not be allowed to assume the obvious risks of his business, as well under the factory act as otherwise. There is no rule of public policy which prevents an employee from deciding whether, in view of increased wages, the difficulties of obtaining employment, or other sufficient reasons, it may not be wise and prudent to accept employment subject to the rule of obvious risks. The statute, indeed, contemplates the protection of a certain class of laborers, but it does not deprive them of their free agency and the right to manage their own affairs." 148 N. Y. 372, 377, 378, 379.

The appellant urges that as, under our statute, contracts exempting the company from liability are void, there can be no assumption of such a risk. The answer to this is, as already remarked, that in such a case no liability arises, and hence there is none from which the contract exempts. Possibly ordinances or statutes might be so framed as to prevent any assumption of risk, but certainly this is not true of an ordinance general in its terms, limiting the speed of trains in a particular locality. And it can make no difference whether the statute relates to the condition of the place where the work is to be done, or the method to be pursued in performing it. If the employee, with full knowledge of either, undertakes to accomplish the task assigned at the place or in the method proposed, he ought not to be permitted to complain, when conditions and methods were precisely as he knew they would be, and to which he has assented.

2. The finding that deceased assumed the risk of injury from the excessive rate of speed within the corporate limits of the city of Davenport leads inevitably to an approval of the court's ruling in directing a verdict for defendant. . . . The jury could have found that the train was moving at from twelve to thirty miles an hour, but it is utterly impossible to say from the evidence that going faster than twelve miles an hour, with which deceased was familiar, caused him to fall, and that this would not have happened if moving at a less speed. If the cars swayed in passing over the blocks and switches, he knew that fact better than any one else, and ought not to have attempted to go to the engine until these were passed. Recovery must be had, if at all, because of negligence in the rate of speed. Compliance with the ordinance having been waived by deceased, in not only consenting, but assisting in operating defendant's trains at a rate of from eight to twelve miles an hour, there is no liability, unless it can be said that the speed at which this train ran, above that mentioned, was not only negligence, but that it was the operating cause of the injury. As the speed above that mentioned, the risks of which he had assumed, cannot be said to have occasioned his death, we need not inquire whether defendant was negligent, independent of the violation of the city ordinance.

The ruling of the District Court is approved and its judgment affirmed.

WEAVER, J., concurs in the result.

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4. *Distinction between Assumption of Risk and Contributory Negligence.*[1]

NARRAMORE *v.* RAILROAD COMPANY.

96 Fed. 298. 1898.

[Reported herein at p. 789.]

KILPATRICK *v.* GRAND TRUNK RY. CO.

74 Vt. 288. 1902.

[Reported herein at p. 797.]

DAVIS COAL COMPANY *v.* POLLAND.

158 Ind. 607. 1901.

[Reported herein at p. 804.]

[1] In addition to the cases referred to below, see Dowd *v.* N. Y., O. & W. Ry. Co., 170 N. Y. 459, and Dempsey *v.* Sawyer, 95 Me. 295.

PART IV.

LIABILITY OF SERVANT FOR TORTS.

CHAPTER XXVI.

Servant's Liability for Torts.[1]

OSBORNE *v.* MORGAN.

130 Mass. 102. 1881.

Gray, C. J. The declaration is in tort, and the material allegations of fact, which are admitted by the demurrer, are that while the plaintiff was at work as a carpenter in the establishment of a manufacturing corporation, putting up by direction of the corporation certain partitions in a room in which the corporation was conducting the business of making wire, the defendants, one the superintendent and the others agents and servants of the corporation, being employed in that business, negligently and without regard to the safety of persons rightfully in the room, placed a tackle-block and chains upon an iron rail suspended from the ceiling of the room, and suffered them to remain there in such a manner, and so unprotected from falling, that by reason thereof they fell and injured the plaintiff. Upon these facts the plaintiff was a fellow servant of the defendants. Farwell *v.* Boston & Worcester Railroad, 4 Met. 49; Albro *v.* Agawam Canal, 6 Cush. 75; Gilman *v.* Eastern Railroad, 10 Allen, 233, and 13 Allen, 433; Holden *v.* Fitchburg Railroad, 129 Mass. 268; Morgan *v.* Vale of Neath Railway, 5 B. & S. 570, 736, and L. R. 1 Q. B. 149.

The ruling sustaining the demurrer was based upon the judgment of this court, delivered by Mr. Justice Merrick, in Albro *v.* Jaquith, 4 Gray, 99, in which it was held that a person employed in the mill of a manufacturing corporation, who sustained injuries from the escape of inflammable gas, occasioned by the negligence and unskilfulness of the superintendent of the mill in the management of the apparatus and fixtures used for the purpose of generating, containing, conducting, and burning the gas for the lighting of the mill, could not maintain an action against the superintendent. But, upon consideration, we are all of opinion that that judgment is supported by no satisfactory reasons, and must be overruled.

The principal reason assigned was, that no misfeasance or positive act of wrong was charged, and that for non-feasance, which was

[1] See cases in Chapter XVI.

merely negligence in the performance of a duty arising from some express or implied contract with his principal or employer, an agent or servant was responsible to him only, and not to any third person. It is often said in the books that an agent is responsible to third persons for misfeasance only, and not for non-feasance. And it is doubtless true that if an agent never does anything toward carrying out his contract with his principal, but wholly omits and neglects to do so, the principal is the only person who can maintain an action against him for the non-feasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not non-feasance, or doing nothing; but it is misfeasance, doing improperly. Ulpian, in Dig. 9, 2, 27, 9; Parsons *v.* Winchell, 5 Cush. 592; Bell *v.* Josselyn, 3 Gray, 309; Nowell *v.* Wright, 3 Allen, 166; Horner *v.* Lawrence, 8 Vroom, 46. Negligence and unskilfulness in the management of inflammable gas, by reason of which it escapes and causes injury, can no more be considered as mere non-feasance, within the meaning of the rule relied on, than negligence in the control of fire, as in the case in the Pandects; or of water, as in Bell *v.* Josselyn; or of a drawbridge, as in Nowell *v.* Wright; or of domestic animals, as in Parsons *v.* Winchell, and in the case in New Jersey.

In the case at bar, the negligent hanging and keeping by the defendants of the block and chains in such a place and manner as to be in danger of falling upon persons underneath, was a misfeasance or improper dealing with instruments in the defendants' actual use or control, for which they are responsible to any person lawfully in the room and injured by the fall, and who is not prevented by his relation to the defendants from maintaining the action. Both the ground of action and the measure of damages of the plaintiff are different from those of the master. The master's right of action against the defendants would be founded upon his contract with them, and his damages would be from the injury to his property, and could not include the injury to the person of this plaintiff, because the master could not be made liable to him for such an injury resulting from the fault of fellow servants, unless the master had himself been guilty of negligence in selecting or employing them. The plaintiff's action is not founded on any contract, but is an action of tort for injuries which, according to the common experience of mankind, were a natural consequence of the defendants' negligence. The fact that a wrongful act is a breach of a contract between the wrongdoer

and one person does not exempt him from the responsibility for it as a tort to a third person injured thereby. Hawkesworth *v.* Thompson, 98 Mass. 77; Norton *v.* Sewall, 106 Mass. 143; May *v.* Western Union Telegraph, 112 Mass. 90; Grinnell *v.* Western Union Telegraph, 113 Mass. 299, 305; Ames *v.* Union Railway, 117 Mass. 541; Mulchey *v.* Methodist Religious Society, 125 Mass. 487; Rapson *v.* Cubitt, 9 M. & W. 710; George *v.* Skivington, L. R. 5 Ex. 1; Parry *v.* Smith, 4 C. P. D. 325; Foulkes *v.* Metropolitan Railway, 4 C. P. D. 267, and 5 C. P. D. 157. This case does not require us to consider whether a contractor or a servant, who has completed a vehicle, engine, or fixture, and has delivered it to his employer, can be held responsible for an injury afterwards suffered by a third person from a defect in its original construction. See Winterbottom *v.* Wright, 10 M. & W. 109; Collis *v.* Selden, L. R. 3 C. P. 495; Albany *v.* Cunliff, 2 Comst. 165; Thomas *v.* Winchester, 2 Selden, 397, 408; Coughtry *v.* Globe Woollen Co., 56 N. Y. 124, 127.

It was further suggested in Albro *v.* Jaquith that many of the considerations of justice and policy, which led to the adoption of the rule that a master is not responsible to one of his servants for the injurious consequences of negligence of the others, were equally applicable to actions brought for like causes by one servant against another. The only such considerations specified were that the servant, in either case, is presumed to understand and appreciate the ordinary risk and peril incident to the service, and to predicate his compensation in some measure upon the extent of the hazard he assumes; and that "the knowledge, that no legal redress is afforded for damages occasioned by the inattention or unfaithfulness of other laborers engaged in the same common work, will naturally induce each one to be not only a strict observer of the conduct of others, but to be more prudent and careful himself, and thus by increased vigilance to promote the welfare and safety of all." The cases cited in support of these suggestions were Farwell *v.* Boston & Worcester Railroad, 4 Met. 49, and King *v.* Boston & Worcester Railroad, 9 Cush. 112, each of which was an action by a servant against the master; and it is hard to see the force of the suggestions as applied to an action by one servant against another servant.

Even the master is not exempt from liability to his servants for his own negligence; and the servants make no contract with, and receive no compensation from, each other. It may well be doubted whether a knowledge on the part of the servants that they were in no event to be responsible in damages to one another would tend to make each more careful and prudent himself. And the mention by Chief Justice SHAW, in Farwell *v.* Boston & Worcester Railroad, of the opportunity of servants, when employed together, to observe the conduct of each other, and to give notice to their common employer of any misconduct, incapacity, or neglect of duty, was accompanied

by a cautious withholding of all opinion upon the question whether the plaintiff had a remedy against the person actually in default; and was followed by the statement (upon which the decision of that case turned, and which has been affirmed in subsequent cases, some of which have been cited at the beginning of this opinion) that the rule exempting the master from liability to one servant for the fault of a fellow servant did not depend upon the existence of any such opportunity, but extended to cases in which the two servants were employed in different departments of duty, and at a distance from each other. 4 Met. 59–61.

So far as we are informed there is nothing in any other reported case, in England or in this country, which countenances the defendants' position, except in Southcote *v.* Stanley, 1 H. & N. 247; s. c. 25 L. J. (N. S.) Ex. 339; decided in the Court of Exchequer in 1856, in which the action was against the master, and Chief Baron POLLOCK and Barons ALDERSON and BRAMWELL severally delivered oral opinions at the close of the argument. According to one report, Chief Baron POLLOCK uttered this dictum: "Neither can one servant maintain an action against another for negligence while engaged in their common employment." 1 H. & N. 250. But the other report contains no such dictum, and represents Baron ALDERSON as remarking that he was "not prepared to say that the person actually causing the negligence" (evidently meaning "causing the injury," or "guilty of the negligence"), "whether the master or servant, would not be liable." 25 L. J. (N. S.) Ex. 340. The responsibility of one servant for an injury caused by his own negligence to a fellow servant was admitted in two considered judgments of the same court, the one delivered by Baron Alderson four months before the decision in Southcote *v.* Stanley, and the other by Baron Bramwell eight months afterwards. Wiggett *v.* Fox, 11 Exch. 832, 839. Degg *v.* Midland Railway, 1 H. & N. 773, 781. It has since been clearly asserted by Barons Pollock and Huddleston. Swainson *v.* North-eastern Railway, 3 Ex. D. 341, 343. And it has been affirmed by direct adjudication in Scotland, in Indiana, and in Minnesota. Wright *v.* Roxburgh, 2 Ct. of Sess. Cas. (3d series), 748; Hinds *v.* Harbou, 58 Ind. 121; Hinds *v.* Overacker, 66 Ind. 547; Griffiths *v.* Wolfram, 22 Minn. 185. *Exceptions sustained.*

GREENBERG *v.* WHITCOMB LUMBER CO. ET AL.

90 Wis. 225. 1895.

ACTION by August Greenberg against the Whitcomb Lumber Company and Parlan Semple for personal injuries. Plaintiff appeals from an order sustaining the demurrer of Parlan Semple to his com-

plaint. Defendant Whitcomb Lumber Company appeals from an order overruling its demurrer to plaintiff's complaint.

NEWMAN, J. The complaint states, in substance, that the defendant the Whitcomb Lumber Company is a corporation; that the defendant Parlan Semple was one of its officers and its general managing agent; that its business was the manufacturing of timber into firewood; that it operated, in this work, a machine which was defective and dangerous; that it knew the machine to be defective and dangerous; that the defect which rendered it dangerous was that the saw was defectively and insecurely fastened to its shaft; that the plaintiff was employed to work upon or with this machine; that he was inexperienced in such work and as to such machine, and did not know of the defect of the machine; that the defendants knew that he was so inexperienced and ignorant; that plaintiff received no instructions; that he was injured, without his fault, by reason of the defect of the machine. Fairly construed, this is the substance of the complaint. It was the duty of the defendant the Whitcomb Lumber Company to furnish the plaintiff a safe machine to work with, and, knowing the defect of the machine and that he was inexperienced, to instruct him of the dangers of the employment. Not to do this was negligence. The complaint states a cause of action against the defendant the Whitcomb Lumber Company.

Whether the complaint states a cause of action against the defendant Parlan Semple is more complex. He was the agent or servant of the Whitcomb Lumber Company, charged with the oversight and management of its operations, and with the duty of providing a safe machine for the work in which the plaintiff was engaged. The principle is well settled that the agent or servant is responsible to third persons only for injuries which are occasioned by his misfeasance, and not for those occasioned by his mere non-feasance. Some confusion has arisen in the cases, from a failure to observe clearly the distinction between non-feasance and misfeasance. These terms are very accurately defined, and their application to questions of negligence pointed out, by Judge METCALF in Bell *v.* Josselyn, 3 Gray (Mass.), 309. "Non-feasance," says the learned judge, "is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do; malfeasance is the doing of an act which a person ought not to do at all." The application of these definitions to the case at bar is not difficult. It was Semple's duty to have had this machine safe. His neglect to do so was non-feasance. But that alone would not have harmed the plaintiff, if he had not set him to work upon it. To set him to work upon this defective and dangerous machine, knowing it to be dangerous, was doing improperly an act which one might lawfully do in a proper manner. It was misfeasance. Both elements, non-feasance and misfeasance, entered into the act, or fact, which

caused the plaintiff's damages. But the non-feasance alone could not have produced it. The misfeasance was the efficient cause. For this the defendant Semple is responsible to the plaintiff. Mechem, Ag. § 569 *et seq.;* 14 Am. & Eng. Enc. Law, 873, and cases cited in note 4; Wood, Mast. & Serv. (2d ed.) 667; Osborn *v.* Morgan, 130 Mass. 102. . . .

The order appealed from by the Whitcomb Lumber Company is affirmed, and the order appealed from by the plaintiff is reversed.

VAN ANTWERP *v.* LINTON.

89 Hun (N. Y.) 417. 1895.

APPEAL by the plaintiff, Edwin Van Antwerp, from a judgment of the Supreme Court in favor of the defendants upon the dismissal of the complaint directed by the court after a trial at the New York Circuit before the court and a jury.

PARKER, J. This appeal brings up a judgment entered on the dismissal of the complaint, after the opening address to the jury by plaintiff's counsel, which was taken down. From the complaint and opening it appears that the plaintiff was injured by the fall of the grand stand at the Yale-Princeton football game on Thanksgiving Day, 1890, on grounds in possession of "The Brooklyns, Limited," a corporation organized under the laws of the state of New York.

The action was brought against "The Brooklyns, Limited," and Messrs. Linton, Chauncey and Wallace, who were appointed a committee of the board of directors of "The Brooklyns, Limited," to put the grounds in condition for the exhibition of the game.

"The Brooklyns, Limited," made default, and the question presented to the trial court, upon the motion to dismiss the complaint, was whether, from the complaint and opening, a cause of action against the individual defendants was stated? It was conceded that the individual defendants did not have any lease from "The Brooklyns, Limited," nor any one else, running to them, and the sole ground upon which the plaintiff sought to charge them with liability was, that they were appointed a committee by the directors of the corporation to erect a stand and otherwise provide for the reception and convenience of the public, and that by reason of their negligent omission of duty there was a defective construction of the stand, which led to its falling, resulting in injury to the plaintiff. As it was conceded that "The Brooklyns, Limited," was a domestic corporation duly organized under the laws of this state, and in possession of the premises when the stand was erected, and also at the time of the accident, liability against the individual defendants could not be

predicated upon their being directors, officers, or stockholders in such corporation. (Demarest *v.* Flack, 128 N. Y. 205.)

That they were the agents of the corporation in directing and superintending the erection of the stand was assumed by the learned trial judge, as he was bound to do, upon the complaint and opening, and he reached the conclusion that the acts with which they were charged constituted non-feasance, and not misfeasance. If he was right in such respect it is conceded that the complaint was properly dismissed, for whatever may be the rule in other jurisdictions, it is conceded that in this state an agent or servant is not liable to third persons for non-feasance.[1] As between himself and his master he is bound to serve him with fidelity, and for a breach of his duty he becomes liable to the master, who in turn may be charged in damages for injuries to third persons occasioned by the non-feasance of the servant. For misfeasance the agent is generally liable to third parties suffering thereby. The distinction between non-feasance and misfeasance has been expressed by the courts of this state as follows: "If the duty omitted by the agent or servant devolved upon him purely from his agency or employment, his omission is only of a duty he owes his principal or master, and the master alone is liable. While if the duty rests upon him in his individual character, and was one that the law imposed upon him independently of his agency or employment, then he is liable." (Burns *v.* Pethcal, 75 Hun, 443.)

Appellant urges that although these individual defendants were charged by the corporation with the duty of erecting this stand, and the acts complained of consisted in omitting to provide for a construction of sufficient strength to withstand the strain to which it was subjected, nevertheless they were guilty of misfeasance rather than non-feasance.

With commendable diligence he has brought to our attention authorities in other jurisdictions tending to support his contention, but we refrain from their consideration, because it is our understanding that the courts of this state have determined otherwise.

In Murray *v.* Usher (117 N. Y. 542), the plaintiff, while employed upon a platform in a saw-mill belonging to two of the defendants, sustained injuries by reason of its falling which occasioned his death. His administrator brought an action against the owners of the mill and one Lewis, who was their superintendent, having general charge of the business, and being specially instructed to look after the necessary repairs, which included the duty of inspecting the platform from time to time, to see that it was kept in a safe condition.

Judgment was recovered against all of the defendants. In the

[1] In Ellis *v.* Southern Ry. Co., 72 S. C. 465, Mr. Justice GARY, writing the opinion, at page 473, says: "The true rule deducible from the authorities is that the servant is personally liable to third persons when his wrongful act is the direct and proximate cause of the injury, whether such wrongful act be one of non-feasance or misfeasance."

Court of Appeals the question of the superintendent's liability was considered, the court holding that the omission of the superintendent to perform the duty devolving upon him constituted non-feasance for which he was not liable in a civil action, but that his employers were.[1] That case, it will be observed, is directly in point with the one under consideration. Lewis, the superintendent, neglected to perform the duty which his employers intrusted to him, and such neglect led to the fall of the platform, which caused plaintiff's injury. In this case the defendants were engaged in superintending the erection of the stand; as more than one was charged with such duty, they were called a committee, but the duties devolved upon them were of the same general character as in Murray's case, and the charge is that the fall of the stand was due to their neglect to properly discharge the obligations put upon them by the corporation.

In Burns *v.* Pethcal (*supra*) an attempt was made to recover of a foreman for the loss of the life of an employee, due, it was charged, to the omission of the foreman to warn the dead man of the danger of working in a particular place. There was a recovery at the Circuit, but the General Term reversed the judgment, holding that a servant is not liable jointly with his master where the negligence of the servant consists of an omission of a duty devolved upon him by his employment, although he may be liable where he omits to perform a duty which rests upon him in his individual character, and one which the law imposes upon him independently of his employment.

These cases fully sustain the decision of the trial court.

The judgment should be affirmed, with costs.

VAN BRUNT, P. J., concurred; FOLLETT, J., dissented.

Judgment affirmed, with costs.[2]

[1] "The general rule of *respondeat superior* charges the master with liability for the servant's negligence in the master's business, causing injury to third persons. They may, in general, treat the acts of the servant as the acts of the master. But the agent or servant is himself liable as well as the master, where the act producing the injury, although committed in the master's business, is a direct trespass by the servant upon the person or property of another, or where he directs the tortious act. In such cases the fact that he is acting for another does not shield him from responsibility. The distinction is between misfeasance and non-feasance. For the former the servant is, in general, liable; for the latter, not. The servant, as between himself and his master, is bound to serve him with fidelity and to perform the duties committed to him. An omission to perform them may subject third persons to harm, and the master to damages. But the breach of the contract of service is a matter between the master and servant alone, and the non-feasance of the servant causing injury to third persons is not, in general, at least, a ground for a civil action against the servant in their favor. (Lane *v.* Cotton, 12 Mod. 488; Perkins *v.* Smith, 1 Wils. 328; Bennett *v.* Bayes, 5 H. & N. 391; Smith's Mas. and Ser. 216, and cases cited.)" Murray *v.* Usher, 117 N. Y. 542, at pp. 546, 547.

[2] Affirmed on the opinion below in 157 N. Y. 716.

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