WHARTON, FRANCIS

PREFACE.

As will be seen by the accompanying Analytical Table, the commentaries that follow may be divided into two distinct parts. The first eleven chapters contain a general exposition of the Law of Agency. The twelfth, thirteenth, fourteenth, fifteenth, sixteenth, and seventeenth chapters present, successively, treatises on the Law of Attorneys, of Auctioneers, of Brokers, of Factors, and of Institors or Salesmen. The eighteenth chapter discusses the Law of Lien, as related to Agency. Some topics frequently associated with that of Agency I have designedly omitted. The Law of Shipping, that of Partnership, and that of Insurance, for instance, are virtually independent themes, for whose adequate discussion the present volume does not afford space.

Two other peculiarities of this work may require explanation. In collecting American authorities, I have thought it advisable to introduce all reported judicial decisions, no matter how cumulative, which have come to my notice in connection with the topics discussed. No doubt in this way my notes may appear overloaded, and my Table of Cases redundant; but it must be recollected that agency is the creature of usage as established by the courts; that usage can only be settled by cumulative

rulings; and that under our American system, there is no state whose adjudications can be safely omitted in such a commentary as the present. The other point which I desire to notice is, that in my summary of Roman Law, both classical and modern, I have relied mainly for authority on the expositions of contemporary German jurists. For this I have had two reasons. In the first place, with the older French school, as represented by Pothier, whose work on the Pandects was published in 1748, we have been already made familiar in this connection by Judge Story, in his excellent treatise on Agency. In the second place, the classical Roman Law, since Pothier's death, has been so much modified by the discovery of Gaius's lost tract, and by the critical labors of the great German commentators who have published within the last fifty years, that the expositions of Pothier, interesting as they are to the historical inquirer, can no longer be relied on for accuracy of exegesis. That they fail to give a correct representation of modern Roman Law in this relation, arises from the fact that they relate to conditions many of which are now obsolete. No treatise on Agency, published more than one hundred years ago, can meet the present wants of practice; much that would be found in such a treatise must now be rejected, as based upon business usages peculiar to a comparatively rude age. Since 1748, when Pothier wrote, English jurists on the one side, and French and German on the other, have been engaged partly in restoring the juridical rules of business Rome, partly in adapting sound legal principles to the necessities of commerce as it now exists. The two jurisprudences, English and Roman,

have, in performing this duty, advanced side by side, arriving instinctively, though without consultation, at the same general results. Each school has undertaken to apply its common maxims to innumerable new contingencies; each has done so, in the main, faithfully and wisely; and the result has been a gradual approximation even on those points as to which, as late as Pothier's day, the two jurisprudences most widely diverged, and the establishment of a harmonious system coextensive with civilized commerce. This system I have endeavored to set forth; and I have done so with peculiar interest, from the fact that its most copious and some of its ablest expositions will be found among the judgments of our American courts.

F. W.

CAMBRIDGE, *January*, 1876.

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CORRECTIONS.

For "Kilner *v.* Banter," in note 2, p. 39, read "Kelner *v.* Baxter."
For "Walworth *v.* Bent," in note 6, p. 50, read "Walworth *v.* Bank."
For "supra, § 126," in note 3, p. 134, read "supra, § 124."
For "Thorode *v.* Smith," in note 6, p. 145, read "Thorold *v.* Smith."
For "Eastern Bk. *v.* Alabama," in note 1, p. 164, read "Eastern Bank *v.* Taylor."
For "Storking *v.* Sage," in note 3, p. 223, read "Stocking *v.* Sage."
For "12 Q. B. 311," in note 5, p. 274, read "7 Cush. 304."
Transfer last sentence in § 411 to the end of italic heading to § 412.
For "12 Q. B. 311," in note 5, p. 285, read "7 Cush. 304."
For "Sater *v.* Henderson," in note 4, p. 289, read "Sater *v.* Hendershott."
In the third line of § 478, p. 312, insert "fraudulent" before "representations."
For "Lindo *v.* Castro," in note 4, p. 323, read "Lander *v.* Castro."
For "Heed *v.* Gervais, Walk. Mich." in note 1, p. 382, read "Head *v.* Gervais, Walk. Miss."
For "Union Bk. *v.* Georgetown," in note 7, p. 386, read "Union Bk. *v.* Geary."
For "Wilson *v.* Luss," end of note 1, p. 396, read "Wilson *v.* Russ."
For "Pitt *v.* Galden," 6th line of note 1, p. 397, read "Pitt *v.* Yalden."
Erase "Witson *v.* Russell" from line 23 of note 1, p. 397.
For "Somell *v.* Champion," end of opening note on p. 408, read "Sowell *v.* Champion."
For "Matt *v.* Smith," in note 5, p. 420, read "Marr *v.* Smith."
For "11 Md." in note 1, p. 434, read "11 Mod."
For "Galton *v.* Emmos," note 4, p. 442, read "Galton *v.* Emus."
For "Short *v.* Spakeman," in note 6, p. 482, read "Short *v.* Spackman."
For "Storking *v.* Page," in note 1, p. 546, read "Stocking *v.* Sage."

LAW OF AGENCY AND AGENTS.

AGENCY AND AGENTS.

CHAPTER I.

ESSENTIAL CONDITIONS OF AGENCY.

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3. Where the substitution is directly or indirectly authorized by the principal, § 31.
4. Where the substitute acts merely ministerially, exercising no discretion, § 33.
5. View of the Roman law, § 39.

I. DEFINITION AND INCIDENTS.

§ 1. *Definition.* — Agency is a contract by which one person, with greater or less discretionary powers, undertakes to represent another in certain business relations. It will be observed that this definition involves the following incidents: —

1. There must be a contract.

2. This contract must have to it competent parties.

3. The agent must have more or less discretion.

4. The thing to be undertaken must be a matter of future business.

5. Agency will not be sustained as to an immoral or illegal act.

To constitute agency there must be consent both of principal and of agent. This is a fundamental axiom of the Roman law: "Obligatio mandati consensu contrahentium consistit."[1] "Ideo per nuntium quoque per epistulam," says Paulus, in commenting on this maxim,[2] "mandatum suscipi potest. Item sive 'rogo' sive volo sive 'mando' sive alio quocumque verbo scripserit, mandati actio est. Item mandatum et in diem differi et sub condicione contrahi potest."

§ 2. Before, however, enlarging on these points, certain explanatory observations, bearing on the topic at large, may be made.

§ 3. *Agency an incident to a complex civilization.* — The subdivision of labor, which belongs to advanced civilization, while it produces men singularly expert in one line of business, leaves these men peculiarly inexpert in all other branches of business. I am required, in order to support myself, to betake myself to a single narrow specialty; and to succeed in this specialty, I must devote to it my principal energies, making me a peculiarly suitable representative of others in this branch of industry. But the very absorption in this specialty which makes me thus competent, makes me incompetent in other specialties, and therefore renders it necessary for me to employ others if I wish to deal with such specialties. But this is not all. Even if I have capacity to attend to a particular piece of business in whose performance I am interested, I may not have time. A manufacturer may be a skilful selling agent; but if he gives his time to selling his goods, he may have no time left to manufacture them. And once more, even if I have time, the acts which I desire to have done may have their seat in such widely separated localities, that to do one necessarily involves, if my personal action in each is required, the leaving undone of the other. The manufacturer, whose mills are in the Merrimac

[1] L. 1. pr. D. XVII. 1. [2] Ibid.

Valley, must have his selling agent in New York; the planter in the Mississippi Valley must have his factor in New Orleans; the work of producing and the work of selling cannot, by the very conditions of space, be performed by the same person. And again, in civilized society, there are many powers which would lie dormant if their exercise depended on the personal action of their possessors. I have a large balance in bank which I desire to employ, but which I can only invest through an agent. I own a farm which, as a non-resident, I can only work through an agent. I am interested in a mill, or an insurance or railroad company, which I and my co-owners can only operate through an agent. It is essential to the owner of property, therefore, that the right to act through agents should be secured; nor is this right less valuable to those who are without property. It is through agency that capital employs the labor with which it is not likely to come in direct contact. And while old men with wealth and power are led to employ others, it is equally beneficial to young men, with vigor and energy to spare, to be thus employed.

§ 4. *Countervailing considerations leading to a limitation of agency.* —Yet, strong as are the motives thus leading to the promotion of agency, there are some countervailing considerations which we must weigh if we would duly appreciate the characteristics of the growth of jurisprudence in this relation. The first is the feeling that while it is sometimes very well for us to act through others, there are matters of germinal importance which it is necessary we should do for ourselves. To perform these the discretion of the individual himself must be invoked; nor will the law allow him to act in such matters through a proxy. A man cannot make a will by a discretionary agent. A man cannot make a binding contract of marriage through such an agent. These exceptions will presently be more fully considered; it is now sufficient to remark that even in the highest state of civilization, when duties are most subtly subdivided, there are powers so intimately involved in the person of their possessor that the law tells him they must be exercised by him alone.

But there is another circumstance to be weighed before we can determine as to the applicability to our present condition of adjudications in earlier times. Agency is favored in law only so far as it can be protected by law. In early stages of civilization,

when confidence bestowed could be abused without means of redress, the law did not encourage the bestowal of confidence. "Men ought not to trust when they cannot exact obedience to the terms of the trust;" "Men ought not to trust strangers whom they cannot reach by law;" sentiments such as these, coupled with the facts that in the early period of the English common law there was no such thing known as private international jurisprudence, and that the subdivision of jurisdictions made breaches of trust easy, account for the rareness with which questions of agency come up in the early reports, and for the helplessness with which in the few reported cases the courts seemed to have gazed on the spectacle of agencies abused. We live now in a state of the juridical atmosphere far more promotive of the systematic development of this branch of the law. Not only do the necessities of business exact agency in all matters in which agency is legal, but agency is a matter of private international jurisprudence, and an untrue agent can be followed wherever he goes by the same general laws which obtain in the place where he was guilty of his breach of trust. Agency is thus made by the law to be as ubiquitous as civilization.

One other circumstance is of such great importance that its critical discussion must be reserved to another chapter, it being here practicable to view it only in outline. The Roman law regarded each Roman citizen as a power whose independence it was essential to preserve, yet whose independence would be imperilled if he should be permitted to put himself in subjection to an agent who was a Roman citizen like himself. The Roman citizen could bind himself by engagements entered into for him by his slave or by his son, for over his slave and his son he had absolute power, and when they spoke he spoke himself. But the Roman citizen could not bind himself by engagements entered into for him by another Roman citizen, for the policy of the law did not permit a Roman citizen, a *paterfamilias*, a prince as he virtually was with absolute power over his own domain, to be placed under the control of any other Roman citizen, invested with the same freedom of action as himself. We have lost, in our domestic times, the true idea of the *paterfamilias; we* conceive him, following the caricatures of our own day, to be a man under home subjection; under the Roman law he was a

man who held in absolute subjection not only his home, but his sons' homes, and the homes and business of slaves who were often persons of high capacity and cultivation. Such being the case, it was the policy of the Roman law to insulate the Roman citizen, charged as he was with high functions, so that these functions could be maintained intact. He might be bound by his sons or his slaves acting as his agents, for they were part of himself. But he could not be bound by the action of other Roman citizens, for these were like himself sovereign princes, subordinate to the commonwealth, indeed, but not permitted to be subordinate to each other.[1] To this peculiarity of the Roman law is to be traced its inapplicability to much of our modern doctrine of agency. Without understanding this peculiarity it is impossible for us to understand the growth of our jurisprudence in this interesting relation.

§ 5. *Agency involves an extension of juridical capacity.* — The natural capacity of a person to change his juridical relations at his will can be modified on two sides.[2] In the first place, this capacity can be *limited*, as when certain persons are pronounced to be incapable, either totally or partially, of juridical acts. In the second place, such capacity can be *extended*, as when certain persons are declared capable of acting juridically through others. This right of acting through others, through the relation of principal and agent, has a double effect in stimulating business: (1) It enlarges business capacity by multiplying the modes by which the individual acts; so that instead of being restricted to the single acts of industry he is capable of performing by himself, he is able to undertake through others specialties of which they alone are capable. In this way not only is a single administrator able indefinitely to extend his sphere of action, but enterprises which necessitate division of labor, and which no individual could conduct with his unaided powers, can be carried on. (2) A substitute is found by whom the interests of persons without juridical capacity can be protected. Infants, persons *non compotes mentis*, and, to some extent, married women, are without juridical capacity. Yet, although incapable of acting themselves, they may act through duly constituted guardians or trustees.

§ 6. *Agency involves a contract between principal and agent.* — Whether, when P. authorizes A. to contract on P.'s behalf with

[1] See infra, § 147.

[2] Savigny, Röm. Recht, III. § 113.

T., and A. executes such contract, P. is to be treated as contracting directly with T., has been the subject of much animated discussion.[1] On the one side, it is argued by Savigny, a jurist entitled to the highest weight, that as the authority in such case emanates exclusively from the principal, so the obligation to perform the contract emanates from him, and, passing through the agent as through a purely mechanical channel, couples itself immediately, without any break in the causal relation, with the reciprocal obligation emanating from the third party. P. authorizes A., for instance, to sell P.'s land to T. P.'s obligation to sell meets directly T.'s obligation to buy; and the two obligations constitute an immediate contract between P. and T. On the other hand, it is insisted by Thöl, a leading authority on the commercial law of the present date,[2] that when A., holding a power of attorney from P., executes, in pursuance thereof, a contract with T., this involves two contracts. T. has two persons dealing with him. To reach P., T. must resort to his contract with A. The agent has contracted, but for the principal, and the principal has contracted through the agent. We overlook, he maintains, the actual existence of two contracts with the third party when we say that the effect is as if the principal had contracted, for the principal has made a contract not only constructively but potentially. It is possible, so he admits, that A. may make a contract which will not be his contract, but which will be exclusively the contract of P., A.'s principal. In such case, one of the parties concerned must be totally lost and absorbed in another. Which of these parties shall be thus absorbed? Shall Titius be turned into Sempronius, or shall Sempronius be turned into Titius? By Savigny and his followers it is held that the principal (mandant) is not to be merged in the agent (mandatary), but that the agent is to be merged in the principal. If the principal is a Christian and the agent a Jew, then the agent is a Christian; if the principal is a Jew and the agent a Christian, then the agent is a Jew. But this opinion, it is replied, involves a contradiction. It assumes that by P.'s original contracting purpose, A., instead of P., is to be the original contracting party; that my original individual contract should be the original individual contract of somebody else, and that the original individual

[1] As illustrating the importance of this inquiry, see infra, § 17.

[2] Thöl's Handelsrecht, Leipzig, 1875, § 70.

contract of somebody else should be my original individual contract; that my contracting through a stranger should establish an independent contract through my contract, but without my particular contract, while my original individual contract is completely and exhaustively the original individual contract of another. It is true that the attempt is made to escape this contradiction by declaring that the contract was originally concluded not by the agent, but by the principal, because the more special will of the agent is contained in the more general will of the principal, and is therefore to be regarded as the application of the will of the principal. But this process of reasoning disregards the distinction between the general intent to make a contract without any precise limitations, and a concrete intent to execute a specific contract. The concrete and precise intent, through which alone a contract can be formulated, originates, in all discretionary cases, with the agent; and is not adopted by the principal until it takes shape in the agent's hands. And it is absurd to maintain that a contract which in its exact shape emanates exclusively from a particular person is not the contract of such person, but is the contract of another.

§ 7. Savigny, in maintaining the unity of the contractual acts of principal and of agent, rests chiefly on the position of the nuntius (Bote, messenger). It is maintained by Savigny that between the case of the nuntius, or messenger, on the one side, and that of the discretionary agent (Stellvertreter) on the other, there is no distinction. To establish this point he assumes four cases: (1) where the nuntius is without knowledge or discretionary powers; (2) where he has knowledge of the act but is without discretionary powers; (3) where he is not entirely without discretionary powers, but has a discretion in reference to the price; and (4) where he has discretion in reference not only to the price but to the object, as where he is authorized to select one out of a series of articles to be purchased. These four cases, he maintains, are all subject to the same rule. "I may direct my will," so he argues, "to a series of alternative conclusions between which my agent may choose; but whichever alternative he adopts is to be regarded by the third party with whom he contracts as my conclusion." He further insists that the degree of discretion given to the agent does not affect the issue. But Thöl answers by saying that in the case in which my agent picks out one among six horses

designated by me in gross, he not only applies my general will, but by pointing that will to a distinct horse, individualizes it (my will) into a precise contract; and he argues further, that under such circumstances I do not enter into a precise and effective contract until this contract has been shaped for me by a foreign self-determining will. The process is this: I conceive a purpose in itself too general to be executed in the form of a contract; next comes the independent concrete will of my agent, a will in itself sufficient for the execution of a contract; and then my own will adopting my agent's will. The agent is the fashioner and effectuator of my will, and is not the mere passive instrument of this will. Suppose, for instance, X. shows to a horse-dealer the following power: "X. is authorized by me to choose from among your horses one to be purchased by me;" in such case the horse-dealer at once sees that the choice depends upon X., and that no valid contract arises until X. makes up his mind. The law relative to the nuntius, or messenger, does not apply to such a case. The nuntius is a person who is the mere instrument of another's will, and who may be therefore a mere child or person incompetent for business. A person whom I appoint to exercise discretionary powers for me is not a nuntius; does not merely convey my will, but creates a will for me. Between the two cases there is an important distinction: in the first case the obligation is grounded solely on my will and my expression of my will, and not upon the will of the agent; in the second case the obligation is grounded solely on the will of the agent and his expression of this will, such will being in correspondence with my general will, and being afterwards adopted by me as my concrete will.[1]

II. WHO MAY BE PRINCIPALS.

§ 8. *There must be competent parties.* — By the Roman law, a person who is incapable of contracting cannot bind himself as a mandant or principal, though a person acting for him may recover in the *actio negotiorum gestorum*, a process which will be hereafter considered more fully.[2] So an employee who is incapable of contracting cannot make himself, by bare consent on his part, liable in the *actio mandati*, however much he may be held for damages arising from his tortious interference. "*Ulpianus*,

[1] See exposition in Thöl's Handelsrecht, § 70.

[2] Infra, § 356.

libro decimo ad edictum. Ait praetor: 'Si quis negotia alterius, sive quis negotia quae cujusque cum is moritur fuerint, gesserit; judicium eo nomine dabo.' Haec verba 'si quis' sic sunt accipienda 'sive quae:' nam et mulieres negotiorum gestorum agere posse et conveniri non dubitatur. 'Negotia' sic accipe, sive unum, sive plura. 'Alterius' inquit: et hoc ad utrumque sexum refertur. Pupillus sane si negotia gesserit, post rescriptum divi Pii etiam conveniri potest in id quod factus est locupletior: agendo autem conpensationem ejus quod gessit patitur. Et si furiosi negotia gesserim, competit mihi adversus eum negotiorum gestorum actio. Curatori autem furiosi vel furiosae adversus eum eamve dandam actio Labeo ait."[1]

§ 9. *By our own law all responsible persons can become voluntary principals.* — By our own law, a person who is capable of making a binding business engagement is capable of acting as voluntary principal in the contract of principal and agent.[2]

§ 10. *Persons not compotes mentis, though incapable of becoming voluntary, may become involuntary principals.* — The Roman law on this point has just been stated; and with it our own corresponds. While, however, a person not *compos mentis* cannot become a voluntary principal, he can, by action of the competent court, become a party to the relation of principal and agent. His tutor or guardian acts for him; and his estate is chargeable not only with the expenses incurred by such tutor or guardian, but by the latter's contracts.[3] But it must be remembered that when one of the parties to a contract is of unsound mind, and the fact is unknown and could not have been ordinarily known to the other contracting party, no advantage having been taken of the lunatic, the fact of such unsoundness will not by itself vacate a *bonâ fide* contract, when such vacating would work injury to the party thus contracting.[4]

§ 11. *Married women.* — By the Roman law married women were permitted to transact such business as fell within their particular departments, and to manage their own property; and when this was the case, they could duly constitute agencies for

[1] L. 3. D. III. 5.

[2] Lea *v.* Bringier, 19 La. An. 197.

[3] Windscheid, Pandekt. § 432; Rudorff, Vormundschaft; Glück, xxviii. p. 435.

[4] Milton *v.* Camroux, 4 Ex. 17; Beavan *v.* McDonnell, 9 Ex. 309. A contract made by a person when drunk may be ratified by him when sober. Matthews *v.* Baxter, L. R. 8 Ex. 132.

this purpose. The early Roman law undoubtedly restricted this power,[1] but with growing civilization these restrictions were relaxed if not abandoned.[2] By the old English common law a married woman could make no valid business engagement, and hence could not constitute a valid agency.[3]

Now, however, whenever she has, either by statute or by settlement, specific business powers, she may execute such powers through an agent.[4] She may appoint her husband her agent, though to sustain such an appointment it must be satisfactorily shown that she acted intelligently and freely.[5]

[1] Gai. I. 189–193.

[2] Windscheid, Pandekt. § 54.

[3] Marshall *v.* Rutton, 8 T. R. 545; Lewis *v.* Lee, 13 B. & C. 291; Foxwiste *v.* Tremaine, 2 Saund. 213; Maclean *v.* Douglass, 3 Bos. & P. 128; Wilkins *v.* Wetherell, 3 Bos. & P. 220; Viner's Abr. tit. Att.

[4] Judge Story (2 Eq. Jur. § 1391; Agency, § 6) states this as admitting of question; but under the recent married women's acts the power must be conceded. Sugden on Powers, c. 5, § 1. See Jones *v.* Gallagher, 3 D. J. & S. 494; Picard *v.* Hine, L. R. 5 Ch. 274; R. *v.* Carnatic R. R. Co. L. R. 8 Q. B. 299.

[5] Rowell *v.* Klein, 44 Ind. 291; McLaren *v.* Hall, 26 Iowa, 297. "The competency or incompetency of a married woman to appoint an agent turns upon the nature of her rights, that is to say, upon the question whether they are those of a *feme covert* or those of a *feme sole*. The power of a married woman to appoint an agent is coextensive with her rights to act as a *feme sole*. By the common law a married woman cannot in her right as *feme covert* make a binding contract during coverture. Marshall *v.* Rutton, 8 T. R. 545; Lewis *v.* Lee, 3 B. & C. 291; Fairthorne *v.* Blaguire, 6 M. & S. 73. In order to bind her husband, she must be shown to have authority, express or implied, to act as his agent. Montague *v.* Benedict, 5 B. & C. 635. She has the right of a *feme sole* in the following cases: When she has been divorced *à vinculo*, or separated by decree of judicial separation, or when deserted by her husband and in possession of a protection order (20 & 21 Vict. c. 85, and Ramsden *v.* Brearley, L. Rep. 10 Q. B. 147), or when the husband has abjured the realm. Lean *v.* Shutz, 2 W. Bl. 1199; Lewis *v.* Lee, 3 B. & C. 297. She was in a like position when the husband had been transported beyond seas as a convict. Carrol *v.* Blencow, 4 Esp. 27. By the married women's property act, 1870 (33 & 34 Vict. c. 93), a married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property declared by this act to be her separate property, or of any property belonging to her before marriage, which her husband shall, by writing under his hand, have agreed shall belong to her after marriage as her separate property, and she shall have the same remedies for the protection of such property as if she were an unmarried woman. In equity the separate estate of a married woman is bound by and liable to satisfy a contract entered into by her in reference to her estate, and it will be assumed, when she has no other means of satisfying the contract, that it has been en-

§ 12. *Infants.* — By the Roman law, the gradations of infancy, in respect to contracts, are thus defined: —

1. The infant (*infans, is qui fari non potest*), up to the period of seven years, is absolutely incapable of business.[1]

2. Children between infancy and puberty (between seven and fourteen with boys, or twelve with girls), who without their guardians can do no act in prejudice of their estates.[2]

3. Persons between puberty and majority, which, by the Roman law, is attained at twenty-five years, who cannot alienate their property without their guardians' consent; and, under certain circumstances, without the consent of the court having jurisdiction.[3]

Our Anglo-American law retains, though with less precision, the same general distinction. An "infant" may through an agent do an act for his own benefit, though not an act to his prejudice;[4] but this must be construed to relate to infants between seven and twenty-one; for an infant under seven cannot be viewed as capable of any juridical act.

III. WHO MAY BE AGENTS.

§ 13. *Married women and infants.* — All persons, as we have just seen, who are legally capable of conducting business in their

tered into with reference to such estate. Jones *v.* Gallagher, 3 D. J. & S. 494; 30 L. J. 298: Picard *v.* Hine, L. Rep. 5 Ch. 274. Apparently a separate business may be carried on by a wife while she resides with her husband, unless he takes such a part in the business as to render himself principally liable. Laporte *v.* Costick, 31 L. T. Rep. N. S. 434. Under this act a married woman may, like a *feme sole*, transfer stock entered or registered in her name, in the manner therein provided (R. *v.* Carnatic Railway Company, L. Rep. 8 Q. B. 299), but the entry is essential. Howard *v.* Bank of England, L. Rep. 19 Eq. 295. Again, a married woman who is a *sole trader* in the city of London, independently of her husband, may, by the custom of London, sue and be sued in the icty courts, with reference to her dealings as sole trader. Bac. Abr. 'Baron and Feme,' M." London Law Times, August, 1875.

[1] Windscheid, Pandekt, § 71.

[2] Ihering, Röm. Recht. III. p. 146; Windscheid, *ut supra.*

[3] L. 3 C. de i. i. r. min. (2. 22); Windscheid, *ut supra.*

[4] Hardy *v.* Waters, 38 Me. 450; Hastings *v.* Dollarbide, 24 Cal. 195; Pickler *v.* State, 18 Ind. 266; Zouch *v.* Parsons, 3 Burr. 1808, questioned in Hoyle *v.* Stowe, 2 Dev. & Bat. 324; R. *v.* Lord, 12 Q. B. 757. See 2 Kent's Com. 236; Thomas *v.* Roberts, 16 M. & W. 778; Whitney *v.* Dutch, 14 Mass. 463; Tucker *v.* Moreland, 10 Peters, 58; Keene *v.* Boycott, 2 H. Black. 545; Bennett *v.* Davis, 6 Cow. 393; Lawrence *v.* McArter, 10 Ohio, 37; Knox *v.* Hack, 10 Harris, 337.

own right, are capable of acting as agents. What they can do for themselves, they are competent, so far as the question of formal capacity is concerned, to do for another.

But can a person not *sui juris* act as an agent? By the Roman law, this question, so far as concerns the right of a principal to avail himself of the services of his slave or his unemancipated son in conducting his business, was answered emphatically in the affirmative. The Roman business man, in fact, was limited, in the management of his general affairs, to agents of this class. For one man to authorize another to bind him by contract was held to be so destructive of personal independence, that it was only permitted in those cases in which the principal's power over the agent was absolute. Roman business society was an aristocracy: each of its members had his retinue of slaves, if not of his own sons, competent for business. The Roman merchant could therefore readily find agents among his slaves if not his sons; and in this way not only was he able to dispense with the services of those who like himself were *sui juris*, but he was able to comply with the spirit of the law which discountenanced such agencies. Hence Roman business usage not only permitted but required the use of persons not *sui juris* as agents.

§ 14. From the Roman law the same principle has passed to our own, though without the same peculiar reason. By our courts it has been frequently held that slaves or villeins, persons outlawed or excommunicated, married women, infants, and aliens may, though incapable of binding themselves by contracts, become agents by whom the contracts of other parties may be legally made.[1]

§ 15. The wife may even become the husband's agent, binding him as effectually as he could bind himself.[2] *A fortiori* may

[1] 2 Kent's Com. 151; Sugden on Powers, c. 5, § 1; Co. Litt. *a*; 112 *a*; Governor *v.* Daily, 14 Ala. 469; Story on Agency, § 7; Lyon *v.* Kent, 45 Ala. 656; Chastain *v.* Bowman, 1 Hill (S. C.), 270.

[2] See Lang *v.* Waters, 47 Ala. 624; Felker *v.* Emerson, 16 Vt. 633; Pickering *v.* Pickering, 6 N. H. 124; McKinley *v.* McGregor, 3 Whart. 309; Cantrell *v.* Colwell, 3 Head (Tenn.), 471. In a Pennsylvania case, Stall, in 1857, about leaving home, left claims due him with Meek for collection, and from the proceeds to pay a debt due Braden, and the remainder to Stall's wife. This constituted the wife Stall's agent. During Stall's absence Braden brought suit; the wife asked Meek for money to pay; he said it should not trouble her, he would pay Braden; he afterwards told her he had paid. Braden recovered judgment, which Stall, on his return in 1867, was com-

the husband act as the wife's agent.[1] So it is generally declared that an infant may, as an agent, bind his principal.[2]

Yet, broadly as these statements appear in our Anglo-American books, they must be taken with some important qualifications. No one has ever pretended that a person destitute of mental capacity can bind another as an agent, viewing the term agency in its proper sense, as already defined; and if an adult idiot could not do this, we certainly cannot ascribe this force to an infant who is absolutely deficient in mental capacity for the business in question. Such a person, to adopt the Roman distinction, may be a *nuntius* or messenger, but he cannot be a mandatary; he may convey a message as accurately as would a telegraph wire, but he would be as incompetent as would a telegraph wire to exercise discretion in the modification or application of such message. Yet it is this very discretion that we find one of the necessary conditions of agency. A person who is endowed with no discretionary powers may be a *locator*, as we will presently see, or a *nuntius*, but he cannot be an agent. Hence we must hold that while legal business capacity, in its formal sense, is not necessary to enable a party to act as agent, yet when there is absolute business incapacity, in its substantial and personal sense, the person so deficient may be treated as a *nuntius*, or as a servant, but not as an agent.

One other qualification is to be noticed. Undoubtedly a person not *sui juris* may as agent bind his principal; but can he be civilly responsible, either to his principal or to third parties, for his acts in the management of the agency? Certainly not; and yet, if we accept this conclusion, we are obliged to revise at least the terminology of our own authorities on this topic. To agency, it is essential that the agent should be liable to the principal[3] and to third parties; a person not *sui juris*, when acting for another, cannot be made liable to his principal or to third

pelled to pay. In 1869 he sued Meek, who pleaded the statute. The court charged: "Unless there was fraud on plaintiff in concealing the receipt of the money, the statute would be a bar; anything said to the wife not communicated to plaintiff would not be such fraud as would prevent the bar; the concealment must be practised on the husband or his constituted agent." Held to be error, being calculated to mislead the jury as to the agency of the wife. Stall *v.* Meek, 70 Penn. St. 181.

[1] Ready *v.* Bragg, 1 Head (Tenn.), 511.

[2] Story, *ut supra;* Brown *v.* Ins. Co. 117 Mass. 479.

[3] See supra, § 6; infra, § 231 *et seq.*

parties; therefore the relation which such a person bears to his principal is not agency. It is certainly not agency in its perfect sense; and it may at the best be treated as a qualified agency; an agency capable of binding the principal and third parties, but not, so far as subjection to adverse suits is concerned, the quasi agent himself.

§ 16. *Alien enemy may become agent.* — An alien enemy may be an agent in order to collect the money and preserve the property of his absent principal, and so far has power to bind his principal.[1] Hence it was correctly held in Louisiana, in 1867, that an agent or mandatary, intrusted with the management or control of real estate in New Orleans for his principal, who resided in one of the Northern States before and during the late war, was not absolved from his obligations to his principal by the breaking out of hostilities between the two sections of the country. The agency continued during the war, and his acts, as such, were binding on his principal.[2]

§ 17. *Principal liable for damages for acts of incompetent agent.* — A principal, knowingly acting through an incompetent agent, cannot set up the invalidity of the agency as a defence to an action in the case, although such a defence could be made to a suit brought on a void contract of agency. Third parties dealing with such an agent may throw up the transaction on discovering the agent's incompetency; but the principal, knowingly availing himself of such an agent, cannot relieve himself from liability for damages incurred by his own wrong. The Roman law is clear to this effect. "Liberto vel amico mandavit pecuniam accipere mutuam; cujus litteras creditor secutus contraxit et fidejussor intervenit: etiamsi pecunia non sit in rem ejus versa, tamen dabitur in eum negotiorum gestorum actio creditori vel fidejus-

[1] Conn *v.* Penn, 1 Pet. C. C. 523; Denniston *v.* Imbrie, 3 Wash. C. C. 396; Griswold *v.* Waddington, 16 Johns. R. 486; Ward *v.* Smith, 7 Wallace, 447; Manhattan Ins. Co. *v.* Warwick, 20 Gratt. 614; Hale *v.* Wall, 22 Gratt. 424; Stoddart *v.* U. S. 6 Ct. of Cl. 340; Sands *v.* Ins. Co. 59 Barb. 556. See, *per contra*, Howell *v.* Gordon, 40 Ga. 302; Conley *v.* Burson, 1 Heisk. 145, holding that war revokes agent's authority.

[2] Mousseaux *v.* Urquhart, 19 La. An. 482. See, also, University *v.* Finch, 18 Wall. 106; Furman *v.* U. S. 5 Ct. of Cl. 579; Montgomery *v.* U. S. 5 Ct. of Cl. 648; Robinson *v.* Ins. Co. 42 N. Y. 54; Yeaton *v.* Berney, 62 Ill. 61. So the fact that members of a firm are alien enemies, while it makes invalid future partnership dealings, does not invalidate acts for the winding up of the affairs of the firm. Bank of N. O. *v.* Matthews, 49 N. Y. 12.

sori scilicet ad exemplum institoriae actionis. Inter negotia Sempronii, quae gerebat, ignorans Titii negotiam gessit: ob eam quoque speciem Sempronio tenebitur, sed ei cautionem indemnitatis officio judicis praeberi necesse est adversus Titium, cui datur actio. . . . . Fidejussor imperitia lapsus alterius quoque contractus, qui personam ejus non contingebat, pignora vel hypothecas suscepit et utramque pecuniam creditori solvit, existimans indemnitati suae confusis praediis consuli posse. Ob eas res judicio mandati frustra convenietur et ipse debitorem frustra conveniet. Negotiorum autem gestorum actio utrique necessaria erit, in qua lite culpam aestimari satis est, non etiam casum, quia praedo fidejussor non videtur. Creditor ob id factum ad restituendum judicio, quod de pignore dato redditur, cum videatur jus suum vendidisse, non tenebitur."[1]

§ 18. *Persons with interests hostile to employer.* — It is sometimes said that a person having interests which conflict with those of another cannot act as such other person's agent; and this has been illustrated by cases where it has been ruled that a person cannot act as agent in buying his own goods, and that when agent he cannot purchase his principal's goods for his own use.[2] But the rulings in these cases, so far from denying juridical capacity for agency, assume such capacity, for they say to the offender: "You undertook to act as agent for the plaintiff; you established with him a valid relation of agency; you were his agent in every juridical sense; but in this agency you misconducted yourself, and were guilty of a breach of faith." The discussion of this particular point therefore belongs to the sections in which the liabilities of agents are considered,[3] and not to the present title, which treats of juridical competency for agency.

IV. AGENCY INVOLVES DISCRETION OF AGENT.

§ 19. *Agent must have more or less discretion. — Distinction between "agency" and "service."* — Agency, or mandate, as has already been seen, is distinguishable from *Locatio conductio operarum*, or the relationship of master and servant, by the fact that the former relates to business transactions, in which there is more or less discretion allowed to the employee, while the latter relates to manual services, which the employee is, as a rule,

[1] L. 30, 31. D. de neg. gest. III. 5; Papinian.

[2] Story on Agency, § 9.

[3] See infra, § 231–246.

obliged to perform under specific orders. Thus, a publisher is the mandatary or agent of the author in printing a book; the compositor is the *locator* or servant of the printer in setting up the type.[1] So a trustee managing an estate is the mandatary or agent of his principal in investing the latter's funds; the trustee's clerk, who keeps his account, is the trustee's *locator* or servant. So a contractor undertakes to build a house for a capitalist; and he is in this the capitalist's mandatary or agent; the mason or the bricklayer who directly lets his labor to the capitalist, is the latter's servant, or *locator*.

§ 20. *Agency includes mechanical commissions, provided such commissions carry with them discretion in the employee as to time and mode.* — I employ, for instance, an engine-maker to build for me a particular engine, he having exclusive control over the use of his time when working for me, and pursuing his own mode of working. Or, I engage a printer to print for me a particular manuscript, he having like discretion as to time and mode. Or, I employ a salesman, he having discretion as to the parties to whom to sell. In each of these cases the employment is agency or mandate, and not that of master and servant, or *locatio conductio operarum*.

In the Institutes, the test is *wages;* and this would lead a superficial observer to conclude that to mandates a want of moneyed consideration was essential. But what is meant is that when *wages* as a price of servile labor is given, then the employment is *locatio operarum;* when a fee, gratuity, or salary is given, then, though the work is mechanical, the employment, if discretion is reserved to the employee, is *mandatum*. "Et ideo si fulloni polienda curandave vestimenta dederis, aut sarcinatori sarcienda, nulla mecede constituta neque promissa, *mandati competit actio*." [2]

The following points of distinction may be noticed in this connection: —

Locatio conductio operarum.	*Mandatum.*
Relationship of Master and Servant.	*Relationship of Principal and Agent.*
1. Fixed wages.	1. Commissions, or compensation

[1] See infra, § 275, 479, 545.

[2] § 13. Inst. de mand.; and see, also, Gaius, III. § 162; infra, § 324.

2. Master is bound to exercise proper care in the materials and machinery given to servant to work upon or with; and if the master neglect this duty, he is liable if the servant is injured thereby.[1]

3. Master is liable for the servant's negligence when the latter is acting within the scope of his employment.

4. Relation concerns chiefly mechanical services; *i. e.* those in which no discretion is allowed to the employee.[2]

5. Servant is not liable to third party for negligence.[3]

in the nature of *quantum meruit*, though this may be commuted by a salary.[4]

2. Unless there be a guaranty by the principal, the agent operates at his own risk.

3. Principal is only liable for agent's negligence in matters which the principal undertakes to have done under his own direction; in respect to other matters, principal is only liable for *culpa in eligendo*.[5]

4. Relation concerns chiefly services of a higher grade, in which discretion is allowed to the employee.[6]

5. Agent is liable to third party for negligence.[7]

V. IT MUST RELATE TO LAWFUL BUSINESS IN FUTURE.

§ 21. *The thing to be undertaken must be a matter of business.* — The sphere of agency is property, so far as property is the object of transfer among contemporaries. Hence agency cannot, as a rule, be used in the settlement of family relations. Neither marriage nor adoption can be performed through an agent; to make a valid marriage or adoption, the principals must personally act. So, in obedience to the principle that agency can only act through contemporaries, a man cannot make a will through an agent. So, by the old law, homage or fealty could not be rendered by an agent.[8] In fine, obligations which do not relate to the transfer of property cannot be executed through agents.[9]

§ 22. *The business must be in future.* — In the Roman law this principle is frequently recognized. "Si post creditam pecuniam

[1] Vangerow, § 645, 650; Baron, § 608; Whart. on Neg. § 206–7–8, and cases there cited.
[2] Supra, § 19; infra, § 535.
[3] Infra, § 535.
[4] See infra, § 321.
[5] Infra, § 277, 482, 538.
[6] Supra, § 19; infra, § 577.
[7] Infra, § 537–540.
[8] Com. Dig. Attorney, C. 3.
[9] See Coombe's case, 9 Co. 76 *b*; Agra Bank, ex parte, L. R. 6 Ch. 206.

mandavero creditori credendam, nullum esse mandatum rectissime Papinianus ait; plane si, ut expectares nec urgueres debitorem ad solutionem, mandavero tibi, ut ei des intervallum, periculoque meo pecuniam fore dicam, verum puto omne nominis periculum debere ad mandatorem pertinere."[1] "Ex mandato apud eum qui mandatum suscepit nihil remanere oportet, sicuti nec damnum pati debet, si exigere faeneratam pecuniam non potuit. Fidejussori negotiorum gestorum est actio, si pro absente fidejusserit: *nam mandati actio non potest competere, cum non antecesserit mandatum.*"[2]

It is otherwise, however, by the modern German law, which treats the ratification as a mandate.[3]

§ 23. *But a commission to execute an act already performed operates as a ratification of such act.* — Supposing that B., after the performance of a particular act by A., on B.'s behalf, directs B. to perform such act; this direction, though not constituting the relationship of principal and agent between A. and B., operates to throw upon B. the responsibility of such act, and to make him, so far as concerns third parties, liable for the same. But the Roman law is clear to the effect that such a ratification (ratihabitio) is not a mandate; the ratification working only to protect the transactions in the *actio negotiorum gestorum* from the charge of inutility. "Pomponius scribit si negotium a te quamvis male gestum probavero, negotiorum tamen gestorum te mihi non teneri. Videndum ergo ne in dubio hoc, an ratum habeam, actio negotiorum gestorum pendeat; nam quomodo cum semel coeperit, nuda voluntate tolletur? Sed superius ita verum se putare, si dolus malus a te absit. Scaevola: immo puto et si comprobem, adhuc negotiorum gestorum actionem esse, set eo dictum te mihi non teneri, quod reprobare non possim semel probatum: et quemadmodum quod utiliter gestum est necesse est apud judicem pro rato haberi, ita omne quod ab ipso probatum est. Ceterum si ubi probavi, non est negotiorum actio: quid fiet, si a debitore meo exegerit et probaverim? quemadmodum recipiam? item si vendiderit? ipse denique si quid impendit, quemadmodum recipiet? *nam utique mandatum non est. Erit igitur et post ratihabitionem negotiorum gestorum actio.*"[4]

[1] Ulpian, L. 12, § 14. D. mand. XVII. 1.

[2] Paulus, L. 20. D. mand. XVII. 1.

[3] Koch, Ford. III. 523.

[4] L. 8 (9). D. de neg. gest. III. 5. So, also, L. 6, § 9. D. eod. L. 9. C. eod. (II. 19.)

§ 24. But even by the Roman law all ancillary acts done by the agent, subsequent to the ratification, are within the scope of the *actio mandati;* and the same rule applies when a principal without dissent permits the intervention of an agent on his behalf. "Semper qui non prohibet pro se intervenire, mandare creditur. Sed et si quis ratum habuerit quod gestum est, obstringitur mandati actione."[1] These general distinctions as to ratification are embodied in our own law. Their amplification and discussion must be reserved to a future chapter.[2]

§ 25. *Agency cannot be maintained as to an immoral or illegal act.* — Where the employment relates to the performance of an immoral or illegal act, neither party can make the contract of employment any basis for a suit against the other. "Rei turpis nullum mandatum est, et ideo hac actione non agetur."[3] "Si adolescens luxuriosus mandet tibi, ut pro meretrice fidejubeas, idque *tu sciens* (the *scienter* being necessary to infect the employee so as to destroy his right of action against his employer) mandatum susceperis, non habebis mandati actionem, quia simile est, quasi perdituro pecuniam sciens credideris."[4] "Qui aedem sacram spoliandam, hominem vulnerandum, occidendum mandatum suscipiat, nihil mandati judicio consequi potest propter turpitudinem mandati."[5] Hence if the agent is ignorant of the turpitude of the act, he may recover from his principal; if he is aware of such turpitude, he cannot recover. When the act is on its face immoral, *e. g.* spoliation or killing, then the agent is necessarily aware of the turpitude of the act; but if the act is on its face lawful, and its turpitude depends on facts of which the agent is not cognizant, then he has a remedy against his principal for compensation for his services.

§ 26. The same view has been sustained by our own law, so far as concerns contracts for immoral[6] or illegal agencies.[7] At the

[1] L. 60. Dig. de div. reg. L. 17.

[2] Infra, § 62 *et seq.*

[3] L. 6, § 3. D. h. t.

[4] L. 12, § 11, eod.

[5] L. 22, § 6, eod.

[6] Story on Agency, § 195; Smith *v.* Stotesbury, 1 W. Bl. 204; 2 Burr. 924; Walcott *v.* Walker, 7 Ves. 1; Forbes *v.* Cochrane, 2 B. & C. 448; Blanchard *v.* Russell, 13 Mass. 1. Infra, § 249, 319, 334.

[7] McIntyre *v.* Parks, 3 Metc. 207; Paine *v.* France, 26 Md. 46; Scruggs *v.* Davis, 5 Sneed, 265; Elmore *v.* Brooks, 6 Heisk. 45; Trist *v.* Child, 21 Wall. 441; Cork & Youghal R. R. in re, L. R. 4 Ch. 748; Holman *v.* Johnson, Cowp. 343; Heugh *v.* Abergavenny, 23 W. R. 40; The Vanguard, W. Rob. Adm. 207. See infra, § 249, 334.

same time an agent receiving profits cannot set up against his principal the illegal character of the transaction in which they were realized. The maxim, *In pari delicto potior est conditio defendentis*, has no application here.[1]

§ 27. Yet, as may be inferred from what has been just stated, the question of illegality is for the *judex fori* to determine, and the law to be applied is the *lex loci solutionis*. Is a suit brought upon an agency to be performed in a state where the performance would be illegal? Then the courts of another state will refuse to lend their aid to enforce such agency, though in their own state the transaction would be legal. Is the agency lawful in the place of performance, but unlawful by the *lex fori?* Then, unless the *lex fori* absolutely directs the judge to refuse to sustain the contract, he will sustain it, on the ground that it is lawful in the place of performance.[2] An exception to this — not very creditable to the courts which have adopted it — is to be found in those English and American cases, in which it has been ruled that a contract in one country to evade or defraud the revenue laws of another country is not illegal in the country of the origin of such contract. But these cases cannot be sustained on principle, however firmly settled they may be by local authority.[3]

VI. HOW FAR AN AGENT MAY ACT BY SUBSTITUTE.

§ 28. *An agent, chosen for his peculiar aptitude in the exercise of a particular discretion, cannot hand over such trust to a sub-agent.* — Agency, as it has been already seen, involves the transmission of greater or less discretionary powers to the agent; and from this it follows that when the discretion thus conveyed is one which requires peculiar aptitude on the part of the agent, and for the exercise of which the agent is chosen for his peculiar gifts, then he must exercise this discretion personally, and cannot depute it to a substitute.[4]

[1] Brooks *v.* Martin, 2 Wall. 79; Pointer *v.* Smith, 7 Heisk. 137. See infra, § 250.

[2] Whart. Confl. of Laws, § 486.

[3] See cases and discussion in Whart. Confl. of Laws, § 484; and see infra, § 249, 334.

[4] 2 Kent's Com. 633; Miles *v.* Bough, 3 Ad. & E. N. S. 845; Cockran *v.* Irlam, 2 M. & Sel. 301; Schmaling *v.* Thomlinson, 6 Taunt. 147; Warner *v.* Martin, 11 How. 209; Catlin *v.* Bell, 4 Camp. 183; Boecock *v.* Pavey, 8 Ohio St. 270; Gillis *v.* Bailey, 1 Foster, 149; Hawley *v.* James, 5 Paige, 323; Locke's Appeal, 72 Penn. St. 491; Lyon *v.* Jerome, 26 Wend. 485; Emerson *v.* Prov. Hat Co. 12 Mass. 241; Winsor, ex parte, 3 Story, 411; Rossiter *v.* Life Ass. Co. 27 Beav. 377;

§ 29. 1. *Where the custom of business authorizes such substitution.*[1] — A salesman, for instance (*institor*), has a certain discretion as to the persons to whom he will sell. Yet a salesman, from the nature of things, may, if compelled to leave the shop for a short time, act through a substitute. So an insurance agent may, through his clerk, not only deliver policies, but contract for certain risks.[2]

§ 30. 2. *Where the principal's interests would suffer unless such substitution be allowed.* — By the Prussian Code, an agent cannot without his principal's assent transfer his agency to another. It has been held that this does not interfere with cases where the agent is prevented by necessity from acting, and where the principal's interests would be impaired if there were no substitution. Indeed, by the principles of the Roman law, even where such substitution is expressly forbidden, substitutions in cases of necessity are sustained.[3] The same view is adopted in our own law.[4]

§ 31. 3. *Where the substitution is directly or indirectly authorized by the principal.* — The first alternative, of course, admits of no discussion. As to the second, it may be mentioned that in most of the cases in which such authorization is implied, it is implied because by the usage of trade, known to both parties, such power of substitution is essential to the execution of the agency.[5]

§ 32. *A fortiori* is this the case where it is impossible for the agent to discharge the entire duties committed to him without breaking up the peculiar line of business in which he is engaged. A trustee, for instance, is employed to manage a particular trust; and for the very reason that he may reserve himself for its general superintendence, he is authorized to employ deputies

Smith *v.* Sublett, 28 Tex. 163: Loomis *v.* Simpson, 13 Iowa, 532; Bissell *v.* Roden, 34 Miss. 63. See, fully, infra, § 276, 579, 709. As to Roman law, see infra, § 34.

[1] See Laussatt *v.* Lippincott, 6 S. & R. 386; Gray *v.* Murray, 3 Johns. Ch. 167; Buckland *v.* Conway, 16 Mass. 396; Trueman *v.* Loder, 11 Ad. & El. 589; Smith *v.* Boutcher, 1 Car. & K. 573; infra, § 544, 579, 645, 709.

[2] Bodine *v.* Ins. Co. 51 N. Y. 117.

[3] L. 1, § 5. D. de exerc. act.

[4] Quebec R. R. *v.* Quinn, 12 E. F. Moore, 233; Dorchest. & M. Bk. *v.* N. E. Bk. 1 Cush. 177.

[5] Coles *v.* Trecothick, 9 Ves. 234; Gray *v.* Murray, 3 Johns. R. 167; Johnson *v.* Cunningham, 1 Ala. 249, N. S.; Laussatt *v.* Lippincott, 6 S. & R. 386. See infra, § 62 *et seq.*

to take charge of its details. A mercantile agency is employed to inquire the character of customers over the whole business world. The heads of such agency are required to superintend the business with prudence and skill; but their local work of investigation must be done by others. In all such cases, therefore, an agent is authorized to act through a sub-agent.[1]

§ 33. 4. *Where the substitute acts merely ministerially, exercising no discretion.* — In this case the right of substitution flows from the very nature of our proposition. The substitute is but the extension of the principal himself, introducing no new party into the contract; while the principal is as liable for the acts of the substitute as for his own.[2]

§ 34. *By the Roman law, mandatary in cases where this is the custom of the business must attend to business personally.* — The Roman law agrees with our own in holding that where a mandatary is selected for his skill in the performance of a particular duty, then this duty must be performed by the mandatary personally, unless hindered by necessity or superior duty.[3] The mandatary who places in a substitute's hands the business he should transact personally is liable for the misconduct of the substitute as if it were his own; but if he is at liberty to appoint a substitute, which occurs whenever the business is such as to involve the necessity or propriety of such an appointment, then he is liable for such substitute whenever either in the choice or the supervision of the substitute he has been negligent. "Mandatu tuo negotia mea Lucius Titius gessit: quod is non recte gessit, tu mihi actione negotiorum gestorum teneris non in hoc tantum, ut actiones tuas praestes, *sed etiam quod imprudenter eam elegeris*, ut quidquid detrimenti negligentia ejus fecit, tu mihi praestes."[4] "Sed si ego tibi, cum esses mensor, mandaverum, ut mensuram agri ageres et tu id Titio delegaveris et ille dolo malo quid in ea re fecerit, tu teneberis, *quia dolo malo versatus es, qui tali homini credidisti.*"[5]

[*The liability of the agent for the negligence of sub-agent is discussed under a future head.*][6]

[1] See infra, § 276, 579, 645, 709.

[2] Williams *v.* Woods, 16 Md. 220; Bodine *v.* Ins. Co. 51 N. Y. 117; Com. Bk. *v.* Norton, 1 Hill, 501. See infra, § 276–278, 479, 537.

[3] See Thibaut's Versuche, Bd. II. No. 6; Koch, III. 547.

[4] L. 21, § 3. D. de neg. gest. III. 5.

[5] L. 2, § 1. D. si mensor, XI. 6.

[6] Infra, § 276, 544, 545.

CHAPTER II.

FORMAL CONDITIONS OF AGENCY.

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I. APPOINTMENT OF AGENTS.

1. *To Continuous Service.*

§ 40. *Appointment to a continuous service implies an authority to do any acts incident to such service.* — The most common form of agency is that which is incident to a continuous service. I appoint, for instance, a house servant, within whose duty it is to supply my family with provisions. I give him no written authority to act for me; there is no written contract between us limiting his powers; but the usage of society prescribes these powers, so far as concerns third parties. He is known by the various persons with whom I deal to be my servant; he is recognized by me as such; and so far as concerns the usual articles of home consumption, he binds me by his orders, though not one word has been written or said by me authorizing him to order or receive the goods. So with regard to the salesman in a store. I engage a salesman; he stands behind the counter in my store; no written or even oral authority has passed from me to him; but his very position is a publication by me that he is my

agent for selling goods in the store, and for all acts within the range of his duties as salesman he binds me to third parties.[1]

§ 41. *Same principle recognized in Roman law.* — The Digest gives us numerous illustrations to the same effect. If A. permits B. to assume the place of business agent in A.'s store, so that B. is looked upon by the public as agent, A. is bound by B.'s acts within the range of such implied agency. To constitute B. a mere *custos*, there must be a total prohibition of the right to contract. "Sed si in totum prohibuit cum eo contrahi, praepositi loco non habetur: cum magis hic custodis sit loco quam institoris."[2] "Quotiens in taberna ita scriptum fuisset, cum Januario servo meo geri negotium veto: hoc . . . . consecutum esse dominum constat, ne institoria teneatur."[3] The appointment and establishment of such an agent, without further publication, is sufficient to charge the principal with the agent's contracts. If the agent's authority is to be restricted, the restriction must be made public. "De quo palam proscriptum fuerit, ne cum eo contrahatur, is praepositi loco non habetur; non enim permittendum erit cum institore contrahere: sed, si quis nolit contrahi, prohibeat: ceterum qui praeposuit, tenebitur ipsa praepositione."[4] Under such circumstances the agent is regarded as legitimated, so far as concerns the public at large, as institor. If, however, there is no such set-

[1] See Kent's Com. 12th ed. 614; Dyer *v.* Pearson, 3 B. & Cr. 38; Hazard *v.* Treadwell, 1 Str. 506; Ramazotti *v.* Bowring, 7 C. B. N. S. 851; Prescott *v.* Flinn, 9 Bing. 19; Whitehead *v.* Tuckett, 15 East, 400; Farmers' & Mech. Bk. *v.* Butchers' Bk. 16 N. Y. 145; Gulick *v.* Grover, 32 N. J. L. 463; Kelsey *v.* Nat. Bk. 69 Penn. St. 426; Maddox *v.* Bevan, 39 Md. 455; Seago *v.* Martin, 6 Heisk. 308; St. Louis Pack. Co. *v.* Parker, 59 Ill. 23; Weaver *v.* Ogletree, 39 Ga. 586; Elsner *v.* State, 30 Tex. 524; Leake *v.* Sutherland, 22 Ark. 219. A note given by an agent for money which he represents to the payee is to be used in the business of the principal, but which is in fact applied by him to his own use, does not bind the principal, unless it appears either that the agent has express authority to execute the note, or that such authority may be implied from the general scope of the agent's employment, or from some custom of the business in which he is engaged. Hunt *v.* Chapin, 6 Lans. (N. Y.) 137.

The *institor's* position, in the Roman law, is hereafter fully discussed. See infra, § 799. It is worth while to notice how far the Romans went in establishing this form of agency, and where they stopped. They refused to approve of the centralization of business in one large establishment having branches in various localities, and they validated no contracts of agency based on such a relation. Within particular stores or shops, however, the institor, or salesman, could bind his principal.

[2] L. 11, § 6. D. XIV. 3. Infra, § 799.

[3] L. 47, pr. D. de peculio, XV. 1.

[4] L. 11, § 2. D. XIV. 3.

tlement of a person as institor, the agency must be announced by the principal. By the present Prussian law, the person who is permitted by another to act as agent for the latter in a store or shop, is to be regarded as duly authorized, and may be regarded by the public as having full powers to represent the principal in the particular line. This rule is declared by Thöl to be merely affirmatory of the principle of the Roman law just cited. Of course this depends upon whether the employment in question was assented to by the principal.

§ 42. *Acquiescence an authorization.* — If A. stand by while B. sells A.'s goods to C., A. being aware of the character of the transaction, and offering no objection, A. is bound by the sale. In other words, he who permits another to act for him in his presence, so that innocent third parties are affected, cannot afterwards, as against such third parties, dispute the agency.[1] The

[1] Heane *v.* Rogers, 9 B. & Cr. 577; Pickard *v.* Sears, 6 Ad. & El. 469; Pole *v.* Leash, 28 Beav. 662; Forsyth *v.* Day, 46 Me. 196; Kelsey *v.* Nat. Bk. 69 Penn. St. 426; Maddox *v.* Beavan, 39 Md. 485; Lewis *v.* Bourbon, 12 Kan. 186; St. Louis Packet Co. *v.* Parker, 59 Ill. 23; Darnell *v.* Griffin, 46 Ala. 520. Nor is this limited to sales in the owner's presence.

R. went to L. and requested him to purchase a small lot of paper for him (to make paper bags) of R. & Co. L. consented, and sent his confidential clerk with R. to R. & Co., and purchased the quantity of paper desired; the purchase was on credit, and charged to L., and when it fell due was paid by L. R. needed more paper, and he and L.'s clerk went again to R. & Co., and a second lot of paper was gotten on like credit as at first. This was delivered to R. at L.'s saloon, and a carrier's receipt was given for it in L.'s name. In a suit by R. & Co. *v.* L. for the price of this paper, L. deposed that the second lot of paper was gotten without any authority from him, and he knew nothing of it, and that it was not gotten for him or for his use, and moved the court to charge the jury, "That unless the defendant (L.) authorized by himself or his agent the purchase of the paper in question on the credit of the defendant (L.), then the defendant is not liable for it." Held, the refusal of this charge is error. Lawrence *v.* Randall & Co. 47 Alab. 240.

If a manufacturing company knowingly permit a person to sell goods in a storehouse with their name over the door, though in a town distant from their place of business, it is a circumstance which taken with others, such as that he sold their manufactured articles, and bought bacon and other country produce for them, must be considered as tending to prove the fact that he was acting as their agent. Gilbraith *v.* Lineberger, 69 N. C. 145. Where one permits another to hold himself out to the public as his agent to sell and buy certain kinds of goods for him, he is bound by the acts and contracts of such agent within the scope of his authority, but that authority does not extend to the borrowing of money or buying clothes for him-

principal is bound to exercise good faith in the choice of the agent, leaving it to parties dealing with the agent to see that the agent acts according to instructions. The Roman law lays peculiar emphasis on the duty of the principal to exercise diligence in selecting the agent, taking the position that when through the infidelity of the agent loss occurs, this loss should be ordinarily borne by the principal, from whom the appointment of the agent springs, rather than by an innocent stranger dealing with the agent. Of the principal it is declared *imputaturum sibi cur talem praeposuerit.* No matter how unlikely may have been the agent's bad faith, it is to be assumed by the principal, on the ground of his supposed *culpa in eligendo.*[1]

§ 43. *Appointment and limitation may be made by public notification.* — The appointment and instalment by the principal of the agent in a particular line of business are a sufficient notification of the agent's authority to conduct such business. If, however, it is desirable to limit the agent's powers, this may be done by due notification.[2] This may be to an individual, or to a series of individuals, by circulars, or by private address. Another method is by posting, or other form of advertisement, at an appointed place in the particular locality. The Roman law provides for this (*palam proscriptum*) under the following limitations: The advertisement must be *palam*, capable of giving notice. This involves (1) words so written or printed that they can be read by persons passing by; (2) posting in the proper business locality; and (3) the adoption of the local language. A notice so framed and so posted is regarded as accessible by everybody,[3] and hence ignorance of such language, or oversight of the notice, cannot, if the notice be thus posted, be set up.[4] If the notice at the time of the contract was defaced by rain or by the interference of strangers, or even by the *dolus* of the agent himself, a third party making such contract is not affected by the notice.[5] But the notice operates when the third party knows its contents, or when it was fraudulently removed or altered by him. "Sed si ipse institor decipiendi mei causa,

self. Ibid. See also Eagle Bank *v.* Smith, 5 Conn. 71.

[1] L. 1, § 4. L. 1, § 9. D. de exerc. act. See Thöl, Handelsrecht, I. 210.

[2] See Baltimore Steam Co. *v.* Brown, 54 Penn. St. 77.

[3] L. 6. L. 9, § 1. D. de juris et facti ignorantia (XXII. 6).

[4] L. 11, § 3. D. (XIV. 3).

[5] L. 11, § 4. D. cod.

detraxit, dolus ipsius praeponenti nocere debet, nisi particeps doli fuerit qui contraxit." [1] But a frequent variation by notice of the terms of the agent's (*institor's*) authority will be jealously scrutinized as tending to defraud the public. "Sed si alias cum alio contrahi vetuit, continua variatione, danda est omnibus adversus eum actio: neque enim decipi debent contrahentes." [2]

§ 44. *Proof of appointment may be circumstantial.* — As we will see more fully hereafter, the appointment of an agent may be established by circumstantial evidence.[3] But where there is a writing appointing an agent, that writing must be produced or accounted for.[4] And the agent cannot by his own declarations establish the agency. He must be called as a witness in the case, as his statements are only secondary evidence.[5]

2. *To execute a Special Mandate.*

§ 45. *Authority to execute a special mandate may be oral.* — We here pass from continuous to isolated services; from the general to the special agent. In the case we have last noticed,

[1] L. 11, § 4. D. eod.

[2] L. 11, § 5. D. eod. Where one who sold goods on his own account failed, and afterwards sells goods at the same place, as agent for another, it is proper that he should in some way notify the public of the change in the nature of his business. *It may be*, that if no such notice is given, a person who ignorantly gives credit to the agent in the belief that he is acting upon his own account, would be entitled to set up such a defence against the principal. Such notice need not be necessarily given by publication in the newspapers; any equivalent manner of making the same public will suffice. Kerchner *v.* Reilly, 72 N. C. 171.

[3] See infra, § 121 *et seq.*; and see Riley *v.* Packington, L. R. 2 C. P. 536; Butler *v.* Hunter, 7 H. & N. 826; Sheets *v.* Selden, 2 Wallace, 177; Streeter *v.* Poor, 4 Kans. 412; Briggs *v.* Taylor, 35 Vt. 57; Fay *v.* Richmond, 43 Vt. 25; Butman *v.* Bacon, 8 Allen, 25; Brdley *v.* Poole, 98 Mass. 169; Clough *v.* Whitcomb, 105 Mass. 482; Stevenson *v.* Hoy, 43 Penn. St. 260; Seeds *v.* Kahler, 76 Penn. St. 268; Larter *v.* Am. Soc. 1 Rob. (N. Y.) 598; Stonington Bk. *v.* Davis, 1 M'Carter (N. J.), 286; Darst *v.* Slevins, 2 Disn. 473; Webber *v.* Brown, 38 Ill. 87; Dutcher *v.* Beckwith, 45 Ill. 460; Clark *v.* M'Graw, 14 Mich. 139; Botsford *v.* Kleinhaus, 29 Mich. 332; Sawyer *v.* R. R. 22 Wisc. 403; Lyons *v.* Thompson, 16 Iowa, 286; Mayer *v.* Ins. Co. 38 Iowa, 304; Norton *v.* Bull, 43 Mo. 113; Patterson *v.* Keystone, 30 Cal. 360; Neal *v.* Patten, 40 Ga. 363; Gimon *v.* Taylor, 38 Ala. 208; Hinderer *v.* State, 38 Ala. 815; Pope *v.* Chafee, 14 Rich. S. C. 69; Hollingsworth *v.* Holshausen, 25 Texas, 628; Gillig *v.* Lake Bigler Co. 2 Nev. 214.

[4] Neal *v.* Patten, 40 Ga. 363.

[5] Fairlee *v.* Hastings, 10 Ves. 126; Streeter *v.* Poor, 4 Kans. 412; Mapp *v.* Phillips, 32 Ga. 72; Brigham *v.* Peters, 1 Gray, 139. Infra, § 163.

there is no direction to do a particular thing; but there is an appointment to a permanent office or service which requires that the particular thing should be done. In the case now before us, there is a special appointment to do the particular thing. In the former case there is only an implied and general direction to do the particular thing; in the latter case the direction is always express and specific. Hence it is that while in the former case the question of the form of authorization does not come up, in the latter case it has been discussed whether a special form is not necessary. But the necessities of business have long since decided that no such form is necessary; except in the cases, hereafter to be noticed, of an agency under seal. A mere verbal direction, express or implied, written or oral, is ordinarily sufficient to authorize one person, with the exception just mentioned, to act for another.[1] And the fact of agency may be established by the habits and course of business of the principal.[2]

§ 46. Even instruments in writing (*e. g.* bills and notes) may be signed by an agent, without written authority, so as to bind the principal.[3] Whether the evidence be sufficient to prove agency is a question for the jury. Hence, where there is evidence of agency, such evidence, though not full and satisfactory, should be submitted to the jury, who are the exclusive judges of its weight. The court, however, if there is no evidence of agency, must so rule.[4] Verbal authority is sufficient for a person to act as agent for a lessor in the collection of rent, or in demanding its payment.[5]

[1] 2 Kent's Com. 12th ed. 614; Harrison *v.* Jackson, 7 T. R. 207; Picket *v.* Pearsons, 17 Vt. 470; Franklin *v.* Ins. Co. 52 Mo. 461; Mechanics' Bk. *v.* Nat. Bk. 36 Md. 5; Lamb *v.* Irwin, 69 Penn. St. 436; Darnell *v.* Griffin, 46 Ala. 520; Whitman *v.* Bolling, 47 Ga. 125; Underwriters' Agency *v.* Seabrook, 49 Ga. 563; Goldrich *v.* Willits, 52 N. Y. 612; Farmers' & Mech. Bk. *v.* Butchers' & Drovers' Bk. 16 N. Y. 145; Howard *v.* Norton, 65 Barb. 161; Pinnix *v.* McAdoo, 68 N. C. 56.

[2] Ibid.; Franklin *v.* Globe Ins. Co. 52 Mo. 461. See Robinson *v.* Walton, 58 Mo. 380. Supra, § 44.

[3] Infra, § 213; Paley's Agency, 160; Story's Agency, § 50; Bank U. S. *v.* Dandridge, 12 Wheat. 64; Rawson *v.* Curtis, 19 Ill. 456; Dyer *v.* Pearson, 3 B. & Cr. 38; Whitehead *v.* Tuckett, 15 East, 409.

[4] Mechanics' Bk. *v.* Nat. Bk. 36 Md. 5; Lamb *v.* Irwin, 69 Penn. St. 436. See, however, Howard *v.* Norton, 65 Barb. 161.

[5] Sheets *v.* Selden's Lessee, 2 Wallace, 177. In an action for the conversion of two bales of cotton, bought by plaintiff of a third person, which a short

But something more than authority in collateral matters is necessary.[1] Thus, in a Tennessee case, the evidence was that during the absence of an attorney from home his wife received and opened a letter addressed to him, containing a draft payable to his order for collection. The drawee paid the draft to the wife. It did not appear that the wife had any general or special authority to act for her husband in his professional matters, but the attorney had placed some individual claims for collection in the hands of the defendant, and instructed him to pay over any moneys that should come to his hands for the attorney to his wife. It was ruled that the wife had no authority to receive payment of the draft, and the drawee was not discharged.[2]

§ 47. *Sending an article to a known agent is an authorization of such agent.* — Goods, to take an ordinary illustration, are sent to an auction room; and the presumption is that they are sent for the auctioneer to sell as the agent of the owner. Or, a vessel in want of stores is turned over by the owner to a provision broker; and the presumption is that the owner employed the provision broker to provision the ship. Or, a person having merchantable goods sends them to a broker whose business is to sell such goods; and the presumption is that this is an authority to the broker to sell.[3]

time before the sale is shown to have belonged to the defendant, a statement by defendant to plaintiff that "the trade was a good one," and that "he laid no claim to the cotton," justifies the inference that defendant had either sold the cotton to plaintiff's vendor, or had authorized him to sell it. Darnell *v.* Griffin, 46 Ala. 520.

[1] Sanderson *v.* Bell, 2 C. & M. 313.

[2] Day *v.* Boyd, 6 Heisk. 458. If the supervisor of a railroad, who has authority to purchase cross-ties for his principal, contracts with a party for their purchase, stating to the seller that his principal wants them to lend to another railroad to which it had promised them, and the cross-ties are furnished and put on the cars of the road whose agent has thus contracted for them, such road is liable for their payment, notwithstanding the statement as to the purpose for which they were purchased be not true, and the real fact was that the supervisor was the agent of another party in making the purchase. The seller is not affected by the truth or falsehood of the statement. S. W. R. R. Co. *v.* Knott, 48 Ga. 516.

[3] 2 Kent's Com. 12th ed. 621; Doubleday *v.* Kress, 60 Barb. 181; Pickering *v.* Bush, 15 East, 38; Saltus *v.* Everett, 20 Wend. 267; Williams *v.* Walker, 2 Sandf. 225; Whitelock *v.* Waltham, 1 Salk. 157. A person delivering to another a paper bearing his signature with blanks unfilled therein, which he must necessarily expect will be filled to make it a completed instrument, gives implied authority to the person receiving it to fill the blanks;

§ 48. *But to bind principal under seal an authority under seal is necessary.* — The principle seems to be that where the law requires a certain peculiar solemnity to pass rights from person to person, this solemnity should be observed as much when the right is passed from the principal to the agent as when it is passed from the agent to the purchaser.[1] One partner, even though the articles of copartnership are under seal, cannot bind the others by seal, as to matters requiring seal, without special authority under seal,[2] though it is otherwise as to the release of a debt.[3]

§ 49. Even where a deed is executed, but with blanks to be afterwards filled up by the grantor, these blanks cannot be filled up by parol authority;[4] though a schedule or inventory may be attached, by parol authority, to an executed deed.[5] So it has been held that a subsequent ratification by the principal will save the unauthorized filling up of blanks.[6] And a signing and sealing with the principal's name, by his authority, express or implied, by his agent, in his presence, is valid;[7] *a fortiori* a filling up of blanks in his presence.[8]

and if they are filled fraudulently the maker will be liable thereon to *a bonâ fide* purchaser for value without notice. Abbott *v.* Rose, 62 Me. 194.

[1] Horsley *v.* Rush, 7 T. R. 209; Williams *v.* Walsby, 4 Esp. N. P. C. 220; Steiglitz *v.* Eggington, 1 Holt N. P. C. 141; Hunter *v.* Parker, 7 Mees. & W. 322; Berkley *v.* Hardy, 5 B. & C. 355; Banorgee *v.* Hovey, 5 Mass. R. 11; Wheeler *v.* Nevins, 34 Me. 54; Emerson *v.* Man. Co. 12 Mass. 240; Despatch Packet *v.* Man. Co. 12 N. H. 205; Van Ostrand *v.* Reed, 1 Wend. 424; Blood *v.* Goodrich, 9 Wend. 68; *S. C.* 12 Wend. 525; Hanford *v.* McNair, 9 Wend. 54; Lawrence *v.* Taylor, 5 Hill, 113; Cooper *v.* Rankin, 5 Binn. 613; Vanhorne *v.* Frick, 6 S. & R. 90; Gordon *v.* Buckley, 14 S. & R. 525; McNaughton *v.* Partridge, 11 Ohio, 223; Delias *v.* Cawthorne, 2 Dever. 90; Davenport *v.* Sleight, 1 Dev. & Bat. 381; Harshaw *v.* M'Kasson, 65 N. C. 688; Rowe *v.* Ware, 30 Ga. 278; Scheutze *v.* Bailey, 40 Mo. 69; though see as to Illinois, Paine *v.* Weber, 47 Ill. 41; Hefner *v.* Palmer, 67 Ill. 161.

[2] Harrison *v.* Jackson, 7 T. R. 207; Elliott *v.* Davis, 2 Bos. & P. 338; Story on Part. § 117; 2 Kent Com. 47.

[3] 3 Kent's Com. 48; Story on Part. § 120.

[4] Hibblethwaite *v.* M'Morine, 6 Mees. & W. 200.

[5] See England *v.* Downs, 2 Beav. 522; Keyes *v.* Brush, 2 Paige, 311; Halsey *v.* Whitney, 4 Mass. 219.

[6] Skinner *v.* Dayton, 19 Johns. 512; Cady *v.* Shepherd, 11 Pick. 400.

[7] Ball *v.* Dunstersville, 4 T. R. 313; King *v.* Longnor, 4 B. & Adol. 647; 1 N. & M. 576; Harrison *v.* Elvin, 3 Ad. & El. 117; Hibblethwaite *v.* M'Morine, 6 Mees. & W. 200; Hanford *v.* McNair, 9 Wend. 56; Gardner *v.* Gardner, 5 Cush. 483.

[8] Hudson *v.* Revett, 5 Bing. 368. The delivery by an owner of stock of

§ 50. If an agent, it may be added, chooses to execute an instrument unnecessarily under seal, the fact that the agent was himself appointed only by parol does not invalidate such instrument as a simple contract.[1]

§ 51. *Yet a contract of sale by an agent, not appointed by writing under seal, may convey an equitable title.* — Suppose an agent, known to be recognized by his principal as such, and to have been solemnly appointed for the purpose, though not by a writing under seal, should sell or agree to sell his principal's lands for a fair price and to a *bonâ fide* purchaser, and should receive the purchase money in whole or in part? In such case a court of equity will sustain a bill by the purchaser against the principal for a specific performance of the sale.[2] And by enjoying the fruits of such a contract the principal is estopped from disputing it.[3]

§ 52. *Power of attorney under seal may be revoked by parol.* — This is a necessity of business; as otherwise an agent, after notice to himself and to every one else, that his principal had directed him to surrender his agency, and forbidden his proceeding as agent, might go on to bind his principal simply because the principal, in the notice, had omitted the formality of a seal.[4]

a power of attorney to transfer, executed in blank, with the certificates, is evidence of an implied authority to fill up the power with the name of an attorney to make the transfer. German, &c. Association *v.* Sendmeyer, 50 Penn. St. 67.

[1] Hunter *v.* Parker, 7 Mees. & W. 322; Despatch Line *v.* Bellamy, 12 N. H. 205; Lawrence *v.* Taylor, 5 Hill, 107; Worrall *v.* Munn, 1 Selden, 229; Long *v.* Hartwell, 34 N. J. L. 116; Cooper *v.* Rankin, 5 Binn. 613; Ledbetter *v.* Walker, 31 Ala. 175. See this position, however, qualified in Baker *v.* Freeman, 35 Me. 485.

[2] Horsley *v.* Rush, 7 T. R. 208; Emmerson *v.* Heelis, 2 Taunt. 28; Clinan *v.* Cooke, 1 Sch. & L. 22; Berkeley *v.* Hardy, 5 B. & Cress. 355; Lawrence *v.* Taylor, 5 Hill, 107; Baum *v.* Dubois, 43 Penn. St. 260; McNaughten *v.* Partridge, 10 Ohio, 223; Ledbetter *v.* Walker, 31 Ala. 175; Groff *v.* Ramsey, 19 Minn. 44; Pringle *v.* Spaulding, 53 Barb. 17. Though see, as to mere verbal agreements, *contra*, Duffy *v.* Hobson, 40 Cal. 240; Treat *v.* De Celis, 41 Cal. 202; Cain *v.* Heard, 1 Cold. 163. See infra, § 438. When a sealed instrument, executed by an agent, is void as a specialty for want of an authority under seal, but would be good if not sealed, the seal may be disregarded as surplusage; and the authority to execute the instrument may be proved by acts of subsequent ratification. Shentze *v.* Bailey, 40 Mo. 69.

[3] Cady *v.* Shepherd, 11 Pick. 400; Swan *v.* Stedman, 4 Metc. 548; Holbrook *v.* Chamberlin, 116 Mass. 155. Infra, § 89.

[4] Brookshire *v.* Brookshire, 8 Ired 74. See Story on Agency, § 49.

A fortiori, is this the case with a written authority not under seal? [1]

§ 53. *The statute of frauds, which requires that to make or surrender estates in land for over three years by an agent, the agent's authority should be in writing, does not apply to contracts for sale.* — For an agent to sign the instrument creating a lease or other instrument in land, it is necessary that he should have written authority; but it is otherwise as to agreements or contracts for sale.[2] Purchases of land may be made by agents not appointed by writing.[3]

3. *By Joint Principals.*

§ 54. *Joint principals (unless partners) must concur in appointment of agent.* — It matters not whether such principals are tenants in common or joint tenants. Whatever may be their interests, no one of them, unless there be a partnership between them, can appoint an agent who can bind the interest of the others.[4] Even where A. the owner of parcel No. I., and B. the owner of parcel No. II., concur in appointing by a single power of attorney C. as their agent, this does not lump parcel No. I. and parcel No. II. together; but they must be kept separate, subject to separate instructions, and accounted for separately to the principals.[5] But, as will hereafter be seen, if merchants unite in sending a mass of goods to a common factor, and he sells such goods in a mass, the profits and losses must be divided *pro rata*.[6]

§ 55. But where one joint principal appoints an agent, and the others acquiesce in the appointment, the agency enures to all. Thus, where one jointly interested with others in a claim with the authority and consent of the others employs an agent to collect the claim and to account to him therefor, he stands in the re-

[1] Coles *v.* Trecothick, 9 Ves. 250; Botsford *v.* Burr, 2 Johns. Ch. 416; Clinan *v.* Cooke, *supra*.

[2] 5 Vin. Abr. 524; Clinan *v.* Cooke, 1 Sch. & Lef. 22; Coles *v.* Trecothick, 9 Ves. 250; Higgins *v.* Senior, 8 Mees. & W. 844; Lawrence *v.* Taylor, 5 Hill, 107; Mortimer *v.* Cornwell, 1 Hoff. Ch. 351; Riley *v.* Minor, 29 Mo. 439; Rottman *v.* Wasson, 5 Kans. 552; Long *v.* Hartwell, 34 N. J. 116.

[3] See Emmerson *v.* Heelis, 2 Taunt. 28; Kenneys *v.* Proctor, 1 Jac. & W. 350.

[4] Story's Agency, § 39.

[5] Coope *v.* Eyre, 1 H. Bl. 37; Hoar *v.* Dawes, Doug. 371; Clarke *v.* Tipping, 9 Beavan, 284; Johnson *v.* O'Hara, 5 Leigh, 456.

[6] Maline, Lex Merc. 80; Corlies *v.* Cumming, 7 Cowen, 154.

lation of trustee to the other claimants, and an action is properly brought in his name alone against the agent to recover the avails of the collection.[1] And the agent of a partnership is not the agent of the partners individually, but of the partnership as a whole.[2]

§ 56. *Agent appointed by two principals with several interests may act as referee for the two.* — It may happen that two principals, with separate and independent interests, may, for the purposes of convenience, unite in appointing a common agent. If this is done knowingly, with the intention that the agent should represent each, he is authorized, in the absence of specific instructions, and when there is no opportunity of resorting to his principals for advice, to adjust the relations of the two.[3] Thus, where the same person is made agent of two mines in the same vicinity, and it becomes necessary for one to deal with the other, he must be presumed to have the same power to act for both that would be possessed if there were two agents acting separately, and may dispose of property in the same way; and such a double authority would dispense with such formalities as could not be complied with where one man acts for both companies.[4] It is therefore held that where an agent is empowered to use the supplies of one company for another, he may use them as well in exchange for articles necessary to be purchased, as *in specie;* and where timber owned by one company was used to obtain powder for the other, which could only be done by settling also an outstanding powder account, this was held within his discretion.[5]

4. *By Corporation.*

§ 57. *Corporations entitled to the same right of action as individuals. Roman law.* — A corporation, according to the Roman law, is entitled to the same liberty of action, in regard to agency, as is a natural person. The law, whether by decree of the prince, or by legislative action, establishes a juridical person, consisting of one or more natural persons; and these one or more natural persons are constituted the juridical person or *corporation*, for the purpose of stimulating public industry, of developing

[1] Noe *v.* Christie, 51 N. Y. 271.
[2] Johnston's Ex'r *v.* Brown, 18 La. An. 330.
[3] Infra, § 244, 513, 715.
[4] Adams Min. Co. *v.* Senter, 26 Mich. 73.
[5] Ibid. See infra, § 244, 513.

the resources of the state, and of conducting municipal, benevolent, or literary interests. The very purpose of their formation as a corporation requires that they should be invested with full business privileges, and subjected to full business liabilities. They are established to do a work which a natural person could not well do; to deprive them of either the capacity or the credit of a natural person would prevent them from doing this work. Hence when the law creates a corporation, this corporation, unless limited by its charter, can do within its prescribed range whatever a natural person *mutatis mutandis* could do.[1] Out of its prescribed range, a corporation, it is true, can do or receive nothing.[2] But within its range, the rights and liabilities of agency apply to it, if there be a distinction, even more signally than they do to persons capable of acting by themselves. For a person capable of conducting business on his own account can sometimes say: "This I reserved to do myself; this could not be supposed to have been committed to another." But a corporation can only act through agents.[3] Its directors, as well as its officers and servants, are its agents. If it has no constitution, then the will of its members is to be treated as the will of the corporation; those not coming to a summoned meeting not being counted.[4] If there is a difference of opinion, a majority decides.[5]

§ 58. *By old English law corporations could only bind themselves by resolutions under seal.* — By a curious barbarism of old English law, a corporation could only bind itself by writings under seal. Were this limitation logically applied, a corporation could never bind itself at all; for as the corporation derives its government by processes not under seal, and as its government consists of persons who are its agents, a corporation could not be bound by the most solemn acts of its governors, since these governors had not been appointed by instruments under seal executed by itself. But absurd and inconvenient as is this

[1] Windscheid, Pandekten, § 58; Savigny, II. 265–274; Bluntschi, deutsch. Privatr. § 34.

[2] L. 10, de I. F. 49. 14.

[3] See, also, to this point Whart. on Neg. § 280; Lattomus *v.* Ins. Co. 3 Houst. 405.

[4] Windscheid, § 59.

[5] L. 19. D. ad munic. (50. 1). L. 160, § 1. D. de R. I. (50. 17). There is no lack of power in a mining company to buy timber, and a purchase of it by a general agent is within his powers; and a sale of it, made by him, will be upheld. Adams Min. Co. *v.* Senter, 26 Mich. 73.

fallacy, it was for many years revered as an essential part of the English common law.[1] It was only by slow stages that it has been repudiated, and the doctrine gradually reached that a seal is no longer necessary to the appointment of a corporation agent.[2]

§ 59. *In the United States a corporation may appoint an agent by parol, and such agent may by parol bind the corporation.* — In this country it has been uniformly held that in all cases within its range, a corporation has, in matters of agency, the same liberty of action as belongs to a natural person capable of business.[3] In other words, as to all action within such range, a corporation is bound by the parol contracts of its agents duly constituted, so far as such contracts are in themselves capable of binding.[4] Nor is a seal necessary for the appointment of the agents even to execute instruments under seal.[5]

So a corporation is liable for the tortious acts of its agents to

[1] Davies, 121; Plowd. 91 *b*; 3 P. Wms. 423.

[2] See Manby *v.* Long, 3 Lev. 107; R. *v.* Bigg, 3 P. Wms. 419; Yarborough *v.* Bank of England, 16 East, 6; Smith *v.* Gas Light Co. 3 Nev. & Man. 771; *S. C.* 1 Ad. & El. 526; Reuter *v.* Electric Tel. Co. 6 El. & Bl. 346; Nicholson *v.* Bradfield, L. R. 1 Q. B. 620; South of Ireland Colliery *v.* Waddles, L. R. 3 C. P. 403; In re Contract Co. L. R. 8 Eq. 14.

[3] See Angell on Corpor, § 284.

[4] 2 Kent's Com. 12th ed. 289; Bank of Columbia *v.* Patterson, 7 Cranch, 299; Fleckner *v.* Bank U. S. 8 Wheaton, 338; Osborn *v.* Bk. U. S. 9 Wheat. 738; Sheldon *v.* Fairfax, 21 Vt. 102; Gassett *v.* Andover, 21 Vt. 343; Maine Stage Co. *v.* Longley, 14 Me. 444; Many *v.* Beekman Iron Co. 9 Paige, 188; Peterson *v.* Mayor, 17 N. Y. 449; Chestnut Hill Turnpike Co. *v.* Rutter, 4 S. & R. 16; McGargle *v.* Hazleton Co. 5 Watts & S. 436; Hamilton *v.* Lycoming Ins. Co. 5 Barr, 344; Lattomus *v.* Ins. Co. 3 Houst. 405; Palmer *v.* Ins. Co. 20 Ohio, 537; Buckley *v.* Briggs, 30 Mo. 452; Merrick *v.* R. R. 11 Iowa, 74; Maher *v.* Chicago, 38 Ill. 366; Rockport R. R. *v.* Wilcox, 66 Ill. 417; Riley *v.* Forsee, 57 Mo. 390; Kitchen *v.* R. R. 59 Mo. 514; Butts *v.* Cuthbertson, 6 Ga. 196. As to liabilities of banks for acts of agents, see infra, § 670.

[5] Maine Stage Co. *v.* Longley, 14 Me. 444; Warren *v.* Ocean Ins. Co. 16 Me. 444; Burrill *v.* Nahant Bank, 2 Metc. 163; Commercial Bk. *v.* Kortright, 22 Wend. 348; Osborn *v.* Bank U. S. 9 Wheat. 738; Bank U. S. *v.* Dandridge, 12 Wheat. 64; Eastman *v.* Coos Bank, 1 N. H. 26; *contra*, Arnold *v.* Mayor, 4 Man. & Gr. 860. See Smith *v.* Gas Light Co. 1 Ad. & El. 526.

The entry upon the records of a corporation of the resolution appointing an agent is not essential to the validity of the appointment, unless the charter or by-laws absolutely require such entry to be made. Smiley *v.* Mayor & A. of Chattanooga, 6 Heisk. 604; Bank U. S. *v.* Dandridge, 12 Wheat. 64; Commer. Bk. *v.* Kortright, 22 Wend. 348.

the same extent as would be a natural person under the same circumstances.[1]

II. ACCEPTANCE OF AGENT.

§ 60. *Agent must expressly or impliedly assent to appointment.* — The Roman law, in all cases in which the promise of the agent (procurator) to do a particular thing has to be formally given, requires this promise to be attested by the solemnities required for the general verification of promises; though the acceptance by an agent of an instrument of attorney may be inferred from his acting under such instrument, without proof of any formal assent. "Procurator autem vel omnium rerum vel unius rei esse potest constitutus vel coram vel per nuntium vel per epistulam: quamvis quidam, ut Pomponius scribit, non putent unius rei mandatum suscipientem procuratorem esse: sicute ne is quidem, qui rem perferendam vel epistulam vel nuntiam perferendum suscepit, proprie procurator appellatur. Sed verius est eum quoque procuratorem esse qui ad unam rem datus."[2] "Invitus procurator non solet dari. Invitum accipere debemus non eum tantum qui contradicit, verum eum quoque qui consensisse non probatur."[3] The canon law goes further, holding that when a procurator knowingly and without expressions of dissent accepts a commission, he is bound conscientiously to execute it, though no words pass and no formal assent is given.[4] By the Prussian (North German Code) this provision is accepted, it being there enacted that in cases where the law requires written consent, the communication of a written power of attorney (Vollmacht) from one person to another, and the acceptance of it by the latter, even though such acceptance be tacit, is a sufficient compliance with the law. When a power is sent to an absent person, it is necessary, in order to bind him, either to prove his acceptance of the power or his use of it.[5] By our own law acceptance is in like manner inferred from the undertaking of the mandate. Even when a person appointed as agent of another acts under the appointment, there is a tacit acceptance, although he writes to his principal declining the agency.[6]

[1] Angell & Ames on Corporations, § 388; and see, for a series of illustrations of such suits, Wharton on Neg. § 250, 271, 798 *et seq.*

[2] L. I. D. de proc. et def. III. 3.

[3] L. 8, § 1, eod.

[4] Cl. I. de procur. (1. 10.) See Koch, Forder. III. 536.

[5] Koch, *ut supra.* So, also, Code Civil, art. 1985.

[6] George *v.* Sandel, 18 La. An. 535.

III. RATIFICATION OF AGENCY.

1. *Conditions of Ratification.*

§ 61. *In Roman law ratification includes all modes of adoption of another's act.* — The Roman law, on the topic before us, is of wider application than our own. *Ratihabitio — ratum habere* — includes the adoption and assumption of a stranger's acts as well as those of an agent. Nor is ratification limited to the assumption of a legal right. It extends to all acts whatever, whether they may be the basis of a legal suit or not.[1]

§ 62. *In our own law the act ratified must have been in some way related to the person ratifying.* — It has been sometimes said that the act ratified must have been done by one purporting to be an agent of the person ratifying.[2]

§ 63. It is, however, enough if the act ratified were done by one claiming to represent persons of the character of the ratifier.[3] Thus, a contract of insurance executed for the benefit of parties in interest, not naming them, may be ratified by such persons, so as to be retrospective.[4] And even the acts of a self-constituted agent may be ratified, though there is no pretence that the agent was authorized.[5]

[1] See Beekhaus über die Ratihabition der Rechtsgechäfte ; Vangerow, I. § 88; Seuffert, die Lehre von der Ratihabition ; Windscheid, Pandekt. § 74.

[2] Saunderson *v.* Griffiths, 5 B. & C. 909 ; Vere *v.* Ashby, 10 B. & C. 288; Wilson *v.* Turman, 6 M. & G. 242; Lucena *v.* Crawford, 1 Taunt. 325; Ancona *v.* Marks, 7 H. & N. 686; Watson *v.* Swann, 11 C. B. N. S. 756; Collins *v.* Swan, 7 Robert. (N. Y.) 623.

[3] Foster *v.* Bates, 12 M. & W. 226; Hill *v.* Piekergill, 1 B. & B. 282.

[4] Watson *v.* Swann, 11 C. B. N. S. 756. See infra, § 80, 356.

[5] "The contract must be made with a person capable of being ascertained at the time when the contract is made." Watson *v.* Swann, 11 C. B. N. S. 771, judgment of Willes, J. A contract, therefore, cannot be ratified by a person not in existence at the time the contract is made. See Kelner *v.* Baxter, L. R. 2 C. P. 174, 186. See, as to companies not being liable for acts of promoters, 1 Lindley, Partnership, 2d ed. 400. But though "the law obviously requires that the person for whom the agent professes to act must be a person capable of being ascertained at the time, it is not necessary that he should be named; but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound by the contract." Watson *v.* Swann, 11 C. B. N. S. 771, per Willes, J. Thus, a ratification may be valid where the agent professes to act for persons filling a certain character, although the actual persons are not then ascertained, or are unknown to him. Foster *v.* Bates, 12 M. & W. 226. A. entered into a contract with

§ 64. From what has just been said, it follows that the person for whom the ratifying agent purports to act must be one who is in contemplation of law existent at the time of the ratifying act.[1] We have this illustrated in an English case, decided in 1866.[2] The plaintiff, the owner of an assembly room, sold to certain of the directors of a projected hotel company, and the directors agreed to purchase, on behalf of the company, the extra stock on the plaintiff's premises. The stock was accordingly received by the company, and consumed in the business of the hotel. A few days after the purchase, the directors met and passed a resolution that the arrangement entered into by the defendants on behalf of the company, for the purchase of stock, was thereby ratified. There was also a subsequent ratification by the company. The articles of association were not duly stamped, nor had the company obtained a certificate of incorporation when the above agreement was entered into between the plaintiff and defendants. At the trial a verdict was entered for the plaintiff, subject to leave reserved to the defendants to move to enter a nonsuit, and for a new trial on the ground of misdirection on the part of the learned judge "in not allowing witnesses to be called to contradict the plaintiff as to the defendants' personal liability." Erle, C. J., in refusing the rule, pointed out that if the company had been in existence at the time the contract was entered into, there would be no doubt that the defendants would have signed as agents. He then said, as to the point immediately before us: "As there was no company in existence at the time of the agreement being made, the agreement would be wholly inoperative, unless it were held to be binding on the de-

T. on behalf of an intestate's estate. After the contract was made, P. took out letters of administration. It was held that P. might sue T. upon the contract, for "the sale was made by a person who intended to act as an agent for the person, whoever he might happen to be, who legally represented the intestate's estate, and it was ratified by the plaintiff after he became administrator; and when one means to act as agent for another, a subsequent ratification by the other is always equivalent to a prior command. Nor is it any objection that the intended principal was unknown at the time to the person who intended to be the agent." Ibid. 233, *per curiam*. See Thorpe *v.* Stallwood, 5 M. & G. 760; 12 L. J. 241, C. P.; Watson *v.* Swann, 11 C. B. N. S. 756, 769; 31 L. J. 210, 213, C. P.; Leake Contracts, 269; and compare Arnould Marine Insurance, 3d ed. 1033; Dicey on Parties, 132.

[1] Stainsby *v.* Frazer's Co. 3 Daly, 98.

[2] Kilner *v.* Banter, L. R. 2 C. P. 174.

fendants personally. The cases referred to in the course of the argument fully bear out the proposition that where a contract is signed by one who professes to be signing 'as agent,' but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby; and a stranger cannot by a subsequent ratification relieve him from that responsibility." . . . . "When afterward the company came into existence it was a totally new creature, having rights and obligations from that time, but no rights or obligations by reason of anything which might have been done before. It was once, indeed, thought that an inchoate liability might be incurred on behalf of a proposed company, which would become binding on it when subsequently formed; but that notion was manifestly contrary to the principles upon which the law of contract is founded. There must be two parties to a contract; and the rights and obligations which it creates cannot be transferred by one of them to a third person who was not in a condition to be bound by it at the time it was made."[1]

§ 65. *Persons ratifying must be cognizant of the facts.* — The person ratifying must have had knowledge of all essential facts, for otherwise the ratification, though applicable to an assumed condition, is not applicable to that claimed to be ratified.[2] He

[1] See Gunn *v.* London & Lancashire Fire Insurance Company, 12 C. B. N. S. 694; Payne *v.* New South Wales Coal, &c. Company, 10 Ex. 283; Higgins *v.* Senior, 8 M. & W. 334.

[2] Davidson *v.* Stanley, 2 M. & G. 921; Horsall *v.* Fauntleroy, 10 B. & C. 909; Bell *v.* Cunningham, 3 Peters, 69; Owings *v.* Hull, 9 Peters, 607; Holderness *v.* Baker, 44 N. H. 414; Copeland *v.* Insurance Co. 6 Pick. 202; Dickinson *v.* Conway, 12 Allen, 487; Combs *v.* Scott, 12 Allen, 493; Day *v.* Holmes, 103 Mass. 306; Lester *v.* Kinne, 37 Conn. 8; Hankin *v.* Baker, 46 N. Y. 660; Pittsburg R. R. *v.* Gazzam, 32 Penn. St. 340; Walters *v.* Munroe, 17 Md. 150; Adams Ex. Co. *v.* Trego, 35 Md. 419; Maxcy *v.* Heckthorn, 44 Ill. 437; Manning *v.* Gasharie, 27 Ind. 399; Hardeman *v.* Ford, 12 Ga. 205; Mapp *v.* Phillips, 32 Ga. 72; Mummy *v.* Haggerty, 15 La. An. 268; Delaney *v.* Levy, 19 La. An. 251; Billings *v.* Morrow, 7 Cal. 171; Williams *v.* Storm, 6 Cold. 303; Tedrick *v.* Rice, 13 Iowa, 214; Humphrey *v.* Havens, 12 Minn. 298; Dodge *v.* M'Donnell, 14 Wisc. 535; Ætna Ins. Co. *v.* Iron Co. 21 Wisc. 458; Com. Bk. *v.* Jones, 18 Tex. 81. Infra, § 614.

The respondent authorized an agent to negotiate for the sale of certain lands belonging to him, among which was a lot known as the Potter lot, and to sell the same on his consent. The agent agreed by parol to sell the lands, including the Potter lot, and the respondent received the money for the

must also be *capax negotii* when ratifying.[1] But if no suppression is proved, and the facts are open to him, he will be presumed to be duly informed.[2]

§ 66. *Principal ratifying agent's act loses all claim for damages against agent.* — Supposing the principal is aware of the relations of the case;[3] then, by ratifying the agent's act, he loses all claim against the agent for damages caused by the latter's interference.[4]

§ 67. *A mere assumption, however, of the agent's act, in order to prevent greater mischief, will not ratify as against the agent.* — An agent may put his principal in such a condition that the latter must adopt, as a choice of evils, the agent's unauthorized act. In such case the principal by this course does not lose his remedy against the agent. Thus, in a Tennessee case, an agent for the collection and transmission of a sum of money being instructed by his principal to remit by express, purchased a check drawn by parties in good standing and credit on New York and forwarded it to the principal. The principal sent the check to New York for payment, but before it was cashed the drawers became insolvent, and the check was dishonored. It was ruled by the supreme court that the agent having violated his instructions in regard to the mode of transmitting the money rendered himself liable to his principal for the loss incurred, and sending the check to New

same, and held the same when, some time after, a demand was made upon him by the purchaser for a conveyance of the Potter lot, and still retained the same. The respondent, however, did not know at the time he received the money that the Potter lot was included by the agent in the sale; and on the trial denied that it was so included, except upon certain conditions not complied with by the petitioner. Held, that the agreement of the agent for the sale of the Potter lot was neither authorized nor ratified. Lester *v.* Kinne, 37 Conn. 8.

[1] McCracken *v.* San Francisco, 16 Cal. 591; Bird *v.* Brown, 4 Exch. 786.

[2] Meehan *v.* Forrester, 52 N. Y. 277.

A. stored corn with B., who, as A. alleged, sold it without authority. All of the purchase money, except the amount of a purchase made by C., was tendered to A. by B., and at the same time A. was informed that all of the corn had been sold; no special mention, however, was made of the sale to C. A. accepted the money tendered. Held, a ratification of all the sales, including that to C. Seago *v.* Martin, 6 Heisk. 308.

[3] See supra, § 65.

[4] Paley's Agency, 31, 171, 329; Thorndike *v.* Godfrey, 3 Greene, 429; Cairnes *v.* Bleecker, 12 Johns. 300; Owings *v.* Hull, 9 Peters, 607; Smith *v.* Cadogan, 2 T. R. 188, note.

York was no ratification by the principal of the act of the agent in buying the check.[1]

§ 68. *Principal after ratification makes himself retroactively liable even for torts.* — He, as well as the opposite contracting party, is subjected to retrospective liability both for contracts and torts.[2] But the ratification, to charge the principal with a tort, must go directly to the tort.[3]

§ 69. *When agent appoints sub-agent, principal, by ratifying sub-agent's acts, makes the latter's acts valid.* — Even supposing there is no right of substitution; yet the principal, by adopting the sub-agent's acts, validates the sub-agency.[4]

§ 70. *Immoral or illegal contract cannot be ratified.* — This results from general principles elsewhere discussed.[5]

§ 71. *But principal may ratify forgery of his name.* — I state this conclusion with some hesitation, as in England a ruling is reported to the contrary effect.[6] But what is a forgery? No doubt if it is patent that a signature is knowingly fabricated

[1] Walker *v.* Walker, 5 Heisk. 425.

[2] Routh *v.* Thompson, 13 East, 274; Wolf *v.* Horncastle, 1 Bos. & P. 316; Prince *v.* Clark, 1 B. & Cr. 186; Spittle *v.* Lavender, 2 Br. & B. 452; Wilson *v.* Tammon, 6 M. & G. 236; Smethurst *v.* Taylor, 12 M. & W. 554; Doe *v.* Goldwin, 2 Q. B. 143; Depperman *v.* Hubbersty, 17 Q. B. 767; Bird *v.* Brown, 4 Exch. 786; Taylor *v.* Plummer, 3 M. & S. 562; Buchanan *v.* Upshaw, 1 Howard, 56; *C. S.* 17 Peters, 70; Drakely *v.* Gregg, 8 Wall. 242; Grant *v.* Beard, 50 N. H. 129; Clark *v.* Lillie, 39 Vt. 405; Frothingham *v.* Haley, 3 Mass. 68; Kelly *v.* Munson, 7 Mass. 319; Odiorne *v.* Maxcy, 13 Mass. 178; Pratt *v.* Putnam, 13 Mass. 379; Copeland *v.* Ins. Co. 6 Pick. 198; Armstrong *v.* Gilchrist, 3 John. Cas. 424; Rogers *v.* Kneeland, 10 Wend. 218; Keeler *v.* Salisbury, 33 N. Y. 648; Jones *v.* Millikin, 41 Penn. St. 252; Pearsoll *v.* Chapin, 44 Penn. St. 9; Finlay *v.* Stewart, 56 Penn. St. 183; Gulick *v.* Grover, 33 N. J. L. 463; Trustees *v.* M'Cormick, 41 Ill. 323; Fowler *v.* Pearce, 49 Ill. 59; Coffin *v.* Gephart, 18 Iowa, 256; Lampson *v.* Arnold, 19 Iowa, 479; Walworth *v.* Bk. 16 Wisc. 629; Brown *v.* La Crosse, 21 Wisc. 37; Levy *v.* Fargo, 1 Nev. 415; Chapman *v.* Lee, 47 Ala. 143; Norton *v.* Bull, 43 Mo. 113; Kounts *v.* Price, 40 Miss. 341; Williams *v.* Storm, 6 Cold. 203; Bean *v.* Drew, 15 La. An. 461; Bains *v.* Burbridge, 15 La. An. 628; Warnekin *v.* Marchant, 18 La. An. 147; Szymanski *v.* Plassan, 20 La. An. 90; Vincent *v.* Rather, 31 Tex. 77.

[3] Lee *v.* West, 47 Ga. 311.

[4] Paley on Agency, 171, and cases there cited; Blore *v.* Sutton, 3 Meriv. 246; Henderson *v.* Barnwell, 1 Y. & Jerv. 387; Coles *v.* Trecothick, 9 Ves. 234; Soames *v.* Spencer, 1 Dowl. & R. 32; Gray *v.* Murray, 3 Johns. R. 167; Johnson *v.* Cunningham, 1 Ala. N. S. 249; Laussat *v.* Lippincott, 6 S. & R. 386. See supra, § 31.

[5] See supra, § 21–25.

[6] Brook *v.* Hook, L. R. 6 Ex. 89.

with intent to defraud, and this is found by the jury, a court must judicially pronounce the case to be forgery. But how can this be predicated of a case in which the person whose signature is said to be forged adopts such signature as his own? In such a case would it be possible to exclude the doubt whether the supposed forger may not have believed that he was or would be recognized as authorized to sign? And if so believing, could he be held guilty of forgery? And in any view can we preclude a party from saying, "My name was signed with the intention of benefiting me. I adopt the act?" Hence the right in such cases to ratify has been frequently affirmed by American courts.[1]

§ 72. *A ratification cannot be as to part of an act.* — The principal cannot say, "A part of this act I ratify, a part I reject." He must, when the transaction is made up of several interdependent conditions, accept either the whole or none.[2] Hence, if the principal ratifies that which favors him, he ratifies the whole.[3] But a principal ratifying that which was within the range of his intended instructions does not ratify acts on the part of his agent of which he is not informed; and hence in ratifying a sale, he does not ratify an unauthorized warranty of which he is not informed at the time of the alleged ratification.[4] But if he rati-

[1] Forsyth *v.* Day, 46 Me. 176; Greenfield Bk. *v.* Crafts, 4 Allen, 447; Garrett *v.* Gonter, 42 Penn. St. 143; Union Bk. *v.* Middletown, 33 Conn. 95; Livings *v.* Wiler, 32 Ill. 387; Fitzpatrick *v.* School Commiss. 7 Humph. 224; Howard *v.* Duncan, 3 Lansing, 174.

[2] Small *v.* Atwood, 6 Cl. & F. 232; Thompson *v.* Carrington, 9 B. & C. 59; Wilson *v.* Poulter, 3 Str. 859; Hovil *v.* Pack, 7 East, 164; Cornwell *v.* Wilson, 1 Ves. 509; Newall *v.* Hurlbert, 2 Vt. 351; Seago *v.* Martin, 6 Heisk. 308; Starr *v.* Stark, 2 Sawyer, 605; Benedict *v.* Smith, 10 Paige, 126; Farmers' Loan Co. *v.* Walworth, 1 Comst. 433; Crans *v.* Hunter, 28 N. Y. 389; Bennett *v.* Judson, 21 N. Y. 238; Elwell *v.* Chamberlin, 31 N. Y. 611; Henderson *v.* Cummings, 44 Ill. 325; Widner *v.* Lane, 14 Mich. 124; Krider *v.* West. Coll. 31 Iowa, 547; Menkens *v.* Watson, 27 Mo. 163; Southern Express Co. *v.* Palmer, 48 Ga. 853; Coleman *v.* Stark, 1 Oregon, 115.

An adoption of a contract by an undisclosed principal is an adoption *in omnibus;* hence, if the contract embodies an agreement that the defendant should set off a debt due to him from the agent, the principal must take the contract subject to this agreement. Ramozetti *v.* Bowring, 7 C. B. N. S. 851, per Erle, C. J.

[3] Skinner *v.* Dayton, 19 Johns. R. 554; Odiorne *v.* Maxcy, 13 Mass. 182; New Eng. Ins. Co. *v.* De Wolf, 8 Pick. 63; Krider *v.* Trustees, 31 Iowa, 547; Menkens *v.* Watson, 27 Mo. 163, and cases cited in prior note.

[4] Hazeley *v.* Lemoyne, 5 C. B. N. S. 530; Smith *v.* Tracy, 36 N. Y. 79; Baldwin *v.* Burrows, 47 N. Y. 199.

fies a sale, he ratifies the acts, however unfair, by which the sale was brought about.[1]

§ 73. *Ratification once made is irrevocable.* — A party who adopts a contract by ratification is bound by it as if he were an original party.[2]

§ 74. *Must be by an act by which third party would be prejudiced.* — Acts of ratification to be sufficient must be something by which the party, by relying upon them, has been prejudiced,[3] otherwise there would be no consideration for the ratification.

§ 75. *Agent ceases to be liable when liability is assumed by principal.* — In cases in which, had the principal authorized the act, he is solely liable, he is solely liable when he ratifies the act.[4]

§ 76. *Until ratification no liability to principal exists; but after ratification liability relates back to the time when the obligation was undertaken.*[5] — In other words, to adopt the exposition of an eminent German commentator,[6] when an agent undertakes an act for another person, the legal character of the act remains undetermined until such other person decides whether or no he will ratify. The contract is not void, but occupies the same position as one that is conditional. The third party contracting is bound from the time of the institution of the contract, and not merely from that of the ratification.[7] The agent cannot, even in this intermediate period, release the third party from liability.[8] *A fortiori* such release is not worked by the intervening death or

[1] Hazeler *v.* Lemoyne, 5 C. B. N. S. 530; Bennett *v.* Judson, 21 N. Y. 238; Mundorff *v.* Wickersham, 63 Penn. St. 87.

An agent, acting under a general authority from his principal to make the sale, sold to another two mules, and the principal subsequently ratified the sale by accepting from the agent the note given for the purchase money. Held, the principal was bound by any warranty of the agent to the purchaser, in regard to the soundness of the mules. Cochran *v.* Chitwood, 59 Ill. 53.

[2] Smith *v.* Cadogan, 2 T. R. 189; Clarke *v.* Van Reimsdyk, 9 Cranch, 153; Hazelton *v.* Batchelder, 44 N. Y. 40 Breck *v.* Jones, 16 Texas, 461.

[3] Doughaday *v.* Crowell, 3 Stockt. (N. J.) 201.

[4] Spittle *v.* Lavender, 2 Br. & B. 452; Lucas *v.* Barrett, 1 Greene (Iowa), 511; Ballou *v.* Talbot, 16 Mass. 461; though see Rossiter *v.* Rossiter, 8 Wend. 494.

[5] See, generally, Wolf *v.* Horncastle, 1 Bos. & P. 316; Frixione *v.* Tagliaferro, 10 Moore P. C. 174; Chapman *v.* Lee, 47 Ala. 143; St. Louis Packet Co. *v.* Parker, 59 Ill. 23.

[6] Windscheid, Pandekten, § 74.

[7] L. 24. D. de neg. gest. (3. 5.)

[8] Seuff. Archiv. XIV. p. 210, 211; Windscheid, § 74.

other incompetency of the agent. "An autem et si mortuus fuisset qui petisset vel furere coeperit, ratum haberi possit, videamus: nam si in universum perinde haberi debet, ac si tunc, cum ratum habeat, per eum bonorum possessionem petat, frustra his casibus ratum habetur."[1]

§ 77. *Ratification is retrospective, except as concerns vested rights.* — It has just been noticed that the principal, by the act of ratification, puts himself in his agent's place. From this it follows that the ratification acts retrospectively; and nowhere is this more unhesitatingly expressed than in the Roman law. The principal, so that law assumes, puts himself, by the ratification, back into the period in which the contract was executed. But accepting this principle as unquestioned, we must limit its application to the relations of the principal to the contracting third party. The third party is precluded from contesting the right of the principal to go back to the original inception of the contract. "Sicut et alias ratihabitiones negotiorum gestorum ad illa reduci tempora oportet, in quibus contracta sunt."[2] But innocent strangers with intervening vested rights are not so precluded. These rights, so far as they accrued prior to his ratification, the principal cannot touch. So far as they are concerned, the ratification is utterly without effect.[3]

§ 78. *Ratification does not divest vested rights intermediately accrued.* — Our own law is in harmony with the Roman as to the principle just stated.[4] A., for instance, without authority from C., but claiming to act for him, attaches B.'s property, to satisfy a valid debt from B. to C. C. cannot, by subsequently ratifying A.'s act, avail himself of the lien caused by such attachment as against B.'s lien creditors. In other words, to adopt

[1] L. 24. D. ratam rem (XLVI. 8).

[2] L. 25, i. f. C. de don. int. vir. et. ux. (V. 16.) As authorities to this point see Wolf *v.* Horncastle, 1 Bos. & P. 316; Depperman *v.* Hubbersty, 17 Q. B. 767; Prince *v.* Clark, 1 B. & Cress. 186; Spittle *v.* Lavender, 2 Brod. & B. 452; Buchanan *v.* Upshaw, 1 Howard, 56; *S. C.* 17 Peters, 70; Chapman *v.* Lee, 47 Alab. 143; Odiorne *v.* Maxcy, 13 Mass. 178; Armstrong *v.* Gilchrist, 3 Johns. Cas. 424; Pratt *v.* Putnam, 13 Mass. 379; Copeland *v.* Ins. Co. 6 Pick. 198; Frothingham *v.* Haley, 3 Mass. 68; Rogers *v.* Kneeland, 10 Wend. 218; Chapman *v.* Lee, 47 Ala. 143; Vincent *v.* Rather, 31 Tex. 77.

[3] Windscheid, Pandekt. § 74, note 7.

[4] Depperman *v.* Hubbersty, 17 Q. B. 767; Coombs *v.* R. R. 3 H. & N. 1; Hurley *v.* Baker, 16 M. & W. 26; Stoddart's case, 4 Ct. of Cl. 511; Fowler *v.* Pearce, 49 Ill. 59; Norton *v.* Bull, 43 Mo. 113; Lowry *v.* Harris, 12 Minn. 255, and cases cited in last section.

the language of Mr. McLaren, ratification is not always effective "where the unauthorized act afterwards ratified is one which, if authorized originally, would have created an immediate duty or obligation on the part of the third party, or made him immediately liable to any burden or charge, or have supported an action of damages against him. The ratification will not draw back to the date of the act, so as to validate it as the foundation of such claim or charge against the third person, if the agent's act, supposing it done only as of the date of the ratification, would not then have created such claim or charge; nor will it draw back, as we have said, if the allowing it a retroactive efficacy would operate to defeat any right or interest which has vested in a third party in absence of any authorized interference on behalf of the principal, even though the principal's interference in time would have prevented such right or interest from vesting." Of this qualification an illustration is given in a case where a lease was to determine on six months' notice, and notice was given as for the landlord six months' before, but by a person who had no authority to do so, and where it was held that the subsequent adoption and ratification by the landlord of that notice did not relate back to defeat the tenant's right to remain for another term, acquired by his not having got notice to quit from the landlord in time.[1] For, in such case, to make such ratification effective would be to permit the landlord to play fast and loose with the tenant. The "unauthorized" person might send the notice to quit; and this notice the landlord could adopt or drop as it seemed best. He could hold back until he saw whether the ratification would be advantageous, and then make his own supineness the ground of action. Supposing that the tenant knew the person giving the notice to be a mere intruder, and hence disregarded the notice, to permit the landlord to adopt the intruder's notice would be to enable him to take advantage of his own wrong.

§ 79. A conclusion sustainable by the same reasoning was reached in a case in which the demand for delivery of property necessary, in an action of trover, to make out the wrongful con-

[1] Fisher *v.* Cuthill, 5 East, 491; Mann *v.* Walters, 10 B. & C. 626; Lyster *v.* Goldwin, 2 Ad. & El. 143. See Buron *v.* Denman, 2 Exch. 167. See, however, Roe *v.* Pierce, 2 Camp. 96; Goodtitle *v.* Woodward, 3 B. & Ald. 689.

version by the defendant, was held to be insufficient if made by a volunteer representative of the plaintiff, though afterwards ratified by the plaintiff.[1] And so has it also been held that random demands or notices made or given by strangers to negotiable paper, could not be afterwards appropriated and enforced by parties who had let their own opportunities to this effect slip.[2] So, also, a stoppage *in transitu*, directed by an unauthorized agent of the plaintiff, cannot, it has been held in England, so operate as to divest the right of the purchasers.[3] So, where the defendant's agent, after revocation of his authority, paid the plaintiff a sum of money to discharge a debt due from the defendant to the plaintiff, and the plaintiff paid back this money to the agent, and sued the defendant, it was held that after the money had been paid back it was too late for the defendant to ratify the payment.[4]

§ 80. Yet when we examine more closely the cases we find that in most, if not all, of those in which ratifications have been sustained some rights of third parties have been disturbed by the ratification, and that hence the ratifying party has had the option of holding back until he could see whether ratification was politic. The true distinction seems to be this: if ratification on part of the principal was an act to be anticipated as morally certain by parties having adverse interest, then the ratification is no surprise to them, and cannot mislead them, and they are bound to treat the original unauthorized act as one which is subsequently to be authorized. The authorization of an agent is always a matter of moral proof. B. claiming to be A.'s agent gives me notice on behalf of A. He may be an agent appointed under a power of attorney for this purpose. He may be A.'s general agent with an implied authority to do this particular thing. He may be the son of A., having the strongest natural claims on him to see after A.'s interest. Even in the first case, it is possible that the power may have been superseded by A.'s death, or by other causes; and we cannot say, therefore, that the act is one which the principal

[1] Coore *v.* Callaway, 1 Esp. 115; Coles *v.* Bell, 1 Camp. 478; Solomon *v.* Dawles, 1 Esp. 73.

[2] Tindal *v.* Brown, 1 T. R. 167; Stewart *v.* Kennett, 2 Camp. 177; Freeman *v.* Boynton, 7 Mass. 483; Stanton *v.* Blossom, 14 Mass. 116.

[3] Bird *v.* Brown, 1 Moore P. C. N. S. 243. But see Newhall *v.* Vargas, 13 Me. 93.

[4] Walter *v.* James, L. R. 6 Ex. 124.

is sure to adopt. All we can say is that we can approach to a moral certainty that the game is not one of fast and loose, but that A. will be morally sure to ratify. This is all we can say in the first case; and this much we may be able to say in many cases in which the agent is without actual authority. In all such cases, — in all cases in which it is morally sure the principal will ratify, — other parties are bound to treat the intervener — the *negotiorum gestor* — as an agent. In cases where the ratification by the principal may be regarded as doubtful, the intervener may be treated as a mere interloper.

§ 81. It may be said that with the view just presented conflicts an authoritative English case[1] in which, where an authorized person, acting as a *negotiorum gestor*, obtained an insurance on a ship for the benefit of the owner, and the ship was subsequently lost, it was held that the owner could afterward ratify the insurance, though he would not have been bound to have paid the premium. At the first glance this would appear to have been a case in which the owner was able to play fast and loose, — to say: "If the vessel is lost, I am insured; if she is not lost, I am not insured." But this view is only superficial. Though personally the owner might have had this choice, the contract itself was absolute. The insurer who insures a ship, in consideration of a premium paid in, agrees to do something for a valuable and adequate consideration. He insures for whomsoever it may concern. His duties are fixed on the closing of the contract. The premium paid him cannot be recovered back from him; the insurance, if the vessel be lost, is due from him as a fair consideration for the contract. Whether the owner can sue upon the contract is a mere matter of form, for the agent can sue in case the principal cannot. The insurer has lost nothing by the fact of the agent being unauthorized; he has been lulled into no false security; no intervening rights have been sacrificed by him. He insured the vessel on his own terms, and by those terms he is bound.

2. *Who may ratify.*

§ 82. *Corporations as well as natural persons may ratify.* — Whoever may act as principal may ratify an agent's act. Hence

[1] Hagedorn *v.* Oliverson, 2 Maule & S. 485. See, also, Routh *v.* Thompson, 13 East, 279; 3 Kent's Com. 260; Story on Agency, § 248.

the law in respect to ratification applies as well to corporations as to natural persons, and is equally to be presumed from the absence of dissent.[1] Thus, a bank whose directors did not promptly disavow the act of its cashier in offering, upon the advice of a minority of them, a reward for the detection of its robbery, was held to be liable for the reward, though notice of the act was not given to them when acting officially.[2]

3. *Form of Ratification.*

§ 83. *Ratification may be informal, except where peculiar form of authorization is required.* — As soon as ratification takes place, the want of original authority in the agent is cured, and the contract is as effective for the principal (saving intervening rights of innocent third parties, which have been already discussed) as if it had been at its inception executed under his orders. "Ratihabitio mandato comparatur."[3] The ratification does not evolve a new contract, but simply calls into activity an old contract that is in abeyance.[4] Thus, the contract is to be interpreted by the laws of the place to which, at its original inception, it was subject.[5] The ratification, therefore, may be made informally, supposing the contract to have been previously executed by the agent with due form.[6] But where a peculiar form of authorization is required to enable the agent to execute a contract, then this same kind of authorization is required to ratify.[7] Nor, if it is necessary that a deed be under seal, can I, subject to the exceptions heretofore noticed,[8] ratify it except under seal;[9] though I may subject myself to an equitable action for redress if I attempt, after enjoying the fruits of such a contract, to avoid its obligation.[10]

So far as concerns the statute of frauds, the ratification by

[1] Kelsey *v.* National Bank of Crawford Co. 69 Pa. St. 426.

[2] Ibid.

[3] L. 12, § 4. D. de sol. (46. 3.) L. 60. D. de R. I. (50. 17.)

[4] Windscheid, Pandekt. § 74. See Wächter, II. p. 682.

[5] Golson *v.* Ebert, 52 Mo. 260.

[6] L. 24, pr. D. ratam rem. 46. 8.

[7] Blood *v.* Goodrich, 9 Wend. 68; *S. C.* 12 Wend. 525; Despatch Line *v.* Bellamy, 12 N. H. 232; Grove *v.* Hodges, 55 Penn. St. 504.

[8] See supra, § 48–51; and see also infra, §§ 454–458.

[9] See Hunter *v.* Parker, 7 Mees. & W. 322; Cady *v.* Shepherd, 11 Pick. 400; Skinner *v.* Dayton, 19 Johns. 513.

[10] Grove *v.* Hodges, 55 Penn. St. 504. See Holbrook *v.* Chamberlin, 16 Mass. 155.

the principal is sufficient, if the act ratified was within the statute, even though the ratification was itself not in writing.[1]

§ 84. *Purpose to ratify not necessary.* — To constitute the conversation and acts of the principal, with knowledge of the facts, a ratification, it is not necessary that a ratification was contemplated.[2]

4. *Evidence of Ratification.*

§ 85. *A principal who permits an unauthorized agent to act for him, and who stands by without interference while third persons deal with such agent as agent, cannot afterwards dispute the authority of such agent.*[3] — The Roman authorities are distinct to this point.[4] The expression *consentire* involves tacit as well as express acquiescence.[5]

§ 86. *Silence may indicate acquiescence.* — The same inference will be drawn from the principal's silence when informed that the agent has entered into obligations in his (the principal's) name.[6] Permanent acquiescence in an agent's unauthorized act is a strong proof of ratification, it being the duty of the principal to repudiate the act, if repudiation would avail to put parties dealing with the agent on their guard;[7] but mere knowledge on the part of the principal, of an agent's unauthorized action, will not make non-interference amount to ratification, unless either the agent or parties dealing with the agent are thereby misled or prejudiced.[8] On the other hand, wherever the usage of busi-

[1] Soames *v.* Spencer, 1 Dowl. & R. 32; Maclean *v.* Dunn, 4 Bing. 722; Paley on Agency, 171.

[2] Hazard *v.* Spears, 2 Abb. (N. Y.) App. Dec. 353.

[3] Bell's Com. 7th ed. note p. 514, citing Pothier, Mand. No. 29; 1 Livermore, 49, 396.

[4] Windscheid's Pandekt. § 81; L. 44, § 1. D. de usurp. 3. 1.

[5] L. 3. C. de R. V. 3. 32.

[6] Smith *v.* Sheehy, 12 Wallace, 358; Courcier *v.* Ritter, 4 Wash. C. C 559; Norris *v.* Cook, 1 Curtis, 464; Marshall *v.* Williams, 2 Biss. 255; Amory *v.* Hamilton, 17 Mass. 103; Bassett *v.* Brown, 105 Mass. 551; Clark *v.* Meigs, 10 Bosw. (N. Y.) 237; Johnson *v.* Jones, 4 Barb. 369; Hanks *v.* Drake, 49 Barb. 186; Hall *v.* Vanness, 49 Penn. St. 457; Mundorff *v.* Wickersham, 63 Penn. St. 87; Kelsey *v.* Nat. Bk. 69 Penn. St. 426; Walters *v.* Munroe, 17 Md. 135; Maddox *v.* Beavan, 39 Md. 485; Hammond *v.* Hannin, 21 Mich. 374; Swartwout *v.* Evans, 37 Ill. 442; Burlington Co. *v.* Greene, 22 Iowa, 508; Farwell *v.* Howard, 26 Iowa, 38; Walworth *v.* Bent, 16 Wisc. 629; Galbraith *v.* Lineburger, 69 N. C. 145; Mangum *v.* Bell, 20 La. An. 215; Clay *v.* Spratt, 7 Bush, 334; Reese *v.* Medlock, 27 Tex. 120.

[7] Law *v.* Cross, 1 Black U. S. 533; Errick *v.* Johnson, 6 Mass. 193; Fitzsimmons *v.* Joslyn, 21 Vt. 129; Doughady *v.* Crowell, 3 Stockt. 201.

[8] White *v.* Langdon, 30 Vt. 599.

ness requires a prompt reply from a principal to an agent of an agent's report of his acts, silence on the part of a principal, after due notification of an agent's unauthorized act, may be construed as a ratification, whenever the principal has had reasonable time and opportunity to reply.[1]

§ 87. *Proof of ratification may be inferential.* — Ratification does not necessarily require a direct assumption of the contested act, or acceptance of its fruits. We may infer ratification when the acts and conduct of the principal are inconsistent with any other supposition than that he intended to ratify the transaction. Even his silence may raise a conclusive presumption, especially where it has a direct tendency to influence the agent.[2] Any acts tending to show an adoption of the agent's course may be received to indicate ratification; and the agent's motives, if he have reason to regard himself as acting for the principal's interests, will be subjected to a liberal interpretation.[3] So where

[1] Prince *v.* Clarke, 1 B. & Cr. 186; Frothingham *v.* Haley, 3 Mass. 70; Erick *v.* Johnson, 6 Mass. 193; Pratt *v.* Putnam, 13 Mass. 363; Amory *v.* Hamilton, 17 Mass. 109; Foster *v.* Rockwell, 104 Mass. 167; Cairnes *v.* Bleecker, 12 Johns. R. 300; Vianna *v.* Barclay, 3 Cowen, 281; Delafield *v.* Ill. 2 Hill, 160; 26 Wend. 192; Bredin *v.* Dubarry, 14 Serg. & R. 30; Pitts *v.* Shubert, 11 La. An. 288; Kehlor *v.* Kemble, 26 La. An. 713; Law *v.* Cross, 1 Black U. S. 533; Bell *v.* Cunningham, 3 Peters, 69; Norris *v.* Cook, 1 Curtis C. C. 464.

[2] Maddox *v.* Beavan, 39 Md. 485; Crooker *v.* Appleton, 25 Me. 131; Bryant *v.* Moore, 26 Me. 84; Rogers *v.* Kneeland, 13 Wend. 114; Kelsey *v.* Nat. Bk. 69 Penn. St. 426; Penn. St. Nav. Co. *v.* Dandridge, 8 Gill & J. 248; St. Louis Packet Co. *v.* Parker, 59 Ill. 23; Lewis *v.* Bourbon, 12 Kans. 186.

[3] Story on Agency, § 253; Maddox *v.* Beavan, 39 Md. 485; Terril *v.* Flower, 6 Mart. 584; Loraine *v.* Cartwright, 3 Wash. C. C. 151; Conn *v.* Penn, 1 Pet. C. C. 496; Bank of Columbia *v.* Patterson, 7 Cranch, 299; Ward *v.* Evans, Salk. 442; *S. C.* Ld. Ray. 928. In Hawley *v.* Sentance, 7 L. T. Rep. (N. S.) 745, an agent for the purchase of goods on credit paid for certain goods out of his own money. This fact was known to the principal, who directed the agent to clear the goods at the custom-house. In the usual course of business this would be done after payment of the price by the agent for the principal. This direction was held to be a ratification of the previous payment by the agent, so as to enable him to sue the principal for the price, as money paid to his use at his request. Benham *v.* Batty, 12 L. T. Rep. (N. S.) 266, was an action to recover a deposit. The defendant employed an agent to sell the lease of a certain house. The latter exceeded his authority, and took a deposit for the conveyance of a longer term than he was authorized to dispose of. The defendant refusing to complete this agreement, the plaintiff applied to the agent for a return of his deposit. Before he would do so he required an order from the defendant, and it was

money borrowed without authority on A.'s behalf is accepted by A., who recognizes the debt as due by himself, this is a ratification.[1] But there must be substantial proof of ratification; it cannot be rested on mere conjecture.[2] This is peculiarly the case where the act to which the alleged ratification relates is a trespass.[3]

§ 88. *An agreement to make good an agent's obligation amounts to a ratification.* — Thus, if A. signs a note as agent for B., though without authority, and B., knowing the facts, promises to pay the note, though without any new consideration, this ratifies A.'s act.[4]

§ 89. *Reaping fruits of act is ratification.* — I cannot ratify a part, and reject the rest;[5] *a fortiori*, I cannot take the fruits of a transaction and reject its burdens.[6] Accepting a grant estops

held that the order so given was evidence of a ratification of a previous general authority, so as to make the defendant liable for the deposit.

[1] Episcopal Society *v.* Episcopal Church, 1 Pick. 372; Ballston Spa Bk. *v.* Marine Bk. 16 Wisc. 120.

[2] Fitzgerald *v.* Dressler, 7 C. B. (N. S.) 374.

[3] Grinham *v.* Willey, 4 H. & N. 496; Gosden *v.* Elphick, 4 Ex. 445.

[4] Fenn *v.* Harrison, 4 T. R. 177; Fitzpatrick *v.* Commis. 7 Humph. 224; Long *v.* Coburn, 11 Mass. 98; Commercial Bk. *v.* Warren, 15 N. Y. 577.

[5] See supra, § 72.

[6] Infra, § 174, 478; Wilson *v.* Poulter, 2 Strange, 859; Hovil *v.* Pack, 7 East, 164; Cornwall *v.* Wilson, 7 Ves. 509; Clark *v.* Van Reimsdyk, 9 Cranch, 153; Forrestier *v.* Boardman, 1 Story, 43; Bronson *v.* Chappell, 12 Wallace, 681; Cushman *v.* Loker, 2 Mass. 106; Odiorne *v.* Maxcy, 13 Mass. 178; Holbrook *v.* Chamberlin, 116 Mass. 155; Palmerston *v.* Huxford, 4 Denio, 166; Morey *v.* Webb, 65 Barb. 22; Warden *v.* Eichtbaum, 3 Grant (Pa.), 42; Wright *v.* Burbank, 64 Penn. St. 247; Reynolds *v.* Davison, 39 Md. 662; Evans *v.* Buckner, 1 Heisk. 291; Toledo, &c. R. R. *v.* Chew, 67 Ill. 378; Chamberlin *v.* Robertson, 31 Iowa, 408; Woodbury *v.* Larned, 5 Minn. 339; Watson *v.* Bigelow, 47 Mo. 413; Blen *v.* Bear River, 20 Cal. 602; Ketchum *v.* Verdell, 42 Ga. 534; Murray *v.* Walker, 44 Ga. 58; Slocomb *v.* Cage, 22 La. An. 165. See, however, Harris *v.* Miner, 28 Ill. 135, where it was held that receiving part of proceeds of an irregular sheriff's sale did not ratify the sale. And see § 356–375.

Where a lessor's agent had contracted to grant a lease for seven or fourteen years, which the lessor understood to mean a lease determinable at the lessor's option, and alleged that the agent had acted without authority: Held, that the lessee was entitled to have the agreement specifically performed, and to have a lease for fourteen years, determinable at his own option at the end of seven years. Powell *v.* Smith, L. R. 14 Eq. 85. Held, also, that the lessee having been put into possession of the farm under the agreement, the lessor was precluded from disputing the agent's authority. Powell *v.* Smith, L. R. 14 Eq. 85.

me from disputing its validity.[1] And taking purchase money ratifies the act, however fraudulent, by which the agent effected the sale.[2] So a principal who has profited by the frauds of a volunteer agent may be made responsible for such frauds, so far as he has profited by them.[3] So an irregular conveyance, by one acting under a power of attorney, of a possessory claim to public land, acquiesced in and acted upon by the principal, the consideration having been enjoyed by him, will vest in the grantee the equitable title to the interest purported to be conveyed.[4]

§ 90. *Suing ratifies.* — To sue on a contract necessarily ratifies the contract.[5] And so if I elect to sue the agent for the proceeds, and not for damages caused by his unauthorized act.[6]

[1] Grove *v.* Hodges, 55 Penn. St. 504. Where an agent authorized to collect a debt receives from the debtor a deed absolute on its face as security merely for the debt, which deed is received by the principal, in the absence of evidence to the contrary it will be presumed that the latter was advised of the arrangement; and if he received it without such information, that he adopted whatever arrangement his agent may have made. Meehan *v.* Forrester, 52 N. Y. 277. Where the principal receives property from an unauthorized act of his agent, before he knows that the act was unauthorized, he will not be required to restore the property before he repudiates the act of the agent, if it will cause him material injury, nor if such restoration would be of no practical value. Humphrey *v.* Havens, 12 Minn. 298. Supra, § 65.

[2] Hazeler *v.* Lemoyne, 5 C. B. N. S. 530; Crans *v.* Hunter, 28 N. Y. 389; Mundorff *v.* Wickersham, 63 Penn. St. 87. Infra, § 477.

[3] Western Bk. of Scotland *v.* Addie, L. R. 1 H. L. Sc. App. 145. See Henderson *v.* Lacon, L. R. 5 Eq. 261.

[4] Starr *v.* Stark, 2 Sawyer, 604.

[5] Smith *v.* Hodson, 4 T. R. 211; Partridge *v.* White, 56 Me. 564; Drennan *v.* Walker, 21 Ark. 539; Harris *v.* Miner, 28 Ill. 135. Thus in Ferguson *v.* Carrington, 9 B. & C. 59, it was held that if a bankrupt, on the eve of his bankruptcy, deliver goods to one of his creditors, the assignees may disaffirm the contract, and recover the value of the goods in trover; but if they bring assumpsit, they affirm the contract. Hence the creditor might set off his debt in the latter case.

[6] Wilson *v.* Poulter, 2 Strange, 859; Billen *v.* Hyde, 1 Atk. 129; Hovil *v.* Pack, 7 East, 164; Vernon *v.* Hanson, 7 T. R. 287; Ferguson *v.* Carrington, 9 B. & Cr. 59; Ham *v.* Boody, 20 N. H. 411; Copeland *v.* Ins. Co. 6 Pick. 198; President of Hartford Bk. *v.* Barry, 17 Mass. 97; Frank *v.* Jenkins, 22 Oh. St. 597. See Smith *v.* Gas Co. 1 Ad. & El. 526; Episcopal Society *v.* Episcopal Church, 1 Pick. 372; Shiras *v.* Morris, 3 Cowen, 60. As qualifying this conclusion, however, see Hunter *v.* Prinsep, 10 East, 378; Peters *v.* Ballestier, 3 Pick. 495; Woodward *v.* Suydam, 11 Ohio, 363. Where a principal, with full knowledge of a fraud perpetrated by his agent in disposing of property purchased with his money, elects to prosecute a judgment for the money so appropriated, he affirms the acts of the agent, and cannot afterward pursue the property, thus recognized, as that

§ 91. *Adoption of subsequent benefit is not proof of ratification of prior disconnected torts though in the same line.* — In other words, the tort sought to be charged upon the principal must have been one of the essential conditions of the benefit reaped by him. If otherwise, accepting the benefit does not ratify the tort. Thus in a Georgia case, the evidence was that laborers were employed by a planter in January, 1868, and shortly thereafter deserted him and hired themselves to the agent of another, and the first employer arrested them and lodged them in jail, under the court contract act, from which confinement the freedman's bureau discharged them, and they then, with the sanction of the bureau, hired themselves to the agent of the second employer, who retained them, and some two months after informed his principal of his action, who then for the first time adopted the hiring, having previously instructed his agent to hire no hands employed by others; it was ruled by the supreme court that the adoption by the principal of the hiring did not make the latter guilty of enticing away the servants of another, so as to render him liable in a suit for damages to the first employer.[1]

§ 92. *Presumption of authority weaker in case of a mere stranger than in that of a relative or friend.* — We have already observed that it requires strong evidence to sustain the implication of agency in the case of a mere stranger meddling in a business in which he has no right to suppose that he was employed.[2] On the other hand, when the party by intervening does so to protect the interests of an absent relative or friend, it is not unnatural to suppose that he acts under the stress of an implied mandate, and a very slight recognition of his acts will be held to amount to a ratification. But if the intervention be in any way tainted with fraud or with personal interest, then the presumption of an implied mandate ceases.[3]

of his agent. Bank of Beloit *v.* Beale, 43 N. Y. 473.

[1] Lee *v.* West, 47 Ga. 311.

[2] See Coore *v.* Calloway, 1 Esp. 115; Coles *v.* Bell, 1 Camp. 478; Solomon *v.* Dawles, 1 Esp. 73; Tindal *v.* Brown, 1 T. R. 167; Freeman *v.* Boynton, 7 Mass. 483; Stanton *v.* Blossom, 14 Mass. 116; Ward *v.* Williams, 26 Ill. 447. See supra, § 76.

[3] Ladd *v.* Hildebrandt, 27 Wisc. 135. Infra, § 356–360.

IV. DISSOLUTION OF AGENCY.

1. *What operates to dissolve Agency.*

a. Mutual Consent.

§ 93. Agency can be terminated by mutual consent, *contrarius consensus*, as can all other consensual contracts.[1] An agency unlimited as to time may thus be at any moment terminated, saving the rights of third persons. An agency limited as to time is dissolved, at the expiration of the time, by its own limitation.[2] So, when the parties make the operation of the agency dependent upon a contingent event, upon the non-existence of such contingency the agency does not go into effect.[3]

b. Revocation by Principal.

§ 94. *Principal may ordinarily revoke at any time.* — Even where an agent is appointed under seal, his authority as to future action may be revoked by parol.[4] But the right to recall future authority from an agent in whom it is reposed, is one which can be exercised only by the principal from whom the authority emanates.[5]

Revocation (revocatio) by the Roman law does not divest the

[1] "Tollitur autem omnis obligatio solutione ejus quod debetur, vel si qui consentiente creditore aliud pro alio solverit. Nec tamen interest, quis solvat, utrum ipse qui debet an alius pro eo: liberatur enim et alio solvente, sive sciente debitore sive ignorante, vel invito solutio fiat." § 1. Inst. quib. mod. toll. III. 29. See for a full expansion and application the whole section which this extract begins.

[2] See Blackburn *v.* Scholes, 2 Camp. 341.

[3] Windscheid, Pandekt. § 411. See Benoit *v.* Conway, 10 Allen, 528.

[4] Brookshire *v.* Brookshire, 8 Ired. 74; Pickler *v.* State, 18 Ind. 266. That the revocation may be made at any time is clear. Blackstone *v.* Buttermore, 53 Penn. St. 260. The principal may, if necessary, compel the agent to deliver up the written instrument containing the power, if it be under private signature. Spear *v.* Gardner, 16 La. An. 383. Where one, as agent for another, contracts to sell the lands of the latter, in consideration of one half the net proceeds of the sales, and there is no stipulation in the contract as to the duration of the employment, the principal has a right to terminate it at any time, and to discharge the agent from his service without notice. Coffin *v.* Landis, 46 Penn. St. 426; Peacock *v.* Cummings, Ibid. 434.

[5] Windscheid, Pandekten, § 411; Gibbons *v.* Gibbons, 4 Harr. (Del.) 105; Wells *v.* Hatch, 43 N. H. 246; Faust *v.* Repoor, 15 How. (N. Y.) Pr. 570; Jones *v.* Warfield, 23 La. An. 434. See fully infra, § 110.

mandatary of any right he may have acquired against the mandant; and notwithstanding the revocation there are circumstances, which have been already noticed, in which the mandant may still be bound on the mandate. But when the mandatary thus continues to act for the mandant (*e. g.* as in a transaction which from necessity cannot be closed by the revocation of the mandate), he cannot maintain the technical *actio mandati;* he is thrown back on equitable actions for money laid out or for labor done. "Item si adhuc integro mandato mors alterutrius interveniat, id est vel eius qui mandaverit, vel eius qui mandatum susceperit, solvitur mandatum. Sed utilitas causa receptum est, si mortuo eo, qui tibi mandaverit, tu ignorans eum decessisse exsecutus fueras mandatum posse te agere mandati actione: alioquin iusta et probabilis ignorantia damnum tibi afferat. Et huic simile est quod placuit, si debitores manumisso dispensatore Titii per ignorantiam liberto solverint, liberari eos; cum alioquin stricta juris ratione non possent liberari, quia alii solvissent, quam cui solvere debuerint."[1] "Si mandavero exigendam pecuniam deinde voluntatem mutavero, an sit mandati actio vel mihi vel heredi meo? et ait Marcellus cessare mandati actionem, quia extinctum est mandatum finita voluntate. Quod si mandaveris exigendem, deinde prohibuisti, exactamque recepisti, debitor liberabitur."[2]

§ 95. *But not so when agency is for good consideration or is coupled with interest.* — It is within the power of the principal to agree with an agent that his authority should be irrevocable either with or without limit, but as to such agreements two observations are to be made. In the first place they are the creatures of particular limitations. Thus, a contract to employ an agent for a year, if he "could fill the place satisfactorily," may be terminated by the employer when, in his judgment, the agent fails to meet that requirement of the contract.[3] Even the use of the term "irrevocable" does not, by itself, except on the conditions presently to be mentioned, prevent a revocation.[4] In the next place, there must be, to sustain such irrevocability, either a valuable consideration, or the power must be coupled

[1] § 10. Inst. de mand. III. 26.

[2] L. 12, § 16. D. eod. L. 30. D. eod. See McEwen *v.* Kerfoot, 37 Ill. 530; Van Dusen *v.* Star Co. 33 Cal. 351; Arnold *v.* Stevenson, 2 Nev. 234.

[3] Tyler *v.* Ames, 6 Lans. (N. Y.) 280.

[4] Macgregor *v.* Gardner, 14 Iowa, 326. As to notice of revocation, see infra, § 210.

with an interest, or the agency must be for the protection of the agent. If either of these conditions exist, then the agency is not dissoluble at the pleasure of the principal.[1] Of such agencies the most common case is that of an assignment to pay debts, in which case the power cannot be revoked until the trust is performed and satisfied.[2] But where the consideration fails, the power can be revoked.[3] The fact that principal and agent are partners does not give the agent such an interest as to make his appointment irrevocable.[4]

§ 96. *Revocation may be implied from facts.* — By the Roman

[1] Brownley *v.* Holland, 7 Ves. 28; Watson *v.* King, 4 Campb. 227; Gaussen *v.* Morton, 10 B. & Cr. 731; Raleigh *v.* Atkinson, 6 Mees. & W. 670; Hunt *v.* Rousmanier, 8 Wheat. 174; Knapp *v.* Alford, 10 Paige, 205; Manfield *v.* Douglass, 1 Sandf. 360; Smyth *v.* Craig, 3 Watts & S. 14; Hutchins *v.* Hibbard, 34 N. Y. 24; Marfield *v.* Goodhue, 3 Comst. 62; Hartley's Appeal, 53 Penn. St. 212.

[2] Walsh *v.* Whitcomb, 2 Esp. 565; Gaussen *v.* Morton, 10 B. & Cr. 731; Goodwin *v.* Bowden, 54 Me. 424.

[3] Smither, ex parte, 1 Deacon, 413.

[4] Travers *v.* Crane, 15 Cal. 127. A. entered into a written agreement with B., by which the former was constituted the agent of the latter for the sale of certain machines. The only provision in regard to the duration of the agency was as follows: Said B., in consideration of the faithful performance, by the said A., of the obligations by him hereinafter assumed, agrees to furnish the said A. such number of machines as the said A. may be able to sell, as his agent, prior to October 1st, 1867. Held, by a reasonable construction of the agreement, the agency continued only until the 1st of October, 1867, and the securities on a bond, executed by A., to secure the faithful performance of his duties as such agent, conditioned that he would justly and fairly account for and pay over all moneys, notes, &c., received by him for such machines as might come to his hands as such agent, were bound only for a failure on the part of A. to account for machines received by him prior to that date. Gundlach *v.* Fischer, 59 Ill. 172. The demand of a note sent to a bank as agent, for collection, terminates the agency, and a refusal to return it will be evidence of a conversion. Potter *v.* Merchants' Bank, 28 N. Y. 641. A power is 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. Blackstone *v.* Buttermore, 53 Penn. St. 266. An interest in the proceeds, to arise as mere compensation for the service of executing the power, will not make the power irrevocable. Blackstone *v.* Buttermore, 53 Penn. St. 266. A power of attorney to collect moneys for the principal, with a provision that the attorney is to have "one half of the net proceeds," is not a power coupled with an interest, and therefore it is revocable. Hartley's Appeal, 53 Penn. St. 212. The interest, however, must be an interest in the property on which the power is to be exercised, and not an interest in the money derived from the exercise of the power. Barr *v.* Schroeder, 32 Cal. 609.

law, when a principal closes an agency, his duty is to withdraw his letter of agency from the hands of his agent, or, if the letter is recorded, to have it cancelled on record; and if he cannot recover the letter, his duty is to take the best means of informing those with whom the agent deals of the revocation. Supposing, however, the letter of attorney is suffered to remain in the agent's hands; an innocent third party, as we have seen, who has no such notice as should put him on his guard, can hold the principal liable on the letter of agency. But this is not the only way of revoking an agency. The principal may cause publication of revocation to be duly made; and this publication, in some jurisdictions, and with certain limitations, is made effective by local law. So when the agency is more or less indivisible, and a new agent is appointed, who from the nature of things must control the mandate, this supersedes the first mandate.[1] "Iulianus ait eum, qui dedit diversis temporibus procuratores duos, posteriorem dando priorem prohibuisse videri."[2] It is otherwise, however, when the appointment of the second agent is not incompatible with the continuance in office of the first.[3] Nor is it only from such significant circumstances as these just mentioned that the fact of revocation can be inferred. Other circumstances of the same class (*e. g.* the principal arriving at the place of agency and undertaking the work himself) may be noticed which should lead third persons to infer that the agency is at an end.[4]

§ 97. *Dissolution of partnership may revoke agency.* — This follows from the rules already laid down.[5] The mere change in the name of a firm, however, does not operate to revoke an

[1] Windscheid's Pandekt. *ut supra;* Copeland *v.* Ins. Co. 6 Pick. 198; Morgan *v.* Stell, 5 Binn. 305.

[2] L. 31, § 2. D. de procur. III. 13.

[3] Davol *v.* Quimby, 11 Allen, 208.

[4] Thus in a late Louisiana case, it was held that the sale by an agent after the owner had sold the property conferred no title, the power to sell being impliedly revoked by the owner's sale. In this case no damage is shown to have been done to the plaintiffs. They had not paid the price; and within an hour or two after the agreement to sell to them, they were informed that the property had been previously sold by the owner and for less than they had agreed to give. Torre *v.* Thiele, 25 La. An. 418. See infra, § 110.

[5] Schlater *v.* Winpenny, 75 Penn. St. 321. A partnership to expire in January appointed an attorney to "buy and sell goods, sign notes, and perform all acts concerning the business." If the plaintiff had notice at the beginning of the partnership of the time of ending, he could not charge the firm with goods sold to the attorney after the expiration. Schlater *v.* Winpenny, 75 Penn. St. 321. As to notice of revocation, see infra, § 110.

agency conferred upon the same persons under another name.[1] And where an agent of a firm, duly authorized to draw checks on the bank deposits of his firm, continued so to draw after the death of one of the partners, both bank and agent being ignorant of such death, it was held that the agent's authority continued in a qualified form, and that, as the surviving partner took no exception to the acts of the agent, no one else could object.[2] As has been seen,[3] a power of attorney under seal may be revoked by parol.

c. Bankruptcy of Principal.

§ 98. *Bankruptcy revokes agency so far as concerns principal's estate.* — So far as concerns agencies which relate to the management of the bankrupt's estate, the agent's power is terminated by bankruptcy, for the reason that the bankrupt has no longer control of his estate, such control having passed to his assignees.[4] It is otherwise, however, (1) as to mere formal acts which the bankrupt, as executor or trustee, might be compelled to execute, notwithstanding his bankruptcy;[5] and (2) as to the right of third parties, derived from a power executed after the bankruptcy of the principal, unless the interests of the general creditors are thereby affected.[6] It is clear that the bankruptcy of the principal will not affect the personal rights of the agent, or his lien upon the proceeds of a remittance made to him under the order of the principal, though received after the bankruptcy.[7] Hence, whenever an agent has an interest as well as a power in the property covered by the agency, he may act in his own name, so far as concerns his own interest, as well after the bankruptcy as before.[8]

d. Insanity of Principal.

§ 99. When the principal becomes incapable of issuing directions to the agent, the relation of agency cannot be, as to future directions, maintained. Here, again, we strike upon the interesting question, elsewhere noticed,[9] as to whether agency consists of

[1] Billingsley *v.* Dawson, 27 Iowa, 210.

[2] Bank of New York *v.* Vanderhorst, 32 N. Y. 553.

[3] Supra, § 52.

[4] 2 Kent's Com. 12th ed. 644; Minnett *v.* Forrester, 4 Taunt. 541; Parker *v.* Smith, 16 East, 382.

[5] Dixon *v.* Ewart, 3 Meriv. 322.

[6] Ibid.; Paley's Agency, 187, 188.

[7] Alley *v.* Hotson, 4 Campb. 325. Infra, § 813.

[8] See infra, § 753–6; Story's Agency, § 483.

[9] See infra, § 101–4.

a continuous emanation from the principal, in itself necessarily extinct the moment the principal's free agency is extinguished, or whether it consists of a series of independent impulses, each one of which continues to operate until its own force is expended or recalled, notwithstanding the free agency of the principal has intermediately ceased. If the former of these views is correct, then the moment a principal becomes insane or otherwise incapable, that moment the agent becomes powerless. We have already seen that this view was so rigorously held by the old English common law jurists, that they insisted that on a principal's death the agency was instantaneously dissolved, even as to *bonâ fide* dealings before notice of the death had reached the agent; and Judge Story, adopting apparently the first of the theories above mentioned, gives as the reason the statement, that "the derivative authority cannot generally mount higher or exist longer than the original authority."[1] He gives as an illustration, the case of a woman whose marriage extinguishes any ante-nuptial agency she may have established;[2] though under the married woman's legislation of our own day this view would not be sustained. As to insanity, however, it is now conceded that the position, that a continuation of capacity is necessary on the part of the principal, does not apply. Although it was once thought that the moment the principal became insane the agency was extinguished,[3] yet it is now agreed that to work such extinguishment it is not only necessary that there should be a judicial decree of insanity, by way of inquisition and commission, but that the insanity should be found to have been of a character which incapacitated the party from contracting.[4] And such is the opinion of Mr. Bell, in his Commentaries,[5] in which he is sustained by the high authority of Sir Samuel Romilly, Sir Vicary Gibbs, and Mr. Adams, in a case put to them when at the English bar.[6]

e. Removal from Office of Principal.

§ 100. *Principal's removal from office closes agency.* — A principal who, when occupying a fiduciary office, appoints agents to

[1] Story's Agency, § 481.

[2] Citing White *v.* Gifford, 1 Roll. Abr. 331; Charmley *v.* Winstanley, 5 East, 266.

[3] Story's Agency, § 481; Davis *v.* Lane, 10 N. H. 156.

[4] Motley *v.* Head, 43 Vt. 633.

[5] 1 Bell Comm. § 413.

[6] See Story's Agency, § 481, where Mr. Bell's argument is reported in full.

aid him in the execution of such office, can only impart power to such agents to represent the trust during his continuance in office.[1] Thus, if a guardian appoints a mandatary to act for his ward, and the ward becomes of age, the mandate ceases *finita voluntate*.[2]

V. DEATH OF PRINCIPAL.

§ 101. *Principal's death dissolves agency.* — By the Roman law, death, as an *interpretatio voluntatis*, dissolves the mandate. "Item si adhuc integro mandato mors alterutrius interveniat, id est vel eius qui mandaverit, vel eius qui mandatum susceperit, solvitur mandatum."[3] "Inter causas omittendi mandati etiam mors mandatoris est: nam mandatori solvitur morte."[4] That the mandate should not be interrupted by death of the mandator, however, be provided by agreement of the parties. "I[illegible] scribit, si, ut post mortem sibi monumentum fierit, qu[illegible] mandavit, heres eius poterit mandati agere. Illum vero qui mandatum suscepit, si sua pecunia fecit, puto agera mandati, si non ita ei mandatum est, ut sua pecunia faceret monumentum. Potuit enim agere etiam cum eo qui mandavit, ut sibi pecuniam daret ad faciendum, maxime si iam quaedam ad faciendum paravit."[5] "Si servum ea lege tibi tradidero, ut eum post mortem meam manumitteres, constitit obligatio: potest autem et in mea quoque persona agendi causa intervenire, veluti si poenitentia acta servum reciperare velim."[6] "Idem est et si mandavi tibi, ut post mortem meam heredibus meis emeres fundum."[7] "Ei, qui mandatu meo post mortem meam stipulatus est, recte solvitur, quia talis est lex obligationis: ideoque etiam invito me recte ei solvitur. Ei autem, cui iussi debitorem meum post mortem meum solvere, non recte solvitur, qui mandatum morte dissolvitur."[8] It is true that there has been much difference of opinion as to whether these extracts are to be understood as going further than recognizing the validity of special *post mortem* contracts;[9] but the prevalent opinion, and that adopted by modern codifications of the Roman law, is that the

[1] See 2 Livermore on Agency, § 307.

[2] L. 12, § 15, 16. D. mand. vel. cont. XVII. 1.

[3] § 10. Inst. de mand. III. 26.

[4] L. 26. pr. D. mand. XVII. 1. So, also, L. 58. D. eod. L. 15. C. eod.

[5] L. 12, § 17. D. mand. XVII. 1.

[6] L. 27, § 1, eod.

[7] L. 13, eod.

[8] L. 108. D. de solut. et lib. XLVI. 3.

[9] See an article by Zimmern in Arch. für civil. prax. IV. p. 235; Koch, III. 577.

rule that mandates are dissolved by the mandant's death has the following exceptions: —

1. When the business is such that it can only be begun after the mandant's death.

2. When the mandate is the direction of a lawsuit.

3. When, in mercantile transactions, the mandate cannot be closed without injury.

4. When the mandatary, before notice of the death has been received, has executed *bonâ fide* a contract with an innocent third party.

§ 102. *Not essential to the true character of agency that it should terminate instantaneously on principal's death.* — It is here that we encounter a psychological conflict which has found its way into our forensic deliberations. On the one side it is maintained that the relation of principal to agent involves constant emanation of power from the principal to the agent; that as it is the principal who is responsible for each particular act, so the principal's will is to be assumed to direct such particular act; that no act can be done except under the immediate impress of this will; that if this will ceases to operate, then instantaneously, just as the telegraphic wire ceases to speak when the electric stimulus is withdrawn, the agency is extinguished; and that consequently, at the instant of the death of either principal or agent, the relation is terminated, and from that moment acts of either, based on the supposed existence of the agency, are without force. On the other hand, it is held that when a specific power is communicated by the principal to the agent, this power impresses on the agent, so far as concerns third parties, a character which continues until such parties have notification of its withdrawal; that to assert that agency consists of a continuing efflux of power from principal to agent is to assert that which is juridically as well as psychologically absurd, because in both fact and law, when a principal charges an agent with certain duties the agent proceeds on his own motion to perform these duties, without further communication from the principal, until the powers are recalled; that agency, if we have to resort to simile to describe it, is not like hand-motion, which ceases when the hand is withdrawn, but rather like steam-motion, which continues after the withdrawal of the hand, until the force is spent; and that therefore the agent's powers cannot be without notice recalled, to

the detriment of third parties who have been led by the principal's act to repose confidence in the agent. From this it is inferred that the death of the principal does not so terminate the agency as to prejudice third parties dealing with the agent after the principal's death, but before this death is known.[1]

§ 103. *In England death of principal works instantaneously absolute extinction of agency.* — In England, after some slight hesitation, the conclusion has been reached that on the principal's death, the agency instantaneously terminates, even as to engagements entered into by the agent *bonâ fide* with third parties before knowledge of the death.[2] Thus, where a married woman had authority from her husband to pledge his credit, during his absence, for necessaries to be supplied to her, it was held that this power ceased immediately on his death, so that his executors were not liable for such necessaries supplied to her after his death, but before notice of the death had been received.[3]

§ 104. *And so in several of our own courts.* — The same view is generally accepted in the United States, so far as concerns acts to be done in the name of the principal.[4] In Pennsylvania, it is true, it is held, following the more equitable doctrine of the Roman law, that acts *bonâ fide* executed for the principal, before notice of his death, bind his estate in favor of innocent third parties;[5] and the same distinction is adopted in Missouri,[6] and in Ohio.[7] Nor is this exception sustainable solely on grounds of

[1] See Bell's Comm. 7th ed. *in loco;* supra, § 99.

[2] Wallace *v.* Cook, 5 Esp. 117; Shipman *v.* Thompson, Willes, 104; Camparani *v.* Woodburn, 15 C. B. 400; Houston *v.* Robertson, 6 Taunt. 448; Bledes *v.* Free, 9 B. & Cr. 167; Farrow *v.* Wilson, L. R. 4 C. P. 744.

[3] Smout *v.* Iberry, 10 M. & W. 1; Smart *v.* Sanders, 5 C. B. 895.

[4] Galt *v.* Galloway, 4 Peters, 332; Clark *v.* Courtney, 5 Peters, 319; Gale *v.* Tappan, 12 N. H. 145; Wilson *v.* Edmunds, 4 Fost. 517; Harper *v.* Little, 2 Greenl. 14; Hunt *v.* Ennis, 2 Mason, 244; Gleeson *v.* Dodd, 4 Metc. 333; Marlett *v.* Jackman, 3 Allen, 287; Johnson *v.* Wilcox, 25 Ind. 182; Rigs *v.* Cage, 2 Humph. 350; Scruggs *v.* Driver, 31 Ala. 274; Saltmarsh *v.* Smith, 32 Ala. 404; Shiff *v.* Lesseps, 22 La. An. 185; Cleveland *v.* Williams, 29 Tex. 204; Travers *v.* Crane, 15 Cal. 12; Ferris *v.* Irving, 28 Cal. 645; Lewis *v.* Kerr, 17 Iowa, 73. Even a warrant of attorney to confess judgment is said to be revocable by death, though the courts will permit judgment to be entered as of the prior term. Nichols *v.* Chapman, 9 Wend. 452.

[5] Cassiday *v.* M'Kenzie, 4 Watts & S. 282; Wilson *v.* Stewart, 5 Pa. L. J. Rep. 450.

[6] Carriger *v.* Whittington, 26 Mo. 204; Dick *v.* Page, 17 Mo. 234.

[7] Ish *v.* Crane, 8 Oh. St. 520.

equity. It rests on the sound principle, noticed above, that agency is not a mystical emanation, which dies when the person from whom it issues dies, but is an act of the will which, when once expressed in words so as to reach innocent third parties, is effective until notice of its recall. To suppose, for instance, that an agency to carry goods ceases, when such goods are in transit, at the instant of the owner's death, and leaves them as waifs on the highway until they can receive a new legal impulse from the executors, is as absurd logically as it would be absurd physically to declare that the death of a particular person in itself works an immediate extinction of all the forces which that person put in motion.[1]

§ 105. *Where the agency is coupled with an interest, then it is not closed by the principal's death.* — It is, however, conceded that where an agent has an interest in a particular property which his agency covers, then his authority is not revoked by death.[2] Thus, where a principal, in view of his going abroad on account of ill health, left a general agent to carry on his business, with authority to sell, and with the proceeds to pay a note indorsed by the agent and a third person, it was held that the arrangement being avowedly for the protection of the agent, the agent was authorized to proceed with the sales after the principal's death.[3]

§ 106. *Death of one of several joint and several principals does not revoke agency.* — An authority delegated to an attorney from three trustees having a power coupled with an interest, and from the survivors and survivor of them, to sell and convey lands, is not revoked by the death of one of the trustees. Such delegation being joint and several, the attorney is invested with the full powers of the surviving trustees, so as to pass both the beneficial and the legal estates.[4]

g. Renunciation of Agent.

§ 107. *Agent may renounce, but not so as to damage principal.* — The mandatary in the Roman law may by unilateral act renounce the mandate; but this renunciation (*renuntiatio*) must,

[1] See Bank of N. Y. *v.* Vanderhorst, 32 N. Y. 553.

[2] Hunt *v.* Rousmanier, 8 Wheat. 174.

[3] Knapp *v.* Alford, 10 Paige, 201, 205.

[4] Wilson *v.* Stewart, 5 Pa. Law J. Rep. 450; Bank *v.* Vanderhorst, 32 N. Y. 553.

if he would relieve himself from liability, be made in such a way (*tempestive — re integra*) [1] that the mandant can either resume the business himself or appoint an alternate. "Mandatum non suscipere liberum est: susceptum autem consummandum aut quam primum renuntiandum est, ut aut per semet ipsum aut per alium eandem rem mandator exsequator. Nam nisi ita renuntiatur, ut integra causa mandatori reservetur eandem rem explicandi, nihilo minus mandati actio locum habet, nisi si justa causa intercessit, aut non renuntiandi aut intempestive renuntiari." [2] "Sicut autem liberum est mandatum non suscipere, ita susceptum consummari oportet, nisi renuntiatum sit (renuntiari autem ita potest, ut integrum jus mandatori reservetur vel per se vel per alium eandem rem commode explicandi) aut si redundit in eum captio qui suscepit mandatum. Et quidem si is cui mandatum est ut aliquid mercaretur, mercatus non sit neque renuntiaverit se non empturum idque sua, non alterius culpa fecerit, mandati actione teneri eum convenit: hoc amplius tenebitur, sicuti Mela quoque scripsit si eo tempore per fraudem renuntiaverit, cum iam recte emere non posset." [3] The same right of the agent to renounce is recognized by our own law.[4] If, however, the agent, after undertaking the work, leaves it unfinished, he is liable to a suit from the principal to meet the losses sustained by the latter.[5] It has been said that this liability exists only when the agent serves for a reward, and that in any view he is liable only for omissions, and not for commissions. But these statements are incorrect. A gratuitous agent, who receives his principal's confidence, but who abandons his work after undertaking it, is liable to the principal for the damage the latter has incurred.[6]

h. Incapacity of Agent.

§ 108. *Absolute incapacity dissolves agency; but not so relative incapacity.* — If the agent becomes incapable of executing his agency, the agency is dissolved. But unless such positive ab-

[1] Koch, III. 597.

[2] § 11. Inst. de mand. III. 26.

[3] L. 22, § 11. D. mand. XVII. 1. See, also, L. 23-25. L. 27, § 2. D. eod.

[4] Case *v.* Jennings, 18 Tex. 661; Story on Bailments, § 202; Story on Agency, § 478.

[5] Elsee *v.* Gatwood, 5 T. R. 143; Balfe *v.* West, 13 C. B. 466; Bender *v.* Manning, 2 N. H. 289; Gill *v.* Middleton, 105 Mass. 479; White *v.* Smith, 6 Lansing, 5. See infra, § 632.

[6] See Whart. on Neg. § 442, 501. Infra, § 272.

solute incapacitation is worked by law, a mere relative technical disability does not produce a dissolution of the agency.[1] We have already seen[2] that an infant or a married woman can be an agent; and hence it follows that the marriage of a female agent does not itself dissolve the agency.[3] An insolvent person, or a person in tutelage, may by the same reasoning represent another in agency. Bankruptcy, when it absolutely destroys business capacity,[4] operates as a civil death, and necessarily terminates the agency. By the English law,[5] a factor, after bankruptcy, may, as representing his assignees, enforce his lien on his principal's property committed to him for sale, though his authority to enter on new engagements for his principal will be regarded as revoked. Notorious insanity will be regarded as an incapacitation of an agent. It will be otherwise, however, so far as concerns third persons dealing *bonâ fide* with the agent, as to insanity that is latent.[6]

i. Death of Agent.

§ 109. *Death of agent dissolves agency.* — Agency necessarily ceases on the death of the agent,[7] and so rigorously is this rule applied that where a firm is appointed to an agency, such agency ceases upon the death of one of the members of the firm, and the principal is not bound by the subsequent acts of a surviving member.[8] In the Roman law the representatives of the agent, on the principle of universal succession, are bound to close the mandate undertaken by the deceased party whom they represent.[9] It is their duty immediately to notify the mandant of the death; and if within their power, it is held to be incumbent on them to continue the exercise of the mandate, so far as is necessary to prevent serious injury to the mandant, until the mandant can

[1] See infra, § 632.

[2] Supra, § 13.

[3] See Reignolds *v.* Davis, 12 Mod. 383; Marder *v.* Lee, 3 Burr. 1469.

[4] See Windscheid's Pandekt. § 289; Whart. Con. of L. § 841.

[5] Hudson *v.* Granger, 5 B. & Ald. 27.

[6] See Whart. Con. of Laws, § 122.

[7] Story on Agency, § 490; citing Pothier de Mandat, n. 101; Merrick's Est. 8 Watts & S. 402; Gage *v.* Allison, 1 Brevard, 495; City Council *v.* Duncan, 3 Brevard, 386. As to the Roman law, Windscheid, Pandekt. § 411; L. 27, § 3. L. 57. D. mand. L. 15. C. h. t. § 10. I. h. t.

[8] Martine *v.* Ins. Soc. of L. 53 N. Y. 339. See, as intimating a contrary opinion, Story's Bailments, § 202.

[9] Windscheid, Pandekt. § 411.

give definite directions.[1] Their liability in such case is *in solidum*. Of course, if the mandate is, as at the time of the mandatary's death, entirely unexecuted, the mandatary's representatives cannot undertake its execution ; otherwise they are charged with the duties stated above. "Morte quoque ejus cui mandatum est, si is integro adhuc quoque ejus cui mandatum est, si is integro adhuc mandato decesserit, solvitur mandatum et ob id heres eius, licet exsecutus fuerit mandatum, non habet mandati actionem."[2] "Mandatum *re integra* domini morte finitur."[3] "Item, si adhuc *integro mandato* mors alterutrius interveniat, id est vel ejus qui mandaverit, vel ejus qui mandatum susceperit, solvitur mandatum. Sed utilitatis causa receptum est, si mortuo eo qui tibi mandaverit, tu ignorans eum decessisse exsecutus fueras mandatum, posse te agere mandati actione ; alioquin iusta et probabilis ignorantia damnum tibi afferat. Et huic simile est, quod placuit, si debitores manumisso dispensatore Titii per ignorantiam liberto solverint, liberari eos ; cum alioquin stricta juris ratione non possent liberari, quia alii solvissent, quam cui solvere debuerint."[4] It should be remembered, however, that the Roman law in this relation is moulded by the doctrine of the continuousness, as to duties as well as to effects, of the representatives of the deceased with the deceased himself.

2. *When Revocation of Agency takes effect.*

§ 110. *Must be with notice. As to agent.* — The revocation of an agency becomes operative as to the agent from the time it is actually made known to him ;[5] if by letter, the dissolution of the agency dates from the period of his receipt of the letter, and not from the date of mailing.[6] The only exception to this rule, if we are to recognize the validity of such exception, is that of the death of the principal, which, according to the ruling of some of our courts, extinguishes the agency instantaneously. But on principle, as we have seen,[7] the justice of this exception cannot be admitted.

§ 111. *As to third parties.* — Third parties dealing *bonâ fide*

[1] Koch, III. 553.
[2] L. 27, § 3. D. mand. XVII. 1.
[3] L. 15. C. h. t.
[4] § 10. Inst. de mand. III. 26.
[5] Windscheid's Pandekt. § 411 ; Robertson *v.* Cloud, 47 Miss. 208; Jones *v.* Hodgskins, 61 Me. 480.
[6] Robertson *v.* Cloud, 47 Miss. 208.
[7] See supra, § 101.

with one who has been accredited to them as an agent, are not affected by the revocation of his agency unless notified of such revocation.[1] The same result follows when the agent is permitted, after revocation of agency, to retain his power of attorney, and when he uses it to transact business in the principal's name.[2] The same rule exists in the Roman law: "Dispensatori qui ignorante debitore remotus est ab actu recte solvitur: ex voluntate enim domini ei solvitur, quam si nescit mutatam, qui solvit liberatur."[3] So, in a case decided in Connecticut in 1873, the defendants, a steamboat company, had employed A. as steward on one of their boats, and A. had, while so employed, purchased supplies for the boat of the plaintiffs and others, by authority of the defendants and on their credit. The defendants afterwards revoked their employment of A. as steward, and advertised for proposals for contracts to board their officers and crews at a fixed price per week, and to furnish the passengers, table, the contractors to furnish all the supplies at their own expense. The defendants subsequently entered into a contract to this effect with A. for one of their boats, and into a similar contract with B. for another boat. No notice was given to the plaintiffs of the change in the manner of victualling their boats, nor did the defendants advertise such change except by advertising for proposals as above. A. and B. afterwards, without the knowledge of the defendants, purchased supplies for their respective boats of the plaintiffs, who were ignorant of their contracts with the defendants, and the goods so purchased were by the direction of A. and B. charged to the defendants. It was ruled by the supreme court that, under the rule that where a general authority has been conferred on an agent, its revocation takes effect as to third persons only after notice, and it is the duty of the principal to notify those persons who have had dealings with the agent, the defendants were liable for the goods purchased by A. but not for those purchased by B.[4] The notice of the revoca-

[1] Weile *v.* U. S. 7 Ct. of Cl. 535; Beard *v.* Kirk, 11 N. H. 397; Tier *v.* Thompson, 35 Vt. 179; Morgan *v.* Stell, 5 Binn. 305; —— *v.* Harrison, 12 Mod. 346; Diversy *v.* Kellogg, 44 Ill. 114; Dicey on Parties, 242.

[2] Salte *v.* Field, 5 T. R. 215, per Buller, J.

[3] L. 51. D. de sol. et lib. XLVI. 3. A case to this effect is given at large in L. 34. D. cod. So in Germany and France, A. L. R. § 200; Code Civil, art. 2005.

[4] Fellows *v.* Hartford, &c. Steamb. Co. 38 Conn. 197.

tion, however, may be collected from circumstances. Thus, where the defendant employed an agent to sell a quantity of brandy, and he sold the same to the plaintiffs to be delivered upon their order within thirty days, but no memorandum of the sale was made, and within the thirty days the plaintiffs demanded the brandy, and the defendant refused to deliver it, and upon a second demand made a second refusal; but two months after the sale the plaintiffs drew up a memorandum of the sale, dating it back to the day of the sale, and requested the agent to sign it for the defendant, which he did, signing the defendant's name by himself as agent, the defendant having no knowledge of the transaction, it was ruled that the defendant was not bound by the agent's memorandum. It appeared that the defendant had previously paid the agent for his services, and had thus in effect terminated his agency, and the fact that the plaintiffs knew that the defendant had refused to carry out the contract, and that the action of the agent was without his knowledge and against his will, were regarded as sufficient to render the act of no effect.[1] It should at the same time be remembered that the principle, that notice of the revocation of an agency is necessary to release the principal from liability, does not apply to a case where the agent had only a special authority to do a particular act, or make a particular contract.[2]

3. *As to Sub-agents.*

§ 112. *Revocation of agency revokes authority of sub-agents.* — By the Roman law, when a mandate is revoked, this revokes the authority of sub-mandataries or substitutes whom the mandatary, without express *facultas substituendi*, has appointed. If, however, the substitute has been appointed by express authority from the mandant (*facultas substituendi*), then the act is regarded as specially authorized by the mandant, and the substitute, by the Roman law as now construed, must be expressly recalled.[3] Such is the rule of our own law.[4] So, with the same limitation, the death of the principal extinguishes the power of the substitute.[5]

[1] Reed *v.* Latham, 40 Conn. 452.

[2] Watts *v.* Kavanagh, 35 Vt. (6 Shaw) 34.

[3] Koch, III. 575.

[4] Story on Agency, § 469; 2 Livermore on Agency, 307.

[5] Story on Agency, § 490.

CHAPTER III.

POWERS OF AGENTS.

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I. POWERS INCIDENTAL TO UNIVERSAL AND GENERAL AGENTS.

1. *Classification.*

§ 116. *Agency may be universal, general, or special. — Universal* agency is where the management of all the principal's business is passed into the agent's hands. A person going abroad may transfer the entire management of his home estate to an agent; and so far as concerns the territory covered by such transfer, the agency may be regarded as universal. So a bankrupt assignee may be regarded as the bankrupt's universal agent; and so with regard to the relations between an infant or a person *non compos mentis* and his guardian.

§ 117. *A general* agent is one who is authorized by his principal to take charge of his business in a particular line. A man can have, in his domicil, but one universal agent; he may have several general agents. He may have, for instance, if he be a manufacturer, an agent for selling, an agent for buying, an agent for running his mills, an agent acting as cashier.

§ 118. *A special agent* is one authorized simply to do a particular insulated act, as where A. authorizes B. to sell or buy for him a particular article, or to negotiate for him a particular bill.

§ 119. *Roman law discriminates between universal agencies on the one side, and general and special agencies on the other side.* — Ulpian generally notices this in a passage already quoted.[1] "Procurator autem vel *omnium* verum vel *unius*, rei esse potest constitutus." The distinction is concretely applied by the same jurist in the following passages: "Apud Julianum quaeritur: si dominus jusserit procuratorem suam certam pecuniam sumere et faenerare periculo suo ita, ut certas usuras domino penderet dumtaxat, si pluris faenerare potuisset, ipse lucraretur, in creditam pecuniam videtur, inquit, accepisse. Plane si omnium negoti-

[1] L. 1, § 1. D. III. 3.

orum, erat ei administratio mandata, mandati quoque eum teneri, quemadmodum solet mandati teneri debitor, qui creditoris sui negotia gessit." [1] "Nam et nocere constat, sive ei mandavi ut pacisceretur, sive omnium rerum mearum procurator fuit." [2] So Paulus [3] says: "Procurator quoque quod detulit ratum habendum est, scilicet si aut universorum bonorum administrationem sustinet aut si id ipsum nominatim mandatum sit aut si in rem suam procurator sit." Ulpian, as if to show that mandates embrace not merely special agencies but general assignments of all the mandant's business powers, declares: "Vero procuratori recte solvitur, verum autem accipere debemus eum, *cui mandatum est vel specialiter vel cui omnium negotiorum administratio mandata* est." [4]

§ 120. *General mandates* (*i. e.* those in which the mandatary is empowered to undertake a particular line of business) are recognized as clearly distinguishable from *universal*. It is enough to constitute such mandate, that the principal should commit a class of special duties to the agent. This is implied from the general definition of the procurator just cited above. The following extracts are clear to the same effect: "Procurator cui generaliter libera administratio rerum commissa est, potest exigere, novare, aliud pro alio permutare." [5] "Mandato generali non contineri etiam transactionem decidendi causa interpositam: et ideo si postea is qui mandavit transactionem ratam non habuit, non posse eum repelli ab actionibus exercendis." [6] "Procurator totorum bonorum, cui res administrandae mandatae sunt, res domini neque mobiles vel immobiles neque servos, sine speciali domini mandatu alienare potest, nisi fructus aut alias res, quae facile corrumpi possunt." [7] The inconvenience of applying the same term to agents who have control of the whole of their principal's business, and to those who take charge of only certain portions of such business, led to the application of the term *universal* to the former kind of mandate, reserving the term *general* to the latter. In either case, however, it is agreed that the particular transactions the agent is competent to undertake, must be determined by the inducement and object of the commission. This

[1] L. 6, § 6. D. mand. XVII. 1.
[2] L. 12. D. de pact. II. 14.
[3] L. 17, § 3. D. Jurej. XII. 2.
[4] L. 12. D. de solut. XLVI. 3.
[5] L. 58. D. de proc. III. 3.
[6] L. 60. eod.
[7] L. 63. D. eod.

is illustrated by two extracts in the Digest. "Ad rem mobilem petendam datus procurator ad exhibendum recte aget." [1] "Ad legatum petendum procurator datus si interdicto utatur adversus heredem de tabulis exhibendis, procuratoria exceptio, quasi non et hoc esset ei mandatum, non obstat." [2] Certain acts must necessarily be excluded from the operations of either a general or a universal agency.[3]

2. *General Agent.*

§ 121. "*General*" *agent presumed to have authority appropriate to his duty.* — Lord Ellenborough [4] has declared that a general authority is derived from and directed to a multitude of instances, whereas a particular or special authority is confined to a particular instance. Judge Story has adopted this distinction,[5] but has qualified it by declaring that the principal is bound by the acts of the *general* agent within the scope of the latter's au-

[1] L. 56. D. de procur. III. 3.

[2] L. 62. eod.

Where the plaintiff, in an action against a bank to recover deposits, expecting to be absent for a short time, gave his clerk and bookkeeper a power of attorney to draw checks on the defendant against deposits for fifteen days only, and deposited the power of attorney with defendant, and after his return resumed his business of drawing his own checks, and it appeared that after the expiration of the power of attorney the clerk continued to draw checks without the knowledge of the plaintiff, a part of which he applied to the business of the plaintiff, and appropriated the balance to his own use. *Held*, that the defendant was liable to the plaintiff for the moneys paid out on the checks drawn by the clerk after his agency ceased, and which he appropriated to his own use. Manufacturers' Nat. Bank *v.* Barnes, 65 Ill. 69. And when the plaintiff's bank-book was written up, showing the payment of such checks, and the checks delivered to the clerk with the bank-book, but the plaintiff had not examined the same, and had no knowledge of the facts, it was held, that the bank had no right to presume that the clerk had a general authority to draw checks thereafter, from such fact. Manufacturers' Nat. Bank *v.* Barnes, 65 Ill. 69. Mr. Chief Justice Lawrence: "The same question arose in the case of Weiser *v.* Denison, 10 N. Y. 68. There, as here, a clerk had drawn checks in the name of his employer, and the pass-book had been several times written up and the checks returned before discovery of the fraud. The court held that the balancing of the pass-book and the return of the checks are for the protection of the depositor, and not for that of the bank, and the failure of the depositor to examine the checks is not such negligence on his part as to exonerate the bank from liability for the continued payment of checks improperly drawn. We do not agree with counsel for appellant in regarding the present case as stronger for the bank than that."

[3] As to acts to which agency does not extend, see supra, § 22.

[4] Whitehead *v.* Tuckett, 15 East, 399.

[5] Story on Agency, § 17–20.

thority, though such acts are in violation of the agent's instructions; while the principal is not so bound by the unauthorized acts of the special agent.[1] The same distinction has been accepted more or less completely by a number of courts;[2] and is sustained by Mr. Smith, in his authoritative work on Mercantile Law.[3] "The authority of such (general) agent," so this able writer tells us, "to perform all things usual in the line of business in which he is employed, cannot be limited by any private order or direction, not known to the party dealing with him. But the rule is directly the reverse concerning a particular agent, that is, an agent employed specially in one single transaction; for it is the duty of the party dealing with such a one to ascertain the extent of his authority; and if he do not, he must abide the consequences."

§ 122. Yet, eminently entitled as are these opinions to our respect, they cannot be accepted without some modification. Undoubtedly the distinction was found by Judge Story in the Roman law; but, as we have just seen, it is to the *universal* and not to the *general* agent that the Roman law assigns the high prerogatives which have just been noticed. I appoint, by a solemn instrument, another as my attorney in fact, to manage all my concerns; and after the publication of this instrument, it would be a fraud for me to set up conflicting secret instructions on my part to my agent, by which his dealings with innocent third parties are vitiated. But does this apply to general agencies, supposing such agencies to consist, as is declared above, of powers to one man to represent another in a special line of duties? If such an agent comes to me for credit, is it not my duty to inquire as to his instructions? Of course, if he has been permitted by his principal to do certain things, I may infer that he is still allowed to do such things. But if he does not set up

[1] Story on Agency, § 126.

[2] Butler *v.* Maples, 9 Wallace, 766; Herbert *v.* Kneeland, 32 Vt. 316; Munn *v.* Com. Co. 15 Johns. 44; Beals *v.* Allen, 18 Johns. 363; Rossiter *v.* Rossiter, 8 Wend. 494; Martin *v.* Farnsworth, 49 N. Y. 555; Reynolds *v.* Kenyon, 43 Barb. 583; Andrews *v.* Kneeland, 6 Cow. 354; Ladd *v.* Franklin, 37 Conn. 53; Willard *v.* Buckingham, 36 Conn. 395; Marquette & Ont. Co. *v.* Taft, 28 Mich. 289; Gulick *v.* Grover, 33 N. J. (Law) 463; Cedar Rapids R. R. *v.* Stewart, 25 Iowa, 115; Dart *v.* Hercules, 57 Ill. 446; Palmer *v.* Cheney, 35 Iowa, 281; Fatman *v.* Leet, 41 Ind. 133; Golding *v.* Merchant, 43 Ala. 705; Baxter *v.* Lamont, 60 Ill. 237; Lattomus *v.* Ins. Co. 3 Houst. 405; Cresct. City Bank *v.* Hernandez, 25 La. An. 43.

[3] Smith's Merc. Law, p. 59.

such implied authority, I am bound to see what his express authority is.

Remembering, therefore, how shadowy is the distinction between "general" and "special" agencies, it is not surprising that there should have been objections started to assigning to "general" agencies incidents so very different from those assigned to special. These objections are expressed in a well known criticism by Bramwell, B.[1] "Reference has been made," so says this acute jurist, "to Story on Agency, § 131, where it is said that the distinction between general agents and special agents may be illustrated by the case of a factor who has a general authority to sell; and if in selling he violates his private instructions, the principal is nevertheless bound. Among others, the case of Fern *v.* Harrison is cited; but it does not warrant the proposition. I can well understand that if a factor is simply employed to sell, he has a general warranty to sell in the usual way; but I doubt whether when a factor is authorized to sell at a particular price, he can bind his principal by a sale at a less price. I do not think that any of the authorities referred to by Mr. Justice Story warrant such an inference." Mr. McLaren, in his note to the seventh edition of Bell's Commentaries, after observing that Judge Story rests the distinction ultimately on the ground of estoppel, says: "The only ground of liability, on the part of a principal to third parties dealing with an agent, for the acts of the agent done in excess of the powers given him, ... is such *culpa* or *quasi culpa* on the principal's part as would be a relevant ground for the plea of estoppel against his pleading the actual terms of the authority given to the agent. Where the principal by his words or conduct *wilfully* causes another to believe the existence of certain powers in the agent, and induces him to deal with the agent on that belief; where the principal has, by words or conduct, made a *representation* to another as to the agent's authority, *in order to induce* others to act upon it; where the representation or conduct complained of, whether active or passive in its character, has been *intended* to bring about the result, whereby the other dealing with the agent has altered his position to his loss; in such a case, and in such a case alone, will the doctrine of estoppel apply to bar the principal from pleading against the third party the terms of the real authority

[1] Barnes *v.* Ewing, 4 H. & C. 511; 35 L. J. Ex. 194.

which he gave to the agent. Mere negligence, although it may have afforded the agent an *opportunity* for the undue assumption of authority, or the perpetration of a fraud by which a third party has been damnified, is not of itself a ground of estoppel.[1] If Mr. Story's principle be understood with these qualifications as to what is meant by 'holding the agent out,' viz.: as possessing certain *powers*, not merely as generally worthy of trust and confidence, it seems that it does afford a criterion equally applicable to all cases of agency, whether general or special; and if so, the importance of the distinction between general and special agency becomes very much diminished. No principal can be held, by merely appointing one his agent, to guarantee the world against any undue assumption of powers on his part, or fraudulent abuse of the opportunities his agency may give him for deceiving others; and if, without any *culpa* creating a ground of estoppel against the principal's pleading the actual extent of the agent's authority, damage has accrued to a third party by the agent's assumption of authority or abuse of his position, the loss must fall on the party dealing with him."[2]

§ 123. Yet in one point Mr. McLaren's criticism, as just stated, must be qualified. He says, at the beginning of the extract, that in order to estop the principal from setting up want of authority to the agent's acts, the principal must have *wilfully* induced the third party to believe that the agent was actually authorized. It is true that afterwards it is insinuated that *culpa* on the principal's part is enough to create such an estoppel; but there is nothing to show that in the author's sense *culpa* is not to be regarded as convertible with that wilfulness which he has previously declared to be essential to such an estoppel. But independently of the fact that *culpa* implies negligence rather than wilfulness, we must hold, notwithstanding Mr. McLaren's argument to the contrary, that where a principal conducts his affairs so negligently as to lead third parties to reasonably suppose that his agent has full powers, then, if the agent exceeds his authority, the principal must bear the loss. It is true that the principal is

[1] To this point are cited Pickard *v.* Sears, 6 Ad. & El. 469; West *v.* Jones, 20 Jur. Ch. 363; Swan *v.* North B. Co. 32 L. J. Ex. 273; Haines *v.* East Ind. Co. 11 Moore P. C. 57; Piggott *v.* Stratton, 29 L. J. Ch. 9; McCance *v.* Lond. & N. W. R. R. 34 L. J. Ex. 29; Smith's L. C. vol. 2, notes to Doe *v.* Oliver; Parsons's Cont. II. 792–800, and cases in notes; More's Lectures, II. 265.

[2] Bell's Com. 7th ed. 511.

not chargeable with *culpa levissima*. He is not chargeable, in other words, with the consequences of those slight negligences into which good business men are liable to fall. But if he is negligent to an extent beyond what is usual with good business men in his department; and if, in consequence of this negligence, third parties repose trust on the supposed agent, then the loss, if loss accrue, must fall on the principal.[1]

§ 124. *Distinction between general and special agency rests upon the authority which the principal exhibits the agent as possessing.* — It will be seen, from what has been said, that the terms "general" and "special," in reference to the point before us, have no fixed meaning. An agent may be general in one relation and special in another relation. An agent may have general powers to do a special thing, as where A. authorizes B. to do everything in his power to obtain a particular picture; or he may have special powers to do a general thing, as where A. authorizes B. to buy any picture that may be sold at a particular place for a particular price. So an agency which would be special if authorized by a person as to a matter out of his business, may be general if authorized by a person within the range of his business. Of this we have an interesting illustration in the adjudication lately made in England in reference to the implied power of an agent to warrant a horse. Where a horse-dealer sells a horse by an agent, the agent has implied authority to warrant the horse, and binds thereby his principal, even though the agent has express instructions not to warrant.[2] But it is

[1] See Whart. on Neg. § 26–72; Smith *v.* Supervisors, 59 Ill. 413; Boos *v.* Ins. Co. 6 N. Y. Sup. Ct. (Thompson & Cook) 364; St. Louis Packet Co. *v.* Parker, 59 Ill. 23. If the principal, by his declarations or conduct, authorized the opinion that he had given more extended powers to the agent than were in fact given, he should not be permitted to avail of the imposition. Golding *v.* Merchant, 43 Ala. 705. The authority of mining superintendents, or general agents in charge of mines, will be recognized without proof, as covering all the ordinary local business of the concern; and persons dealing with them have a right, in the absence of notice to the contrary, to assume they have such power. Adams Min. Co. *v.* Senter, 26 Mich. 73.

[2] Howard *v.* Sheward, L. R. 2 C. P. 148; Coleman *v.* Riches, 16 C. B. 104; Helyear *v.* Hawke, 5 Esp. 72; Alexander *v.* Gibson, 2 Camp. 555; Fenn *v.* Harrison, 3 T. R. 759; Nelson *v.* Cowing, 6 Hill, 336; Bradford *v.* Bush, 10 Ala. 386; Cocke *v.* Campbell, 13 Ala. 286; Ezell *v.* Franklin, 2 Sneed, 236; Hunter *v.* Jameson, 6 Iredell, 252. See infra, § 187.

otherwise with regard to a sale by the agent of a private person. Thus, where the defendant, who was not a dealer in horses, but a tradesman, sold a horse through a servant, who had no authority to warrant, but who actually did warrant the horse to be sound and quiet, the court of common pleas held that the warranty did not bind the master. "We understand," said Erle, C. J., "those judges [1] to refer to a *general* agent employed for his principal to carry on his business, that is, the business of horse-dealing, in which case there would be by law the authority here contended for. . . . . It is also contended that a *special* agent, without any express authority in fact, might have an authority by law to bind his principal, as where the principal holds out that the agent has such authority and induces a party to deal with him on the faith that it is so. . . . . The main reliance was placed on the argument that an authority to sell is by implication an authority to do all that in the usual course of selling is required to complete a sale, and that the question of warranty is, in the usual course of the sale, required to be answered; and that therefore the defendant by implication gave to Greigg (the servant) an authority to answer that question, and to bind him by his answer." . . . . It was held, however, that on this point the plaintiff had failed. "We are aware that the question of warranty frequently arises upon the sale of horses, but we are also aware that sales may be made without any warranty, or even an inquiry after warranty. If we laid down for the first time that the servant of a private owner, intrusted to sell and deliver a horse on one particular occasion, is thereby authorized by law to bind his master by a warranty, we should establish a precedent of dangerous consequences. For the liability created by a warranty extending to unknown as well as to known defects is greater than is expected by persons inexperienced in law; and as everything said by the seller in bargaining may be evidence of warranty to the effect of what he said, *an unguarded conversation with an illiterate man sent to deliver a horse may be found to have created a liability which would be a surprise equally to the servant and the master.* We therefore hold that the buyer taking a warranty from such an agent as was employed in this case takes it at the risk of being able to prove that he had the principal's authority; and if there was no

[1] In Helyear *v.* Hawke, Alexander *v.* Gibson, and Fenn *v.* Harrison, above cited.

authority in fact, the law does not, in our opinion, create it from the circumstances."[1] In other words, does the principal exhibit the agent as possessing the authority to warrant? In the case last cited it could hardly be said that a master reposes such a critical trust in a servant not an expert in the particular business, especially where the sale is not part of the master's ordinary business. On the other hand, where in a particular business the usage is to warrant, a person engaged in such business, and familiar with its usage, may be naturally regarded as authorizing declarations made by his agent that he (the agent) was empowered to warrant. The criterion in this, and in all other cases, is, does the principal, whether intelligently or negligently, leave on third parties the *bonâ fide* belief that his agent is authorized to exercise certain powers. If so, the principal is bound by the exercise of the powers.[2]

§ 125. *Permitting a person to act as agent binds principal.* — An *express* mandate is where the employer directly commissions the employee. An *implied* mandate exists where, when A., knowing that B. is acting as his agent, does not, though having opportunity so to do, dissent from or disavow the agency. "Semper qui non prohibet pro se intervenire, mandare creditur. Sed et si quis ratum habuerit quod gestum est, obstringitur mandati actione."[3] In conformity with this principle, Ulpian declares: "Qui patitur ab alio mandari, ut sibi credatur mandare intellegitur."[4] So by the same jurist: "Si passus sim aliquem pro me fideiubere vel alias intervenire, mandati teneor, et, nisi pro invito quis intercesserit aut donandi animo aut negotium gerens, erit mandati actio."[5] Papinius goes more into detail, and presents the maxim with its due limitations: "Qui fide alterius pro alio fideiussit *praesente et non recusante*, utrosque obligatos habet iure mandati: quod si pro invito vel ignorante alterutrius mandatum secutus fideiusset, eum solum convenire potest qui mandavit, non etiam reum promittendi: nec me movet quod pecunia fideiussoris reus liberetur: id enim continget et si meo mandato pro alio solvas."[6] Hence we may assume generally that where

[1] Brady *v.* Todd, 9 C. B. N. S. 592.

[2] See, to same effect, Smith *v.* Tracy, 36 N. Y. 79; Schuchardt *v.* Allens, 1 Wall. 359; Randall *v.* Kehlor, 60 Me. 37; Temple *v.* Pomroy, 4 Gray, 128; St. Louis Packet Co. *v.* Parker, 59 Ill. 23; Palmer *v.* Hatch, 46 Mo. 585. See, however, Hunter *v.* Jameson, 6 Ired. N. C. 252; and see fully, § 187.

[3] L. 60. D. de div. reg. L. 17.

[4] L. 18. D. mand. XVII. 1.

[5] L. 6, § 2, eod.

[6] L. 53, eod. Says Mr. Dicey (Dicey on Parties, 242): "A distinction

one man, to the knowledge of another, transacts business of that other, "as for him and in his place, there intervenes, by that very fact, without more, a contract of mandate between them, whereby the latter charges the former with that business, and from which all the consequences of an express mandate shall ensue on both sides."[1] So far as concerns third parties, the test is acquiescence and recognition. Did A. acquiesce in B. acting as his agent? Did he recognize B. as such agent? If so, he is estopped from afterwards disputing such agency.[2]

is often drawn, as to the effect of private orders between the position of a general and a particular agent; a general agent being one who is employed to perform all things usual in a particular course of business or employment, *e. g.* a factor, broker, &c.; a particular agent is one who is employed in a single instance (Whitehead *v.* Tuckett, 15 East, 400; Story, Agency, 127, n. 1), *e. g.* a servant sent for the first time by his master to borrow money of a friend. 'The authority,' it has been said, 'of a general agent to perform all things usual in the line of business in which he is employed cannot be limited by any private order, not known to the party dealing with him. But the rule is directly the reverse concerning a particular agent, *i. e.* an agent employed specially in a single transaction; for it is the duty of a party dealing with such a one to ascertain the extent of his authority, and if he do not he must abide the consequences.' Smith's Mercantile Law, 7th ed. 128, 129. But the distinction thus laid down is not, it is submitted, maintainable, since, if even a particular agent (though the term itself is not a very happy one, Byles on Bills, 8th ed. 29) is held out to other persons as having an authority beyond that which his principal intends him to possess, the principal will be bound up to the extent of the agent's apparent authority. Story's Agency, § 127. The true rule seems to be that apparent authority can never be restrained by private orders from the principal which are unknown to the third party; but that a particular agent, as being employed in one instance only, can rarely have any apparent authority whatever, and third persons therefore must, as a general rule, trust to his real or actual authority. Compare Alexander *v.* Gibson, 2 Camp. 555; Brady *v.* Todd, 30 L. J. 223, C. P.; 9 C. B. N. S. 592; Howard *v.* Sheward, L. R. 2 C. P. 148; 36 L. J. 42, C. P.; Ward *v.* Evans, 2 Ld. Raym. 928."

[1] Bell's Com. 7th ed. 510, note.

[2] Withington *v.* Herring, 5 Bing. 442; Fenn *v.* Harrison, 3 T. R. 757; Fitzherbert *v.* Mather, 1 T. R. 12; Trickett *v.* Tomlinson, 13 C. B. N. S. 633; Prescott *v.* Flinn, 9 Bing. 19; Davidson *v.* Stanley, 2 M. & G. 721; Levy *v.* Pyne, Car. & M. 453; Watkins *v.* Vince, 2 Stark. 368; Whitehead *v.* Tuckett, 15 East, 400; Commercial Bank *v.* Kortright, 22 Wend. 346; Lewis *v.* Commis. of Bourbon, 12 Kans. 186; Min. Co. *v.* Senter, 26 Mich. 73; Smith *v.* Supervisors, 59 Ill. 413; Planters' Bank *v.* Merritt, 7 Heisk. 177; Abbott *v.* Rose, 62 Me. 194; Lock *v.* Stearns, 1 Mete. 560; Dodge *v.* M'Donnell, 14 Wisc. 553; Houghton *v.* Bank, 26 Wisc. 663; Schimmelpennick *v.* Bayard, 1 Pet. 264.

§ 126. *Agent is authorized to employ means suitable and usual to execute his mandate.* — On this point we have already incidentally dwelt.[1] The rule applies equally to those mandates which consist of an appointment to a continuous line of duties, and to those which consist of a mandate to effect a single purpose. As to the first class, or general mandates, as they are often called, the rule is explicit. If a person is held out to others, or to the public at large, by his principal, as having a general authority to act for him in a particular business or employment, the principal cannot limit his authority by private or secret instructions. In such case, good faith requires that the principal should be bound by the acts of his agent done within the ordinary and usual scope of the employment in which he is engaged as such agent.[2] Hence, a principal is liable for the rent of a place of business occupied by his agent while carrying on the business for which he was employed.[3]

§ 127. *An implied authority, inferred from circumstances, is to be limited by the circumstances from which it is inferred.*[4] — A., for instance, is in the habit of sending B., his servant, to buy goods, but always for cash. B. departs from this usage, and buys from C. goods on credit. B.'s course in this respect, being unauthorized by A., should put C. on his inquiry, and C. making no inquiry, but at his own risk trusting B., cannot recover from A.[5] So, as will be seen more fully hereafter, even a general agency does not authorize the agent to bind the principal out of the scope of the agency. Thus, the mere employment of an officer or agent as manager of a steamboat does not clothe him with ap-

[1] See supra, § 40; infra, § 700.

[2] Barnett *v.* Lambert, 15 Mees. & W. 489; Dawson *v.* Granby, 2 Pick. 345; Temple *v.* Pomroy, 4 Gray, 128; Lattomus *v.* Ins. Co. 3 Houston, 405; Davidson *v.* Stanley, 2 M. & G. 741; Levy *v.* Pyne, 1 C. & M. 453; Brady *v.* Todd, 9 C. B. N. S. 592; Palmer *v.* Hatch, 46 Mo. 585; Payne *v.* Potter, 9 Iowa, 549; Cedar Rapids R. R. *v.* Stewart, 25 Iowa, 115; Layet *v.* Gano, 17 Ohio, 466; Perrottin *v.* Cucullu, 6 La. 587; Smith *v.* Supervisors, 59 Ill. 412; Humphrey *v.* Havens, 12 Minn. 298; St. Ant. Falls *v.* Eastman, 20 Minn. 277; Rogers *v.* Kneeland, 10 Wend. 218; Nelson *v.* Hudson R. R. 48 N. Y. 498; Smith *v.* Tracey, 36 N. Y. 79; Anderson *v.* Coonly, 21 Wend. 279; Peck *v.* Harriott, 6 S. & R. 489; Williams *v.* Getty, 31 Penn. St. 464; Schuchart *v.* Allens, 1 Wallace, 359; Randall *v.* Kehlor, 60 Me. 37.

[3] Tucker *v.* Woolsey, 64 Barb. 142; 6 Lans. 482.

[4] See Baines *v.* Ewing, L. R. 1 Ex. 320; Sanderson *v.* Bell, 2 C. & M. 313; Day *v.* Boyd, 6 Heisk. 458; Quinn *v.* Carr, 6 N. Y. S. C. (Thomp. & Cook) 705. See infra, § 459.

[5] Rusby *v.* Scarlett, 5 Esp. 75; Flemyng *v.* Hector, 2 M. & W. 181.

parent authority to issue bills of lading for goods not on board, or not delivered to one authorized to receive freight on account of the boat.[1] Hence we may conclude, that whether we infer an agency inductively from a series of services rendered by the agent to the principal with the latter's assent, or whether we accept it from the principal's express recognition of the agent as a permanent servant, the agency is not to be stretched beyond the line which these services indicate.[2]

§ 128. *And so as to special agencies.* — Thus, as will be hereafter more fully seen, an agent appointed to sell in a store, or to act for the principal in other limited capacity, which does not involve the receiving of money, is not authorized to receive money for his principal, unless expressly authorized by direction or usage;[3] nor is a person employed to negotiate a bargain authorized to receive money payable by such bargain.[4] Generally, therefore, we must hold that an agent's acts, out of the line of his mandate, do not bind the principal.[5]

§ 129. *Act must be in scope of authority.* — A debtor, to sustain as a defence a payment to the agent instead of to the principal, must show that the payment to the agent was in the course

[1] Dean *v.* King, 22 Ohio St. 119. Where the agent of such boat carelessly issues a bill of lading acknowledging the receipt of freight not on board or not delivered to a person authorized to receive it, the owne s of the boat are not estopped, by reason of such carelessness, from denying the receipt thereof, although the shipper may have been misled thereby. Dean *v.* King, 22 Ohio St. 119.

[2] Pickering *v.* Bush, 15 East, 38; Dyer *v.* Pearson, 3 B. & Cr. 38; Johnson *v.* Wingate, 29 Me. 404; Washington Bk. *v.* Lewis, 22 Pick. 24; Richardson *v.* Strong, 13 Ired. 106; Surles *v.* Pipkin, 69 N. C. 513: Lewis *v.* Bourbon, 12 Kans. 186; Hills *v.* Upton, 24 La. An. 427. Infra, § 801.

[3] Morris *v.* Cleasby, 4 M. & S. 566; Kaye *v.* Brett, 5 Ex. 274; Calais Co. *v.* Van Pelt, 2 Black U. S. 372; Day *v.* Boyd, 6 Heisk. 458. See supra, § 40; infra, § 459, 801.

[4] Baring *v.* Corrie, 2 B. & Ald. 137; Puttock *v.* Ware, 3 Hurl. & N. 979; Higgins *v.* Moore, 34 N. Y. 417; Doubleday *v.* Kress, 50 N. Y. 410; Kornemann *v.* Monaghan, 24 Mich. 36; Peck *v.* Harriott, 6 Serg. & R. 149; Seiple *v.* Irwin, 30 Penn. St. 513; Morris *v.* Ruddy, 5 C. E. Green (20 N. J. Eq.), 236; Austin *v.* Thorp, 30 Iowa, 376. See, fully, infra, § 712, 713.

[5] Ibid.; Whitehead *v.* Tuckett, 15 East, 408; Walters *v.* Brogden, 1 Y. & J. 457; Abbott *v.* Rose, 62 Me. 194; Hatch *v.* Taylor, 10 N. H. 538; Ladd *v.* Franklin, 37 Conn. 53; Herbert *v.* Kneeland, 32 Vt. 316; Munn *v.* Commis. Co. 15 Johns. 44; Rossiter *v.* Rossiter, 8 Wend. 494; Martin *v.* Farnsworth, 49 N. Y. 455; Marquette Co. *v.* Taft, 28 Mich. 289; Dart *v.* Hercules, 57 Ill. 446; Baxter *v.* Lamont, 60 Ill. 237; Berry *v.* Barnes, 23 Ark. 211; Congar *v.* R. R. 17 Wisc. 477.

of business, and that it was appropriated by the payer to the specific purpose of extinguishing the particular debt. If a shopman, who is authorized to receive payment over the counter, receives the money elsewhere than in the shop, the payment is not good as against the master. And the reason is that the master may be willing to trust the agent to receive money in the regular course of business in the shop, under the inspection of the master himself, and of other employees in the same store; but that the same trust may naturally be not extended to the shopman's receipts elsewhere than in the shop.[1] Nor is the line of restriction that of locality alone. Authority to receive payment in one line of business will not include authority to receive payment in another line of business. Thus, authority to receive payment at the counter does not include authority to receive a legacy due the master.[2] And so as to all other departments of agency. Thus, the clerks and porters of railroad companies are not authorized by their principals to cause, by virtue of their office, the arrest of persons whom they suspect, though with reason, of attempting to steal from the principals.[3] So the subalterns of an express company do not bind their principals for goods received outside of the office;[4] nor do the subalterns of a railroad company bind the company by contracts to carry outside of its route and settled business.[5] So a railroad yard-master, whose business is to have charge of the yard, make up trains in the yard, and who has a right to employ men for all purposes they are required for in the yard and to do his part of the business, and to discharge them, to employ brakemen for himself and also for the road trains, and whose authority consists in employing men in his department, has no authority, by virtue of his office alone, to bind the railroad company employing him, by engaging a surgeon to attend one of the men under him in the service of the company, who had been run over and injured by the company's cars.[6] So if A. permit B. to hold himself out to the public as A.'s agent to sell and buy certain kinds of

[1] See infra, § 800–1; Kaye *v.* Brett, 5 Ex. 274.

[2] Sanderson *v.* Bell, 2 C. & M. 313. See to same effect, Day *v.* Boyd, 6 Heisk. 458.

[3] Allen *v.* R. R. L. R. 6 Q. B. 65; Edwards *v.* R. R. L. R. 5 C. P. 445.

[4] Cronkite *v.* Wells, 32 N. Y. 247.

[5] Wait *v.* R. R. 5 Lans. 475; Burroughs *v.* R. R. 100 Mass. 26.

[6] Marquette & Ont. R. R. Co. *v.* Taft, 28 Mich. 289.

goods for him, he is bound by the acts and contracts of B. within the scope of his authority, but that authority does not extend to the loaning of money or buying clothes for B.[1]

A general agent cannot submit his principal's interests to arbitrators.[2] Nor can he confess judgment.[3]

[1] Gilbraith *v.* Lineberger, 69 N. C. 145. As additional authorities to the effect that the agent, to bind his principal, must be acting within the scope of his authority, may be mentioned the following: Reedie *v.* R. R. 4 Exch. 255; Laugher *v.* Pointer, 5 B. & C. 547; Butler *v.* Hunter, 7 H. & N. 826; Peachy *v.* Rowland, 13 C. B. 187; Sadler *v.* Henloch, 4 E. & B. 570; Cuthbertson *v.* Parsons, 12 C. B. 304; Boulton *v.* Reynolds, 2 E. & E. 369; Webber *v.* Granville, 9 C. B. (N. S.) 883; Edwards *v.* Bushell, L. R. 1 Q. B. 97; Bagley *v.* R. R. L. R. 6 C. P. 415; Adams *v.* Flanagan, 36 Vt. 400; Belcher *v.* R. R. 43 Vt. 133; Taft *v.* Baker, 100 Mass. 68; Ramsden *v.* R. R. 104 Mass. 117; Williams *v.* R. R. 107 Mass. 108; Willard *v.* Buckingham, 36 Conn. 395; Fellows *v.* Steamboat Co. 38 Conn. 197; Union Bk. *v.* Mott, 39 Barb. 180; Olyphant *v.* M'Nair, 44 Barb. 446; Westfield Bk. *v.* Cornen, 37 N. Y. 320; Haydock *v.* Stow, 40 N. Y. 365; Cosgreve *v.* Ogden, 49 N. Y. 255; Quinn *v.* Carr, 11 N. Y. Sup. Ct. 259; Black *v.* Shreve, 2 Beasley, 455; Hagerstown Bk. *v.* London, 3 Grant, 135; Stevenson *v.* Hoy, 43 Penn. St. 191; Tanner *v.* R. R. 53 Penn. St. 411; Balt. St. Co. *v.* Brown, 54 Penn. St. 77; Chorpenning *v.* Royce, 58 Penn. St. 476; Mundorff *v.* Wiekersham, 63 Penn. St. 87; All. & M. R. R. *v.* Donahue, 70 Penn. St. 119; York Co. Bk. *v.* Stein, 24 Md. 447; Balt. & O. R. R. *v.* Blocher, 27 Md. 277; Adams *v.* Brown, 16 Oh. St. 75; Pickens *v.* Diecker, 21 Oh. St. 212; Trout *v.* Emmons, 29 Ill. 433; Schneider *v.* Seely, 40 Ill. 257; Hutchings *v.* Ladd, 16 Mich. 493; Smith *v.* Webster, 23 Mich. 298; Berry *v.* Anderson, 22 Ind. 36; Rupp *v.* Stith, 33 Ind. 244; Tidrick *v.* Rice, 13 Iowa, 214; Mordhurst *v.* Boies, 24 Iowa, 99; Wanless *v.* M'Candless, 38 Iowa, 20; Conger *v.* R. R. 17 Wisc. 477; Barteau *v.* West, 23 Wisc. 416; Allison *v.* R. R. 64 N. C. 382; Garretson *v.* Duenckel, 5 Mo. 104; King *v.* Pearce, 40 Mo. 222; Gass *v.* Coblenz, 43 Mo. 377; Gehrke *v.* Jod, 59 Mo. 522; Bell *v.* Offutt, 10 Bush, 858; New Orl. R. R. Co. *v.* Bailey, 40 Miss. 375; Howell *v.* Gordon, 40 Ga. 302; Stehn *v.* Fussnacht, 20 La. An. 83; Harris *v.* Cuddy, 21 La. An. 388; Ball *v.* Bender, 22 La. An. 493; Grimes *v.* Hagood, 27 Tex. 693. See infra, § 671, 681.

[2] Trout *v.* Emmons, 29 Ill. 433.

[3] Howell *v.* Gordon, 40 Ga. 302. A power of attorney, which simply authorizes the agent to conduct or control the business and affairs of the principal during his absence, does not authorize the sale by the attorney of the land of the principal. Watson *v.* Hopkins, 27 Texas, 637. The general agent of the owner of real estate, in the management of his buildings, gave a lease, under seal, in which the name of the principal appeared as lessor, but which was signed by the agent, who received some of the instalments of rent due, and the principal then brought an action against the lessee for subsequent instalments. Held, that a surrender of the lease to the agent, and an acceptance thereof by him, were a good defence to the action, although the agent had no written authority either to make a lease or

§ 130. *Principal is responsible even though the special act committed is privately forbidden by him.* — Supposing the act in question was incidental to the discharge of the agent's office, the principal is bound, even though he may have privately forbidden the act.[1] It should be remembered, however, that public agents

to accept a surrender. Amory *v.* Kannoffsky, 117 Mass. 351.

Where the agent of a line of steamships had clerks on the wharf who were intrusted with the business of signing bills of lading, it was held that the proprietors of this line of steamships were bound by the act of one of these clerks in signing a bill of lading for goods to go by a particular vessel by name, although the clerk was only authorized to contract to have the goods carried on the next vessel sailing after the receipt of the goods. Goddard *v.* Mallory, 52 Barb. 87.

A broker, who was employed by plaintiff, procured insurance on petroleum. The policy contained a provision that the insurer could raise, at its option, the rate of premium. The insurer notified the broker that it would raise the rate of premium one per cent. Subsequently, a clerk employed by the broker, without the knowledge or consent of the plaintiff, returned the policy to the insurer, with a direction to cancel indorsed thereon, and the insurer cancelled the same. Held, that plaintiff could not disaffirm the act of the clerk, and the insurer was not, after such cancellation, liable for a loss. Standard Oil Co. *v.* Triumph Ins. Co. 6 N. Y. Supreme Ct. 300. A father agreed that his son should have from the goods of a store the support of himself and family as a compensation for his services in conducting the business. From the goods the son paid P. for medical services to his wife, but the father erased the credit therefor from the books, and sued P. to recover the value of the goods. Held, that he could not recover. Morse *v.* Powers, 45 Vt. 800. A local board of health, being in occupation of a sewage farm, had given plenary powers for the management of such farm in the most beneficial manner to one B. A ditch ran between the farm and the land of the plaintiff. With a view to rendering such ditch more capable of carrying off the drainage from the farm, B. wrongfully went upon the plaintiff's land, and pared away his side of the ditch, and cut down so much of the brushwood and underwood on the plaintiff's side as impeded the flow of drainage along the ditch. Held, that the acts so done by B. were not within the scope of his employment; and consequently the local board were not liable for them at the suit of the plaintiff, there being no implied authority from the board to do them. Bolingbroke *v.* Local Board, L. R. 9 C. P. 575.

[1] Howard *v.* Braithwhaite, 1 Ves. & B. 209; Duke of Beaufort *v.* Neeld, 12 Cl. & F. 290; Fenn *v.* Harrison, 3 T. R. 757; 4 T. R. 177; Whitehead *v.* Tuckett, 15 East, 400; Wilson *v.* Hart, 7 Taunt. 295; Bryant *v.* Moore, 26 Me. 84; Munn *v.* Commis. 15 Johns. 44; Jeffries *v.* Bigelow, 13 Wend. 518; Hildebrand *v.* Crawford, 6 Lansing, 502; Morey *v.* Webb, 65 Barbour, 22; Andrews *v.* Kneeland, 6 Cowen, 354; Cosgrove *v.* Ogden, 49 N. Y. 255; Kelly *v.* Coal Co. 11 N. Y. Sup. Ct. 261; Anderson *v.* State, 22 Ohio St. 305; Adams Mining Co. *v.* Senter, 26 Mich. 73; Rourke *v.* Story, 4 E. D. Smith, 54; Willard *v.* Buckingham, 36 Conn. 365; Fatman *v.* Leet, 41 Ind.

bind the government, so far as the subjects of such government are concerned, only to the extent of the powers actually conferred.[1]

§ 131. An agent, though transcending the limits of his power, binds his principal as against third parties, according to the Roman law, when the limits of the power are not expressed in the letter of agency which is the only notice to the third party of the character of the agency. This may happen when there are secret instructions, not expressed in the letter of agency; or when the agent has power to borrow a particular sum of money for his principal, and after having borrowed the sum from one party, he borrows the same from a second *bonâ fide* lender.[2] In the latter case the second lender would be entitled to recover the amount loaned from the principal; but the first lender would be precluded from such recovery, if it should appear that he was guilty of negligence in not retaining the letter of agency, or (as in case of a circular letter) not entering on it the amount paid by him. And in case of his being paid by the principal, the principal has a claim against him for the damages caused by such negligence.[3]

§ 132. *Third party in such case may recover if acting bonâ*

135; Reynolds *v.* Kenyon, 43 Barb. 583; Adams Exp. Co. *v.* Schlesinger, 75 Penn. St. 246; Butler *v.* Maples, 9 Wall. 766; Abbott *v.* Rose, 62 Me. 194; Barnard *v.* Wheeler, 24 Me. 412; Golding *v.* Merchant, 43 Ala. 705; Davenport *v.* Ins. Co. 17 Iowa, 276; Palmer *v.* Cheney, 35 Iowa, 281; Bell *v.* Offutt, 10 Bush, 632; Planters' Bk. *v.* Merritt, 7 Heisk. 177; Morton *v.* Scull, 23 Ark. 289. An agent, acting within the general scope of his apparent authority, purchased personal property, for which he gave a note signed by him as agent, without naming the principal. The property purchased was received by the principal. Held, the payee having taken the note *bonâ fide*, that it bound the principal, notwithstanding the agent's instructions prohibited him from giving notes. Hildebrand *v.* Crawford, 6 Lans. (N. Y.) 502. A principal, employing an agent to do an illegal act, is responsible for the injury done, whether the agent acts innocently or maliciously. Hynes *v.* Jungren, 8 Kans. 391. A conversation between the principal and agent in the presence of the seller, which amounted to nothing more than mere advice or directions as to the quantity of the goods he should purchase, would not prevent a recovery against the principal though the agent exceeded in his purchase the quantity directed, if the goods thus purchased were resold and the proceeds received by the principal. Palmer *v.* Cheney, 35 Iowa, 281.

[1] Lee *v.* Munroe, 7 Cranch, 366; Baltimore *v.* Reynolds, 20 Md. 1; State *v.* Hastings, 10 Wisc. 518; Hull *v.* Marshall, 12 Iowa, 142. Infra, § 510–13.

[2] Koch, Ford. III. p. 567; Pothier, trat. des contrats de bienfaisance, tom. II. p. 1, seq. No. 89.

[3] See Koch, III. p. 567.

fide, and without negligence. — We may contemplate[1] the transcending by an agent of his principal's commission in two relations: first, when it relates to the extent or quantity of a thing to be bought or sold; secondly, when it involves the execution of a mandate after the authorization has ceased. The Roman law in both cases holds that engagements which the agent, exceeding the limits of his authority, makes with a third person, bind the principal, when the third party acts in good faith, and is guilty of no negligence.[2] It is true that the following is sometimes cited as conflicting with this view. "Si procurator ad unam speciem constitutus officium mandati egressus est, id, quod gessit, nullum domino praeiudicium facere potuit. Quodsi plenam potestatem agendi habuit, rem indicatam rescindi non oportet, quum, si quid fraude vel dolo egerit, convenire eum more iudiciorum non prohibearis."[3] But the opposite interpretation to that claimed is to be put on this passage. What it says is that it is within the power of the mandant, when the mandatary has in a process done some act repugnant to his agency, not, indeed, on this ground to impeach the decision rendered in the process, but to hold the mandatary responsible for his misconduct; when, however, a special attorney, avowedly acting under a power of attorney, transcends such power, this is not to be imputed as negligence to the principal. For third persons who deal with an attorney claiming to act under a limited power have notice of the power, and are bound to see if the limits are transgressed.[4] A

[1] Koch, Ford. III. 563. Infra, § 137–8.

[2] This doctrine is maintained by Huber, praelect. ad Inst. h. t. § 10; Hofacker, princip. juris Rom. Germ. tom. III. § 2015; Buchner, Versuch einer Theorie des Vollmachtvertrags, § 110. It is disputed, according to Koch (III. 563), by d'Avezan, contractuum, lib. II. tract. IV., and by Westphal, in a treatise published in Halle, 1784. But the rule Koch treats as incontestable. And see Goodwin *v.* Roberts, 33 L. T. N. S. 272.

[3] L. 10. C. de proc. II. 13.

[4] To this it may be added that L. 22. C. de fidejus. VIII. 41 (cited as conflicting with the view in the text), relates not to mandates in principle, but to the technical bearings of the *actio mandati contraria;* and that L. 15, § 10. D. XL. 9; and L. 4, pr. D. XL. 1, relate to *manumissio vindicta* in its technical relations, and not to mandates; that L. 25, § 14. D. XXIX. 2, relates only to the *aditio hereditatis;* and that all these passages relate to the merely formal side of the old civil law. L. 7. D. de divortiis, XXIV. 2, cited by the scholastic jurists as sustaining them, does not relate to a mandate for the performance of a particular commission, but to the sending of a letter of divorce by a messenger, and a change of purpose by the messenger before the delivery of the letter. See infra, § 459, 460.

more pertinent authority, however, is to be found in an opinion of Africanus, given in the Digest under the title De rebus creditis.[1] Africanus assumes the termination of a mandate by the death of the principal, and of the ignorance of the agent of such death, and assumes three distinct cases in which the question may present itself: (1) stipulation; (2) loan; and (3) receipt of money. Africanus holds that the stipulation is beyond doubt invalid; that this is incident to the technical character of the transaction. He comes to the same conclusion as to the loan and the securities given for it. This, also, is to be explained by the peculiarities of the contract of loan. He does not, however, deny that other obligations arising out of the transaction could be made good against the principal or his heirs. The payment, however, must operate as an equitable bar against the principal, when the person paying acted in good faith, and so Africanus holds, saying, "placebat, debitores quidem ei, qui solvissent, liberatos esse, si modo ipsi quoque ignorassent, dominum decessisse."[2] From these positions naturally flows the more modern conclusion of the unity of the mandant with the mandatary; for in all cases, argues Koch, where by the old law the third person had a right of action against the mandatary, this right was directly available against the mandant, as he was substantially the party in interest. By the old law, however, the mandatary could only in such case defend by the *exceptio doli*, in cases where the third person knew that the mandate was extinguished or transcended, from which proceeds the modern rule, that the test is the good faith of the third person.

This is expressly recognized in those cases in which it was held, that the third person can directly maintain an action against the principal, although the agent (magister or institor), overstepped the limits of his commission. As to the magister, this appears from the following: "Unde quaerit Ofilius, si ad reficiendem navem mutuatus nummos in suos usus converterit, an in exercitorem detur actio. Et ait, si hac lege accepit quasi in navem impensurus, mox mutavit voluntatem, teneri exercitorem imputaturum sibi, cur talem praeposuerit: quod si ab initio consilium cepit fraudandi creditoris et hoc specialiter non expresserit, quod ad navis causam accepit, contra esse: quam distinctionem Pedius probat. Sed et si in pretiis rerum emptorum fefellit magister,

[1] L. 41. D. XII. 1. [2] Koch, Ford. III. 565.

exercitoris erit damnum, non creditoris."[1] The same doctrine is specifically pointed at procuration in the Codex.[2] The principle is recognized in the very qualification attached to it: That the third party acted as a prudent business man and was guilty of no laches in trusting the agent.[3]

§ 133. *The fact that the agent knows he is fraudulently transcending his powers does not infect bonâ fide third persons with notice.* — Some of the scholastic jurists erroneously held that it was enough to vitiate an agent's acts when transcending his powers, that he should know the fact himself.[4] It is true that the following passage in the Digest has been cited to this effect: "Fundi venditor etiamsi mandaverit alicui, ut emptorem in vacuam possessionem induceret, priusquam id fieret, non recte emptor per se in possessionem veniet. Item si amicus venditoris mortuo eo priusquam id sciret, aut non prohibentibus heredibus id fecerit, recte possessio tradita erit. Sed si id fecerit, cum sciret dominum mortuum aut cum sciret heredes id facere nolle, contra erit."[5] But this refers to the relations between mandant and mandatary, and not to those between mandatary and third parties. And the rule is substantially the same as that adopted by our Anglo-American courts.[6]

§ 134. *Usage interprets authority.* — An authorization, however, we must remember, is steeped, to use one of Savigny's metaphors, in the atmosphere of the jurisprudence in which it has its seat.[7] Of this jurisprudence, local custom is a part. It is the usage of a place that a mercantile agency should be executed in a particular way; and the parties who authorize and agree to exercise this agency impliedly incorporate this usage in their contract.[8] But a conflicting usage will be no excuse for an express violation of instructions.[9]

[1] L. 1, § 9, 10. D. de exerc. XIV. 1.

[2] L. 10. C. de procur. II. 13.

[3] L. 7, § 1. D. de exerc. act. D. XIV. 1. L. 11, § 3, 4. D. de inst. act. XIV. 3. L. 51. D. de solut. et lib. XLVI. 3. L. 34, § 3, 4, eod.

[4] See Leyser, Medit. Sp. 180, M. 4; Koch, Ford. III. 566.

[5] L. 33. D. de adq. pos. XLI. 2.

[6] See cases cited, supra, § 127–9.

[7] Savigny's Röm. Recht, § 371.

[8] Young *v.* Cole, 3 Bing. N. C. 724; Sutton *v.* Tatham, 10 Ad. & E. 27; Bayliffe *v.* Butterworth, 1 Ex. 445; Graves *v.* Legg, 2 H. & N. 210; Pickering *v.* Buck, 15 East, 38; Brady *v.* Todd, 9 C. B. N. S. 592; Frank *v.* Jenkins, 22 Ohio St. 577; Schuchardt

[9] R. *v.* Lee, 12 Mod. 514; Story's Agency, § 199; Farmers' & Mech. Bank *v.* Sprague, 52 N. Y. 615. Infra, § 676, 696, 738.

§ 135. *Same rule applies to special agencies.* — So when A. is employed by B. to do a particular act, A. is authorized by B. to do whatever is proper and usual to perfect such act. Among the illustrations of this rule we may adduce the following: An agent sent from a foreign country with goods, in quantities for exhibition and sale, who produces letters from his principal to a correspondent of the latter at the place to which he is sent, asking assistance and advice for him in the prosecution of his business, has such apparent authority to hire suitable premises for storage of the goods as will justify the correspondent in renting such premises to him for the purpose, on the principal's account, yet, no authority can be implied from these facts which will authorize the advancement of money by the correspondent of the agent, on account of the principal, even after an advance made by him for duties on the goods has been approved.[1]

So authority to raise money "on such conditions as he may think most conducive to the interests of the company," authorizes the treasurer of a corporation to raise money by drafts on one of the directors, payable to his own order, and indorsed by him, and charged by the acceptor to the company.[2]

§ 136. *But in special agencies acts out of mandate do not bind principal.*[3] — Thus, an authority to a general superintendent of an express company to employ and direct agents does not authorize him to employ a person in a line divergent from and conflicting with the interests of the company.[4]

§ 137. *Third party dealing with agent bound to exercise the caution of a good business man.* — Here a new distinction meets us, which requires independent examination. I may be careless in exhibiting confidence in an agent, yet this does not make me

v. Allen, 1 Wall. 359; Greeley *v.* Bartlett, 1 Greenl. 172; Randall *v.* Kehler, 60 Me. 37; Goodenow *v.* Tyler, 7 Mass. 36; Upton *v.* Suffolk Mills, 4 Cush. 586; Day *v.* Holmes, 103 Mass. 306; Willard *v.* Buckingham, 36 Conn. 395; Daylight Burner Gas Co. *v.* Odlin, 51 N. H. 56; McKinstry *v.* Pearsall, 3 John. 319; Smith *v.* Tracy, 36 N. Y. 79; Watson *v.* Brewster, 1 Barr, 381; Bennet *v.* Clemens, 58 Penn. St. 24; Rosenstock *v.* Tormey, 32 Md. 169; Am. Cent. Ins. Co. *v.* McLantham, 11 Kans. 533. See Whart. Confl. of Laws, § 434, and particularly as to Brokers, infra, § 696.

[1] Muller *v.* Pondir, 6 Lans. (N. Y.) 472. See as to other cases, supra, § 124; infra, § 187, 730.

[2] Belknap *v.* Davis, 1 Appleton, 455.

[3] Baines *v.* Ewing, L. R. 1 Ex. 320; Dicey on Parties, 243.

[4] Adams Express Co. *v.* Trego, 35 Md. 47. See fully, supra, § 125, 129.

liable to a third party, who, in dealing with such agent, fails to apply the diligence usual with good business men under the circumstances. The case becomes, in such a view, one of what is called contributory negligence;[1] in other words, the causal connection between my negligence in giving color to the employment of A., and B's. loss by dealing with A., is broken by B.'s own negligence in trusting A. without due inquiry. I may be, for instance, in business relations with A., and may have incautiously employed A. on some occasions as my agent; but if A. should hold himself out to B. as having obtained from me extraordinary powers, it would be the duty of B. to inquire of me whether such powers were really given. In other words, if I permit A. to appear to the world as my agent, and if B., on faith of this permission, trusts A. as my agent, B., if guilty of no laches, may fall back on me as principal. But if there is anything likely to put a reasonable business man on his guard as to the nature of the agency, it is the duty of the third party to inquire how far the agent's acts are in pursuance of the principal's limitations. Under such circumstances the third party must, in the first place, inquire as to the extent of the agent's authorization. If this be in writing, its contents must be scrutinized, for ordinarily the agent is limited by the terms of the writing.[2] If there be a public authorization (*e. g.* one of record), this must be carefully scanned, for such authorization is notice to all the world, and no ignorance of its contents is an excuse. Even as to an informal authorization, the person dealing with the agent is bound to inquire if there is anything to awaken suspicion in a prudent business man.[3] It is true that the Roman law here makes a just distinction based on the capacity of the third party to make inquiry. The institor, or local business agent, bears such relation as to place and time to his principal, that inquiry as to the nature of the authority is presumed to be practicable; the shipmaster, on the other hand, when at sea, is so detached that such inquiries cannot be effectively made.[4] To inquire of the principal, it is

[1] See Wharton on Negligence, § 300.

[2] L. 19. D. de R. J. L. 11, § 5. D. h. t. Weise's appeal, 72 Penn. St. 351; Atwood *v.* Munnings, 7 B. & Cr. 278; De Bouchont *v.* Godschmid, 5 Ves. 213. See fully, supra, § 132; infra, § 221.

[3] Dozier *v.* Freeman, 47 Missis. 647; Davidson *v.* Porter, 57 Ill. 300.

[4] L. I. pr. D. de exercit. act.

true, is always prudent; yet it must be remembered that such inquiry is often impracticable, and often conveys so serious a reflection on the agent that it is only justified by well grounded suspicion. Unless there be such suspicion, it is sufficient to ask the agent to exhibit his powers. By the Roman law, it is sufficient, if, in construing these powers, the agent exercise a reasonable good faith, framed upon the current business usage.[1]

§ 138. *Duty of third person to inquire whether the due conditions of the agency exist.*[2] — Supposing that the right of the agent to contract is dependent on certain conditions, it is the duty of the agent to inquire if these conditions exist. *Et in summa diligentiam creditorem debere praestare.*[3] Thus, when a shipmaster applies for a loan for repairs of a ship, the creditor must see whether the ship really needs repairs: "Si illud quoque scierit, necessariam refectioni pecuniam esse."[4] So also must the third party inquire if the proposed contract is able to satisfy these conditions. Thus, for instance, to adopt an illustration taken by Thöl from the Roman law, if a shipmaster wants to borrow money at a particular port to buy a sail, the inquiry arises whether such a sail could be obtained in that port.[5] Then, again, inquiry may be made as to whether the mode of execution is reasonable, as whether the particular amount of money sought to be borrowed is necessary for the particular purpose. It should be remembered, however, that inquiries of this kind are to be determined by what strikes the eye, and by general estimates. "Si multo tamen major pecunia credita fuerit, quam ad eam rem esset necessaria, non debere *in solidum* adversus dominum navis actionem dari."[6] Hence it has been held that in such matters the third party (there being no other grounds of suspicion), may trust the estimate of the agent. This is illustrated in the Roman law by the case of the ship officer who borrows money for the repair of the ship, and who pays an exorbitant

[1] L. 11. D. depos. (16. 3.) L. 3, pr. D. de SC. Macedoniano (14. 6.) L. 8. D. quod cum eo qui in aliena potestate. (14. 5.) A purchaser from an agent holding property for sale, with knowledge of such agency, and that the agent is selling to raise money for his own purposes, and intending to apply it to his own uses, acquires no title as against the principal. Easton *v.* Clark, 35 N. Y. 225.

[2] Craycraft *v.* Salvage, 10 Bush, 696; Weise's appeal, 73 Penn. St. 351; Kirkpatrick *v.* Winans, 1 Green (N. J.), 467. Supra, § 132, 137.

[3] L. 7, § 1. D. de exercit. act. XIV. 1.

[4] L. 7, pr. D. de exercit. act.

[5] L. 7, § 1. D. de exercit. act.

[6] L. 7, pr. D. de exercit. act.

price for the repairs. The lender is not bound to examine into price, but may trust the officer. "Sed et si in pretiis rerum emptorum fefellit magister, exercitoris erit damnum, non creditoris."[1] To burden the third party with inquiries into the conduct of the agent in such relations, would be to make the third party himself the agent. "Non oportet creditorem ad hoc adstringi, ut ipse reficiendae navis curam suscipiat, et negotium domini gerat, quod certe futurum sit, si necesse habeat probare, pecuniam in refectionem erogatam esse."[2] If the agent misconducts himself in this respect, the loss falls on the principal, to whose mistake in the appointment of the agent the loss is attributable. "Imputaturum sibi, cur talem praeposuerit."[3]

§ 139. *Extraordinary pretensions to be scrutinized by third party.* — If the claims of the agent are anomalous and extraordinary, then if the principal is accessible, he should be applied to for information.[4] Yet we must again notice that the third party is not bound to exercise to the agent an extent of distrust and suspicion which would destroy business confidence. When there is no just ground to suspect, he must not suspect; on the other hand, when there is any good reason to put the third party on his inquiry, he is bound to go to the principal for this purpose, or otherwise he will open himself to the charge of collusion with the agent against the principal. If there are no grounds of suspicion, the principal, even by the Roman law, must bear the loss in case the agent exceeds or perverts his instructions.[5] At the same time it must be kept in mind that the pretension by an agent to extraordinary or peculiar powers is by itself sufficient to arouse suspicion. It is otherwise as to peculiarities in an agent's conduct outside of his agency. These, if not touching his business character, are not just grounds for suspicion.

II. POWERS OF JOINT AGENTS.

§ 140. *Joint agents must usually concur to validate a joint act of agency.* — If A. appoints B., C., and D. as joint agents to do a particular act, the act does not bind A., unless it is united in by B., C., and D.[6] In the execution of trusts for *public* purposes

[1] L. 1, § 10. D. de exercit. act.
[2] L. 7, pr. de exerc. act. 14. 1.
[3] L. 1, § 9. D. de exercit. act. 14. 1; Thöl, Handelsrecht, I. 202.
[4] Dozier *v.* Freeman, 47 Missis. 647.
[5] Thöl, Handelsrecht, I. 211, citing L. 11, § 4. i. f. D. h. t.
[6] Despatch Line *v.* Bellamy Man. Co. 12 N. H. 205; Low *v.* Perkins, 10 Vt. 532; Town *v.* Jacquith, 6 Mass.

(*e. g.* boards for public works, boards for charities), it is enough, unless otherwise limited by the statute of appointment, if a majority of the trustees unites.[1] But in respect to agencies established by an individual for private purposes, the rule is imperative; and under this rule where a commission vests power in two without words of survivorship, and one of them dies, unless there is a subsequent recognition by the principal of the survivor as agent, his acts will not bind the principal.[2]

§ 141. *When instrument or business usage authorizes severance then either agent may act singly.* — We must at the same time remember that the authority to the agents may be given in such terms as to authorize a several execution, or an execution by a majority or other number; and in the absence of express words, if the power is so exercised under circumstances justifying the inference that the principal intended that less than the whole number might act, the principal is bound to those who have dealt with the agents acting upon such inference.[3] When the instrument shows that the power is to be joint and several, the execution may be joint and several.[4] Another exception may be found in the cases in which the usage of business is for one of several joint factors to act for the common principal.[5] So there can be little doubt that a principal is liable in an action for damages for misconduct, or breach of duty on the part of one of several joint agents.[6]

§ 142. *Joint agents jointly liable.* — Where two or more persons undertake to execute an agency together, then they are jointly liable each for the other's receipts; nor is it any defence that one of the agents wholly transacted the business with the knowledge of the principal.[7] And a joint consignment makes each liable for

46; Kupfer *v.* Inhab. South Parish, 12 Mass. 185; Heard *v.* March, 12 Cush. 580; Hawley *v.* Keeler, 53 N. Y. 114; Green *v.* Miller, 6 Johns. 39; Johnston *v.* Bingham, 9 Watts & S. 56; Hartford Fire Ins. Co. *v.* Wilcox, 57 Ill. 180; Peter *v.* Beverley, 10 Peters, 564; Floyd *v.* Johnson, 2 Littell (Ky.), 115. See Bank U. S. *v.* Davis, 2 Hill, 451. And this even though one of the joint agents die or refuse. Co. Litt. 112 *b*; 1 Com. Dig. 144.

[1] Jewett *v.* Alton, 7 N. H. 253; Caldwell *v.* Harrison, 11 Ala. 755; Soens *v.* Racine, 10 Wisc. 271.

[2] Hartford Fire Ins. Co. *v.* Wilcox, 57 Ill. 180.

[3] Hawley *v.* Keeler, 53 N. Y. 114.

[4] Cedar Rapids R. R. *v.* Stewart, 25 Iowa, 115.

[5] See infra, § 765.

[6] See Bank U. S. *v.* Davis, 2 Hill, 451; Russel, Fact. & Brok. 318; Guthrie *v.* Armstrong, 5 B. & Ald. 628.

[7] Godfrey *v.* Saunders, 3 Wils. 73;

the whole amount, supposing the consignees jointly undertake the work, notwithstanding a private agreement among themselves that neither shall be liable for the other.[1] By the Roman law, when two or more mandataries undertake the execution of a particular commission, each is liable *in solido* for the entire work. "Duobus quis mandavit negotorium administrationem: quaesitum est, an unusquisque mandati indicio in solidum teneatur. Responde unumquemque pro solido conveniri debere, dummodo ab utroque non amplius debito exigatur."[2]

§ 143. *Several agents not jointly liable.* — If A., B., and C. are appointed as agents of D., and act concurrently, either is necessarily liable for the acts of the others. But if they act independently, for independent purposes, neither is liable for the other's acts, unless concert or subordination be proved. Thus, the deacons of an unincorporated religious society, who are *ex officio* agents for the management and control of its property and effects, cannot be held personally liable on a contract made by other agents of the society, unless it be shown that the former participated in the appointment of the latter, or in some way ratified such contract.[3]

§ 144. This reasoning rests on a principle familiar to both the Roman law and our own. When a principal divides among several agents certain distinct spheres of action, each agent is to be regarded as legitimated only in his particular sphere. "Si divisis (officiis), ut alter locando, alter exigendo, pro cujusque officio obligabitur exercitor."[4] In such case contracts by third persons are to be made with the agents severally. "Si plures sint magistri, non divisis officiis, quodcumque cum uno gestum erit, obligabit exercitorem."[5] In case, however, the power of attorney so requires, the collective action of the agents is necessary. "Si sic praeposuit: ne alter sine altero quid gerat."[6]

M'Ilreath *v.* Margetson, 4 Doug. 278; Snelling *v.* Howard, 51 N. Y. 373.

[1] Waugh *v.* Carver, 2 H. Bl. 235. See Wells *v.* Ross, 7 Taunt. 403; Aldridge *v.* R. 15 C. B. (N. S.) 582. A firm of solicitors acting for two trustees, and receiving trust moneys from them and paying over a portion of such moneys to one only of the trustees who afterwards died insolvent, is liable to the trust estate for the whole amount of moneys received from the two trustees. Lee *v.* Sankey, 27 L. T. N. S. 809; 15 L. R. Eq. 204; V. C. B.

[2] L. 60, § 2. D. mand. XVII. 1.

[3] Devoss *v.* Gray, 22 Ohio St. 159.

[4] L. 1, § 13. D. de exercit. act. So also, L. 11, § 5. D. de instit. act.

[5] L. 1, § 13. D. de exercit. act.

[6] L. 1, § 14. D. de exercit. act.

"Vel cum omnibus simul contrahi voluit." [1] Ordinarily, however, when several persons undertake to act jointly as agents, by a joint expression of liability, they make themselves liable jointly. And where a firm of agents give their firm notes with nothing upon them to indicate that they do not assume a personal liability, they must be treated as principals in the notes.[2]

§ 145. *Two coördinate agents cannot control each other.* — When two coördinate agents receive instructions from the principal and are independent of each other, neither has a right to repudiate the acts of the other without special authority from the principal.[3]

III. POWERS COMMON TO ALL AGENCIES.

1. *To bind by Contract.*

§ 146. *By modern commercial law this power is conceded.* — By the law of all modern commercial nations, an agent has the power of binding his principal by contract; and this power involves, to a greater or less degree, the right of determining not merely the mode but the extent of the obligation it imposes. This right is one of the necessities of modern society; yet we must remember that as a right in derogation of personal liberty and power, it is to be strictly construed. As a matter of natural justice I am entitled to the control of my person and of the produce of my own labor. If I am incompetent to govern myself or my property, the law may take from me the management of both. But that I should voluntarily cede to another person the right, at his election, to bind, if not my person, at least my property, by entering into contracts by which I am to be bound, is no doubt one of the requisites of an advanced and multiplex civilization; but it is a power so capable of abuse that it should be strictly construed by the courts. The right of one man thus to bind another should not be established unless by the plain and intelligent action of the person to be bound.[4]

§ 147. *Otherwise by older Roman law.* — The Roman law, for reasons which are noticed incidentally in prior sections, refused to allow a principal to be bound by the act of any person who was not subject to his immediate will. We have this shown in

[1] L. 11, § 5. D. h. t.; Thöl, Handelsrecht, ed. 1875, p. 199.

[2] Snelling *v.* Howard, 51 N. Y. 373.

[3] Law *v.* Cross, 1 Black U. S. 533.

[4] See supra, § 4, 5.

a well known fragment of Paulus:[1] "Quaecunque gerimus, cum ex nostro contractu originem trahunt, nisi ex nostra persona obligationis initium sumant, inanem actum nostrum faciunt et ideo neque stipulari, neque emere, vendere contrahere, ut alter suo nomine recte agat, possumus." I cannot be bound, so Paulus reasons, by another's obligation, because an obligation, to bind me, must spring directly from myself. So in the following fragment from Ulpian:[2] "Alteri stipulari nemo potest, praeterquam si servus domino, filius, patri stipuletur: inventae enim sunt huiusmodi obligationes ad hoc, ut unusquisque sibi adquirat, quod sua interest: caeterum ut alii detur, nihil interest mea." The person contracting must be the person interested directly in the contract. For me, an independent person, to bind another by a contract in which I am not interested, is to transcend the limits of the law. On the same reasoning, if I engage that a third person (a freeman) shall do a particular thing, this binds neither this third person nor myself.[3]

§ 148. Such being the principles of the Roman law, it is obvious that representation in the institution of contracts, if adopted at all, must be adopted circuitously. The end was reached in part by the recognition of the exception that though one business man (*paterfamilias*) could not be represented by another business man, who was an independent person; yet that he could be represented by his slave, or his son, whom he held in subjection, and who were the choiceless instruments of his will.[4] And a second remedy was found in the introduction

[1] L. 11. de oblig. et act. (44. 7); Paulus, lib. 12, ad Sabinum.

[2] L. 38, § 17, de verb. obl. (45. 1); Ulpianus, lib. 49, ad Sabinum.

[3] L. 38. pr. L. 83. pr. de verb. obl.

[4] Pr. I. de stipul serv. (3. 17): Servus *ex persona domini* ius stipulandi habet. L. 31. pr. de hered. instit. (28. 5): Non minus servos, quam liberos heredes instituere possumus: si modo eorum scil. servi sint, quos ipsos heredes instituere possumus, cum testamentifactio cum servis *ex persona dominorum* introducta est. § 2. I. de hered. instit. (2. 14): Servus etiam alienus post domini mortem recte heres instituitur, *quia et cum hereditariis servis est testamentifactio.* Nondum enim adita hereditas personae vicem sustinet, non heredis futuri, sed defuncti: cum ctiam eius, qui in utero est, servus recte heres instituatur. See, also, L. 25, § 1–3 de adquir. hered. (29. 2). L. 26 de stipul. serv. (45. 3). L. 61, § 1 de adquir. rer. dom. (41. 1.) The slave could earn nothing for himself, and could only have at heart the interest of the master, whose commands he was bound to obey. Ulpianus lib. 2 ad legem Iuliam et Papiam. Placet, quoties adquiritur per aliquem hereditas vel quid aliud ei, cuius quis in

of a practice by which the intended agent should promise that the particular business should be performed, but that he should assign all the benefits derived from it to his principal, and be indemnified by his principal for all damage thereby occurring to himself. So far as concerns masters and officers of ships, their right to bind the owner was always affirmed, irrespective of the question whether the *magister navis*, or the *institor*, was in the *potestas* of the principal.[1]

§ 149. *Gradual relaxation of this rule.* — But limitations of agency such as those which we have just noticed could not continue when the reasons which produced them ceased to operate. When Europe awoke from the sleep of the Middle Ages, the Roman law, indeed, continued to be regarded as authoritative, but the haughty insularism of the Roman citizen was a thing of the past. If slavery continued to exist, the slaves no longer remained a supple and cultivated class, capable of acting as their owners' business agents. If paternal supremacy still continued, it was so far modified that the son who attended to business was regarded as practically emancipated, and hence, on strict Roman principles, incapable of representing his father. The *paterfamilias* was no longer one of a select body of privileged persons who alone were regarded as *capax negotii;* there was no longer any such aristocracy; there were no longer slaves or sons by whom such merchant princes, even if they had formed a distinct class, could be represented; if the strict Roman law was maintained, business men would be precluded from any business that required agency for its execution. Hence, the old Roman idea that a contract requires immediate and direct consent between the contractors, was forced to yield to the necessities of a period in which agents who were under *potestas* could no longer be found.

§ 150. It is true the change was gradual, and marked by occasional fluctuations. The Roman rule, that no one can stipulate with a third person, was treated by the glossators and commentators as convertible with the position that a stipulation could not be made in the name of a third person. Bartolus excepted from the operation of this rule the tutor, the curator, and the

potestate est, confestim adquiri ei, cuius est in potestate: neque momento aliquo subsistere in persona eius, per quem adquiritur: et sic ei adquiri, cui adquiritur. See supra, § 4, 5, 19.

[1] See L. 1, § 9, de exerc. act. (14.1.)

actor; and to this Baldus, though viewing with jealousy the proposed expansion of the Roman rule, assented. But a procurator, it was still argued, could not, unless personally interested in the contract, formally bind his principal, if the *verba executiva* were in the principal's name. Hence, as far back as Accursius, the following stipulation was held good: *Promittis, mihi recipientis nomine ejus* (or *pro eo*). For here the *obligatio* as well as the *executio* is technically in the name of the stipulant, and is therefore on its face not obnoxious to the strict Roman rule forbidding such representation. Yet, if I promise something in another's name, the obligation, by its express words, enures not to my benefit, but to his. Practically, however, the glossators and their successors held that the stipulation *Promittis mihi recipienti nomine ejus* was the foundation of the *actio directa* for the stipulant. This claim could be either assigned to the principal, or he could himself directly avail himself of it in the *actio utilis*. But so far as concerns the capacity of an agent not under *potestas* to bind his principal, we find the strict Roman doctrine, by which such capacity is denied, affirmed, as late as the seventeenth century, by both Cujacius and Donellus.

§ 151. The canon law, which in this respect lies at the basis of our own equity system; was not bound by the shackles which Roman civil polity imposed on Roman jurisprudence. The canon law, in dismissing the doctrine of the incapacity of persons under *potestas*, accepted the doctrine of the equal juridical rights of all persons not infants or married women; and such being the case, as agency was necessary to carrying on business, it was essential that the right to act as agents should be extended to persons not under *potestas*. As to ecclesiastical investitures, this rejection of the old restraints on agency was expressly declared. Clericus absens per alium vel alius magis pro ipso poterit de beneficio Ecclesiastico investiri.[1] So an engagement to marry could be made through a special mandatary.[2] Then, as a vindication of these conclusions on general ethical principles, is announced for the first time the rule which has been, with slight verbal variations, adopted in all modern systems, and which is a leading maxim of modern jurisprudence: —

[1] Cap. 24. X. de Praebend, 3. 5.

[2] Cap. ult. de procur. in VI. (1. 19.) See discussion supra, § 2–6.

Potest quis per alium, quod potest facere per seipsum.[1]

Or, as it is given in another place: —

Qui facit per alium est perinde, ac si faciat per seipsum.[2]

§ 152. As late as the seventeenth century continued the conflict between the canonists and the legists, the first accepting, the second rejecting, this expansion of agency; and to the legists was given, as has been mentioned, the high authority of Cujacius and Donellus. But a restriction such as that defended by the legists could no longer be maintained. In the days of the classical jurists, it was no great burden on business, for there was a large class of persons under *potestas* who could act as agents; in the revival of business after the dark ages it operated as a suppression of all forms of agency, for there were no longer any persons under *potestas* to act as agents. Other considerations came into play in aid of the canonists. The tribute paid by Tacitus to German good faith was appealed to; and it was asked whether it was good faith in a principal to refuse to be bound by a promise which he authorized his agent to make. Reference was made, as indicating the policy of the modern state, to the feudal maxim that when a feudal lord grants a *feudum antiquum*, the agnates of the grantee can maintain a right of succession to the investiture. It would be absurd, it was further argued, to affirm this right of agency in the intercourse between nations and to deny it in the intercourse between individuals. But the chief reason given was that fair dealing between man and man required the upholding of all engagements which men through men should honestly make.

§ 153. Chief among the vindicators of this great principle is Grotius.[3] He starts with the recognition of the antithesis of the *promissio mihi facta de re danda alteri*, and the *promissio in ipsius nomen collata, cui res danda est.* He applies to this the following conditions: [4] —

1. Si mihi facta est promissio, omissa inspectione, an mea privatim intersit, quam introduxit ius Romanum, naturaliter videtur mihi acceptanti ius dari efficiendi, ut ad alterum ius perveniat, si et is acceptet, ita ut medio tempore a promissore promissio revocari non possit, sed ego cui facta est promissio, eam possim

[1] Reg. 68; de reg. jur. in VI. (5. 12.)

[2] Reg. 72, eod.

[3] De jure belli et pacis, lib. II. cap. XI. § 18.

[4] Buchka, Stellvertretung, p. 163.

remittere. Nam is sensus iuri naturae non repugnat, et verbis talis promissionis maxime congruit, neque nihil mea interest, si per me alter beneficium adquirat.

2. Quod si promissio in nomen eius collata est, cui danda res est, distinguendum est, an qui acceptat aut speciale mandatum habeat acceptandi, aut ita generale, ut talis acceptatio ei inclusa censeri debeat: an vero non habeat. Ubi mandatum tale antecessit, distinguendum ultra non puto, sitne persona sui iuris necne, quod Romanae leges volunt, sed plane ex tali acceptatione promissionem perfici: quia consensus potest et per ministrum interponi ac significari. Velle enim censeor, quod in alterius voluntate posui, si et ille velit. Deficiente autem mandato, si alius, cui promissio facta non est, acceptat volente promissore, tunc is erit effectus, ut promissori revocare promissionem non liceat, antequam is, quem spectat promissio, eam ratam habuerit aut irritam. Sic tamen, ut medio illo tempore is, qui acceptavit, remittere promissum non possit, quia hic non adhibitus est ad ius aliquod accipiendum, sed adstringendam promissoris fidem in sustentando beneficio, ita ut promissor ipse, si revocet, faciat contra fidem, non contra ius proprium alicuius.

It is true, as Buchka remarks,[1] that on the last of these points Grotius speaks hesitatingly; and it is true that among his followers there was much controversy as to the effect which would accrue in such case to a contract in favor of a third person when there was no mandate received by the acceptant from the third party.

Böhmer[2] takes much more emphatic ground, holding that every promise that is accepted must be fulfilled: —

Cum promissum obliget ideo, quod ab altero acceptatum sit, et ex ea *acceptatione* ius perfectum ab altero promissum exigendi acquisiverit, et sine promissi acceptati implemento *fides humana* solidissimum illud humani generis ligamen iustitiaeque fulcrum certissimum conservari nequeat, consequens est, promissum, quod non tantum in proprium, sed etiam in alterius commodum et usum vergit, sancte servandum, nec promissori integrum esse, ab eo recedere. Hoc vero ut impetretur effectumque habeat, praeterea necesse est, ut non tantum *stipulanti*, sed etiam *tertio*, in cuius utilitatem pactum initum est, ius perfectum adquiratur,

[1] Stellvertretung, p. 164.

[2] Exercitationes ad Pandectas. XXVIII. ad lib. II. tit. cap. I. § 5, 6.

idque etiam ex voluntate et intentione praesumta paciscentium, qui id egisse videntur, ut tertio ius efficax perfectumque adquiratur, ne alioquin actum inanem et rem sine effectu egisse censeantur. Quid vero impediret, quo minus ius perfectum in tertium ex voluntate paciscentium adquiri posset, cuius nomine promissum a compaciscente acceptatum esse constat? nihil enim tam conveniens est naturali aequitati, quam voluntatem domini vel promittentis, volentis rem suam vel ius perfectum in alium transferre, ratam haberi.[1] Accedit quod is, qui rem alterius etiam sine mandato egit, ex sua gestione ei se obstringat, cuius commodum quaesivit et consequens eius intersit, ut tertio, cuius gessit negotia, ius erga promissorem adquiratur.

§ 154. In accordance with these views, Böhmer determines Grotius's first case (the promissio mihi facta de re alteri danda) as follows: si mihi per *acceptationem* ius datur efficiendi, ut ad alterum ius perveniat, si et is consentit: simul efficaciter volo intendoque eaque necessario mente esse debeo, ut alter statim me interveniente ius *eventualiter* adquirat, si is meum factum ratum habeat. Qui enim vult finem, velle etiam censetur media, fini consequendo idonea. Neque enim ratio sufficiens suppeditari potest, quare nolit mihi statim ius adquiri, qui suo pacto mihi prodesse sibique ius adquirere voluit efficiendi, ut ad me ius perveniat. Naturaliter vero ad hoc sufficit voluntas stipulantis, cum probabiliter credat, alterum voluntatem suam ad hoc pactum accommodaturum esse. Inde vero fluit medio tempore *i. e.* antequam tertii consensus accesserit illud promissum a stipulatore citra iniuriam tertii remitti non posse, cui eventualiter ius adquirere volui promittentem a suo promisso medio tempore recedere non posse.

§ 155. In respect to the second case of Grotius (the promissio in ipsius nomen collata, cui res danda est), Böhmer holds that if the third person had contracted with the agent, he at once acquires a right under the contract. The same conclusion he applies herein, differing from Grotius, even when there is no mandate: —

Qui pactum inet et illud in nomen tertii confert citra mandatum veluti: promittisne te Titio bibliothecam tuam post mortem restituturum esse? utrumque intendit, ut et sibi adquirat ius, promissorem efficaciter adstringendi: et Titio, in cuius nomen

[1] § 40 I. de rer. divis.

concepta promissio; parum enim refert, utrum promissor dicat, promitto tibi, me Titio post meam mortem bibliothecam daturum esse: an vero: promitto Titio amico tuo, te acceptante, me eidem bibliothecam meam, ubi decessero, daturum esse; nam dum acceptat hoc promissum, utrumque ex communi hominum sensu intendere videtur, tum ut sibi, tum etiam ut tertio ius adquirat; ideo enim pactum init: ideo promissum acceptat, quod alterum efficaciter obstringere velit, pro quo fine obtinendo utrumque necessarium est. Neque contradictione carere videtur ratio Grotiana: quia hic non adhibitus est ad ius aliquod adcipiendum, sed ad obstringendam promissoris fidem in sustentando beneficio. Si enim adhibitus est ad adstringendam promissoris fidem in sustentando beneficio, ius omnino adquirere debuit, mediante quo adstringere queat fidem promissoris in dando beneficio, adeoque hic casus a priori adeo non differt, nisi quod hic explicite promissio in nomen tertii collata, in priori autem casu magis implicite.

2. *To bind by Unilateral Act.*

§ 156. *Agent may bind principal by performing part of divisible mandate.* — If an agent, as we have seen, deviates from his instructions, the principal may decline to sustain the action of the mandatary. The Roman law is to the same effect: "Is qui exsequitur mandatum non debet excedere fines mandati, ut ecce si quis usque ad centum aureos mandaverit tibi, ut fundum emeres vel ut pro Titio sponderes, neque pluris emere debes neque in ampliorem pecuniam fideiubere, alioquin non habebis cum eo mandati actionem: adeo quidem, ut Sabino et Cassio placuerit, etiam si usque ad centum aureos cum eo agere velis, inutiliter te acturum: diversae scholae auctores recte te usque ad centum aureos acturum existimant: quae sententia sane benignior est. Quod si minoris emeris, habebis scilicet cum eo actionem, quoniam qui mandat, ut sibi centum aureorum fundus emeretur, is utique mandesse intellegitur, ut minoris si possit emeretur."[1] "Itaque si mandavero tibi ut domum Seianum centum emeres tuque Titianis emeris longe majoris pretii, centum tamen aut etiam minoris, non videris implesse mandatum."[2] "Potest et ab una dumtaxat parte mandati iudicium dari: nam si is qui mandatum suscepit egressus fuerit mandatum, ipsi quidem man-

[1] § 8. Inst. de man. III. 25.

[2] L. 5, § 2. D. mand. XVII. 1.

dati judicium non competit, at ei qui mandaverit adversus eum competit." [1] The mandant may ratify the mandatary's unauthorized acts.[2] But if he refuse his assent, then the question arises whether the mandant is bound by that part of the transactions which the mandate warranted, or whether he could repudiate the whole transaction. The Roman standards take the first view.[3] Paulus says: [4] "Et quidem si mandavi tibi, ut aliquam rem mihi emeres, nec de pretio quicquam statui tuque emisti, utrimque actio nascitur. Quod si pretium statui tuque pluris emisti, quidam negaverunt te mandati habere actionem, etiamsi paratus esses id quod excedit remittere: namque iniquum est non esse mihi cum illo actionem, si nolit, illi vero, si velit, mecum esse." Gaius to the same point says: "Sed Proculus recte eum usque ad pretium statutum acturum existimat, quae sententia sane benignior est." [5] In other words, in questions of this class, the first point to be determined is, whether the act of the agent is so divisible that one part of it, that which is executed in obedience to the will of the principal as originally expressed, is separately obligatory on the principal. To constitute such divisibility it is necessary to be able to resolve the act of the agent into two or more separate acts, one or more of which is in furtherance of the authority. Under such circumstances the principal may be held liable on that part of the agent's act authorized by him; it being clear that when the third party performs his side of the contract on the faith of the principal's authority to the agent, the principal cannot avail himself as a defence of the fact that the agent, in matters not specified in the power, acted without authority. On the other hand, the principal cannot recover from a party dealing *bonâ fide* with the agent, on such part of the contract only as the principal authorized, because such third party agreed to the contract as an entirety, and did not agree to that part of it which the principal authorized, taking such part by itself.[6] How far an agent may bind his principal when contracts are divisible as to time, price, or quantity, is discussed in a future chapter.[7]

[1] L. 41. D. eod.

[2] Supra, § 68; and L. 7, pr. C. ad SC. Maced. IV. 28.

[3] § 8. Inst. mand. III. 26, quoted supra.

[4] L. 3. D. mand. XVII. 1.

[5] L. 4, eod.

[6] Thöl, Handelsrecht (1875), § 71. See infra, § 247, 260, 660.

[7] See infra, § 258–269.

§ 157. *As to torts.* — When a tort does not involve an evil intent, a principal may be bound by the agent's act. Thus an agent of a corporation, who, within the range of his authority, commits a trespass on the person,[1] or on the property,[2] of another, binds his principal; though it is otherwise when the tort (an illegal arrest, is out of the range of the agent's authority.[3] And it has been even held that a corporation can be sued for a libel contained in a telegram which its servants passed over its wires,[4] and for keeping a mischievous dog;[5] though in both these cases the tort might be treated as a negligence of the servants.

3. *To bind by Representations.*

§ 158. *A principal is chargeable with the representations of his agent when such representations were among the inducements which led to the contract which the principal seeks to enforce.* — A vendor, for instance, cannot through his agent make statements which lead others to purchase without being bound by such statement. And the rule thus applicable to contracts of sale is applicable to all other contracts effected by agency.[6] Nor need the

[1] Whart. on Neg. § 646; Seymour *v.* Greenwood, 7 H. & N. 355; Limpus *v.* London Omnibus Co. 1 H. & C. 526; Goff *v.* R. R. 30 L. J. Q. B. 148; 3 E. & E. 672; Hamilton *v.* R. R. 53 N. Y. 25; Pittsburg R. R. *v.* Hinds, 53 Penn. St. 512; Townsend *v.* R. R. 56 N. Y. 295. See infra, § 474–489.

[2] Mears *v.* R. R. 11 C. B. (N. S.) 850. Infra, § 474–487.

[3] Edwards *v.* R. R. L. R. 5 C. P. 445; Allen *v.* R. R. L. R. 6 Q. B. 65. See Poulton *v.* R. R. L. R. 2 Q. B. 534; infra, § 474–487.

[4] Whitfield *v.* R. R. 1 E. B. & E. 115. See Lawless *v.* Anglo-Egyptian Cotton Co. L. R. 4 Q. B. 262.

[5] Stiles *v.* Cardiff Nav. Co. 4 N. R. 483; 33 L. J. Q. B. 310.

[6] Hern *v.* Nichols, 1 Salk. 289; Dawson *v.* Atty, 7 East, 367; Fountaine *v.* Carmarthen R. R. L. R. 5 Eq. 316; Demerrit *v.* Mesereve, 39 N. H. 521; Barbour *v.* Britton, 26 Vt. 112; Putnam *v.* Sullivan, 4 Mass. 45; Bird *v.* Daggett, 97 Mass. 494; Thallhimer *v.* Brinckerhoff, 4 Wend. 394; Sandford *v.* Handy, 23 Wend. 260; North River Bk. *v.* Aymar, 3 Hill, 262; New Y. & N. H. R. R. *v.* Schuyler, 34 N. Y. 30; Bennett *v.* Judson, 21 N. Y. 238; Crans *v.* Hunter, 28 N. Y. 389; Elwell *v.* Chamberlain, 31 N. Y. 611; Colum. Ins. Co. *v.* Masonheimer, 76 Penn. St. 138; De Voss *v.* Richmond, 18 Grat. 338; Continental Ins. Co. *v.* Kasey, 25 Grat. 268; Madison R. R. *v.* Norwich Sav. Co. 24 Ind. 458; Mut. Ins. Co. *v.* Cannon, 48 Ind. 265; Morton *v.* Scull, 23 Ark. 289; Doe *v.* Robinson, 24 Miss. 688. 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

representations be in words. Any assumption by the agent of a material fact, by which the third party is influenced to the contract, in like manner binds the principal.[1]

§ 159. *A principal is bound by such representations when he has authorized the agent to make them.* — Of course when a business man says: "A. is my agent; he is authorized to speak for me," the principal is bound by what the agent says. Eminently is this the case with corporations, which only speak by agents, and which, if they were not bound by this kind of declaration, would not be bound by declarations at all. On this principle we can explain cases of liability which at the first glance seem inconsistent with the limitations expressed in the preceding sec-

power, may rely upon the representation, and the prineipal is estopped from denying its truth. New York & N. H. R. R. *v.* Sehuyler, 34 N. Y. 30.

While acting upon the matter of his agency a special agent binds his principal as effectually as a general agent ean do. Morton *v.* Seull, 23 Ark. 289.

[1] New York & N. H. R. R. *v.* Schuyler, 34 N. Y. 30. Infra, § 708.

The plaintiff sold certain goods to the defendants through F., who was fully authorized to make the purchase. Afterwards, upon the representation of F. to the plaintiff that it was necessary to send a receipted bill to the defendants in order to obtain payment of it, the plaintiff receipted the bill of the goods and delivered it to F. F. presented the bill thus receipted to the defendants, who paid the amount of it to him, they having no knowledge of the circumstanees under whieh the reeeipt was given. The money so reeeived by F. was never paid to the plaintiff. *Held*, in an action of assumpsit, brought against the defendants for the amount of the bill, that the plaintiff was entitled to reeover. Willard *v.* Buckingham, 36 Conn. 395. F. being the general agent of the defendants, and authorized to purchase the goods, he was acting in the whole matter within the seope of his authority, and his aets and declarations were to be considered as the acts and deelarations of the defendants, and his knowledge of the eireumstances under which the receipt was given, as their knowledge. Willard *v.* Buckingham, 36 Conn. 395.

A. sells a lot of tobaeco to B., to be delivered at the depot by a eertain day; A. informs B. of the delivery of the tobaeco, and requests him to eome to the depot on the appointed day for a settlement, and if he, A., should be absent, to inquire of one F., the depot agent, for him. B. arrives in the afternoon of the day appointed, after A. had left, and as requested, inquires of F. for A. F. informs B. that A. had left with him a lot of tobaeco for him, B., at the same time handing an invoice for the same, made out in A.'s handwriting. B. pays F. for the tobacco, who, on the next day, remits the proceeds to A. Held, that these faets, standing alone, are *primâ facie* evidence that F. was the agent of A. to deliver the tobaeco and receive the money. Held further, that the ageney being thus established, the invoiee and reeeipt, as well as the deelaration of the agent, were properly admitted as evidence of the settlement of the plaintiff's claim for the tobaeco. Pinnix *v.* McAdoo, 68 N. C. 56.

tions. Thus where a railroad company authorizes a particular officer to account to passengers for baggage, the statements made by such officer, the day after the loss, as to the manner of the loss, have been held to bind the company.[1] This is not because such statements are part of the *res gestae*, for they are not; nor because they enter into the consideration of the contract, for they do not; but because they are made by a person to whom the principal delegates the duty of speaking on the subject. Under this head may be classed those cases in which agents authorized to settle debts on behalf of their principals have been held to be capable of taking, by their declarations and admissions, such debts out of the statute of limitations.[2]

§ 160. *Representations are inoperative if not within range of mandate.* — Admissions made by persons having no authority to represent the principal are necessarily inadmissible.[3] We have

[1] Morse *v.* R. R. 6 Gray, 450.

[2] Burt *v.* Palmer, 5 Esp. 145; Anderson *v.* Sanderson, 2 Stark. 204; *S. C.* Holt, 591. Evidence of what an agent said in regard to a transaction already passed, but while his agency for similar objects still continued, is not admissible to prove the contract itself, although it is competent to contradict the statement of the agent that no such contract was made. Stenhouse *v.* C. C. & A. R. R. Co. 70 N. C. 542. If such evidence is, after objection, received generally, without confining it to the contradiction of the statement of the agent, it is error, and entitles the party objecting to its reception to a new trial. Stenhouse *v.* C. C. & A. R. R. Co. 70 N. C. 542.

If a bank agent, having authority to collect or transfer its judgments, makes a written assignment of one of its judgments to himself, and remits to his principal the money due on it, this does not, of itself, amount to a payment or satisfaction of the judgment, as in favor of the defendant; but it is a question for the jury to decide, whether the transaction was intended as a payment and satisfaction or as a transfer. If a transfer, and not a payment of the judgment, was really intended by the agent, no loose declarations on his part, or on the part of his principal, would convert it into a payment; and if a payment was really intended by him at the time, the character of the transaction could not be changed, as against the defendant, by any subsequent conduct on the part of the agent or his principal. East. B. of Ala. *v.* Taylor, 41 Ala. 93.

If an agent, having authority to collect or transfer a judgment belonging to his principal, makes a written assignment of it to himself, his declaration to his principal, made at the time of remitting the money, to the effect that the judgment was *paid*, does not estop him, on a subsequent motion by the defendant to enter satisfaction of the judgment, from showing that the transaction was really intended by him at the time, not as a payment, but as a transfer of the judgment. East. Bank *v.* Taylor, 41 Ala. 93. See infra, § 708.

[3] Corbin *v.* Adams, 6 Cush. 93; Byers *v.* Fowler, 14 Ark. 87; Garth *v.* Howard, 8 Bing. 451; Columb. Ins. Co. *v.* Masonheimer, 76 Penn. St. 138;

frequent instances of this position in suits against railroad companies in which it is sought to charge the company with the admissions of subalterns not authorized to speak on the particular subject. Of these cases we may take the following as illustrations: In an action to recover damages for injuries occasioned to the plaintiff by a defective rail, the pieces of the broken rail were produced by the defendant. The plaintiff was allowed to prove declarations of an employee of the defendant, having supervision of its track, made six months after the accident, in substance, that he discovered a flaw in the end of the rail, and so hid the pieces at the time of the accident. This was held error; it being ruled that even if the declarations had been made at the time of the accident, they were incompetent, the employee in question not having authority in the particular department.[1] Declarations made by the conductor of the train to a passenger, a moment before an accident, of the bad condition of the road, and his train having run off the track five consecutive times next preceding the present trip, are not admissible in proof of negligence, either as *res gestae*, or admissions of an agent binding on the principal.[2] So the declarations of an engineer made a few days after a collision, chargeable to his negligence, are not competent to affect his employers, these declarations not being part of the transaction, and the engineer not being authorized to speak for the company.[3] So a conductor cannot bind a railroad company by agreeing to give a free passage without consideration.[4] So the declarations of a car-driver, as to a collision, made after the car had stopped, but while the driver was still in his place, are not competent to charge the company.[5] On the other hand, in a Missouri case, language used by the superintendent of a street railway company, admitting and justifying an assault of one of its drivers, was held to bind the company.[6]

Lansing *v.* Coleman, 58 Barb. 611; Anderson *v.* R. R. 54 N. Y. 334; Bennett *v.* Holmes, 32 Ind. 108; Lafayette R. R. *v.* Ehrman, 30 Ind. 83.

[1] Anderson *v.* R. W. & O. R. R. Co. 54 N. Y. 334.

[2] Mob. & M. R. R. *v.* Ashcraft, 48 Alab. 15.

[3] Robinson *v.* R. R. 7 Gray, 92. See infra, § 162.

[4] Wakefield *v.* R. R. 117 Mass. 544.

[5] Luby *v.* R. R. 3 Smith (N. Y.), 731.

[6] Malecek *v.* R. R. 57 Mo. 17.

In Northwestern Union Packet Co. *v.* Clough, decided by the United States supreme court in 1875, the defendant in error brought action against the company for injuries sustained by her while attempting to go on board their steamer. Two days after the

§ 161. *Special authorization not necessary to make such representations operative.* — Such representations are binding on the

accident a witness had a conversation with the captain of the company's boat relative to the accident, and this conversation was offered and received in evidence. The court held that this was error. The court said: "Declarations of an agent are, doubtless, in some cases, admissible against his principal, but only so far as he had authority to make them, and authority to make them is not necessarily to be inferred from power given to do certain acts. A captain of a passenger steamer is empowered to receive passengers on board, but it is not necessary to this power that he be authorized to admit that either his principal, or any servant of his principal, has been guilty of negligence in receiving passengers. There is no necessary connection between the admission and the act. It is not needful the captain should have such power to enable him to conduct the business intrusted to him, to wit, the reception of passengers, and, hence, his possession of the power to make such admissions affecting his principals is not to be inferred from his employment. 1 Taylor's Ev. § 541. An act done by an agent cannot be varied, qualified, or explained, either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done, at a later period. 1 Taylor, 526. The reason is, that the agent to do the act is not authorized to narrate what he had done, or how he had done it, and his declaration is no part of the '*res gestæ*.'"

An agent with restricted power to sell a tract of land at a given price has no power to bind his principal by any representation as to the quantity or quality. False representations may release the purchaser but cannot bind the principal, if beyond the scope of the authority. National Co. *v.* Bruner, 4 Green, 331.

A fire insurance was effected in respect of certain property through an agent named Donald, who inspected the premises. One condition of the policy was, that any material misdescription of the property would render the policy void. The buildings were described as built of brick and slated, but it turned out that one of the buildings was not roofed with slate but with tarred felt. The company alleged that Donald was not their agent, but the agent of the insured; and that the misdescription rendered the policy void. It was ruled in 1875, by Sir R. Malins, V. C., that the misdescription was immaterial and not sufficient to vitaite the policy; but that if material, it was made by Donald, as the agent of the insurance company, and the insured were not responsible for it. Universal Non-Tariff F. Ins. Co. in re, L. R. 19 Eq. 485. See to same effect Continental Ins. Co. *v.* Kasey, 25 Grat. 268.

The unauthorized representations of a public agent whose powers and duties are expressly defined by statute, in regard to facts which are equally open to both parties and readily ascertained, are not binding upon his principal or the public. State *v.* Haskell, 20 Iowa, 276.

A representation made by an agent without authority, and contradicted by the express terms of a contract made at the time, is not binding on the principal. Cook *v.* Whitfield, 41 Miss. 341.

principal even though unauthorized by him.[1] Thus in a Vermont case, the defendants sent a servant to employ the plaintiff, who was a physician, to visit a boy who had been injured in their service, and the servant was ordered to tell the physician that they would pay for the first visit. The servant instead of thus limiting the engagement, employed the plaintiff generally. He attended until the boy recovered; and it was held that the defendants were liable for his whole bill.[2]

§ 162. *A principal is bound by such representations of his agent as are part of the res gestae.*[3] — This rule has to be carefully limited; but in itself it results necessarily from the relations of principal and agent. I sell goods by sample; the appearance of the sample, — in other words, that which it gives itself out to be, — is an important element in determining how far I am bound. So when I sell goods by an agent, the attitude of my agent becomes in like manner an important element in determining how far I am bound. My conversation from my own lips, in closing the conditions, is evidence against me; for the same reason is any conversation from my agent's lips, in closing the conditions. Two requisites, however, are essential to such admissibility: first, as we have seen, the declarations must be within the scope of the agent's mandate; secondly, they must have been uttered as part of the transaction itself. When the transaction is closed; when the agent's authority in respect to it has therefore ceased; then his statements as to its character cannot be received.[4] Even representations made by an agent con-

[1] Lobdell *v.* Baker, 1 Metcalf (Mass.), 193; Mundorff *v.* Wickersham, 63 Penn. St. 87.

[2] Barber *v.* Britton, 26 Vt. 112; cited and approved in Mundorff *v.* Wickersham, 63 Penn. St. 87.

[3] Bree *v.* Holbeck, Doug. 654; Fitzherbert *v.* Mather, 1 T. R. 12; Biggs *v.* Lawrence, 3 T. R. 454; Lee *v.* Munroe, 7 Cranch, 366; Burnham *v.* R. R. 63 Me. 298; Lobdell *v.* Baker, 1 Metc. 193; Willard *v.* Buckingham, 36 Conn. 395; Bank U. S. *v.* Davis, 2 Hill, 451; North River Bank *v.* Aymar, 3 Hill, 262; Sandford *v.* Handy, 23 Wend. 260; Rowell *v.* Klein, 44 Ind. 290; Sweetland *v.* Tel. Co. 27 Iowa, 433; Robinson *v.* Walton, 58 Mo. 380; Pinnix *v.* M'Adoo, 68 N. C. 56; Howerton *v.* Latimer, 68 N. C. 370; M'Comb *v.* R. R. 70 N. C. 178.

[4] Hern *v.* Nichols, 1 Salk. 289; Bree *v.* Holbeck, Doug. 654; Fairlee *v.* Hastings, 10 Ves. 125; Lobdell *v.* Baker, 1 Met. 193; Lowell *v.* Winchester, 8 Allen, 109; Robinson *v.* R. R. 7 Gray, 92; Hubbard *v.* Elmer, 7 Wend. 446; Anderson *v.* R. R. 54 N. Y. 334; Stewartson *v.* Watts, 8 Watts, 392; Chic., &c., R. *v.* Lee, 60 Ill. 501; Rowell *v.* Klein, 44 Ind. 290; Chic., B. & Q. R. R. *v.* Riddle, 60 Ill. 534; East B. *v.* Taylor, 41 Ala. 93; Greer *v.* Higgins, 8 Kansas, 519; Pinnix *v.*

trary to his instructions are binding if they are within the agent's mandate, and are part of the consideration of a contract on which the plaintiff sues.[1]

M'Adoo, 68 N. C. 56; Melton *v.* R. R. 68 N. C. 107; Stenhouse *v.* R. R. 70 N. C. 542; M'Comb *v.* R. R. 70 N. C. 178, and cases cited supra, § 160.

[1] Barwick *v.* Eng. Joint Stock Bk. L. R. 2 Exc. 259. Of this we have an interesting illustration in a case reported in Maine in 1875. Burnham *v.* R. R. 62 Me. 298. The defendants' ticket agent represented to the plaintiff, a college student, that it was necessary to purchase but one ticket to enable him to pass over the road, stopping over one night at an intermediate station, and that the conductor would give a stop-over check, to enable him to do so. At the time these representations were made, and in consequence of them, the plaintiff having informed the agent of his desire to stop over, purchased the ticket, paying the fare demanded for the whole distance. On the second day his ticket was refused by the conductor, upon the ground that it was indorsed "good for this day only," and the plaintiff, refusing to pay the fare demanded, was expelled from the cars. It was ruled by the supreme court that in an action against the company such representations of the ticket agent bound the company, though the rules of the company prohibited passengers from stopping over upon such tickets. Danforth, J.: "In this case there is a conflict of testimony, so far as it relates to the liability of the defendants; no facts in relation to this point for the jury to pass upon. The instruction was that the action could be maintained, leaving only the question of damages to the jury. If this was correct, the defendants have no cause of complaint for the refusal of the requests for certain instructions made by them. On the 16th of February, 1871, the plaintiff purchased of the defendants' station agent at South Paris a ticket entitling him to a passage from that place to Northumberland. Upon the ticket was indorsed the date and 'good for this day only.' In the absence of other testimony, this would have been proof of a contract for a passage on the train that went through on that day. But the plaintiff stopped at Gorham, an intermediate station, and the next morning got upon the cars to complete his journey, claiming the right to do so by virtue of the ticket purchased the day before, and refused, upon demand of the conductor, to pay any further fare, whereupon he was expelled from the cars. This expulsion is now justified on the ground that the ticket is the only admissible evidence of the contract between the parties, and is therefore conclusive upon that point. But it is seldom, if ever, that the ticket embodies all the elements of the contract. The running of the trains, as well as all reasonable rules prescribing the manner and facilitating the business of carrying passengers, certainly so far as known, becomes a part of the contract, and may be proved by either party, though not indorsed upon the ticket. Sears *v.* Eastern R. R. Co. 14 Allen, 433. In the case at bar the inquiry presented is: What is the contract? Not whether the rule of the company, or the contract expressed by the ticket, is reasonable. No objection is made to the authority of the company to make such a rule or contract. But did the plaintiff have such a knowledge of the rule as to make it

§ 163. *But agent cannot establish his agency by his own declaration.* — The general rule is, that the agency must be established

binding upon him, or did he in any way assent to it as a part of the contract for his passage from South Paris to Northumberland. As either party may prove terms of the contract, not expressed upon the ticket, so either party may prove the acceptance, or rejection, or waiver, of any terms thereon indorsed. The ticket is not a written contract signed by the parties. It is, at most, evidence of some existing contract for a passage between two places named, and that the holder has paid the fare demanded. Upon the plaintiff's ticket we find the indorsement 'Good for this day only.' The fact that he accepted and produced it as proof of his right to a passage would certainly be *primâ facie* evidence of his right to a passage on the day of its date alone, and possibly he would not be permitted to deny that he was bound by that indorsement, unless he could show that his assent had been withheld with the knowledge and consent of the company. This he attempts to do, by showing just what contract was made with the ticket agent at South Paris. But it is said this agent had no authority to change any of the rules of the company, and, therefore, his acts or statements upon this point are not admissible. It may be conceded that this, or any other agent, had no authority to change or abrogate any rule established by the company, but the consequences claimed will by no means follow. He was placed there for the purpose of selling tickets, and, it may be admitted, such tickets as will secure a passage in accordance with the rules of the company. The plaintiff desired to purchase just such a ticket. He was ignorant of the rules of the company, but wished to go over a portion of the road one day, and another portion the next day. The rules make a part of the contract. It seems that before this the conductor had been permitted to give 'stop-over checks.' This custom had been abrogated but a few days previous, of which, so far as appears, no notice had been given. This is the very point upon which the plaintiff desires information. To whom shall he go to obtain it? To whom can he go but to the person appointed by the company for the purpose of giving such information, and selling the proper tickets. To that person he does go, and is informed that the custom of giving stop-over checks still continues, and that it is necessary to purchase but one ticket. Relying upon this information, as he was justified in doing, he purchased his ticket, and paid the fare demanded, and for the whole distance. The real contract between the plaintiff and the ticket agent was made before the ticket was seen. The plaintiff paid his money upon the statement of the agent, and not upon any indorsement upon the ticket. He took the ticket, not as expressing a contract, but as proof of the contract he had already made with the agent. He had neither seen nor assented to the indorsement, nor was he asked to assent to it. As between the plaintiff and agent the contract was definite, with no misunderstanding or suggestion of it. Under that contract the plaintiff commences his journey, and on the first day asked for his 'stop-over check,' and is informed by the conductor, not that his ticket is not sufficient, or in any way different from those previously issued, but that his orders were not to give out any more 'stop-over checks.' Still he was permitted to retain his ticket, en-

aliunde before the declarations of the agent are admissible;[1] but if, after the declarations have been admitted, the agency is sufficiently proved, this cures the error.[2]

§ 164. *Principal chargeable with agent's fraudulent representations when such representations are in furtherance of principal's plans.* — An agent, for instance, who in order to obtain a policy of insurance makes fraudulent representations as part of the inducements to the contract, prejudices his principal as much as if the representations had been made by the principal himself.[3]

couraged to expect that he would be permitted to complete his passage according to his understanding of the contract. On the next day, however, his ticket was refused, and, upon demand being made, he refused to pay a second fare, whereupon he was expelled from the cars. The conductor acted in obedience to orders from his superiors; the plaintiff, in obedience to information he had received from the ticket agent and upon which he had paid his money; surely, then, he was not in the wrong. But it is said the company were not bound by the contracts of the agent. Admit it. The conductor had proof from the ticket that the fare had been paid for the whole distance, and from the statements of the plaintiff, which he had no reason to doubt, and which were confirmed by the custom so lately abrogated, that he had paid it upon the representations of the agent that the ticket would carry him through. If, under these circumstances, the company, through the conductor, would repudiate or deny the contract, the least they could do would be to pay back the surplus money that they had received, or deduct it from the fare claimed, neither of which was done, or offered to be done; and this they were legally bound to do before refusing to execute the contract made by their agent, even if they were not bound by it. Cheney *v.* B. & M. R. R. Co. 11 Metc. 121; 1 Redf. on Railways, 100, note. Exceptions and motion overruled."

[1] Fairlie *v.* Hastings, 10 Ves. 126; Brigham *v.* Peters, 1 Gray, 139; Streeter *v.* Poor, 4 Kans. 412; Mapp *v.* Phillips, 32 Ga. 72. Supra, § 44.

[2] Rowell *v.* Klein, 44 Ind. 291. When the agent of a firm represents himself to be agent of an individual member thereof, the partner for whom he assumes to act is not individually bound by his acts. An agent can bind himself by not disclosing his agency, but he cannot bind a party for whom he is not an agent, no matter how much he assumes. He cannot create an agency by representations. Jaeger *v.* Kelley, 52 N. Y. 274. A letter, containing an acknowledgment of the receipt of money, subscribed with the name of a party, "per" another, purports to be his writing, executed by his agent; and may be received as evidence to charge him, when the person so signing it testifies that he was the clerk of the other in a different department of his business, had written some letters for him, at his request and dictation, and none without it, though he does not remember anything in connection with the particular letter, except that it is in his handwriting. Prestridge *v.* Irwin, 46 Ala. 653.

[3] Willes *v.* Glover, 1 Bos. & Pul. 14; Roberts *v.* Fonnereau, Park on Ins. 285; Ruggles *v.* Ins. Co. 4 Mason, 74;

Even where the fraud consists in the fraudulent suppression of a fact by an agent, such fraud may be imputable to the principal. Thus in an English case, which may serve to illustrate this point, the evidence was that the principal procured an insurance on a ship which a few days before had been lost at sea. At the time of the insurance, the principal had an agent at Smyrna, who knew of the loss, but who abstained from telegraphing the loss to the principal, in order that the principal might effect the insurance. It was held that this suppression vitiated the insurance.[1] Differing in some respects from this conclusion is a case first determined by Judge Story, in the circuit court, and afterwards by the supreme court of the United States, in which it was held that a policy was not affected by the fact that it was effected after a loss of which the owner, who procured the policy, might have been advised, had the master not avowedly taken means to prevent intelligence of the loss reaching the owner before the policy was secured.[2] The cases, however, are saved from actual conflict by a distinction taken by Judge Thompson, in giving the opinion of the supreme court: "It is a little difficult to perceive how, in any legal sense," so he argues, "the relation of principal and agent could exist, at the time when the misconduct of the master is alleged to have taken place. So far as he was agent for navigating the vessel, it had determined by the absolute destruction of the subject. The agency would seem to have ceased from necessity. There was nothing upon which it could act." There is nothing therefore in the ruling of the supreme court which prevents us from accepting as authoritative the wise and sound decisions of the English courts,[3] that principal and agent, so far as concerns transactions such as those before us, are one, and that the fraudulent statement of the one, by which the contract is effected, is to be treated as the fraudulent statement of the other.

12 Wheat. 408; Fitzherbert *v.* Mather, 1 T. R. 12; Gladstone *v.* King, 1 Maule & S. 35; Seaman *v.* Fonnereau, Str. 1183; Mackintosh *v.* Marshall, 11 Mees. & W. 116; Maynard *v.* Rhode, 1 C. & P. 360; Kibbe *v.* Ins. Co. 11 Gray, 163; Rockford *v.* R. R. 65 Ill. 224, and cases cited in note to § 160.

[1] Proudfoot *v.* Montefiori, L. R. 2 Q. B. 50. See Fuller *v.* Wilson, 3 Ad. & El. N. S. 58.

[2] Ruggles *v.* Ins. Co. 4 Mason, 74; 12 Wheat. 408.

[3] Fuller *v.* Wilson, 3 Ad. & El. N. S. (3 Q. B.) 58; Proudfoot *v.* Montefiori, L. R. 2 Q. B. 50.

It is otherwise, however, when the attempt is to charge the principal with the false statement in an action of deceit.[1]

§ 165. *Same rule is applicable to corporations.* — "If reports," so is the rule stated by Lord Westbury,[2] "are made to the shareholders of a company by their directors, and the reports are adopted by the stockholders at one of the appointed meetings of the company, and these reports are afterwards industriously circulated, misrepresentations contained in those reports must undoubtedly be taken, after their adoption, to be representations and statements made with the authority of the company, and therefore binding upon the company." So, also, Lord St. Leonards[3] says: "I have certainly come to this conclusion, that, if representations are made by a company fraudulently, for the purpose of enhancing the value of their stock, and they induce a third person to purchase stock, these representations so made by them do bind the company. I consider representations of the directors of a company as representations by the company; and, although they may be representations made to the company, it is their own representation."[4] In conformity with this view a railway company has been held liable for damages resulting from the publication of a false time table.[5]

§ 166. Even though the false representations were not ratified by the corporation, yet, as will hereafter be seen,[6] it is liable in damages at common law if they were made by its agents in the management and furtherance of its business.[7] But, independently of this point, the principal cannot avail himself of a contract thus induced. Thus in an action against a corporation, to recover calls made by the plaintiff, such calls being paid by the plaintiff on the faith of the misrepresentations of the directors

[1] See this distinction well put in Bigelow's Cases on Torts, 20; and see this topic discussed, infra, § 497.

[2] 9 H. Lds. 725.

[3] Nat. Ex. Co. of Glasgow *v.* Drew, 2 Macq. 103, cited Brice on Ultra Vires, 229. And see to same effect, Ranger *v.* R. R. 5 H. L. Ca. 72; Mackay *v.* Com. Bk. L. R. 5 P. C. 391; Fogg *v.* Griffin, 2 Allen, 1; Brokaw *v.* R. R. 3 Vroom, 328; Vance *v.* R. R. 3 Vroom, 334.

[4] See, also, National Patent Steam Fuel Co. in re, 4 Drew, 529.

[5] Denton *v.* R. R. 5 E. & B. 860; Williams *v.* Swansea Trustees, 14 C. B. N. S. 845; Wharton on Neg. § 662, 810.

[6] Infra, § 477, 488.

[7] Barwick *v.* English Joint Stock Bk. L. R. 2 Ex. 259; approved in Swift *v.* Winterbotham, L. R. 8 Q. B. 244. So, also, Western Bank *v.* Addie, L. R. 1 H. L. Scotch, 148, where such liability was affirmed so far as concerns suits brought on the contract, but negatived as to actions of deceit. See fully, infra, § 478.

of the corporation, made in a prospectus issued by them, it was said by the court that, supposing there be fraud, "in such a case the company must bear all the consequences of the fraud of those they employ." [1] The tendency of the earlier equity practice was to greatly restrict the remedies for such wrongs.[2] Now, however, this liability is enforced, so far as concerns the right of the party injured to rescind the contract, if not too late.[3] But the English chancery judges still hold that an action of deceit, in such cases, must be brought against the directors personally, and cannot be maintained against the corporation.[4]

§ 167. *Where agent ignorantly makes a false statement of which principal knows the falsity, the principal cannot enforce the bargain obtained by such false statement.* — We here approach a series of cases which cross and recross each other in singularly complex lines. In the first case on which it is necessary to comment,[5] which was decided in the English exchequer in 1840, the question was presented by the defendant refusing to comply with a contract to take a furnished house, on the ground that the house had been represented to the defendant by the plaintiffs as entirely unobjectionable as a residence, whereas the adjoining house was a brothel and a nuisance, which was compelling people in the neighborhood to abandon their homes. It was part of the case that this fact was known to the plaintiff, but was not known to his agent, by whom alone the negotiations for the plaintiff were conducted. By a majority of the court, Rolfe, Alderson, and Parke, BB., it was ruled that the defence could not be sustained. By Rolfe, B., the ruling was put on the ground that false representations of the agent do not affect the principal when such representations are "collateral to the contract," though it is hard to see how representations that a furnished house was entirely unobjectionable as a residence could

[1] Kennedy *v.* Panama Co. L. R. 2 Q. B. 580. And see generally, supra, § 159, infra, § 679, 687.

[2] See North of England Joint Stock Co. ex parte Bernard, 5 De G. & Sm. 283; Duranty's case, 26 Beav. 268; Hull & Johnson Assurance Co. ex parte Gibson, 2 De G. & J. 275; Royal British Bk. *v.* Mixer's Close, 4 De G. & J. 575; Athenæum Assurance Co. ex parte Sheffield, 18 Johns. 451.

[3] New Brunswick R. R. Co. *v.* Conybeare, 8 H. Lds. 725; Western Bk. *v.* Addie, L. R. 1 S. & D. 145; Oakes *v.* Turquand, L. R. 2 H. Lds. 325. See infra, § 173.

[4] See infra, § 171.

[5] Cornfoot *v.* Fowke, 6 Mee. & W. 358.

have been treated as collateral to a contract for the lease of such house. By Alderson, B., another course of reasoning was taken. "The representation, though false, was believed by the agent to be true. . . . . It is said that knowledge on the part of the principal is sufficient to establish the fraud. *If indeed the principal had instructed his agent to make the false statement, this would be so, although the agent would be innocent of any deceit; but this fact also fails.* . . . . I think it impossible to sustain *a charge of fraud* when neither principal nor agent has committed any." Parke, B., put the case on the ground that the contract was in writing, and the representations, being collateral to the contract, could only avoid it if fraud were proved, which he denied could be done when both the plaintiff and his agent were innocent of the fraud. He admitted, however, that if "the plaintiff not merely knew of the nuisance, but purposely employed an ignorant agent, suspecting the question would be asked of him, and at the same time suspecting or believing that it would by reason of such ignorance be answered in the negative, the plaintiff would unquestionably be guilty of a fraud." But from the conclusions of the majority of the court, Lord Abinger, C. B., dissented, saying with marked emphasis that he considered the case so plain that had it not been for the opinions of his brethren he would not have conceived it open to doubt. He insisted that "the principal, though not bound by the representation of the agent, cannot take advantage of a contract made under the false representation of an agent, whether that agent was authorized by him or not to make such representation." He denied, that to the conception of fraud "any degree of moral turpitude" is essential; and he maintained that "the warranty of a fact which does not exist, or the representation of a material fact contrary to the truth, are both said in the language of the law to be fraudulent, *although the party making them suppose them to be correct.*" The same conflict of opinion was exhibited in the same court in a subsequent case, ruled in 1842.[1]

§ 168. In 1842, almost contemporaneously with the case in the exchequer last noticed, a case involving the same question was argued before the queen's bench.[2] It was here insisted by Lord

[1] Moens *v.* Heyworth, 10 Mee. & W. 147.

[2] Fuller *v.* Wilson, 3 Ad. & El. N. S. (3 Q. B.) 58.

Denman, following Lord Abinger, that where an agent makes, however innocently, false statements, even without moral fraud, the law will relieve a purchaser from a bargain which he acceded to under the influence of such false statements. "We think," said Lord Denman, "that the principal and his agent *are for this purpose completely identified*, and that the question is not what was passing in the mind of either, but whether the purchaser was in fact deceived by them or either of them." The ruling of the king's bench in this case was reversed on error, but solely on the question whether the evidence showed a positive statement of any kind by the agent.[1]

§ 169. The liability of the principal in the cases before us is rested, we must remember, upon two assumptions which it is important to distinguish. The first, as stated by Lord Denman, is that "every false statement made by one person and believed by another, and so acted upon as to bring loss upon him, constituted a grievance for which the law gives a remedy by action."[2] This position was overruled by the exchequer chamber,[3] and was finally abandoned by the queen's bench, under Lord Denman's lead.[4] The other assumption, however, by which the liability of the principal can in such cases be sustained, is that the principal and the agent, when a bargain is effected by their joint action, are to be considered as one, and that the principal, if cognizant of the facts, cannot avail himself of a bargain induced by the agent's misstatements, however innocent they may have been on the part of the agent; and this position, which is substantially that of Lord Abinger in Cornfoot *v.* Fowke, has been subsequently accepted by high authorities both in England and in the United States. "I should feel no hesitation," said Lord St. Leonards, when commenting[5] on Cornfoot *v.* Fowke, "if I had

[1] Wilson *v.* Fuller, 3 Ad. & El. N. S. (3 Q. B.) 1009; Tindal, C. J. expressly stating that the court declined to "enter into the question discussed in Cornfoot *v.* Fowke."

[2] Evans *v.* Collins, 5 Q. B. 820.

[3] Ormrod *v.* Huth, 14 M. & W. 650. As to actions of deceit, see infra, § 478.

[4] Barley *v.* Walford, 9 Q. B. 197.

[5] National Exc. Bk. *v.* Drew, 2 Macqueen H. of L. 103. Lord Cairns (Reese Silver Mining Co. *v.* Smith, L. R. 4 Eng. App. 64) states the law to be that "if persons take upon themselves to make assertions as to which they are ignorant, whether they are true or not they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue." Lords Hatherley and Colonsay concurring.

myself to decide that case, in saying, that although the representation was not fraudulent, — the agent not knowing that it was false, — yet that as it in fact was false, and false to the knowledge of the principal, it ought to vitiate the contract." "I should be sorry," so afterwards declared Willes, J.,[1] "to have it supposed that Cornfoot *v.* Fowke turned upon anything but a point of pleading." "As to Cornfoot *v.* Fowke," such is the criticism of Lord Campbell,[2] "which was brought before us to illustrate the liability of a principal for his agent, I am not called upon to say whether the case was well decided by the majority of the judges in the exchequer, although the voice of Westminster hall was, I believe, rather in favor of the dissentient chief baron." A case,[3] apparently irreconcilable with the expressions just stated may be explained on other grounds. The plaintiff, desiring to lease a tenement from the defendant, sent to him an agent to make representations as to the plaintiff's good character. The agent was honest, and stated what he believed to be true; but in point of fact the plaintiff was intending to use the house as a brothel. The plaintiff obtained the lease, and used the house as a brothel; but was ejected by the defendant, upon his discovery of the fraud. The plaintiff brought an ejectment, upon which there was a verdict for the defendant; the jury finding the facts as above stated. Leave, however, was granted to the plaintiff to enter a verdict for him if the court should hold that the lease, notwithstanding these facts, was valid. The court held that the plaintiff was entitled, in the particular form of action, to recover, chiefly on the ground that the plaintiff having obtained possession, could not, by the English practice, be forcibly turned out on ground of fraud in the agreement by which he obtained title. It was said, however, that by interposition of a court of equity he could obtain relief.[4] But wherever, as in Pennsylvania, equitable defences are allowed in ejectment, the plaintiff would under similar circumstances, be entitled to the verdict.

§ 170. So far as concerns the main question raised in Cornfoot *v.* Fowke, the dissenting opinion of Lord Abinger, as noticed above, has been accepted in the United States, with one or two

[1] Barwick *v.* English Joint Stock Bk. L. R. 2 Exc. 259.

[2] Wheelton *v.* Hardisty, 8 E. & B. 270. See Benjamin on Sales, § 462.

[3] Ferrett *v.* Hill, 15 C. B. 207.

[4] Ferrett *v.* Hill, 15 C. B. 207.

qualified exceptions;[1] and it has been held that where an agent, however innocently, makes a false representation, such representation is so far imputable to the principal that he cannot avail himself of any bargain induced by such representation.[2] In conformity with this rule it was decided, in a well considered case in Vermont, that if a principal obtain credit upon the statement of an agent, which statement is so far fraudulent and false that if made by the principal himself it would avoid the bargain, the principal, if he knew that the statement was false, will be bound by it, though it be not made under his directions or with his cognizance, to the same effect as if he had made it himself.[3] In Massachusetts, indeed, we have a case which may seem to recede from this conclusion. A Boston broker, undertaking to buy copper in Boston for a New York principal, was asked by the Boston vendor whether intelligence had been received in New York of the rise of copper in Europe. The agent answered, "None that I know of." Intelligence of such advance had been received, however, in New York, and of this the principal was aware. The fact, if known, would no doubt have been of material influence in deterring the vendor from the sale at the price designated. It was ruled by the supreme court that notwithstanding the agent's statement the contract was valid, and would be enforced.[4] But this ruling may be distinguished by the circumstances: (1) that the agent made no positive statement that no news of the kind asked for had arrived in New York, but only that he knew of no such news; and (2) that the inquiry was one which concerned the state of the markets, of which the vendor could with due diligence on his part be advised.

§ 171. *Fraudulently false representations of agent are imputable to principal.* — Of this proposition, so far as it involves the

[1] See Kent's Com. 12th ed. 490; Story on Agency, § 139; 3 Am. Law Rev. 430; Coddington *v.* Goddard, 16 Gray, 436.

[2] Fitzsimmons *v.* Joslin, 21 Vt. 129; Ferson *v.* Sanger, 1 Wood. & M. 147; Bennett *v.* Judson, 21 N. Y. 238; Griswold *v.* Haven, 25 N. Y. 595; Graves *v.* Spier, 58 Barb. 349; Durst *v.* Burton, 47 N. Y. 167; Atherton *v.* Atherton, 50 N. Y. 670; Mundorff *v.* Wickersham, 63 Penn. St. 87; Veazie *v.* Williams, 8 How. U. S. 134; Crump *v.* Mining Co. 7 Grat. 352; De Voss *v.* Richmond, 18 Grat. 338; Bowers *v.* Marshall, 10 Sm. & M. 169; Lawrence *v.* Hand, 23 Missis. 103; Morton *v.* Scull, 23 Ark. 289.

[3] Fitzsimmons *v.* Joslin, 21 Vt. 129.

[4] Coddington *v.* Goddard, 16 Gray, 436.

right of the principal to avail himself of a bargain obtained by the fraudulently false representations of his agent, there can be no question. From Lord Holt's day to the present, it has been agreed that no matter how innocent of his agent's fraud the plaintiff may be, he cannot reap the fruits of such fraud.[1] But as to the extension of this doctrine to cases in which the principal is sued for deceit, wide divergencies of opinion exist. Thus the exchequer court was equally divided on the following facts: An agent of the defendant sold a log of mahogany to the plaintiff, knowing it to be defective, but warranting it to be sound. The log was to be paid for in two bills of exchange; but before payment of the second the defect was discovered. The defendant was ignorant not only as to the defect, but as to the false representations of his agent. On his refusing to make an allowance, the plaintiff sued him for deceit. Pollock, C. B., and Wilde, B., held the action was maintainable. Bramwell and Martin, BB., while admitting that the plaintiff could have rescinded the contract, if he had not cut up the log, held that the defendant could not be held in an action of deceit. To sustain such an action, it was urged by Martin, B., the deceit must emanate from the principal.[2] This division was followed by an apparent contemporaneous conflict between the exchequer chamber and the house of lords. In the case in the exchequer chamber,[3] it was held that a bank was liable in an action of deceit for the fraudulent and false statement of its manager; and by Willes, J., who delivered the unanimous opinion of the court, it was said: "We conceive that we are in no respect overruling the opinions of my brothers Martin and Bramwell in Udell *v.* Atherton," cited above. . . . . "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 prin-

[1] Hern *v.* Nichols, 1 Salk. 288; Fitzherbert *v.* Mather, 1 T. R. 12; Gladstone *v.* King, 1 Maule & S. 35; Mackintosh *v.* Marshall, 11 Mees. & W. 116; Maynard *v.* Rhode, 1 C. & P. 360; Veazie *v.* Williams, 8 How. U. S. 134; Ferson *v.* Sanger, 1 Wood. & M. 147; Concord Bk. *v.* Gregg, 14 N. H. 331; Kibbe *v.* Ins. Co. 11 Gray, 163; Elwell *v.* Chamberlin, 31 N. Y. 611; Atherton *v.* Atherton, 50 N. Y. 670; Mundorff *v.* Wickersham, 61 Penn. St. 87; Madison R. R. *v.* Norwich, 24 Ind. 457; Lawrence *v.* Hand, 23 Missis. 103; and cases cited in prior notes.

[2] Udell *v.* Atherton, 7 H. & N. 172.

[3] Barwick *v.* English Joint Stock Bank, 2 Exch. 259. See Bigelow's Cases on Torts, 29.

cipal is answerable for the act of an agent in the course of his business, ... 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."

Two days after this decision was given a judgment of the house of lords in a Scotch appeal, in which the plaintiff claimed that by the fraudulent representations of the directors of the company, who were its agents, he had been induced to buy from the company a certain portion of its stock; and the demand, following the Scotch practice, was for damages, or for a *restitutio in integrum*, the plaintiff in this way having the advantage of claiming the alternative of rescission or of remuneration.[1] It was ruled by Lord Chelmsford and Lord Cranworth, *first*, that if the company had sought to have enforced the contract they could not have done so, as they could not have taken advantage of their agent's fraud; *secondly*, that the plaintiffs in the present action could not rescind the contract because they could not as a matter of fact restore the stock; and *thirdly*, though they could sue the directors for their fraudulent representations, yet these fraudulent representations were not imputable to the company, as it was itself innocent of the deceit. On the last point, therefore, we have a direct conflict between the opinions of Lords Chelmsford and Cranworth, and the ruling of the judges of the court of exchequer. By the former, a principal, himself innocent of deceit, is held not to be liable in damages for the fraudulent representations of his agent, though the principal reaped the benefit of these representations. By the latter (the exchequer court), the principal is held when so benefiting, to be liable whenever the declarations were within the range of the agent's accredited powers. As according with the last stated opinion is now to be mentioned a subsequent ruling of the queen's bench,[2] in which a banking company was held liable for its managers' fraudulent and false statements as to

[1] Western Bank of Scotland *v.* Addie, L. R. 1 Sc. App. 146.

[2] Swift *v.* Winterbotham, 28 L. T. N. S. 339; L. R. 8 Q. B. 244. Reversed on a question of fact, 30 L. T. N. S. 31. See infra, § 478. See, also, Kennedy *v.* Panama Mail Co. L. R. 2 Ex. 259.

the solvency of a customer of a bank.[1] As bearing in the same direction is a still later decision of the privy council,[2] where it was ruled that in an action of deceit, whether against a person or against a company, the fraud of the agent, wherever the principal reaps the benefit of the fraud, may be treated, both as to the merits and as to pleading, as the fraud of the principal.[3]

§ 172. In this country the tendency is to hold that a principal is liable in an action for deceit based on the fraudulent representations of his agents;[4] *a fortiori* is this the case with corporations, since as a corporation is incapable of making fraudulent misrepresentations except through agents, to assert that it is not liable for the fraudulent representations of its agents when *infra vires* is to assert that it is not liable for false representations at all.[5]

[1] Brice on Ultra Vires, 230 *et. seq.* See Benjamin on Sales, § 454 *et. seq.*, and Bigelow's Cases on Torts, 31–8, where the cases are ably criticised.

[2] Mackay *v.* Bank, L. R. 5 P. C. 394. See infra, § 478.

[3] Mackay *v.* Bank, L. R. 5 P. C. 394. The evidence in this case was that an officer of a banking corporation, whose duty it was to obtain the acceptance of bills of exchange in which the bank was interested, fraudulently, but without the knowledge of the president or directors of the bank, made a representation to A. which, by omitting a material fact, misled A., and induced him to accept a bill in which the bank was interested; and A. was compelled to pay the bill. It was held by the privy council that A. could recover from the bank the amount so paid. See infra, § 478.

[4] See cases cited infra, § 478; and see Locke *v.* Stearns, 1 Metc. 560; Jeffrey *v.* Bigelow, 13 Wend. 518. Torne *v.* Parkersburg R. R. 39 Md. 36; Veazie *v.* Williams, 8 How. U. S. 134; Durst *v.* Burton, 47 N. Y. 167; Morton *v.* Seull, 23 Ark. 289; Madison R. R. *v.* Norwich, 24 Ind. 459.

[5] See this point distinctively discussed, infra, § 478. By the by-laws of a railroad company, its treasurer was made the custodian of the ledger and other books relating exclusively to the ownership and transfer of the capital stock of the company; he was required to prepare and countersign all certificates of ownership of stock and scrip that might be issued, and to receive and enter upon the proper books all transfers thereof. It was made his duty, also, to affix the seal of the company to all certificates of ownership of stock and scrip properly issued by the company, and signed by the president. Such treasurer, wishing to obtain money for his own use, fraudulently issued from the office of the company sundry certificates of stock, signed by himself, sealed with the corporate seal of the company, and having also the signature of the president, and purporting to be genuine in every respect. Upon the stock so issued, the treasurer, through the ageney of a broker, borrowed large sums of money, the lender not knowing for whom the money was wanted, and advancing the same solely upon the faith of the certificates, which he believed to be genuine. Two of the certificates were issued directly to the lender, and the third was issued to the broker and by him assigned to the

§ 173. *Persons induced by fraud to take shares in corporation may be relieved of their shares.* — It is at all events plain that where a person is induced by the fraudulent representations of the officers of a corporation to take shares, he can, if he is not estopped by laches, be relieved from the responsibilities attached to him by his subscription.[1]

§ 174. *Principal ratifying is bound by representation.* — It is conceded that where the principal ratifies a sale made by the agent, by receiving its fruits, he is thereby bound by the agent's representations.[2] But the representations must be shown to have been made by the agent when acting for the principal within the range of the employment. Thus where the evidence showed that the agent, for whose act the defendants were sought to be charged, was the agent of several other insurance companies engaged in the same business at the same place, and there was nothing in the proof to show for which of the companies the agent was acting at the time he did the acts from which the

lender. Some months afterward it was discovered that there had been a fraudulent issue of stock to a large amount by the treasurer, who, soon after the discovery, absconded. The company thereupon gave notice, requesting the holders of its genuine stock to present their certificates and receive in exchange new certificates. Upon presentation of the above certificates by the holder thereof, in pursuance of this notice, he was informed that they were spurious, and the treasurer of the company refused to exchange them for new certificates. On suit brought against the company, by the holder of these certificates, for its refusal to exchange them for new certificates, it was held, that the defendant was liable for the fraudulent acts of its agent; and the jury, in assessing the damage to which the plaintiff was entitled, might allow him the amount of the money advanced on the stock, with interest, or the amount of the market value of the stock at the date of the loan, with interest (if they deemed it proper to allow interest), the amount allowed, however, not to exceed the amount of the money loaned, with interest, if the value of the stock should be greater than the loan and interest. Tome *v.* Parkersburg R. R. Co. 39 Md. 36.

[1] Brice on Ultra Vires, 237; Coneybeare *v.* New Brunswick Land Co. 9 H. Lds. 711; Ross *v.* Estates Invest. Co. L. R. 3 Ch. 682; Central R. R. *v.* Kisch, L. R. 1 H. of Lds. 99; Oakes *v.* Turquand, L. R. 2 H. L. 325; and cases cited supra, § 170–2. The prior cases indicate the chancery practice to be to refuse such relief where the plaintiff does not promptly repudiate the contract before intervening equities accrue, unless it should appear that all other members of the company united in the false statements. Dodgson's case, 3 De Gex & S. 65; Bernard's case, 5 De Gex & S 288; Mixer's case, 4 De Gex & J. 575, discussed in Bigelow's Cases on Torts, 25–29; and see supra, § 166.

[2] See cases cited supra, § 89; infra, § 478.

fraud was sought to be inferred, it was ruled by the supreme court of Georgia that a verdict against the company was illegal, and without evidence to support it, and it was error in the court to refuse a new trial.[1]

§ 175. *One of two or more joint and several agents can bind principal by representations.* — Wherever an agent can bind a principal by his acts, he can bind his principal by his representations. But for the acts of an agent to bind the principal, such acts must be within the range of the agent's authority. If the agent is only authorized to act conjointly with a colleague, then, to all person knowing this limitation, such agent's act or representations do not bind the principal unless assented to by such colleague. If the agent is authorized to act singly, then his single representations may bind the principal.[2]

4. *To bind by Negligence.*

§ 176. The power of the agent to bind by his negligence his principal is discussed at large in a subsequent chapter.[3]

5. *To bind by receiving Notice.*

§ 177. *Notice to agent is notice to principal.* — He who avails himself of the services of an agent must take these services burdened by any equities that he would have been individually subjected to had he transacted the particular business in person. That which would have been notice to him, dealing with the matter personally, is notice to him when dealing through an agent.[4]

[1] Underwriters' Agency *v.* Seabrook, 49 Ga. 563.

[2] See Peter *v.* Beverley, 10 Peters, 564; Inhabitants *v.* Cole, 3 Pick. 244; Towne *v.* Jacquith, 6 Mass. 46; Franklin *v.* Osgood, 14 Johns. 553; Kling *v.* Hammar, 2 Penns. R. 349; Heard *v.* March, 12 Cush. 580; Hawley *v.* Keeler, 53 N. Y. 114; Guthrie *v.* Armstrong, 5 B. & Ald. 623. And see on this particular point, Bank U. S. *v.* Davis, 2 Hill, 45. Supra, § 140.

[3] See infra, § 475; and see Wharton on Negligence, § 156.

[4] Fitzherbert *v.* Mather, 1 T. R. 12; Hiern *v.* Mill, 13 Ves. 114; Toulmin *v.* Steere, 3 Mer. 210; Dryden *v.* Frost, 3 M. & C. 670; Berkeley *v.* Watling, 7 Ad. & El. 29; Astor *v.* Wells, 4 Wheat. 466; Bowman *v.* Watken, 1 How. 196; Flagg *v.* Mann, 2 Sumn. 354; Hovey *v.* Blanchard, 13 N. H. 145; Smith *v.* Water Commis. 38 Conn. 208; Bank U. S. *v.* Davis, 2 Hill, 451; Fulton Bk. *v.* Canal Co. 4 Paige, 137; Nat. Ins. Co. *v.* Minch, 53 N. Y. 144; Philadelphia *v.* Lockhardt, 73 Penn. St. 217; Slater *v.* Irwin, 38 Iowa, 261; Monroe *v.* Stulte, 9 Ired. 281; Grandy *v.* Ferebee, 68 N. C. 356; Ross *v.* Houston, 25 Miss. 591. See infra, § 584, 673.

Otherwise third persons dealing with an agent would be subjected to great disadvantages. An agent purchasing of a factor might have notice that the goods purchased belonged to the factor's principal, and yet, notwithstanding this notice, the purchaser employing such agent would be entitled to take the goods discharged from the title of the real owner. An attorney might say, "I act only for my client;" but an agent dealing with such attorney, if notice to agent were not notice to principal, might defy such notice, and convey to his principal an interest discharged of the client's title. The only way of avoiding such perversions of justice is by holding, that the principal is to be bound by all notices coming to his agent, when such notices would have bound him, if given directly to himself.

§ 178. *Notice must be in the range of the agent's duties.* — Yet it must be remembered that agency is limited to special spheres, and that as an agent, when acting out of these spheres, ceases to represent his principal, so a principal is not affected by notice to the agent out of the sphere of action of the agent.[1] It is true that we are not without authorities to the effect that the notice, to bind the principal, must have been given to the agent in the particular transaction to which the notice relates.[2] But the better opinion is that wherever the agent, acting in the scope of his duties for his principal, receives notice in a matter in which he represents the principal, such notice is notice to the principal, although the notice is not received in the identical transaction to which the notice relates. The test is, whether

[1] Fuller *v.* Bennett, 2 Hare, 402; Hiern *v.* Mill, 13 Ves. 120; Lawrence *v.* Tucker, 7 Greenl. 195. See Mobile & O. R. R. *v.* Thomas, 42 Ala. 673, which rules that whether the notice was within the agent's scope is a question of law. See also Adams Ex. Co. *v.* Trego, 35 Md. 47; Smith *v.* Water Commis. 38 Conn. 208; Bracken *v.* Miller, 4 Watts & S. 102; Congon *v.* R. R. 24 Wisc. 157; Bierce *v.* Red Bluff Hotel Co. 31 Cal. 160.

[2] Gould *v.* Oliver, 2 Scott N. R. 241; Fitzgerald *v.* Fauconberge, Fitzgibbon, 211; Lowther *v.* Carlton, 2 Atk. 242; Mountford *v.* Scott, 3 Maddock, 34; Kennedy *v.* Green, 3 Myl. & K. 699; Wilde *v.* Gibson, 1 H. of L. C. 605; Farmers' Bk. *v.* Payne, 25 Conn. 444; Bank U. S. *v.* Davis, 2 Hill, 452; Westfield Bk. *v.* Cornen, 37 N. Y. 320; Jackson *v.* Sharp, 9 Johns. 163; Hood *v.* Fahnestock, 8 Watts, 489; Bracken *v.* Miller, 4 W. & S. 111; U. S. *v.* Shriver, 3 Md. Ch. 381; Winchester *v.* R. R. 4 Md. 231; Keenan *v.* Ins. Co. 12 Iowa, 126; Second Nat. Bk. *v.* Curren, 36 Iowa, 556; M'Cormick *v.* Wheeler, 36 Ill. 114; Congar *v.* R. R. 24 Wisc. 157; Bierce *v.* Red Bluff Hotel, 31 Cal. 160. See infra, § 673.

the information was of a character which it was the duty of the agent to communicate. If so, it binds the principal.

§ 179. Thus, in a leading English case, the plaintiff placed goods in the hands of a person to sell in his own name, and the defendants bought them of that person through a broker. The defendant did not know that the goods belonged to the plaintiff, but the broker did, from having been previously in the employment of the person employed to sell, but not from anything that was communicated to him while acting as the defendant's broker in the transaction. It was held by the common pleas, and afterwards by the exchequer chamber, that the defendants were chargeable with this knowledge of their broker, and were therefore not entitled to set off a debt due to them from the person employed to sell against the plaintiff's claim for the price of the goods.[1] The same liberal construction is adopted by the supreme court of the United States. "In England," says Bradley, J., in 1870, in the supreme court of the United States,[2] "the doctrine now seems to be established,[3] 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 upon 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

[1] Dresser *v.* Norwood, 17 C. B. N. S. 466; 32 L. J. C. P. 201; 34 L. J. C. P. 48, Ex. Ch. See Brown *v.* Savage, 4 Drew, 635; Nutting, ex parte, 2 M. D. & De G. 302; Edwards *v.* Martin, L. R. 1 Eq. 121; Peruv. Ry. Co. *v.* Thames Ins. Co. L. R. 2 Ch. App. 617; Blumenthal *v.* Brainard, 18 Vt. 410; Hart *v.* Bank, 33 Vt. 252; The Distilled Spirits, 11 Wall. 356. See Kerr on Fraud & Mistake, 172–204; and Wyllie *v.* Pollen, 32 L. J. Ch. 782, where the lord chancellor said, that in order to affect the principal with *constructive* notice of facts within the knowledge of an agent, it is necessary not only that the knowledge should be derived from the same transaction, but it must be a knowledge of facts material to the transaction, and which it is the duty of the agent to communicate.

[2] Distilled Spirits, 11 Wall. 366.

[3] See Hargreaves *v.* Rothwell, 1 Keen, 158; Lenehan *v.* McCabe, 2 Irish Eq. 342; Fuller *v.* Benett, 2 Hare, 394; Dresser *v.* Norwood, 17 C. B. N. S. 466.

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 the principal, it appears to us to be a sound view of the law." [1]

§ 180. *Notice cannot be given collusively.* — The rule which charges a principal with the knowledge of his agent is for the

[1] To same effect see Hovey *v.* Blanchard, 13 N. H. 145; Patten *v.* Ins. Co. 40 N. H. 375; Hart *v.* Bank, 33 Vt. 252. Where a purchase was made by a married woman, through her husband as her agent, of mortgaged premises, under a power of sale, and the agent was present and saw a tender made to the persons selling, before the sale, of the amount due on the note for which the sale was made, and the same tender was made to the agent after the sale, but before the deed was made. Held, that this was sufficient to charge the purchaser, through her agent, with notice of the tender. Flower *v.* Elwood, 66 Ill. 441. An application was made to the agent of an insurance company for a risk of $4,000; the agent in forwarding the application said if the company would not take $4,000, he would place $1,000 in another company of which he was agent; the secretary said he would take but $3,000, which was placed in the first company, and $1,000 in the other, both policies being issued at the same time; the conditions of the first company avoided the policy unless other insurance were *immediately* notified to the secretary, and indorsed on the policy; eight months after, and before any loss, the *agents* indorsed the other insurance on the policy and notified the company, who made no objection; the agents wrote policies for the company, to be countersigned by the agents. Held, in an action to recover for a loss, there was evidence for the jury that the company had notice of the additional insurance when their policy was issued. Farmers' Mutual Ins. Co. *v.* Taylor, 73 Penn. St. 342. Mercur, J.: "If an insurance company will confine the business of its agents within the limits of the special written authority given to them, it has a right to ask that it shall not be bound by any act of the agent not warranted thereby. If, however, the company itself ignores that special authority; if, outside and beyond it, it either expressly gives, or encourages an agent, to exercise great additional powers three several years; and ratifies and confirms the same, thus holding him out to the world as rightfully exercising all those powers, thereby inducing the public to believe in and rely upon his said enlarged agency, the company cannot, after a loss has occurred, repudiate his action, and fall back upon the written authority for the purpose of avoiding the legal effect of those acts, which he has done by their encouragement in the general scope of the business. The public do not see the written authority, but they do see the acts which the agent does. They know that the company ratifies them. They then have a right to presume such continued acts are within the scope of his authority, and to act upon such presumption. Such a rule is necessary to protect the people who are obliged to transact business relating to insurance remote from the main offices of insurance companies." Farmers' M. Ins. Co. *v.* Taylor, 73 Penn. St. 354.

protection of innocent third persons. If a person colludes with an agent to cheat the principal, the latter is not responsible for the act or knowledge of the agent.[1]

§ 181. *Notice cannot be proved by declarations not part of the res gestae.* — Notice to a principal cannot be established by the declarations of an agent made after the transaction in which he was an agent has been closed and completed.[2]

§ 182. *Rule does not apply to public officers.* — It has been held in North Carolina that the rule does not apply to surveys of entries of land by public surveyors when in discharge of their public duties.[3] But this exception ought not to be extended to apply to cases in which the state claims a benefit on which the notice would be a burden. In such case the distinctions which bear on private individuals bear on the state.

§ 183. *Notice to proper officer of corporation is notice to corporation.* — Perplexing questions may arise as to the effect of the immediate doctrine before us upon corporations. On the one side, it may be well argued that if a casual notice to a single officer of the corporation is to bind the corporation, corporations which have numerous officers more or less occupied with its affairs will be put to a great disadvantage. On the other side, it may be urged with equal propriety, that to say that notice to a corporation is only effective when given to its directors sitting in state, would give a corporation the benefits of the law of agency without any of its compensatory burdens.

§ 184. The true view is that already set forth. Wherever an officer of a corporation can bind the corporation by his acts, there notice to him will be notice to the corporation. But in either case the officer, to make him the binding representative of the corporation, must be acting within the range of his authority.[4]

[1] Nat. L. Ins. Co. *v.* Minch, 53 N. Y. 144.

[2] Greer *v.* Higgins, 8 Kan. 519.

[3] Merril *v.* Sloan, 1 Murphy, 121.

[4] Mech. Bk. *v.* Seton, 1 Pet. 199; Lyman *v.* Bank, 12 How. U. S. 225; Porter *v.* Bk. 19 Vt. 410; New Hamp. Sav. Bank *v.* Downing, 16 N. H. 157; Housatonic Bk. *v.* Martin, 1 Metc. 294; Com. Bk. *v.* Cunningham, 24 Pick. 274; Frost *v.* Belmont, 6 Allen, 152; Weld *v.* Gorham, 10 Mass. 366; Farmers' Bk. *v.* Payne, 25 Conn. 444; Bank *v.* Milford, 36 Conn. 93; Trenton Bk. *v.* Woodruff, 2 N. J. Eq. (1 Green) 117; Custer *v.* Bk. 9 Penn. St. 27; Bank *v.* Whitehead, 10 Watts, 397; Bank of U. S. *v.* Davis, 2 Hill N. Y. 451; Fulton Bank *v.* Canal Co. 4 Paige, 127; Mitchell *v.* Cook, 29 Barb. 243; New Hope Bridge Co. *v.* Phœnix Bk. 3 N. Y. 156; Westfield Bank *v.*

6. *To bind by Fraud.*

§ 185. We have already seen that a principal is bound by his agent's fraudulent representations when such representations are in furtherance of the principal's plans. How far the principal is bound by the agent's tortious acts will be considered in a future chapter.[1]

Cornen, 37 N. Y. 320; Second Nat. Bk. *v.* Curren, 36 Iowa, 556; Louisiana Bank *v.* Senecal, 13 La. 525; Terrell *v.* Bank, 12 Ala. 502; Blackman *v.* Bank, 7 Ala. 205; Branch Bank *v.* Steele, 10 Ala. 915; Goodloe *v.* Godley, 21 Missis. 233. See infra, § 671, 673. A notice officially addressed to the president of a corporation, who is also its general agent, in relation to matters under his supervision and control as such general agent, is notice to the corporation. Smith *v.* Water Commissioners, 38 Conn. 208.

[1] Infra, § 474. "It has been maintained that fraud stands in a different position from other torts, and that an employer is not liable to be sued for the fraud of his agent, unless he has authorized the particular fraudulent representation complained of. See Benjamin Sales, 350; Cornfoot *v.* Fowke, 6 M. & W. 358; Udell *v.* Atherton, 7 H. & N. 172; 30 L. J. 337, Ex.; Western Bank of Scotland *v.* Addie, L. R. 1 Sc. App. 145. But though this view may be supported by good authority, the better opinion seems to be that '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 benefit of his master, though no express command or privity of the master be proved. . . . . In all the cases, in which the master has been held liable, it may be said 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.' Barwick *v.* English Joint Stock Bank, L. R. 2 Ex. 265–7 (Ex. Ch.), per Curiam." Dicey on Parties, 448. While it is true that the principal is bound by the fraudulent acts of his agent perpetrated on third persons while acting under his authority in reference to the subject of his agency, yet a person dealing with the agent is not liable to the principal for the acts of the agent in fraud of the rights of the principal, when such person is not himself a party to the fraud. Where an agent under a valid power sells and indorses negotiable paper, in fraud of the rights of the principal, to *bonâ fide* purchasers, for a valuable consideration, paid without notice that the agent is acting fraudulently toward his principal, and there is nothing on the face of the papers, or circumstances of the case, to put them upon inquiry, the purchasers will acquire a title free from all equities existing between the principal and agent. Mason *v.* Bauman, 62 Ill. 76.

IV. SPECIAL POWERS OF PARTICULAR AGENCIES.

1. *To buy.*

§ 186. *Special agent is limited by terms imposed.* — An agent specially instructed to buy a limited amount of goods, is as much restricted from buying less than the amount specified, wherever the quantity goes to the consideration, as he would be from buying more than the amount.[1] A mere agency to buy goods does not imply such an agency as authorizes a purchase on credit; and where a special agent is employed in a single transaction, those dealing with him must look to his authority, or abide the consequences.[2] So an authority to an agent, to buy a lot of real estate, will not authorize him to sell or exchange it.[3] Nor can an agent, unless this be permitted by local usage, bind his principal by a negotiable note for the payment of goods purchased.[4]

2. *To sell.*

§ 187. *An agent authorized to sell may do whatever is usual to effect sale.* — Where the agent is authorized in general terms to sell, he is assumed to have power to take all the usual steps to effect the sale; and of what is usual, the jury is to determine.[5]

[1] Olyphant *v.* McNair, 41 Barb. 446. See supra, § 156; infra, § 268; otherwise when amount is unrestricted.

[2] Berry *v.* Barnes, 23 Ark. 411; Stoddart *v.* McIlvain, 7 Rich. 525.

[3] Todd *v.* Benedict, 15 Iowa, 591.

[4] Hazeltine *v.* Miller, 44 Me. 177; Denison *v.* Tyson, 17 Vt. 549; Emerson *v.* Man. Co. 12 Mass. 237; Taber *v.* Cannon, 8 Metc. 458; Savage *v.* Rix, 9 N. H. 549; Bank *v.* Bugbee, 1 Abbott Ct. Ap. 86. See Temple *v.* Pomroy, 4 Gray, 128, where it was intimated that when necessary to the business such notes could be given. And so Sprague *v.* Gillett, 9 Metc. 91. See supra, § 134. The employment of a special agent in a single transaction to buy goods does not imply authority to pledge the credit of his principal, even though in making the purchase he represents himself as a partner of his principal in the business. Berry *v.* Barnes, 23 Ark. 411. The mere fact that an agent is furnished with money to pay for purchases to be made from time to time for his principal, in this case, of live stock, does not imply that his authority is restricted to cash purchases, or require him to pay for the property on the day of purchase. Adams *v.* Boies, 24 Iowa, 96.

[5] Bayliff *v.* Butterworth, 1 Ex. 423; Pickering *v.* Buck, 15 East, 38; Bryant *v.* Moore, 26 Me. 84; Nelson *v.* Cowing, 6 Hill, 337; Haydock *v.* Stow, 40 N. Y. 363; Randall *v.* Kehlor, 60 Me. 37; Peters *v.* Farnsworth, 15 Vt. 155; Fay *v.* Richmond, 43 Vt. 25; Benjamin on Sales, § 624. See Bliss *v.* Clark, 16 Gray, 60, where it was held that an authority to sell at public sale

§ 188. *Sales by sample and warranty binding when usual.* — Thus where it is usual to sell by sample, an agent may sell by

on a particular day must be executed on that day.

Upon a written request by an owner of freehold property to an estate agent to procure a purchaser for it, and to advertise it at a certain price, it was held that the agent had no authority to enter into an open contract for sale, and that he had no authority to enter into any contract for sale. Hamer *v.* Sharp, L. R. 19 Eq. 108. Sir Charles Hall, V. C.: "The question in this case is one of very considerable importance in reference to the disposal of landed estate generally. The question is whether, when an owner of an estate puts it into the hands of an estate agent for sale, stating a price for and giving particulars of the property to enable him to inform intending purchasers, but giving no instructions as to the absolute disposal, and none as to the title of the property, and mentioning none of those special stipulations which it might be proper to insert in conditions in reference to the title, that is sufficient authority to the agent to sign a contract for the sale of the property for the price stated in the instructions, without making any provision whatsoever as to title. In considering whether the instructions of October, 1872, were a sufficient authority to the agent for that purpose, I cannot help expressing an opinion that such an authority to an agent on the part of a vendor would be highly imprudent, as the purchaser would then be entitled to require, on completion, attested copies of all documents of title, and the expense of them would swallow up, to a great extent, the purchase money. This estate agent must have known that if this property had been offered for sale by public auction there would have been conditions to guard the vendor against being subject to certain expenses, and to prevent the contract becoming abortive by reason of a purchaser requiring a marketable title. Could he suppose that he was invested with authority to sign a contract without considering what it should contain as regards title? As an intelligent and well informed person, he could not suppose that he was properly discharging his duty to his principal when he signed the contract which he signed; such a contract was not one within the scope of his authority to sign. If he had a right to enter into any contract at all, it was one of a different description, and on that ground alone, — this being a bill for specific performance, and the court having a discretion, — I hold that the alleged contract, if it be a contract, is not one which the court will decree to be carried into effect." Hamer *v.* Sharp, L. R. 19 Eq. 112.

An agent to sell lands has not, merely as such, power to convey. He may bind his principal to convey, but cannot himself convey, unless authorized by a power of attorney, first duly acknowledged and recorded. Therefore a deed cannot be demanded of or payment tendered to a mere agent to sell. Force *v.* Dutcher, 3 Green (N. J.), 401.

A power of attorney to sell and convey lands, and do whatever is proper and necessary thereto, gives no authority to make partition of lands in which the principal has an interest as tenant in common, though if the attorney undertakes so to do, his proceedings may be ratified and confirmed either by deed of the principal recognizing the partition as of legal validity, or by such acts of the principal as will operate as an *estoppel in pais*. Borel *v.* Rollins, 30 Cal. 408.

See, generally, § 124, 739.

sample, and bind his principal to the warranty resulting from a sale by sample.[1] So where it is usual to warrant, there a warranty by the agent will bind the principal.[2] But it must be remembered that the test is usage; and that with the application of this test the position of the agent has much to do. Thus it has been held that a general agent authorized by his principal to carry on a particular business may warrant if usual in that business;[3] but that this usage does not apply to the case of a servant authorized to make a particular private sale of a horse,[4] nor to a servant selling stock.[5] The better opinion is that the right to warrant horses without special authority is, unless there be a usage to the contrary, limited to the servants of professional horse-dealers.[6]

§ 189. To authorize an agent to give a special warranty unusual in the particular business, he must have specific instructions.[7]

§ 190. A formal power to sell and execute conveyances involves power to execute proper deeds or bills of sales, with the usual covenants.[8] And a power not under seal may be construed as authorizing the agent to bind the principal by a contract,[9] but not to execute a deed under seal.[10]

[1] Andrews *v.* Kneeland, 6 Cowen, 354; Randall *v.* Kehlor, 60 Me. 37.

[2] Alexander *v.* Gibson, 2 Camp. 555; Dingle *v.* Hare, 7 C. B. N. S. 145; Howard *v.* Shepherd, L. R. 2 C. P. 148; Randall *v.* Kehlor, 60 Me. 37; Morris *v.* Bowen, 52 N. H. 416; Fay *v.* Richmond, 43 Vt. 25; Upton *v.* Suffolk Bk. 11 Cush. 586; Milburn *v.* Belloni, 34 Barb. 607; Sandford *v.* Handy, 23 Wend. 260; Nelson *v.* Cowing, 6 Hill, 337; Schuchardt *v.* Allens, 1 Wallace, 359; Palmer *v.* Hatch, 46 Mo. 585. See Bradford *v.* Bush, 10 Ala. 386, where it was held that a warranty sale, even if authorized, could not, under an ordinary power to sell, be rescinded and adjusted.

[3] Howard *v.* Shepherd, L. R. 2 C. P. 148; Alexander *v.* Gibson, 2 Campb. 555. See supra, § 126.

[4] Brady *v.* Todd, 9 C. B. N. S. 592. See, as qualifying this, supra, § 124, and Nelson *v.* Cowing, 6 Hill, 336; Bradford *v.* Bush, 10 Ala. 386; Cocke *v.* Campbell, 13 Ala. 286; Hunter *v.* Jameson, 6 Ired. 252; Bryant *v.* Moore, 26 Me. 84; Lipscomb *v.* Kitrell, 11 Humph. 256.

[5] Smith *v.* Tracy, 36 N. Y. 79.

[6] See Helyear *v.* Hawke, 5 Esp. 73; Bradford *v.* Bush, 10 Ala. 386. See supra, § 124.

[7] Upton *v.* Suffolk Mills, 11 Cush. 586; Palmer *v.* Hatch, 46 Mo. 585.

[8] Vanada *v.* Hopkins, 1 J. J. Marsh. 293; Taggart *v.* Stanberry, 2 McLean, 543; Valentine *v.* Piper, 22 Pick. 85; Le Roy *v.* Beard, 8 How. 451. See, however, to the contrary, Nixon *v.* Hyserott, 5 Johns. 58; Gibson *v.* Colt, 7 Johns. 390, overruled in 6 Hill, 336.

[9] See Hersley *v.* Rush, and other cases cited supra, § 45–48.

[10] See supra, § 48.

§ 191. A power to sell necessarily involves a power to receive the purchase money on the usual terms.[1]

[*Powers of sale, in reference to brokers, factors, auctioneers, and salesmen, are discussed under these special titles.*]

§ 192. *Agent can sell on credit whenever this is the usage.*— As the usage of a particular business at a particular place is supposed to be incorporated in the contract, if the usage is for sales under the particular circumstances to be made on credit, the agent is justified in complying with this usage if he use due precaution as to the vendee.[2] It is otherwise when there is no such usage.[3]

§ 193. *A power to sell does not necessarily include a power to pledge.* — This point is elsewhere discussed.[4] Whatever may be the doubts as to the equity of this rule, stated in its naked terms, and however completely it may have been done away with as to factors by statute, it is plain that a special power to sell goods does not authorize the agent to pledge for his own debt.[5]

[1] Capel *v.* Thornton, 3 C. & P. 352; Graves *v.* Legg, 2 H. & N. 210; Goodale *v.* Wheeler, 11 N. H. 424; Leverick *v.* Meigs, 1 Cowen, 645; Peck *v.* Harriott, 6 Serg. & R. 149; Yerby *v.* Grisby, 9 Leigh, 387; Hoskins *v.* Johnson, 5 Sneed, 469; Johnson *v.* McGruder, 13 Missis. 365. See this limited in Dupont *v.* Wertheman, 10 Cal. 364.

[2] Wiltshire *v.* Sims, 1 Campb. 258; Houghton *v.* Matthews, 3 Bos. & P. 489; Newsom *v.* Thornton, 6 East, 17; Greeley *v.* Bartlett, 1 Greene, 76; Griffith *v.* Fowler, 18 Vt. 390; Daylight Gas Co. *v.* Odlin, 51 N. H. 56; McLinsley *v.* Pearsall, 3 Johns. 319; Robertson *v.* Livingston, 5 Cow. 474; Leverick *v.* Meigs, 1 Cowen, 645; Willard *v.* Buckingham, 36 Conn. 395; Williams *v.* Evans, L. R. 1 Q. B. 352; Goodenow *v.* Tyler, 7 Mass. 36; May *v.* Mitchell, 5 Humph. 365; Reano *v.* Magee, 11 Mart. 639; Hosmer *v.* Beebe, 14 Mart. 368; Littlejohn *v.* Ramsay, 16 Mart. 655; James *v.* M'Credie, 1 Bay, 294; Ruffin *v.* Mebane, 6 Ired. Eq. 507; Brown *v.* Central Land Co. 42 Cal. 257; Marshall *v.* Williams, 2 Biss. 255. Where a principal authorizes his agent to sell "upon credit." Held, that *a reasonable* credit was meant, which reasonableness was a question to be determined by the evidence. Brown *v.* Cent. Land Co. 42 Cal. 257. Where the principal received without objection accounts of sales made on credit, by a commission merchant. Held, that he waived his previous instructions to sell for cash, and that the merchant was justified in afterwards presuming that he had authority to make further sales on credit. Marshall *v.* Williams, 2 Biss. 255. Supra, § 134; infra, 740.

[3] Wiltshire *v.* Sims, 1 Campb. 268; State *v.* Delafield, 8 Paige, 524; Seiple *v.* Irwin, 30 Penn. St. 513; Law *v.* Stokes, 32 N. J. Law, 241. Infra, § 740.

[4] See infra, § 745, 746.

[5] Wood *v.* Goodridge, 6 Cush. 117; De Bouchout *v.* Goldsmid, 5 Ves. Jr. 211; Foss *v.* Robertson, 46 Ala. 483;

§ 194. *Nor a power to barter.* — This results from the position hereafter stated, that a sale must be for money.[1]

Nor a power to sell at auction. — Unless in cases of usage or necessity such a power is not implied from a naked direction to sell.[2]

§ 195. "*Retail*" *does not include* "*wholesale.*" — Under ordinary circumstances, a salesman in a store is limited to retailing, and cannot dispose of the goods in masses by wholesale.[3]

§ 196. *Conditions in power cannot be varied.* — It has just been said that whatever is necessary to effectuate a power is within the range of the agent. It must, however, be remembered, that this is with the qualification that no new conditions, not expressed in the power, are imposed. This is illustrated in a case decided in Illinois in 1872. A party authorized another by letter to sell for him a certain tract of land. The portion of the letter creating the authority was as follows: "My terms are, parties purchasing it to assume the mortgage now on it, due in one and two years from the twenty-second day of last March, of $5,275, the balance to be paid to me, one third cash, the rest in one and two years, at eight per cent. Now, if you can sell it on those terms within a few days, you can sell it for $800 per acre net." The agent contracted a sale of the premises at $850 per acre on substantially the above terms, but with a condition giving the purchaser an option whether or not he would complete the purchase, allowing him thirty days after he was furnished with an abstract of the title, in which to decide, and with a further condition that, in case the title was not perfect, the vendor should pay $2,000 and all other damages and expenses. In an action by the purchaser against the vendor to recover damages for a failure to convey in compliance with the terms of the contract, the above conditions were regarded as exceeding the agent's authority, and that the contract was therefore held not binding on the principal.[4]

Morris *v.* Watson, 15 Minne. 212; Parsons *v.* Webb, 8 Greenl. 38; Urquhart *v.* M'Iver, 4 Johns. 103; Hays *v.* Linn, 7 Watts, 520; Newcome *v.* Thornton, 6 East, 17; Martini *v.* Coles, 1 M. & Sel. 140. Infra, § 744. A power of attorney authorizing a sale and conveyance does not authorize a mortgage. Gaylord *v.* Stebbins, 4 Kansas, 42.

[1] Guerreiro *v.* Peile, 3 B. & A. 616; Kent *v.* Bornstein, 12 All. 342; Lumpkin *v.* Wilson, 5 Heisk. 555; Trudo *v.* Anderson, 10 Mich. 357. Infra, § 210.

[2] Towle *v.* Leavitt, 3 Fost. 360.

[3] See Hampton *v.* Matthews, 2 Harris, 105.

[4] Baxter *v.* Lamont, 60 Ill. 237. See infra, § 713.

§ 197. *Agent disobeying orders is liable for market value of goods.* — An agent who, in disobedience to instructions not to part with the goods till the price is received, causes the goods to be shipped, without being paid for, is liable for the value of the goods to the principal.[1] But the principal cannot recover more than the market value, though he had himself set a higher value in his instructions.[2]

3. *To transfer Principal's Title to Property.*

§ 198. *Agent, unless clothed with real or apparent authority from owner, cannot transfer title to goods.* — By Anglo-American law the owner of goods cannot have his title divested by his agent's tortious and unwarranted transfer to a third party, unless he has himself clothed the agent with apparent authority to make such transfer.[3] *Nemo plus juris in alium transferre quam ipse habet.*

Hence a person who, when he has notice or is bound to take notice (from the want of apparent authority on part of an agent) of the agent's incapacity to pass such title, can himself receive no title; and such third person, even though he should have intermediately sold the goods, is bound to the owner in an action of trover.[4] In other words, unless the owner of goods gives an agent

[1] Stearine Co. *v.* Heintzmann, 17 C. B. N. S. 56. See, also, Walker *v.* Smith, 4 Dall. 389; Nickerson *v.* Soesman, 98 Mass. 364.

[2] Austill *v.* Crawford, 7 Ala. 335; Ainsworth *v.* Partillo, 13 Ala. N. S. 460; Maynard *v.* Pease, 99 Mass. 555; Evans *v.* Root, 3 Selden, 7 N. Y. 186; Seigworth *v.* Leffel, 76 Penn. St. 476; Cothers *v.* Keever, 4 Barr, 168. See, however, remarks in Sedgwick on Damages, 408; and see Millbank *v.* Dennistown, 1 Bosw. 246; Nelson *v.* Morgan, 2 Martin, 257.

[3] Peer *v.* Humphreys, 2 Ad. & El. 161; Boyson *v.* Coles, 6 M. & S. 14; Calais Co. *v.* Van Pelt, 2 Black U. S. 372; Kinder *v.* Shaw, 2 Mass. 398; Stanley *v.* Gaylord, 1 Cush. 538; Gilmore *v.* Newton, 9 Allen, 171; Parsons *v.* Webb, 8 Greenl. 38; Galvin *v.* Bacon, 2 Fairf. 28; Courtis *v.* Cane, 32 Vt. 418; Haggerty *v.* Palmer, 6 John. Ch. 437; Williams *v.* Merle, 11 Wend. 80; Barrett *v.* Warren, 3 Hill, 348; Covill *v.* Hill, 4 Denio, 323; Tradesman Bk. *v.* Merritt, 1 Paige, 302; Frazier *v.* Erie Bk. 8 W. & S. 18; Miller *v.* Lea, 35 Md. 396; Davidson *v.* Porter, 57 Ill. 300; Foss *v.* Robertson, 46 Ala. 483. See Fowler *v.* Hollins, L. R. 7 Q. B. 616, quoted at large, infra, § 730.

[4] Stone *v.* Marsh, 6 B. & Cr. 551; Guichard *v.* Morgan, 4 Moore, 36; Barton *v.* Williams, 5 B. & A. 395; Marsh *v.* Keating, 1 Bing. N. C. 198; *S. C.* 2 Cl. & F. 250; White *v.* Spettique, 13 M. & W. 603; Lee *v.* Bayes, 18 C. B. 599; Gilmore *v.* Newton, 9 Allen, 171; Heckle *v.* Lurvey, 101 Mass. 344; Riley *v.* Water Power, 11 Cush. 11; Hoffman *v.* Carow, 20 Wend. 21; *S. C.* 22 Wend. 285; Roland *v.* Gundy, 5 Oh. 202; Beasley *v.* Mitchell, 9 Ala. 780; Foss *v.* Robertson, 46

either real or apparent authority to sell, a sale by the agent conveys no title to the purchaser as against the owner.[1] A factor indubitably has such power, but it is otherwise with a broker when undertaking to sell on credit.[2] But such authority may be implied from the nature of the case. Thus an agent to whom an unmatured bill of exchange is sent for collection, to which bill is appended a bill of lading, is bound to deliver the bill of lading to the drawee on his accepting the draft.[3] The same conclusion is reached in a case decided by the supreme court of the United States in 1875.[4] "Nor can it make any difference," says Strong, J., "that the draft with the bill of lading has been sent to an agent (as in this case) 'for collection.' That instruction means simply to rebut the inference from the indorsement that the agent is the owner of the draft. It indicates an agency.[5] It does not conflict with the plain inference from the draft and accompanying bill of lading that the former was a request for a promise to pay at a future time for goods sold on credit, or a request to make advances on the faith of the described consignment, or a request to sell on account of the shipper. By such a transmission to the agent he is instructed to collect the money mentioned in the drafts, not to collect the bill of lading. And the first step in the collection is procuring acceptance of the draft. The agent is, therefore, authorized to do all which is necessary to obtaining such acceptance. If the drawee is not bound to accept without the surrender to him of the consigned property or of the bill of lading, it is the duty of the agent to make that surrender, and if he fails to perform this duty, and in consequence thereof acceptance be refused, the drawer and indorsers of the draft are discharged."[6]

§ 199. *Exception in cases of sales by market overt, by persons dealing with negotiable paper, and by factors.* — To this rule, however, there are certain well-marked exceptions. The first, according to the English law, is when there is a sale by market overt;[7] but as such sales are not in this country especially protected,[8] it is not necessary that they should be here discussed.

Ala. 483; Davidson *v.* Porter, 57 Ill. 300.

[1] See cases cited supra, § 187–192; and see also infra, § 763.

[2] Infra, § 712–3.

[3] Lanfear *v.* Blossman, 1 La. An. 148; Woolen *v.* Bk. 12 Blatch. 359.

[4] Merchants' Bk. *v.* Nat. Bk. MSS.

[5] Sweeney *v.* Easter, 1 Wall. 166.

[6] Mason *v.* Hunt, 1 Douglas, 297.

[7] See Benjamin on Sales, § 8.

[8] 2 Kent's Com. 325; Griffith *v.* Fowler, 18 Vt. 390; Hoffman *v.* Carow, 22 Wend. 290.

The second is in regard to negotiable notes, the title to which, before maturity, the holder, though he be an agent without right so to do, may pass to a *bonâ fide* purchaser without notice.[1] It is otherwise where the holder takes the paper fraudulently or with notice of its taint.[2] The third arises under the factor statutes, as adopted in England and in most of the United States, by which factors and consignees are deemed to be true owners of the goods so far as to give validity to sales; and "purchasers from 'any agent or agents intrusted with any goods, wares, or merchandise, or to whom the same may be consigned,' are protected in their purchases, notwithstanding notice that the vendors are agents; provided the purchase and payment be made in the usual and ordinary course of business, and the buyer has not notice, at the time of purchase and payment, of the absence of authority in the agent to make the sale or receive the payment. And by the amendment act, 5 & 6 Vict. c. 39, the possession of the goods themselves is treated as having the same effect as that of bills of lading or 'other documents of title' (which under 6 Geo. 4, c. 94, gives the possessor power to make a valid sale); and a 'document of title' is defined to be 'any document used in the ordinary course of business as proof of the possession or control of goods, or authorizing, or purporting to authorize, either by indorsement or delivery, the possessor of such documents to transfer or receive goods thereby represented.' These acts apply solely to persons intrusted as factors or commission merchants, not to persons to whose employment a power of sale is not ordinarily incident, as a wharfinger who receives goods usually without power to sell.[3] The statute is limited in its scope to mercantile transactions, to dealings in goods and merchandise, and does not embrace sales of furniture or goods in possession of a tenant or bailee for hire."[4]

[1] Miller *v.* Race, 1 Burr. 452; Grant *v.* Vaughan, 3 Burr. 1516; Solomons *v.* Bank, 13 East, 135; Lownes *v.* Anderson, 13 East, 130; Bolton *v.* Puller, 1 Bos. & P. 539; Collins *v.* Martin, 1 Bos. & P. 649; Clement *v.* Leverett, 12 N. H. 317; Ballard *v.* Bell, 1 Mason, 243; Cruger *v.* Armstrong, 3 Johns. Cas. 5; Coddington *v.* Bay, 5 Johns. Ch. 54; *S. C.* 20 Johns. 237; Brenzer *v.* Wightman, 7 Watts & S. 264; Davis *v.* Henderson, 25 Miss. 549.

[2] Treutell *v.* Barondon, 8 Taunt. 100; Sigourney *v.* Lloyd, 8 B. & Cr. 622; Goodman *v.* Harvey, 4 Ad. & El. 870; Welch *v.* Sage, 47 N. Y. 143; Phelan *v.* Moss, 67 Penn. St. 59.

[3] Monk *v.* Wittenbury, 2 B. & Ad. 484.

[4] Benjamin on Sales, 1st Am. ed. § 19. To this section, Mr. Perkins,

§ 200. *At common law, agent with primâ facie right to sell may convey title to bonâ fide purchaser without notice.* — But at common law, independently of the statutes just cited, if the owner of goods permit an agent to have possession of them, "or of those documents which are the *indicia* of property therein, — thereby enabling him to hold himself forth as having not the possession only but the property, — a sale by such person to a purchaser without notice will bind the true owner." [1] "But probably," says Mr. Chitty,[2] "this proposition ought to be limited to cases where the person who had the possession of the goods was one who from the nature of his employment might be taken *primâ facie* to have had the right to sell." [3] "This limitation," adds Mr. Benjamin,[4] "was approved by the barons of the exchequer in Higgins *v.* Burton,[5] and when thus limited the principle does not differ substantially from the provisions of the factor's act, as amended by the 5 & 6 Vict. c. 39." [6] Hence an agent who is intrusted with the disposition of negotiable paper may transfer absolutely the title thereof to a *bonâ fide* purchaser.[7]

§ 201. *Where property is unlawfully sold by agent, it, or its proceeds, may be followed by principal until he meet with a bonâ*

the American editor, adds the following note: "See 1 Chitty Contr. 11th Am. ed. 298–300; Navulshaw *v.* Brownrigg, 2 De G. M. & G. (Am. ed.) 441, and notes, 445; Nickerson *v.* Darrow, 5 Allen, 419, 422. The English statutes are the foundation of acts in several of the American states on the same subject; as in New York, Pennsylvania, Rhode Island, Ohio, Maine, Massachusetts, &c. See Smith's Merct. Law (Am. ed.) 126, note; 2 Kent, 628, note (*b*); Bott *v.* McCoy, 20 Ala. 578; Michigan State Bk. *v.* Gardner, 15 Gray, 362; De Wolf *v.* Gardner, 12 Cush. 19; Ullman *v.* Barnard, 7 Gray, 554; Jennings *v.* Merrill, 20 Wend. 1; Warner *v.* Martin, 11 How. U. S. 209."

[1] Abbott, C. J., Dyer *v.* Pearson, 3 B. & C. 38; Bayley, J., Boyson *v.* Coles, 6 M. & S. 14.

[2] Chitty on Contracts, 11th Am. ed. 534.

[3] Ibid.

[4] Benjamin on Sales, § 19.

[5] 26 L. J. Ex. 342. To this the American editor adds, Pickering *v.* Busk, 15 East, 38; 1 Chit. Cont. (11th Am. ed.) 277; Saltus *v.* Everett, 20 Wend. 267; Lobdell *v.* Baker, 1 Met. 202; Crocker *v.* Crocker, 31 N. Y. 507; Wooster *v.* Sherwood, 25 N. Y. 278; West. Trans. Co. *v.* Marshall, 37 Barb. 509.

[6] See also to same effect Whitehead *v.* Tuckett, 15 East, 400; Martini *v.* Coles, 1 M. & Sel. 140; Taylor *v.* Plumer, 3 M. & Sel. 562; Jones *v.* Hodskins, 61 Me. 480; Veil *v.* Mitchell, 4 Wash. C. C. 105; Clement *v.* Leverett, 12 N. H. 317; Koch *v.* Willi, 63 Ill. 144.

[7] Bolton *v.* Puller, 1 Bos. & P. 539; Collins *v.* Martin, 1 Bos. & P. 648; Grant *v.* Vaughan, 3 Burr. 1516; Goodman *v.* Harvey, 4 Ad. & El. 870.

fide purchaser without notice. — We have just seen in what cases a sale by an agent fails to pass title in the principal's goods. Supposing that such invalid sale is made by the agent, then the principal may follow it, or its proceeds, wherever such may be found; and he can exercise this right until he is checked in his pursuit by such a *bonâ fide* purchaser without notice, as by the distinctions stated in the foregoing sections is entitled to hold to the goods.[1] The same rule enables a *cestui que trust* to follow his money into land purchased by his trustee.[2] When, however, goods have been sold by the agent, and turned into money, and such money, mixed with other money of the agent, passes into the hands of other parties, where it forms part of a general fund, and becomes undistinguishable, then, from the nature of things, it eludes further pursuit.[3] The principal, even in cases where there is no tort, may follow his goods into the hands of the agent's assignees so far as they stand in the same position as to notice with the agent.[4]

4. *To insure.*

§ 202. *Authority to insure involves authority to adjust, settle, and abandon.* — If an agent is authorized to effect a policy, this authorizes him to adopt all proper means to adjust and settle a loss.[5] So an agent to insure has an incidental authority to abandon the property insured upon a total loss;[6] and notice of a second or other insurance in another company given to an agent employed to negotiate for risks, to make surveys, and to receive applications for insurance, is within the scope of the business and

[1] Parke *v.* Eliason, 1 East, 544; Taylor *v.* Plumer, 3 M. & Sel. 562; Bolton *v.* Plummer, 1 Bos. & P. 539; Lane *v.* Dighton, Ambl. 409; Fowler *v.* Hollins, L. R. 7 Q. B. 616; Jackson *v.* Clarke, 1 Y. & Jer. 216; Conard *v.* Ins. Co. 1 Peters S. C. 306; Hourquebie *v.* Girard, 2 Wash. C. C. 212; Veil *v.* Mitchell, 4 Wash. C. C. 105; Thompson *v.* Perkins, 3 Mason, 232; Le Breton *v.* Peirce, 2 Allen, 8; Chest. Man. Co. *v.* Dehon, 5 Pick. 7; Farmers' & Mech. Bk. *v.* King, 57 Penn. St. 202; Sheffer *v.* Montgomery, 65 Penn. St. 329; Greene *v.* Haskell, 5 R. I. 487; Norris *v.* Tayloe, 49 Ill. 11. See infra, § 232, 233.

[2] Blagge *v.* Miles, 1 Story R. 452; Boyd *v.* McLean, 1 Johns. Ch. 582; Murray *v.* Lylburn, 2 Johns. C. 214. Infra, § 236.

[3] Ibid.; Paley's Agency, 90–95; Robson *v.* Wilson, 2 Marsh. Ins. 295; Dumas, ex parte, 2 Ves. 582; Kip *v.* Bank, 10 Johns. R. 65.

[4] See infra, § 763.

[5] Richardson *v.* Anderson, 4 Campb. 43; Goodson *v.* Brooke, 4 Campb. 163; but see Huber *v.* Limmerman, 21 Ala. 488. Infra, § 705.

[6] Chesapeake Ins. Co. *v.* Stark, 6 Cranch, 268.

authority of such agent, and will bind the principal whether the agent has communicated such notice to him or not.[1] So the insurer's agent may waive conditions in the policy,[2] and may receive payment on the insurance, though this payment must be in money.[3]

§ 203. *Insurance traveller represents company.* — An interesting question here emerges as to the party whom an insurance agent, employed by an insurance company to seek for and obtain insurers, represents. Is he the agent of the insured, or of the company? The earlier decisions, based on the fact that the agent was employed by the insured to present his case to the company, inclined to the opinion that he was agent of the insured. But the courts are now accepting, and rightfully, the conclusion, that as the agent acts under a general retainer from the company, he is to be treated throughout as agent of the company.[4]

§ 204. *Agent may be by implication required to insure.* — Whenever the usage of trade requires the agent to insure, then he is bound to follow this usage.[5] A factor with power to sell not only is at liberty to insure for his principal as well as for himself, but is bound to do so when required by usage or the understanding of the parties.[6] The course of dealing between the

[1] Lattomus *v.* Ins. Co. 3 Houst. 405.

[2] Sheldon *v.* Ins. Co. 26 N. Y. 460.

[3] Bonsfield *v.* Croswell, 2 Campb. 545; Richardson *v.* Anderson, 1 Campb. 43, n; Todd *v.* Reid, 4 B. & Ald. 210; Russell *v.* Bangley, 4 B. & Ald. 395; Scott *v.* Irving, 1 B. & Adol. 605; Campbell *v.* Hassell, 1 Stark. 233, cited Paley on Agency, 278–285.

[4] See this ably argued by Miller, J., in Coe *v.* Wilkinson, 13 Wall. 222. To the same effect, see Woodbury *v.* Charter Oak Co. 31 Conn. 526; Winnesheik Ins. Co. *v.* Holzgrape, 53 Ill. 516; Pierce *v.* Ins. Co. 50 N. H. 297; North Am. Ins. Co. *v.* Throop, 22 Mich. 146: Franklin *v.* Ins. Co. 42 Mo. 456; and Mr. Green's note to Story on Agency, 8th ed. § 58. An agent of an insurance company, authorized to issue policies of insurance and consummate the contract, binds his principal by any act, agreement, representation, or waiver, within the ordinary scope and limit of insurance business, which is not known by the assured to be outside the authority granted to the agent. Am. Cent. Ins. Co. *v.* McLanthan, 11 Kansas, 533. When an insurance company issues to a person an open policy, with blanks therein for the indorsement of risks agreed upon by him and blank certificates for the description of the risks thus agreed upon to be signed by him, with authority to take the premiums, he is to be deemed an agent of the company. Wass *v.* Me. M. Ins. Co. 61 Me. 537.

[5] Kingston *v.* Wilson, 4 Wash. C. C. 315. Infra, § 705, 782.

[6] De Forest *v.* Ins. Co. 1 Hall N. Y. R. 114.

parties may make it obligatory on a continuous agent to insure, unless notice has been given to him to discontinue the practice.[1] When he undertakes to insure, and fails, then he becomes liable for the loss.[2] The effect of a gratuitous engagement to insure is elsewhere noticed.[3] It may be generally observed that a mere loose gratuitous promise to insure, when there is no exclusive confidence bestowed, is no ground for action should the promise not be fulfilled.[4]

§ 205. *Insurance broker is bound to exercise customary diligence.* — An insurance broker, employed either directly or constructively to effect an insurance, is bound to exercise the diligence customary with good and prudent experts in his particular department of business. It should be remembered, however, that he is not an insurer himself.[5] Hence it is the duty of such agents to see that the insurers are in good market credit at the time of the insurance, and they must take the usual business modes of ascertaining such credit;[6] they must exercise the customary skill in the preparation of the documents;[7] they must be careful to see that their principal is fairly treated in the settlement,[8] and that the settlement is properly pushed.[9]

5. *To collect or receive a Debt.*

§ 206. *Agent authorized to receive payment binds principal by receipt.* — When an agent is authorized to receive payment, his receipt, if in the ordinary course of business, binds his principal.[10]

[1] Smith *v.* Lascelles, 2 T. R. 189; 1 Liv. Ag. 324; Paley's Agency, 18; Crosbie *v.* M'Doual, 13 Ves. 158; French *v.* Reed, 6 Binney, 308; Randolph *v.* Ware, 3 Cranch, 503; Thorne *v.* Deas, 4 Johns. R. 101; Morris *v.* Summerl, 2 Wash. C. C. 203; Ralston *v.* Barclay, 6 Miller, La. 653.

[2] French *v.* Reed, 6 Binn. 308; Tickel *v.* Short, 2 Ves. 239; Turpin *v.* Bilton, 5 Man. & G. 455. See Wilkinson *v.* Coverdale, 1 Esp. Cas. 74.

[3] Whart. on Neg. § 442–450.

[4] Thorn *v.* Deas, 4 Johns. R. 84; McGee *v.* Bast, 6 J. J. Marsh. 456.

[5] Smith *v.* Codogan, 2 T. R. 188; Moore *v.* Morgue, Cowp. 479; Comber *v.* Anderson, 1 Campb. 653. It will not be presumed that the agents of an insurance company have authority to make parol contracts to insure; such authority must be shown affirmatively. Ætna Ins. Co. *v.* Northwestern Iron Co. 21 Wisc. 458.

[6] Windscheid, Pandekt. II. 420.

[7] Ibid.; Parke *v.* Hammond, 6 Taunt. 495; *S. C.* 4 Campb. 344; Mallough *v.* Barber, 4 Campb. 150; Mayhew *v.* Forrester, 5 Taunt. 615.

[8] Rundle *v.* Moore, 3 Johns. Cas. 36.

[9] Power *v.* Butcher, 10 B. & Cr. 329.

[10] Infra, 580; Favenc *v.* Bennett, 11 East, 38; Blackburn *v.* Scholes, 2

Where, however, the principal is undisclosed, and there is no notice that there is such a principal, whatever payments would be good as to the agent, will be good as to the principal.[1]

§ 207. *General authority to receive and pay out money embraces authority to sue, compromise, and adjust.* — In such case the agent stands in the place of the principal, and is entitled to take any steps that may best execute the trust imposed.[2] A *tender* may be effectually made to a person having authority to receive a debt.[3]

§ 208. *But a special authority to receive payment of a debt does not include a power to compromise or settle by note.* — In such case the agent is required, unless otherwise authorized, to receive only money in payment;[4] and hence he cannot take in satisfaction the debtor's note;[5] nor release without payment;[6] nor does such authority enable the agent to negotiate bills received in payment.[7] A power to settle claims does not include a power to arbitrate.[8] A power to receive payment does not include a power, on part payment, to extend the time of payment of balance.[9]

Campb. 342; Baring *v.* Corrie, 2 B. & Ald. 137, and cases cited supra; De Valingen *v.* Duff, 14 Peters, 282; Corlies *v.* Cummings, 6 Cow. 181; Renard *v.* Turner, 42 Ala. 117.

[1] Ibid.; Capel *v.* Thornton, 3 C. & P. 352; George *v.* Clagett, 7 T. R. 361; Stracy *v.* Deey, 7 T. R. 361; Traub *v.* Millikin, 57 Me. 63; Lime Rock *v.* Plimpton, 17 Pick. 159; Conklin *v.* Leeds, 58 Ill. 178; Koch *v.* Willi, 63 Ill. 144. Infra, § 465.

[2] Howard *v.* Baillie, 2 H. Bl. 618; Joyce *v.* Duplessis, 15 La. An. 242; Sprague *v.* Gillett, 9 Met. 91; Merrick *v.* Wagner, 44 Ill. 266.

[3] Moffat *v.* Parsons, 5 Taunt. 307; Kirton *v.* Braithwaite, 1 Mees. & W. 310. A payment by the maker of a promissory note, before its transfer by the payee, to an agent of the payee, within the scope of his authority, is a good payment. Renard *v.* Turner, 42 Ala. 117.

[4] Woodbury *v.* Larned, 5 Minne. 339; Sykes *v.* Giles, 5 Mees. & W. 645; Harper *v.* Goodsell, 5 Q. B. 422; Atwood *v.* Munnings, 7 B. & Cr. 278. Infra, § 210.

[5] Ibid.; Ward *v.* Evans, 2 Ld. Ray. 928; Kirk *v.* Hyatt, 2 Carter, 322.

[6] Patterson *v.* Moore, 35 Penn. St. 69.

[7] Hogg *v.* Snaith, 1 Taunt. 347; Murray *v.* E. Ins. Co. 5 B. & Ald. 204. See Gardner *v.* Baillie, 6 T. R. 591; Hogarth *v.* Wherley, 32 L. T. N. S. 800. See Rossiter *v.* Rossiter, 8 Wend. 494. The mere possession of a promissory note by an agent is not sufficient to authorize payment to the agent; but the note must be indorsed as in all other cases. Doubleday *v.* Kress, 50 N. Y. 410.

[8] Michigan R. R. *v.* Gongar, 55 Ill. 503.

[9] Hutchings *v.* Munger, 41 N. Y. 155; Chappel *v.* Raymond, 20 La. An. 277.

§ 209. *Nor to pledge the proceeds.* — A power to collect a debt does not authorize the agent to pledge a note received for the amount,[1] nor to submit the debt to arbitration.[2]

[*As to cases in which the power to receive money is incidental to an agency, see supra*, § 126–135.]

§ 210. *Agent authorized to collect a debt is authorized to receive only in lawful currency.* — The general rule is that the agent is to be understood as intrusted with power to receive payment only in money.[3] He cannot, therefore, without special authority, receive payment in goods,[4] or in negotiable paper,[5] though where the usage is to pay in checks, he may receive in checks, if he use due discretion.[6] Nor can he extinguish the debt due the principal by setting off against it his own debt;[7] though it is otherwise where the usage is for a mercantile agent to credit his principal only with the balance due him on a settlement of accounts with debtors.[8] If the agent is required to receive the debt in a particular currency he is bound to do so,[9] and if he negligently receive in a depreciated currency, the loss must be upon himself.[10]

Confederate money, on the principles just stated, could not be

[1] See Hays *v.* Linn, 7 Watts, 520; Jones *v.* Farley, 6 Greenl. 226.

[2] Paley's Agency, 191, 291; Goodson *v.* Brooke, 4 Camp. 163; Scarborough *v.* Reynolds, 12 Ala. 252.

[3] Favenc *v.* Bennet, 11 East, 38; Blackburn *v.* Scholes, 2 Camp. 343; Todd *v.* Reid, 4 B. & Ald. 210; Russel *v.* Bangley, 4 B. & Ald. 395; Bartlett *v.* Pentland, 10 B. & C. 760; Scott *v.* Irving, 1 B. & Ad. 605; Barker *v.* Greenwood, 2 Y. & Coll. 415; Richardson *v.* Anderson, 1 Camp. 43; Bousfield *v.* Cresswell, 2 Camp. 545; Underwood *v.* Nicholls, 17 C. B. 239; Stewart *v.* Aberdein, 4 Mees. & W. 211; Williams *v.* Evans, L. R. 1 Q. B. 352; Howard *v.* Chapman, 4 C. & P. 508; Hudson *v.* Granger, 5 B. & A. 27; Sweeting *v.* Pearce, 7 C. B. N. S. 485; Bell's Com. 7th ed. 528; 9 C. B. N. S. 534; Bridges *v.* Garrett, L. R. 4 C. P. 580; 5 C. P. 451. See Renard *v.* Turner, 42 Ala. 117; McCullock *v.* McKee, 4 Harris, 289; Lumpkin *v.* Wilson, 5 Heisk. 555.

[4] Howard *v.* Chapman, 4 C. & P. 508; Guerriere *v.* Peile, 3 B. & Ald. 616.

[5] Sykes *v.* Gill, 5 M. & W. 645; McCullock *v.* McKee, 4 Harris, 289; Hoel *v.* Storrs, 7 Wisc. 253.

[6] Thorode *v.* Smith, 11 Mod. 71; Russell *v.* Hankey, 6 T. R. 12; Williams *v.* Evans, L. R. 1 Q. B. 352.

[7] Greenwood *v.* Burns, 50 Mo. 52; Todd *v.* Reid, 4 B. & Ald. 210; Scott *v.* Irving, 1 B. & Ald. 605; Catterall *v.* Hindle, L. R. 1 C. P. 186. See White, ex parte, L. R. 6 Ch. 397.

[8] Stewart *v.* Aberdein, 4 M. & W. 228. See Sweeting *v.* Pearce, 30 L. J. C. P. 109; 7 C. B. N. S. 489; *S. C.* 9 C. B. N. S. 534; Warner *v.* Martin, 11 How. U. S. 209. Infra, § 783.

[9] Mangum *v.* Bell, 43 Miss. 288.

[10] Chapman *v.* Cowles, 41 Ala. 103; Renard *v.* Turner, 42 Ala. 117.

received as currency by which a debt may be extinguished;[1] but an agent who, from necessity, there being no other currency, and in the exercise of the prudence usual with good business men under the circumstances, received such currency, will be relieved from liability for the loss so ensuing to his principal.[2] Where such currency is rapidly depreciating, it will be negligence to receive it;[3] and so where there are other circumstances indicating a want of due diligence and caution.[4] Confederate *bonds* cannot, in any view, be regarded as a valid medium of payment.[5]

§ 211. *Where principal, when indebted to agent, authorizes agent to collect money to pay himself from principal's debtor, this authorizes the agent to receive the debt from the latter in any mode which he (the agent) chooses.* — A., who is indebted to B., authorizes B. to pay himself by collecting a debt due from C. to A. In this case B. may receive payment from C. in any way he (B.) chooses; provided that the balance due A., after paying B., is handed over to A. If B. receives in cash that balance, he is put in a position as completely to discharge his duty to the principal as if he had received the whole in cash. It can make, so it has been properly held, no difference to the principal, whether the agent receive part and retain part, or receive only the balance, which he himself is entitled to receive from the agent. A person, however, who does not take the ordinary and proper course of paying the whole in money, must take care to be able to prove that the agent is in this situation. If he pay by settlement, on account, or otherwise, he takes upon himself the risk of being able to show the debt due by the principal to

[1] Ward *v.* Smith, 7 Wall. U. S. 447; Strauss *v.* Bloom, 18 La. An. 48; Thorn *v.* Thompson, 19 La. An. 687.

[2] Baird *v.* Hall, 67 N. C. 230; Utley *v.* Young, 68 N. C. 387; Purvis *v.* Jackson, 69 N. C. 474; Richardson *v.* Tutrell, 42 Miss. 525; Turner *v.* Beall, 22 La. An. 490.

[3] Alley *v.* Rogers, 19 Grat. 360; Ewart *v.* Saunders, 25 Grat. 207.

[4] Where money was paid into the hands of R. for the benefit of E., an infant of tender years, and R. gave his receipt therefor, and signed it as agent of E., and afterwards, in 1858, loaned the money to a firm of which he was a member, and took their note, and in April, 1863, collected it in Confederate money, the firm being perfectly solvent, it was held that he was liable to E. for the loss thereby sustained. Shuford *v.* Ramsour, 63 N. C. 622.

[5] Brown *v.* Smith, 67 N. C. 245; Goldsborough *v.* Turner, 67 N. C. 403. Though see Longmire *v.* Herndon, 72 N. C. 629.

the agent, and the specific circumstances under which the agent was appointed to receive the money.[1]

§ 212. *And so where agent has a lien on the money coming to the principal.* — By the same reasoning, where an agent has a lien on the debt due from the third party, he (the agent) may receive payment to the extent of his lien otherwise than in cash;[2] and this even after the revocation of the agency;[3] though such payment is made at the risk of the third party, who has to establish the validity of the lien.[4] A factor having such lien, and not notifying the third party of it, is precluded from recovering it from the third party, in case the latter pays over the amount to the principal without notice.[5]

6. *To negotiate Bills.*

§ 213. *Agent employed to negotiate bill may take ordinary modes of negotiation.* — Thus, if necessary, he may indorse the paper in his own name, for his employer, and at the latter's risk,[6] or in the name of his employer,[7] but an express direction to the contrary from the principal precludes indorsement;[8] nor can a limitation to indorse in the principal's name sustain an indorsement in the name of the principal and agent jointly,[9] nor can an authority to negotiate paper be construed to extend to the issuing of accommodation paper.[10]

But without express power to negotiate paper, paper cannot be negotiated. — Thus a power to receive and discharge debts does not authorize the indorsing a bill of exchange,[11] nor is this implied in a general power to transact business,[12] nor in a power

[1] Alderson, B., Barker *v.* Greenwood, 2 Y. & C. 418. See Pratt *v.* U. S. 3 Nott & Hun. 106.

[2] Drinkwater *v.* Goodwin, Cowp. 251; Hudson *v.* Granger, 5 B. & A. 27; Howard *v.* Chapman, 4 C. & P. 508; 1 Bell's Com. 7th ed. 528.

[3] Hudson *v.* Granger, supra.

[4] Drinkwater *v.* Goodwin, *ut supra.*

[5] Holmes *v.* Tutton, 5 E. & B. 65; Robinson *v.* Rutter, 4 E. & B. 954; Williams *v.* Millington, 1 H. Bl. 81. See infra, § 777.

[6] Bayley on Bills, ch. 2, § 7.

[7] Paley's Agency, 201, 210, citing Fenn *v.* Harrison, 4 T. R. 177. See Hicks *v.* Hankin, 4 Esp. 116.

[8] Fenn *v.* Harrison, 3 T. R. 757.

[9] Stainback *v.* Read, 11 Grat. 281.

[10] Ibid.; Gulick *v.* Grover, 33 N. J. Law, 463; Stainer *v.* Tyson, 3 Hill, 279; Wallace *v.* Bank, 1 Ala. N. S. 565.

[11] Kilgour *v.* Finlyson, 1 H. Bl. 156. See Savage *v.* Rix, 9 N. H. 263; Denton *v.* Tyson, 17 Vt. 549; Graham *v.* Savings Inst. 46 Mo. 186.

[12] Hogg *v.* Smith, 1 Taunt. 347;

to advance money,[1] but it is otherwise with agents employed to generally manage the concerns of an absent principal.[2] To receive checks in place of cash, does not include power to indorse and collect such checks.[3] A general agent cannot make accommodation paper.[4] But a power to clerks to indorse may be inferred from a merchant's settled usage in permitting indorsements by his clerks.[5] An authority to receive payment by acceptance of a bill drawn in blank does not empower the agent to draw a bill payable to the order of the drawer.[6] But a power to sign negotiable paper binds the principal to a *bonâ fide* holder of accommodation paper issued by the agent.[7]

§ 214. *Power not to be extended beyond limits prescribed.* — An agent authorized to negotiate paper can only bind his princi-

Murray *v.* E. I. Co. 5 B. & A. 204; Lawrence *v.* Gebhard, 41 Barb. 575; Scarborough *v.* Reynolds, 12 Ala. 252; Shaw *v.* Stone, 1 Cush. 238; Severance *v.* McCall, 3 Head, 619; Duconge *v.* Forgay, 15 La. An. 327; Robertson *v.* Levy, 19 La. An. 327; Gulick *v.* Grover, 33 N. J. (Law) 463; Paige *v.* Stone, 10 Metc. 160; Kerns *v.* Piper, 4 Watts, 222; Bank *v.* Johnson, 3 Rich. 42; Hills *v.* Upton, 24 La. An. 427.

[1] Webber *v.* Williams College, 23 Pick. 302.

[2] Tappan *v.* Bailey, 4 Metc. 529; Knapp *v.* McBride, 7 Ala. 19.

[3] Graham *v.* Savings Inst. 46 Mo. 126.

[4] Gulick *v.* Grover, 33 N. J. L. 463. See, also, Greenwood *v.* Spring, 54 Barb. 575. We should remember that no matter what may be the terms of the mandate, it may be expanded, as against the principal, by his mode of dealing. Infra, § 225. Where it appears that the husband of the defendant, who is separate in property from her, was authorized to employ servants for the hotel kept by the defendant and in which she resides, to settle with them and to pay their wages, and that he had general superintendence and sole control and management of the hotel; it has been ruled in Louisiana, that this authority included the power to make a note for the wages due to servants employed in the hotel. Even without specific powers the agent can bind the principal by drawing bills and signing notes, where it is necessary to raise funds to carry into effect the main object of the agency; *a fortiori*, would he have authority to acknowledge a debt due to the employee of a hotel whom he was authorized to employ and to settle with. James *v.* Lewis, 26 La. An. 664. It being proved that the defendant resided at the hotel during the term the services were rendered by the plaintiff, it must be presumed that she was informed of what her agent did in regard to the settlements with the servants in her employ, and that she ratified his acts, as it is not shown that she ever repudiated them — the plaintiff continuing in her service after the note was given. James *v.* Lewis, 26 La. An. 664.

[5] Dyer *v.* Pearson, 3 B. & Cr. 38; Whitehead *v.* Tuckett, 15 East, 409; Smith *v.* Ind. Co. 16 Sim. 16.

[6] Hogarth *v.* Wherley, 32 L. T. N. S. 800.

[7] Bird *v.* Daggett, 97 Mass. 494.

pal within the limits of his office; and hence he is held not to possess, by virtue of such employment, the authority to purchase or sell goods.[1]

§ 215. *Must give notice to employer of any contingencies.* — We will see hereafter that an agent is bound to notify his principal of any events of importance connected with the agency. This is necessarily the case with regard to the non-acceptance of paper, or any other detriments to which it is exposed.[2]

7. *To transact Business abroad.*

§ 216. *Such power to be subject to laws of place of business.* — An authority to transact business abroad is virtually to transact such business in conformity with the laws and usages of the place of transaction. *Locus regit actum.* The law of the place of performance enters into the contract of agency, and is supposed to have been adopted as part of that contract by the parties.[3]

8. *To represent as Partner.*

§ 217. The relation of partner to partner, belonging to a distinct branch of jurisprudence, will not be here discussed.

9. *To represent in Maritime Agencies.*

§ 218. This topic, also, is simply noticed at this point for the purpose of saying that, from the fact that it is affected by distinctive considerations which cannot be here adequately examined, it is remanded to treatises on maritime law.

10. *To pay out Money.*

§ 219. *Any payment accepted by creditor discharges principal.* — Wherever an agent is authorized to pay a debt to a creditor of the principal, any payment which is accepted by the debtor discharges the principal.[4] Nor is this discharge affected by the

[1] 3 Chitty Com. & Man. 196; Kirkpatrick *v.* Winans, 1 Green (N. J.), 407.

[2] Paley's Agency, 39; Arrott *v.* Brown, 6 Whart. 9; Canonge *v.* Bank, 15 Martin, 344; Durnford *v.* Patterson, 7 Miller (La.), 740. See Bank U. S. *v.* Davies, 2 Hill, 451; Mead *v.* Engs, 5 Cowen, 303; United States *v.* Barker, 2 Paine C. C. 340. Infra, § 302.

[3] Wharton's Confl. of Laws, § 397 *a*; Treat *v.* Celis, 41 Cal. 202; Neille *v.* U. S. 7 Ct. of Cl. 535; Owings *v.* Hull, 9 Peters, 607.

[4] Townsend *v.* Inglis, Holt N. P. 278; Underwood *v.* Nicholls, 17 C. B. 239; Strong *v.* Hart, 6 B. & Cr. 160.

fact that the security taken by the creditor from the agent was inadequate or conditional, if the creditor gave a receipt in full to the principal, who had no reason to suspect the good faith of the transaction, and who reposed on its completion.[1]

11. *To loan does not authorize to collect.*

§ 220. Authority to loan money and take securities for its payment, implies no authority to collect.[2]

V. CONSTRUCTION OF LETTERS OF ATTORNEY.

§ 221. A letter of attorney, as a written instrument by which one person conveys a power to another person, is to be construed in harmony with the rules of interpretation applicable to instruments granting powers. Among these rules we may particularize the following: —

§ 222. 1. *General terms to be limited to the object.* — In other words, a particular object is in view, and in stating this object, the draftsman, whether professional or lay, uses terms which, if

[1] Paley's Agency, 250–2; Wyatt *v.* Hertford, 3 East, 147; March *v.* Pedder, 4 Camp. 257; Reed *v.* White, 5 Esp. 122; Cheever *v.* Sweet, 15 Johns. 276; Muldon *v.* Whitlock, 1 Cow. 290; Brown *v.* Tel. Co. 30 Md. 39.

[2] Cooley *v.* Willard, 34 Ill. 69. It is well settled that a debtor is authorized to infer that an attorney or agent, who has been employed to make a loan, is empowered to receive both principal and interest, from his having possession of the bond and mortgage given for the loan, or of the bond only. But the inference in such cases is founded on the custody of the securities, and it ceases whenever they are withdrawn by the creditor; and it is incumbent on the debtor who makes payment to the attorney or agent, relying upon such inference, to show that the securities were in his possession on each occasion when the payments were made. Haines *v.* Pohlmann, 25 N. J. Eq. 179. The Chancellor: "It is well settled, that the debtor is authorized to infer that an attorney or scrivener, who has been employed to make a loan, is empowered to receive both principal and interest, from his having possession of the bond and mortgage given for the loan or of the former only. The numerous cases on this point will be found collected in Williams *v.* Walker, 2 Sandf. Ch. 325. See also Hatfield *v.* Reynolds, 34 Barb. 612; Megary *v.* Funtis, 5 Sandf. Sup. C. R. 376. But the inference in such case is founded on the custody of the securities, and it ceases whenever they are withdrawn by the creditor; and it is incumbent on the debtor who makes payment to the attorney or agent, relying upon such inference, to show that the securities were in his possession on each occasion when the payments were made." Haines *v.* Pohlmann, 25 N. J. Eq. 183.

taken by themselves, might pass to the agent the prerogatives of a general agency. They are not, however, to be so taken by themselves, but must be construed simply as conveying such powers as are usual and proper for the discharge of the particular duty imposed.[1]

[1] Scrivenes *v.* Pask, 18 C. B. (N. S.) 785, aff. L. R. 1 C. P. 715; Cox *v.* R. R. 3 Ex. 268; Flemyng *v.* Hector, 2 M. & W. 181; Hawtyne *v.* Bourne, 7 W. & W. 595; Atwood *v.* Munnings, 7 B. & Cr. 278; Rusby *v.* Scarlett, 5 Esp. 75; Gardner *v.* Baillie, 6 T. R. 591; Murray *v.* E. I. Co. 5 B. & Ald. 204; Harper *v.* Godsell, L. R. 5 Q. B. 422; Hay *v.* Goldsmidt, Taunt. 349; Ireland *v.* Livingston, 5 L. R. H. L. Cas. 395; Hogg *v.* Snaith, 1 Taunt. 347; Wright *v.* Ellison, 1 Wall. 16; Holloday *v.* Daily, 19 Wall. 606; Weston *v.* Alley, 49 Me. 94; Holmes *v.* Morse, 50 Me. 102; Hanson *v.* Haitt, 14 N. H. 56; State *v.* Atherton, 16 N. H. 203; Willard *v.* Buckingham, 36 Conn. 391; Weber *v.* Williams Coll. 23 Pick. 302; Butman *v.* Bacon, 8 Allen, 25; Mech. Bk. *v.* Merchts. Bk. 6 Metc. 13; Lewis *v.* Sumner, 13 Metc. 269; Shores *v.* Caswell, 13 Metc. 413; Wilson *v.* Troup, 7 Johns. Ch. 32; 2 Cow. 195; Lawrence *v.* Gebhard, 41 Barb. 575; North River Bk. *v.* Aymar, 3 Hill, 262; Hefferman *v.* Adams, 7 Watts, 716; Patterson *v.* Moore, 35 Penn. St. 69; Henby *v.* Warner, 51 Penn. St. 276; Weise's appeal, 72 Penn. St. 35; Grant *v.* Ludlow, 8 Ohio St. 54; Oliver *v.* Sterling, 20 Oh. St. 391; Dean *v.* King, 22 Oh. St. 119; Hitchins *v.* Ricketts, 17 Ind. 625; Miller *v.* Edmonston, 8 Blackf. 291; Cooley *v.* Willard, 34 Ill. 69; Merrick *v.* Wagner, 44 Ill. 266; Hartford Ins. Co. *v.* Wilcox, 57 Ill. 182; Greve *v.* Coffin, 14 Minn. 345; Dodge *v.* Hopkins, 14 Wisc. 630; Lang *v.* Fuller, 21 Wisc. 121; Gould *v.* Bowen, 26 Iowa, 9; Tappan *v.* Morseman, 18 Iowa, 499; Wanless *v.* M'Candless, 38 Iowa, 20; Alemany *v.* Daly, 36 Cal. 90; Duffy *v.* Hobson, 40 Cal. 240; Lamy *v.* Burr, 36 Mo. 85; Petteway *v.* Dawson, 64 N. C. 450; Wood *v.* McCain, 7 Ala. 800; Scarborough *v.* Reynolds, 12 Ala. 252; M'Millan *v.* Hutchinson, 4 Bush, 611; Rankin *v.* Eaking, 3 Head, 229; Sewannee Co. *v.* M'Call, 3 Head, 619; Matherson *v.* Davis, 2 Cold. 443; Bird *v.* Loyal, 2 La. An. 541; Harrington *v.* Moore, 21 Tex. 541; Reese *v.* Medlock, 27 Tex. 120; Merriman *v.* Fulton, 29 Tex. 97. L. executed a power of attorney to H., authorizing him to collect his said judgments against C., by sales under execution, &c., to receive the money thereon, "arbitrate or compound" the same, and for that purpose to employ counsel. After the aforesaid sales, F. brought an action against L. to annul the said sales, and conveyances to L., as clouds on his (F.'s) title. H. consulted counsel, who advised him that the said sales under W.'s judgment, after payment, were void, and L.'s title invalid. It was ruled that as incident to the powers expressly given to collect said judgment, arbitrate and compound the same in connection with subsequent instructions from L., by letter, H. had power to authorize counsel to appear in said action, and consent to a judgment annulling said sales upon terms that enabled him to realize the amount due to L. on his judgment. Lee *v.* Rogers, 2 Sawyer, 550. A power of attorney to sell and convey real property, given by a husband and his wife, in general terms,

§ 223. 2. *Intendment to be in favor of effectuating special intent.* — While a letter of attorney will not be so construed, as we have just seen, as to unduly expand an agency beyond its special object, the courts will take that special object under protection, and will construe the terms of the instrument, if the meaning be doubtful, so as to favor such special object. In this respect letters of attorney may be distinguished from wills and trusts containing powers of appointment, in which there is usually no party claiming as a purchaser.[1] It is otherwise, however, when we have a letter of attorney before us for interpretation. In such a letter, the issue is generally between the writer of the letter and third persons trusting the agent on the faith of such letter. In such case, emerges the rule that in instruments in writing, granting powers on which third persons are invited to repose, the intendment is to be against the

without any provision against a sale of the interest of either separately, or other circumstance restraining the authority of the attorney in that respect, authorizes a conveyance by the attorney of the interest of the husband by a deed executed in his name alone. Holladay *v.* Daily, 19 Wall. 606. A power of attorney to demand pecuniary indemnification from a foreign government, with power to do every necessary act, empowers the agent to prosecute the claim before a commission. Neille v. United States, 7 Ct. of Cl. 535. A power of attorney, giving to the attorney in fact full authority to represent the person of the principal in all that concerns his interest in the State of California, and to annul any other power previously granted, and letters afterwards written by the principal to the attorney, speaking generally of the sale of land in California belonging to the principal, and of the price and terms, and telling the attorney he can give a provisional writing of sale, and to make a sale and it will be approved, do not confer authority upon the attorney to bind the principal by a contract of sale. Treat *v.* Celis, 41 Cal. 202. A power of attorney which gives the agent the authority "to cite and appear" must be construed as conferring upon the agent the power to prosecute and defend suits which may be brought by or against his principal. A sale of property under a judicial proceeding carried on contradictorily with the agent who holds such a power of attorney, is not therefore void for want of authority in the agent to represent his principal in the litigation. Miller *v.* Marmiche, 24 La. An. 30. It is better that the immediate employer and principal of an agent should suffer by the imprudence of his employee, than that third parties should suffer from those acts of agents which are recognized by the public as valid, because of the confidence reposed in the principal. Crescent Bank *v.* Hernandez, 25 La. An. 43.

[1] See Long *v.* Long, 5 Ves. 445; and other cases cited 2 Story Eq. Jur. § 1063, 1064; Story on Agency, § 67, note.

grantor.[1] In other words, to adopt Savigny's test, the party is supposed to have meant to have applied to doubtful terms the sense by which they would be most likely to be made operative.[2] And slight variations as to the mode of executing a power cannot be set up by the principal to bar his responsibility.[3]

§ 224. *Ambiguity to be construed to favor a bonâ fide execution.* — Where language is ambiguous, and the agent *bonâ fide* adopts a permissible construction, the principal cannot, on the ground that such construction was not intended by him, disown and dishonor the act of the agent. In other words, "when a principal," to adopt the language of Blackburn, J., in an opinion given by him in the house of lords,[4] "gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent *bonâ fide* adopts one of them, it is not competent to the principal to repudiate the act as unauthorized, because he meant the order to be read in the other sense, of which it is equally capable."[5]

§ 225. 3. *Written conditions cannot be varied by parol.* — A person executing a power of attorney is supposed to embody in the written instrument his final intentions; and when such is the case, the terms of the instrument cannot be varied by parol.[6] Such is the general rule applicable to all formal instruments; yet, so far as concerns letters of attorney, it is manifest that there are several qualifications to be observed. The first of these is one already discussed,[7] that usage is to be received to interpret terms, though not to affix conditions conflicting with the obvious terms of the instrument. The second is that where, in an in-

[1] Blackett *v.* Royal Ins. Co. 2 Cr. & J. 244; De Tastet *v.* Crousillat, 2 Wash. C. C. 132; Brown *v.* M'Gran, 14 Peters, 450; Stall *v.* Meek, 70 Penn. St. 181; Weed *v.* Adams, 37 Conn. 378.

[2] Savigny, VIII. § 374.

[3] Simonds *v.* Clapp, 16 N. H. 222.

[4] Ireland *v.* Livingston, 2 Q. B. 99; 5 Q. B. 516; 5 Eng. App. 395.

[5] See Benjamin on Sales, Perkins's ed. § 590, referring in note to Foster *v.* Rockwell, 104 Mass. 167; and see Mech. Bk. *v.* Merchants' Bk. 6 Metc. 13, and other cases cited, infra, § 248.

The leading maxims of the Roman law on this point are the following: —

"Verba *contra stipulatorem* interpretenda sunt." L. 38, § 18. D. XLV. 1.

"Ambiguum pactum *contra venditorem* interpretandum est." L. 172, pr. D. L. 17.

[6] See Hartford Ins. Co. *v.* Wilcox, 57 Ill. 182.

[7] Supra, § 134; infra, § 676, 696, 738.

formal instrument, an agent is limited to particular conditions, he may be relieved from these conditions by a subsequent parol agreement between himself and the principal. The principal, as has been seen, cannot set up private instructions, limiting the power, as against the third party.[1] But it is otherwise with regard to expansions of the power by which the principal undertakes to extend its range. By such expansions he may extend his liability beyond the written instrument.[2] Eminently is this the case where the principal, by his acts and statements, leads third parties to believe that he has reposed in the agent trusts beyond those specified in the written power. By such a course the principal is estopped from afterwards disputing his liability to innocent third parties, who were led by such acts or statements on his part to contract with the agent.

§ 226. 4. *Informal instruments more open to parol interpretation than formal.* — A formal instrument is supposed to contain the mature intentions of the author, and is frequently constructed with professional advice. It is otherwise with informal notes and memoranda. Writings of this kind are often indistinguishable, so far as concerns the caution with which they are issued, from spoken words; and the same liberality of construction and of modification which is accorded to the one may be invoked for the other.[3]

§ 227. 5. *Burden is on third parties, when notified of instrument, to examine it.* — Another point to be here kept in mind is that where an agent holds out that he acts under a written instrument, it is the duty of persons dealing with him to examine the

[1] See supra, § 130.

[2] Hartford Ins. Co. *v.* Wilcox, 57 Ill. 182. Thus, to adopt an illustration given by Judge Story, where a written power is given to buy goods at a limited price, this may be expanded by parol to authorize a purchase at a higher price. Story on Agency, § 79, 80, citing Williams *v.* Cochran, 7 Rich. 45; Hartford Ins. Co. *v.* Wilcox, 57 Ill. 180. The rule that parol evidence cannot be given to contradict or vary a written agreement is limited to the parties actually contracting with each other by the agreement and their privies; it cannot be evoked by a stranger to the contract. Coleman *v.* Nat. Bank of E. 53 N. Y. 388. Nor does it preclude a party, who has contracted with an agent, from maintaining an action against the principal, upon parol proof that the contract was, in fact, made for the principal, although the agency was not disclosed by the contract and was not known to such party at the time of making it. Coleman *v.* Bank, 53 N. Y. 388.

[3] See Story's Agency, § 84.

instrument.[1] If he fail to do this, he is guilty of negligence, which precludes his recovery if the claim against the principal is not based on fraud.[2] If the letter of attorney, under which the agent acts, authorizes the proposed transaction, then third parties, dealing with the agent on the basis of the letter, are not prejudiced by any private instructions from the principal to the agent, even though those instructions were in writing, unless such instructions are in some way referred to in the letter.[3]

[1] Story's Agency, § 72, citing Towle *v.* Leavitt, 3 Foster, 360.

[2] Wharton on Negligence, § 300; Schimmelpennick *v.* Bayard, 1 Peters, 264; Atwood *v.* Munnings, 7 B. & Cress. 278; De Bouchout *v.* Goldsmid, 5 Ves. 213; North River Bank *v.* Aymer, 3 Hill, 262. So also the Roman law. L. 19. D. de R. J. L. 11, § 5. D. h. t. See fully, § 137–8–9.

[3] Fenn *v.* Harrison, 3 T. R. 757; 4 T. R. 177; Whitehead *v.* Tuckett, 15 East, 400; Wilson *v.* Hart, 7 Taunt. 295; Bryant *v.* Moore, 26 Me. 84; Munn *v.* Commis. Co. 15 Johns. 44; Hildebrand *v.* Crawford, 6 Lansing, N. S. 502; Rossiter *v.* Rossiter, 8 Wend. 498; Rourke *v.* Story, 4 E. D. Smith, 54; Anderson *v.* State, 22 Ohio St. 305; Adams Mining Co. *v.* Senter, 26 Mich. 73; Planters' Bk. *v.* Merritt, 7 Heisk. 177.

Where a power of attorney is given to an agent "to make checks and draw money out of any bank or banks wherein the same may have been deposited, in the name of or for account of the principal," the fact that a sufficient amount to meet the check was not deposited, when the check was drawn is not a valid defence, and does not authorize the principal to refuse paying it in the hands of a party who had no notice of the prohibition put upon the agent. Cres. Bank *v.* Hernandez, 25 La. An. 43. Where an agent issues a commercial obligation authorized by the terms of his mandate, the legal presumption is that it was for a valuable consideration which has actually accrued to the benefit of his principal, and that, therefore, the principal is bound by it; and third parties who, acting on the presumption, receive such negotiable obligations, are protected against the equities of which they have no notice. Crescent City Bank *v.* Hernandez, 25 La. An. 43.

Weise in writing authorized Lyons to sell land, a sale to be binding on Weise if made according to conditions named; if, through Lyons's agency, "a purchaser is sent to or induced to negotiate with me and we consummate a sale," Lyons was to be entitled to commissions as if he had conducted the negotiations. "If taken out before sold within four months, I will pay —— dollars for advertising." Held, that the purchaser from Lyons was, by the terms of the paper, put on his inquiry from the principal whether the authority had been revoked. Weise's appeal, 72 Penn. St. 351.

A telegram of the following tenor, viz.: "Boston, Nov. 11, 1872. To Otis Whitney: Get cargo bonded; will hold bondsman harmless and come down if necessary. See Spaulding. C. G. Underwood," is not sufficient to authorize said Whitney to sign Underwood's name to a receipt for the cargo

(which had been attached upon a writ against the Great Falls Ice Co.), acknowledging the property to be in that corporation and agreeing to deliver it to the sheriff, who had attached it upon the writ against said corporation. Millay *v.* Whitney, 63 Maine, 522.

CHAPTER IV.

DUTIES OF AGENT TO PRINCIPAL.

I. As to Loyalty to Trust.
- Agent cannot use his trust for his own benefit, § 231.
- Cannot purchase principal's property given him to sell, § 232.
- One of two trustees cannot purchase, § 234.
- Purchases by agent voidable by principal, § 235.
- Profits made by agent out of principal's property to be in trust for principal, § 236.
- Sale by agent to principal of agent's property without notice is voidable by principal, § 239.
- Agent who acquires property for principal will be treated as trustee, § 240.
- Agent cannot use trust information against principal, § 241.
- Cannot dispute title of principal, § 242.
- Agent liable when mixing principal's property with his own, § 243.
- Agent, without his principal's consent, cannot accept adverse interest, § 244.
- Tampering by one party with agent of opposite party avoids contract so obtained, § 245.
- Agent neglecting to invest liable for interest, § 246.

II. As to Fidelity to Instructions.
- 1. *Obedience requisite*, § 247.
  - Agent to obey instructions, § 247.
  - When instructions are ambiguous, agent acting *bonâ fide* on probable construction is not liable, § 248.
  - Immoral or illegal instructions not to be obeyed, § 249.
  - But principal may recover fruits of such instructions, 250.
  - Agent not liable if obedience would have produced no benefit, § 251.
  - Forcible interference of third parties or *casus* a defence, when not induced by agent's misconduct, § 253.
  - Necessity a defence, § 255.
- 2. *Discretion of agent as to innocent strangers*, § 256.
  - Principal holding out agent as having discretionary powers is bound by the same, § 256.
- 3. *Discretion of agent viewed as to himself or as to cognizant third parties*, § 257.
- 4. *Discretion as to time*, § 258.
  - Agent must ordinarily punctually obey orders as to time, § 258.
- 5. *Discretion as to price*, § 260.
  - Agent ordinarily limited to terms stated, § 260.
- 6. *Discretion as to quality*, § 263.
  - Under generic orders agent may select, § 263.
  - As to specific articles specific instructions must be specifically obeyed, § 266.
- 7. *Discretion as to quantity*, § 268.
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  - But not as to indivisible articles, § 269.
  - In execution of powers, deficient execution is void, but excessive void only to as excess, § 270.

III. As to Skill and Diligence.
- Agent bound to possess qualifications suitable for the agency, § 272.
- Must bestow on the work a diligence such as good business men under the circumstances are accustomed to bestow, § 273.
- Diligence beyond this not required, § 274.
- *Diligentia quam suis* not the test, § 275.
- Agent liable for his servant's negligence, § 276.
- But primary agent liable only for

culpa in eligendo for ancillary agents, § 277.
Agent's employee not liable to principal, § 278.
Agent liable for negligent custody of money or goods, § 279.
IV. As to Form of Executing Papers.
Transaction must be in principal's name, § 280.
Contract must correspond with authorization, § 282.
Instrument under seal, to bind principal, must be in principal's name, § 283.
The fact of agency must appear on instrument, § 284.
Such form a natural expression of agent's intent, § 285.
Language to bind principal must be distinct, § 286.
Same rule applies to vendee, § 287.
Necessity of exactness to preserve chain of title, § 288.
Question is one of notice to third parties, § 289.
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In construing informal writings parol evidence may be received to show that an agent's signature represents the principal, § 296.
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On commercial non-negotiable instruments, where the agent is *primâ facie* the contracting party, the principal may sue or be sued, unless it should appear that the agent was the party exclusively privileged or bound; and in the latter case, the other contracting party can sue either principal or agent, § 298.
V. As to Accuracy in Accounts.
Agent bound to keep exact accounts, § 299.
Presumption of negligence from failure to do so, § 301.
Principal must be advised of emergencies in agency, § 302.
Agent omitting to account is liable to suit and for interest, § 303.
VI. As to Surrendering Trust.
Agent must pay over at close of agency, § 304.
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Agent liable to reimburse principal for losses, § 306.
Damages includes expenses *bonâ fide* and prudently incurred, § 307.
VIII. As to Sub-agent.
Sub-agent, who is a servant, is bound to primary agent: otherwise when sub-agent has liberty of action, § 308.

I. AS TO LOYALTY TO TRUST.

§ 231. *Agent cannot use his trust for his own benefit.* — Wherever an agent attempts to use his fiduciary powers for his own benefit, he will be liable to be arrested in the attempt by a court of equity; nor will he be permitted to reap any profit from the breach of trust.[1] Thus the president of a bank, having general authority to certify to the goodness of checks, cannot certify to his own checks;[2] and an agent employed to settle a debt cannot

[1] See infra, § 573, 760.

[2] Claflin *v.* Bank, 25 N. Y. 293; Titus *v.* Bank, 5 Lans. 250.

be allowed to purchase it by a bargain with himself.[1] A gift by a beneficiary to his trustee is *primâ facie* fraudulent.[2]

§ 232. *Agent cannot ordinarily purchase property given to him for sale.* — An agent employed to sell cannot purchase without a full disclosure, not only of his interest in the purchase to the principal, but of any facts concerning the property of which he is specially advised. And in order to validate the sale the burden is on the agent to prove that such information was given.[3]

[1] Reed *v.* Norris, 2 Myl. & Cr. 361. See Comstock *v.* Comstock, 57 Barb. 453; Knabe *v.* Tornot, 16 La. An. 13.

B. having bought shares in a company at £2 per share, and knowing that K. was desirous to buy such shares, represented that he knew of some shares which were to be had for £3 or less, and requested K. to give him authority to buy at that price. K. gave him authority, but told B. to do his best for him and to get them for less if possible. B. transferred his shares to K. at £3 per share, pretending that another person was the vendor. Held, that B. must account to K. for the difference between the price at which he bought and the price at which he sold the shares to K. Kimber *v.* Barker, L. R. 8 Ch. App. 56; 21 N. R. 65; 27 L. T. N. S. 526.

[2] Comstock *v.* Comstock, 57 Barb. 453. Where a person engaged in the grain business for himself and others purchased and held a lot of corn for parties who advanced him the money for that purpose, it was held, that the corn was the property of the parties advancing the money, and that the agent had no interest in it subject to an execution. Cool v. Phillips, 66 Ill. 217.

The managers and officers of a company where capital is contributed in shares, are in a legitimate sense trustees, alike for its stockholders and its creditors, though they may not be trustees technically and in form. They accordingly have no right to enter into or to participate in any combination the object of which is to divest the company of its property and obtain it for themselves at a sacrifice; they have no right to seek their own profit at the expense of the company, its stockholders, or even its bondholders. On the other hand, in case of embarrassment to the company, and any necessity to sell the estates of the company, it is their duty, to the extent of their power, to secure for all those whose interests are in their charge the highest possible price for the property which can be obtained for it. These principles applied to a case where the local managers and officers of an embarrassed railroad, holding a small portion of its bonds, of which a much greater portion was held by non-residents, got an order of sale under a mortgage to secure the bonds, and proceeded in a hasty and rather secret way to sell it, and to buy it at a price much below its value, for themselves; the conditions of sale being made such as to render it difficult for persons generally to purchase; and the whole proceeding of sale being attended also with evidences of gross disregard of the interests of the bondholders generally, and of course of the stockholders. Jackson *v.* Luteling, 21 Wall. 617.

[3] Lowther *v.* Lowther, 13 Ves. 103; Lees *v.* Nuttall, 1 Rus. & M. 53; 2 Myle & K. 819; Salomons *v.* Pender,

That which the agent cannot do directly he cannot do indirectly, and hence authority to an agent to purchase a certain mare for his principal at a limited price will not justify the agent in sending a third person to buy it, and then buying of him at an advance, though it be within the limit prescribed.[1] Any such purchase is an abuse of such confidence and relationship, and any title, benefit, or advantage derived therefrom, by the purchaser, is, in equity, fraudulently acquired, and enures to the benefit of the *cestui que trust* or principal.[2]

3 H. & C. 639; Diplock *v.* Blackburn, 3 Camp. 44; Murphy *v.* O'Shea, 2 J & L. 422; Morrison *v.* Thompson, 9 Q. B. 480; Dunne *v.* English, L. R. 18 Eq. 524; Provost *v.* Gratz, 6 Wheat. 481; Baker *v.* Whiting, 3 Sumner, 476; Comstock *v.* Ames, 1 Biss. 180; Mott *v.* Harrington, 12 Vt. 199; Copeland *v.* Ins. Co. 6 Pick. 198; Smith *v.* Townsend, 109 Mass. 506; Mills *v.* Mills, 26 Conn. 213; Holdredge *v.* Gillespie, 2 Johns. Ch. 30; Davoue *v.* Fanning, 2 Johns. Ch. 252; Reed *v.* Warner, 5 Paige, 650; Lawrence *v.* Maxwell, 6 Lansing, 469; Ackerman *v.* Emott, 4 Barb. 626; Low *v.* Graydon, 50 Barbour, 414; Taussig *v.* Hart, 49 N. Y. 301; Woodruff *v.* Cook, 2 Edwards, 269; Bain *v.* Brown, 56 N. Y. 285; Condit *v.* Blackwell, 22 N. J. Eq. 486; Bartholomew *v.* Leach, 7 Watts, 472; Armstrong *v.* Elliott, 29 Mich. 485; Mason *v.* Bauman, 62 Ill. 76; Lafferty *v.* Jelley, 22 Ind. 471; Ackenburgh *v.* M'Cool, 36 Ind. 473; Collins *v.* Case, 23 Wisc. 230; Stewart *v.* Mather, 32 Wisc. 345; Stephens *v.* M'Beal, 1 M'Arthur, 38; Leake *v.* Sutherland, 25 Ark. 219; White *v.* Ward, 26 Ark. 445; Grumley *v.* Webb, 44 Mo. 444; Gaines *v.* Allen, 58 Mo. 541. See other cases infra, § 573–4, 760

[1] Armstrong *v.* Elliott, 29 Mich. 485.

[2] Ibid.; White *v.* Ward, 26 Ark. 445. An agent authorized to sell certain real estate of his principal contracted to sell the same for $17,000, and advised his principal of the sale. The next day, other parties applying to purchase the property, he opened negotiations for a sale to them, which resulted in his giving a contract in his own name, as vendor, for $26,000. He then took an assignment of the first contract and procured his principal to deed direct to the parties with whom he had contracted, on the representation that the purchaser under the first contract had assigned to them. The price to be paid under the second contract he did not communicate to his principal. He received the $26,000, accounting to his principal only for the $17,000. In an action to recover the residue, it was ruled that, assuming the first sale to have been in good faith, the agent could not rightfully appropriate to himself the advance upon the second sale, but that the principal was entitled to the benefit thereof. Bain *v.* Brown, 56 N. Y. 285. If an agent, having charge of lands of his principal, acquires a tax title thereto, he holds such title as trustee for his principal. Krutz *v.* Fisher, 8 Kan. 80; Fisher *v.* Krutz, 9 Ibid. 501. A person owning a large and valuable property in the city of Chicago, obtained the services of another as agent and confidential adviser, in the management of the estate. After four years' service of an important character, to the principal, for

§ 233. So an executor, assignee, or guardian cannot purchase at private sale the property of his *cestui que trust;*[1] though

which the agent had received no compensation, the former conveyed to the latter an undivided one third of the property, of the value of about $125,000, the deed reciting a consideration of $12,000, and "for other good and valuable considerations." There was no money paid by the grantee, the only consideration for the conveyance being such services as he had rendered and such as he had agreed to render, in the matter of the management of the estate. At the time of the conveyance there was an incumbrance upon the entire property, amounting to $36,000, the conveyance being made subject to one third of the same. Simultaneously with the execution of the deed, the grantee entered into a covenant to continue his services in the matter of the estate committed to his care, even after the death of his grantor; and if he himself should die, he covenanted that his successors after him, at the expense of his estate, should render them. At the time of the transaction the grantee was engaged in a large and remunerative mercantile business, by which he had already acquired property estimated at $50,000; and soon after he made the covenant mentioned he closed his connection with that business in order that he might bestow his entire time upon the business of his employer. Upon the objection, in a suit by one of the children and devisees of the grantor, that the consideration for the deed was so grossly inadequate that a court of equity ought to set it aside as fraudulent, it was held, there was adequate consideration for the deed, and it was valid. Uhlich *v.* Muhlke, 61 Ill. 499.

The agent of a mercantile firm for the sale of goods is not authorized to sell to another firm in which he is himself interested; and the making of such sales will justify his employers in dismissing him before the expiration of the term for which he has been employed. Reimers *v.* Ridner, 2 Rob. (N. Y.) 7.

In Dunne *v.* English, L. R. 18 Eq. 524, it was said by Sir G. Jessel, M. R.: "It is not enough for an agent to tell the principal that he is going to have an interest in the purchase, or to have a part in the purchase. He must tell him all the material facts. He must make a full disclosure. Now, if I may say so, with great respect, I do not know that I could put the case better, or state the law more clearly, than is done by Lord St. Leonards, in the case of Murphy *v.* O'Shea, 2 J. & Lat. 422. The marginal note, which is a very fair representation of the judgment, is this: 'If, in a transaction between principal and agent, it appears that there has been any underhand dealing by the agent, *ex. gr.* that he has purchased the estate of the principal in the name of another person instead of his own, however fair the transaction may be in other respects, it has no validity in a court of equity.' Lord St. Leonards says: 'One thing admits of no dispute; the moment it appears in a transaction between principal and agent that there has been any underhand dealing by the agent, — that he has made use of another person's name as a purchaser, instead of his own, — however fair the transaction may be in other respects, from that moment it has no validity in this court.' Again, he states thus the

[1] Lacey, ex parte, 6 Ves. 628.

when such purchase is made at a public sale, in proceedings which are perfectly open and fair, and for the benefit of the

other rule about full disclosure: 'This, therefore, is a case, not merely of an agent who had his principal in his power, but one in which the agent had full knowledge of the rule of the court; which, however, does not prevent an agent from purchasing from his principal, but only requires that he should deal with him at arm's length, and after a full disclosure of all that he knows with respect to the property.' It must be a full disclosure of all he knows. The point came before the same lord chancellor in another case of Molony *v.* Kernan, 2 D. & War. 31. He says: 'As to the merits, it is not denied that an agent may take a lease from his principal.' Purchasing or taking a lease in this court is the same thing. 'The great case of Lord Selsey *v.* Rhoades, 2 S. & S. 41, before Sir John Beach, which afterwards went to the house of lords (1 Bligh, 1), established this; but it must always be difficult to sustain such a lease in this court. It must be proved that full information has been imparted, and that the agreement has been entered into with perfect faith.' That is, the agent must prove those things — good faith and full information. I will only read a few words from another well known case, Lowther *v.* Lowther, 13 Ves. 95, 102, in which Lord Erskine, then lord chancellor, states the doctrine as Lord Eldon had laid it down: 'Considering the defendant Bryan as an agent, the principle upon which a court of equity acts in cases of this kind is very properly admitted, having been settled in many instances, particularly in the time of Lord Eldon, resting upon grounds connected with the clearest principles of equity, and the general security of contracts, viz., that an agent to sell shall not convert himself into a purchaser, unless he can make it perfectly clear that he furnished his employer with all the knowledge which he himself possessed.' So that the older authorities and the modern authorities agree.

"Now, what is the meaning of 'knowledge which he himself possessed' — 'full disclosure of all that he knows?' Is it sufficient to say that he has an interest? Is it sufficient to put a principal on inquiry? Clearly not. Upon that point I have before me the case of Imperial Mercantile Credit Association *v.* Coleman, L. R. 6 H. L. 189, 194. There is a passage in the argument of the counsel for the appellants, which I think very fairly and properly states the law: 'It is not enough to say that the directors were sufficiently informed to be put upon inquiry. They ought, in such a case, to have the fullest information given to them, and ought not to be driven to inquiry;' for which two cases are cited: Fawcett *v.* Whitehouse, 1 Russ. & My. 132, and Hichens *v.* Congrave, 1 Russ. & My. 150, n. I take it that is a correct statement of the law. In that case the defendant Coleman was a director of the company. He brought a purchase to the company in which he was interested as broker, and took a large commission. He told the other directors that he had an interest, and they were aware that his business was that of a stock broker, and that he had a commission, so that they knew the nature of his interest, though they did no know the amount. He had a large commission. Lord Chelmsford, in addressing the house of lords, says this (L. R. 6 Ho. Lords, 201): 'It was, however, contended that Messrs.

estate, the sale will not be disturbed.[1] And it has been ruled in Indiana [2] that the president of a company, who was also director, having knowledge, through his official position, that the company's stock was worth more than its nominal market value, and who purchased stock of a stockholder for the market price, and without disclosing to him the facts within his knowledge as to the real value, did not fall within the above rule. The court held that there was no relation of trust between the parties, and that, in the absence of actual fraud, the purchase was valid.[3]

§ 234. *One of two trustees cannot purchase.* — Where two trustees are employed to sell, one cannot purchase, subject to the above limitations, at the other's sale.[4]

Knight & Coleman were known to be stock brokers, and that, therefore, declaring that they had an interest in the transaction conveyed all the requisite information that they were interested in that character. It was answered, however, that the commission of brokers upon placing shares and debentures varied considerably, according to the varying character of each transaction; and therefore the knowledge that Messrs. Knight & Coleman were acting as stock brokers afforded very scanty information as to the nature of their interest.' The directors knew Messrs. Knight & Coleman had an interest, and they knew it was an interest by way of commission; but because they did not know the amount of commission and did not ask, it was held that Coleman was liable to make over to the company the whole profit he had obtained from the transaction. Lord Chelmsford goes on afterwards: 'There was, therefore, the more reason, for disclosing the real nature of the transaction; and as it is almost admitted that without the protection of the article, the principle applicable to his fiduciary position would have prevented his making a profit to himself out of the funds of the association, so his non-compliance with the conditions of that article leaves him exposed to the application of the principle, and liable to refund the profit which he must be considered to have received in trust for the association.' That shows that even a statement which would in other cases be constructive notice sufficient to put the party on inquiry will not be sufficient in the case of principal and agent; that, for reasons of policy, he must not only put the principal on inquiry, but must give him full information and make full disclosure.'' Dunne *v.* English, L. R. 18 Eq. 533–536.

[1] Chorpening's appeal, 32 Penn. St. 315; Fisher's appeal, 34 Penn. St. 315.

[2] Board of Commissioners of Tippecanoe County *v.* Reynolds, 44 Ind. 509.

[3] See also Carpenter *v.* Danforth, 52 Barb. 581.

[4] Davoue *v.* Fanning, 2 Johns. Ch. 261; Wade *v.* Harber, 3 Yerg. 353; Gaines *v.* Allen, 58 Mo. 541. Where a mortgage provides that the sale in case of default may be made by the mortgagee, or in case of his refusal to act, by the marshal, the mortgagee and marshal are, for the purposes of making the sale, co-trustees, and the mortgagee cannot, by refusing to make the sale, and thereby procuring it to

§ 235. *Such sales not void but voidable.* — Yet it must be remembered that a court of equity will not vacate all dealings between agent and principal. They require, however, to use the language of Lord St. Leonards, that the agent "should deal with him (the principal) at arm's length, and after a full disclosure of all that he knows with respect to the property."[1] Such purchase will be valid against all the world, except the principal, who may set it aside within a reasonable time,[2] if it appear that the con-

be made by the marshal, relieve himself of his disability to purchase at the sale. Gaines *v.* Allen, 58 Mo. 537. Wagner, Judge: "We are now brought to the further inquiry, Could Allen by a neglect or refusal to execute the power, and developing the trust upon Marshal Hayden, absolve himself from his character of trustee, so as to acquire the absolute fee by buying in the property? By the terms of the instrument, rightfully interpreted, Allen and Hayden were constituted, for the purposes of making the sale, co-trustees, with an alternative power in each to execute the trust. It is a familiar doctrine that one trustee cannot purchase at a sale made by his co-trustees. It he does, his purchase may be avoided. Any other rule would lead to connivance and fraud. The mortgagee or trustee might, when a favorable opportunity presented itself, abrogate his fiduciary character, in behalf of the other person named to sell, and reap an unconscionable advantage. It might be difficult to prove positive or active fraud, and therefore the wisest policy is to stop the temptation by placing upon it a total disability. But it was never intended, that because Hayden exercised the naked power of sale vested in him, therefore Allen should cease to have any further connection with the trust, and be at liberty to act as any other disinterested person. The deed, after giving either Allen or Hayden the power to sell, provides, not that Hayden should do anything more, but that Allen should, with the proceeds, do what mortgagees or trustees ordinarily do, namely, pay the expenses of the trust, then satisfy the note and interest, and the remainder, if any, pay over to the mortgagors in the deed. It is manifest that he was regarded as the principal trustee throughout, in whom mainly the trust and confidence was reposed, and he cannot therefore be distinguished from the ordinary case of a mortgagee, with power to sell, and as such clothed with all the rights and disabilities incident to that relation. That, when under such circumstances a mortgagee buys in the property at his own sale, the equity of redemption still subsists in the creditor, has long been an established principle in this court. McNess *v.* Swaney, 50 Mo. 388; Reddick *v.* Gressman, 49 Mo. 389; Thornton *v.* Irwin, 43 Mo. 153; Allen *v.* Ransan, 44 Mo. 263." Gaines *v.* Allen, 58 Mo. 545.

[1] Murphy *v.* O'Shea, 2 J. & Lat. 422; S. P. Eastern Bk. *v.* Alabama, 41 Ala. 93; Uhlich *v.* Muhlke, 61 Ill. 499; Eshleman *v.* Lewis, 49 Penn. St. 410; Williams *v.* Reed, 3 Mason, 405; New York Cent. Ins. Co. *v.* Nat. Prot. 2 Barb. 470; Campbell *v.* Walker, 5 Ves. 678; Marsh *v.* Whitmore, 21 Wallace, 178; Eastern Bk. *v.* Taylor, 41 Ala. 93.

[2] Eastern Bank of Alabama *v.* Taylor, 41 Ala. 93; Leach *v.* Fowler, 22 Ark. 163.

veyance was obtained by undue influence,[1] or may ratify it if he prefer, which ratification, if made with a full knowledge of all the circumstances, will be valid.[2] Thus if a broker holding in his hands for sale stock of a customer transfers it to himself without authority, and subsequently sells it at an advance, the customer can either adopt the sale and charge the broker with the profits, or he can sue in trover for damages for the conversion; but the customer cannot charge the broker either as purchaser, or as guilty of a conversion, and at the same time treat the stock as unsold, and for that reason ask for an account.[3] And where an agent, by virtue of a power of attorney conveyed the property of his principal and took a conveyance to himself, and then mortgaged it, it was held that while such use of the power of attorney would not give him the title as against his principal, as the principal might have repudiated the acts of his attorney; yet that a purchaser under decrees of foreclosure of prior mortgages, being a stranger to the transaction, could not object to the validity of the mortgage though he could inquire into its true consideration.[4]

Sales voidable as to third parties with notice. — When an agent, in purchasing from his principal, conceals material facts from the principal, this avoids not only the sale from the principal to the agent, but a sale from the agent to a third party with notice of the concealment.[5]

§ 236. *Profits made by agent out of principal's property are in trust for principal.* —Whatever is made out of the trust property, even in departure from the instructions of the principal, belongs to the principal.[6] Thus where the owner of a note secured

[1] Uhlich *v.* Muhlke, 61 Ill. 499.

[2] Walworth *v.* Bank, 16 Wisc. 629.

[3] Taussig *v.* Hart, 49 N. Y. 301. See Lawrence *v.* Maxwell, 6 Lans. (N. Y.) 469. Supra, § 65.

[4] Cleveland Ins. Co. *v.* Reed, 1 Biss. 180. See Comstock *v.* Ames, 1 Abb. (N. Y.) App. Dec. 411.

[5] Norris *v.* Tayloe, 49 Ill. 18. See supra, § 201.

[6] Massey *v.* Davies, 2 Ves. Jr. 317; Morison *v.* Thompson, L. R. 9 Q. B. 480; Robinson *v.* Robinson, 1 De G. M. & G. 256; Oliver *v.* Piatt, 3 How. U. S. 333; Wiley's appeal, 8 Watts & S. 244; Norris's appeal, 71 Penn. St. 106; Bartholomew *v.* Leach, 7 Watts, 472; Campbell *v.* Ins. Co. 2 Whart. 64; Marwin *v.* Buchanan, 62 Barb. 468; Dutton *v.* Willner, 52 N. Y. 313; Leak *v.* Sutherland, 25 Ark. 219; Barton *v.* Moss, 32 Ill. 50; Mason *v.* Bauman, 62 Ill. 76; Ely *v.* Hanford, 65 Ill. 267; Lafferty *v.* Jelley, 22 Ind. 471; Clark *v.* Anderson, 10 Bush, 91; Rhea *v.* Puryear, 26 Ark. 344; White *v.* Ward, 26 Ark. 445; Ackenburg *v.* M'Cool, 36 Ind. 473; Prevost *v.* Gratz, 1 Pet. C. C. 364.

by mortgage placed the same, properly indorsed, in the hands of a creditor, to be sold in the market to raise money for the owner's benefit, and finally assigned the same absolutely for $4,500, for which the agent gave him credit on his books, but shortly afterward, professing to act on behalf of his principal, sold the securities for $5,000; it was ruled in Illinois that he was bound to account to his principal for the full amount received by him.[1]

§ 237. The principle of accountability for such profits is held to exist, although the agent may have contributed his own funds or responsibility in producing the result, and although no risk or expense was incurred by the principal.[2]

§ 238. Any usage by which an agent claims to appropriate such profits is nefarious and fraudulent, and as such will be repudiated by the courts.[3] Thus an agent has been held bound to account for the profit he has made by a clandestine sale of timber to his principal on his (the agent's) own account, although a third person, who acted in the transaction and sold the timber in his own name, was copartner of the agent. It was held that even the copartner would have to forfeit his profits if it could be shown that he knew the other to be acting in violation of his duty to his principal.[4] So where a factor buys up goods for himself which he ought to buy as factor, and instead of charging commission takes the profits on a resale by him to the prin-

[1] Mason *v.* Bauman, 62 Ill. 76. See to same effect, East India Co. *v.* Henchman, 1 Ves. Jr. 289.

[2] Dutton *v.* Willner, 52 N. Y. 313; Ackenburgh *v.* McCool, 36 Ind. 473; Bain *v.* Brown, 7 Lans. (N. Y.) 506. In a late English case in chancery, the evidence was that A., being aware that B. wished to obtain shares in a certain company, represented to B. that he, A., could procure a certain number of shares at £3 a share. B. agreed to purchase at that price, and the shares were thereupon transferred, in part to him and in part to his nominees, and he paid to A. £3 a share. He afterwards discovered that A. was in fact the owner of the shares, having just bought them for £2 a share. It was *held*, that on the facts A. was an agent for B., and A. was ordered to pay back to B. the difference between the prices of the shares. Kimber *v.* Barker, 8 L. R. Ch. 56. If the agent, by representing that he paid a larger sum for the property than he actually did, obtains from the principal more than the actual price, the latter may recover of the agent the difference between the sum received by him and that actually paid. Ely *v.* Hanford, 65 Ill. 267. Where an agent, authorized to sell a thing for a particular price, sells it at a higher price, the surplus will belong to the principal, and the agent is entitled only to his stipulated commission. Denson *v.* Stewart, 15 La. An. 456.

[3] Diplock *v.* Blackburn, 3 Camp. 43.

[4] Massey *v.* Davis, 2 Vesey, 317.

cipal, as if he were a merchant selling to his principal, this is a fraud, and he must account for the profits as belonging to the principal.[1] Yet at the same time it has been held that it is competent for one who constitutes another his agent to purchase a piece of land, to agree to pay him a specified sum if he obtains it, and for such agent to make the best bargain he can in the premises without liability to account to the principal for the profit of the transaction, provided there is no taint of fraud.[2]

§ 239. *Sale by agent to principal of agent's property without notice is voidable by principal.* — This follows from the position just stated, and is sustained by the same authorities.[3] If the principal, however, ratifies the sale, he ratifies it *in toto*.[4] Thus where A. and B. contracted for the purchase of a lot at $2,500, and A. in a few days after undertook to purchase the same lot as the agent of C. without disclosing his interest, or the fact that he and B. had purchased it, but representing that it was wholly owned by another, and it could be obtained for $4,050, which sum C. paid him, and he caused the original vendor to convey the title to C.; it was ruled by the supreme court of Illinois that while D., upon discovering the facts, had the right to avoid the contract by tendering a reconveyance, and recover back the consideration paid by him, he could not retain the title and recover from A. the difference between what he paid and the price paid by A. and B. It was at the same time determined that if A. was the agent of C. to purchase the lot before or at the time he purchased the same in the name of A. and B., and paid only $2,500 therefor, and, by representing that the lot cost $4,050, obtained the latter sum from his principal, then he would have been liable, in assumpsit, to the principal, for the difference.[5]

§ 240. *Agent who acquires property for principal will be treated as trustee.* — When an agent invests his principal's funds in notes or other securities, such notes belong to the principal, and he may pursue them in the hands of third persons with notice.[6] So if one person undertakes to buy property for another, and accepts the other's confidence for this purpose, he cannot use the title thus acquired against his principal, but

[1] East India Co. *v.* Henchman, 1 Ves. Jr. 289.

[2] Anderson *v.* Weiser, 24 Iowa, 428.

[3] See also Sharman *v.* Brant, L. R. 6 Q. B. 720. Infra, § 760.

[4] See supra, § 72.

[5] Ely *v.* Hanford, 65 Ill. 267.

[6] Bank *v.* King, 57 Penn. St. 292. See supra, § 201; infra, § 412.

becomes, as to the property, a trustee *ex maleficio*.[1] Thus in a late Pennsylvania case,[2] the defendant represented to plaintiff, who was the holder of an unrecorded deed of land, on which an execution had been levied, that if she would allow him to buy the land at the sheriff's sale he would execute a writing before the land was bid off, declaring that he bought it for her. The defendant accordingly bought the property, but refused to execute the writing. It was ruled by the supreme court that the defendant was trustee for the plaintiff. In a much earlier case in the same state,[3] a husband and wife, having no children, conveyed the estate of the wife to a stranger, who reconveyed to them as joint tenants in fee, under a parol agreement between the husband and wife that the husband should settle the fee upon the wife's heirs, and the husband died without making the settlement. It was held that the parol evidence was admissible to establish the agreement.[4]

[1] Von Hurter *v.* Spengeman, 2 Green (N. J.), 185. See infra, § 242.

[2] Wolford *v.* Herrington, 74 Penn. St. 311.

[3] Thomson *v.* White, 1 Dall. 447.

[4] As sustaining this rule are cited Wallace *v.* Baker, 1 Binn. 616; Drum *v.* Simpson, 6 Binn. 482; Cozens *v.* Stevenson, 5 S. & R. 426; Overton *v.* Tracey, 14 Ibid. 326; Oliver *v.* Oliver, 4 Rawle, 144; Robertson *v.* Robertson, 9 Watts, 34; Pugh *v.* Good, 3 W. & S. 58; Miller *v.* Pearce, 6 Ibid. 100; Morey *v.* Herrick, 6 Harris, 128. To the same effect see Baker *v.* Paine, 1 Ves. 457; Towers *v.* Moor, 2 Vern. 98; Townshend *v.* Stangroom, 6 Ves. 328; Hunt *v.* Rousmanier, 8 Wheat. 174; Keisselbrach *v.* Livingston, 4 Johns. C. R. 144; Gillespie *v.* Moon, 2 Johns. Ch. 585; Peterson *v.* Grover, 20 Me. 363; Babcock *v.* Wyman, 19 How. 289. In Overton *v.* Tracey, 14 S. & R. 426, Duncan, J. said: "If one of the contracting parties insists on a certain stipulation, and desires it to be made a part of the written agreement, and the other by his promise to conform to it, as if it were inserted in the written agreement, prevents its insertion, this is a fraud, and chancery will enforce the agreement as if the stipulation had been inserted. Having no court of chancery, our common law courts have constantly acted upon this principle from Thomson *v.* White, 1 Dall. 424, to Christ *v.* Diffenbach, 1 S. & R. 464, in a succession of decisions, varying in their circumstances, but all bottomed upon this principle." But where an authorized agent purchases land for his principal, and advances the purchase money, not as a *loan to him* upon the security of the lands purchased, or for the purpose of converting the money into lands, but as an advance to the principal, to enable the agent to accomplish the object of his principal, it has been held that no trust will result in favor of the agent. Byers *v.* Danley, 27 Ark. 77. An agent, under a general power to buy, cannot purchase of himself; and whether his purchase be fraudulent or not, it is the right of his principal to rescind the contract thus made, on discovering the breach of confidence. Conkey *v.* Bond, 36 N. Y. 427.

§ 241. *Agent cannot use trust information against principal.* — An agent who becomes in the course of his agency familiar with defects in his principal's title cannot take advantage of this knowledge against the principal.[1] So an agent who, knowing the peculiar position of his principal, obtains an assignment of a debt due from his principal, will be held trustee for his principal, and will only be entitled to the sum he actually paid for the debt.[2] So the clerk of a broker, employed to sell land, having access to the secret correspondence relating to its sale, if he purchases, will be held to be trustee for the vendor.[3] So the master of a ship, purchasing the ship at a public sale, will be held to purchase for the owner.[4]

§ 242. *Agent cannot dispute title of principal.* — An agent is bound to act under his principal's title, and is precluded from acting under or countenancing an adverse interest existing outside of the agency.[5] Thus where an insurance broker effected a policy on a ship in name of a partnership, and on loss received the money, he was held answerable for it to the surviving partner, although the partnership had no legal title to the vessel, and though the broker was himself, as mortgagee, the registered owner.[6] So an agent receiving money for his principal cannot set up, as against the principal, a notice given to him (the agent) by a third party, not to pay over.[7] Yet where the principal's title is based upon fraud or tort, the agent, in an action, brought against him for the goods, may set up as a defence the title of the

[1] Ringo *v.* Binns, 10 Peters, 269; Krutz *v.* Fisher, 8 Kans. 90; Fisher *v.* Krutz, 9 Kans. 501; Galbraith *v.* Elder, 8 Watts, 81; Cleavinger *v.* Reimar, 3 Watts & S. 486; Cumberland Coal Co. *v.* Sherman, 30 Barb. 553. See infra, § 578.

[2] Reed *v.* Norris, 2 Myl. & Cr. 374. See White's Eq. Cases, 137; Henry *v.* Raman, 25 Penn. St. 354.

[3] Gardner *v.* Ogden, 22 N. Y. 327.

[4] Chamberlain *v.* Harrod, 5 Greenl. 420; Barker *v.* Ins. Co. 2 Mason, 369; Schooner Tilton, 5 Mason, 465; Copeland *v.* Ins. Co. 6 Pick. 198.

[5] Kieran *v.* Sanders, 6 Ad. & El. 515; Benson *v.* Heathorn, 1 Y. & Coll. 341; Scott *v.* Crawford, 4 Man. & G. 1031; Roberts *v.* Ogilvy, 9 Price' 269; Nicholson *v.* Knowles, 5 Mad. 47; Goslin *v.* Birnie, 7 Bing. 339; Holl *v.* Griffin, 10 Bing. 246; Hawes *v.* Watson, 2 B. & C. 540; Harman *v.* Anderson, 2 Camp. 243; Van Horne *v.* Fonda, 5 Johns. Ch. 459; Holbrook *v.* Wight, 24 Wend. 169; Bowman *v.* Rainetaux, 1 Hoff. Ch. 150; Barnard *v.* Kobbe, 54 N. Y. 516; Magill *v.* Hinsdale, 6 Conn. 469; Collins *v.* Tillon, 26 Conn. 368; Bain *v.* Clark, 30 Mo. 252; Hardenburgh *v.* Bacon, 33 Cal. 356. Infra, § 573, 761.

[6] Dixon *v.* Hammond, 2 B. & A. 310.

[7] Nicholson *v.* Knowles, 5 Mad. 47; Hancock *v.* Gomez, 58 Barb. 490.

third party from whom the goods were unlawfully taken.[1] So a bailee may set up the *jus tertii* as a defence when the bailment has been determined by what is equivalent to eviction as a paramount title.[2]

§ 243. *Agent liable when mixing principal's property with his own.* — An agent who mixes his principal's property with his own is liable for interest; and the burden of proof will be on him to distinguish the two masses. If he fail to do this, the aggregate may be charged to him as the principal's.[3] So if he receive notes which subsequently depreciate, but which before depreciation he mixes with his own funds, he is liable for the loss.[4] So if the agent deposit his principal's funds in his own name in the bank, and the bank fail, the agent is held for the loss.[5] But

[1] 1 Bell's Com. 7th ed. 533; 2 Story Eq. Jur. § 317; Hardman *v.* Wilcock, 9 Bing. 382, note; Taylor *v.* Plumer, 3 M. & S. 562; Cheeseman *v.* Exall, 20 L. J. Ex. 209; Biddle *v.* Bond, 34 L. J. Q. B. 137; Hunt *v.* Maniere, 34 Beav. 157.

[2] Biddle *v.* Bond, *ut supra*. A commission merchant detaining the proceeds of a sale from his principal, cannot justify himself by setting up outstanding equities between the principal and a third party, in which he has no concern. Aubery *v.* Fiske, 36 N. Y. 47. Where the plaintiff's agent sold a vessel, and paid the proceeds to the defendant for the plaintiff, it was held, the former could not resist the claim of the latter for such money on the ground that the plaintiff did not own the vessel when sold. Jenks *v.* Manson, 53 Maine, 209. It is not necessary that an agent should have been appointed, or should have undertaken expressly to purchase or procure a conveyance of certain property on behalf of his principal, to estop him from buying in an outstanding paramount title, and asserting it in opposition to the interests of his principal. It is enough that the principal asserts a claim to or interest in the property without regard to the sufficiency of the title. Hardenburgh *v.* Bacon, 33 Cal. 356.

[3] Chedworth *v.* Edwards, 8 Ves. Jr. 46; Lupton *v.* White, 15 Ves. Jr. 432; Panton *v.* Panton, 15 Ves. Jr. 440; Bartlett *v.* Hamilton, 46 Me. 425; Manning *v.* Manning, 1 Johns. C. 527; Massachusetts Ins. Co. *v.* Carpenter, 2 Sweeny, 734; De Peyster *v.* Clarkson, 2 Wend. 77; Peyton *v.* Smith, 2 Dev. & Bat. Eq. 325; Farmer's Bk. *v.* King, 57 Penn. St. 202; Dyott's Est. 2 Watts & S. 565; Graver's Est. 50 Penn. St. 189; Kerr *v.* Laird, 27 Miss. 544; Pinckney *v.* Dunn, 2 S. C. 314; Cartwell *v.* Allard, 7 Bush, 482; Norris *v.* Hero, 22 La. An. 605. See for other cases, infra, § 272 *et seq.*, 783.

[4] Marine Bank *v.* Fulton Bank, 2 Wallace, 252. Infra, § 279.

[5] Caffrey *v.* Darby, 6 Vesey, 496; Wren *v.* Kirton, 11 Ves. 378; Massey *v.* Banner, 1 Jac. & Walk. 245; Fletcher *v.* Walker, 3 Mad. 73; MacDonnell *v.* Harding, 7 Sim. 178; Johnston *v.* Newton, 11 Hare, 160; Wilks *v.* Groom, 3 Drew, 584; Hammon *v.* Cottle, 6 S. & R. 290; Com. *v.* M'Allister, 4 Casey, 480; *S. C.* 6 Ibid. 539; Miller *v.* Proctor, 20 Oh. St. 442; Cartwell *v.* Allard, 7 Bush, 482; Byrne

where an agent deposited in his own name confederate money collected for his principal, and on the bank failing on the failure of the Confederacy, the same was lost, it was ruled that the agent was not liable for the loss either from the depreciation of the notes [1] or from the failure of the bank.[2] In the latter case, however, the duty of transmittal to his principal was suspended by the war. And it has been ruled that the agent does not convert himself into a mere debtor by putting the principal's money into a chest with his own. In such case the principal may claim, out of the chest, the sums which belonged to him before the mixture.[3]

§ 244. *Agent, without his principal's consent, cannot accept adverse interest.* — Where a principal consents that his agent shall act in some special matters as agent for an opposing interest, or as referee for both interests, this double employment may be accepted by the agent, who, in the particular matter thus committed to him, must consider himself as bound to discharge his duty fairly to both of the parties by whom he is thus engaged. Such double duty may beundertaken by brokers,[4] by expressmen,[5] and by auctioneers;[6] and so, also, an attorney at law may act, by the consent of his client, as referee or arbiter both for his client and the opposing party.[7] So, also, a principal, when fully knowing the facts, can ratify the agent's action, though tainted with employment by an opposing party.[8] It should be also kept in mind that when an agent of an insurance company acts as agent of the insured, material omissions in the application for the policy, which would otherwise have avoided it, will not affect its validity as against the company.[9] But when an agent, without knowledge of his principal, becomes engaged in an adverse interest, he is guilty of a gross breach of trust, making himself per-

v. Schwing, 6 B. Monr. 199; Norris *v.* Hero, 22 La. An. 605; Shuford *v.* Ramsour, 63 N. C. 622. See for other cases, infra, § 279.

[1] Ansley *v.* Anderson, 35 Ga. 8.

[2] Hale *v.* Wall, 22 Grat. 424.

[3] Farmers', &c. Bank *v.* King, 57 Penn. St. 202.

[4] Infra, § 718; and see also supra, § 56.

[5] Fitzsimmons *v.* Express Co. 40 Ga. 330.

[6] See infra, § 655.

[7] Joslin *v.* Cower, 56 N. Y. 626. Infra, § 573.

[8] Woodhouse *v.* Meredith, 1 Jac. & Walk. 204; Sanderson *v.* Walker, 13 Ves. 601; White *v.* Ward, 26 Ark. 445; Smith *v.* Townsend, 109 Mass. 500; Stewart *v.* Mather, 32 Wisc. 345; Walworth *v.* Bank, 16 Wisc. 629. Supra, § 65.

[9] Marshall *v.* Ins. Co. 7 Fost. 157; Masters *v.* Ins. Co. 11 Barb. 624. See supra, § 203.

sonally liable to his principal for the damage,[1] and vitiating, as we will presently see, at the principal's election, any contract made under the influence of such disloyal engagements. And this rule obtains even where the agent reaps no benefit from the transaction.[2]

§ 245. *Tampering by one party with agent of opposite party avoids contract so obtained.* — An interesting case to this effect was decided in England in 1875.[3] It appeared in evidence that the Panama Company entered into a contract with the India Rubber Company, by the terms of which the former were allowed the option of having a telegraph cable made and laid down by the latter. The payment was to be made by instalments, beginning with the order, and continuing during the progress of the work, in accordance with the certificate of B., an agent of the Panama Company. An order was given and a first instalment of £40,000 paid to the defendants, together with £600 commission to B. Shortly after the payment the plaintiffs discovering that a secret sub-contract existed between B. and the India Rubber Company, by which contract B. was to lay the cable himself, filed a bill to set aside the original contract, and obtain repayment of the £40,600 paid by them to the defendants and the engineer B. The vice-chancellor gave judgment in their favor, and his decision was upheld by the lords justices. "I take it, according to my view of the law, to be clear," says Lord Justice James, "that any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal, cognizable in this court. . . . . And I take it to be equally clear that the defrauded principal, if he comes in time, is entitled at

[1] Wright *v.* Dannah, 2 Camp. 203; Rothschild *v.* Brookman, 5 Bligh N. S. 172; Morison *v.* Thompson, L. R. 9 Q. B. 480; Dunne *v.* English, L. R. 18 Eq. 524; Gillett *v.* Peppercorne, 3 Beav. 78; Taylor *v.* Salmon, 4 Myl. & Craig, 139; Church *v.* Ins. Co. 1 Mason, 341; Parkhurst *v.* Alexander, 1 Johns. Ch. 394; Copeland *v.* Ins. Co. 6 Pick. 198; Everhardt *v.* Searle, 71 Penn. St. 256; White *v.* Ward, 26 Ark. 445; McArthur *v.* Fry, 10 Kans. 233; Lloyd *v.* Colson, 5 Bush, 587; Mullen *v.* Keetzleb, 7 Bush, 253; Ely *v.* Hanford, 65 Ill. 267. See cases as to attorneys, infra, § 573.

[2] Campbell *v.* Walker, 5 Ves. 580; James, ex parte, 8 Ves. 348. An agent of a factor is not liable to a third person for failing to transmit his orders to the principal of the agent as to the sale of cotton consigned by such third person to the factor. Reid *v.* Humber, 49 Ga. 207.

[3] Panama Telegraph Co. *v.* India Rubber, &c. Co. L. R. 10 Ch. 515; 32 L. T. N. S. 517; 23 W. R. 583.

his option to have the contract rescinded; or if he elects not to have it rescinded, to have such other adequate relief as the court may see its way to give him." "It is said that there is no authority and no *dictum* to that effect. The clearer a thing is, the more difficult it is to find any express authority or any express *dictum* exactly to the point. I doubt whether there could be found any authority or any *dictum* exactly laying down the first of the two propositions I have mentioned, and which nobody has in the course of the argument ventured to dispute, — that is, that any surreptitious dealing between one principal and the agent for the other principal is a fraud on such other principal cognizable in this court." The principle is thus laid down: Where there is a case which in the contemplation of a court of equity is a case in which a principal is conspiring with the servant of the other principal to induce him to cheat his master in a matter of business, the latter is entitled to say, "I will have nothing more to do with the transaction." It is to be observed, however, that the opinion just given is to some extent qualified by Lord Justice Mellish, who, while concurring in the decision of the case, says: "I am not quite certain that I go the full length, as stated by the lord justice (James), in thinking that because a person has been a party to a fraudulent contract of this kind, the mere fact of his having been guilty of such a fraudulent contract, even supposing that the full remedy for the fraud could be otherwise obtained, would entitle the party to say, 'Because you acted fraudulently, therefore I will have nothing more to do with you, and I will not carry out my contract with you.' I am not aware of any authority that has gone to that extent." [1]

§ 246. *Agent neglecting to invest liable for interest.* — It has been said that an agent who wilfully retains in his hands a fund belonging to his principal is liable for interest. The shape, however, which this proposition more properly takes is that a trustee, holding funds which he ought to invest, but which he neglects to invest, is liable for interest.[2]

[1] See, also, Kemp *v.* Rose, 32 L. T. O. S. 51; Stone *v.* Hayes, 3 Denio, 575.

[2] Barney *v.* Saunders, 16 How. U. S. 342; Manning *v.* Manning, 1 Johns. C. 527; Mumford *v.* Murray, 6 Johns. C. R. 1; Jacob *v.* Emmett, 11 Paige, 42; De Peyster *v.* Clarkson, 2 Wend. 77; Williamson *v.* Williamson, 6 Paige, 298; Dyott's Est. 2 Watts & S. 565; Graver's app. 50 Penn. St. 189; Norris's appeal, 71 Penn St. 106; Kerr *v.* Laird, 27 Missis. 544.

II. AS TO FIDELITY TO INSTRUCTIONS.

1. *Obedience requisite.*

§ 247. *Agent to obey instructions.* — It is the primary duty of an agent to obey the instructions given to him by his principal, so far as this is possible. The mere fact that the agent intended a benefit to the principal is no defence.[1] The presumption is that the principal knows his own interests and objects better than these are known by the agent; and the agent is bound to carry out the principal's plans. Yet here an important distinction is to be kept in view. In mandates in which the agent's discretion as a specialist is invoked, he is to exercise this discretion. "Do as you think best; I employ you because you are an expert in this department." This leaves the agent at liberty to take his own course for the attainment of a particular object. On the other hand, when the means as well as the end are prescribed, the agent must adopt the means designated as well as attempt to achieve the object.[2] When by departure from instructions the agent makes profits from the property or credit of the principal, this profit belongs to the principal.[3] All losses arising from departure from instructions must be borne by the agent.[4]

§ 248. *Where instructions are ambiguous, and agent acts bonâ fide, in accordance with a probable construction, he will not be held liable.* — This point has been elsewhere stated. It has justly received the approbation of the highest English court of appeals,[5] as well as of our own tribunals.[6]

[1] Rechtscherd *v.* Accommodation Bk. 47 Mo. 181. See § 251.

[2] Stearine Co. *v.* Heintzman, 17 C. B. N. S. 56. See Catlin *v.* Bell, 4 Camp. 184; Sheills *v.* Blackburn, 1 H. Bl. 158; Le Guen *v.* Governeur, 1 Johns. Cas. 437, n; Allen *v.* Suydam, 20 Wend. 321; Allen *v.* Brown, 51 Barbour, 86; Wilson *v.* Wilson, 26 Penn. St. 394; Peisch *v.* Quiggle, 57 Penn. St. 247; National Co. *v.* Bruner, 4 Green N. J. 331; Fowler *v.* Colt, 25 N. J. Eq. 202; Williams *v.* Higgins, 30 Md. 404; Brown *v.* M'Gran, 14 Peters, 494; Sawyer *v.* Mayhew, 51 Me. 398; Hardeman *v.* Ford, 12 Ga. 205; Lee *v.* Clement, 48 Ga. 128; Bell *v.* Bell, 3 W. Va. 183; Hollingsworth *v.* Green, 1 Cincin. 305; Thornton *v.* Boyden, 31 Ill. 200. See as to powers of agent, supra, § 180–197.

[3] Dutton *v.* Willner, 52 N. Y. 313; Leak *v.* Sutherland, 25 Arkan. 219; Krutz *v.* Fisher, 8 Kans. 90; Ackenburgh *v.* M'Cool, 36 Ind. 473; Mason *v.* Bauman, 62 Ill. 76; Massey *v.* Davies, 2 Ves. Jr. 317; Morison *v.* Thompson, L. R. 9 Q. B. 480. Supra, § 236.

[4] Williams *v.* Littlefield, 12 Wend. 362. See infra, § 758.

[5] Ireland *v.* Livingston, L. R. 5 Eng. App. 395. Supra, § 223–4.

[6] Mechanics' Bk. *v.* Merchants' Bk. 6 Metc. 13; Foster *v.* Rockwell, 104

§ 249. *Agent not chargeable with disobedience when obedience would be immoral or illegal.* — Suppose an agent undertakes to perform an illegal or immoral act, and then withdraws? On the general principle that no one can avail himself of legal process to obtain satisfaction for an immoral or illegal undertaking, the principal in such a case cannot recover.[1] And any contract to evade the revenue laws of a country will be judged by the courts of that country to be invalid for the above reason.[2] Nor can an agent set up his principal's orders as a defence to a suit against him by a third party for a tort.[3]

§ 250. *Principal cannot enforce against agent an illegal contract, but may recover from agent the fruits of such contract if they are liquidated in agent's hands.* — Wherever, in order to sustain a suit against the agent, it is necessary for the court to enforce an illegal contract, the court will refuse its aid to enforce the suit.[4] Nor can the principal compel the repayment by the agent of money designed for an illegal purpose, if it has been applied on the principal's order to the illegal purpose.[5] But an agent who has in his hands money belonging to his principal, on

Mass. 167; Bessant *v.* Harris, 63 N. C. 542; Long *v.* Pool, 68 N. C. 479; Marsh *v.* Whitmore, 21 Wallace, 178. "If this, however, were doubtful, the doubt ought to be resolved favorably to the agent. In the case in hand, the Bank of Commerce having accepted the agency to collect was bound only to reasonable care and diligence in the discharge of its assumed duties. Warren *v.* The Suffolk Bank, 10 Cushing, 582. In a case of doubt, its best judgment was all the principal had a right to require. If the absence of specific instructions left it uncertain what was to be done further than to procure acceptances of the drafts, and to receive payment when they fell due, it was the fault of the principal. If the consequence was a loss, it would be most unjust to cast the loss on the agent." Strong, J., Merchants' Bk. *v.* National Bk. of Commerce, U. S. Sup. Ct. Nov. 1875. Supra, § 224.

[1] Browning *v.* Morris, Cowp. 792; Canaan *v.* Bryce, 3 B. & Ald. 179; Webster *v.* De Tastet, 7 T. R. 157. See Paley by Lloyd, 8–10; Delaney *v.* Stoddart, 1 T. R. 22; Simpson *v.* Nicholas, 3 Mees. & W. 240; Southey *v.* Sherwood, 2 Meriv. 435; Greenwood *v.* Curtis, 6 Mass. 376; Brookover *v.* Hurst, 1 Metc. 668; Smith *v.* Godfrey, 8 Fost. 382; Bibb *v.* Bibb, 17 B. Monr. 307; Marksbury *v.* Taylor, 10 Bush, 519. Supra, § 25.

[2] Whart. Confl. of Laws, § 483 *et seq.*, where the distinction in this relation between domestic and foreign laws is discussed.

[3] Infra, § 542.

[4] Bulmer, ex parte, 13 Ves. 313; Buck *v.* Buck, 1 Campb. 547; Paley by Lloyd, 64. Supra, § 25.

[5] Hastelow *v.* Jackson, 8 B. & C. 222; Smith *v.* Bromley, Dougl. 696; Brookover *v.* Morris, Cowp. 792. See, however, Brooks *v.* Martin, 2 Wal. 79; Pointer *v.* Smith, 7 Heisk. 57.

a closed or terminable account, cannot set up, as a defence to an action by the principal for money had and received the illegality of a part or of a whole of the transactions.[1] And so *a fortiori*, where money given to an agent for an illegal purpose remains unemployed, or where the illegal orders are countermanded by the principal before application, the debt may be recovered from the agent.[2]

§ 251. *Agent not liable in damages if obedience to instructions could not have benefited the principal.* — It has been much discussed whether, if an agent can show that his execution of the duties assigned to him would have produced no benefit to the principal, he (the agent) is bound to the principal in damages. Certainly where an agent is directed to do a specific thing for the purpose of producing a certain money return to the principal, (*e. g.* where the agent is directed to purchase certain goods for the principal, and the goods have intermediately been so injured as to be valueless), and the agent, finding that the supposed result is unattainable, omits to do such thing, then the agent is not answerable in damages.[3] But cases presenting this single issue are rare. Disobedience to instructions often produces, apart from the direct money loss, business discredit to the principal; and other considerations may intervene subjecting the principal to collateral loss. In this case arises the question of causal connection between the agent's disobedience and the principal's loss. If the principal's loss is appreciable, and in the ordinary course of business flows from the agent's disobedience, then the agent is liable for the loss.[4]

§ 252. Yet if there be no damage, there can be no recovery. "If orders," says Mr. Sedgwick,[5] "have been disobeyed, and injury results, the loss shall be *primâ facie* ascribed to the disobedience of orders, and in the absence of conflicting proof, the

[1] Farmer *v.* Russell, 1 B. & P. 296; 7 Vesey, 473; Tenant *v.* Elliot, 1 B. & P. 3; Bensfield *v.* Wilson, 16 M. & W. 185; Nicholson *v.* Gooch, 5 E. & B. 999; Johnson *v.* Lansley, 12 C. B. 468; Murray *v.* Vanderbilt 39 Barb. 140; Daniels *v.* Barney, 22 Ind. 207.

[2] Taylor *v.* Lendie, 9 East, 49; Fletcher *v.* Marshall, 15 M. & W. 755; Parry *v.* Roberts, 9 A. & E. 118; Hastelow *v.* Jackson, 8 B. & Cr. 222; Chinn *v.* Chinn, 22 La. An. 599; Daniels *v.* Barney, 22 Ind. 207. Supra, § 25; infra, § 610, 699.

[3] Webster *v.* De Tastet, 7 T. R. 157; 1 Bell's Com. 7th ed. 530.

[4] See Wharton on Negligence, § 73; De Tastet *v.* Crousillat, 2 Wash. C. C. 132. Infra, § 391–2.

[5] Sedgwick on Dam. 6th ed. 412.

primâ facie evidence shall be deemed conclusive; and that the plaintiff can only recover such damages as it appears from the evidence certain or probable that he actually sustained; and that the agent is always at liberty to show that if the order had been obeyed, the same damage would have resulted, or that the real loss is much less than the plaintiff's claim." Thus it has been held that in a suit against an agent for negligence in presenting a draft, it is a good defence that under no circumstances would the draft have been paid; and that it was really valueless.[1] So, in an action against an agent for selling below the limits fixed by the principal, the agent may prove in defence that the goods at no time brought more than they produced at the sale.[2] With these cases may be mentioned English rulings that if a ship, of which the insurance has been neglected, has, in the course of her voyage, deviated so that an insurance, if effected, would have been void, or if the principal has no insurrable interest, the agent has a good defence.[3] So, as has been seen, where a ship is lost on a route not covered by the principal's instructions for insurance, the principal cannot recover from the agent for neglect in obtaining such insurance.[4]

§ 253. *If loss was immediately attributable to casus, or the intervention of third parties, yet this constitutes no defence, if the principal was exposed to such casus or intervention by the agent's misconduct.* — In other words, the causal connection between the principal's damage and the agent's misconduct is not broken by the interposition of dangers to which that misconduct exposes the principal.[5]

[1] Suydam *v.* Allen, 20 Wend. 324. See Bank of Orleans *v.* Smith, 3 Hill, 560.

[2] Blot *v.* Boiceau, 3 Comst. 78; *S. C.* 1 Sandf. S. C. 111; Frothingham *v.* Everton, 12 N. H. 239.

[3] Delaney *v.* Stoddart, 1 T. R. 22; Fourin *v.* Oswell, 3 Camp. 359; the authority of which, as Mr. McLaren correctly states (1 Bell's Com. 7th ed. 531), is not touched by Glaser *v.* Cowie, 1 M. & S. 52; Bryan *v.* Lewis, 1 Ry. & M., overruled, but not on this point, by Hibblewhite *v.* McMorine, 6 M. & W. 202; Alsop *v.* Coit, 12 Mass. 40; 2 Phillips Ins. No. 1904.

[4] Marsh. on Ins. b. 1, ch. 8, § 2; Paley's Agency, 75–6.

[5] Infra, § 387. Wh. on Neg. § 123; L. 29, § 2. D. ad Leg. Aq.; Seigel *v.* Eisen, 41 Cal. 109; Bailiffs of Romney Marsh *v.* Trinity House, L. R. 5 Exch. 208; Ionides *v.* Universal Marine Ins. Co. 14 C. B. N. S. 259; Marsden *v.* City Ass. L. R. 1 C. P. 240; Wilson *v.* Wilson, 26 Penn. St. 394; Greenleaf *v.* Moody, 13 Allen, 362; Clark *v.* Norwood. 19 La. An. 116; Hoadley *v.* North. Trans. Co. 115 Mass. 304;

§ 254. But *casus*, unless so provoked, is a defence. "The supervening loss must in some way be connected with the fault, either as creating the loss as a cause, or as determining the incidence of some other cause of loss. If a principal direct an agent to pack his goods in a particular kind of case for exportation, and the vessel is captured by pirates, the agent would not be responsible because he had not packed the goods in the kind of case ordered. The use of this, or want of the other case, in no way contributes to the loss, or occasions the goods coming in the enemy's way."[1] So where a freshet of unprecedented fury bursts down a valley, those employed in the construction of a dam which is swept away are not liable if they used the diligence which good engineers are, under the circumstances, accustomed to apply.[2]

§ 255. *Necessity a defence.* — It need scarcely be mentioned that unless the agent is an insurer, he may set up necessity as a defence to a suit against him for the non-performance of his contract of agency. This, however, is a point which may be more properly discussed in another section.[3]

2. *Discretion of Agents as to Innocent Strangers.*

§ 256. *Principal holding out agent as having discretionary powers is bound by the same.* — The question of the discretionary powers of agents is to be viewed in two relations: first, in respect to strangers dealing *bonâ fide* and non-negligently with the agent; and secondly, with regard to the agent and those dealing with him, with knowledge either actual or constructive of the limitations of his agency. As to the first of these alternatives, the doctrines heretofore stated, as bearing on general as distinguished from special agencies, are to prevail.[4] Does the principal hold out the agent, either by giving him a general mandate, or appointing him to a continuous business service (*e. g.* as salesman or *institor*), as having discretion in the particular matter? If so, the principal, so far as concerns innocent third par-

Caffrey *v.* Darby, 6 Ves. 496; Wren *v.* Kirlen, 11 Ves. 378; Davis *v.* Garrett, 6 Bing. 716; Barker *v.* James, 4 Camp. 112; May *v.* Roberts, 12 East, 89.

[1] Infra, § 386; M'Laren's note to Bell's Com. 7th ed. 532.

[2] See, as illustrating this, Livingston *v.* Adams, 8 Cowen, 195.

[3] See infra, § 388.

[4] See supra, § 121–125; 137–9.

ties, is bound by the agent's action within the margin of such mandate or employment.[1]

3. *Discretion of Agent viewed as to himself or as to cognizant third Parties.*

§ 257. *But otherwise in respect to agent himself or third parties dealing with notice either actual or constructive of the limitations of the agency.* — Here a series of independent considerations await us. These may be classified as follows: —

4. *Discretion as to Time.*

§ 258. *Agent must ordinarily punctually obey orders as to time.* — An agent, for instance, is directed to buy or to sell at a particular time. The presumption is, under such circumstances, that time is of the essence of the mandate. The principal, if the order be to sell, may need the money at the time designated, and if the money come subsequently it may be too late. If the order be to purchase at a particular time, it may be that the time is important, not only because the principal may have the money ready at that time, but because the goods may be wanted for a market which may be only open at that peculiar period. Hence it is that when a particular time is specified for the execution of the commission, the presumption is that this time was intentionally designated, and is obligatory on the agent.[2]

§ 259. Two exceptions may be mentioned to this rule. The first is, when from the nature of things there must be a certain range of discretion as to time, as where the execution of an order depends upon such contingencies as the arrival of a cargo which may be delayed a few days.[3] The second is where great mischief will ensue to the principal from a punctual execution of his orders, as when fruits are received in such a condition that they must be consumed at once or be spoiled. *A fortiori* is this the case when the agent has an interest in the proceeds, as is the case with a factor.[4] But even a factor is bound to a rigid execution

[1] Supra, § 40, 125–139; infra, § 454, 460.

[2] Cornwall *v.* Wilson, 1 Ves. 509; Williams *v.* Littlefield, 12 Wend. 362; Evans *v.* Root, 13 Seld. 186; Day *v.* Crawford, 13 Ga. 508; Rommel *v.* Wingate, 103 Mass. 327 (infra § 268); Capes *v.* Phelps, 24 La. An. 562. "Der Beauftragte ist verpflichtet den übernommenen Auftrag *pünktlich* auszuführen." Windscheid, Pandekten, § 410.

[3] See Catlin *v.* Bell, 4 Camp. 183.

[4] See Chapman *v.* Morton, 1 M. &

of orders, unless it shall appear that such execution will bring eminent loss on the principal.[1]

The topic of sales on credit has been already discussed.[2]

5. *Discretion as to Price.*

§ 260. *Agent ordinarily limited to terms stated.* — We have observed elsewhere that a factor, empowered to sell at a fixed price, can sell at less than that price, if the articles are perishable, or if there is no reasonable future prospect of the market reaching the price limited.[3] In such cases, however, if the principal can be consulted, his instructions must be taken before sale; and now, where telegraphic communications unite all business centres, the old rules authorizing sales for foreign principals without notice are no longer applicable. A purchase exceeding a maximum price fixed by the principal, if made by the agent, is at the agent's own risk. When the agent exceeds such limit, "the principal is not bound to take the goods. If by due exertions the agent can execute the order within these limits, he is bound to do so as cheaply as he can, and to give his principal the benefit of that cheapness."[4] So an agent authorized to bind his principal by a note payable at a limited period cannot validly execute, under this authority, a note payable at a less period.[5] But the principal may elect to take goods at the price limited by himself, leaving the agent to be bound for the excess.[6] It should be added that when there are no special directions as to price, the agent must sell at the fair market price.[7]

§ 261. Whether when an agent insures for the principal at a rate beyond that authorized by the principal, the principal is bound to the extent of the premium he authorized, has been much discussed. Mr. Livermore[8] cites a French decision to the

W. 541; Brown *v.* M'Gran, 14 Peters, 480; Parker *v.* Brancker, 22 Pick. 40; Stall *v.* Meek, 70 Penn. St. 181; Frothingham *v.* Everton, 12 N. H. 239; Milbank *v.* Dennistoun, 21 N. Y. 386; *S. C.* 1 Bosworth, 246, and cases cited infra, 758.

[1] Scott *v.* Rogers, 31 N. Y. 676.

[2] Supra, § 187–193.

[3] Evans *v.* Potter, 2 Gall. 13; Burrill *v.* Phillips, 1 Gall. 360; infra, § 758. As to Roman law, see supra, § 156.

[4] Blackburn, J., in Ireland *v.* Livingston, L. R. 5 Q. B. 516.

[5] Batty *v.* Caswell, 2 Johns. 48; Tate *v.* Evans, 7 Mo. 419.

[6] Johnson *v.* Blasdale, 1 Sm. & M. 1. Supra, § 156.

[7] Bigelow *v.* Walker, 24 Vt. 149.

[8] Agency, ch. 5, § 1.

effect that the principal is so bound, the agent being liable for the excess. Chancellor Kent is of the same view:[1] but Judge Story qualifies this by saying that perhaps it may not be quite certain that our law would decide this case in the same way, although the decision is full of equity. It might be difficult to say that the principal could insist upon his right to adopt the policy made contrary to his orders, without ratifying it *in toto*.[2]

§ 262. It is generally said that a purchase at a less price than that fixed by the principal binds the principal. This is so in ordinary contracts of purchase and sale; but where there is anything essential in the sum for which the principal authorizes the agent to bind him, then that sum determines the bounds of the principal's liability. Undoubtedly the doctrine of the Roman law,[3] that an authority to buy for a greater sum implies an authority to buy for a less sum, obtains as an elementary rule among ourselves;[4] but this is only when the price is divisible.[5] Whether an agent acting for several principals can lump their accounts, presents points which are elsewhere discussed.[6] As a rule, an agent, it must be remembered, can only sell for money.[7]

6. *Discretion as to Quality.*

§ 263. *Under generic orders agent may select.* — The cases under this head fall into two classes: *first*, where the agent's orders are to buy articles of a particular generic type; *e. g.* a horse, or a bale of cotton; *secondly*, where the orders are to buy a specific thing; *e. g.* the horse Eclipse, or a special article which has been exposed to sale. As to the first, *i. e.* generic orders, the agent is at liberty to move within the orbit prescribed, but cannot move outside of that orbit. On this topic we have numerous adjudications bearing collaterally. We may start by maintaining that if the goods purchased are *in specie* the same as ordered, and are merchantable under such title, this is sufficient.[8] Thus it has been held that a purchaser cannot avoid

[1] 2 Kent's Com. 12th ed. 618.

[2] Story on Agency, § 174; and see Baines *v.* Ewing, 4 Hurl. & C. 511, cited infra, § 268.

[3] See § 8, I. III. 26. And supra, § 156.

[4] See 2 Kent's Com. 12th ed. 618; Gordon *v.* Buchanan, 5 Yerg. 81.

[5] See Pindley *v.* Breedlove, 16 Mart. 105.

[6] Infra, § 734, 763, 775.

[7] Supra, § 210.

[8] See Jennings *v.* Gratz, 3 Rawle, 168; Borrekins *v.* Bevan, 3 Rawle, 23; Carson *v.* Baillie, 19 Penn. St. 375; Windsor *v.* Lombard, 18 Pick.

a purchase of "Manila Sugar," where there is no express warranty, when it appears that the article is what is commonly delivered under that name, although the lot sold contains more than is usually the case with sugar of that description.[1] So when the plaintiff contracted with the defendants for the making of and sale to the plaintiffs of "all the horn chains they," the defendants, "manufactured," the question on trial, there being no warranty, was, what was a due fulfilment of the order thus to manufacture "horn chains." "The defendant," said Colt, J., when deciding the question in the supreme court of Massachusetts,[2] "contended that the words implied a warranty that the chains should be made wholly of horn, and that there was a failure to comply if part of the links were made of hoof; but the ruling of the court was, that if there was an article called and known in the market as horn chains, made partly of horn and partly of hoof, and the parties intended this article when they entered into the contract, it was sufficient. This ruling was right. *There are many articles which are named from one of several different materials of which they are made.* A contract, for instance, to furnish gold watches or mahogany furniture, would not be construed to require the whole watch to be gold, or the whole piece of furniture to be mahogany." So it was held in Pennsylvania that the vendor was not liable for breach of warranty in the sale of "superior sweet scented Kentucky leaf tobacco," on the ground the tobacco was of an inferior grade if it was really of Kentucky leaf; the question of scent being not capable of positive business determination.[3] Yet we must note a distinction between the duties of an agent employed to purchase and a vendor under circumstances such as those just enumerated. The agent may be ordered to inspect and test the article beforehand; and if so, he would be liable to the principal if his judgment was negligently rendered.[4] But if his order was to purchase by description, then his liability would be limited by the lines just given.[5] We must keep in mind, it

214; Henshaw *v.* Robins, 9 Mete. 87; Osgood *v.* Lewis, 2 H. & Gill, 495.

[1] Gossler *v.* Eagle Sugar Refinery, 103 Mass. 331.

[2] Swett *v.* Shumway, 102 Mass. 365.

[3] Fraley *v.* Bispham, 10 Barr, 320.

[4] Lambert *v.* Heath, 15 M. & W. 487.

[5] See Beals *v.* Olmstead, 24 Vt. 114; Barrett *v.* Hall, 1 Aiken, 269; Hawkins *v.* Pemberton, 51 N. Y. 204;

is true, in determining the applicability of the cases before us, the distinction between a warranty and a description. "A warranty is an express or implied statement of something which a party undertakes shall be part of a contract, and though part of the contract collateral to the express object of it. But in many of the cases, the circumstance of a party selling a particular thing by its proper description has been called a warranty, and the breach of such a contract a breach of warranty; *but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfil;* as if a man offers to buy peas of another, and he sells him anything else in their stead, it is a non-performance of it."[1] It is the latter class of cases that apply to the point now immediately before us.

§ 264. The English cases bear generally in the same direction. Thus it has been ruled that when a party engaged to sell a seed called "Skirving's Swedes," the engagement was not met by the tender of any other seed than "Skirving's Swedes;" a seed known by that particular name in the market.[2]

§ 265. The rule is that where a purchase is ordered of articles which are to have a specified qualification, and articles are purchased without this qualification, the contract of sale will not be enforced. Thus where the sale was of hops, and it being known that the use of sulphur in the preparation of hops diminished their value, the seller, in reply to a question from the buyer as to whether the hops had been prepared with sulphur, answered untruly though ignorantly that they had not. It was held that the fact, subsequently discovered, that sulphur had been used, vitiated the contract of sale.[3] The same rule applies to the purchase of negotiable paper or other evidences of indebtedness. The defendant, in April, 1836, employed the plaintiff, a stock-broker, to sell for him four unstamped Guatemala bonds. It appeared that in 1829 the Guatemala government had repudiated bonds of this class, of which fact both plaintiff and defendant were ignorant.

Gaylord Man. Co. *v.* Allen, 53 N. Y. 515; Hastings *v.* Lovering, 2 Pick. 220; Richmond Man. Co. *v.* Farquar, 8 Blackf. 89; Lyon *v.* Bertram, 20 How. U. S. 153.

[1] Lord Abinger, C. B. in Chanter *v.* Hopkins, 4 M. & W. 399.

[2] Allan *v.* Lake, 18 Q. B. 560. See also, Josling *v.* Kingsford, 13 C. B. N. S. 447; Azemar *v.* Casella, L. R. 2 C. P. 431; 677; Nichols *v.* Godts, 10 Ex. 161.

[3] Bannerman *v.* White, 10 C. B. N. S. 844.

It was held that the defendant was bound to restore the price received from the sale. The contract, said Tindal, C. J., was for real Guatemala bonds, and the case was as if the contract had been to sell foreign coin, and the defendant had delivered counters instead.[1] Suppose that instead of the purchaser having in his own person negotiated the purchases mentioned above, he had negotiated them through an agent, it is difficult to see how, in a suit against the seller, any other law could be laid down.[2] If, however, from any reason the remedy fail against the seller, the purchaser could have a remedy against the agent if the latter's negligence had caused the loss. Of course if the purchaser had in such cases ordered the agent simply to buy goods by brand or title, then no suit against the agent under facts as those just stated could be maintained. But if the agent ordered to buy one article bought another article; or if the agent ordered to buy an article of a certain quality, neglected the usual precautions of determining such quality, and bought an inferior article, then the agent becomes personally liable. Of course if in such a suit the loss is immediately attributable to the plaintiff's negligence, he cannot recover.[3] And of course, also, where the agent buys that which the buyer specifically directed, the agent is not liable, notwithstanding the worthlessness of the article.[4]

§ 266. *As to specific article, specific instructions must be absolutely obeyed.* — If the agent is instructed to buy a specific article, he has no discretion; and if unable to purchase such article, he is not at liberty, supposing the *differentia* go to the essence of the commission, to purchase another article of the same generic character. An order, for instance, is sent for the purchase of the horse Eclipse; a horse of peculiar qualities of speed and endurance, needed for a particular purpose. It is a good defence to the agent that he cannot procure this particular horse;

[1] Young *v.* Cole, 3 Bing. N. C. 724. See to same point, Jones *v.* Ryde, 5 Taunt. 488; Westropp *v.* Solomon, 3 Bing. N. C. 724; Gompertz *v.* Bartlett, 2 E. & B. 849; Thrall *v.* Newell, 19 Vt. 202; Lobdell *v.* Baker, 1 Metc. 193; *S. C.* 3 Metc. 469; Cabot Bk. *v.* Morton, 4 Gray, 156; Merriam *v.* Wolcott, 3 Allen, 258; Wilder *v.* Cowles, 109 Mass. 497; Terry *v.* Bissell, 26 Conn. 23; Murray *v.* Judah, 6 Cow. 484; Ledwich *v.* M'Kim, 53 N. Y. 289, cited Benj. on Sales, Am. ed. § 607.

[2] See to this point, Lambert *v.* Heath, 15 M. & W. 487.

[3] Pooley *v.* Brown, 11 C. B. N. S. 566.

[4] Lambert *v.* Heath, 15 M. & W. 487.

he is not required to look out for another horse having similar qualities.[1] An agent agrees to obtain for his principal a particular music hall for a specified time; but the hall is burned down before that time. Supposing the instructions to be pointed exclusively at this hall, the agent is not bound to go further; but the fire is a sufficient defence to a suit against him for negligence.[2] An agent is instructed to obtain the services of a particular lady to play on the piano at a concert. The lady is too ill to perform. This, supposing the agent to be bound up to this particular offer, is a sufficient defence to a suit against the agent for failure in duty.[3] Or, generally, specific goods which the agent undertakes to procure, perish without the agent's fault; in such case the agent cannot be held liable.[4]

§ 267. But if the agent undertakes to obtain the goods at a particular season, it is no defence that the goods could not be obtained at that season. The agent, supposing him to undertake to act in the matter as an expert, is liable at least for his negligence in undertaking to furnish the goods at an unseasonable time, and in this way misleading the principal.[5]

7. *Discretion as to Quantity.*

§ 268. *Agent is not to exceed, but may fall below, quantity ordered.*[6] — Here we are met by the distinction between articles fungible and divisible and those which are infungible and indivisible. An agent, for instance, is ordered to buy a watch. Here there can be no question that the agent would transcend his instructions if he should purchase three quarters of a watch, or a watch and a quarter. But if an agent ordered to purchase one hundred shares of Pennsylvania Railroad stock should purchase on the one hand fifty shares, on the ground that only these could

[1] Shep. Touch. 173, 382; Faulkner *v.* Lowe, 2 Ex. 595; Hall *v.* Wright, 1 E. B. & E. 746; Tasker *v.* Shepherd, 6 H. & N. 575. See supra, § 180–197.

[2] Taylor *v.* Caldwell, 3 B. & S. 826.

[3] Robinson *v.* Davison, cited Benjamin on Sales, § 570.

[4] Dexter *v.* Norton, 47 N. Y. 62. See Boast *v.* Ferth, L. R. 4 C. P. 1; Clifford *v.* Watts, L. R. 5 C. P. 577; Whincup *v.* Hughes, L. R. 6 C. P. 78; Rigby *v.* Hewitt, 2 Exch. 24; Hoey *v.* Felton, 11 C. B. N. S. 143; Carstairs *v.* Taylor, L. R. 6 Exch. 217; Wakeman *v.* Robinson, 1 Bing. 215; Hall *v.* Fearnley, 3 Q. B. 913. Supra, § 252.

[5] Youqua *v.* Nixon, 1 Peters C. C. 221; Gilpins *v.* Consequa, 1 Peters C. C. 91. Infra, § 272.

[6] As to Roman law see supra, § 156.

at the time be had; or, on the other hand, one hundred and ten shares, on the ground that if not purchased in a block of this size there could be no purchase at all; then questions of much greater complication arise.[1] If we were to appeal to the rulings made under similar circumstances on contracts for sale, we would have no difficulty in arriving at a decided result. A seller who agrees to furnish a particular quantity of divisible goods, must supply exactly this amount. If he furnishes a greater amount in bulk, the buyer is not bound to select that part for which he contracted, but may reject the whole.[2] Thus in a Massachusetts case, the plaintiff in New York wrote to the defendants in Boston, offering to sell coal, and stating that he had a vessel of 375 tons which he could load "on Monday." The defendants telegraphed on the Monday in question to "ship that cargo, 375 tons, immediately." The plaintiffs did not begin to load until nine days afterwards, and then shipped a cargo of 392 tons. But the court held that this was not a compliance with the contract. "This," said Morton, J., "bound the defendants to receive a cargo of 375 tons to be loaded at once. *It did not bind them to take a larger cargo*, or one which could not be shipped substantially as speedily as proposed by the plaintiff in his letter."[3] So in an English case, a contract having been made for the delivery of ten hogsheads of claret, the vendor sent fifteen hogsheads to the purchaser. But the court held that the contract was not performed, "for the person to whom they (the hogsheads) were sent cannot tell which of the ten are to be his, and it is no answer to the objection to say that he may choose which ten he likes, for that would be to force a new contract upon him.[4] So a contract of insurance, which a broker underwrites for £150, when he was limited by his principal to £100, is void as against the principal.[5] So *a fortiori* is the converse true; and a delivery of less than the contract calls

[1] See Olyphant *v.* M'Nair, 41 Barb. 446.

[2] Barber *v.* Taylor, 5 Mees. & W. 527; Dixon *v.* Fletcher, 3 M. & W. 146.

[3] Rommel *v.* Wingate, 103 Mass. 327. On an order to purchase 150 bales of cotton, the principal is liable on a purchase of 78 bales, being all that at the time could be bought, which purchase he repudiated on other grounds than that of the deficiency. Marland *v.* Stanwood, 101 Mass. 470. See Olyphant *v.* M'Nair, 41 Barb. 446; Davenport *v.* Buckland, Hill & Denio, 75.

[4] Cunliffe *v.* Harrison, 6 Exc. 903; S. P.; Hart *v.* Mills, 15 M. & W. 85; and see Levy *v.* Green, 8 E. & B. 575.

[5] Bains *v.* Ewing, 4 Hurl. & C. 511. See supra, § 261.

for will not be accepted even as part performance of the contract.[1] But when an agent is ordered to purchase a certain quantity of fungible and divisible goods, he is claimed to have a discretion which will authorize him to purchase either more or less than the specified quantity, if such, according to a sound business judgment, would be best for the employer's interest. An interesting case on this topic is worthy of notice, not only for the able discussions that it elicited, but the singular vicissitudes to which it was exposed.[2] The mandate which came up for construction is dated July 25th, and is as follows: "My opinion is that should the beet crop prove less than usual, there may be a good chance of something being made by importing cane sugar at about the limit I am going to give you as a maximum, say 26*s.* 9*d.*, for Nos. 10 and 12, and you may ship me 500 tons to cover cost, freight and insurance, — fifty tons more or less of no moment if it enables you to get a *suitable* vessel. You will please to provide insurance, and draw on me for the cost thereof, as customary, attaching documents, and I engage to give the same due protection on presentation." A telegram was sent the next day to say that the "insurance is to be done with average, and, if possible, the ship to call for orders at a good port in the United Kingdom." The plaintiffs answered on the 6th of September: "We are in the receipt of your esteemed favor of 25th July, and take due note that you authorize us to purchase and ship on your account a cargo of about 500 tons, provided we can obtain Nos. 10 to 12 D. S., at a cost not exceeding 26*s.* 9*d.* per *cwt.*, free on board, including cost, freight and insurance; and your remarks concerning the destination of the vessel have also our attention. . . . . If prices come within your limits, and we can lay in a good cargo, we shall not fail to operate for you." When this letter was written, prices at the Mauritius were above the specified limit, freight ranging from £2 15*s.* to £3 a ton. In the course of September, however, the plaintiffs received an offer from a partially loaded vessel to take 7,000 or 8,000 bags of sugar at a freight of £2 10*s.* per ton for a direct voyage to London, and ascertained that at

[1] Hoar *v.* Rennie, 3 H. & N. 19; Oxendale *v.* Wetherell, 9 B. & C. 386; Markland *v.* Stanwood, 101 Mass. 470; Wright *v.* Barnes, 14 Conn. 518; Roberts *v.* Beatty, 2 Penn. 63. See Wilkins *v.* Stevens, 8 Vt. 214; Starr *v.* Morey, 108 Mass. 570; McKnight *v.* Devlin, 52 N. Y. 399; Kouger *v.* Blanck, L. R. 5 Ex. 179; Lathrop *v.* Harlow, 23 Mo. 213.

[2] Ireland *v.* Livingston, L. R. 2 Q. B. 99; 5 Q. B. 516; 5 Eng. App. 395.

this rate of freight the sugar could be so purchased as to bring the cost, freight and insurance within the limit assigned by the defendant. The plaintiffs, though using due diligence, could not obtain more than 5,778 bags, weighing about 392 tons, and those were purchased from fourteen separate vendors, it being impossible in any other way to approach the consummation of the bargain. This quantity was shipped to the defendant; and then, being unable to fill up the remaining portion of the vessel with any further goods under the defendant's orders, they shipped on their own account about 150 tons of inferior quality. In order to bring what they bought within the specified limit, they reduced their own commissions by £163 19*s.* 4½*d.* The ship sailed on September 29th with the cargo just stated. On October 26th they received from the defendant a countermand of his order; they having down to this period watched the market in reference to its completion. The defendant refused to accept the 392 tons shipped to him; and the plaintiff having brought suit in the queen's bench, the judges, Cockburn, C. J., Mellor and Shee, JJ., held that the true construction of the order was that the plaintiffs were to buy sugar for the defendant, according to the usage of the market at the Mauritius, where the sugar could only be bought in several parcels from different persons, and as fast as the plaintiffs bought each lot, in pursuance of the order, each lot was appropriated to the order, and that the defendant was bound to accept what was so bought, and had himself, by countermanding the order, prevented its execution for the entire quantity ordered. In the exchequer chamber, the judgment of the queen's bench was reversed by Kelly, C. B., Martin and Channell, BB., and Keating, J. (Montague Smith, J., and Cleesby, B., diss.), on the ground that the order was for a single shipment of one cargo by a single vessel. An appeal was taken to the house of lords, when the judgment of the exchequer chamber was reversed, and that of the queen's bench affirmed. The lords, however, put their judgment on a new ground. They held that the original instruction given by the defendant to the plaintiffs was so ambiguous that it fairly admitted of either construction; and that "when a principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent *bonâ fide* adopts one of them and acts upon it, it is not competent for the principal to repudiate the act as unauthorized,

because he meant the order to be read in the other sense, of which it is equally capable."[1] All, therefore, that is ruled by this famous case, so far as concerns the point immediately before us, is that agreed upon by the judges of the queen's bench, *i. e.*, that when the usage of the place of sale permits it, an agent is justified in filling up his principal's orders by piecemeal, and that the principal is bound by such performance. There is no ruling that such partial performance would be good in a place where not sustained by the usage of trade.[2]

§ 269. *But as to indivisible articles no such liberty allowed to agent.* — An agent, for instance, is ordered by his principal to purchase a particular house. It is clear that the agent is bound to the house as an entirety, and that he would violate his instructions should he purchase either a portion of the house, or the house with land attached to it which his principal did not embrace in the order. Many refinements are discussed by recent German authors[3] as to what is and what is not divisible. I order, for instance, the sale of a span of horses. Would this order sustain the sale of the horses singly? Certainly not, because the price of the horses as a span is far greater than that which they would ordinarily bring if sold singly. But if I order the sale of a drove of horses at private sale, the presumption is that I authorize them to be sold in lots. So with regard to a purchase of books. I may give an agent great liberty in selecting for me a library; but this would not justify him in buying one volume of a particular work, leaving the other volumes unbought. On the other hand, he could purchase complete works separately.

§ 270. *In the execution of powers a deficient execution is void, but an excessive execution is void only for the excess.* — The law concerning the execution of testamentary and fiduciary powers forms an independent topic of jurisprudence. Any attempt to abridge, within the few lines which could be here used, Lord St. Leonard's authoritative work on this topic, would be futile; and it may be sufficient here to say that in the execution of powers the rules just stated prevail in their general bearings. If it be possible to pare away a redundancy, in the execution of a power,

[1] Supra, § 224, 248.

[2] See Johnston *v.* Kershaw, L. R. 2 Ex. 82. And see as to Roman law, supra, § 156.

[3] See particularly Bar, Causalzusammenhange; Mommsen, Beiträge zum obligationenrecht.

without impairing the object for which the power was created, this must be done. But where a power is inexhaustively executed, so that only part of its office is discharged, then the execution is to be regarded as inoperative.[1]

III. DUTY OF AGENT AS TO SKILL AND DILIGENCE.

§ 271. The liability of a principal for his agent's negligence is the distinctive topic of another work with which these pages are to be taken in connection. It would be superfluous, therefore, as well as inconsistent with our present limits, to undertake in this place a specific citation of the cases which bear on this special inquiry. I must here content myself, therefore, with recapitulating certain general principles, which are abundantly sustained by authority in the volume to which I have just referred.

§ 272. *Agent bound to possess qualifications suitable for the agency.* — No doubt a person who disclaims acquaintance with a particular specialty may, if pressed to undertake it, relieve himself from liability for losses caused by his ignorance, by showing that this ignorance was stated by himself when he undertook the employment, and was known to his employer. But unless this be the case, he is liable even for honest and conscientious mistakes, if such mistakes were the result of an incompetency of which his employer was not cognizant. Every man who assumes to practise at a specialty claims a reasonable acquaintance with the laws of such specialty, and a reasonable facility in their application. If he undertake the work without such acquaintance and without such facility, and loss ensue, he is liable for such loss. "Imperitiam culpae adnumerandam . . . . puta si quis sarciendum quid polien dumve conduxit, culpam eum praestare debere, et quod imperitia peccavit, culpam esse, quippe ut artifex conduxit."[2] But it is not required that this skilfulness should be perfect. If so, no agents could be obtained, for there is no branch of industry in which perfect skilfulness is attainable. What is required is the degree of skill usual with good business men of the particular order at the particular place. An agent,

[1] See Sugden on Powers, ch. 5. And see also Alexander *v.* Alexander, 2 Ves. 644; Bostock *v.* Jardine, 34 L. J. Ex. 142, misreported in 3 H. & C. 700.

[2] Heumann, Handlexicon, 270; L. 9, § 5. D. 19. 2. Cf. L. 13, § 5, eod. L. 8, § 1. L. 27, § 29. D. 9. 2.

for instance, appointed to oversee the machinery in a remote western saw-mill, is required to possess a far less thorough knowledge of mechanics than is the agent appointed to oversee a steam-engine factory at a business centre. An agent appointed to buy skins from Indian trappers is required to possess an entirely distinct training from an agent appointed to buy sugars in Cuba, or from an agent appointed to buy cutlery at Sheffield. There must be acquaintance with the particular business undertaken, and this acquaintance must be equal to that usual with good business men, accustomed to deal with the specialty in question. Less than this could not be required without putting a premium on ignorance, and without destroying industry by destroying employers. More could not be asked without bringing employment to a stand-still from an inability to find employees.[1]

[1] See also Stanton *v.* Bell, 2 Hawks, 145; Heineman *v.* Heard, 50 N. Y. 29. The Roman law presents the same distinctions. If the mandatary holds himself out as a specialist in the subject matter of the mandate, he is obliged to exhibit the care of such specialist; if, however, goods accepted by him as a mandatary are subsequently detained in his hands as a depositary, then, as he does not hold himself out as a depositary, he is liable only for for such care as an ordinary depositary (not a specialist) is accustomed under such circumstances to bestow. "Sed si facio ut facias, haec species tractatus plures recipit, nam si pacti sumus, ut tu a meo debitore Carthagine exigas, ego a tuo Romae, vel ut tu in meo, ego in tuo solo aedificem, et ego aedificavi et tu cessas, in priorem speciem mandatum quodammodo intervenisse videtur, sine quo exigi pecunia alieno nomine non potest: quamvis enim et impendia sequantur, tamen mutuum officium praestamus et potest mandatum ex pacto etiam naturam suam excedere (possum enim tibi mandare ut et custodiam mihi praestes et non plus impendas in exigendo quam decem); et si eandem quantitatem impendere-mus, nulla dubitatio est. Sin autem alter fecit, ut et hic mandatum intervenisse videatur, quasi refundamus invicem impensas: neque enim de re tua tibi mando, sed tutius erit et in insulis fabricandis et in debitoribus exigendis praescriptis verbis dari actionem, quae actio similis erit mandati actioni, quemadmodum in superioribus casibus locationi et emptioni." L. 5, § 4. D. de praes. ver. XIX. 5. But if there is any undertaking on the part of the mandatary to receive and keep the goods on behalf of the mandant (the keeping of the goods not being thrown on him by necessity, as in the former case), then the mandatary is bound to keep the goods with the diligence of a specialist, *i. e.* such a diligence as a person holding out to take goods on deposit is accustomed to bestow. This is the distinction in this relation between a mandatary and a depositary. "Quod si rem tibi dedi, ut, si Titius rem non recepisset, tu custodires, nec eam recepet, videndum est, utrum depositi tantum an et mandati actio sit. Et Pomponius dubitat: puto (Ulpianus) mandati esse actionem, quia plenius fuit mandatum habens et custodiae legem. Idem

§ 273. *Agent must bestow on the trust a diligence such as that which good business men under similar circumstances are accustomed to bestow.* — Here, again, we are to avoid the dangers of requiring too little diligence and of requiring too much. For the law to permit any particular agent, in any particular case, to fall below the level of good business men of his class, would be to lower the standard of industry, and by exposing capital to undue and unusual risks, repel it from the employment of labor. Industry, if left alone, will find its own just level; in a civilized community, where multifarious tastes require gratification, and where the standard of comfort is high, men will on the average work as much as they safely can to gratify these tastes, and to reach this standard of comfort; a diligence beyond this the law could not enforce without destroying individual liberty, and thereby destroying the source of all voluntary diligence; and hence the test hit upon by the Roman law is wisely accepted by our own, — the test of the diligence usual among good business men dealing with the particular specialty. In reaching the result we strike from the calculation all who are not *good* business men; all who do not fall under the head of the *bonus et diligens paterfamilias;* and we put aside, therefore, the idlers and the adventurers. We take the industrious and reliable workmen of the particular class, and the diligence they are accustomed to show we exact from the agent who undertakes to do their work.[1] To

Pomponius quaerit, si tibi mandavero, ut rem ab aliquo meo nomine receptam custodias, idque feceris mandati an depositi tenearis. Et magis probat mandati esse actionem, quia hic est primus contractus." L. 1, § 12. D. dep. XVI. 3.

[1] See, in addition to authorities cited in Whart. on Neg. § 26 *et seq.*, Harriman *v.* Stowe, 57 Mo. 93; Fay *v.* Strawn, 32 Ill. 295; Gilson *v.* Collins, 66 Ill. 136; Marsh *v.* Whitmore, 21 Wall. 178; Williams *v.* Higgins, 30 Md. 404; Myles *v.* Myles, 6 Bush, 237; New Orl. R. R. *v.* Albritton, 38 Missis. 242.

In Chambersburg Ass. Appeal, 76 Penn. St. 203, it was said by Mercur, J. . "In considering whether a trustee has made himself liable for a failure to collect and convert the assets in his hands, regard must be had to the character of the trust. Thus, a guardian would not be held to such prompt action in enforcing the collection of securities, as an executor, administrator, or assignee for the benefit of creditors, would be. The duty of the former is to hold and retain; that of the latter to collect and prepare for distribution. Charlton's appeal, 10 Casey, 473; Neff's appeal, 7 P. F. Smith, 91. It was then the duty of the appellee, within a reasonable time, to make proper efforts to convert all the assets and securities into money for distribution. If he failed to make such efforts, he was guilty of gross negligence, and became liable for any loss thereby sus-

such an agency a money consideration is not necessary. It is enough that relations of confidence are established between the employer and the person employed, and the intention is to enter upon a business engagement. A., an expert, for instance, holds out to be familiar with a particular specialty. B., desiring assistance, goes to A., and engages A.'s services, though with an understanding that the services are to be gratuitous. Supposing that B. tenders confidence to A., in asking for these services, and A. accepts this confidence in giving them, then A. is liable to B. for any damage caused to B. by A.'s negligence in this relation.[1]

§ 274. *Diligence beyond this is not required.* — The scholastic jurists, it is true, talk of a *culpa levissima*, which is the antithesis of *diligentia diligentissimi*, and hold that there are agencies to which *culpa levissima* is imputable. That this assumption is without authority in practical jurisprudence has been elsewhere demonstrated.[2] That it cannot be adopted in business life, it re-

tained. Johnston's Estate, 9 W. & S. 107. There an administrator, upon a sale of assets at vendue, took a note with security, payable in six months, and when it fell due, the payors were able to pay it, but the administrator made no effort to collect it within six months after maturity, and by the subsequent insolvency of the makers, it was lost. The administrator was held to be chargeable with the loss. That was a case of omission only." In this case a saving fund association held the title to lands as collateral for a debt due them by Anspach; they assigned for the benefit of creditors. The assignee being informed that Anspach had no title to the lands, and without making proper investigation of the title, &c., took from Anspach other securities and reconveyed the land to him, Anspach's debt having been lost. Held, that the assignee was liable, under the circumstances in this case, for the amount of the debt, on the ground of supine negligence. Chambersburg Ass. Appeal, 76 Penn. 203.

[1] As to physicians, see Ruddock *v.* Lowe, 4 F. & F. 519; Rich *v.* Pierpoint, 3 F. & F. 35; Hancke *v.* Hooper, 7 C. & P. 84; Lamphier *v.* Phipos, 8 C. & P. 479; Wilmot *v.* Howard, 32 Vt. 447; Long *v.* Morrison, 14 Ind. 595; Wood *v.* Clapp, 4 Sneed, 65; Patten *v.* Wiggin, 15 Me. 594; Howard *v.* Grover, 28 Me. 97; Bellinger *v.* Craigue, 60 Barb. 480; Fowler *v.* Sergeant, 1 Grant, 355; nor does it make any difference that the service was gratuitous. Whart. on Neg. § 437, 640; R. *v.* Macleod, 12 Cox C. C. 534. As to lawyers, see Gleason *v.* Clark, 9 Cow. 57; Varnum *v.* Martin, 15 Pick. 440; Evans *v.* Watrous, 2 Porter, 205; Whart. on Neg. § 749. So Paulus (L. 2. D. II. 2.) says: "Hoc edicto dolus debet jus dicentis puniri; nam si adsessoris imprudentia jus aliter dictum sit quam oportuit, non debet hoc magistratui officere, sed ipsi adsessori." Even a *gratuitous* service by an attorney at law involves liability, if there be confidence imposed. Percy *v.* Millaudon, 20 Mart. (La.) 68. See infra, § 779.

[2] See Whart. on Neg. § 65.

quires but a moment to see. Supposing that there is a business man who is transcendently diligent, — diligent in the devotion of time and zeal, diligent in the acquisition and application of sagacity, — could such a man be obtained for an agency? Is it consistent with the laws of real life that he should be content to serve another, when he could be so successful in serving himself? Or, if there be such preternatural business men, does their success in managing their own affairs make it likely that they would, if they submitted to the harness, successfully administer the affairs of others? Is intense diligence permanently sustainable? Can we depend in the long run on the extraordinary efficiency which is brilliantly successful in the short run? Is not the diligence that ultimately succeeds the diligence that works with average power? If so, the same rule applies with peculiar force to contracts of agency. We cannot expect permanently from an agent that vehement and exhausting action which we can only expect occasionally from the principal. The most we have a right to expect is that degree of diligence which is usual among faithful, capable, and industrious business men, doing the same kind of work. When we appoint an agent, this usage qualifies and shapes the agency.[1] And where instructions are doubtful, or the line of duty is doubtful, then the agent who acts conscientiously and diligently is to have the benefit of the doubt.[2]

§ 275. *Diligentia quam suis not the test.* — It is frequently intimated that the proper test is *diligentia quam suis*, or the diligence which the agent employed is accustomed to show in his own affairs; but this test, as is elsewhere shown,[3] although it may be sometimes appealed to when fraud is charged, cannot be used as determining the degree of diligence required from an agent. A factor, for instance, may be willing to sell his own goods at high rates to a purchaser in doubtful credit; but he cannot so dispose of the goods of his principal. A broker may be willing to sell on credit his own securities, but he cannot sell on credit the securities of his principal. An insurance agent may be in the habit of insuring his own property inadequately, but he must adequately insure the property of his principal, or he will be liable for the

[1] See Whart. on Neg. § 48.

[2] Ireland *v.* Livingston, L. R. 5 Eng. App. 395; supra, § 248; Mechanics' Bk. *v.* Merchants' Bank, 6 Metc. 13; Foster *v.* Rockwell, 104 Mass. 187; Longmire *v.* Herndon, 72 N. C. 629.

[3] See Whart. on Neg. § 54.

loss. A trustee may speculate with his own funds; he may embark them in hazardous adventures, which may or may not terminate successfully; but with the funds of his principal he can attempt no such experiments; he must seek for such funds safe investments, whose modest returns he would himself scorn; that he exposed himself to the same hazards will be no defence, in case by the investment his principal incurs a loss. On the other hand, the fact that by his peculiar sagacity, if such were the cause, he hit upon a peculiarly successful speculation for himself, does not make him liable in case he declined to make a similar investment for his principal. With regard to the trust funds committed to him, he is obliged to show the diligence and fidelity usually shown by good and prudent business agents. What he chooses to do with his own affairs is not the test.

§ 276. *Agent is liable to principal for losses incurred by negligence of agent's servant within the range of the latter's employment.* — This rule is abundantly sustained in another work to which reference is now made.[1] That the sub-agent is, if a servant, liable only to his immediate master, is also plain.[2]

§ 277. *But when an agent is authorized to employ an ancillary agent, then such ancillary agent becomes individually liable to the principal, and the primary agent is liable only for culpa in eligendo.* — This proposition results from the distinction between agency and service, between the mandator and the locator, which has been already noticed.[3] A master is liable for his servant's negligence because the servant is presumed to act always under the master's orders; the servant being regarded as the master's direct instrument in the work, and the master being liable for the imperfection of his servants in the same way that he would be liable for the imperfection of his machinery. The principal is not usually liable for his agent's negligence, because agency implies independent discretion on the part of the agent; the agent becoming a new legal centre of action and liability. The master is liable for the servant's negligence, because there is a direct causal connection between the wrong done by the servant and the master. The

[1] See Whart. on Neg. § 156 *et seq.* And see infra, § 475 *et seq.*

[2] Infra, § 348, 482, 535; Stephens *v.* Badcock, 3 B. & Ad. 354; Myler *v.* Fitzpatrick, 6 Mad. 360.

[3] See supra, § 19. And see also fully infra, § 535, 545. And see Campbell *v.* Reeves, 3 Head (Tenn.), 226.

principal is not liable for the agent's negligence, because the causal relation between the principal and the injury done is broken by the interposition of the independent free agency of the agent.[1] Of course these offices cannot be kept wholly distinct. The servant becomes an agent, and his negligences are not imputable to his employer, whenever he is allowed free discretion as to his mode of action. An agent becomes a servant, and his negligences are imputable to his principal, whenever he is allowed no discretion as to his mode of action.[2] But as a general rule, wherever an agent is allowed discretion as to his mode of action, then his negligence is not so imputable. Thus if I employ a contractor to build a house for me, giving him full liberty as to the mode of building, and placing the whole control in his hands, I am not liable for injury caused by his negligence.[3] And to sub-agency the same rule extends. If I, a primary agent, am authorized to employ an ancillary agent, the latter having full discretion as to his mode of work, I not interfering except by directing the object he is to attain, then I am not responsible for such ancillary agent's negligence. Thus the primary agent (*e. g.* a trustee) may have to employ attorneys at law; and if so he is liable only for *culpa in eligendo*, or for negligently instructing such attorneys, and is not liable for their negligence in the performance of their duties.[4] So an attorney at law is liable for the

[1] See Whart. on Neg. § 134; infra, § 535–8.

[2] Stone *v.* Cartwright, 6 T. R. 411; Mulligan *v.* Wedge, 4 Ad. & E. 737; Myer *v.* Fitzpatrick, 6 Mad. 360; Cochran *v.* Irlam, 2 M. & Sel. 301; Cobb *v.* Beck, 6 Q. B. 930; Robbins *v.* Fennell, 11 Q. B. 248; Cartwright *v.* Hately, 1 Ves. Jr. 292; Pinto *v.* Santos, 5 Taunt. 447; De la Viesca *v.* Lubbock, 10 Sim. 629; Amory *v.* Hamilton, 17 Mass. 108; Trafton *v.* U. S. 3 Story, 646; Cleaves *v.* Stockwell, 33 Me. 341; Wilson *v.* M'Laughlin, 107 Mass. 587; Williams *v.* Woods, 16 Md. 220; Commercial Bk. *v.* Norton, 1 Hill, 501; Hills *v.* Ross, 3 Dall. 331. And see infra, § 545.

[3] Bromley *v.* Coxwell, 2 Bos. & P. 438; Rapson *v.* Cubitt, 9 M. & W. 710; Welfare *v.* R. R. 4 Q. B. 698; Overton *v.* Freeman, 11 C. B. 867; Cuthbertson *v.* Parsons, 12 C. B. 304; Readle *v.* R. R. 4 Exc. 243; Hillard *v.* Richardson, 3 Gray, 349; Foster *v.* Preston, 8 Cowen, 198; Barry *v.* St. Louis, 17 Mo. 121; Brown *v.* Lent, 20 Vt. 529; Forsyth *v.* Hooper, 11 Allen, 419; Kelly *v.* Mayor, 11 N. Y. 432; Pfau *v.* Williamson, 63 Ill. 16; Taber *v.* Perrott, 2 Gall. 565; Miller *v.* Meeh. Bk. 30 Md. 392; McCants *v.* Wells, 3 S. C. 569; 4 S. C. 381. Infra, § 537–8, 601.

[4] Buckland *v.* Conway, 16 Mass. 366. See Harrold *v.* Gillespie, 7 Humph. 59; Wilson *v.* Smith, 3 How. U. S. 763; Hobbs *v.* Duff, 43 Cal. 485; Watson *v.* Muirhead, 57 Penn. St. 247; Godefroy *v.* Dalton, 6 Bing. 468. Infra, § 601.

negligence of his clerks, who are his servants,[1] but not for that of his associates.[2] A primary agent, also, may have occasion to act through brokers; and if so, his duty is completed if he select a broker who is competent and reliable; and he is not liable for the broker's negligence.[3] Of course the primary agent may make himself liable, by contract for the conduct of the ancillary agent.[4] And wherever the primary agent is made to pay a third party for the negligence of the ancillary agent, then the primary agent may recover from the ancillary agent the amount.[5] It is also to be remembered that the primary agent, though not liable for the negligences of ancillary agents, is liable for lack of due diligence in choosing them, and in informing them of what their duties consist.[6]

§ 278. *Agent's employees not liable to principal.* — It has just been noticed that an ancillary agent may become directly liable to the principal.[7] It is otherwise, however, with an employee under the immediate control of the agent. Such servant is liable to his own master, but not to his master's principal. Thus where the plaintiff employed builders to construct a dwelling, who employed the defendants, plumbers, to fit the house with waterworks, and the plumbing was negligently done, and the building and furniture injured in consequence, it was ruled that there was no privity between the parties to the suit, and that the defendants were liable only to their employers.[8]

§ 279. *Agent liable for negligent custody of money or goods.* — An agent is bound to apply to the custody of his principal's money or goods that care which is usual with good business men under the circumstances. If, for instance, there is a respon-

[1] Floyd *v.* Nangle, 3 Atk. 568; Simmons *v.* Rose, 31 Beav. 11; Whitney *v.* Ex. Co. 104 Mass. 152; Bradstreet *v.* Everson, 72 Penn. St. 124; Lewis *v.* Peck, 10 Ala. 142; Wilkinson *v.* Griswold, 12 Smedes & M. 669, and other cases cited. Infra, § 601, 604.

[2] Godefroy *v.* Dalton, 6 Bing. 468; Watson *v.* Muirhead, 57 Penn. St. 247. Infra, § 603.

[3] Darling *v.* Stanwood, 14 Allen, 504. See also generally Goswell *v.* Dunkley, 1 Strange, 680; Branby *v.* Coxwell, 2 Bos. & P. 438; Merrick *v.* Barnard, 1 Wash. C. C. 479.

[4] Taber *v.* Perrott, 2 Gall. 565; Clark *v.* Bank, 17 Penn. St. 322. And see fully infra, § 487, 501, 543.

[5] Mainwaring *v.* Brandon, 8 Taunt. 202; Farebrother *v.* Ansley, 1 Camp. 343. Infra, § 306.

[6] See cases cited above, and particularly Miller *v.* Proctor, 20 Oh. St. 442. As to public officers, sec § 488, 547.

[7] See supra, § 276; infra, § 308.

[8] Bissell *v.* Roden, 34 Miss. 63. See Loomis *v.* Simpson, 13 Iowa, 532.

sible bank in the place, where deposits are usually made, then the agent must deposit in such bank; and if such bank, through circumstances involving no negligence on the part of the agent, fail, the agent is not liable.[1] But the deposit should be made in the principal's name; and where such is the business usage, the agent who should, in conscious violation of his duty in this respect, deposit the money in his own name, becomes responsible for the loss in case the bank fail.[2] But where there is no usage calling for separate accounts, the agent who *bonâ fide* places the trust funds in his own name will be relieved, if otherwise exercising due diligence.[3] In such case, however, he must show that the money thus lost actually belonged to his principal, and the burden is on him to do this in all cases in which he mingled his principal's money with his own.[4] So as to goods, the agent is bound to see that his principal's goods are properly stored, though he is not liable in case of loss through *casus*.[5] In any view, it is the duty of the agent to keep his principal's property separate from his own; and if he mingle the two, so that they cannot be distinguished, the whole is said to be claimable by the principal.[6]

IV. AS TO FORM OF EXECUTING PAPERS.

§ 280. *Transaction must be in principal's name.* — That an agent's contract, in order to bind the principal, must be in the principal's name, is a conclusion which results from the nature of the transaction itself. A contract made by an agent, without reference to the principal, is on its face simply the agent's act. A mere concurrence of intentions of the principal, of the agent, and of the third party, that the contract is to be treated as the principal's, does not make it such, unless this concurrence finds

[1] Wilks *v.* Groom, 3 Drew, 584; Johnston *v.* Newton, 11 Hare, 160; Heckert's appeal, 69 Penn. St. 264; Com. *v.* M'Allister, 4 Casey, 480; *S. C.* 6 Ibid. 536; Bile's appeal, 12 Harris, 337; Yoder's appeal, 9 Wright, 394; M'Ilhenny's appeal, 10 Wright, 347; Hale *v.* Wall, 22 Gratt. 424.

[2] Caffrey *v.* Darby, 6 Ves. 496; Wren *v.* Kirton, 11 Ves. 378; Massey *v.* Banner, 1 Jac. & Walk. 245; Fletcher *v.* Walker, 3 Mad. 73; Macdonnell *v.* Harding, 7 Sim. 178; Hammon *v.* Cottle, 6 S. & R. 290; Byrne *v.* Schwing, 6 B. Mon. 199; Cartwell *v.* Allard, 7 Bush, 482; Webster *v.* Pierce, 35 Ill. 159; Norris *v.* Hero, 22 La. An. 605. See supra, § 243.

[3] Hale *v.* Wall, 22 Grat. 424.

[4] Bartlett *v.* Hamilton, 46 Me. 425.

[5] Goswell *v.* Dunkley, 1 Str. 680, and cases cited supra, § 274; infra, § 386.

[6] See Greene *v.* Haskell, 5 R. I. 447; Wren *v.* Kirton, 11 Ves. 377; Paley's Agency, 48.

expression in words or acts. There must be an obligation emanating from the principal and reaching to the third party. A mere intent, on the part of the principal, unless such intent be communicated authoritatively to the third party, cannot bind the principal. By the Roman law this view is emphatically affirmed.[1] The same position finds its place in the common law of most European states.[2] In the modern practice of the Roman law, the course is for the agent to announce the transaction to be for the principal's benefit, and for this to be accepted by the third person dealing with the agent. In this way the intents of three parties unite in the transaction: the principal, who authorizes the agent to do a particular thing; the agent, who does the particular thing in the principal's name; the third person, who agrees to this thing as the principal's act. The contract is therefore essentially trilateral.[3]

§ 281. *Peculiarities in this respect of Roman law.* — By the classical Roman law a person, so far as the form is concerned, may validly contract either in his own name or the name of another. A contract made by me in another's name has precisely the same effect, in respect to myself, as a contract made by me in my own name. It is no matter by what name I call myself: I am equally bound under any title I may assume. New effects, at the same time, proceed from the contract when another person, whose name is employed in the contract, is bound thereby. So far, therefore, as concerns the workings of a contract, that which is *alieno nomine* contains the same incidents as that which is *suo nomine*, with the addition of the liability that may be attached to the person whose name I may use. We cannot therefore say, so argues Thöl in his authoritative work on Commercial Law,[4] that we have first a contract *suo nomine*, and secondly a contract *alieno nomine*, which is not a contract *suo nomine*; but we have first a simple contract *suo nomine*, and secondly a contract *suo nomine* with an enlargement involving another person; which enlargement is the contract *alieno nomine*. The existence and extent of the authorization are, by the classical Roman law, of no moment in respect either to the rights or liability of the agent, or to the rights of the principal, based upon

[1] See authorities discussed in Thöl, Handelsrecht, § 74.

[2] See Thöl, *ut supra*.

[3] Ibid. See discussion supra, § 3–5.

[4] Handelsrecht (1875), § 70.

the contract executed by the agent; the authorization is important only for the purpose of fixing the liability of the principal on the contract. By the modern Roman law the existence and extent of the authorization under which the agent acts are of primary importance in the four several relations which have been just noticed: first, as to the principal's right to sue on the contract; secondly, as to the principal's liability on the contract; thirdly, as to the agent's right to sue on the contract; fourthly, as to the agent's liability on the contract. The authorization is that which defines the relations between the three parties to the contract, *i. e.* between the principal, the agent, and the third person. Undoubtedly we must recognize as established the principle that if I make a contract under the directions and in the name of A., A. alone is bound to fulfil this contract. Hence we must conclude that such contract is the contract of the principal alone. It satisfies, therefore, the interests of the principal, and does not impair the interests of the agent, that so far as concerns the rights conferred by the contract, these rights should be enjoyed by the principal.[1]

§ 282. *Contract must correspond to authorization.* — The contract, to bind the principal, must, to sustain the institorial action in the Roman law, be in furtherance of the object for which the institor or agent was appointed. "Exercitoria . . . . institoria tunc habet locum . . . . quid cum eo ejus rei causa, cui praepositus erit, contractum fuerit."[2] "Non omne . . . . obligat eum . . . . sed ita, si *ejus rei gratia*, cui praepositus est, contractum est, *i. e.* dumtaxat ad id, ad quod eum praeposuit."[3] In other words, the contract must be in execution of the authorization which the institor has either expressly or tacitly received. When the contract is not in pursuance of this power, the principal is not bound.[4] It must be "ex causa cui praepositus fuit." For, "praepositio certam legem dat contrahentibus, — modum egressus (magister) non obligavit exercitorem."[5] When there is an express written authorization given to the institor, this power is to be construed according to the ordinary rules of verbal interpretation. But when there is no such authorization communicated, or when the institor's (agent's) authority is expressed by the circumstances of his office, then the object of this office is to be

[1] Thöl, Handelsrecht, § 70.
[2] § 2. I. quod cum eo. (4.7.)
[3] L. 5, § 11. D. h. t.
[4] See L. 2. C. h. t.
[5] L. 5, § 12. D. h. t. L. 1, § 12. D. de exercit. act.

taken as defining his powers.[1] In what respect the institor can bind the principal, is then to be determined by the ordinary rules of the particular business.

§ 283. *Instrument under seal, to bind principal, must be in principal's name.* —With us, in instruments under seal, which presuppose a peculiar degree of consideration, the signature must be in the principal's name, in order to bind the principal.[2] At common law, a conveyance of his principal's property by the attorney, in his own name, though as the agent of his principal, is void;[3] and an agent releasing in his own name a debt due his principal does not discharge the debt;[4] but wherever the instrument makes the agent the party virtually contracting, though it states him to be agent, if it is signed by him individually, he becomes personally responsible, the words declaring his agency being treated as a mere personal description.[5] Nor can the prin-

[1] L. 2. D. de jurisdictione. (2. 1.) L. 113. L. 147. D. de R. J. (50. 17.)

[2] Combe's case, 9 Co. 76; Frontin *v.* Small, 2 Ld. Raym. 1418; Norton *v.* Herron, Ry. & Moo. 229; Burnham *v.* Williams, 7 Q. B. 103; Harper *v.* Williams, 4 Ad. & E. N. S. 232; Fairlie *v.* Fenton, L. R. 5 Ex. 169; Clarke *v.* Courtney, 5 Peters, 349; Lutz *v.* Linthicum, 8 Peters, 165; Stinchfield *v.* Little, 1 Greenl. 231; Dyer *v.* Burnham, 35 Me. 10; Savage *v.* Rix, 9 N. H. 263; Morse *v.* Green, 13 N. H. 32; Stackpole *v.* Arnold, 11 Mass. 27; Bradlee *v.* Boston Glass Man. 16 Pick. 347; Taber *v.* Cannon, 8 Metc. 456; Bedford Ins. Co. *v.* Covell, 8 Metc. 442; Bank of Am. *v.* Hooper, 5 Gray, 567; Brown *v.* Parker, 7 Allen, 337; Reed *v.* Latham, 40 Connect. 452; Hovey *v.* Magill, 8 Conn. 680; Bogart *v.* De Bussy, 6 Johns. 94; Taft *v.* Brewster, 9 Johns. 54; Minard *v.* Reed, 7 Wend. 68; Pentz *v.* Stanton, 10 Wend. 271; Townsend *v.* Corning, 23 Wend. 435; Squier *v.* Norris, 1 Lans. 282; Hopkins *v.* Mehaffy, 11 S. & R. 126; Hefferman *v.* Addams, 7 Watts, 116; Devinney *v.* Reynolds, 1 W. & S. 328; Daniells *v.* Burnham, 2 La. 243; Key *v.* Parnham, 6 Har. & J. 418; Grubbs *v.* Wiley, 9 Sm. & Mars. 29; Webster *v.* Brown, 2 S. C. 428; Einstein *v.* Holt, 52 Mo. 340. An agreement in the words, "We, the undersigned, a committee appointed by the town of," &c., to finish a basement, "do hereby agree to pay," &c., for finishing such basement, signed and sealed by the individuals composing such committee, with the words "committee for the town," following their names, binds only such individuals and not the town. Fullam *v.* West Brookfield, 9 Allen, 1.

[3] Combe's case, 9 Co. 76; Frontin *v.* Small, 2 Ld. Raym. 1418; *S. C.* 2 Strang. 705; Berkeley *v.* Hardy, 5 B. & Cr. 355; Townsend *v.* Hubbard, 4 Hill N. Y. 351; Bogart *v.* De Bussy, 6 Johns. 94; Stone *v.* Wood, 7 Cowen, 453; Sheldon *v.* Dunlap, 1 Harr. N. J. 245. See infra, § 458, 504.

[4] D'Abridgcourt *v.* Ashley, Moor, 818; Wells *v.* Evans, 20 Wend. 251; *S. C.* 22 Wend. 324.

[5] Appleton *v.* Binks, 5 East, 148; Kennedy *v.* Gouveia, 3 Dow. & Ry. 503; Duvall *v.* Craig, 2 Wheat. 45; White *v.* Skinner, 13 Johns. 307; De-

cipal technically avail himself by suit of an instrument under the agent's hand and seal.[1]

But where the agent has authority to execute a sealed instrument, and does so in his own name as agent, a valuable consideration passing to the principal, all parties intending that the principal should be bound by the instrument and not the agent, the better opinion is that the principal is bound at least in equity to make good his implied promise.[2]

§ 284. *But the fact of agency must appear on the instrument: it is not enough for the agent simply to sign the principal's name.* — It is true that it has been sometimes intimated that it is enough if the agent simply sign the principal's name, without adding any words expressive of the fact that the signing is by an agent;[3] but it has been well argued by a learned Massachusetts judge,[4] that "it is not enough that an attorney in fact has authority, but it must appear, by the instruments themselves, which he executes, that he intends to execute this authority. The instruments should be made by the attorney expressly as such attorney; and the exercise of his delegated authority should be distinctly avowed upon the instruments themselves. Whatever may be the secret intent and purpose of the attorney, or whatever may be his oral declaration or profession at the time, he does not in fact execute the instruments as attorney, and in the exercise of his power as attorney, unless it is so expressed in

ming *v.* Bullitt, 1 Blackf. Ind. 241; Hall *v.* Bainbridge, 1 Mann. & Gr. 42; Hutton *v.* Bullock, L. R. 9 Q. B. 572.

[1] Clarke *v.* Courtenay, 5 Peters, 319; Andrews *v.* Estes, 2 Fairfax, 267; New Eng. Mar. Ins. Co. *v.* De Wolf, 8 Pick. 56; Spencer *v.* Field, 10 Wend. 88; Hopkins *v.* Mehaffy, 11 S. & R. 129; Potts *v.* Rider, 3 Hammond, 71.

[2] Infra, § 458; Story on Agency, § 160, citing Abbott on Shipping, pt. 2, ch. 2, § 5–8; Dubois *v.* Del. Can. Co. 4 Wend. 285; Robbins *v.* Butler, 24 Ill. 387; M'Naughten *v.* Partridge, 1 Ohio, 223; Yerby *v.* Grisby, 8 Leigh, 387; Van Reimsdyk *v.* Kane, 1 Gall. 630; *S. C.* 9 Cranch, 153; Devinney *v.* Reynolds, 1 Watts & Serg. 328; Robbins *v.* Butler, 24 Ill. 387; Butler *v.* Kaulbach, 8 Kan. 668. But where an agent undertakes to contract on behalf of an individual or corporation, and contracts in a manner which is not legally binding upon his principal, he will be personally responsible, as he is presumed, in such case, to know the exact extent of his authority. Mann *v.* Richardson, 66 Ill. 481. See infra, § 523; though see Schaak *v.* Anthony, 1 M. & Selw. 573.

[3] Wilkes *v.* Back, 2 East, 142, per Lawrence, J.; Devinney *v.* Reynolds, 1 Watts & S. 328; Hunter *v.* Giddings, 97 Mass. 41; Forsyth *v.* Day, 41 Me. 382.

[4] Fletcher, J., in Wood *v.* Goodridge, 6 Cush. 120.

the instruments. . . . . If such a mode of execution is proper and legal, it seems most remarkable that it is nowhere stated or suggested in any work of authority. The execution of instruments by agents, in this way, would certainly be attended with great difficulties and danger. If the agent might execute instruments in this mode, the principal, if he found his name signed to an instrument, would have no means of knowing by whom it had been signed, or whether he was bound or not bound by such signature ; and other persons might be greatly deceived and defrauded, by relying on such signature as the personal act and signature of the principal, when the event might prove that it was put there by an agent who had mistaken his authority, and consequently that the principal was not bound." It is true that A., acting for B., may, in B.'s presence, and under B.'s direction, sign B.'s name to a paper ; [1] but in this case the person writing is regarded as the mere passive instrument in the principal's hands. Where the deed is executed in the principal's absence, by virtue of a power of attorney, it is proper that the power of attorney should be recited, or in some way the fact expressed that the signature was made by the agent acting for the principal.

§ 285. *Such form a natural expression of agent's intent.* — When a solemn instrument, which presumes deliberation and care, is to be executed, the natural course is for the parties, in carrying out the views which have been just expressed, to use such terms as will show that the principal, who is to be the real contracting party on the one side, is to be accepted as such by the third party with whom the contract is made. In other words, a contract, or bilateral obligation, is to be executed between A. and B. It is not convenient, however, for A. to act personally in the matter, and he empowers C. to appear as his agent. Undoubtedly in informal instruments, as will presently be seen, or in transactions in which C. has an interest of his own, the agency of C. may be more or less conspicuously asserted, and it may be left to circumstances to determine what was the actual intent of the parties. But where a solemn instrument is executed, the presumption is that parties will expressly

[1] King *v.* Longner, 4 B. & Ad. 647; Dunsterville, 4 T. R. 313; Gardner *v.* 1 Nev. & M. 576; Hibblethwaite *v.* Gardner, 5 Cush. 483. M'Morine, 6 Mees. & W. 200; Ball *v.*

declare their intent. And if an agent's intent is that he is not to be bound, but that his principal is, then he will take care that the instrument be not in his own name, but his principal's.

§ 286. *Language to bind principal must be distinct.* — It has just been stated that a sealed instrument, to technically bind an alleged principal, must have on its face the name of the party from whom it emanates. Questions of difficult determination must necessarily arise as to the party whom the instrument thus designates; and it may happen that the language used may be such as to defeat what was the real intent of the parties. "It is not enough," says Parsons, C. J.,[1] "for the attorney, in the form of the conveyance, to declare that he does it as attorney; for he being in the place of the principal, it must be the act and deed of the principal, done and executed by the attorney in his name."

In applying this principle, it has been held that the following instrument was invalid, so far as to bind the alleged principal: "Know all men by these presents, that the New England Silk Co., a corporation, by C. C. their treasurer, &c., do hereby grant, &c. . . . . In witness whereof, I, the said C. C., in behalf of said company, and as their treasurer, do hereto set my hand and seal. C. C., treasurer of New England Silk Co."[2] It was admitted by the court that the fact that the seal was a mere "wafer and a paper" was not in itself an objection. But it was argued that as the signature and seal were declared in the instrument to be the "hand and seal" not of the company but of C. Colt, the treasurer, this excluded the hypothesis of the company being the person bound. So where A., the attorney of P., executed a deed in his own name, signing it opposite the seal, but adding the words "attorney for P.," it was ruled that neither under the Mexican or common law did any interest of P. in the granted premises pass by the deed.[3] But it would be otherwise were the seal of the principal used.[4]

§ 287. *Same rule applies as to party named as vendee.* — So, also, when there is to be a solemn conveyance or grant of prop-

[1] Fowler *v.* Shearer, 7 Mass. 19; S. P. Berkeley *v.* Hardy, 8 Dow. & R. 102.

[2] Brinley *v.* Mann, 2 Cush. 337. See to the same effect, Paice *v.* Walker, L. R. 5 Ex. 173; Norton *v.* Herron, 1 C. & P. 648; Morrison *v.* Bowman, 29 Cal. 337; Freese *v.* Crary, 29 Ind. 524; Sencerbox *v.* M'Grade, 6 Minn. 484; and see infra, § 458–9, 499, 728.

[3] Echols *v.* Cheney, 28 Cal. 157.

[4] Means *v.* Swormstedt, 32 Ind. 87.

erty, through the medium of an agent, the principal must be stated as the vendee or covenantee, and not the agent.[1]

§ 288. *Necessity of exactness as to parties based on importance of preserving chain of title.* — Nor is the strictness with which this principle is applied attributable merely to the tendency of the courts to insist upon exact forms of conveyancing. It is true that on this ground alone the decisions we have just noticed could be sustained. For, as has been well argued, a party cannot pass out of himself that which he does not have; and a party who does not execute a deed cannot pass out of himself that which he does have. "If the attorney should make them" (leases) "in his own name, though he added also, by virtue of the letter of attorney to him made for that purpose, yet such leases seem to be void; because the indenture, being made in his own name, must pass the interest and lease from him, or it can pass from nobody. It cannot pass from the master immediately, because he is no party; and it cannot pass from the attorney at all, because he has nothing in the lands. And then his adding, *by virtue* of the *letter of attorney*, will not help it; because the letter of attorney made over no estate or interest in the land to him, and consequently he cannot, by virtue thereof, convey over any to another. Neither can such interest pass from the master immediately, or through the attorney; for then the same indenture must have this strange effect at one and the same instant: to draw out the interest from the master to the attorney, and from the attorney to the lessee, which certainly it cannot do."[2] This reasoning may appear dry and technical, but such a criticism ceases to be applicable when we remember that it is only through the application of such guards that a paper title to property can be safely established, and that without such paper title real estate, at least, under our registry system, would lose its negotiability. How could a title be traced unless the deed show a direct passage of the property from the vendor to the vendee? Against whom should searches, for the purpose of the discovery of incumbrances, be directed? Who would be registered as the grantor in the deed? Whose interest would be bound by judgment? How could third parties go behind the record, and claim a clean title from a vendor who was not the grantor?

[1] Story's Agency, § 151, citing Clarke *v.* Courtney, 5 Peters, 319, 349, 350.

[2] Gilbert, C. B., in Bac. Abridg. Leases, I. § 10.

How could subsequent *bonâ fide* sales by the grantor be defeated by the allegation that the grantor was not the vendor? Inquiries such as these show that so far as concerns innocent third parties, it is impossible, with respect to solemn instruments which are registered as public muniments of title, to treat the agent who conveys as the same person as the principal who does not convey. And yet, as we have seen, a court of equity will regard such agent, so far as concerns persons having notice of the agency, as the agent of the owner, and will compel the owner, if privy to the transaction, and reaping its benefits, to make good the sale.[1]

§ 289. *Question is one of notice to third parties.* — Indeed, in construing deeds and other instruments which are placed on record, and which from their nature depend upon their own terms for construction, the question is, what these deeds actually say. It is not necessary that any particular phraseology should be used to designate agency, nor is such phraseology prescribed by the law. If the agent or attorney shows that he signs as agent or attorney, this is enough. The more exact course is to sign the principal's name, and to add "By his agent, A. B." But it has been held sufficient to say "For A. B." (the principal) "C. D." (the agent.)[2]

§ 290. *In negotiable paper the same strictness of construction is applicable.* — Negotiable paper, which passes from hand to hand, — and as to which parties dealing are entitled to judge, from the terms of the instrument itself, who are the persons whom it binds, — is to be construed with a closeness similar to that applied to deeds which are muniments of title. If a note has attached to it the name of A. B., then persons taking it on the faith of A. B.'s name cannot afterwards be prejudiced by extrinsic evidence that A. B. was not principal, but agent.[3] Hence, so far

[1] As authorities to last point, see Van Reimsdyck *v.* Kane, 1 Gall. 630; *S. C.* 9 Cranch, 153; Devinney *v.* Reynolds, 1 Watts & Serg. 328; M'Naughton *v.* Partridge, 10 Ohio, 223; Yerby *v.* Grigsby, 9 Leigh, 387; Taylor *v.* Guest, 45 How. (N. Y.) Pr. 277; Butler *v.* Kaulbach, 8 Kans. 568; Tucker *v.* Woolsey, 64 Barb. 142, 6 Lans. 482; Robbins *v.* Butler, 24 Ill. 387.

[2] Infra, § 458, 504, 505. Story's Agency, § 153, citing Mussy *v.* Scott, 7 Cush. 216; Hunter *v.* Miller, 6 B. Monr. 612; Wilburn *v.* Larkin, 3 Blackf. 55; Martin *v.* Almond, 25 Mo. 313; Deming *v.* Bullitt, 1 Blackf. Ind. 241. And see also Fairlie *v.* Fenton, L. R. 5 Ex. 169; Norton *v.* Herring, 1 C. & P. 648; Bowen *v.* Morris, 2 Taunt. 374; Lander *v.* Castro, 43 Cal. 497; Long *v.* Coburn, 11 Mass. 97.

[3] Lefevre *v.* Lloyd, 5 Taunt. 749; Beckham *v.* Drake, 9 M. & W. 79;

as concerns persons taking such paper, before maturity, for a valuable consideration, we must sweep aside all questions as to whether those signing the paper occupy other relations than those which the paper states. The courts must determine the question of liability by an examination of the terms used, taking them in their ordinary commercial sense.[1] Hence for parties signing a note to say in the note that they sign on behalf of a corporation, of which they are directors, relieves them but binds the corporation;[2] but it is otherwise when they sign as directors or officers, not stating that they sign for the corporation, as in such case the title will be treated as mere description.[3] It should be remembered, at the same time, that though the principal is not directly liable on the note, yet the party advancing money on the note, which money goes to the principal, may maintain an action for money paid, &c. against the principal.[4]

§ 291. The following signatures have been held to bind A. B., the principal: —

"For A. B., C. D." (the agent), though A. B. was a corporation, and the note began, "I promise," &c.[5]; "Pro A. B., C. D."[6]; "C. D., agent for A. B."[7]

Siffkin *v.* Walker, 2 Camp. 308; Sowerby *v.* Butcher, 2 C. & M. 368; Leadbitter *v.* Farrer, 5 M. & S. 345; Eaton *v.* Bell, 5 B. & Ald. 34; Bradlee *v.* Glass Man. 16 Pick. 347; Stackpole *v.* Arnold, 11 Mass. 27; Bank of N. A. *v.* Hooper, 5 Gray, 567; Pentz *v.* Stanton, 10 Wend. 276; Anderson *v.* Shoup, 17 Oh. N. S. 128; Lindo *v.* Castro, 43 Cal. 497. See infra, § 504.

[1] Kennedy *v.* Gouveia, 2 Dow. & R. 503; Higgins *v.* Senior, 8 Mees. & W. 834; Hastings *v.* Lovering, 2 Pick. 214; Bank of N. A. *v.* Hooper, 5 Gray, 567; Taber *v.* Cannon, 8 Metc. 460; Williams *v.* Robbins, 16 Gray, 77; Hall *v.* Bradbury, 40 Conn. 32; Dusenberry *v.* Ellis, 3 Johns. Cas. 70.

[2] Lindus *v.* Melrose, 3 H. & N. 176.

[3] Dutton *v.* Marsh, L. R. 6 Q. B. 361; Brinley *v.* Mann, 2 Cush. 337.

[4] Infra, § 458. Allen *v.* Coit, 6 Hill, 318; Rogers *v.* Coit, 6 Hill, 322. See Jenkins *v.* Hutchinson, 13 Q. B. 744; Simons *v.* Patchett, 7 E. & B. 586; Collen *v.* Wright, 8 E. & B. 647.

[5] Emerson *v.* Prov. Hat Co. 12 Mass. 237. See for the converse, Rice *v.* Grove, 22 Pick. 158.

[6] Long *v.* Coburn, 11 Mass. 97.

[7] Ballou *v.* Talbot, 16 Mass. 461; Roberts *v.* Bulton, 14 Vt. 195; Campbell *v.* Baker, 2 Watts, 83; Hovey *v.* Magill, 2 Conn. 680; though see De Witt *v.* Walton, 5 Selden, 571; and in Bradlee *v.* Glass Man. 16 Pick. 347, it was held that for the parties to sign their own names, without terms designating agency, bound them, though in the note they averred that the payment was to be "for the" alleged principal.

§ 292. Yet when we scrutinize the cases of notes signed by officers of a corporation, these cases melt into each other by shades which it is not easy to discriminate. We may, however, generally say that a person who defines himself in a negotiable note or bill as treasurer or agent of a designated corporation, and signs the paper as such, binds not himself but the corporation.[1] But it is otherwise where the party signs simply as agent,[2] or where there is no indication that the person signing acts on a principal's behalf;[3] or where the alleged principal cannot be made liable on the note, as where A. B. signs as "executor of C. D.," he having no power as executor to issue paper;[4] or "as trustee of C. D.;"[5] in all which cases the agent is held liable.

§ 293. The mere attaching of a title to the signer's name, such as "treasurer," or "director," does not itself shift the liability from the signer to the company of which he is the officer, unless in the body of the instrument he states that he signs for the company, or unless it should appear that he was known by the parties to be acting as agent for the company. The title will be treated as a mere description of the party signing.[6] But it has been held to be otherwise when it is shown that the party signing has been in constant habit of signing notes in this way, which have been regularly paid.[7]

§ 294. A woman signing her own name to a note cannot, it is ruled in New York, bind her husband by her signature,[8] al-

[1] Lindus *v.* Melrose, 3 H. & N. 176; Bowen *v.* Morris, 2 Taunt. 374; Mann *v.* Chandler, 9 Mass. 335; Fiske *v.* Eldredge, 12 Gray, 474; Mott *v.* Hicks, 1 Cowen, 513; Brockway *v.* Allen, 17 Wend. 40; Lazarus *v.* Shearer, 2 Ala. N. S. 718.

[2] Williams *v.* Robbins, 16 Gray, 77; Dubois *v.* Canal Co. 4 Wend. 285; Bickford *v.* Bank, 42 Ill. 238; Scott *v.* Baker, 3 W. Va. 285; Rand *v.* Hale, 3 W. Va. 495. Infra, § 449, 504.

[3] Dutton *v.* Marsh, L. R. 6 Q. B. 361; Haverhill Ins. Co. *v.* Newhall, 1 Allen, 130; Barker *v.* Ins. Co. 3 Wend. 94. Infra, § 449, 504.

[4] Childs *v.* Monins, 2 Br. & B. 460; Forster *v.* Fuller, 6 Mass. 58; Tassey *v.* Church, 4 W. & S. 346.

[5] Hill *v.* Bannister, 8 Cow. 31.

[6] Downman *v.* Jones, 4 Q. B. 235; Childs *v.* Monins, 2 Brod. & B. 460; Dutton *v.* Marsh, L. R. 6 Q. B. 361; Moss *v.* Livingston, 4 Comst. 208; Rossiter *v.* Rossiter, 8 Wend. 494; Brinley *v.* Mann, 2 Cush. 337; Taft *v.* Brewster, 9 Johns. R. 334; Pentz *v.* Stanton, 10 Wend. 277; Stone *v.* Wood, 7 Cow. 453; Hills *v.* Bannister, 8 Cow. 31; Forster *v.* Fuller, 6 Mass. 58; Barker *v.* Ins. Co. 3 Wend. 94; Collins *v.* Ins. Co. 17 Ohio St. 215; Scott *v.* Baker, 3 W. Va. 285; Rand *v.* Hale, 3 W. Va. 285. Infra, § 490, 504.

[7] Hovey *v.* Magill, 2 Conn. 680; though see Williams *v.* Robbins, 16 Gray, 77. Infra, § 499, 728.

[8] Minard *v.* Reed, 7 Wend. 68.

though in England, in a case before the common pleas,[1] where a bill of exchange, addressed to the defendant by the name of "William B.," was accepted by his wife, by writing across it her own name, "Mary B.," and there was no evidence of any express authority in the wife so to accept the bill; but, on its being presented to the husband, after it had become due, he said he knew all about it; that the bill was a millinery bill (for which the husband appeared to be liable), and that he would pay it very shortly; it was held, that he was liable as acceptor.

§ 295. *Between persons cognizant of the fact, an agent, liable to strangers as principal, on negotiable paper, may set up his non-liability.* — It is true that there have been judicial intimations that an agent who signs himself as principal may be treated as principal even by those for whom he is really agent.[2] But this is an error. To those who are privy to the fact that the agent signs the note in a merely representative character, he is liable as agent only in case of misrepresentation or deceit; and to his principal, or those standing in the shoes of his principal, he is not liable at all.[3] Thus, where A. was B.'s agent at Malta, for the purpose of buying and forwarding to B., in England, bills on England, on account of money received by A. as B.'s agent; and where A. bought bills in Malta, in the course of his agency, and indorsed them without reservation to B., it was held, by the English privy council, that A. was not liable to B. on the dishonor of the bills.[4] So, in a well argued case in Pennsylvania, it was ruled that an agent does not, by indorsing to his principal a note given by the vendee of his principal's goods, become, by the mere fact of indorsement, liable to his principal on the note.[5]

[1] Lindus *v.* Bradwell, 5 C. B. 583.

[2] See Thomas *v.* Bishop, 2 Str. 955; *S. C.* Cas. temp. Hard. 1; Goupy *v.* Harden, 7 Taunt. 159.

[3] Kidson *v.* Dilworth, 5 Price, 564; Dowman *v.* Jones, 7 Q. B. 103; Castrique *v.* Buttigieg, 10 Moore P. C. 94; Mott *v.* Hicks, 1 Cowen, 513; Sharp *v.* Emmett, 5 Whart. 288; Miles *v.* O'Hara, 1 Serg. & R. 32; Lewis *v.* Brehme, 33 Md. 412; Milligan *v.* Lyle, 24 La. An. 144.

[4] Castrique *v.* Buttigieg, 10 Moore P. C. 94.

[5] Sharp *v.* Emmett, 5 Whart. 288. A person who has been acting as agent for another cannot be held personally liable for a draft which he has given in favor of a third person, if the consideration for which the draft was given enured to the benefit of his principal; when the payee of the draft knew at the time he took it that the drawer was only acting as agent and

§ 296. *In construing informal writings an agent's signature may be shown to represent the principal.* — Heretofore we have been discussing either solemn instruments, capable of registry as muniments of title, or negotiable bills, as to both of which classes of papers third parties are entitled to judge simply from the words used. We now approach writings which are virtually short-hand memoranda of bargains, as to which much greater latitude of interpretation is allowed, and as to which it is admissible to prove that the person whose signature is attached is not principal but is merely agent, duly authorized to contract.[1] Nor do third parties dealing with such instruments occupy usually a position stronger than the primary parties. A person taking a mere memorandum of a bargain, takes a paper which he knows must be supplemented and explained by parol proof; and the same rule applies to business non-negotiable writings, which on themselves convey such intimations as to agencies as should put third parties on inquiry.[2] Thus a written contract for the building of a meeting-house, signed by the defendants as "the committee" of a religious society, does not, agency being shown, bind personally the committee.[3] So a notice to quit, given by a general agent for a landlord, may be signed by the agent; it being known to the

the draft showed on its face that it was to be charged not to the drawer but to the account of the principal. Milligan *v.* Lyle, 24 La. Ann. 144; Gerber *v.* Stuart, 1 Mon. T. 172.

[1] Spittle *v.* Lavender, 2 Br. & B. 452; Fairlie *v.* Fenton, L. R. 5 Ex. 169; Bowen *v.* Morris, 2 Taunt. 374; Deslandes *v.* Gregory, 2 El. & El. 602; Higgins *v.* Senior, 8 M. & W. 834; Trueman *v.* Loder, 11 A. & E. 539; Beckman *v.* Drake, 9 M. & W. 79; 2 H. L. Cas. 579; New Eng. Ins. Co. *v.* De Wolf, 8 Pick. 56; Rice *v.* Gove, 22 Pick. 158; Southard *v.* Sturtevant, 109 Mass. 390; Sturdivant *v.* Hull, 59 Me. 172; Bell *v.* Bruen, 17 Peters, 161; *S. C.* 1 Howard, 169; Olcutt *v.* R. R. 27 N. Y. 559; Marny *v.* Beckman Co. 9 Paige, 188; Platt *v.* Cathell, 3 Denio, 604; Townsend *v.* Hubbard, 4 Hill, 351; Taylor *v.* Guest, 45 How. N. Y. 277; Haile *v.* Peirce, 32 Md. 327; Butler *v.* Kaulbach, 8 Kans. 668; Wolfley *v.* Rising, 12 Kans. 535; Newman *v.* Sylvester, 42 Ind. 406. See infra, § 492, 684, 729. An order drawn upon E., treasurer of the N. & N. W. R. R. Co., with a direction "to charge to February estimates," was accepted by his writing upon it, "Accepted, payable on return of March estimates, E., treas." Held, that E. was not personally liable. Amisson *v.* Ewing, 2 Cold. (Tenn.) 366.

[2] See Deslandes *v.* Gregory, 2 El. & El. 602; Huntington *v.* Knox, 7 Cush. 371; Higgins *v.* Senior, 8 Mees. & W. 834; Evans *v.* Wells, 22 Wend. 325; Hopkins *v.* Mehaffy, 11 Serg. & R. 129. See infra, § 492, 496, 788.

[3] Stanton *v.* Camp. 4 Barbour, 274.

tenant that for the purpose the signature is meant as that of the landlord.[1]

§ 297. *Duty of agent is to show that it was not intended to bind himself personally.* — A sale note was as follows: —

"Sold A. 200 quarters wheat, as agents for J. S. & Co., of Dantzig," &c., (signed without any qualification) "W. & A."

On the construction of this contract the court of exchequer held the agents personally liable, on the ground that where a person signs a contract in his own name without qualification, he is *primâ facie* to be deemed as contracting personally; and in order to prevent this liability on the contract from attaching, it must be apparent from the other portions of the instrument that he did not intend to bind himself; and they held that to show he had no such intention to bind himself, the words, "as agents for J. S. & Co." were not sufficient.[2] In another case decided by the same judges the sale note ran: —

"I have this day sold you on account of J. T. 100 bales of cotton, (signed) E. F., broker."

It was held that the writer's description of himself, not as agent, but as broker, — a person who is little more than a negotiator, — excluded the idea of personal liability.[3] If the agent

[1] Jones *v.* Phipps, L. R. 3 Q. B. 567.

The reference to the principal, says a leading German authority, may be expressed in varying terms. The party acting may hold himself forth as "Agent," or "Factor," or "commissary," or "institor;" but however this may be there must be enough to show that not he but the principal is to be bound by the act. The announcement of agency commonly proceeds from the agent. There are cases, however, in which the principal makes the declaration, and cases in which it is made by principal and agent concurrently. Some such declaration, however, must be made so as to bring the mind of the principal in contact with that of the contracting third party. The mere existence of an authorization by principal of agent is not sufficient, even though such authorization be known by the third party. Nor is the case altered by the circumstance that the agent omits to exhibit his powers for the purpose of defrauding the third party, however much the agent may thereby make himself personally liable to such third party. Nor is liability attached to the principal by the fact that the parties acted on the supposition that agency existed, if no words or acts established a contractual relation between the principal and the third party. Thöl, Handelsrecht (1875), p. 203.

[2] Paice *v.* Walker, L. R. 5 Ex. 173. See, also, M'Williams *v.* Willis, 1 Wash. 199; Forster *v.* Fuller, 6 Mass. 58; Whiting *v.* Dewey, 15 Pick. 428; Meyer *v.* Barker, 6 Binn. 228; Harper *v.* Hampton, 1 Harris & J. 622; Sencerbox *v.* M'Grade, 6 Minn. 494. See infra, § 505.

[3] Fairlie *v.* Fenton, L. R. 5 Ex.

act without authority, or exceed his authority, he will, as will be seen hereafter, be personally bound.[1]

§ 298. *On non-negotiable instruments, where the agent is primâ facie the contracting party, unless it should appear that the agent is the person exclusively privileged or bound, the principal can sue or be sued; and in the latter case the other contracting party can sue either principal or agent.* — With regard to the first of these propositions, it is plain that where by a non-negotiable commercial instrument certain rights are nominally given to an agent, the principal, whether specified or unspecified, may sue for such rights.[2] Of this we have an illustration in a Massachusetts case,[3] where on a written order to deliver goods "to D. A. Neale, President of the Eastern Railroad Company," such order being accepted by the drawee, the company, being the party really interested, could maintain a suit in their own name. On the other hand, on such an informal instrument, the principal can be sued, unless it should appear that exclusive credit was given to the agent.[4] On such an instrument it is competent for the plaintiff to show that one or both of the contracting parties were agents

169. See Norton *v.* Herron, 1 C. & P. 648; Wake *v.* Harrop, 30 L. J. Ex. 173; 31 L. J. Ex. 451; Mahoney *v.* Kekule, 23 L. J. C. P. 54; Bowen *v.* Morris, 2 Taunt. 374. See infra, § 727.

[1] See infra, § 524. And see Polhill *v.* Walter, 3 B. & Ald. 114; Hampton *v.* Specknagle, 9 Serg. & R. 212; Meek *v.* Smith, 7 Wend. 315; Clark *v.* Foster, 8 Vt. 98; Underhill *v.* Gibson, 2 N. H. 352; Grafton Bk. *v.* Flanders, 4 N. H. 239; Wilson *v.* Barthrop, 2 Mees. & W. 363; Long *v.* Colburn, 11 Mass. 97; Ballou *v.* Talbot, 16 Mass. 461; Palmer *v.* Stephens, 1 Denio, 472; Deming *v.* Bullitt, 1 Blackf. 241; Keener *v.* Harrod, 2 Ind. 63; Lazarus *v.* Shearer, 2 Ala. 718.

[2] Beckham *v.* Drake, 9 Mees. & W. 79; Sims *v.* Bond, 5 B. & Ald. 393; 2 Nev. & M. 614; Bowen *v.* Morris, 2 Taunt. 154; Piggott *v.* Thompson, 3 Bos. & P. 147; Gilmore *v.* Pope, 5 Mass. 491; Huntington *v.* Knox, 7 Cush. 374; Slawson *v.* Loring, 5 Allen, 340; Town of Garland *v.* Reynolds, 5 Appleton, 45; Tainter *v.* Prendergrast, 3 Hill, 72; Merrick's Est. 5 Watts & S. 9; Vermont Cent. R. R. *v.* Clayes, 21 Vt. 30; Potter *v.* Yale College, 8 Conn. 60. See fully infra, § 398, 409.

[3] Eastern R. R. *v.* Benedict, 5 Gray, 561.

[4] Higgins *v.* Senior, 8 Mees. & W. 834; Jones *v.* Littledale, 6 Ad. & El. 486; Thompson *v.* Davenport, 9 B. & C. 78; 2 Smith's Lead. Cas. 309; Fowler *v.* Hollins, L. R. 7 Q. B. 616; infra, § 730; Hutton *v.* Bullock, L. R. 9 Q. B. 572; Clarke *v.* Van Reimsdyk, 9 Cranch, 153; Ford *v.* Williams, 21 How. 288; Tucker *v.* Woolsey, 64 Barb. 142; *S. C.* 6 Lans. 482; Coleman *v.* Nat. Bk. 53 N. Y. 388; Commercial Bk. *v.* French, 21 Pick. 486; Hopkins *v.* Lacouture, 4 La. 64. See fully infra, § 458.

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 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.*" "The true rule, it is submitted, is, that the parol evidence is admissible for the purpose of introducing a new party, but never for that of discharging an apparent party to the contract."[1] What constitutes an election to bind exclusively one of the two parties thus severally liable will be in future discussed.[2]

V. AS TO ACCURACY IN ACCOUNTS.

§ 299. *Agent bound to keep exact accounts.* — The agent[3] is bound to debit or charge himself in the account with all money and other things which have come into his hands in his agency;[4] and if by his own fault he has let any of them be lost or perish, he must charge himself in place of these with the sums at which the damage resulting from their loss may be estimated. If by his fault they have become deteriorated to such an extent that they are no longer receivable by the principal, the agent must treat them as if entirely lost by his fault, and charge the damage accordingly, reserving the things to himself on his own account. He must place to his debit not only what he has received, but what ought to have come into his hands, but which he has neg-

[1] Parke, B. in Higgins *v.* Senior, 8 Mees. & W. 834, citing Jones *v.* Littledale, 5 Ad. & El. 486. And so Jones *v.* Ins. Co. 14 Conn. 501; James *v.* Bixby, 11 Mass. 36; Elbinger Act. Ges. *v.* Claye, L. R. 8 Q. B. 317. See supra, § 296; infra, § 492.

[2] See infra, § 469, 788; Calder *v.* Dobell, L. R. 6 C. P. 486; Tiernan *v.* Andrews, 4 Wash. C. C. 567; Paige *v.* Stone, 10 Metc. 160.

[3] See 1 Bell's Com. 7th ed. 532, note.

[4] Smith on Merc. Law, 47–9; Chedworth *v.* Edwards, 8 Ves. 49; Wedderburn *v.* Wedderburn, 2 Keen, 722; 4 Myl. & Cr. 41; Beaumont *v.* Boultbee, 11 Ves. 358; Lupton *v.* White, 15 Ves. 439; Eaton *v.* Welton, 32 N. H. 352; Clark *v.* Moody, 19 Mass. R. 145; Peterson *v.* Poignard, 9 B. Monr. 309; Hart *v.* Ten Eyck, 2 Johns. Ch. 108; Hass *v.* Damon, 9 Iowa, 589; Clarke *v.* Moody, 17 Mass. 145; Kerfoot *v.* Hyman, 52 Ill. 512; Chinn *v.* Chinn, 22 La. An. 599; Riley *v.* State, 22 Tex. 703.

lected to realize, crediting the principal with the depreciation. Pothier insists, also, following out in this respect his theory as to *culpa levissima*, that the agent, in charging the receipt of cash for goods sold, is bound not merely to charge the price received, though that be the price limited by the principal, but must add that which he might have sold for, had he exercised proper prudence; but this imposes an intensity of diligence beyond that prescribed by the Roman standards, and would place an intolerable burden on business.[1] But it is clear in any view that he must charge himself with the fruits and profits which he draws from the principal's property in his hands, or which by the diligence of good business men in his situation he could have drawn. He is bound to charge himself with deteriorations caused by his own want of due diligence. Whether he can set off losses so produced by extraordinary gains accrued to the estate through his exertions has been disputed. On the strict principles of the Roman law it is argued that this cannot be done. But when an agent is appointed to use his discretion in a series of transactions, and when in some of these his principal gains largely, in others loses, it seems but fair that the gains, unless he is chargeable with fraud or constructive fraud, should be set off against the losses, supposing that on the whole line of transactions the principal has not been the loser by the agent's acts.

§ 300. We have an illustration of this in an English case,[2] where the evidence was that a factor slightly exceeded his limited price in the purchase of hemp, and at the same time made a greater saving in the freight by contracting at the time he did, instead of waiting for a fall in hemp, and where Lord Hardwicke held that as the price of freight was rising more than the price of hemp was falling, the loss on the latter might be neutralized by the gains on the former.

§ 301. *Presumption arising from failure to keep accounts.*— No matter how innocent may be the failure to keep accounts, carelessness in this respect is imputed as negligence. *Imperitia culpae adnumeratur.* A person undertaking to act as agent must show the skill in accounting customary in agencies of the class in question. It is true he will not be thus precluded from proving claims against the principal. If he can substanti-

[1] See Whart. on Neg. § 65.

[2] Cornwall *v.* Wilson, 1 Ves. Jun. 509.

ate such claims *aliunde*, he may do so, though such proof will be severely scrutinized. But so far as concerns commissions, his failure to keep accounts is generally fatal. For as is said by Lord Eldon, a man standing in a relation imposing a duty to keep regular accounts cannot be permitted to make a demand for work and labor in that character, of which he has kept no account; and so a receiver who does not pass his accounts regularly is not allowed any poundage.[1]

§ 302. *Principal must be advised of emergencies of agency.* — So it is the duty of the agent to advise the principal of any circumstances which may require the principal's attention; and the agent is liable for any losses which may accrue to the principal from neglect in this respect.[2] Eminently is this the case, as is elsewhere seen,[3] with regard to parties having charge of negotiable paper. "In re mandata non pecuniae solum, cuius est certissimum mandati iudicium, verum etiam existimationis periculum est. Nam suae quidem quisque rei moderator atque arbiter non omnia negotia sed pleraque ex proprio animo facit. Aliena vero negotia exacto officio geruntur, nec quidquam in eorum administratione neglectum ac declinatum culpa vacuum est."[4]

§ 303. *Agent omitting to account is liable to suit and interest.* — An agent omitting to render, after reasonable opportunity from time of sale, his account of sales to his principal, is liable to suit without previous demand.[5] If he wilfully retain the money received, after demand, he is liable for interest, even though he made no interest.[6] This is eminently the case when

[1] White *v.* Lady Lincoln, 8 Ves. Jr. 363; Middleditch *v.* Sharland, 5 Ves. Jr. 434; Makepeace *v.* Rogers, 4 De G. J. & S. 649; Willard's Eq. § 104.

[2] Callender *v.* Oelrichs, 5 Bing. N. C. 58; Johnston *v.* Baillie, 1 Bell's Com. 7th ed. 533; Forrestier *v.* Bordman, 1 Story, 43; Harvey *v.* Turner, 4 Rawle, 229; Arrott *v.* Brown, 6 Wharton, 9; Devall *v.* Burbrage, 4 Watts & S. 305; Parkhill *v.* Imlay, 15 Wend. 431; Hooper *v.* Burnett, 26 Missis. 428; Jett *v.* Hempstead, 25 Ark. 462; Crawford *v.* Bank, 13 Martin, 214; Miranda *v.* Bank, 6 Miller La. 740; M'Mahon, *v.* Franklin, 38 Mo. 548; Dodge *v.* Perkins, 9 Pick. 368.

[3] Supra, § 215, 216.

[4] L. 21. C. IV. 35. The agent is not bound to account to the principal until the *time* fixed by the terms of the agency, or a *demand* by the principal. In such a case the commencement of the suit is a sufficient demand. Leake *v.* Sutherland, 25 Ark. 219.

[5] Haas *v.* Damon, 9 Iowa, 589.

[6] Paley's Agency, 49; Dodge *v.* Perkins, 9 Pick. 368; Reid *v.* Glass Fact. 3 Cowen, 393; Williams *v.* Storr, 6 Johns. Ch. 653; Comegys *v.* State, 10 Gill. & J. 175; Leake *v.* Suther-

the agent mixes his principal's money with his own, and uses the fund for purposes of credit or self-support.[1] So if he negligently or wilfully omit to advise his principal as to the receipt of funds of which receipt it was his duty to advise his principal, he becomes liable for interest.[2]

VI. AS TO SURRENDERING TRUST.

§ 304. *Agent must pay over at close of agency.* — By the Roman law, whatever the mandatary receives as the subject matter of the mandate from the mandant must be surrendered to the mandant when the mandate is terminated. "Ex mandato apud eum qui mandatum suscepit nihil remanere oportet, secuti nec damnum pati debet, si exigere faeneratam pecuniam non potuit."[3] Of course this involves a full account of the transaction as complete. "Non ideo minus omnis temporis bonam fidem explorari oportet, quod dominus post annos quinque de provincia reversus, mox rei publicae causa profecturus non acceptis rationibus mandatum instauraverit. Cum igitur ad officium procuratoris pertinuerit quidquid ex prima negotiorum gestorum administratione debuit ad secundam rationem transferre, secundi temporis causa priorem litem suscipiat."[4] "Qui alium defendit, satisdare cogitur: nemo enim alienae litis idoneus defensor sine satisdatione intellegitur."[5] There must be a transfer to the mandant of all assets, debts, or claims belonging to the mandant which the mandatary may have in hand. "Si procuratorem dedero nec instrumenta mihi causae reddat, qua actione mihi teneatur? et Labeo putat mandati eum teneri nec esse probabilem sententiam existimantium ex hac causa agi posse depositi: unius cuiusque enim contractus initium spectandum et causam." . . . . "Si liber homo, cum bona fide serviret, mandaverit Titio ut redimeretur et nummos ex eo peculio dederit, quod ipsum sequi, non apud bonae fidei emptorem relinqui debuit, Titiusque pretio soluto liberum illum manumiserit, mox ingenuus

land, 25 Ark. 219; Clemens *v.* Caldwell, 7 B. Monr. 171; Anderson *v.* State, 2 Kelly, 370; Bedell *v.* Janney, 4 Gilm. 193.

[1] Rogers *v.* Boehm, 2 Esp. Cas. 704; Brown *v.* Ricketts, 4 Johns. Ch. 303; Jacot *v.* Emmett, 11 Paige, 142; Utica Co. *v.* Lynch, 11 Paige, 520; Spear *v.* Tinkham, 2 Barb. Ch. 211. Supra, § 243.

[2] Dodge *v.* Perkins, 9 Pick. 368; Clark *v.* Moody, 17 Mass. 145.

[3] L. 20. D. mand. XVII. 1.

[4] L. 56, § 2. D. mand. XVII. 1.

[5] L. 46. D. de proc. III. 3.

pronuntiatus est, habere eum mandati actionem Iulianus ait adversus eum cui se redimendum mandavit, sed hoc tantum inesse mandati iudicio, ut sibi actiones mandet, quas habet adversus eum a quo comparavit. Plane si eam pecuniam dederit, quae erat ex peculio ad bonae fidei emptorem pertinente, nullae ei, inquit Iulianus, mandari actiones possunt, quia nullas habet, cum ei suos nummos emptor dederit: quinimmo, inquit, ex vendito manebit obligatus, sed et haec actio inutilis est, quia quantum fuerit consecutus, tantum empti iudicio necesse habebit praestare." "Proinde si tibi mandavi, ut hominem emeres, tuque emisti, teneberis mihi, ut restituas. Sed et si dolo emere neglexisti (forte enim pecunia accepta alii cessisti ut emeret) aut si lata culpa (forte si gratia ductus passus es alium emere) teneberis. Sed et si servus quem emisti fugit, si quidem dolo tuo, teneberis, si dolus non intervenit nec culpa, non teneberis nisi ad hoc, ut caveas, si in potestatem tuam pervenerit, te restituturum. Sed et si restituas, et tradere debes. Et si cautum est de evictione vel potes desiderare, ut tibi caveatur, puto sufficere, si mihi hac actione cedas, ut procuratorem me in rem meam facias, nec amplius praestes quam consecuturus sis."[1] "Qui mandatum suscepit, ut pecunias in diem collocaret, isque hoc fecerit, mandati conveniendus est, ut cum dilatione temporis actionibus cedat."[2]

§ 305. With the thing itself is to be rendered all the fruits and accretions it has intermediately received. "Si ex fundo quem mihi emit procurator fructus consecutus est, hos quoque officio iudicis praestare eum oportet."[3] . . . . This includes interest on money whenever the mandatary has himself drawn interest, or has retained the money beyond the time when it should have been repaid, or has been guilty of laches as to investment or other use of the money. "Si procurator meus pecuniam meam habeat, ex mora utique usuras mihi pendet. Sed et si pecuniam meam faenori dedit usurasque consecutus est, consequenter dicemus debere eum praestare quantum cumque emolumentum sensit, sive ei mandavi sive non, quia bonae fidei hoc congruit, ne de alieno lucro sentiat; quod si non exercuit pecuniam, sed ad usus suos convertit, in usuras convenietur, quae legitimo modo in

[1] L. 8, pr. § 5, 10. D. mand. XVII. 1.

[2] L. 43. eod. See also L. 45, pr. eod.

[3] L. 10, § 2. D. mand. XVII. 1. And see L. 10, § 3, 10; and also L. 8, pr. eod. already quoted.

regionibus frequentatur. Denique Papinianus ait etiam si usuras exegerit procurator et in usus suos convertit, usuras eum praestare debere." [1] "Si mandavero procuratori meo, ut Titio pecuniam meam credat sine usuris, isque non sine usuris crediderit, an etiam usuras mihi restituere debeat, videamus. Et Labeo scribit restituere eum oportere, etiamsi hoc mandaverim, ut gratuitam pecuniam daret, quamvis, si periculo suo credidisset, cessaret, inquit Labeo, in usuris actio mandati." [2] The same rules hold good in our own jurisprudence.[3]

VII. AS TO REIMBURSEMENT OF PRINCIPAL FOR DAMAGES SUSTAINED BY LATTER.

§ 306. *Agent liable to reimburse principal for losses.* — An agent is bound to reimburse his principal for any expenses incured by the latter in consequence of the agent's misconduct.[4]

§ 307. *Damages in suit against agent include expenses bonâ fide and prudently incurred in suit against principal.* — It may be the duty of the plaintiff to first proceed against the alleged principal, so as to test the latter's liability. If so, the plaintiff is entitled, with his other damages, to recover from the pretended agent the expenses of such suit, the servant having been notified of its pendency.[5] The subject of contingent or collateral damage is discussed under another head.[6]

VIII. AS TO SUB-AGENT.

§ 308. *Sub-agent who is a servant is bound to the primary agent; otherwise when sub-agent has liberty of action.* — The distinction between an agent and a servant is elsewhere discussed;[7] and it is shown that while a *servant* is subject and bound to his

[1] L. 10, § 3. D. mand. XVII. 1.

[2] L. 10, § 8, eod.

[3] See Makepeace *v.* Rogers, 4 De G. J. & S. 649.

[4] Mazetti *v.* Williams, 1 B. & Ad. 415; Boorman *v.* Brown, 3 Ad. & El. N. S. 511; Wilson *v.* Short, 6 Hare, 366; Mainwaring *v.* Brandon, 8 Taunt. 202; Farebrother *v.* Ansley, 1 Camp. 343; Bell *v.* Cunningham, 3 Peters, 69; Dodge *v.* Tileston, 12 Pick. 328; Hinde *v.* Smith, 6 Lansing, N. S. 464; Arrott *v.* Brown, 6 Whart. 9; Harvey *v.* Turner, 4 Rawle, 223; Gilson *v.* Collins, 66 Ill. 136; Oliver *v.* Johnson, 24 La. An. 460. Supra, § 272 *et seq.*

[5] See Collen *v.* Wright, 7 E. & B. 301; 8 E. & B. 647; Spedding *v.* Nevell, L. R. 4 C. P. 212; Goodwin *v.* Francis, L. R. 5 C. P. 295; Grand Trunk R. R. *v.* Latham, 63 Me. 177.

[6] Infra, § 391.

[7] Supra, § 19, 20; 277-8; infra, § 535-8.

immediate superior, an *agent* is independently liable to third parties for his torts, and, so far as concerns the appointment of associates, is liable only for *culpa in eligendo*. Hence it follows that when an agent appoints a servant, such servant is bound in duty to the agent; when such agent is authorized to appoint an ancillary agent, such second or ancillary agent is bound in duty directly to the common principal.[1]

[1] Supra, § 277; infra, § 348, 571–579.

CHAPTER V.

DUTIES OF PRINCIPAL TO AGENT.

I. Principal must reimburse Agent's Expenses.
- Principal must relieve agent from any burdens assumed by the latter in the agency, § 311.
- Must advance necessary funds, § 312.
- Must repay to agent all his outlays and advances, § 313.
- But not as to needless outlays, § 315.
- Agent may recover from principal payments on latter's behalf, § 316,
- Agent entitled to interest, § 317.
- Losses from agent's misconduct may be set off, § 318.
- Advances for illegal purposes cannot be recovered, § 319.

II. Agent entitled to Compensation for Services.
- "Salary," "honorarium," or "commissions," not "wages," the remuneration of agency, § 321.
- Terms settled by custom if not by contract, § 323.
- Remuneration may be contingent, or dependent on discretion of principal, § 324.
- Before commissions are earned, transactions must be complete, § 325.
- Principal not liable for commissions when sale is without intervention of broker, § 326.
- But principal cannot evade payment of commissions when earned, § 327.
- There must be proof of specific employment of agent, § 330.
- But such proof may be inferential, § 331.
- After authority ends no commissions can be earned, § 332.
- No commissions on illegal transaction, § 334.
- Agent disloyal to trust cannot recover commissions, § 336.
- Agent engaging his whole time to principal cannot recover for his own use compensation from other persons, § 338.
- Agent's negligence to be set off against his claim for commissions, § 339.

III. Agent may obtain Indemnity for Losses.
- Principal must indemnify agent for losses sustained by latter in mandate, § 340.
- But principal not chargeable with *casus* to agent, § 343.
- Nor with collateral damage to agent, § 344.
- Nor when agent's negligence has inflicted counterbalancing injuries on principal, § 345.
- But in such case the negligence should be directly traceable to agent, § 346.
- Master not usually liable to servant for negligent act of fellow servant, nor for such risks of service as servant may be supposed to take on himself, § 347.

IV. Sub-Agents.
- Servant must look to his immediate master for compensation, § 348.
- But otherwise as to ancillary agent, § 349.

I. PRINCIPAL MUST REIMBURSE EXPENSES OF AGENT.

§ 311. *The principal must relieve the agent from any burdens assumed by the agent in the exercise of his agency.* — By the Roman law, where an agent, in exercise of his agency, incurs

any personal liability, the principal is bound to relieve the agent from the burden of such liability, whether or no such liabilities amount at the time to incumbrances on the property of the agent. "Si mandatu meo fundum emeris, utrum cum dederis pretium ageres mecum mandati, an et antequam des, ne necesse habeas res tuas vendere? et recte dicitur in hoc esse mandati actionem, ut suscipiam obligationem, quae adversus te venditori competit: nam et ego tecum agere possum, ut praestes mihi adversus venditorem empti actiones. . . . . Item si, dum negotia mea geris, alicui de creditoribus meis promiseris, et antequam solvas dicendum est te agere posse, ut obligationem suscipiam: aut si nolit creditor obligationem mutare, cavere tibi debeo defensurum te. Si iudicio te sisti promisero nec exhibuero, et antequam praestem mandati agere possum, ut me liberes: vel si pro te reus promittendi factus sim. . . . . Quotiens autem ante solutam pecuniam mandati agi posse diximus, faciendi causa, non dandi tenebitur reus: et est aequum, sicut mandante aliquo actionem nacti cogimur eam praestare iudicio mandati, ita ex eadem causa obligatos habere mandati actionem, ut liberemur."[1] "Est enim earum specierum judicialis quaestio, per quam res expediatur, non absimilis illa, quae frequentissime agitari solet, fideiussor an et prius quam solvat agere possit, ut liberetur. Nec tamen semper exspectandum est, ut solvat aut iudicio accepto condemnetur, si diu in solutione reus cessabit aut certe bona sua dissipabit, praesertim si domi pecuniam fideiussor non habebit, qua numerata creditori mandati actione reum conveniat."[2] If, however, the agency is by its terms limited to the assumption by the agent of a particular liability, then the agent cannot recover from the principal until the liability be closed. "Sed si mandatu meo iudicium suscepisti, manente iudicio sine iusta causa non debes mecum agere, ut transferatur iudicium in me: nondum enim perfecisti mandatum."[3] Of course this principle does not apply where the agent transacts business only in the principal's name, because in this case no personal liability is assumed by the agent. When, however, the agent makes himself personally responsible, then he can require the principal to relieve him of any incumbrances or liabilities.

§ 312. *Principal must usually advance necessary funds.* —

[1] L. 45, pr. § 2, 3, 5. D. h. t.
[2] L. 38, § 1. D. h. t.
[3] L. 45, § 1. D. h. t.

Whenever funds are necessary to enable the mandatary to proceed with a commission he has undertaken, he may, by the Roman law, recover these from his principal; supposing that it be not part of the understanding that these funds should be provided by the agent himself; though by the same law no suit can be brought by him before he undertakes and enters on the work. "Sed si mandavero tibi, ut creditori meo solvas, tuque expromiseris et ex ea causa damnatus sis, humanius est et in hoc casu mandati actionem tibi competere. Quotiens autem ante solutam pecuniam mandati agi posse diximus, faciendi causa, non dandi tenebitur reus: et est aequum, sicut mandante aliquo actionem nacti cogimur eam praestare iudicio mandati, ita ex eadem causa obligatos habere mandati actionem, ut liberemur." [1]

§ 313. *Principal must repay to agent all outlays and advances by the latter for the former, provided that such expenses are under the circumstances just.* — And this is to be judged from the stand-point of the mandatary and not of the mandant. "Idem Labeo ait et verum est reputationes quoque hoc iudicium admittere. Et, sicuti fructus cogitur restituere is qui procurat, ita sumptum, quem in fructus percipiendos fecit, deducere eum oportet: sed et si ad vecturas suas, dum excurrit in praedea, sumptum fecit, puto hos quoque sumptus reputare eum oportere, nisi si salariarius fuit et hoc convenit, ut sumptus de suo faceret ad haec itinera, hoc est de salario. Idem ait, si quid procurator citra mandatum in voluptatem fecit, permittendum ei auferre, quod sine damno domini fiat, nisi rationem sumptus istius dominus admittit." [2] "Impendia mandati exsequendi gratia facta si bona fide facta sunt restitui omnimodo debent, nec ad rem pertinet, quod is qui mandassat potuisset, si ipse negotium gereret, minus impendere." [3] "Sumptus bona fide necessario factos, etsi negotio finem adhibere procurator non potuit, iudicio mandati restitui necesse est." [4]

§ 314. The same rule is established in Anglo-American jurisprudence. "Agents are entitled, besides their commission, to be reimbursed all advances made in the regular course of a legal employment. Such are the incidental charges for duties, warehouse room, &c., and all payments made for the necessary pres-

[1] L. 45, § 4, 5. D. de mand. XVII. 1. And see also L. 12, § 17. D. h. t. where this appears in concrete.

[2] L. 10, § 9, 10. D. mand. XVII. 1.

[3] L. 27, § 4. D. eod.

[4] L. 56, § 4. D. eod.

ervation of property committed to their care." [1] Thus an agent acting for the best, but without orders, may, if such be the usage, in cases of emergency, insure a cargo, so as to bind his principal for the premium.[2] "Where an agent acting faithfully," said Swift, C. J., in an early case in Connecticut,[3] "without fault, in the proper service of his principal, is subjected to expense, he ought to be reimbursed. If sued on a contract made in the course of his agency pursuant to his authority, though the suit be without cause, and he eventually succeeds, the law implies that the principal will indemnify him and refund the expense." [4] Nor is it any objection that such outlay was without benefit to the principal, if it appear that the outlay was at the time judicious.

§ 315. *Agent cannot recover for disbursements made by him needlessly.* — An agent cannot, of course, recover disbursements made by him without cause.[5] As this is expressed by Mr. McLaren,[6] "the agent's disbursements must not only be made *ex causa mandati*, but *inculpabiliter*, *i. e.* that it has not been the agent's fault which has given occasion to the expenditure or loss. Pothier points out that the principles applicable are the same as those which regulate the case of a claim by the cautioner on the

[1] Paley's Agency by Waterman, 108, citing 1 Roll. Ab. 124, pl. 7; Colley *v.* Merrill, 6 Greenl. 50; Ramsay *v.* Gardner, 11 Johns. R. 439; Powell *v.* Newburg, 19 Johns. R. 284; D'Arcy *v.* Lyle, 5 Binn. 450. See also Curtis *v.* Barclay, 5 B. & Cr. 141; Sentance *v.* Hawley, 13 C. B. (N. S.) 458; Giddings *v.* Sears, 103 Mass. 311; Wynkoop *v.* Seal, 64 Penn. St. 361; Means *v.* Adreon, 31 Md. 229; Rosenstock *v.* Tormey, 32 Md. 169; M'Croskey *v.* Mabey, 45 Ga. 327; Bastable *v.* Denegre, 22 La. An. 124. A., desirous of forming a joint stock company, induced certain persons to act as provisional directors thereof, telling them that they should be liable to no expense. At a meeting of such directors a prospectus of the company was laid before them, and their names inserted therein as directors, and a resolution was agreed to by all of them, that the prospectus be advertised. A., applying to advertising agents to advertise the company, was asked by them for his authority, and showed them the prospectus and resolution. *Held*, that an action lay by the advertising agents against one of the directors for services in advertising the company. Maddick *v.* Marshall, 16 C. B. (N. S.) 387.

[2] Wolfe *v.* Hardcastle, 1 B. & P. 323.

[3] Storking *v.* Sage, 1 Conn. 519.

[4] See as to last point, Hawes *v.* Martin, Esp. 162; Del. Ins. Co. *v.* Delaunie, 3 Binn. 295; Frixione *v.* Tagliaferro, 10 E. F. Moore, 675.

[5] L. 52. D. 17. 1; Howard *v.* Tucker, 1 B. & Ad. 712; Wolfe *v.* Horncastle, 1 B. & P. 323; Pickering *v.* Demerrit, 100 Mass. 416; Day *v.* Holmes, 103 Mass. 306.

[6] Bell's Com. 7th ed. 534.

debtor for whom he has paid, as *e. g.* with regard to the omission to propone proper exceptions and defences that the principal might have opposed against the creditor, — the case of a cautioner's recourse on the debtor being, in fact, only a particular case of mandate. Omission by the agent to propone a defence not competent to the principal if *he* had been sued, but personal to the agent himself, will not bar recourse by the agent against the principal." [1] Hence we may hold that if a defence will not benefit the principal, it need not be set up by the agent.[2] But where the principal directs the agent to set up the personal defence and the agent refuses; or where the agent, from personal motives, officiously volunteers a payment which the principal has refused to make, it is said that the agent cannot have recourse to the principal, though the principal might have been personally liable.[3]

§ 316. *Agent may recover from principal payments made on the latter's behalf.* — If an insurance broker, for instance, being exclusively liable for the premium, is credited therefor by the underwriters, he may recover it from the principal.[4] And whereever a creditor satisfies his debt from the agent, the agent may have recourse to the principal for reimbursement.[5]

A broker who purchases for a principal stock or goods which

[1] Poth. Mand. 78 *et seq.*; Scott, 9 July, 1752, Elch. Caut. 24; Watson *v.* Bruce, M. 5964; Huntley *v.* Sanderson, 1 Cr. & Mees. 467. See Simpson *v.* Penton, 2 Cr. & M. 430; Alexander *v.* Vane, 1 M. & W. 511.

[2] See L. 29, § 6. D. 17. 1.

[3] Child *v.* Morley, 8 T. R. 610; Day *v.* Holmes, 103 Mass. 306.

[4] Power *v.* Butcher, 10 B. & Cr. 329; Seymour *v.* Pychlan, 1 B. & Ald. 14.

[5] See Wyatt *v.* Hertford, 2 East, 147; Marsh *v.* Pedder, 4 Camp. 457; Reed *v.* White, 5 Esp. 122; Cheever *v.* Sweet, 15 Johns. 276; Muldon *v.* Whitlock, 1 Cow. 290; Brown *v.* Tel. Co. 30 Md. 39. "Where merchants here gave a written engagement to their agents at the Havana, to save them harmless from all costs, damages, and expenses which might arise in consequence of any lawsuit which then was or might be brought against them for the recovery of freight or average on the cargo of a certain ship, it was held that the agents were entitled to recover for money which they were obliged to pay in consequence of legal proceedings on an award made previous to obtaining the written engagement. Hill *v.* Packard, 5 Wend. 375. See also Rogers *v.* Kneeland, 10 Wend. 219; *S. C.* in error, 13 Wend. 114. In Pennsylvania, see Tiernan *v.* Andrews, 4 Wash. C. C. R. 564, and Elliott *v.* Walker, 1 Rawle, 126." Sedgwick on Damages, 420, 6th edition.

which he refuses to take, can recover from the principal the price paid.[1]

§ 317. *Agent entitled to interest on advances.* — By the Roman law the mandatary is entitled to receive interest from the mandant for his disbursements for the mandant. "Nec tantum id quod impendi, verum usuras quoque consequar. Usuras autem non tantum ex mora esse admittendas, verum iudicem aestimare debere, si exegit a debitore suo quis et solvit, cum uberrimas usuras consequeretur, aequissimum enim erit rationem ejus rei haberi: aut si ipse mutuatus gravibus usuris solvit."[2] So where the mandatary has to borrow money on his principal's account, he is entitled to receive from his principal the interest he has been obliged to pay for the loan; if he has to draw in his own funds which were bearing interest, he is to be reimbursed the interest he has thereby lost; if he applies funds he has at hand, which he could otherwise have invested so as to have produced interest, he is entitled to recover the interest such funds could have made according to the current rates. This is sustained by the opinion just cited, and may be inferred from the following: "Non tantum sortem verum etiam usuras ex pecunia aliena perceptas negotiorum gestorum iudicio praestabimus, vel etiam quas percipere potuimus. Contra quoque usuras, quas praestavimus *vel quas ex nostra pecunia percipere potuimus quam in aliena negotia impendimus*, servabimus negotiorum gestorum judicio."[3] These views obtain in our own jurisprudence.

[1] Marland *v.* Stanwood, 101 Mass. 470; Giddings *v.* Sears, 103 Mass. 311; Brown *v.* Phelps, 103 Mass. 313; Rosenstock *v.* Tormey, 32 Md. 169. A broker bargained for shares of a corporation on time, at the request of his principal, and rendered himself personally liable. The principal was notified of the terms of the purchase and signified his assent thereto. Before the time of the credit expired, the broker requested the principal to advance money as a margin for security against loss by depreciation of the market price of the stock, and the principal said "that it would be all right." The principal failed to supply the money, and a further credit was obtained. Afterwards the seller, the broker, and the principal met together, and the latter was informed by the seller that he looked to the broker for payment, and if not paid should sell the stock. The principal said "he could do nothing about it." On the same day the broker paid for the stock and notified the principal that he had done so. Held, that the broker might maintain an action to recover from the principal the difference between the price he paid and the price he received for the shares. Durant *v.* Burt, 98 Mass. 161.

[2] L. 12, § 9. D. h. t.

[3] Paulus, in L. 19, § 4. D. de neg. gest. III. 5. See also L. 1. C. eod.

§ 318. *Principal may set off against agent's claim for reimbursement, all losses produced by agent's misconduct.* — Even independently of the principal's equitable rights under such circumstances, he may set off, against the agent's claims, any loss he may have himself sustained through the agent's misconduct.[1] *A fortiori* a fraudulent outlay will not be reimbursed.[2]

§ 319. *Advances for illegal purposes cannot be recovered.* — This, again, rests upon the principle so frequently stated, that no suit can arise from an illegal transaction.[3] When, therefore, the money is advanced by the agent for illegal or immoral purposes, no suit will lie for its recovery.[4]

§ 320. As is elsewhere noticed,[5] money advanced by an agent in respect to a consummated illegal transaction, in whose illegal concoction he has in no way taken part, may be recovered back by him from his principal.[6] In any view, however, the illegality must be specifically presented to the consideration of the court, for the court will not, of its own motion, seek for the taint, so as to preclude the agent from recovery.[7] Judges "need not be astute to find illegality in order to enable one rogue to defeat the better right of another."[8] Peculiarly does this obtain where the agent making the disbursements is more or less the principal's dupe.

II. AGENT ENTITLED TO COMPENSATION FOR SERVICES.

§ 321. "*Salary*," "*honorarium*," *or* "*commissions*," *not* "*wages*," *the remuneration of agency.* — So far as concerns "wages," the Roman standards are clear that they are inconsis-

[1] Bell's Com. 7th ed. 534; Paley by Lloyd, 116; Capp *v.* Topham, 6 East, 392; Fuller *v.* Ellis, 39 Vt. 345; Dodge *v.* Tileston, 12 Pick. 328; Williams *v.* Littlefield, 12 Wend. 362.

[2] Marvin *v.* Buchanan, 62 Barbour, 468.

[3] See supra, § 25, 249.

[4] Brown *v.* Turner, 7 T. R. 631; Mather, ex parte, 3 Ves. 373; Aubert *v.* Maize, 2 B. & P. 271; Canaan *v.* Bryce, 3 B. & Ald. 180; M'Kinnell *v.* Robinson, 3 M. & W. 434; Kennett *v.* Chambers, 14 How. 38; Armstrong *v.* Toler, 11 Wheat. 258; Farrar *v.* Burton, 5 Mass. 395; Callaghan *v.* Hallett, 1 Caines, 104; Graves *v.* Delaplaine, 14 Johns. 146; Swan *v.* Scott, 1 S. & R. 164; Newbold *v.* Sims, 2 S. & R. 317; Scott *v.* Duffy, 14 Penn. St. 18.

[5] Infra, § 698.

[6] Armstrong *v.* Toler, 11 Wheat. 258; Warren *v.* Ins. Co. 13 Pick. 518; Greenwood *v.* Curtis, 6 Mass. 380; Farmer *v.* Russell, 1 Bos. & P. 296; Pallecate *v.* Angell, 2 Cr., Mee. & R. 211; M'Fadden *v.* Jenkins, 1 Hare, 462.

[7] Lloyd's note to Paley, 102, 103.

[8] Bell's Com. 7th ed. 535, citing Poth. Mand. 7.

tent with the idea of mandatum. "Mandatum," says Paulus,[1] "nisi gratuitum (that is to say without such fixed price as distinguishes *locatio et conductio*, the hiring of service) nullum est: nam originem ex officio atque amicitia trahit; contrarium ergo est officio merces: *interveniente enim pecunia res ad locationem et conductionem potius respicit.*" So in the Institutes[2] it is declared, "In summa sciendum est mandatum nisi gratuitum sit, in aliam formam negotii cadere: *nam mercede constituta incipit locatio* et conductio esse. Et ut generaliter dixerimus: quibus casibus sine mercede suscepto officio mandati aut depositi contrahitur negotium, *his casibus interveniente mercede locatio et conductio contrahi intellegitur.* Et ideo si fulloni polienda curandave vestimenta dederis aut sarcinatori sarcienda nulla mercede constituta neque promissa, mandati competit actio." Gaius, in a passage from which the exposition in the Institutes is expanded,[3] makes the same distinction: "In summa sciendum est, quotiens faciendum aliquid gratis dederim, quo nomine si mercedem (wages) statuissem, locatio et conductio contraheretur, mandati esse actionem, veluti si fulloni polienda curandave vestimenta aut sarcinatori sarcienda dederim." In other words, if I employ a fuller to clean clothes, or a tailor to repair them, if such wages (*mercedem*) are stipulated as create the relation of master and servant, then the contract is that of *locatio et conductio*, or hiring; if otherwise, it is *mandatum.* Undoubtedly, by the strict rule of the older law, the *actio mandati* did not lie for any compensation to the mandatary, though the quality of the contract was not affected by the fact that he expected and received compensation. "Si remunerandi gratia honor intervenit, erit mandati actio."[4] Nor could the *actio mandati* be employed to recover a salary or commission. For it a special equitable remedy was given: the *persecutio extra ordinem.* "Adversus eum cujus negotia gesta sunt, de pecunia, quam de propriis opibus vel ab aliis mutuo acceptam erogasti, mandati actione pro sorte et usuris potes experiri. *De Salario autem quod promisit, apud praesidem provinciae cognitio praebebitur.*"[5] So Papinius[6] says: "Salarium procuratori (mandatary) constitutum *si extra ordinem peti coeperit*, considerandum erit, laborem dominus remunerare voluerit atque ideo

[1] L. I. § 4. D. h. t. XVII. 1.
[2] § 13. Inst. eod.
[3] Gaius, III. 162.
[4] L. 6, pr. D. h. t.
[5] L. 1. C. IV. 35.
[6] L. 7. D. XVII. 1.

fidem adhiberi placitis oporteat an eventum litium majoris pecuniae praemio contra bonos mores procurator redemerit."[1]

§ 322. "*Salary*" *to be distinguished from* "*commissions.*"— The line between salary and commissions is marked. Salary is for a specific period of time; commissions for a specific transaction. Salary is fixed, and cannot be increased by proof of extra work;[2] commissions vary with the amount of the service.[3] Salary continues though no work happens to be completed; commissions, on the other hand, are not due until the work is complete.[4] Yet a broker, not entitled to his commissions until the completion of the transaction, may recover compensation on a *quantum meruit* from his principal if the transaction be broken off by the latter's caprice.[5] And the courts will sustain as reasonable a usage by which the seller is liable to pay for a commission to a broker whose services he has accepted, and who found a vendee, although the sale was not consummated by the broker; it appearing that the broker was ready to continue his services.[6]

§ 323. *Terms settled by custom if not by contract.* — It is, of course, competent for the parties to determine by agreement to

[1] See, also, L. 56, § 3. D. XVII. 1; and Koch's exposition of these passages in Ford. III. 524.

[2] Marshall *v.* Parsons, 9 C. & P. 656; though when a custom exists to the contrary such allowance can be made. U. S. *v.* M'Daniel, 7 Peters, 1. In U. S. *v.* Fillebrown, 7 Peters, 28, it was held that this may be varied by custom. See, also, Perkins *v.* Hart, 11 Wheat. 237. Where an agent acts for an agreed salary, or where there is no express contract in reference to his compensation, he will not be allowed to retain profits incidentally obtained in the execution of his duty, any usage to the contrary notwithstanding; and all profits and advantages over and above the agent's ordinary compensation belong to the principal. Jacques *v.* Edgell, 40 Mo. 76.

[3] Day *v.* Croft, 2 Beav. 488.

[4] Simpson *v.* Lamb, 17 C. B. 603; Lara *v.* Hill, 15 C. B. N. S. 45; Hamond *v.* Holiday, 1 C. & P. 384; M'Gavock *v.* Woodlief, 20 How. U. S. 221; Walker *v.* Tirrell, 101 Mass. 257; Bornstein *v.* Laws, 104 Mass. 214; Newhall *v.* Pierce, 115 Mass. 657; Trundy *v.* Hartford Steam Co. 6 Rob. N. Y. 312; Briggs *v.* Bond, 56 N. Y. 289; Earp *v.* Cummins, 54 Penn. St. 394; Keys *v.* Johnson, 68 Penn. St. 42; Platt *v.* Patterson, 7 Phil. 155; Tinges *v.* Moale, 25 Md. 480. Infra, § 327.

[5] Durkee *v.* R. R. 29 Vt. 127. An agent's commission, where he "agrees and obliges himself to manage a vessel to the best advantage, according to his judgment, for the owner," does not depend upon the profitable result of the adventure, if he discharged his duty faithfully. Stewart *v.* Rogers, 19 Md. 98. See fully supra, § 321 *et seq.*

[6] Loud *v.* Hall, 106 Mass. 404.

what the compensation of the agency shall amount.[1] Where there is no such agreement, then the rate is to be determined by custom.[2] Even though there be a salary, custom may authorize extra allowances.[3] And where there is no ascertainable custom, then the jury must fix the amount on the principles of *quantum meruit*.[4]

[1] Marshall *v.* Parsons, 9 C. & P. 656; Bower *v.* Jones, 8 Bing. 65; Robinson *v.* Ins. Co. 2 Caines, 357; Colton *v.* Dunham, 2 Paige, 274; Stewart *v.* Mather, 32 Wis. 344.

[2] Paley's Agency, 101–2; Eicke *v.* Meyer, 3 Camp. 412; Cohen *v.* Paget, 4 Camp. 96; Roberts *v.* Jackson, 2 Starkie N. P. 225; Stewart *v.* Kahle, 3 Stark. N. P. 361; Reed *v.* Rann, 10 B. & C. 438; Winch *v.* Fenn, 2 T. R. 52; Baynes *v.* Fry, 15 Ves. 120; Suydam *v.* Westfall, 4 Hill, 211. Factors in charge of gold dust have no right to take their pay or compensation out of the gold dust. The gold dust is to be treated as property, and their compensation must be estimated in money. McCune *v.* Exfort, 43 Mo. 134.

[3] U. S. *v.* McDaniel, 7 Peters, 1. But ordinarily where the principal, having an agent in his employ, confers upon him additional powers which involve greater duties, with no stipulation for additional compensation, the agent cannot recover extra wages for such additional service. Moreau *v.* Dumagene, 20 La. An. 230.

[4] Brown *v.* Nairne, 9 C. & P. 204; Burnett *v.* Bouch, 9 C. & P. 620; Suydam *v.* Bartle, 10 Paige, 94; Mangum *v.* Ball, 43 Miss. 288; Woods *v.* M'Cranie, 21 La. An. 557. "In a recent English case (Smith *v.* Thompson, 8 C. B. 44) the plaintiff was employed as clerk, to do the business of shipping agent at Southampton, under a contract of hiring for two years, at £150 for the first year, £160 for the second year, and also 50 per cent. on the gross profits. The defendant, alleging disobedience of orders and misappropriation of moneys, discharged him. The jury found these issues against the defendant, and gave the plaintiff a verdict of twelve months' salary and twelve months' share of profits. One year's salary, within a trifling sum, appears to have been paid. A motion was made to set aside the verdict on the ground that the damages were excessive, but it was denied. Wilde, C. J., said: 'With respect to the amount of damages, it was for the jury to say what amount of compensation the plaintiff was entitled to for the defendant's breach of contract.' And Maule, J., said: 'There is no ground for saying that the damages were miscomputed. It must be borne in mind that embezzlement was imputed to the plaintiff.' The result at which the verdict arrived seems not open to observation. But the language of the court appears by no means equally free from objection. Why, in a case of this kind of simple contract, is it for the jury to fix without control the defendant's liability? and what has a charge of embezzlement set up in the plea to do with the quantum of damages? If in a case of this description there is no rule of damages, it would seem to be difficult to declare one in any; and if an unfounded defence is to have the effect of turning an action of contract into one of tort, and to give the uncontrolled discretion of the subject to the jury, the principles which govern the measure of damages will in all cases be in great risk of being lost

§ 324. *Agent may make his claim for remuneration contingent, or limited to a particular fund, or dependent upon the discretion of the principal.* — As will be seen elsewhere, it is permissible for an attorney at law to restrict himself for his fees to the produce of the suit;[1] and the same rule applies *a fortiori* to other branches of agency.[2] By the same reasoning, the agent may by contract throw himself entirely on the goodwill of his employer for his reward, in which case, if the intent to preclude himself from anything but a gratuity is clear, he cannot afterwards obtain compensation by suit.[3] So there may be cases in which a relative or neighbor may render services which it may be claimed were tendered and accepted as mere acts of friendship, and as to which, therefore, it would be inequitable to permit him to exact pecuniary remuneration.[4]

§ 325. *In brokerage, transaction must be completed before commissions are earned.* — We have already seen that this is one of the distinguishing conditions of commission.[5] But if the failure of the negotiation be due to the principal's interference, or from other causes outside of the agent, after the agent had completed his part in the transaction, the commissions are earned.[6]

sight of. That there is a rule in cases of this kind seems not to me to be doubtful; and it is, that the plaintiff has a right to recover the stipulated wages for the full time, subject to the defendant's right to recoup whatever the plaintiff might during the period have reasonably earned. So, again, where it was agreed between the plaintiff and the defendant that in case of a vacancy occurring in the command of a certain East India vessel, the plaintiff should be appointed for two voyages, it was held that the jury *might* give damages for what the plaintiff could have earned on both the voyages, and that they were not limited to one. Richardson *v.* Mellish, 2 Bing. 229. Here, too, I apprehend that the jury were *bound* to give their verdict for both the voyages, subject, of course, to the right of recoupment." Sedgwick on Damages, 416, 417, 6th edition.

[1] See infra, § 619.

[2] Robinson *v.* Ins. Co. 2 Caines, 357.

[3] Taylor *v.* Brewer, 1 Maul. & S. 290.

[4] Andrus *v.* Foster, 17 Vt. 556; Guild *v.* Guild, 15 Pick. 130; Eaton *v.* Benton, 2 Hill, 578; Hill *v.* Williams, 6 Jones, Ex. N. C. 242. See Le Sage *v.* Coussmaker, 1 Esp. 188; Lee *v.* Lee, 6 G. & J. 309; Little *v.* Dawson, 4 Dall. 111; Robinson *v.* Raynor, 28 N. Y. 494; Martin *v.* Wright, 13 Wend. 460.

[5] Supra, § 322.

[6] Hamond *v.* Holiday, 1 C. & P. 384; Topping *v.* Healey, 3 F. & F. 325; Prickett *v.* Budger, 1 C. B. N. S. 296; Lockwood *v.* Levick, 8 C. B. N. S. 603; Gillespie *v.* Wilder, 99 Mass. 170; Newhall *v.* Pierce, 115 Mass. 459; Kock *v.* Emmerling, 22 How. U. S. 69; Harris *v.* Burtnett, 2 Daly, 189; Briggs *v.* Boyd, 56 N. Y.

§ 326. *Principal not liable for commissions when sale was without intervention of broker.* — The agent must be an efficient agent in, or the procuring cause of the contract.[1] Where the defendant, being the owner of three parcels of land, employed the plaintiff, a broker, to negotiate sale thereof at a specified price for each parcel, and the plaintiff found a purchaser for one parcel, the sale being effected and the commissions paid; afterwards, the defendant, without the intervention of the broker, effected the sale of a second parcel, with the purchaser of the first, for the price and upon the terms under which the plaintiff had been instructed to sell; it was ruled that the plaintiff was not entitled to commission on the sale of the second parcel.[2]

§ 327. *But cannot evade commissions when earned.* — But the principal cannot, by taking a virtually consummated transaction out of the agent's hands, evade the payment of commissions.[3]

289; Doty *v.* Miller, 43 Barb. 529; Keys *v.* Johnson, 68 Penn. St. 42; Middleton *v.* Findlay, 25 Cal. 76; Phelan *v.* Gardner, 43 Cal. 306; Bailey *v.* Chapman, 41 Mo. 536; Tyler *v.* Pars, 52 Mo. 249; Budd *v.* Zoller, 52 Mo. 238. As to application of this principle to cases where the negotiation was broken off by *casus*, see Reed *v.* Rann, 10 B. & C. 438; Broad *v.* Thomas, 7 Bing. 99. And see other cases, infra, § 327.

A ship-broker who wrote to a ship-owner asking him to sell a certain vessel, and subsequently introduced a purchaser to him, was held not entitled to recover commissions from the seller, no contract express or implied, and no usage to charge the seller in such cases, being shown. Cook *v.* Welch, 9 Allen, 350.

H., a real estate broker, having heard that K. desired to sell certain property, went to the office of K. and told him that in case he should succeed in negotiating a sale, he should expect the usual commission of two and a half per cent. Afterwards H. brought K. and J. together, and certain papers were executed whereby they contracted for the sale of the property, with a stipulation that if either party should fail to comply with the contract a forfeiture of $1,000 should be paid by the party in default. Afterwards J., having failed to comply with the contract, gave his note for the forfeit money. Held, that H. was not entitled to any commissions. Kimberly *v.* Henderson, 29 Md. 512.

[1] Antrobus *v.* Wickens, 4 F. & F. 291; Tombs *v.* Alexander, 101 Mass. 255; Walker *v.* Tirrell, 101 Mass. 257; M'Clave *v.* Paine, 2 Sweeny, 407; 41 How. Pr. 140. See Barrett *v.* Jones, 64 Penn. St. 223.

[2] McClave *v.* Paine, 49 N. Y. 561; Loyd *v.* Matthews, 51 N. Y. 125; Barnard *v.* Monnet, 1 Abb. (N. Y.) App. Dec. 106; Keys *v.* Johnson, 68 Pa. St. 42.

[3] Hamond *v.* Holiday, 1 C. & P. 384; Topping *v.* Healey, 3 F. & F. 325; Prickett *v.* Budger, 1 J. Scott, N. S. 296; Lockwood *v.* Levick, 8 J. Scott, N. S. 603; McGavock *v.* Woodlief, 20 How. U. S. 221; Gillespie *v.* Wilder; 99 Mass. 170; Bornstein *v.* Lans, 104 Mass. 214; Loud *v.* Hall,

Even while negotiations by a broker are merely pending, the owner, having committed the matter to the broker, cannot resume its control, so as to escape commissions.[1]

§ 328. A broker has earned his commission when he procures a party with whom his principal is satisfied and who actually contracts for the property at a price satisfactory to the owner.[2] Thus in a late case in New York the evidence was that the defendant employed the plaintiff, a real estate broker, to sell his house, it being agreed that if a sale was effected through the agency of plaintiff or any other person, the plaintiff was to receive a stipulated commission. The plaintiff advertised and took other steps to sell to different parties, and finally made a

106 Mass. 404; Newhall *v.* Price, 115 Mass. 459; Chapin *v.* Bridges, 116 Mass. 105; Lincoln *v.* M'Clatchie, 36 Conn. 136; Paulson *v.* Dallett, 2 Daly, 40; Harris *v.* Burtnett, 2 Daly, 189; Stillman *v.* Mitchell, 2 Rob. N. Y. 523; Hague *v.* O'Connor, 1 Sweeny, 472; *S. C.* 4 Rob. N. Y. 287; Doty *v.* Miller, 43 Barb. 529; Moses *v.* Bierly, 31 N. Y. 462; Briggs *v.* Boyd, 56 N. Y. 289; *S. C.* 65 Barb. 199; Mooney *v.* Elder, 56 N. Y. 238; Vreeland *v.* Vetterlein, 33 N. J. L. 247; Keys *v.* Johnson, 68 Penn. St. 42; Jones *v.* Adler, 34 Md. 440; Winpenny *v.* French, 18 Oh. St. 869; Bailey *v.* Chapman, 41 Mo. 536; Woods *v.* Stephens, 46 Mo. 555; Nesbit *v.* Helser, 49 Mo. 383; Tyler *v.* Pars, 52 Mo. 249; Budd *v.* Zoller, 52 Mo. 238; Gillett *v.* Corum, 7 Kans. 156; Walton *v.* N. Orleans, 23 La. An. 398; Stewart *v.* Mather, 32 Wisc. 344; Middleton *v.* Findlay, 25 Cal. 76; Phelan *v.* Gardner, 43 Cal. 306.

[1] Keys *v.* Johnson, 68 Penn. St. 42, and cases above cited.

A ship-broker, who, being employed by the owner of a vessel to obtain a charter, brings to him a person with whom he makes an agreement for a charter, is entitled to the usual commissions for obtaining a charter although the owner afterwards, without legal excuse, refuses to sign the charter party, and the voyage agreed on is never made. And testimony of other ship-brokers that they never knew of a case in which the broker's commissions had been paid when no charter party had been executed, and that, so far as they knew, it was not the custom of ship-brokers to charge a commission under such circumstances, is not such proof of a custom as will prevent his recovering his commissions. Cook *v.* Fiske, 12 Gray, 491.

[2] Keys *v.* Johnson, 68 Penn. St. 42; M'Gavock *v.* Woodlief, 20 How. U. S. 221; Kock *v.* Emmerling, 22 How. U. S. 69. Evidence that a real estate broker has advertised a farm for sale, that his agent took several persons to the farm with a view to purchase, and talked upon the subject with others, one of whom testified that he had purchased the farm from the owner in person, paid him money on the farm, and moved himself and his goods upon it, is sufficient (no objection being taken to its competency) to warrant a finding that the broker had faithfully endeavored to sell the farm, and that the owner had made an agreement, binding upon him, to sell it. Chapin *v.* Bridges, 116 Mass. 105.

parol contract for the sale to a religious society, which contract the defendant agreed to ratify. Upon presentation of the account the defendant refused to pay, claiming he had withdrawn the property from market. At the time of the commencement of the suit, to recover the commission, no contract in writing had been made, and no part of the purchase money had been paid. The sale was thereafter consummated, and the property was conveyed to the society. It was ruled by the court of appeals that the plaintiff was entitled to his commission upon the production of a purchaser, ready and willing to purchase upon defendant's terms, although defendant was unable or refused to consummate the contract; that the parol contract showed, *primâ facie*, that such a purchaser had been produced; that the defendant, having based his refusal to pay, not upon the ground of the invalidity of the parol contract, but upon that of the withdrawal of the property, could not shield himself from liability upon the former ground, and that a refusal to nonsuit was therefore no error.[1] So where a commission merchant made advances to a planter, under an agreement that the latter was to ship his entire crop to the merchant, but the planter shipped a portion of his crop to another merchant, it was ruled in Louisiana that the merchant who had made the advances could recover from the planter the usual commissions which he would have charged on the part of the crop shipped to other parties.[2]

[1] Mooney *v.* Elder, 56 N. Y. 238. The law will *presume*, in the absence of evidence to the contrary, that the person so procured was *solvent* and pecuniarily able to perform the contract he offered to make. Solvency, not insolvency, is presumed in the absence of proof on the subject. Hart *v.* Hoffman, 44 How. (N. S.) Pr. 168.

[2] Thornhill *v.* Picard, 24 La. An. 159. A. authorized B., as real estate agent, to sell for him twenty-one acres of land at $1,500 per acre, B. to receive a commission of 2½ per cent. on the sale. B. afterwards received of a party $1,000, and gave a receipt therefor in the name of A., by himself, which was to be applied as a part of the purchase money, if the party should finally become the purchaser of the land; but if he failed or refused to consummate the purchase within a specified time, he giving no obligation of any kind binding him to make the purchase, then the $1,000 deposit was to be forfeited. The sale was never consummated. It was ruled by the supreme court that in an action by A. against B. to recover the $1,000 forfeited, the latter contending that he was entitled to the money as commission on the sale at $31,500; that at most he was only entitled to the commission on the deposit. Pierce *v.* Powell, 57 Ill. 323. Defendants received of plaintiffs a quantity of whiskey to sell on commission; for their services in receiving, caring for, and sell-

§ 329. Even when, after the purchaser comes in, the vendor voluntarily reduces the price of the property, or the quantity, or otherwise changes the terms of sale as proposed to the broker,

ing the property, they were to charge a commission of 2½ per cent. on the sales. A. portion of the whiskey was sold by them, a portion by the agent of plaintiffs, and a portion remained unsold, which plaintiffs demanded. Defendants claimed a lien for the full amount of their commissions on all the whiskey, and refused to deliver without payment thereof. Plaintiffs paid the claim, under protest, in order to obtain the whiskey, and brought this action to recover it back. The referee found plaintiffs entitled to judgment for the entire amount so paid, to which defendants excepted. Held, that plaintiffs had no right to rescind the contract and take the property without payment for the services already rendered by defendants, which, in the absence of a contract or usage fixing it, was, as in other cases, what the services were fairly worth; that the burden was upon plaintiffs of showing that they did not owe the money paid, but that it was extorted from them unjustly, and that the exception to the referee's conclusion as to the amount due sufficiently covered the question; and that, it appearing that defendants were entitled at least to a portion of their claim, the finding was error. Briggs *v.* Boyd, 56 N. Y. 289. The defendant entered into the following agreement with the plaintiff: "Whereas H. (the plaintiff) has proposed to find a purchaser for my hotel in W., now I agree that if he shall find or send any person who will purchase the same at any terms to which I may assent, and I shall make the sale to such person, I will pay him $1,000 for his services when the said sale is effected." The plaintiff set about finding a purchaser, and induced B. to go to the defendant and offer him $25,000 for the property, but the defendant refused to sell for that price and asked $26,000. The defendant had in fact at the time agreed orally with S. to sell him the property, and soon after sold it to him for $25,000. B., not long after, offered S. $1,000 for his bargain, which he accepted, and it was arranged that a deed which the defendant had made to S., and had deposited as an escrow until certain conditions were performed, should be cancelled, and a conveyance made directly by the defendant to B. which was done. In a suit brought by H. against the defendant for the $1,000 mentioned in the contract. Held, (1) that the agreement did not preclude the defendant from selling the property himself, and that upon such a sale to a purchaser that was not procured by the plaintiff, the latter was not entitled to the $1,000. (2) That the deed from the defendant to B. did not estop him from denying that the sale was made to B. and that he might show the circumstances under which the conveyance was made. Hungerford *v.* Hicks, 39 Conn. 259. A. employed a broker to sell a house, but afterwards sold it himself to one to whom the broker had furnished information which induced him to make the purchase; and in settling with the broker did not tell him the name of the purchaser. *Held*, that the question whether the not mentioning the name of the purchaser was such a concealment of a material fact as to avoid the settlement was one of fact for the jury. Newhall *v.* Pierce, 115 Mass. 457.

so that a sale is consummated, or terms or conditions are offered which the proposed buyer is ready and willing to accept, in either case the broker will be entitled to his commission at the rate specified in his agreement with his principal.[1]

§ 330. *There must be proof of specific employment of agent.* — To sustain a claim under these circumstances for brokerage, however, there must be proof that the broker was actually engaged and entered on his services.[2] Thus, in a case in Connecticut, the evidence was that the plaintiff, a real estate broker, without any prior request by defendant, introduced to him a person who purchased of him a piece of land. The plaintiff was present during the negotiation between the parties, but so far from representing the defendant, spoke disparagingly of the value of the property, and suggested that the price asked was too large. He also was present with the parties at the consummation of the contract and the delivery of the deed. There was no question that the sale was brought about by means of the plaintiff, and but for him the parties would not have come together; but during the whole transaction the defendant thought the plaintiff was acting as the agent of the purchaser, and never intended to employ him for himself. In an action to recover a commission on the sale, it was ruled by the supreme court that no contract of employment was implied from the facts in the case, and the plaintiff was not entitled to recover.[3] In a case in Maryland, the evidence was that D. employed several brokers in Baltimore to effect for him a loan of $10,000 for three years at eight per cent., to be secured by a mortgage on certain real estate. G., who was one of the number, discovered a person able and willing to make the loan, and notified D., who declined to accept, stating that he had already perfected a loan of that amount on the same property and at the same rate *for one year* through one of the other agents whom he had employed, and had paid him his full commissions. It was a usage among the brokers in Baltimore that when two or more were employed to negotiate the same transaction, the broker who first succeeded in making such negotiation was entitled to full commissions, and the others were not entitled to any. It was held that G. was not entitled to recover any commissions.[4]

[1] Steward *v.* Mather, 32 Wis. 344.

[2] Keys *v.* Johnson, 68 Penn. St. 42; Glenn *v.* Davidson, 37 Md. 365; Morrow *v.* Allison, 39 Ala. 70. Infra, § 616.

[3] Atwater *v.* Lockwood, 39 Conn. 45.

[4] Glenn *v.* Davidson, 37 Md. 365.

§ 331. *Such proof, however, may be inferential.* — Thus it has been correctly ruled in New Hampshire that acceptance of subscriptions obtained by an agent of a railroad company, and acceptance of the benefits of his services, are equivalent to an antecedent request to him to act, and the company will be bound to recompense him therefor.[1] So in an English case, the evidence was that the plaintiffs, house agents, were instructed by the defendant to offer a leasehold house for sale, for which they were to receive a commission of two and a half per cent. on the amount of premium if they found a purchaser, but one guinea only for their trouble if the premises were sold "without their intervention." The particulars were entered on the plaintiffs' books, and they gave a few cards to view. It further appeared that B. (the future purchaser), who had observed on passing that the house was to be disposed of, but who had not then been over it, called at the plaintiffs' office and obtained a card to view the premises in question, amongst others, the terms being written by the plaintiffs' clerk on the back of the card. B. went to the house a few days afterwards, but thought the price asked (£2,200) too high, and let the matter for the time drop. He subsequently renewed his negotiation with a friend of the defendant's, and by that agency became the purchaser of the lease for £1,700. It was ruled that there was evidence for a jury that B. had become a purchaser of the premises "through the plaintiffs' intervention," and consequently that the plaintiffs were entitled to the stipulated commission.[2] It should be remembered that whoever employs the broker is liable for the commissions, whether such employer holds the property beneficially or in trust.[3]

§ 332. *After authority closes, no commissions can be earned.* — Thus there can be no recovery of commissions on a sale proposed after the expiration of the time fixed for sale. Although the owner cannot avail himself of the broker's services in finding a purchaser, and then by taking the negotiations into his own hands and reducing the price, effect a sale to the same purchaser and refuse to pay commissions, yet, if the broker accepts an employment that makes his rights to commissions depend on procuring a purchaser on specified terms, he cannot recover if he

[1] Low *v.* Connecticut, &c. R. R. Co. 46 N. H. 284.

[2] Mansell *v.* Clements, L. R. 9 C. P. 139.

[3] Jones *v.* Adler, 34 Md. 440.

does not perform that service, unless the employer interfered and prevented performance.[1]

§ 333. So after the broker's own authority is expired, he can no longer make commissions. Thus in a case in Maine, the rules of an insurance company provided that agents should receive a commission of "five per cent. on each renewal collected and transmitted by them." It was ruled by the supreme court that the plaintiff, whose agency of such company had terminated, was not afterwards entitled to this commission on policies procured by him while he was agent, the collection and remittance of the renewals not having been made by him, and no custom to pay commissions after the termination of the agency being shown.[2]

§ 334. *No commission on illegal transaction.* — It has been already seen that a contract for an immoral or illegal object cannot be enforced.[3] In conformity with this rule an agent cannot earn commissions by a transaction contrary to good morals, or to the precepts or policy of the law.[4] Thus no commissions can be recovered on a stock gambling transaction,[5] though as obnoxious to this objection is not to be considered a contract to furnish stocks on time, or to purchase stocks with a view to sell and make a profit on their rise.[6]

[1] Briggs *v.* Rowe, 1 Abb. (N. Y.) App. Dec. 189; Glenn *v.* Davidson, supra, § 330.

[2] Spaulding *v.* N. Y. Ins. Co. 61 Me. 329. See Hovey *v.* Blakeman, 4 Ves. 596.

[3] Supra, § 249; infra, § 615.

[4] Supra, § 25, and cases there cited; § 249, 319; Bulmer, ex parte, 13 Ves. 313; Forbes *v.* Cochrane, 2 B. & Cr. 448; Josephs *v.* Pebrer, 3 B. & Cr. 639; Trist *v.* Child, 21 Wallace, 441; Blanchard *v.* Russell, 13 Mass. 1; Paine *v.* France, 26 Md. 46.

[5] Stebbins *v.* Leowolf, 3 Cush. 137; Amory *v.* Merryweather, 2 B. & Cr. 578; Brua's appeal, 55 Penn. St. 294.

[6] Smith *v.* Bouvier, 70 Penn. St. 331. In this case Thompson, C. J., said: "The main contention in the case, however, was not this, but whether or not the transaction, an ordinary purchase and sale of stocks through the plaintiffs as brokers, was or was not a gambling transaction, and one which should for that reason deprive them from recovering for money advanced and commissions earned. This, the learned judge instructed the jury, would be the character of a transaction where, from the beginning, it was agreed and understood that the stock dealt for was not intended to be delivered, but that the parties were to settle their mutual wagers on the prices of stocks, by paying the difference between sales at different times. He further explained, saying, 'I submit to you, that if the transaction was a speculation founded upon a real sale and purchase of stocks by the plaintiffs, for the defendants, actually sold,

§ 335. So no commissions or compensation will be given to an

bought, and delivered, then it was not a gambling transaction, and not an unlawful contract.'

"This was right, but it did not go far enough, according to the theory of the plaintiffs in error. They insisted that the jury should have been instructed that all purchases of stocks, with a view to resell and make profit on their rise, or contracts to furnish stocks on time, should be declared gambling transactions and illegal, not only between buyer and seller, but as to the brokers or agents through whom the sales and purchases had been made. This would make a great inroad into what has, for an indefinite period, been regarded as a legitimate business, and would either destroy it altogether, or if continued, put the brokers at the mercy of those for whom they transact such business. Let it be understood that a broker has no power to recover either for advances or commissions, however honestly he may have dealt, and there will be found enough persons whose easy consciences would throw their losses upon the shoulders of those who advanced the money and earned commissions in their service. It would be a very palpable wrong to the brokers who are licensed to do such business, if such were held to be the law. To this extent Brua's appeal, 5 P. F. Smith, 294, never was intended to go. That case came before the court on the report of auditors, expressly finding that the notes in question were given for stakes or bets on the rise and fall of certain stocks — that neither party was to receive or deliver any stocks. The auditors said: 'Kauffman in effect betted that in twenty-five days Harlem stock would sell at less than $60 per share; but viewed in the aspect of legal principles and precedents, the contract was one which the parties were free to make, and the obligations created by it and the subsequent notes are in law untainted by any fraud or deceit, or want of consideration,' and therefore they held that the 'notes' should come in for a *pro rata* share of the decedent's estate.

"This we regarded as a 'most lame and impotent conclusion.'

"Having nothing to do but to administer the law against betting and gambling, we held the consideration of the notes illegal, and the contract incapable of enforcement. This result cannot be doubted. But we held in the same case, that stock-brokerage was not necessarily gambling. We said: 'The *bonâ fide* purchase of stocks no doubt can be conducted lawfully, and is generally so conducted without in the least trenching on the gambler's province. . . . . *Bonâ fide* time contracts about stocks and other personal property seem, from custom, to be necessary in our country; and although such transactions may be greatly affected by the rise and fall of the market, yet they are not for this reason obnoxious to the objections made to the transactions we are now considering; for in such case the losing party has something for his money, but the losing gambler nothing.'

"The doctrine contended for here would place all stock contracts on the same footing, if making profits may be deduced as the motive of the parties buying and selling. When stocks are bought and sold, to be actually delivered, it is a very different case from that of Brua's appeal, supra, where the transaction was found to have been simply a bet or wager. In the one case, the transaction is within the scope of a business everywhere recognized as legitimate; in the other, it is a gambling transaction, which courts will

agent for services in lobbying a legislature,[1] or in selling or pur-

never exert their power to enforce, if not entirely executed by the parties.

"Whether the transactions embraced in this case were *bonâ fide*, or were merely in a form to cover gambling transactions, after a full explanation of what constituted the true difference in law between them, was left to the jury to say, upon the evidence, to which class they belonged. The jury found them to have been *bonâ fide* actual sales, and purchases of stocks to be delivered. As there was no error in these instructions, this result settled the defence against the defendants below and plaintiffs in error. The instructions on all the other questions raised here were proper, and such as the case required. We must, therefore, affirm the judgment. Judgment affirmed." Smith *v.* Bouvier, 70 Penn. St. 331.

Although an executory contract for the sale of goods to be delivered at a future day, where both parties are aware that the seller expects to purchase himself to fulfil his contract, and no skill or labor or expense enters into the consideration, but the same is a pure speculation upon chances, is contrary to the policy of the law and can be enforced by neither party; yet where such a contract has been executed, an agent employed by his principal to make the contract can recover from him any money he may have advanced in the transaction by his authority, or with a ratification. Warren *v.* Hewitt, 45 Ga. 501.

[1] Marshall *v.* R. R. 16 How. 314; Trist *v.* Child, 21 Wall. 441; 9 Am. Law Rev. 684; Fuller *v.* Dance, 18 Pick. 472; Harris *v.* Roof, 10 Barbour, 489; Rose *v.* Truax, 21 Barb. 361; Gray *v.* Hook, 4 Comst. 449; Clippenger *v.* Hepbaugh, 5 Watts & S. 315.

In Trist *v.* Child, supra, it was agreed by the court that compensation could be recovered for drafting a petition which sets forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them either orally or in writing to a committee or other proper authority, with other services of like character intended to reach only the understanding of the persons sought to be influenced. It was however held, that when such services are blended with those which are forbidden, compensation can be recovered for no part. Mr. Justice Swayne said: "Before considering the contract here in question, it may be well, by way of illustration, to advert to some of the cases presenting the subject in other phases, in which the principle has been adversely applied. Within the condemned category are: An agreement to pay for supporting for election a candidate for sheriff; Swayze *v.* Hull, 3 Halsted, 54; to pay for resigning a public position to make room for another; Eddy *v.* Capron, 4 Rhode Island, 395; Parsons *v.* Thompson, 1 H. Blackstone, 322; to pay for not bidding at a sheriff's sale of real property; Jones *v.* Caswell, 3 Johnson's Cases, 29; to pay for not bidding for articles to be sold by the government at auction; Doolin *v.* Ward, 6 Johnson, 194; to pay for not bidding for a contract to carry the mail on a specified route; Gulick *v.* Bailey, 5 Halsted, 87; to pay a person for his aid and influence in procuring an office, and for not being a candidate himself; Gray *v.* Hook, 4 Comstock, 449; to pay for procuring a contract from the government; Tool Company *v.* Norris, 2 Wallace, 45; to pay for procuring signatures to a petition to the governor for a pardon; Hatzfield *v.* Gulden, 7 Watts, 152;

chasing a public office;[1] or in violating revenue laws,[2] or in violating blockade, or other applicatory statutes relating to shipping;[3] or in furthering an interest adverse to that of his employer;[4] or in a transaction in which the commissions are a cloak to usury.[5] But the want of an internal revenue license as

to sell land to a particular person when the surrogate's order to sell should have been obtained; Overseers of Bridgewater *v.* Overseers of Brookfield, 3 Cowen, 229; to pay for suppressing evidence and compounding a felony; Collins *v.* Blantern, 2 Wilson, 347; to convey and assign a part of what should come from an ancestor by descent, devise, or distribution; Boynton *v.* Hubbard, 7 Mass. 112; to pay for promoting a marriage; Scribblehill *v.* Brett, 4 Brown's Parliamentary Cases, 144; Arundel *v.* Trevillian, 1 Chancery Reports, 47; to influence the disposition of property by will in a particular way; Debenham *v.* Ox, 1 Vesey, 276. See, also, Addison on Contracts, '91; 1 Story's Equity, ch. 7; Collins *v.* Blantern, 1 Smith's Leading Cases, 676, American note.

"The question now before us has been decided in four American cases. They were all ably considered, and in all of them the contract was held to be against public policy and void. Clippenger *v.* Hepbaugh, 5 Watts & Sergeant, 315; Harris *v.* Roof's Executor, 10 Barbour's Supreme Court, 489; Rose & Hawley *v.* Truax, 21 Ibid. 361; Marshall *v.* Baltimore & Ohio Railroad Company, 16 Howard, 314. We entertain no doubt that in such cases, as under all other circumstances, an agreement, express or implied, for purely professional services, is valid. Within this category are included, drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptional. But such services are separated by a broad line of demarcation from personal solicitation, and the other means and appliances which the correspondence shows were resorted to in this case. There is no reason to believe that they involved anything corrupt or different from what is usually practised by all paid lobbyists in the prosecution of their business." Trist *v.* Child, 21 Wallace, 448.

[1] Josephs *v.* Pebrer, 3 B. & Cr. 630; Stackpole *v.* Earl, 2 Wils. 133; Waldo *v.* Martin, 2 B. & Cr. 319; 6 D. & R. 364; Parsons *v.* Thompson, 1 H. Bl. 322, cited Paley's Agency, 601-2; Harrington *v.* Chatel, 1 Bro. C. C. 124; Filson *v.* Himes, 5 Barr, 452.

[2] Waymell *v.* Reed, 5 T. R. 454; Holman *v.* Johnson, Cowp. 341; Armstrong *v.* Toler, 11 Wheat. 258; Greenwood *v.* Curtis, 6 Mass. 378.

[3] See Whart. Confl. of Laws, § 490.

[4] See supra, § 231; infra, § 336, 615; Morison *v.* Thompson, L. R. 9 Q. B. 480; and see Wyburd *v.* Staunton, 4 Esp. 179.

[5] Dunham *v.* Dey, 13 Johns. R. 40: Dunham *v.* Gould, 16 Johns. R. 367; Fanning *v.* Dunham, 5 Johns. Ch. 134; Colton *v.* Dunham, 2 Paige, 267; Williams *v.* Hance, 7 Paige, 581, cited Paley's Agency, Am. ed. 107.

real estate agent will not defeat a recovery of a commission by one not an agent, under a special agreement to find a purchaser for a house.[1]

§ 336. *Agent if disloyal to trust cannot recover commissions.* — If an agent (*e. g.* a broker) is employed to transact a particular piece of business, and in the transaction is guilty of bad faith to his principal, he thereby forfeits his commissions.[2] And this applies to cases where a broker even without fraudulent intent, receives commissions from a conflicting interest.[3] Thus F. employed S. to sell certain land, for which S. was to receive the difference between the purchase money received, and $125 an acre; and E. agreed in writing with S. to pay him $500, "for services in assisting to negotiate a purchase" of the land. S. brought E. and F. together and a contract was made for sale of the land at $150 per acre. E. and F. afterwards consummated the sale themselves. It was held by the supreme court of Pennsylvania, that S. acting for both without their consent could not recover the $500 from E.; that if as S. alleged the $500 was to give E. the preference, this was selling his discretion, and was bad faith to F., and that the fact that F. suffered no loss did not alter the case.[4]

[1] Pope *v.* Beals, 108 Mass. 561.

[2] Segar *v.* Parrish, 20 Grat. 672; Vennum *v.* Gregory, 21 Iowa, 326. Infra, § 573, 715, 724.

[3] Morison *v.* Thompson, L. R. 9 Q. B. 480; Salomon *v.* Pender, 3 H. & C. 639; Denew *v.* Daverell, 3 Camp. 451; Audenreid *v.* Betteley, 8 Allen, 302; Parker *v.* Vose, 45 Me. 54; Walker *v.* Osgood, 98 Mass. 348; Farnsworth *v.* Hemmer, 1 Allen, 494; Jones *v.* Hoyt, 25 Conn. 386; Sea *v.* Carpenter, 16 Ohio, 412; Myers *v.* Walker, 31 Ill. 353; Kerfoot *v.* Hyman, 52 Ill. 512; Cleveland *v.* Pattison, 15 Ind. 70; Porter *v.* Silver, 35 Ind. 295; Brown *v.* Clayton, 12 Ga. 564; Sumner *v.* Reicheniper, 9 Kans. 320; Rosenthal *v.* Myers, 25 La. An. 463; Hunsaker *v.* Sturgis, 29 Cal. 142. See Kimber *v.* Barber, L. R. 8 Ch. App. 56.

[4] Everheart *v.* Searle, 71 Penn. St. 256. In an action by a real estate broker to recover his commission for selling defendant's farm, there was evidence that defendant gave plaintiff charge of selling his land, and that plaintiff exerted himself to find a purchaser, and that subsequently defendant brought R. to plaintiff, and asked him to effect an agreement between R. and defendant for the exchange of their lands; that plaintiff succeeded in doing this, and that both defendant and R. signed an agreement acknowledging their indebtedness to plaintiff for his customary commissions. Held, that plaintiff's services in bringing about the exchange were rendered in pursuance of his original employment by defendant, and the fact that R. also signed the agreement did not release defendant from his liability to plaintiff. Redfield *v.* Tegg, 38 N. Y. 212.

§ 337. But the mere acceptance by the agent of an adverse interest will not preclude him from recovering commissions if such acceptance be with the principal's full knowledge and free consent.[1] Thus an agent for two distinct parties, authorized to sell lands for each, who brings about an interview between the owners which ends in an exchange in which he takes no part, is entitled to recover the customary commissions from each.[2] So if a middleman brings together a buyer and seller, each of whom has agreed, without the other's knowledge, to pay the middleman a commission for any contract made between them, and a contract is made between them, in which the middleman takes no part, he may receive his commission from each, though he concealed from each his agreement with the other.[3]

§ 338. *An agent engaging his whole time to his principal cannot recover for his own use compensation from other persons.* — This point belongs more properly to the topic of master and servant, than to that of principal and agent. If, however, an agent contracts to give all his energies to a particular line of business under a particular principal, it is bad faith, from which he cannot be permitted to profit, for him to offer his services to another interest.[4]

[1] Rothschild *v.* Brookman, 5 Bligh N. S. 172; Morison *v.* Thompson, L. R. Q. B. 480; Woodhouse *v.* Meredith, 1 Jac. & Walk. 204; Stewart *v.* Mather, 32 Wisc. 345. See Smith *v.* Townsend, 109 Mass. 500. Supra, § 244.

[2] Mullen *v.* Kertzleb, 7 Bush, 253. It would be otherwise if he had himself negotiated the exchange. Lloyd *v.* Colston, 5 Bush, 587.

[3] Rupp *v.* Sampson, 16 Gray, 398. "The plaintiff," said Bigelow, C. J., "was not an agent to buy or to sell, but only acted as a middleman to bring the parties together, in order to enable them to make their own contracts. He stood entirely indifferent between them, and held no such relation in consequence of his agency as to render his action adverse to the interests of either party." The European Society, through their paid and confidential agent C., negotiated with the Etna Company, through their paid and confidential agent O., a transfer by the latter of a branch of their business to the former for £15,000. C. claimed from the Etna Company, as a commission, or a bonus for his services in the transaction, £2,000, which the latter having refused, he contrived that the purchase money to be paid by his employers should be increased to £17,000, out of which the Etna Company secretly agreed to pay him the £2,000. On the winding up of the affairs of the Etna Company, O., alleging that there was an agreement between C. and him that he should get half the commission or bonus, made a claim of £1,000 against the latter company. *Held*, that such a claim could be allowed. Owens, in re, 7 Ir. R. Eq. 235, V. C.; affirmed on appeal, 7 Ir. R. Eq. 424.

[4] Eades *v.* Vandeput, 4 Doug. 1;

§ 339. *Agent's negligence to be set off against his claim for commissions.* — Mere negligence does not, as does disloyalty, forfeit a claim to commissions *in toto*. The loss, however, accruing to the principal by the negligence, may be set off against the agent's claim.[1] Thus it has been held in Illinois where an agent who has made a sale of real estate which his principal repudiated on account of the agent's negligence, — but where subsequently the agent executed a contract of sale to the purchaser, — that the agent was entitled to his commissions, but that the principal could recoup any damages which he had sustained through the agent's action in executing the contract.[2] So, in a suit brought by an overseer against a planter for compensation for services, it has been ruled in Georgia that it is competent for the defendant to prove and recoup the damages sustained by him in consequence of the failure of the plaintiff to enforce the provisions of the contract made by him as the agent of the defendant, with the freedmen.[3] So the defendant may prove a failure to render accounts; but such failure will not itself defeat a suit to recover salary previously earned, though damage arising from the failure might be set off against the salary.[4]

Bloxam *v.* Elsee, 1 C. & P. 558; Thompson *v.* Havelock, 1 Campb. 527; Gardner *v.* M'Cutcheon, 4 Beav. 535; James *v.* Le Roy, 6 Johns. R. 274; Smith's Master & Servant, 82; 2 Kent's Com. 288.

[1] Kelly *v.* Smith, 1 Blatch. 290; Callendar *v.* Oelrichs, 5 Bing. N. C. 58; Makepeace *v.* Rogers, 4 De G. J. & S. 649; Storer *v.* Eaton, 50 Me. 219; Dodge *v.* Tileston, 12 Pick. 328; Williams *v.* Littlefield, 12 Wend. 362. See infra, § 615.

[2] McEwen *v.* Kerfoot, 37 Ill. 530.

[3] Lee *v.* Clements, 48 Ga. 128.

[4] Sampson *v.* Somerset Iron Works, 6 Gray, 120. As to failure of duty in this relation, supra, § 231 *et seq.* And see Gallup *v.* Merrill, 40 Vt. 133, where it was ruled that an agent who refuses to render a specific account to his principal, when required, is not thereby barred from maintaining an action for a balance due from the principal, but such refusal only affects the agent unfavorably as a matter of evidence. H. shipped rice consigned to B. abroad, for sale on commission by B., for the benefit of H. B., according to agreement, made advances to H. upon the rice, and incurred expenses in connection therewith, and sold it, and claimed to have earned commission. The proceeds realized by the sale, however, were insufficient to reimburse B. the amounts so advanced, and alleged to have been earned. To an action by B. to recover the balance, after crediting H. with the amount realized by the sale, of the amount of such advances and expenses, and for the commission so alleged by B. to have been earned, H. pleaded that B., by neglecting to take proper care of the rice, and by mismanaging the sale, had caused the proceeds to be insufficient to meet the amount due to B. *Held*, that it did not afford an answer, as it

III. AGENT MAY OBTAIN INDEMNITY FOR LOSSES.

§ 340. *Principal must indemnify agent for any losses sustained by the latter in executing principal's orders.* — Where the orders are illegal, and known to be such by the agent, then no action for indemnity can be maintained by the agent against the principal.[1] But where the agent, unconscious at the time of the illegality of his mandate, is exposed to loss in its execution, it is the principal's duty to indemnify him; and he may recover from his principal such indemnity. In such case the suit may be either in assumpsit or case; though in either action a breach must be alleged.[2] So if an agent, in consequence of a deception practised on him by his principal, innocently incurs a risk or responsibility, and is compelled to pay damages to a purchaser on account thereof, he will be entitled to a remuneration from his principal.[3] Not only all losses incurred by the agent on account of the principal are, with the limitations hereafter expressed, chargeable to the principal,[4] but in equity the agent is entitled to be indemnified against liability as well as loss incurred on behalf of his principal.[5]

amounted to an attempt to set off a claim for unliquidated damages against a legal debt of a definite and an ascertained amount, and that such a plea could not be construed as a plea of never indebted, inasmuch as the general issue in this shape must deny the existence of a debt which the plea expressly admitted. Best *v.* Hill, 21 W. R. 147, C. P.

[1] See supra, § 249.

[2] Adamson *v.* Jarvis, 4 Bing. 66; Drummond *v.* Humphreys, 39 Me. 347; Stocking *v.* Sage, 1 Day, 522; Green *v.* Goddard, 9 Metc. 212; Coventry *v.* Barton, 17 Johns. 142; Avery *v.* Halsey, 14 Pick. 174; Ramsay *v.* Gardner, 11 Johns. 439; Powell *v.* Newburg, 19 Johns. 284; Rogers *v.* Kneeland, 10 Wend. 219; Howe *v.* Buffalo, 37 N. Y. 297; D'Arcy *v.* Lisle, 5 Binn. 441; Elliott *v.* Walker, 1 Rawle, 126; Moore *v.* Appleton, 26 Ala. 633. The declaration must negative the existence of knowledge by the agent of the unlawfulness of the act. Moore *v.* Appleton, 26 Ala. 633.

[3] Yeatman *v.* Corder, 38 Mo. 337.

[4] Ibid. See Frixione *v.* Tagliaferro, 10 E. F. Moore, 175.

[5] Lacey *v.* Hill, L. R. 18 Eq. 182. Messrs. C., brokers on the London Stock Exchange, on behalf of Sir R. H., entered into contracts for the purchase of stocks to be completed on the 15th of July, 1870. On the 12th of July they wrote to Sir R. H., to the effect that unless he paid them on the 15th a balance (which consisted of the difference between the contract price of the stock and the value thereof at the market price of the day) owing to them from him, they would be defaulters; but that if such payment were made, they would sell or continue the stocks, as he thought fit. Sir R. H. promised to pay, and directed them to deal with the stocks as they thought

§ 341. By the Roman law, also, the mandant must indemnify the mandatary for any injury directly sustained through the agency, provided such injury is not directly attributable to the mandatary's own misconduct. This holds good even though the injury is imputable only to the negligence and not to the *dolus* of the mandant, or though it occur through *casus* or through the violence of a third party, provided the mandatary exposed himself to such *casus* or violence when in the ordinary and proper performance of his duties. "Si quis debitori suo mandaverit ut Titio solveret, et debitor, mortuo eo, cum id ignoraret, solverit, liberari eum oportet. . . . . Non omnia, quae impensurus non fuit, mandator, imputabit: veluti quod spoliatus sit a latronibus, aut naufragio res amiserit, vel languore suo suorumque adprehensus quaedam erogaverit: nam haec magis casibus quam mandato imputari oportet. Sed cum servus, quem mandatu meo emeras, furtum tibi fecisset, Neratius ait, mandati actione te consecuturum, ut servus tibi noxae dedatur: si tamen sine culpa tua id acciderit. Quod si ego scissem talem esse servum, nec praedixissem, ut possis praecavere, tunc, quanti tua intersit, tantum tibi praestari oportet. Faber mandatu amici sui emit servum decem, et fabricam docuit: deinde vendidit eum viginti, quos mandati judicio coactus est solvere: mox, quasi homo non erat sanus, emptori damnatus est. Mela ait, non praestaturum id ei mandatorem; nisi, posteaquam emisset, sine dolo malo ejus hoc vitium

best, and they sold part and continued part. Sir R. H. did not pay on the 15th, but shot himself; on the next day a bank of which he was a partner stopped payment, and on the 19th he died. On the 16th Messrs. C. were (solely by reason of Sir R. H.'s failure to pay them) declared defaulters on the stock exchange, and ceased to be members of that body, and, in accordance with the rules, all their transactions for Sir R. H. were closed, and all the stocks they had continued for Sir R. H. were sold at the price of the day. In consequence of the value of the stocks having fallen, the balance appearing to be due to them from Sir R. H. was thus largely increased. The stocks afterwards continued to fall in value. Messrs. C. afterwards paid 6*s.* 8*d.* in the pound on their stock exchange debts, and were readmitted as members of the stock exchange. Held, that the sale was justifiable, both under the usage of the stock exchange (which entitles a broker to sell upon his principal becoming insolvent), and also because the continuation was only effected on the representation of Sir R. H. that he would pay on the 15th. Lacey *v.* Hill, L. R. 18 Eq. 182. Held, also, that although Messrs. C. had not paid their debts in full, they were entitled to prove against Sir R. H.'s estate for the increased balance appearing due to them after the sales were effected. Lacey *v.* Hill, L. R. 18 Eq. 183.

habere coeperit servus. Sed si jussu mandatoris eum docuerit, contra fore, tunc enim et mercedem et cibaria consecuturum: nisi si ut gratis doceret, rogatus sit."[1] "Quod vero ad mandati actionem attinet, dubitare se ait, num aeque dicendum sit omnimodo damnum praestari debere, et quidam hoc amplius, quam in superioribus causis servandum: ut etiam si ignoraverit is, qui certum (hominem) emi mandaverit, furem esse: nihilominus tamen damnum decidere cogatur; justissime enim procuratorem allegare, non fuisse se id damnum passurum, si id mandatum non suscepiset. Idque evidentius in causa depositi apperere. Nam licet alioquin aequum videatur, non oportere cuiquam plus damni per servum evenire, quam quanti ipse servus sit: multo tamen aequius esse, nemini officium suum, quod ejus, cum quo contraxerit, non etiam sui commodi causa susceperat, damnosum esse, et sicut in superioribus contractibus, venditione locatione pignore, dolum ejus, qui sciens reticuerit, puniendum esse dictum sit, ita in his culpam eorum, quorum causa contrahatur, ipsis potius damnosam esse debere. Nam certe mandantis culpam esse, qui talem servum emi sibi mandaverit: et similiter ejus, qui deponat, quod non fuerit diligentior circa monendum, qualem servum deponeret."[2]

§ 342. Wherever the mandatary is injured by the mandant's shortcomings in this respect, there the mandatary has an action against the mandant; and in all respects the mandatary is to be saved harmless by the mandant for what he does on the mandant's behalf. "Si mihi mandaveris ut rem tibi aliquam emam, egoque emero meo pretio habebo mandati actionem de pretio reciperando; sed et si tuo pretio, impendero tamen aliquid bona fide ad emptionem rei, erit contraria mandati actio: aut si rem emptam nolis recipere: simili modo et si quid alius mandaveris et in id sumptum fecero. Nec tantum id quod impendi, verum usuras quoque consequar. Usuras autem non tantum ex mora esse admittendas, verum iudicem aestimare debere, si exegit a debitore suo quis et solvit, cum uberrimas usuras consequeretur, aequissimum enim erit rationem ejus rei haberi: aut si ipse mutuatus gravibus usuris solvit. Sed et si reum usuris non relevavit, ipsi autem et usurae absunt vel si minoribus relevavit, ipse autem maioribus faenus accepit, ut fidem suam liberaret, non dubito debere eum mandati iudicio et usuras

[1] L. 26. 1, 8. D. mand. XVII. 1. [2] L. 61, § 5. D. de furt. XLVII. 2.

consequi. Et (ut est constitutum) totum hoc ex aequo et bono iudex arbitrabitur." [1]

§ 343. *By Roman law principal not chargeable with damage to agent caused by casus fortuitus to the agent when engaged in the agency.* — The classical Roman law made a distinction in this respect between Societas (partnership) and Mandates, holding that while in the former *casus* was to be borne equally by the partners, in the latter, *casus* was to be borne exclusively by the mandatary.[2] But modern Roman jurists have modified this by holding that when the *casus* occurs to the mandatary necessarily (or in ordinary natural sequence) when in the discharge of his duties as mandatary, and as an incident to such duties, and not through the negligence or misconduct of the mandatary, then the loss is to be charged to the mandant. "Discrimen inter rigorem juris Romani et inaequitatem morum ac fori Germanici etiam in quaestione de casu fortuito, qui mandatorio, dum mandato operam dat, contigit, a prudentibus nostratibus introductum cernere est. . . . . Videlicet regulariter nullus mandans mandatorio de fortuito casu tenetur, tam jure Romano quam moribus: his tamen ex aequitate receptum est, ut in rebus *necessariis* occasione vel ob causam expediti mandati fortuitum damnum contingens, mandanti imputari possit. Id quod in societas contractu, in quo tacitum quoddam mandatum, Dd. agnoscunt, receperunt." [3]

§ 344. *Agent cannot recover from principal for damage sustained by him in matters collateral to the agency.* — An agent, who unnecessarily exposes himself, while engaged in his agency, to injury, cannot recover from his principal compensation for such injury, nor can he *a fortiori* recover damage in matters collateral to his agency. "Non omnia, quae inpensurus non fuit mandator, imputabit, veluti quod spoliatus sit a latronibus aut naufragio res amiserit vel languore suo suorumque adprehensus quaedem erogaverit: *nam haec magis casibus* quam mandato imputari oportet." [4] If the object injured is used by the agent as properly conducive to the discharge of the agency, then the principal is liable, but not otherwise. This distinction, as one essential to a

[1] L. 12, § 9. D. XVII. 1. See, also, L. 10, § 9. D. eod. L. 14. C. de neg. gest. II. 19.

[2] L. 26, § 6. D. h. t. above cited; Koch, III. 555.

[3] Schilter, prax. jur. Rom. exerc. XXVIII. § 93.

[4] L. 26, § 6. D. de mand. XVII. 1; Koch, Ford. III. 555.

sound view of this topic, has found its way into our own practice.[1]

§ 345. *Nor can he recover if by his negligence he has inflicted injury on his principal which counterbalances his advances.* — As we have already seen,[2] the agent is liable to the principal for damages caused by the agent's misconduct. Of course this claim can be set off against the agent's claim for the recovery of advances.[3]

§ 346. *Agent chargeable with losses of which his misconduct has been the cause, but not of those of which his misconduct has been simply the condition.* — Here again must we fall back upon the distinction between *causes* and *conditions*. A cause is a moral antecedent, of such a character that by its action, in the ordinary sequence of natural laws, the result in question is produced. A condition is an antecedent to which no moral responsibility is attachable, and which, in the ordinary sequence of natural law, could not produce the result in question, unless by the interposition of a moral agent. A man who either intentionally or negligently shoots another is the *cause* of that other's death; the gun, the bullet, the powder, are the *conditions* of such death.[4] The same distinction, though expressed in terms somewhat different, is recognized by Mr. M'Laren, in one of his recent notes to Bell's Commentaries.[5] "Losses sustained by the agent, if the business forming the object of the mandate has been the *proximate* cause, are also chargeable as sustained *ex causa mandati*. But it is necessary to discriminate between losses of which the agency has been the *cause*, and those of which it has been only the *occasion*. In the latter case no indemnification is due to the agent; *nam haec magis casui* (*casibus* in Mommsen's edition of 1872), quam mandato imputari debeat.[6] The same principle applies to a partner who has sustained loss in the course of the business of the copartnership, for he is as to his management an agent for the whole concerned. The Roman jurists give cases illustrative of the difference, divided by very subtle distinctions,

[1] See Corbin *v.* Ameriean Mills, 27 Conn. 274; Saveland *v.* Green, 36 Wisc. 612.

[2] Supra, § 273.

[3] Callender *v.* Oelrichs, 5 Bing. R. 58; Makepeace *v.* Rogers, 4 De G. J. & S. 649; Capp *v.* Topham, 6 East, 392; Dodge *v.* Tileston, 12 Pick. 328; Williams *v.* Littlefield, 12 Wend. 362.

[4] See Whart. on Neg. § 93. And see infra, § 385.

[5] 1 Bell's Com. 7th. ed. 534.

[6] L. 26. D. mand. 17. 1.

if they do not in some instances really contradict each other.[1] . . . . There are not many cases in our own books turning on this distinction, but Mr. Livermore has detailed a very interesting one, decided by the supreme court of Pennsylvania,[2] where the court, on the authority of Erskine and Heineccius, found in favor of an agent for reimbursement of losses which befell him, and reparation of injuries done to him by Christophe, the tyrant of Hayti, on account of the enmity the latter bore to the principal. Another case in which the same distinction applies is where the holder of a draft has so falsified it as to increase the amount of the sum which the drawer orders the drawee to pay. The contract between the drawer and the drawee is a mandate *pecuniae credendae* or *solvendae;* and the drawer's right to reimbursement against the funds of the principal in his hands, or against the principal personally, depends, like that of any other mandatary, on whether or not he has paid money *ex causa mandati.* Pothier has applied the distinction between the case where loss is suffered by an agent *ex causa* or *ex occasione mandati*, to the loss the drawee suffers by paying a falsified draft." [3]

§ 347. *Master not usually liable to servant for negligent act of fellow-servant, nor for such risks of service as servant may be supposed to take on himself.* — As this point mostly occurs in suits by servant against master, and rarely in those of agent against principal, it falls more properly within the province of another treatise where it is discussed at large.[4]

IV. SUB-AGENTS.

§ 348. *Servant must look to his immediate master for compensation.* — There is no privity between the servant of an agent and the agent's employer; and hence such servant cannot fall back upon such primary employer for wages.[5] "In the common case

[1] See for example the cases put by Paulus, D. XVII. 1. 26. 6. And compare Julian XVII. 2. 52. 4. And see Pothier's explanation conformably to the leading distinction between the agency *causing* the loss (as if the risk of it was one necessary to be run for the sake of the agency or partnership business, and to which the agent would not have exposed himself but for that necessity), and the agency business being merely the *occasion* of his being exposed to the incidents of the misfortune, as he might have been independently of the agency.

[2] D'Arcy *v.* Lyle, 5 Binn. 441.

[3] Pothier, Tr. du contr. de change. Nos. 99, 104.

[4] Whart. on Neg. § 224.

[5] See Mann *v.* Shiffner, 2 East, 523; Westwood *v.* Bell, 4 Camp. 348; Simmons *v.* Rose, 31 Beav. 11, and cases

of an upholsterer," says Lord Erskine, when illustrating this rule,[1] "employed to furnish a house; dealing himself in only one branch of business, he applies to other persons to furnish those articles in which he does not deal. Those persons know the house is mine. That is expressly stated to them. But it does not follow that I, though the person to have the enjoyment of the articles furnished, am responsible. Suppose another case: A person instructs an attorney to bring an action, who employs his own stationer, generally employed by him. The client has nothing to do with the stationer, if the attorney becomes insolvent." So the owner of a building is not personally liable to a sub-contractor who has been employed by the contractor in making additions or works upon the building.[2] Where a principal has not conferred upon his agent the power of substitution, the mere fact that he knows that his agent has appointed a sub-agent does not amount to a ratification of the substitution, nor make the substitute directly liable to the principal, nor relieve the agent from such liability.[3]

§ 349. *But an ancillary agent, with liberty of action for which he is personally liable, may look to the principal directly.* — This follows from the nature of the employment of such principal.[4]

cited supra, § 308; infra, § 604, 827. See also Johnson *v.* Ogilby, 3 P. Will. 277; Dubois *v.* Canal Co. 4 Wend. 285; Meyer *v.* Barker, 6 Binn. 234; Pelanne *v.* Coudreau, 16 La. An. 127.

[1] Hartop, ex parte, 12 Ves. 352.

[2] Pelanne *v.* Coudreau, 16 La. An. 127.

[3] Loomis *v.* Simpson, 13 Iowa (5 With.), 532; Bissell *v.* Roden, 34 Miss. 63.

[4] See Snook *v.* Davidson, 2 Camp. 218; Lanyon *v.* Blanchard, 2 Camp. 597; Westwood *v.* Bell, 4 Camp. 348; Coles *v.* Trecothick, 9 Ves. 234; Lansat *v.* Lippincott, 6 S. & R. 386; Gray *v.* Murray, 3 Johns. R. 167. See supra, § 28; infra, 537–544, 571, 827.

CHAPTER VI.

NEGOTIORUM GESTIO.

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§ 355. *Negotiorum gestio*, or the voluntary interposition of one friend for the protection of the interests of another, is not recognized by the English common law as constituting an obligation by which the party assisted is bound. As, however, the Roman law in this respect is adopted in those of the American states which accept Roman jurisprudence as their basis, and as in other of our states, as well as in England, there are points in which the two jurisprudences in this respect approach, I have thought it best to devote to the topic an independent chapter.

§ 356. *Points in which unauthorized agency (negotiorum gestio) differs from impertinent mixing in another's affairs.* —When a principal is capable of taking care of his own business, but is excluded from its management by the intrusion of a stranger, this involves such an interference with the principal's rights as amounts to a delict or *quasi* delict in the stranger so interfering. "Culpa est, immiscere se rei ad se non pertinenti." [1] Mere good intention is no defence to a suit for damages against the person so interfering. From such mixing in the affairs of another, unauthorized agency, of the class of Negotiorum Gestio, is widely distinguished. A. owns property which is exposed to a sudden shock, he being at the time absent, and a friend interferes to avert ruin. Certainly such friend is not a mere meddler; and

[1] L. 36. D. de R. J. (50. 17.) See supra, § 81.

we can well understand, therefore, why in the Roman law he should be held entitled to reimbursement for all expenses incurred by him for the benefit of the estate. But it is not on the *utilitas absentium* only that the equity of *negotiorum gestio* rests. The owner of perishable property, for instance, from various reasons, may be in such a condition that this property may be wrecked unless a friend intervene. In such case the party who thus, from motives of kindness, intervenes, is entitled to the same protection as if the owner were actually absent at the time of the intervention.

§ 357. *Cases in which the principal wills the interference of the agent* (negotiorum gestor). — The will of the principal may either exhibit itself beforehand, or subsequently, by way of ratihabition. Of the first class (*e. g.* cases in which the principal invites the aid of an agent, without designating the particular agent who actually intervenes, or cases in which the agency is inoperative as a mandate) the Roman law gives several illustrations. Of these we may mention the following: —

Nam et Servius respondet (ut est relatum apud Alfenum libro 39. Digest.) cum a Lusitanis tres capti essent, et unus ea conditione missus, uti pecuniam pro tribus adferret, et nisi redisset, ut duo pro eo quoque pecuniam darent, isque reverti noluisset et ob hanc causam illi pro tertio quoque pecuniam solvissent: (Servius respondit) aequum esse. Praetorem in eum reddere judicium.[1]

§ 358. In other words, one of three prisoners is released under the condition that he return with a ransom for all three, and that the other two, in case of his not returning, will pay his ransom for him. He does not return; and the other two pay his ransom together with their own. In this case the relation of negotiorum gestio is established between the person whose ransom is paid and those who pay it. The relation is based on the will of the former that the ransom should be paid, though he did not designate the parties who were to pay it.

Another case to the same effect is the following: —

Mandasti filio meo, ut tibi fundum emeret; quod cum cognovissem, ipse eum tibi emi. Puto referre, qua mente emerim. Nam si propter ea, quae tibi necessaria esse scirem, *et te ejus voluntatis esse, ut emtum habere velles*, agemus inter nos negotiorum

[1] L. 21, pr. D. h. t. Paulus, lib. 9, ad Edictum.

gestorum, sicut ageremus, si aut nullum omnino mandatum intercessisset, aut Titio mandasses, et ego, quia per me commodius negotium possim conficere, emissem. Si vero propterea emerim, ne filius mandati judicio teneatur, magis est, ut ex persona ejus et ego tecum mandati agere possim, et tu mecum actionem habeas de peculio: quia, *etsi Titius id mandatum suscepisset et, ne eo nomine teneretur, ego emissem*, agerem cum Titio negotiorum gestorum, et ille tecum et cum illo mandati. Idem est, et si *filio meo mandaveris*, ut pro te fidejuberet, et ego pro te fidejusserim. § I. Si *proponatur, te Titio mandasse, ut pro te fidejuberet*, meque, quod is aliqua de causa impediretur, quo minus fidejuberet, liberandae fidei ejus causa fidejussisse, negot. gest. mihi competit actio.[1] In this case A. commissions B.'s son to buy a piece of land, and B., learning of this, undertakes the transaction in his son's name. On such a state of facts, if B. had completed the purchase on A.'s behalf, the *actio negot. gest.* would lie. Agency would be constituted by the very act of the purchase of the land; and the will of A., the principal, would be expressed by his commission to B.'s son. And so where A. commissions Titius to offer security for him, but Titius is prevented from acting, C., who takes the place of Titius, can maintain the *actio negot. gest.*

§ 359. *Negotiorum gestio based upon the necessity of the principal.* — Cases may occur in which the interposition of an unauthorized agent is necessary to save the property of the principal from great deterioration, if not destruction. It may be that the principal is necessarily obliged to desert his property, leaving no one in charge. It may be that he becomes incapable (*e. g.* by an attack of insanity) of managing his own interests. Absence is the contingency that naturally presented itself most prominently to the jurists. As to absence we have the following: —

Igitur cum quis *negotia absentis* gesserit, ultro citroque inter eos nascuntur actiones, quae appellantur negotiorum gestorum. Quas ex nullo contractu proprie nasci manifestum est, quippe ita nascuntur istae actiones, si sine mandato quisque alienis negotiis gerendis se obtulerit. Ex qua causa ii, quorum negotia gesta fuerint, etiam ignorantes obligantur. *Idque utilitatis causa receptum est, ne absentium, qui subita festinatione coacti, nulli*

[1] L. 46. D. h. t.

demandata negotiorum suorum administratione, peregre profecti essent, desererentur negotia.[1]

From this passage we learn that the care taken by the gestor of the affairs of an absent friend was the basis of the *obligatio;* but that at the same time the *actiones n. g.* were based on the political importance of having the affairs of absent persons saved from ruin while they were away. In a great empire, men of affairs, such as were generally the Roman heads of families, were frequently called upon to leave their homes for distant points, which for rapid business communication were inaccessible. Such men were the most trusted servants of the republic; unless the estates of such men were cared for in their absence, those estates, subject to contingencies which the absent owner could not provide against, would be exposed to spoliation; and the commonwealth would suffer not only by the crippling of the particular individuals thus hurt, but by the consequent withdrawal of responsible business men from such public services as required absences from home. We have this noticed in the following fragment: —

Ulpianus, lib. 10, ad Edictum: Hoc edictum necessarium est, quoniam magna utilitas *absentium* versatur, ne *indefensi* rerum possessionem, aut venditionem patiantur, vel pignoris distractionem, vel poenae committendae actionem, vel injuria rem suam amittant.[2]

§ 360. Here, again, is prominently noticed the policy of such protection being given to absent parties; a policy which applies with almost equal force to the United States, a country which exhibits, in the vastness of its territory, and in the diversity of its subordinate jurisprudences, so much resemblance to the Roman empire. Then again: Si quis *absentis negotia* gesserit, si quidem ex mandatu, palam est, ex contractu nasci inter eos actiones mandati — si vero sine mandatu, placuit quidem sane eos invicem obligari, eoque nomine proditae sunt actiones, quas appellamus negotiorum gestorum. *Ideo autem id ita receptum est*, quia plerumque homines eo animo *peregre proficiscuntur, quasi statim redituri, nec ob id ulli curam negotiorum suorum mandant, deinde novis causis intervenientibus ex necessitate diutius absunt*, quorum negotia desperire iniquum erat.[3]

[1] L. § 1. Inst. de obl. quae quasi ex contr. III. 27. See supra, § 81.

[2] L. I. D. h. t.

[3] L. 5. D. de obligat. et act. XLIV. 7.

Here Gaius notices the care given to the concerns of an absent person as the basis of the *obligatio negotiorum gestorum.* And as is observed by Köllner, in the very intelligent essay to which we are largely indebted in the present discussion,[1] the passages just quoted are the more important, because, instead of deciding concrete, and thereby it might be said exceptional cases, they announce abstract propositions as of general force.

But absence is not the only ground, as has been already incidentally seen, on which agencies of this kind rest. A business man may be rendered suddenly incapable of business, and it is essential for him and essential for the state that some one should step in to protect his interests. Of course this, with us, might be done by an appeal to a court of chancery, and by the appointment of a guardian or trustee. This could be also done by the Roman law; but in many cases such interposition could not be secured without great delay, and in all cases time would elapse between the accruing of the incapacity and the appointment of the guardian, in which the estate would need protection. Hence Ulpian thus speaks: —

Et si *furiosi* negotia gesserim, competit mihi adversus eum actio. Curatori autem furiosi vel furiosae adversus eum eamve dandam actionem, Labeo ait.[2]

§ 361. Expenditures on behalf of and in the interests of an infant, are approved when necessary to the preservation of the estate (urgentibus necessitatis rationibus): —

Contra *impuberes* quoque, si negotia eorum *urgentibus necessitatis rationibus* utiliter gerantur, in quantum locupletiores facti sunt, dandam actionem ex utilitate ipsorum receptum est. Quae tibi quoque jure decernitur, quod sumtus in pupillum, quem Romam tutorum petendorum gratia duxisti, fecisse te allegas: si non matertera ejusdem se facere paratam propriis impendiis ostenderit.[3]

Other passages extend the same protection to the estates of prisoners of war[4] and of deceased persons.[5]

§ 362. *Cases in which the interposition of a non-authorized agent (gestor) is not necessary, but in which such interposition,*

[1] Die Grundzüge der Obligatio Negotiorum Gestorum, Göttingen, 1856.

[2] L. 3, § 5. D. h. t. Ulpianus, lib. 10, ad Edictum. See as to our own law, infra, § 374.

[3] L. 2. C. h. t. Severus et Anton. Sopatrae.

[4] L. 20. D h. t. L. 19, § 5. D. h. t.

[5] L. 3, § 6. D. h. t. L. 21, § 1, 22, 23. D. h. t.

being bonâ fide, is sustained in justice to the parties, and from the general policy of the law. — Cases may arise in which, from community of interests, or from motives of friendship, one person may interpose for the protection of another's interests, though it may subsequently turn out that such interposition was not necessary. In such case the policy of the law, as well as justice to both parties, requires that the party interposing should be regarded as agent, provided this be without detriment to the principal. Of the application of this rule we have several illustrations in the Digest.[1] Among those we may particularize the following, as bearing on similar relations in our own law.

Pater, si emancipati filii res a se donatas administravit, filio actione negot. gest. tenebitur.[2]

A father takes charge, without specific authority, of his son's business. The father is regarded as the *gestor* or agent of the son.

Ignorante virgine mater a sponso filiae res donatas suscepit, quia mandati vel depositi cessat actio, negotiorum gestorum agitur.[3]

A mother, without specific authority, takes charge of certain effects given to her unmarried daughter, by the latter's intended husband. The mother is the daughter's *gestor* or agent, and is both privileged and liable as such.

Ignorante quoque sorore, si frater negotium ejus gerens dotem a viro stipulatus sit: judicio negot. gestorum, ut virum liberaret, jure convenitur.[4]

A brother, taking charge, without specific authority, of his sister's affairs, stipulates for a return of the *dos;* this is regarded as a *negotiorum gestio.*

§ 363. So this form of agency may spring out of a community of business interests. "Ex facto quaerebatur: quendam ad siliginem emendam curatorem decreto Ordinis constitutum, eidem alium subcuratorem constitutum siliginem miscendo corrupisse, atque ita pretium siliginis, quae in publicum emta erat, curatori adflictum esse: quaque actione curator cum subcuratore experiri possit et consequi id ut ei salvum esset, quod causa ejus damnum cepisset? Valerius Severus respondit, *adversus contutorem negotiorum gestorum actionem tutori dandam. Idem respondit, ut*

[1] L. 35, pr. D. h. t. L. 37, § 2. D. h. t. L. 32, § 1. D. h. t. L. 30. D. h. t.

[2] L. 37, § 2. D. h. t.

[3] L. 32, § 1. D. h. t. Papinianus.

[4] L. 48. D. h. t. Papinianus.

Magistratus adversus Magistratum eadem actio detur, ita tamen si non sit conscius fraudis. Secundum quae etiam in subcuratore idem dicendum est.[1]

Here A., a guardian or curator, is declared to be entitled to maintain the *actio negotiorum gestio* against B., a co-guardian or sub-curator, who undertakes to represent A. And Köllner sustains this ruling on the ground that co-guardians, when acting for each other, are to be regarded as reciprocal representatives; and that the sub-curator is regarded as the representative of the curator, though not expressly employed as such.

§ 364. So in the following interesting case: —

Uno defendente causam communis aquae, sententia praedio datur: sed, qui sumtus necessarios probabiles in communi lite fecit, negotiorum gestorum actionem habet.[2]

A., who has in common with B. a water privilege on C.'s land, defends the privilege in a suit brought by C.. The suit is decided in favor of C. Here A. is entitled to recover from B. the latter's share of the costs of process, though there was no authority from B. to act, supposing the defence to be for the common interest. This would not hold good if A.'s defence was frivolous, or if B., having notice to come in, declined to do so.

And again: —

Si quis pecuniam, vel aliam quandam rem ad me perferendam acceperit; quia meum negotium gessit, neg. gest. mihi actio adversus eum competit.[3]

A. takes charge of money or other property which had been given him to bring to B. A. is liable to B. in the *actio neg. gest.*

And again: —

Fidejussor imperitia lapsus alterius quoque contractus, qui personam ejus non contingebat, pignora vel hypothecas suscepit et utramque pecuniam creditori solvit, existimans, indemnitati suae confusis praediis consuli posse. *Ob eas res* judicio mandati frustra convenietur et ipse debitorem frustra conveniet, *negotiorum autem gestorum actio utrique necessaria erit, in qua lite culpam aestimari satis est*, non etiam casum, "quia praedo fidejussor non videtur," &c.[4]

[1] L. 30. D. h. t. Julianus, lib. 3. Dig.
[2] L. 31, § 7. D. h. t. Papinianus, lib. 2. Respons.
[3] L. 6, § 2. D. h. t. Julianus.
[4] L. 32, pr. D. h. t.

§ 365. A. engages to become security for B. to C., but, instead of this, erroneously binds himself by a contract of indebtedness to C. This debt A. pays to C. Supposing B. loses no more, if this be carried out, than he would have done had A. strictly complied with his instructions, then A. is to be regarded as B.'s *gestor* in the transaction, because A. in this respect is not to be regarded as a *praedo*, *i. e.* as a person who has unlawfully meddled in the transaction, and because A.'s act has *pro tanto* relieved B.

§ 366. Here is a more common case: —

Cum pecuniam ejus nomine solveres, qui tibi nihil mandaverat, neg. gest. actio tibi competit, cum ea solutione debitor a creditore liberatus sit, *nisi si quid debitoris interfuit, eam pecuniam non solvi.*[1]

My paying money on account of B. entitles me to the *actio n. g.*, if the payment be for B.'s benefit. It is otherwise, however, if B. has an interest in postponement of payment, or if he objects to the payment, or if there is an opportunity of consulting him, which I neglect. This is implied from what is said by Gaius: —[2]

Solvendo quisque pro alio, licet invito et ignorante, liberat eum; quod autem alicui debetur, alius sine voluntate ejus non potest jure exigere. Naturalis enim, simul et civilis, ratio suasit alienam conditionem meliorem quidem (etiam) ignorantis et inviti nos facere posse, deteriorem non posse.

§ 367. By the law of Louisiana, a *negotiorum gestor* has the right to be refunded the taxes assessed on the property and paid by him during the continuance of his possession; though no privilege exists therefor.[3] But a *negotorium gestor* cannot be treated as an administrator. Thus, where the heirs of the deceased wife of the defendant, alleging that he failed to open her succession, or cause an inventory thereof, consisting of half of the community property, to be made, but has administered the same as *negotiorum gestor*, and permitted it to be wasted and dilapidated, obtained an *ex parte* order directing him to file an account of his administration and a notary public to make an inventory of said succession; it was finally ruled that a *ne-*

[1] L. 43. D. h. t. Labeo, lib. 6. Posterior cet.

[2] L. 39. D. h. t.

[3] Succession of Erwin, 16 La. An. 132.

gotiorum gestor cannot be thus compelled, in such process, to render an account to the court in a fiduciary capacity, as an administrator of a succession; nor is the surviving husband, holding under the law as usufructuary, to be called on thus for an account of an administration.[1]

§ 368. *How far the motives of the unauthorized agent touch the question of agency.* — It will be at once seen that the question of agency, in cases of this class, depends largely on the motives of the person intervening. A person who impertinently, either for mischief, or for his own gain, meddles in the affairs of another, cannot be generally regarded as representing that other. Yet it must be remembered that the mere expectation of making money out of the transaction, does not, if the other requisites heretofore noticed exist, prevent the relationship of agency. Sed et si quis negotia mea gessit, non mei contemplatione, sed sui lucri causa: Labeo scripsit, suum eum potius, quam meum negotium gessisse. Qui enim depraedandi causa accedit, suo lucro non meo commodo studet. Sed nihilominus, imo magis, et is tenebitur negotiorum gestorum actione. Ipse tamen, si circa res meas aliquid impenderit, non in id, quod ei abest, quia improbe ad negotia mea accessit, sed in quod ego locupletior factus sum, habet contra me actionem.[2]

§ 369. *By Anglo-American law the voluntary payment of another's debt binds the latter when he takes advantage of the payment.* — As a general rule, if A., without authority, voluntarily pays B.'s debts, B. is under no legal liability to repay A., the reason given being that the policy of our law does not permit any one to make himself the creditor of another without the latter's consent.[3] But the fallacy of this argument (since the law permits any one by purchasing claims against another to become without the latter's consent his creditor) has caused the rule to be occasionally questioned, so far as concerns its universality.[4]

[1] Rentz *v.* Cole, 26 La. An. 623.

[2] L. 6, § 3. D. h. t.

[3] Bancroft . Abbott, 3 Allen, 524; Richardson *v.* Williams, 49 Me. 558; South Scituate *v.* Hanover, 9 Gray, 420; England *v.* Marsden, Law R. 1 C. P. 529. See Exall *v.* Partridge, 8 T. R. 308.

[4] See Sutton *v.* Tatham, 10 Ad. & El. 27; Brown *v.* Hodgson, 4 Taunt. 189; Longchamp *v.* Kenney, 1 Doug. 137; Exall *v.* Partridge, 8 T. R. 308; Sapsford *v.* Fletcher, 4 T. R. 511; Fisher *v.* Fallows, 5 Esp. 171; Hales *v.* Freeman, 4 Moore, 21; Foster *v.* Ley, 2 Bing. N. C. 369; Moreland *v.* Davidson, 71 Penn. St. 371.

§ 370. Thus it has been said[1] that even if the consideration were passed, it would be unnecessary to allege a request, if the act stated in the consideration cannot, from its nature, have been a gratuitous kindness, but imports a consideration *per se;* and it is further held that it is immaterial to the right of action whether the bargain, if actually concluded and executed, or the loan, if made, and the money actually advanced, was proposed and urged by one party or the other.[2] Yet it must be remembered that as rulings of this character can be explained on the ground of ratification,[3] it is not proper that they should be quoted as sustaining any claim in the nature of an unratified *negotiorum gestio.* For, as has been accurately stated,[4] if the person sought to be charged refuse to adopt or take advantage of the consideration, when performed, a promise on his part would not be implied, since he is not bound to indemnify persons for acts done without his consent or wish, however beneficial such acts may be, unless he takes advantage of them, and refuses to ratify them.

§ 371. *Promise is implied from acceptance of work or goods.* — Where a party accepts and adopts work rendered to him, this, under ordinary circumstances, renders him liable for such services.[5] This is the case where one not a relation and not an object of charity, but able to earn wages, is employed in the service of another for any period of time;[6] where a husband permits his wife to receive goods which he did not authorize her to buy, but for which he knows his own credit has been pledged; where an infant retains a lease after he arrives at full age, without objecting;[7] where A. purchases goods for B., and B. receives them and uses them without objection, knowing that they are not a gift, when a promise will be implied on his part to pay for them,

[1] Fisher *v.* Pyne, 1 Man. & Gr. 265.

[2] Mountford *v.* Horton, 2 Bos. & Pul. 62. See Victors *v.* Davies, 12 M. & W. 758, in which it is decided that no request need be averred. But see Hayter *v.* Moat, 2 M. & W. 56.

[3] See supra, § 62.

[4] Story on Contracts, Bigelow's ed. § 598.

[5] See fully authorities, § 89.

[6] Moreland *v.* Davidson, 71 Penn. St. 371; Lewis *v.* Trickey, 20 Barb. 387; Tipper *v.* Bicknell, 3 Bing. N. C. 710.

[7] Story on Contracts, § 117, and cases cited.

and no previous request need be proved;[1] where a parent stands by and permits clothing to be supplied to his child.[2]

§ 372. So far as concerns work and labor, however, it must be remembered that by the strict rule of the English common law, if they are merely gratuitous, and performed for the defendant without his request or privity, however meritorious or beneficial they may be, they afford no cause of action.[3] Thus in a New York case,[4] where A. entered on land belonging to P., and without his knowledge or authority cleared it, made improvements, and erected buildings, and P. afterwards promised to pay him for the improvements he had made, it was ruled by the supreme court that the work having been done, and the improvements made without the request of P. the promise was a *nudum pactum*, on which no action could be maintained. So, in another case in the same court,[5] the evidence was that A. owned a wheat stubble-field, in which P. had a stack of wheat, which he had promised to remove in due season for preparing the ground for a fall crop. A., at the proper season, sent a message to P. requesting the immediate removal of the stack of wheat, as he wished, on the next day, to burn the stubble on the field. P. having agreed to remove the stack by ten o'clock the next morning, A. waited till that time, and then set fire to the stubble in a remote part of the field. The fire spreading rapidly, and P. not appearing to remove the stack, A. removed it for him. It was

[1] Law *v.* Wilkins, 6 Ad. & E. 718; Fishmongers' Co. *v.* Robertson, 5 Man. & Gr. 192. See Jennings *v.* Brown, 9 M. & W. 496.

[2] Law *v.* Wilkins, 6 A. & E. 718; Nichole *v.* Allen, 3 C. & P. 36. But see Mortimore *v.* Wright, 6 M. & W. 485, where Lord Abinger doubts these cases. The question of constructive authorization is for the jury. Baker *v.* Keen, 2 Stark. 501.

[3] Story on Contracts, Bigelow's ed. 603; Bartholomew *v.* Jackson, 20 Johns. 28; Ehle *v.* Judson, 24 Wend. 97; Frear *v.* Hardenburgh, 5 Johns. 272; Hunt *v.* Bate, Dyer, 272 *a;* 1 Roll. Abr. 11, pl. 1; Hayes *v.* Warren, 2 Stra. 933; Roscorla *v.* Thomas, 3 Q. B. 234; Jeremy *v.* Goochman, Cro. Eliz. 442; Dogget *v.* Vowell, Moore, 643; Hines *v.* Butler, 3 Ired. Eq. 307; Allen *v.* Richmond, 41 Mo. 302. If A. undertake, as a mere act of friendship, to receive a note for P. and to deliver it, for collection, into the hands of L., an attorney, A. cannot, after the death of P, maintain a claim against P.'s estate for services voluntarily rendered in the prosecution of the suit for the collection of the same. Morrow *v.* Allison, 39 Ala. 70.

[4] Frear *v.* Hardenburgh, 5 Johns. 273.

[5] Bartholomew *v.* Jackson, 20 Johns. 28.

ruled that as A. performed the service without the privity or request of P., he was not entitled to recover for it.

§ 373. So one tenant in common, who makes necessary repairs upon the common property without his co-tenant's consent, was held in Massachusetts, in 1868, not entitled to recover contribution from the co-tenant for the cost of such repairs.[1] "The doctrine of the common law," says Foster, J., "on this subject is stated by Lord Coke as follows: 'If two tenants in common or joint tenants be of an house or mill, and it fall in decay, and the one is willing to repair the same, and the other will not, he that is willing shall have a writ *de reparatione facienda*, and the writ saith *ad reparationem et sustentationem ejusdem domûs teneantur*, whereby it appeareth that owners are in that case bound *pro bono publico* to maintain houses and mills which are for habitation and use of men.' Co. Lit. 200 *b;* Ibid. 54 *b*."[2] "In Carver *v.* Miller, 4 Mass. 561" (so proceeds Judge Foster), "it was doubted by Chief Justice Parsons whether these maxims of the common law, as applied to mills, are in force here, especially since the provincial statute of 7 Anne c. 1, revised by stat. 1795, c. 74. . . . . The difficulty in the way of awarding damages in favor of one tenant in common against his co-tenant for neglecting to repair is that both parties are equally bound to make repairs, and neither is in more default than the other for a failure so to do. Upon a review of all the authorities, we can find no instance in England or in this country in which, between co-tenants, an action at law of any kind has been sustained, either for contribution or damages, after one has made needful repairs in which the other refused to join." It is also held that if a workman, employed and directed to do a particular thing, choose to do some other thing, without the direction or assent of the employer, the implied promise of the employer to pay for his labor will not extend to the new work; but if the work is accepted by the employer, it would be a sufficient consideration for a promise to pay for it, and such acceptance might imply such promise.[3]

§ 374. *Self-constituted agent of non-responsible principal may recover for necessities.* — When, however, a person incapable of caring for himself is in a state of destitution, the law, in order to

[1] Calvert *v.* Aldrich, 99 Mass. 74.

[2] See also Bowles's case, 11 Co. 82. Hort *v.* Norton, 1 McCord, 22. See also Phetteplace *v.* Steere, 2 Johns. 442.

[3] Story on Contracts, *ut supra*, citing

enable his wants to be supplied, will charge his estate for the payment of necessary expenses incurred by a friend or other agent voluntarily aiding him.[1] So the price of goods furnished to a man when drunk may be recovered if he use them when sober;[2] and so even for necessaries which he consumed at once when drunk.[3]

§ 375. *Principal receiving goods he did not order to be treated as liable.* — Judge Story has found an analogy to the *negotiorum gestor* in the case of the principal who, having received from his factor goods which he is not bound to take, as they were bought without orders from him, instead of returning such goods, becomes a voluntary agent for his own factor, and sells them at the port of delivery. Has he power to do this? If not, at law, such a sale, Judge Story argues, would be sustained in equity.[4] Lord Eldon lays down the same rule even more broadly. "I have a strong conviction, upon sound principles, confirmed by my short experience at Guildhall, that if a man under a contract to supply one article supplies another, under such circumstances that the party to whom it is supplied must remain in utter ignorance of the change, until the goods are under circumstances in which it would be against the interest of the other to return or reject them, instead of doing what is best for him, selling them immediately, a jury would have no hesitation in saying he ought to be considered, if he pleased, not as a purchaser, but as placed

[1] See Crooks *v.* Turpin, 1 B. Monr. 185; Earle *v.* Crum, 42 Miss. 165; Baxter *v.* Earl of Portsmouth, 2 C. & P. 178; 7 D. & R. 617; Tally *v.* Tally, 2 Dev. & Bat. 385. As to Roman law, see supra, § 360–1. A plaintiff who has indorsed the notes of a self-constituted agent of a lunatic, to enable such agent to raise money ostensibly for the benefit of the family of such lunatic, which money was used by the agent in cultivating the farm of the lunatic, can only recover, in a suit against the lunatic upon the notes signed by the agent, so much of his debt as he can show was actually expended for the necessary support of the lunatic, and such of his family as were properly chargeable upon him. Richardson *v.* Strong, 13 Ired. 106, cited and approved, Surles *v.* Pipkin, 69 N. C. 513. And see McCrillis *v.* Bartlett, 8 N. H. 569; Wentworth *v.* Tabb, 1 Y. & Col. C. C. 171.

[2] Gore *v.* Gibson, 13 M. & W. 623.

[3] Ibid.; Pitt *v.* Smith, 3 Camp. 33; Fenton *v.* Halloway, 1 Stark. 126; Cooke *v.* Clayworth, 18 Ves. 15; Drummond *v.* Hopper, 4 Harring. 327; Prentice *v.* Achoon, 2 Paige, 30; Seymour *v.* Delancey, 3 Cow. 445; Wigglesworth *v.* Steers, 1 Hen. & M. 70, cited Story on Contracts, § 86.

[4] Story's Agency, § 143, citing Kemp *v.* Pryor, 7 Ves. Jr. 240; Cornwall *v.* Wilson, 1 Ves. 509; Smith on Mer. Law, 52, 53 (2d ed.); Ibid. ch. 5, § 2, p. 99 (3d ed.).

by the vendor in a situation in which, acting prudently for him, he was an agent. The consequence, then, is, that he would be liable to account for the money received, subject to freight or other charges; though while the goods were *in transitu* he had considered himself owner." [1]

[1] Kemp *v.* Pryor, 7 Ves. Jr. 240.

CHAPTER VII.

CAUSAL CONNECTION.

I. Causation by Direction.
- A principal is the cause of an act which he directs his agent to do, § 381.
- An agent is held to his principal for injuries to the principal which the agent produces, § 382.

II. Causation by Neglect.
- Neglect is a juridical cause of an injury which results from it in ordinary natural sequence, § 383.
- An omission may be a juridical cause, § 384.
- A "condition" or "occasion" is not necessarily a cause, § 385.
- Causal connection is broken by *casus*, or *vis major*, § 386.
- But not so if *casus*, or *vis major*, is provoked, § 387.
- Necessity a broader defence than *casus*, § 388.
- Agent not liable if disaster is imputable to interposition of an independent responsible person, § 389.
- Nor for what is produced by principal, § 390.
- Agent not liable to principal for contingent profits and losses, § 391.
- This distinction applicable to suits against insurance agents for neglecting to insure, § 393.

§ 380. I HAVE discussed the topic of causal connection, in suits for negligence, so fully in another treatise,[1] that it remains for me at present simply to recapitulate, with a few additional authorities, the rules that are there pronounced. It should be observed that the causal relation, in matters concerning agency, comes into discussion mainly in two distinct aspects: first, as to the liability of the principal for the agent; second, as to the liability of the agent to the principal. A principal is not liable for any acts of his agent of which the agent was not the cause. An agent is not liable for any acts unless he was the cause of such acts. What, however, is *cause*, in its juridical sense? This question may be answered as follows: —

I. CAUSATION BY DIRECTION.

§ 381. *A principal is the cause of an act which he directs his agent to do.* — He may be exclusively liable, as is the case when the agent, in matters contractual, acts as the representative of the principal. He may be cumulatively liable, as is the case in certain classes of occult agency, and in torts in which the agent

[1] Whart. on Neg. § 73 *et seq.*

does the tortious act not by compulsion, but by free choice. But whether exclusively or inclusively, he who directs an act which is performed under his direction by another is liable for such act.

§ 382. *An agent is liable to his principal for injuries to the principal which the agent directs.* — Here, also, there is no breach in the causal relation. Of that which the agent directs, and which is done under his direction, he is the juridical cause.

II. CAUSATION BY NEGLECT.

§ 383. On this topic we must accept the following proposition: *The juridical cause of an injury, in the sense immediately before us, consists of such an act or omission, on the part of a responsible human being, as in ordinary natural sequence results in such injury.*

§ 384. *An omission may be a juridical cause.* —It is sometimes said that an omission cannot be a cause.[1] No doubt that if I promise, without consideration, to do a thing, and then, before any injury results to the party to whom I promise, withdraw from my promise, notifying him of the withdrawal, I incur to him no legal liability for the omission. But it is otherwise when having undertaken a mandate, I omit some act necessary to its faithful discharge. *Voluntatis est suscipere mandatum, necessitatis est consummare.* A lawyer, for instance, who, undertaking a suit, omits to do something essential to its proper management, is liable for the injury thereby resulting to his client, even though his services are gratuitous.[2] So I am bound to keep my premises in good order so that they do not occasion injury to others; and if I omit to perform this duty, I am liable for the damage produced by the omission. "Suppose that there is, to my knowledge, a peculiar danger in the nature of a trap, a concealed trap, on the premises, of which I neglect to warn the person who I know is going there by my permission: it is obviously unimportant whether the pit was dug by my orders, or whether it was there when I myself came to the premises, and I have only neglected to have it fenced."[3] But on the other hand, unless such omission be an imperfection in the discharge of a legal duty, it does not impose liability. Were it otherwise, business would

[1] See Story's Agency, § 308 *et seq.*

[2] See infra, § 600.

[3] Cotton *v.* Wood, 8 C. B. (N. S.) 568. Supra, § 273; infra, § 600.

be brought to a stand-still. If those who, without any legal duty imposed on them, omit to do something that would produce a benefit to others, should be liable for such omission, everybody would be prevented from helping himself because he would be compelled by law to occupy himself with helping others. Nor would those who would be thus assisted be benefited by the assistance. No public enterprise (*e. g.* running a railroad) could be safely conducted if every person employed or unemployed, skilful or unskilful, should be required, if he sees anything he thinks wrong about it, to dash in to correct the wrong. No man could courageously and consistently discharge his special office, if all other persons were constituted his overseers. Industry would be useless, and practical communism established, if it were the duty of everybody to do everything for everybody else.

§ 385. *A "condition" or "occasion" not necessarily a cause.* — Much confusion has resulted from the treating of "conditions" or "occasions" as causes; and from treating persons concerned in such "conditions" or "occasions" as responsible parties to the event. But a person may be the condition or occasion of an injury to another, without being its cause.[1] I may, for instance, manufacture powder, and that powder may produce another's death, yet I am not thereby the cause of such death. I may carry in my cars a load of fruit from warehouse to warehouse in weather so inclement that the fruit freezes, but I am not responsible for the damage if I am at the time acting under the owner's orders. So neither a person destitute of reason,[2] nor a person acting under compulsion,[3] nor an unconscious person,[4] can be a juridical cause. And for the same reason a person acting convulsively, in a position in which he is placed by no negligence of his own, is not chargeable with his acts, unless they are of the nature of a nuisance for which his estate is responsible.[5]

§ 386. *Causal connection is broken by casus, or vis major.* — Suppose, however, an agent is prevented from the discharge of his duty by *casus*, or the act of God; or by *vis major*, or the act of hostile overwhelming force, is he responsible? First we have

[1] See Thames *v.* Housatonic R. R. 4 Conn. 40.

[2] Whart. on Neg. § 88.

[3] Whart. on Neg. § 89.

[4] Whart. on Neg. § 90.

[5] Scott *v.* Shephard, 2 W. Black. 892; 1 Smith's Leading Cases, 549; Whart. on Neg. § 75. Supra, § 346.

to determine, in answering this question, what is the meaning of the terms used. This meaning has been much discussed. "I consider" said Lord Mansfield,[1] "it" (the act of God) "to mean something in opposition to the act of man." "The law presumes against the carrier" (and although in suits for negligence outside of common carriage the defendant is entitled to interpose other defences, yet the defence of "act of God," when made, is to be defined in the same way as in suits against common carriers), "unless he shows it was done by the king's enemies, or *by such acts as could not have happened by the intervention of man, as storms, lightnings, and tempests.*" Hence, a common carrier cannot defend on the ground of destruction by fire, unless such fire was caused by lightning; nor on the ground of loss by thieves, though he should be able to prove that he had used the diligence practised in such matters by good business men. With common carriers, in respect to such liability, are to be placed innkeepers. It is otherwise, however, with ordinary contracts of agency. In such contracts the agent (unless he makes himself personally liable as surety or insurer) is required only to exercise such diligence as is usual with good business men under the circumstances. And independently of this defence, he is open to defend himself on the ground of *casus*, or the act of God, as above defined, or on that of *vis major*, or the irresistible force of a public enemy.[2]

§ 387. *But no defence if casus, or vis major, was provoked.* — The agent, however, cannot defend himself, if exposure to *casus*, or *vis major*, was brought about by his own negligence. I undertake, for instance, to do a particular work for my principal by a particular time, or in a particular way. An unprecedented storm, if I have previously exercised due diligence, will be a defence if it prevents me from executing my agency; but it will be otherwise if through my culpable delay, or my culpable want of skill

[1] Forward *v.* Pittard, 1 T. R. 27.

[2] As to act of God, see Blyth *v.* Birm. Water Works, 11 Exch. 781; Carstairs *v.* Taylor, L. R. 6 Ex. 217; Wakeman *v.* Robinson, 1 Bing. 213; 8 Moore, 63; Street *v.* Holyoke, 105 Mass. 82; Livingston *v.* Adams, 8 Cow. 175; Lehigh Bridge Co. *v.* Lehigh Coal Co. 4 Rawle, 9; Bell *v.* McClintock, 9 Watts, 119; Knoll *v.* Light, 76 Penn. St. 268. As to *vis major*, see Holladay *v.* Kennard, 12 Wall. 176; Watkins *v.* Robert, 28 Ind. 167; Magellan Pirates, 25 Eng. L. & Eq. 595; *S. C.* 18 Jur. 18; So. Ex. Co. *v.* Craft, 49 Miss. 480. See supra, § 274.

or preparation, I expose myself to such storm.[1] So if I, by my own imprudence, expose myself to the public enemy, and am thus prevented by irresistible force from executing the agency I undertook, *vis major* cannot be set up by me as a defence in a suit brought against me by my principal.[2] So if a vessel I have inadequately insured is destroyed by a storm, the loss, if I could have averted it by due diligence, is imputable, not to the *casus*, but to my neglect.[3]

§ 388. *Necessity, when set up by agents, a broader defence than casus.* — It must at the same time be remembered that necessity, when set up as a defence by agents who are not insurers, is subjected to a more liberal construction than is *casus*, or *vis major*, when set up by common carriers or innkeepers. *Casus*, or *vis major*, cannot, in the latter class of cases, be used as a bar, when produced by any human intervention save that of irresistible hostile force. It is otherwise with necessity. Necessity, by a recent thoughtful German commentator, has been classified as subjective or objective;[4] in other words, that which concerns the agent himself, who is to do the particular thing, and that which concerns the particular thing to be done. An agent, for instance, is taken so sick, without any negligence on his part, that he is unable to execute his commission;[5] or he becomes insane;[6] or he is detained by private violence; and in each of these cases he cannot be held liable, if he be not an insurer, for non-performance of his engagement. Or the thing he undertakes to do becomes impossible for reasons connected with itself, — *e. g.* a person whom he undertakes to negotiate with dies, or goods he undertakes to procure perish without his fault; and in such case also he ceases to be liable.[7]

§ 389. *Agent is not liable for negligence to principal if injury*

[1] Williams *v.* Littlefield, 12 Wend. 362; Johnson *v.* Friel, 50 N. Y. 679; Austin *v.* Steam Co. 43 N. Y. 75; Seigel *v.* Eisen, 41 Cal. 109; Caffray *v.* Darbey, 6 Ves. 496; Davis *v.* Garrett, 6 Bing. 716; Barker *v.* James, 4 Camp. 112; May *v.* Roberts, 12 East, 89; Wren *v.* Kirten, 11 Ves. Jr. 378; Paley's Agency, 9–19. See Hoadley *v.* Trans. Co. 115 Mass. 304; supra, § 253.

[2] Colt *v.* M'Mechen, 6 Johns. 160; Railroad *v.* Reeves, 10 Wall. 176; Holladay *v.* Kennard, 12 Wall. 254.

[3] Wallace *v.* Telfair, 2 T. R. 188; De Tastet *v.* Crousillat, 2 Wash. C. C. 132; Park *v.* Hammond, 4 Camp. 344.

[4] Mommsen, Beiträge zum Obligationenrecht, erste Abtheilung.

[5] Supra, § 108.

[6] Ibid.

[7] See Greenleaf *v.* Moody, 1 Allen, 363; Wallis *v.* Manhattan Co. 2 Hall, 495; Dusar *v.* Perit, 4 Binn. 361.

is imputable to the interposition of an independent responsible person. — Of course this rule does not apply to cases where the agent is an insurer. But in other cases, where a responsible third party, whose intervention could not be warded off by such prudence on the part of the agent as is common to good business men, intervenes, and causes injury to the principal, then the agent is not liable to the principal for the injury.[1]

§ 390. *Nor is agent liable to principal for losses produced by principal's negligence.*[2]

§ 391. *Agent not liable to principal for contingent profits or losses.*[3] — An agent omits to forward money in time, and the principal subsequently fails, when he might have remained solvent had the money in question been forwarded. The agent is liable for the loss of the particular sum, but not for the damage to the principal arising from his loss of credit. So, also, an agent who fails to ship goods to his principal may be liable for the loss on the particular goods; but not for the loss of contingent and speculative gains which his principal might have made by the reinvestment of the funds obtained by the sale of such goods.[4] So an agent employed to buy a ship, or purchase or erect machinery, is liable to his employer for any damage accruing from defects in such machinery, but not from loss of business to the principal of which the use of defective machinery is the occasion.[5] So if the agent agrees to purchase a particular article, to which certain accretions are to be expected, he is obliged, in case of his negligent failure to perform his contract, to put his principal in the condition the principal would have been in had the article been bought; *i. e.* he must pay the principal the value of the article with its accretions,[6] but is not bound for contingent profits. Or, to state the rule in terms sometimes adopted by the

[1] See this rule expanded and sustained in Whart. on Neg. § 134. And see, in addition to cases there cited, Fitzsimmons *v.* Inglis, 5 Taunt. 534. And see infra, § 423.

[2] See Whart. on Neg. § 300.

[3] See Horne *v.* R. R. L. R. 8 C. P. 131; Whart. on Neg. § 148. Supra, § 251.

[4] Schooner Lively, 1 Gall. 314; Brown *v.* Smith, 12 Cush. 366; Boyd *v.* Brown, 17 Pick. 453; Fleming *v.* Beck, 48 Penn. St. 309; Story on Agency, § 220, citing Short *v.* Skipwith, 1 Brock. C. R. 103; Bell *v.* Cunningham, 3 Peters, 69; *S. C.* 5 Mason, 161.

[5] See Whart. on Neg. § 73 *et seq.*; Blanchard *v.* Ely, 21 Wend. 342; Griffin *v.* Colver, 16 N. Y. 489; Freeman *v.* Clute, 3 Barb. S. C. 424; Thompson *v.* Shattuck, 2 Metc. 615; Olmsted *v.* Burke, 25 Ill. 86.

[6] See infra, § 726.

courts, no damages can be claimed for the loss of a contract collateral to the one broken.[1]

§ 392. At the same time it must be remembered that in a suit by a principal against an agent for not shipping goods to a particular port, their value at the port of delivery must be replaced by the agent.[2] So, also, when a mill was prevented from being run by reason of a steam-engine not being ready by the time contracted for, it was held that the plaintiff was entitled to recover the profits which the mill would have earned while it was stopped.[3] So if an agent detain an overdue article, the *primâ facie* standard of damages, in addition to the value of the article, is the sum which would have been intermediately earned.[4]

§ 393. *These distinctions applicable to suits against insurance agents for neglecting to insure.* — What damages can the owner recover from an insurance agent for his neglect to insure, whereby the loss falls on the owner? The answer is, that the plaintiff can recover from the agent whatever he could have recovered (supposing there was no negligence on his part) from the insurer on the policy.[5] The same test is applied where the agent neglects to insert in the policy a *proviso* in consequence of which neglect the insurers are relieved.[6]

[1] Bridges *v.* Stickney, 38 Me. 361; Crain *v.* Petrie, 6 Hill, 522; Masterton *v.* Brooklyn, 7 Hill, 62; Vicars *v.* Wilcocks, 8 East, 1; Duckworth *v.* Ewart, 2 H. & C. Exch. 129; Sharp *v.* Powell, L. R. 7 C. P. 253. In Louisiana, by the Civil Code, arts. 1928, 2294-5: "When the object of the contract is anything but the payment of money, where the debtor has been guilty of no fraud or bad faith, *he is liable only for such damages as were contemplated, or may be reasonably supposed to have entered into the contemplation of the parties at the time of the contract.*" See this test applied in Williams *v.* Barton, 13 La. 404; Goodloe *v.* Rogers, 10 La. An. 631.

[2] Bell *v.* Cunningham, 3 Peters, 69. The market price at the place of delivery is the measure of compensation. U. S. *v.* Speed, 8 Wall. 77; Phila. W. & B. R. R. *v.* Howard, 3 How. 307; Fox *v.* Harding, 7 Cush. 516; Le Guen *v.* Gouverneur, 1 Johns. C. 436; Story *v.* R. R. 6 N. Y. 85; Clark *v.* Miller, 4 Wend. 628; Hoy *v.* Greenoble, 34 Penn. St. 9; McKnight *v.* Ratcliffe, 44 Penn. St. 156; Ryder *v.* Thayer, 3 La. An. 149; Wallace *v.* Tumlin, 42 Ga. 462; Rhodes *v.* Baird, 16 Oh. St. 57. See Stearine Co. *v.* Heintzmann, 17 C. B. N. S. 56.

[3] Davis *v.* Talcott, 14 Barb. S. C. 611; reversed on appeal, on grounds independently of that just stated, *S. C.* 12 N. Y. 184.

[4] Trent *v.* Lumber Co. L. R. 4 Ch. App. 112.

[5] Webster *v.* De Tastet, 7 T. R. 157; Fomin *v.* Oswell, 3 Camp. 357; Park *v.* Hammond, 4 Camp. 344; Perkins *v.* Ins. Co. 4 Cowen, 645; Morris *v.* Summerl, 2 Wash. C. C. 203; De Tastet *v.* Crousillat, 2 Wash. C. C. 132. Supra, § 251.

[6] Mallough *v.* Barber, 4 Camp. 150; Sedgwick on Dam. 6th ed. 402.

CHAPTER VIII.

PRINCIPAL AGAINST THIRD PERSON.

I. On Contracts.
- Principal may ordinarily sue on contract of agent, § 398.
- This right exists in cases of ratified contracts, § 399.
- When contract is in principal's name, he may enforce it as if made by himself, § 400.
- When executed by agent under seal, agent alone can sue, § 401.
- When agent has a lien, or other interest, agent can also sue, § 402.
- Even though the agent is exclusively looked to in the contract, the undisclosed principal may sue, § 403.
- But undisclosed principal can only claim subject to equities applicable to agent, § 405.
- Part payment to agent of undisclosed principal is part payment to principal, § 407.
- Principal may by notice to third party invalidate subsequent payments, § 408.
- Person signing contract in his own name may be shown to be agent for another, § 409.
- Exception in cases of negotiable paper and instruments under seal, § 411.
- Principal may recover from third parties his money or goods wrongfully transferred to them by agent, § 412.
- So as to money paid by agent by mistake, § 413.
- Principal may recover fraudulent transfers by agent, § 414.
- Principal is bound by agent's representation, § 415.

II. On Torts.
- Principal may have redress for injuries to his interests in agent's hands, § 417.
- If agent participate in tort, he may be sued either jointly or severally, § 420.
- Principal, if guilty of negligence which causes injury, cannot sue third party for such injury, § 422.
- But if principal is in no way chargeable with negligence, he is not barred by the contributory negligence of an agent not under his control, § 423.

I. ON CONTRACTS.

§ 398. *Principal may sue ordinarily on contract of agent.* — The old Roman law, in furtherance of a policy which has been already discussed, provided that no one could acquire rights through the agency of an independent free agent, and that hence the mandant could not, without an assignment from the mandatary, sue a third person on an obligation entered into by the mandatary, unless the mandatary was under the mandant's subjection. The rigor of this principle, however, was much modified by the appeal to a juridical relation similar to the mandate, *i. e.* the *actio institoria;* the old principle was not directly re-

pudiated, but the mandant was enabled, by extending the analogy, to proceed against third parties by the *actio utilis*. Si procurator vendiderit et caverit emptori, quaeritur, an domino vel adversus dominum actio dari debeat. Et Papinianus libro tertio responsorum putat cum domino ex empto agi posse utile actione ad exemplum institoriae actionis, si modo rem vendendam mandavit: ergo et per contrarium dicendum est utilem ex empto actionem domino competere.[1] This was afterwards applied to all cases in which the old law prevented immediate relationship between the mandant and the third person with whom the mandatary dealt. The qualification thus gradually introduced was accepted as a principle by the later jurists, and was incorporated into those jurisprudences which take the Roman law as a basis. The agent, when the agency is legally established and notified, is one with the principal; what he does the principal does; on his contracts the principal may sue. This maxim is accepted, as we have already abundantly shown, in our own law.[2]

§ 399. *This right exists in cases of ratified contracts.* — As has been already seen,[3] the principal, when ratifying a contract, is entitled to sue on itas plaintiff.

§ 400. *When agent contracts in name of principal, principal may enforce contract to the same effect as if made by himself.* — In such case the agent is the mere irresponsible instrument by which the contract is effected, and the principal takes the contract free from any equities peculiar to the agent.[4] Even when the principal's name is not given, yet, if the defendant had notice, at the time of the contract, that he contracted not for himself but for another, then set-offs against the agent cannot be interposed by the defendant.[5] Nor is the right to sue on the prin-

[1] L. 13, § 25. D. de act. emti. XIX. 1.

[2] See supra, § 4, 5, 147; infra, § 722, 792.

[3] Supra, § 76.

[4] Seignior *v.* Walmer, Godb. 360; Thorp *v.* How, Bull. N. P. 130; Young *v.* White, 9 Beav. 506; Walter *v.* Ross, 2 Wash. C. C. 283; U. S. *v.* Parmele, 1 Paine C. C. 258; Wilson *v.* Codman, 3 Cranch, 204; Machias Hotel Co. *v.* Coyle, 35 Me. 405; Kelley *v.* Munson, 7 Mass. 319; Bird *v.* Daggett, 97 Mass. 494; Willard *v.* Buckingham, 36 Conn. 395; Weed *v.* R. R. 19 Wend. 534; Leverick *v.* Meigs, 1 Cow. 648; Taintor *v.* Prendergrast, 3 Hill. 72; Elwell *v.* Chamberlain, 31 N. Y. 611; New Y. & N. H. R. R. *v.* Schuyler, 34 N. Y. 30; Frazier *v.* Bank, 8 Watts & S. 18; De Voss *v.* Richmond, 18 Grat. 338; Brewster *v.* Saul, 8 La. 296.

[5] Semenza *v.* Brinsley, 18 C. B. (N. S.) 487; Ilsey *v.* Merriam, 7 Cush. 242, and cases cited infra, § 405, 466, 723, 762.

cipal's part excluded by a several right to sue on the agent's part.[1]

§ 401. *When contract is executed by agent under seal, then agent alone can sue.* — This point will be hereafter independently discussed.[2]

§ 402. *Where agent has a lien or other interest in the subject matter of suit.* — In this case, as will be in future shown, the agent may sue for the protection of his interests.[3]

§ 403. *Even though the agent is exclusively looked to in the contract, the undisclosed principal may avail himself of the contract in suit against third party.* — No doubt a third party, dealing with an agent, may, as we will see, estop himself, by express or implied agreement, from having recourse to an undisclosed principal ;[4] but it does not follow that the converse proposition, that the undisclosed principal cannot, under these circumstances, proceed against the third party, is true. Judge Story, indeed, lends his high authority to the support of this opinion ; but it is hard to see how, if we put aside the question of defences peculiar to the agent, the principal can be kept from availing himself of rights which really belong to himself. Even on the strict principles of the Roman law, this right, as we have seen, is conceded to the principal ; and *a fortiori* by our own law, the undisclosed principal is entitled to sue on such a contract.[5] And a principal, resident in one of the United States, may maintain an action in his own name for goods sold by his agent in another state, when no agency is disclosed at the time of the sale.[6]

§ 404. It is true that, as we will see,[7] a principal may author-

[1] Infra, § 402, 428, 755.

[2] Infra, § 438.

[3] Infra, § 428, 755.

[4] See infra, § 463, 469, 496, 788.

[5] See infra, § 722, 762. And see as additional cases to this effect, Huntington *v.* Knox, 12 Q. B. 311; Graham *v.* Duckwell, 8 Bush, 12; Woodruff *v.* M'Gehee; 30 Ga. 158; Foster *v.* Smith, 2 Cold. (Tenn.) 744. Where chattels are bought by one in his own name, but he is, in fact, buying as the agent of another, the undisclosed principal will be entitled to the possession of the chattels as against the vendor, who has no longer a general or a special property therein. Any such undisclosed principal, partner, or joint owner has the right, on discovering that a purchase has been made by such agent, partner, or joint owner, in his own name, or without disclosing his true relation to other parties, to tender complete performance of the contract of purchase, and take possession of the chattels. Conklin *v.* Leeds, 58 Ill. 178.

[6] Barry *v.* Page, 10 Gray (Mass.), 398. Otherwise when principal is a foreigner, § 793.

[7] Infra, § 431.

ize an agent to contract in such a way that the agent shall be the sole person entitled to sue upon the contract. But where the principal does not thus preclude himself from suing, we must acknowledge the conclusiveness of the argument on this point of Mr. M'Laren, the late intelligent editor of the Commentaries of Mr. Bell:[1] "The principal is entitled, according to the plainest principles of the civil law, to demand from his agent a cession of all rights of action which he has, in the execution of his mandate, required; and even if the third party has no claim against the principal by having renounced it or barred himself of it, the principal seems still entitled, without the formality of an assignation in this more than in any other case, to sue on the agent's contract made for his behoof, being of course liable, as any assignee would be, to the defendant's counter claims against the assignee. It is not easy to see how the third party's election to abandon his claim against the principal, and to trust entirely to the credit of the agent, should, without the assent of the principal, involve an abandonment on the part of the principal of his rights against the third party, under a contract made by him and by his authority." I employ an agent, for instance, to purchase goods for me. He does so, in his own name, but with my money. Many causes — his unfaithfulness, his absence, his mental incapacitation, his death — may make it desirable for me to throw off the agency, and maintain my rights in my own person. Of course these rights are now subject to any defences to which my agent, in dealing with third parties who knew him only, may have given rise. But, subject to this abatement, the rights are mine, both as against my agent and the third parties; and these rights may be resumed by me, and maintained in my own name.

§ 405. *When principal is not disclosed, and agent contracts as for himself, principal can only claim subject to equities applicable to agent.* — It is in such case the principal's fault that the agent is permitted thus to contract without restriction; and he cannot complain if a third party, dealing with the agent under the impression that the agent was principal, should make his own claims against the agent a reason for his contracting with the agent. In such case, if the principal come in and sue on the contract, he must do so subject to any set-off the third party

[1] Bell's Com. 7th ed. 527–8.

may have against the agent.[1] But a person who contracts with an agent, knowing him to be only an agent, but not knowing whose agent he is, cannot, in an action brought by the principal, avail himself of a defence good against the agent.[2]

[1] Paley's Agency, 329; Rabone *v.* Williams, 7 T. R. 360; Carr *v.* Hinchliffe, 4 B. & C. 547; Capel *v.* Thornton, 3 C. & P. 352; George *v.* Clagett, 7 T. R. 361; Stracy *v.* Decy, 7 T. R. 361; Blackburn *v.* Scholes, 2 Camp. 342; Baring *v.* Corrie, 2 B. & A. 137; Warner *v.* M'Kay, 1 M. & W. 595; Leeds *v.* Ins. Co. 6 Wheat. 565; Traub *v.* Milliken, 57 Me. 63; Culver *v.* Bigelow, 43 Vt. 249; Lime Rock Bk. *v.* Plimpton, 17 Pick. 159; Kingsley *v.* Davis, 104 Mass. 178; Lock's appeal, 72 Penn. St. 491; Miller *v.* Lea, 35 Md. 396; Conklin *v.* Leeds, 58 Ill. 178; Koch *v.* Willi, 63 Ill. 144; and infra, § 465, 466, 722, 723, 741, 762.

[2] Infra, § 466; Semenza *v.* Brinsley, 18 C. B. N. S. 467; Ilsey *v.* Merriam, 7 Cush. 242, and cases cited next note.

On this topic it is said, by Mr. Dicey, in his valuable work on Parties (p. 135): "Though A. is acting as agent of P., either T. may decline expressly to contract with any other than A., or else it may be manifest from the circumstances of the contract that T. contracted with A. and with A. only. In this case, although A. may have been, as a matter of fact, acting as agent for P., and though P. may have rights as against A., yet P., with whom T. never contracted, cannot sue T., and A., who is the only person with whom he did contract, is the only person who can sue T. Thus, where a contract was made with A., one of the several partners, in his individual capacity, and he at the time declared that he alone was interested in it, it was held that the other partners, although they might be interested in it, could not sue upon it. Lucas *v.* De La Cour, 1 M. & S. 249. For though the partner might, as regards his fellow partners, act as their agent, yet "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. Ibid. 250, per Ellenborough, C. J. If T. contracts with A., in consideration of the known personal capabilities of A., he cannot be made liable to P., for whom A. was acting as agent. Robson *v.* Drummond, 3 B. & Ald. 303.

"T. contracts with A., the agent of P., under circumstances which make it possible for an action to be brought either by P. or A. An action is brought by P. T. can set off against a debt claimed by P. any debts due from P. to T. If T. supposed A. to be contracting as principal, he can also set off debts due from A. to T. George *v.* Claggett, 7 T. R. 359; 2 Smith L. C. 6th ed. 113, 115, 116; Sims *v.* Bond, 5 B. & Ad. 393. If T. knew that A. was contracting as an agent, even though T. did not know that he was contracting as an agent of P., and *a fortiori*, if T. knew that A. was contracting as an agent of P., T. cannot set off debts due from A. to him. Semenza *v.* Brinsley, 18 C. B. N. S. 467; 34 L. J. 161, C. P.

"Where a purchaser bought goods of a person whom he knew to be only an agent, though he did not know whose agent he was, it was held that the purchaser could not, in an action by the principal for the price of the goods, set off a debt due to the purchaser

§ 406. The question depends upon the expectations held out to the third party making the contract. Suppose, for instance, A. claiming only to be an agent (though without disclosing his principal's name) sells goods to B., who is A.'s creditor; in such case, as B. has notice that A. is only an agent, B. cannot, when P. sues for the price, set off his (B.'s) claim against A.[1] So, as we have seen, if the buyer has such opportunities of knowing that the seller is but an agent as to put him, the buyer, on his inquiry, then he is precluded from setting up such agency as a ground for a personal set-off.[2] Thus where the plaintiff sold through an agent, and the buyer also bought through an agent, and the purchasing agent knew that the goods were not the property of the person immediately selling them, this knowledge

from the agent. For, in order to make this defence of set-off 'a valid defence, it seem obvious that the plea must show that the contract was made by a person whom the plaintiff intrusted with the possession and the ownership of the goods, that he sold them as his own in his own name, as principal, with the authority of the plaintiff, and that the defendant then believed him to be the principal in the transaction.' Semenza *v.* Brinsley, 34 L. J. 163, C. P., — per Curiam. See Dresser *v.* Norwood, 17 C. B. N. S. 466; 34 L. J. 48, C. P." Dicey on Parties, 142.

[1] Infra, § 466, 709, 723; Baring *v.* Corrie, 2 B. & Ald. 137; Fish *v.* Kempton, 7 C. B. 687; Dresser *v.* Norwood, 17 C. B. N. S. 466; Turner *v.* Thomas, L. R. 6 C. P. 810; Moore *v.* Clementson, 2 Camp. 22; Ferrand *v.* Bischoffsheim, 27 L. J. C. P. 302; Semenza *v.* Brinsley, 34 L. J. C. P. 161; 18 C. B. N. S. 466; Ilsey *v.* Merriam, 7 Cush. 242.

[2] See 2 Smith Lead. Cas. note to George *v.* Claggett. This is the case where the agent is a broker. Evans *v.* Waln, 71 Penn. St. 69; Foss *v.* Robertson, 46 Ala. 483; Boyson *v.* Coles, 6 M. & S. 14. See infra, § 709, 723.

P. intrusted A. with goods for sale as his factor. A., to P.'s knowledge, sold the goods to T. A. sold as his own, and T. did not, in fact, know that he was, in this transaction, the agent or factor of P. In an action by P. against T., for the price of the goods, T. pleaded that he believed, at the time of sale, the goods were absolutely the property of A., and that A. being indebted to him at that time in a sum more than sufficient to pay for the goods, he sought to set off that amount against it. The plaintiff, T., demurred on the ground that the plea should have gone on to allege not merely that T. believed the goods to be the sole property of A., but that he had no means of knowing to the contrary, and that he had no notice that the goods were the property of P. Held, that the plea was good; that in its present shape it sufficiently averred want of notice; and *semble*, that even if the plea did not amount to an allegation of want of notice, the absence of notice would be matter of evidence, and need not appear in the plea. Borries *v.* Imperial Ottoman Bk. 22 W. R. 92; L. R. 9 C. P. 38.

on the part of the purchasing agent was held to be knowledge on the part of his principal, so as to prevent the latter from taking advantage of a set-off against the plaintiff of a debt due by the plaintiff's agent personally.[1] And such notice to the third party, as we have seen, may be constructive; as where the agent is a broker.[2]

§ 407. *Part payment to an agent of undisclosed principal is part payment to principal.* — Until the principal discloses himself, all payments to the agent on account are chargeable to the principal; the principal being precluded from denying, under such circumstances, the right of the agent to receive the payments.[3]

§ 408. *Principal may by notice invalidate all subsequent payments from third party to agent.* — This follows from the necessities of the relation of principal and agent. Payment made to an agent after such notice is a nullity, and the principal may recover the debt notwithstanding such payment.[4]

§ 409. *Person signing contract in his own name may be shown to be agent for another.* — It may be objected that when A. binds himself by written contract to do a particular thing, it is a violation of a fundamental principle of the law of evidence to receive testimony to show that A. means P., for this is varying a written instrument by parol. But the objection is not sound.[5] The instrument itself is not varied by parol testimony, but the parol testimony goes only to show to whom it is that the instrument refers. The question is, who is A.; and under any circumstances evidence, on behalf either of the principal or of third parties, is admissible to show that A. is the person who brings suit. Now P., the principal, may use his own name in bringing suit, or he may use the name of A.; and it is as legitimate to show that he sues by the name of A., as it is to show that he sues by the name of P.[6]

[1] Dresser *v.* Norwood, 17 C. B. N. S. 466.

[2] Evans *v.* Waln, 71 Penn. St. 69.

[3] Cowp. 256; Favenc *v.* Bennett, 11 East, 38; Blackburn *v.* Scholes, 2 Camp. 342; Renard *v.* Turner, 42 Ala. 117.

[4] Mann *v.* Forrester, 4 Camp. 60; Strange, 1182; Frazier *v.* Erie Bk. 8 W. & S. 18. See generally, as to where payment to agent binds principal, supra, § 206.

[5] See supra, § 296, 298; infra, § 492, 729.

[6] See fully supra, § 280–298; Higgins *v.* Senior, 8 Mees. & W. 834; Trueman *v.* Loder, 11 A. & E. 589; Beckman *v.* Drake, 9 M. & W. 79; 2 H. L. Cas. 579.

§ 410. Yet at the same time it is not admissible for an agent, signing an instrument in his own name, without mentioning his principal, to introduce evidence to show that he did not intend to bind himself.[1]

§ 411. *Exception in cases of negotiable paper and instruments under seal.*—Yet to the rule just stated we must admit an exception based on the fact that a person who signs his name to a bill of exchange, or to an instrument under seal, must be considered to be the sole party.[2] But a principal may sue in his own name on a promissory note not negotiable, made in his behalf and for his benefit, although by its terms it is payable to the agent.[3] It will be remembered that the principal is entitled to follow his money into the hands of all third persons with notice.[4]

§ 412. *Principal may recover from third parties his money or goods wrongfully transferred to them by the agent.*—Nor is it necessary for this purpose that the transfer by the agent should have been in the principal's name, provided that in such case the consideration of the contract, so far as concerns the third parties, has failed. Thus where an agent makes a deposit on a contract concluded in his own name, though with the principal's money, the principal may compel the deposit to be paid back to himself;[5] and so where the agent has paid money on a policy to an insurance company, which policy has never attached.[6] So if an agent receives money of his principal and lends it, taking a promissory note to himself, the note belongs to the principal, and the borrower may not pay the agent after he has been informed that there is a superior right, and has received notice not to pay the agent.[7] Where the transfer is tortious, the principal may, as will be presently seen, elect to sue for the tort.[8]

§ 413. *So as to money paid by the agent through mistake.*—Suppose an agent, under a mistake of fact, pays *bonâ fide* the

[1] Higgins *v.* Senior, 8 M. & W. 834; 2 Smith Lead. Cas. note to Thomson *v.* Davenport. Supra, § 296; infra, § 492.

[2] Emly *v.* Lye, 15 East, 7; Siffkin *v.* Walker, 2 Camp. 308; Beckham *v.* Drake, 9 M. & W. 79. See fully supra, § 280–298.

[3] Nat. L. Ins. Co. *v.* Allen, 116 Mass. 398.

[4] Supra, § 201.

[5] Duke of Norfolk *v.* Worseley, 1 Camp. 337; 1 Bell's Com. 7th ed. 529.

[6] Dalsell *v.* Mair, 1 Camp. 532; Power *v.* Butcher, 10 B. & Cr. 329; 1 Bell's Com. 7th ed. 528; Story on Agency, § 435.

[7] Farmers', &c. Bank *v.* King, 57 Penn. St. 202.

[8] Infra, § 414, 417, 763.

principal's money to a third party. In this case the money must be considered as received by the third party for the principal's use; and it may be recovered by the principal;[1] and this has been extended to payments in mistake of law.[2]

§ 414. *Principal may recover fraudulent transfers of agent.* — So may the principal recover his goods fraudulently received by third parties from the agent;[3] and, as will presently be seen, he may, if he choose, proceed for damages for such tortious transfer, instead of suing in the form of contract. "In the case of money or goods paid away by the agent for an illegal purpose," says Mr. McLaren, in a valuable note to the late (1870) edition of Bell's Commentaries,[4] "there will be a difference if he has done so as agent, but without authority, or has done so on his own account. In the former case, the principal would be entitled to recover in any event; in the latter, only by identifying the goods as his in the receiver's hands; for any other *medium concludendi* would make him sue in the place of the agent, who, as *particeps criminis*, cannot sue. The principal cannot adopt the agent's right of repetition, but must follow his property by proceedings *in rem*, which will be successful only where the property is identifiable, unless the defendant be proved cognizant of the fact that the agent was dealing with the principal's property without authority.[5]

§ 415. *Principal is bound by agent's representations.* — As we have already seen,[6] the principal, in adopting the agent's contract, adopts it in the way it is made by the agent, and hence the representations of the agent, be they fraudulent or fair, by which the contract is induced, bind the principal.

II. TORTS.

§ 417. *Principal may have redress for injuries to his interests in agent's hands.* — No doubt an agent may have such a property in his principal's goods as may entitle him to sue a tres-

[1] Anchor *v.* Bank of England, Doug. 637; Treuttel *v.* Barandon, 8 Taunt. 100; Sigourney *v.* Lloyd, 8 B. & C. 622; Lloyd *v.* Sigourney, 5 Bing. 525; Stevenson *v.* Mortimer, Cowp. 805; Bell's Com. 7th ed. 529.

[2] U. S. *v.* Bartlett, Davies, 9.

[3] Clark *v.* Shee, Cowp. 197; Taylor *v.* Plumer, 3 M. & S. 562; Boyson *v.* Coles, 6 M. & S. 14; Frazier *v.* Erie Bk. 8 W. & S. 18, and cases cited infra, § 420.

[4] 1 Bell's Com. 7th ed. 529.

[5] See Paley by Lloyd, 337.

[6] Supra, § 158 *et seq.*

passer for damages.[1] This, however, does not exclude the principal's right to sue; for any person who is injured by a wrongful act may bring an action of tort against the wrong-doer. Hence the principal may sustain such an action; and unless he has given the agent apparent authority to pass away the property of the goods,[2] he (the principal) can follow the goods into the hands of the agent's assignees. The principal may therefore maintain an action of trover against whatever parties may subsequently hold the goods. Such parties have no title whatever to the goods; they take originally from one who had no power, apparent or real, to dispose of the goods; and no series of ordinary assignments can vest in them a title which the true owner cannot break.[3] Even money of the principal which has been applied by the agent to a prohibited purpose may be recovered by the principal, if clearly traced, from the fraudulent holder.[4] So if an agent procure the note of his principal to be discounted, and deposit the proceeds in bank to his own credit, the principal may in his own name maintain an action therefor against the bank, notwithstanding the bank after notice had paid out an equivalent sum of money on the check of the agent.[5]

§ 418. *A fortiori*, when an agent improperly disposes of a bill belonging to his principal, by indorsing it when over due, the holder, who takes it subject to all imperfections of title, cannot retain against the principal, either the bill itself or one substituted for it, whilst in the hands of the same holder.[6]

§ 419. As has just been seen,[7] the principal may waive the tort, and sue for money or goods received by the defendant.

§ 420. *If agent participate in tort, he may be sued severally or jointly with other tort feasors.* — We have already seen that agents are liable to their principals for their torts.[8] Each person concerned in the tort is severally liable, and neither can es-

[1] Dicey on Parties, 10; Alton *v.* R. R. 19 C. B. N. S. 213. Infra, § 444.

[2] As an illustration of this see Koch *v.* Willi, 63 Ill. 144. See supra, § 125.

[3] Dicey on Parties, 241; Pickering *v.* Busk, 15 East, 43; Taylor *v.* Plumer, 3 M. & S. 576; Fowler *v.* Hollins, L. R. 7 Q. B. 616; 41 L. J. Q. B. 277; aff. in H. of Lds. 33 L. T. N. S. 73. Supra, § 201; infra, § 730.

[4] Clark *v.* Shea, Cowp. 197. See supra, § 201, 232–3.

[5] Frazier *v.* Erie Bk. 8 W. & S. 18. See also Mechanics' Bk. *v.* Levy, 3 Paige, 608; Tradesmen's Bk. *v.* Merritt, 1 Paige, 302.

[6] Paley on Agency, 339; Lee *v.* Zagury, 1 Moore, 556; *S. C.* 8 Taunt. 114.

[7] Supra, § 414.

[8] See supra, § 272–9.

cape liability by showing that another person is equally liable. So, if A. sues X. alone, X. cannot take any steps to compel him to make Y. or Z. co-defendants; and X., if found guilty, will have to pay compensation, not for a third, but for the whole of the damage done to A.; and when X. has paid the whole of the damages, he cannot compel Y. and Z. to repay him any part of what he has been compelled to pay; for it is a maxim of law that there is no right of contribution between wrong-doers.[1]

§ 421. The several wrong-doers may be sued jointly,[2] but if so, the wrong complained of must be shown to be joint. Thus if A. sues X., Y., and Z. in trover, a joint act of conversion must be shown to justify a verdict against all the defendants. A verdict of guilty can be taken only against such defendants as can be proved to have joined in the conversion charged.[3]

§ 422. *Principal cannot, if guilty of negligence which causes injury, sue third party for such injury.* — This, which is the underlying principle of the doctrine of contributory negligence, is elsewhere fully discussed.[4]

§ 423. *But if principal is in no way chargeable with negligence (e. g. with culpa in eligendo), he is not barred by the contributory negligence of an agent not under his control.* — This is undoubtedly a question of much difficulty; but the better opinion is that a principal is not barred from recovering from a third party for damages sustained to the principal through the negligence of a third party, to which negligence an independent agent of the principal contributed.[5]

[1] Dicey on Parties, 431, citing Merryweather *v.* Nixon, 2 Smith L. C. 6th ed. 481. Infra, § 474.

[2] Taylor *v.* Plumer, 3 M. & S. 562.

[3] Dicey on Parties, 431; Wilbraham *v.* Snow, 2 Wms. Saund. 47 *a;* Coryton *v.* Lithebye, 2 Wms. Saund. 117 *c.*

[4] Supra, § 390. See Whart. on Neg. § 300.

[5] Supra, § 389. See Whart. on Neg. § 395; Bigelow's Cases on Torts, 726; Shearman & Red. on Neg. § 46; 1 Smith's Lead Cas. 4th ed. 220; Tuff *v.* Warman, 2 C. B. N. S. 740; The Milan, 1 Lush. 388; Danville Turnpike Co. *v.* Stewart, 2 Met. (Ky.) 119; Webster *v.* R. R. 38 N. Y. 260; but see *contra,* Thorogood *v.* Bryan, 8 C. B. 115; Armstrong *v.* R. R. L. R. 10 Ex. 47, and American cases cited Whart. on Neg. § 310, 311, 395, and Bigelow's Cases on Torts, 726, where the law in this relation is satisfactorily discussed. And see article in Solicitors' Journal, cited in 12 Albany Law J. 312.

CHAPTER IX.

AGENT AGAINST THIRD PERSON.

I. When Agent is interested in Contract.
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II. When Principal is undisclosed, or is a Foreigner, or otherwise irresponsible.
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III. When Agent is Party to an Instrument.
When business paper is payable to an agent in his own name, he may sue thereon, § 434.
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So as to negotiable paper indorsed in blank, § 436.
On contracts under seal the obligee must sue, § 438.
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VI. Limitations under which Agents can sue.
Must be usually under principal's direction, § 446.
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Nor can principal, by contracting as agent, elude defences proper to himself, § 448.
VII. Peculiarities of Modern Roman Law, § 449.

I. WHEN AGENT IS INTERESTED IN CONTRACT.

§ 428. *Agent who is interested in goods has a right to sue for the same.* — Wherever the agent, for instance, has a lien on goods, or an interest in the same for his fees or expenses, he may bring suit for them or their proceeds. We will see elsewhere that this is the case with factors,[1] and as to auctioneers.[2] The privilege is justly extended to all cases in which the agent is responsible for the purchase money to the principal, and in which, therefore, he is the trustee of the legal property of the goods.[3]

[1] Infra, § 755.

[2] Infra, § 647.

[3] Owen *v.* Bruce, 12 East, 225; Houghton *v.* Mathews, 3 Bos. & P. 485; Lum *v.* Robertson, 5 Wall. 277; Kent *v.* Bornstein, 12 Allen, 342; Hodge *v.* Comly, 2 Miles, 286; Evrit *v.* Bancroft, 22 Oh. St. 172; Whitehead *v.* Potter, 4 Ired. 257.

In such case, suit may be brought in the name of either principal or agent.[1]

§ 429. At the same time it must be remembered that an agent who, in selling property of his principal, binds himself personally, acquires no greater rights against the purchaser than are conveyed by the agreement on which he sues.[2]

Wherever an agent without authority pays money to a third person, he can sue for its recovery; and this includes payments by mistake; the agent pays on his own responsibility, and on his own responsibility he can sue.[3] We must, however, keep in mind that the principal, by ratifying the agent's act, can at any time make the transaction his own.[4]

II. WHEN PRINCIPAL IS UNDISCLOSED, OR IS A FOREIGNER, OR IS OTHERWISE IRRESPONSIBLE.

§ 430. *Agent may sue where principal is undisclosed, or a foreigner.* — It will be presently seen that the agent of an undisclosed or foreign principal may be sued on the contract executed by such agent.[5] If capable of being sued on such contract, he must be also entitled to sue on it. This has been expressly ruled as to contracts by agents acting for undisclosed principals.[6]

[1] Infra, § 439. See cases cited infra, § 647, 755. As will be hereafter seen, this distinction is adopted in the case of auctioneers, § 647; and of factors, § 755.

[2] Evrit *v.* Bancroft, 22 Ohio St. 172. The plaintiff, a real estate agent, having authority to sell a farm, was, by agreement with his principal, to have, for his services, all the farm brought above a specified price per acre, and the balance of the purchase money he was to pay over to the principal. He entered into an agreement in his own name with the defendants for the sale of the farm, whereby they agreed to pay a higher price for it than he was to pay over to his principal. In an action by the plaintiff against the defendants to recover as damages for the breach of the agreement, the amount of compensation he would have received if the agreement had been fulfilled by the defendants: Held, that the liability of the defendants was to be ascertained from their own agreement, irrespective of the agreement between the plaintiff and his principal; and that the rule of damages would be the same, whether the suit was brought in the name of the principal or in the name of the plaintiff as one of the contracting parties. Evrit *v.* Bancroft, 22 Ohio St. 172.

[3] Williams *v.* Millington, 1 H. Bl. 84; Stevenson *v.* Mortimer, Cowp. 806; Shields *v.* Davis, 6 Taunt 65; Kent *v.* Bornstein, 12 Allen, 342; Story on Agency, § 398; Dicey on Parties, 140.

[4] Sadler *v.* Leigh, 4 Camp. 194.

[5] See infra, § 496, 514, 788, 791.

[6] Beebe *v.* Robert, 12 Wend. 417; Hovey *v.* Pitcher, 13 Missis. 171; Bickerton *v.* Burrell, 5 M. & S. 383. In such cases the agent must disclose

And the same reasoning would lead us to conclude that the agent who contracts for a foreign principal may bring suit on the contract.[1] So where from any circumstances no rights or liabilities attach to the principal, there the agent may be treated as the contracting party.[2]

§ 431. *Where principal is undisclosed, and where the contract is made with the agent, expressly excluding an undisclosed principal, then the suit may be in the name of the agent.* — "Every man has a right to elect what parties he will deal with."[3] Hence an undisclosed principal, by intervening in such a case, must, as has been seen, if he intervene, do so subject to whatever equities bear upon the ostensible principal.[4] It is true that where the contract is made with the agent, with no conditions excluding liability to another, then the undisclosed principal may, on disclosing himself, sue.[5] But if the other contracting party say, "I contract with you, A., alone; I will have no dealings with P.," and if A. assent to this, then if P. sue, he will, if his agent were authorized and competent to bind him, be estopped by his agent's act.[6]

§ 432. *Agent for pretended named principal cannot sue as real principal.* — At the same time a principal, by claiming to be only an agent for a named principal, precludes himself, it has been ruled by Lord Ellenborough, from suing as principal, on an executory contract;[7] though when, before suit is brought on a contract partially executed, the defendant has notice that the

principal's name. Willard *v.* Lugembuhl, 24 La. Ann. 18.

[1] See infra, § 514, 755.

[2] See Oom *v.* Bruce, 12 East, 225.

[3] Chapman, C. J.: Winchester *v.* Howard, 97 Mass. 303.

[4] See supra, § 405; infra, § 723, 741.

[5] Huntington *v.* Knox, 12 Q. B. 311.

[6] See Humble *v.* Hunter, 12 Q. B. 311; Winchester *v.* Howard, 97 Mass. 303; and see supra, § 298, 405; infra, § 448, 469.

"Where an agent makes a contract, stating who his principal is, the principal, and not the agent, is the person generally the party to the contract, if the agent have the authority he alleges. But, on the other hand, an agent may, and often does, make himself personally a party to the contract, if the form of the contract be such as to amount to saying: 'Although I am an agent only, nevertheless I contract for myself;' and although the principal may in some cases take advantage of such a contract, the agent, being the contracting party, is clearly liable, and can therefore sue upon it." Fisher *v.* Marsh, 34 L. J. 178, Q. B., per Blackburn, J.

[7] Bickerton *v.* Burrell, 5 M. & S. 383; S. P. Boulton *v.* Jones, 2 H. & N. 564.

agent is the real principal, then the suit may be maintained in the latter's name.[1] Much difficulty, however, may arise as to the distinction just made; for if A., an agent, says, "I represent P., a person known to be capable and influential in this particular business, and known also to be solvent," we have a right to suppose that the contract was made on the basis of P.'s peculiar qualifications; and if we concede to T., the defendant, the right to say, "I contracted with P., and did not contract with A.," then this right cannot be affected by a notice before suit, in which notice P. takes no part, that A. is the real person interested in the contract. Suppose, for instance, that A., a picture dealer, agrees, as the agent of C., a well known connoisseur, to select certain paintings for T., when in point of fact the selection is to be made by A. and not C.[2] In such case no one would insist that A. could maintain an action against T. for his services; or that A.'s case would be improved by his notifying T., before suit, that he, not C., was the real principal. "In many cases, such as, for instance, the case of contracts, in which the skill or solvency of the person who is named as the principal may reasonably be considered as a material ingredient in the contract, it is clear that the agent cannot then show himself to be the real principal, and sue in his own name; and it may be fairly urged that this, in all executory contracts, if wholly unperformed, or if partly performed without the knowledge of who is the real principal, may be the general rule."[3]

[1] Rayner *v.* Grote, 15 M. & W. 359. See infra, § 467.

[2] See infra, § 467.

[3] Judgment in Rayner *v.* Grote, 15 M. & W. 359. On this difficult question Mr. Dicey, in his work on Parties, p. 144, says: "A person who contracts, in reality for himself, but apparently as agent for another person, whose name he gives, cannot sue on the contract as principal. A. induces T. to contract with him as being the agent, and as acting on behalf of a principal, P., whom A. names, though in fact A. has no authority to act on behalf of P., and is in reality entering into a contract for his own benefit. A., under these circumstances, cannot treat the contract as made with himself, and sue in his own name on showing himself to be the real principal. Leake Contracts, 306; Schmaltz *v.* Avery, 16 Q. B. 655; 20 L. J. 228, Q. B.; Bickerton *v.* Burrell, 5 M. & S. 383. The ground of the rule is that T. did not mean to contract with A., but meant to contract with P., and that P. cannot by his act turn a contract with another person into a contract with himself. Boulton *v.* Jones, 2 H. & N. 564; 27 L. J. 117, Ex. It may be considered doubtful whether, when the contract is partly executed, A. cannot, if the contract be not one involving reliance on the personal skill of P., sue T. on showing that he is prin-

§ 433. *This incapacity does not exist when pretended principal is unnamed.* — But this reasoning, at all events, does not

cipal, and after giving T. notice of the fact. Compare Smith's Mer. Law, 7th ed. 162. A. contracted in writing with T. for the purchase of an estate expressly as agent of P., named in the contract as principal, but without any authority from the latter, and being himself the real principal in the transaction, and paid a deposit in part payment of the purchase money. It was held that A. could not maintain an action to recover the deposit without giving notice to T. of his real position as principal. Bickerton *v.* Burrell, 5 M. & S. 383. 'Where a man,' it is said in this case by Ellenborough, C. J., 'assigns to himself the character of an agent to another whom he names, I am not aware that the law will permit him to shift his situation, and declare himself to be the principal, and the other to be a mere creature of straw. That, I believe, has never yet been attempted. Now on the face of this agreement, it is stated that the plaintiff made the purchase, paid the deposit, and agreed to comply with the conditions of sale for P., and in the mere character of agent. Is not this account of himself to be taken fortissime contra proferentem; that is, that he was really treating in the character which he assigned to himself at the time of the purchase; and has not the defendant, with whom the plaintiff dealt as an agent, a right still to consider him as such, notwithstanding he would now sue in the character of principal? Supposing that he might, under a different state of circumstances, have entitled himself to sue in his own name, surely the defendant ought to have had notice of the plaintiff's real situation before he is subjected to an action at the plaintiff's suit, and while it was open to him to make a tender.' Ibid. 386, 387, per Ellenborough, C. J. A. made a written contract for the sale and delivery of goods to T., in which he described himself as agent for P., a named principal; and T., after having full knowledge that A. was not an agent, as described, but was the real principal in the transaction, accepted a part delivery of the goods from A., and paid for them. It was held that T. could not afterwards refuse to receive and pay for the remainder, and that A. might sue in his own name upon T.'s default in doing so. Raynor *v.* Grote, 15 M. & W. 359; 16 L. J. 79, Ex. 'The defendant's counsel. . . . . cited the case of Bickerton *v.* Burrell, 5 M. & S. 383, as an authority that the plaintiff could not sue . . . . in his own name. That case is, indeed, in one respect stronger than the present, inasmuch as that was for money had and received, whereas, this is a case of executory contract. If indeed the contract had been wholly unperformed, and one which the plaintiff, by merely proving himself to be the real principal, was seeking to enforce, the question might admit of some doubt. In many such cases, — such as for instance the case of contracts in which the skill or solvency of the person who is named as the principal may reasonably be considered as a material ingredient in the contract, — it is clear that the agent cannot then show himself to be the real principal, and sue in his own name; and perhaps it may be fairly urged that this, in all executory contracts, if wholly unperformed, or if partly performed, without the knowledge of who is the real principal, may be the general rule. But the facts of this case raise a totally different question, as the jury must be taken to have found,

apply to cases in which there is no principal disclosed. "With this passage," says Patteson, J., in a subsequent case in the queen's bench,[1] after citing the extract given above, "we entirely agree; but it is plain that it is applicable only to cases where the supposed principal is named in the contract; if he be not named, it is impossible that the other party can have been in any way induced to enter into the contract by any of the reasons suggested." [2]

III. WHEN AGENT IS PARTY TO AN INSTRUMENT.

§ 434. *When business paper is payable to an agent in his own name, he may sue thereon, although he is known at the time to represent another person.*[3] — In such case, not only is the agent, as the nominal trustee, entitled to sue on behalf of his principal, but the parties whom he sues, by taking the paper with his name on it, are to be regarded as agreeing that he should thus bring suit.[4] If he refuses to sue, the parties beneficially interested may sue in his name.[5]

under the learned judge's direction, that this contract has been in part performed, and that part performance accepted by the defendants with full knowledge that the plaintiff was not the agent, but the real principal. If so, we think the plaintiffs may, after that, very properly say that they cannot refuse to complete that contract, by receiving the remainder of the goods, and paying the stipulated price for them. And it may be observed that this case is really distinguishable from Bickerton *v.* Burrell, 5 M. & S. 383, on the very ground on which that case was decided; for here, at all events, before action brought and trial had, the defendants knew that the plaintiff was the principal in the transaction.' Rayner *v.* Grote, 15 M. & W. 365, 366, per Curiam."

[1] Schmalz *v.* Avery, 16 Q. B. 655.

[2] "A person sometimes contracts avowedly, and on the face of the contract as an agent, but in reality on his own behalf, and without regard to any principal. The so called agent is then in reality not an agent, but a person contracting for himself. If the person so contracting merely avows himself to be an agent, and does not give the name of any principal for whom he alleges himself to be acting, he can sue on the contract as a principal, the reason of this being, that the defendant cannot be supposed to have entered into the contract in reliance on a principal whose name was not known to him." Dicey on Parties, 184.

[3] This rule has been already fully discussed by us. See supra, § 280–298.

[4] Atkyns *v.* Amber, 2 Esp. 493; Lum *v.* Robertson, 5 Wall. 277; Orr

[5] Lum *v.* Robertson, 5 Wall. 277; Harriman *v.* Hill, 14 Me. 127; Demuth *v.* Cutler, 50 Me. 298. See Skowhegan Bk. *v.* Baker, 36 Me. 154; Herndon *v.* Taylor, 6 Ala. 461; Gage *v.* Kendall, 15 Wend. 640; Foster *v.* Shattuck, 2 N. H. 171.

§ 435. *Policy of insurance in name of agent may be sued in his name.* — Of course this is the rule when the insurance is in the agent's or broker's name for the benefit of those whom it may concern; for in such case the agent is trustee for such parties [1] Where the policy is in the broker's name in trust for a particular person, then either the broker or such person may sue. "In policies of insurance," says Bayley, J., "it is a common practice to bring your action either in the name of the agent or of the principal." [2] The principal, in such case, by suing, supersedes the broker's action.[3] But where the policy is in the broker's name and under seal, the broker exclusively must sue, and exclusively control the suit at common law.[4] Of course if the broker's name does not appear on the policy, he has no right of action.[5]

§ 436. *Negotiable paper indorsed in blank for collection may be sued upon by the agent in his own name.* — If the principal, by putting the paper without restriction in the agent's hands, gives the agent ostensible power to treat the paper as his own, the agent may sue thereon in his own name.[6] Where, however, no

v. Lacy, 4 M'Lean, 243; Wheelock *v.* Wheelock, 5 Vt. 433; Binney *v.* Plumley, 5 Vt. 500; Boardman *v.* Roger, 17 Vt. 589; Johnson *v.* Catlin, 27 Vt. 89; Bradford *v.* Bucknam, 12 Me. 15; Bragg *v.* Greenleaf, 14 Me. 395; Van Staphorst *v.* Pearce, 4 Mass. 258; Fisher *v.* Ellis, 3 Pick. 322; Fairfield *v.* Adams, 16 Pick. 381; Commercial Bk. *v.* French, 21 Pick. 486; Norcross *v.* Pease, 5 Allen, 331; Fish *v.* Jacobson, 2 Abb. App. Dec. 132; *S. C.* 5 Bosw. 514; Hodge *v.* Comly, 2 Miles, 286; Sater *v.* Henderson, 1 Morris, Iowa, 118; Barbee *v.* Williams, 4 Heisk. 522; Shepherd *v.* Evans, 9 Ind. 260; M'Henry *v.* Ridgeley, 2 Scam. 309; McConnell *v.* Thomas, 2 Scam. 313; Grist *v.* Backhouse, 4 Dev. & Bat. L. 362; Moore *v.* Penn, 5 Ala. 135; Jackson *v.* Heath, 1 Bailey, 355; Cocke *v.* Dickens, 4 Yerg. 29; Groce *v.* Herndon, 2 Tex. 410.

[1] Paley's Agency, 361; Usparicha *v.* Noble, 13 East, 332; Sargent *v.* Morris, 3 B. & Ald. 277.

[2] Sargent *v.* Morris, 3 B. & Ald. 280.

[3] Sargent *v.* Morris, 3 B. & Ald. 277; Garrett *v.* Handley, 4 B. & C. 664; Finney *v.* Ins. Co. 8 Metc. 34.

[4] Gibson *v.* Winter, 5 B. & Ad. 96; Shack *v.* Anthony, 1 M. & S. 593; Spencer *v.* Field, 10 Wend. 88.

[5] 1 Liv. Pr. & Ag. 225; Russel, Fact. & Bro. 250; Bridge *v.* Ins. Co. 1 Hall, 247.

[6] Clarke *v.* Pigot, 12 Mod. 195; Miller *v.* Race, 1 Burr. 452; Solomons *v.* Bank, 13 East, 135, n.; Peacock *v.* Rhodes, Doug. 633; Lang *v.* Smyth, 7 Bing. 284; Adams *v.* Oakes, 6 C. & P. 70; Bolton *v.* Puller, 1 B. & P. 539; Collins *v.* Martin, 1 B. & P. 648; De La Chaumette *v.* Bank, 9 B. & C. 208; U. S. *v.* Dugan, 3 Wheat. 172; Murray *v.* Lardner, 2 Wall. 110; Little *v.* O'Brien, 9 Mass. 423; Brigham *v.* Mareau, 7 Pick. 40; Coddington *v.*

such ostensible power is given to the agent, or the power is restricted, the agent's right to sue is proportionally qualified.[1]

§ 437. Where a note is payable to A. as "trustee for B.," or "for the use of B.," or as "guardian of B.," it is obviously proper that the suit should be brought by A., and by A. alone, the whole purport of the instrument being that its legal control is in A.[2] The same rule is applicable to a bond given to A. for the use of himself and B., on which A. alone can sue, and which B. can neither sue on nor release;[3] and to agents to whom bills of lading are deliverable.[4]

§ 438. *In contracts under seal, the agent, if the obligee, must sue.* — At common law, the party named as obligee is exclusively entitled to sue on the instrument.[5] But at the same time, although the principal cannot in such cases sue as immediate plaintiff, yet an action on the case, or a suit in equity, may be maintained, on part of the principal, to enforce and equitably effectuate the contract.[6]

§ 439. *On informal non-negotiable instruments, when it is doubt-*

Bay, 5 Johns. Ch. 54; *S. C.* 20 Johns. 637; Mauran *v.* Lamb, 7 Cow. 174; Guernsey *v.* Burns, 25 Wend. 411; Ferguson *v.* Hamilton, 35 Barb. 427; Welch *v.* Sage, 47 N. Y. 143; Pearce *v.* Austin, 4 Whart. 480; Phelan *v.* Moss, 67 Penn. St. 59; Hamilton *v.* Vought, 34 N. J. 187; Banks *v.* Eastin, 15 Mart. 291.

[1] See Sherwood *v.* Roys, 14 Pick. 172; Thatcher *v.* Winslow, 5 Mason, 58.

[2] Doe *v.* Thompson, 2 Foster, 217; Wheelock *v.* Wheelock, 5 Vt. 433; Binney *v.* Plumley, 5 Vt. 500. See Bank *v.* Slason, 13 Vt. 334; Bank U. S. *v.* Lyman, 20 Vt. 666; Buffum *v.* Chadwick, 8 Mass. 103; Commercial Bk. *v.* French, 21 Pick. 486; (when the note is payable to A. B., cashier, the bank may sue; Barney *v.* Newcomb, 9 Cush. 46;) M'Connell *v.* Thomas, 2 Scam. 313; Horah *v.* Long, 4 Dev. & B. L. 274; Grist *v.* Backhouse, 4 Dev. & B. L. 362. Linn *v.* Holland, 12 Mo. 127, apparently *contra*, is under a local statute.

[3] Offley *v.* Warde, 1 Lev. 235.

[4] Blanchard *v.* Page, 8 Gray, 281; Griffith *v.* Ingledew, 6 S. & R. 429, Gibson, J., dissenting. *Contra*, Coxe *v.* Harden, 4 East, 211; Waring *v.* Cox, 1 Camp. 369, said, however, to have been overruled by Lord Ellenborough, Paley's Agency, 364. And see Amos *v.* Temperley, 8 M. & W. 798; Du Puirat *v.* Wolfe, 29 N. Y. 436.

[5] Supra, § 283. U. S. *v.* Parmele, 1 Paine C. C. 252; Clark *v.* Courtney, 5 Peters, 319; Andrews *v.* Estes, 2 Fairf. 267; Spencer *v.* Field, 10 Wend. 88; Hopkins *v.* Mehaffy, 11 Serg. & R. 129; Potts *v.* Rider, 3 Hammond, 71.

[6] See Van Reimsdyk *v.* Kane, 1 Gall. 630; *S. C.* 9 Cranch, 153; Devinney *v.* Reynolds, 1 Watts & S. 328; M'Naughton *v.* Partridge, 1 Ohio, 223; Robbins *v.* Butler, 24 Ill. 387; Yerby *v.* Grigsby, 8 Leigh, 389. See supra, § 51.

ful on the face of the instrument whether principal or agent was the person whom the parties intended should have the right of suit, then suit may be brought by either principal or agent. — It has been already observed that on such instruments, when the agent is *primâ facie* the contracting party, the principal is entitled to sue, unless it should appear to have been the intention of the parties that the agent should be for this purpose exclusively privileged.[1] Among instruments of this class innumerable varieties are possible; and on those which have come before the courts, decisions have been given, some of which cannot be reduced to any uniform rule. In each case the object of the court, no doubt, was to effectuate the intent of the parties; but in doing so reasons have been employed which in other cases, under circumstances almost identical, would defeat such intent. In construing instruments of this class there are two preliminary considerations to be kept in mind. The first is that persons who make a contract are supposed to do so with intent that it should be operative; and therefore they are presumed to exclude an interpretation by which it would be inoperative.[2] The other is that by giving, in cases of doubt, the agent, as well as the principal, the right to sue, substantial justice can be effected, for in both cases the defendant is entitled to the same defence; and in case of the agent suing, the process, under the present equitable powers of the courts, can be so moulded as to be put under the principal's control, or may be superseded by a subsequent suit by the principal. Hence it is that the present tendency of the courts is to hold that on such instruments either agent or principal may sue.[3]

§ 440. Yet this conclusion is not universally accepted,[4] nor even by the courts who incline towards it has it been approached without hesitation. Thus in Massachusetts, in an early case,[5] the agent, in an action upon a subscription for shares in a turnpike company, where the promise was to pay him as agent, was

[1] Supra, § 298.

[2] See Whart. Confl. of Laws, § 429–431.

[3] See Lum *v.* Robertson, 5 Wall. 271; Herndon *v.* Taylor, 6 Ala. 461; Lewis *v.* Hodgdon, 17 Me. 267; Stevenson *v.* Mortimer, Cowp. 805; Sims *v.* Bond, 5 B. & Ad. 393; 2 Nev. & M. 616; Bickerton *v.* Burrell, 5 M. & S. 385; Rayner *v.* Grote, 15 M. & W. 359; Rutland R. R. *v.* Cole, 24 Vt. 33; Beebe *v.* Robert, 12 Wend. 413; Griffith *v.* Ingledew, 6 S. & R. 429; Dupont *v.* Mt. Pleasant Co. 9 Rich. 259. See supra, § 398; infra, § 755, 761.

[4] Thacher *v.* Winslow, 5 Mason, 58; Middlebury *v.* Case, 6 Vt. 165; Arlington *v.* Hinds, D. Chipman, 431.

[5] Gilmore *v.* Pope, 5 Mass. 491.

nonsuited on the ground that there was "no consideration, as between the agent and the subscribers, to support an action of assumpsit;" and though on the construction of the instrument itself the contract was clearly with the corporation alone, and therefore on this ground the decision was right, yet the wrong reason given was used as the basis of several other cases, which excluded the agent on the ground that only he from whom the consideration flows can sue.

§ 441. This position, however, is now generally repudiated, and it is agreed that the mere fact that no consideration flows from the agent specifically, does not preclude him, when he is the ostensible party in interest, or the technical party on the instrument, from bringing suit.[1]

§ 442. We must at the same time remember that where the title of an agent is merely introduced in the contract to express the fact that a principal will enforce the contract through such servant as he may appoint, then the suit must be brought by the principal himself.[2] So, also, it is said that on a shipment of goods consigned to A., on account of B., B. and not A. is the proper party to sue.[3]

§ 443. Whether, *on a promise to A.*, upon a consideration received from A., to pay a sum of money to B., B. can maintain an action, there is a conflict of opinion. "If one person," says Buller, J.,[4] makes a promise to another for the benefit of a third, that third may maintain an action upon it."[5] In Massachusetts, however, we are told by Hoar, J., that on "a promise to A., upon a consideration received from A., to pay a sum of money to B.," "it is now well settled in this commonwealth that B. can maintain no action."[6] But we may generally

[1] Buffum *v.* Chadwick, 8 Mass. 103; Colburn *v.* Phillips, 13 Gray, 66, where the reasoning in Gilmore *v.* Pope is discussed and discarded. Middlebury *v.* Case, 6 Vt. 165; Johnson *v.* Catlin, 27 Vt. 87, and cases cited supra, § 434–5.

[2] Piggott *v.* Thompson, 3 B. & P. 147; Bowen *v.* Morris, 2 Taunt. 274; Woodstock Bk. *v.* Downer, 27 Vt. 482; Taunton, &c. Turnpike Co. *v.* Whiting, 20 Mass. 327; Eastern R. R. *v.* Benedict, 5 Gray, 561; Oakey *v.* Bend, 3 Edw. Ch. 482; Gunn *v.* Cantine, 10 Johns. R. 387; Jones *v.* Hart, 1 Hen. & Mun. 471.

[3] Sargent *v.* Morris, 3 B. & Ald. 277.

[4] Marchington *v.* Vernon, 1 B. & P. 101.

[5] So, also, Martin *v.* Hinde, Cowp. 437.

[6] Colburn *v.* Phillips, 13 Gray, 166, citing Mellen *v.* Whipple, 1 Gray, 317; Field *v.* Crawford, 6 Gray, 116; Dow *v.* Clark, 7 Gray, 198.

hold that when an agent is personally interested in a contract he may sue.[1]

IV. WHEN AGENT RECEIVES PERSONAL INJURY.

§ 444. *Agent may sue personally for torts to himself.* — Whatever may be the rights of the principal in respect to a tortious injury inflicted on the agent, there can be no question that the agent has the right to sue personally for such damage as is peculiar to himself; and that he may even, if his principal is party to the infliction of the injury, sue his principal for redress.[2] Even where his loss is only pecuniary, the same protection is given to him; and he is entitled in this way to obtain compensation for injuries inflicted on himself or his interests by the negligence, the fraud, or the force of other parties.[3]

V. PUBLIC AGENTS WHEN PERSONALLY LIABLE.

§ 445. *Public agents, when personally liable, may sue personally, but otherwise not.* — It is within the power of a public agent, by making himself personally party to a contract, to sue on it personally. Where he does not so make himself a party, however, the government must sue.[4] As a rule, a promise to a public officer is to be enforced by a suit in the name of the body he represents. This results from the principle just announced, the officer being a purely indifferent person in the contract, and the principal being the only real party in interest.[5]

VI. LIMITATIONS UNDER WHICH AGENTS CAN SUE.

§ 446. *Agents, when suing as such, are usually subject to the direction of their principals.* — It has already been noticed that a principal, in cases where the action of the agent was unauthorized, can at any time, by ratifying the action, make it his own.[6] But independently of this, an agent, it will be remembered, can never, when acting as such, dispute the title of the principal;

[1] Orr *v.* Lacy, 4 M'Lean, 243; Fish *v.* Jacobson, 2 Abb. (N. Y.) App. Dec. 132; Horah *v.* Long, 4 Dev. & B. L. 274; Grist *v.* Backhouse, 4 Dev. & B. L. 362. Supra, § 428; infra, § 647, 755.

[2] See Whart. on Neg. § 201. Supra, § 340.

[3] Paley's Agency, 361 *et seq.* Sheets *v.* Selden, 2 Wallace, 177; Dugan *v.* U. S. 3 Wheat. 172; Bainbridge *v.* Downie, 6 Mass. 253.

[4] Pigott *v.* Thompson, 3 B. & P. 147; Bowen *v.* Morris, 2 Taunt. 374; Irish *v.* Webster, 5 Greenl. 171; Garland *v.* Reynolds, 20 Me. 45. That in such contracts the public officer is entirely impersonal, see infra, § 510–13.

[5] Supra, § 68.

and as far as this title is concerned, the principal is entitled at any time to step in and cause the suit to be conducted according to his own views. In many jurisdictions this may be done by motion in the court having control of the suit; in others the course is by bill in equity; but in no case will the agent be permitted, against the principal's protest, to give the suit a turn prejudicial to the principal's interests. But be this as it may, the principal, by intervening in a distinct suit, absorbs the case, so far as concerns his own interests, and to that extent supersedes the agent.[1] Yet such intervention is not to be permitted to affect the agent's lien, or other interests in the subject matter of the suit, which no act of the principal can disturb.[2]

§ 447. *Agent, when suing on contract, is open to same defences that would be made if the suit were brought by the principal.* — No change in the formal character of the suit can affect the merits of the issue. The agent, if he sues in his own name for a claim due the principal, sues as trustee for the principal; and he is subjected, therefore, to equities or set-offs that apply to the principal.[3] It is also open to the defendant to show no contract was made with the agent as agent.[4]

§ 448. *A principal, by contracting as agent, cannot elude defences to which he would otherwise have been subject.* — It may sometimes occur that a principal may, in order to avoid claims upon himself, contract as agent with an illusory principal behind. In such case the nominal principal, in whose name the suit is brought, can only recover subject to any equities applicable to the real principal.[5] And if the contract was made with the real principal and not the nominal principal, then the suit must be brought in the name of the real principal.

[1] Sargent *v.* Morris, 3 B. & A. 277; Sadler *v.* Leigh, 4 Camp. 194; Morris *v.* Cleasby, 4 M. & S. 566; Taintor *v.* Prendergrast, 3 Hill, 72.

[2] Infra, § 766–776; supra, § 405.

[3] Coppin *v.* Walker, 7 Taunt. 237; Coppin *v.* Craig, 7 Taunt. 243; Atkyns *v.* Amber, 2 Esp. 493; Bayley *v.* Morley, 7 T. R. 311; Rabone *v.* Williams, 7 T. R. 360; Humble *v.* Hunter, 12 Q. B. 311; Solomons *v.* Bank, 13 East, 135, n.; De la Chaumette *v.* Bank, 9 B. & C. 208; Stewart *v.* Aberdeen, 4 M. & W. 218; Leeds *v.* Ins. Co. 6 Wheat. 565; Huntington *v.* Knox, 7 Cush. 371; Lime Rock Bk. *v.* Plimpton, 17 Pick. 159; Taintor *v.* Prendergrast, 3 Hill, 72; Merrick's Est. 2 Ashmead, 485; *S. C.* 8 W. & S. 402. Infra, § 465, 467, 755.

[4] Humble *v.* Hunter, 12 Q. B. 310; Winchester *v.* Howard, 97 Mass. 303. Supra § 431; infra, § 454.

[5] Bickerton *v.* Burrell, 5 M. & S. 383; Humble *v.* Hunter, 12 Q. B. 359. See supra, § 405, 431; infra, § 468, 469, 755.

VIII. PECULIARITIES OF MODERN ROMAN LAW.

§ 449. According to the Roman law as it now obtains, the agent can maintain suit, in his own name, against a third person, only in the following cases: —

1. When the contract is in the agent's name.
2. When he transcends the limits of his power.
3. And when the principal (mandant) is absent.

1. When the contract is made in the agent's name, he must, as against the party with whom he contracts, appear personally as plaintiff. Nor is this rule varied by the circumstance that he was known by the third party to be acting for another, nor by the circumstance that the agent speaks of being merely an "agent" without disclosing the principal.

2. When the agent holds himself out as the representative of a particular person, but either oversteps the limits of his commission or is acting without legal authority, then the following distinctions are to be made: If the third person knew of the defect, the contract is regarded as having been made with the expectation that the supposed principal will ratify the act of his unauthorized agent. If he is deceived in his expectation, he is limited to the cancelling of the transaction, and to a suit for a recovery from the pretended agent of whatever the latter had received; this limitation arising from the fact that such agent is bound to him (the third person) not by privity of contract (*consensu*) but only *re*. Hence on such a state of facts only a recovery of what has been paid can be had. If, however, the third person was induced to undertake the transaction through the fraud of the pretended agent, then the latter is responsible to the former for damages in the *actio doli*.

§ 450. If the third person knew nothing of the defect, and acted in good faith, he is still not entitled to maintain a suit against the intervening party upon the contract, upon the assumption that the contract is valid, for such is not the fact; but he can maintain an action for damages for the tort.[1] When the principal is absent, the agent can be compelled by suit to fulfil the agreement, so far as it is within the latter's power, and the agent may be compelled to apply to this purpose any funds he may have in his hands given to him by the principal for this purpose.

[1] Koch, III. 571–2.

CHAPTER X.

THIRD PERSON AGAINST PRINCIPAL.

I. On Contracts.

Principal is suable on all contracts executed by him through agent, § 454.

Even when appointment is revoked, agent binds principal as to innocent third parties, § 455.

Foreign principal is not usually extra-territorially liable for his factor's contracts, § 456.

Where agent is incompetent principal is necessarily liable, § 457.

Principal is not directly liable on contracts under seal or on negotiable paper executed in the agent's name; but as to other contracts evidence is admissible to show that the principal is the real party bound, § 458.

Contract to bind principal must be authorized by him, § 459.

Must be within apparent scope of agent's authority, § 460.

Members of clubs are liable for their agents' contracts, § 461.

Agent becomes liable when drawing credit to himself, or when ostensibly the contracting party, or when he acts without authority, § 462.

Third party may estop himself from proceeding against principal, § 463.

Undisclosed principal may be sued when disclosed, § 464.

Third person dealing with an agent, supposing him to be principal, can take advantage of any set-off against agent, § 465.

Third party employing agent on account of his peculiar qualifications cannot be met by intervention of undisclosed principal, § 467.

Private agreement between principal and agent that the latter shall be exclusively bound cannot divest liability of principal, § 468.

Creditor, by giving exclusive credit to agent, may exonerate undisclosed principal, so far as to give effect to any defences arising before disclosure of principal, § 469.

Creditor who elects and takes security from agent cannot afterwards recover against principal, § 470.

Merely proceeding against agent is not such an election, § 472.

But otherwise when judgment is obtained, § 473.

II. On Torts.

A principal who directs torts to be performed by an agent is liable for such torts, § 474.

When the relation is that of master and servant, the act must be within the "scope" or "course" of employment, § 475.

Principal is not liable for agent's mistake of law, § 476.

Principal bound by malicious or fraudulent torts which he ratifies, § 477.

Principal bound by agent's deceits of which he takes advantage, § 478.

But is not liable for his agent's independent unauthorized torts, § 479.

Even master not liable for servant's independent torts when servant is rightfully free to act, § 480.

When principal is otherwise liable, it is no defence that he forbade the act, § 481.

Where agent is at liberty to take his own course, there principal not liable, § 482.

But otherwise when principal retains right to interfere, § 483.

So principal is liable for nuisance, § 484.

So where act is done by agent as principal's substitute, § 485.

So as to torts incident to agency, § 486.

Principal who contracted to do a thing is liable for agent's torts which prevent the performance of the contract, § 487.

Public officer is not liable for his subaltern's torts, § 488.

I. ON CONTRACTS.

§ 454. *Principal is suable on all contracts executed by him through agent.* — The agent, when duly employed by a principal to execute a contract, is, by our modern jurisprudence, absorbed in the principal; and on such contract the principal, and not the agent, is to be sued. Nor need the mandate in such case be direct. For all contracts made by the agent within the scope of his authority, the principal is ordinarily the party liable.[1] And the same rule holds good, as has been already seen, in respect to contracts which are made on behalf of a principal by an agent not authorized to do the particular act, but whose act in this respect is subsequently ratified by the principal.

§ 455. *Even when an appointment is revoked, as between principal and agent, agent binds principal as to third parties dealing with agent in bonâ fide ignorance of the revocation.* — This point is elsewhere discussed.[2]

§ 456. *A foreign principal is not usually extra-territorially liable for his factor's contracts.* — This proposition, which is expanded in a future chapter,[3] is illustrated in an ably argued English case, where the evidence was that H. F. & Co. were merchants in London, and defendant was a partner in the firm of H. B. & Co., carrying on business at Rangoon. Goods were supplied by plaintiff to H. F. & Co., on their order, given in consequence of an arrangement between the two firms, as disclosed in letters, that H. F. & Co. should "purchase" and send out goods on "the joint account" of the two firms, two per cent. to be charged on the invoice by the London firm, and five per cent. by the Rangoon firm, including guarantee. The plaintiff had no knowledge of the defendant, or that the Rangoon firm were in any way interested in the transaction, until after the goods were supplied. It was held in the exchequer chamber (affirming the judgment of the queen's bench) that the defendant was not, as an undisclosed principal, a party to the contract under which the goods were supplied by the plaintiff; for that, on the true construction of the correspondence, the Rangoon firm did not give authority to the London firm to establish privity of contract and pledge their credit with the English suppliers of the goods; inas-

[1] See supra, § 129.

[2] See supra, § 110.

[3] See infra, § 791; and see Oelrichs *v.* Ford, 23 How. 49.

much as the presumption that foreign constituents do not give the English commission merchant any authority to pledge their credit to those from whom the commission merchant buys on their account, applies to such a case.[1] In such cases the agent is in any view *primâ facie* liable.[2]

§ 457. *If agent is incompetent, principal becomes directly liable to third parties dealing with such agent.* — Suppose a principal knowingly selects as an agent a person incapable in law of acting as such agent, what effect has this upon third parties dealing *bonâ fide* with such agent? The agent not being *sui juris* cannot be made personally liable on the contract, even in those cases in which an agent could make himself personally liable. Reasoning, however, from those cases in which it is held that if a person not capable of contracting holds out to be so capable, and thus obtains money or goods, he is liable to a prosecution for false pretences,[3] we must conclude that if a person not capable of acting as an agent fraudulently acts as such, parties injured by such fraud may thus obtain redress. But beyond this our Anglo-American law does not go, it being held that an infant who has induced an adult to contract with him, by representing himself to be of full age, cannot be made liable in case.[4]

§ 458. *Principal is not directly liable on contracts under seal or on negotiable paper executed by the agent in the agent's name; but as to other contracts evidence is admissible to show that the principal is the real party bound.* —As we have already seen, the transaction, to bind the principal, must be in the principal's name.[5] The contract must correspond with the authorization,[6] and the fact of agency must appear on the instrument.[7] But in construing informal contracts, parol evidence is admissible, on the part of the third contracting party, to charge the principal.[8]

§ 459. *Contract to bind principal must be authorized by him.* — But, as we have already fully seen, there must be proof of au-

[1] Hutton *v.* Bulloch, Law Rep. 9 Q. B. (Ex. Ch.) 572.

[2] Infra, § 514, 791.

[3] See R. *v.* Hanson, Say. 229; Wh. Cr. Law, 7th ed. § 2099.

[4] Price *v.* Hewett, 8 Exch. 146; Liverpool Loan Ass. *v.* Fairhurst, 9 Exch. 422; Wright *v.* Leonard, 11 C. B. N. S. 258; Overton *v.* Banister, 3 Hare, 503; Goode *v.* Harrison, 5 B. & Ald. 147, cited Broom's Com. 592; though see Carpenter *v.* Carpenter, 45 Ind. 142.

[5] Supra, § 280.

[6] Supra, § 282.

[7] Supra, § 284.

[8] Supra, § 296–298, 409; infra, § 492, 729.

thorization, either express or implied, in order to bind the principal.[1] "No one can become the agent of another person except by the will of that other person. His will may be manifested in writing or orally, or simply by placing another in a situation in which, according to ordinary rules of law, or perhaps it would be more correct to say according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him; but in every case, it is only by the will of the employer that an agency can be created. This proposition, however, is not at variance with the doctrine, that where one has so acted as from his conduct to lead another to believe that he has appointed some one to act as his agent, and knows that that other person is about to act on that behalf, then, unless he interposes, he will in general be estopped from disputing the agency, though in fact no agency really existed.[2]

"Another proposition to be kept constantly in view is, that the burden of proof is on the person dealing with any one as an agent through whom he seeks to charge another as principal. He must show that the agency did exist, and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it." [3]

§ 460. *Principal is not liable to third party when such party has notice direct or constructive that the agent in the contract acts out of the scope of his authority.* — In other words, where T. makes with A., as agent of P., a contract which T. knows or ought to know A. is not authorized by P. to execute, P. is not bound to T.[4] Hence the agent cannot by fraudulent combination with a third party bind the principal.[5]

[1] § 40, 129. See Farnsworth *v.* Brunquest, 36 Wisc. 202.

[2] See supra, § 42, 121, 126; infra, § 700.

[3] Pole *v.* Leask, 33 L. J. 161, 162, Ch., judgment of Lord Cranworth.

[4] Supra, § 129, 138, 139. P., a jeweller, kept a shop in the country, living himself in London. The country shop was managed by a shopman, A., from whom T. had been in the habit of receiving orders in P.'s name, for goods, which were sent to the country shop, and afterwards paid for by P. A. went to London, and ordered jewelry there of T. in P.'s name, which he then carried away with him and absconded with. T., it was held, could sue P. for the price of the goods obtained by A. Summers *v.* Solomon, 26 L. J. 301, Q. B.; 7 E. & B. 879. Bramwell, B., does not assent to the law of this case. 3 H. & N. 794; Dicey on Parties, 244. Supra, § 122.

"The question in this case (and the same remark applies to other cases of

[5] Heilbronner *v.* Douglass, 32 Tex. 215. Supra, § 245.

§ 461. *Members of clubs are liable for their agents' contracts.*— We will presently see[1] that committees of clubs may make themselves personally liable on contracts made by them. So far as concerns the members of such clubs, they are of course liable on all contracts to which they expressly or impliedly assent. But there must be some such assent; and whether it is assumed by the members depends upon the facts.[2] "In the case of an ordinary subscription club," says Mr. Dicey, in his work on Parties,[3] "the mere fact of a person's being a member does not give the committee of the club power to pledge his personal credit, and he cannot, therefore, merely on the ground of his membership, be sued for the price of goods supplied to the steward according to the order of the committee."[4] Nor, it has been held in England, is mere membership of a committee sufficient to impose upon the individual members of the committee liability for the price of goods ordered by a member of the committee, and supplied by a tradesman upon credit for the purposes of the club. It must be shown, in order to fix any individual member of the committee with responsibility, that the contract was made with his concurrence, or perhaps that the members of the committee are authorized to pledge one another's credit.[5] Upon this principle it was ruled that no liability attached to two members of a committee who were sued for the price of goods supplied to the club on the order of another member of the committee.[6] It has been also

a similar kind) was not what was the exact relation between the defendant and A., but whether the defendant had so conducted himself and held the other out as to lead the plaintiff reasonably to suppose that A. was the defendant's general agent for the purpose of ordering goods." Summers *v.* Solomon, 26 L. J. 302, Q. B., judgment of Coleridge, C. J.

A principal is not liable for the unauthorized acts of his agent in withholding a part of the money of the principal in making a loan, or in giving his own notes, payable at a future time, in lieu of the money in his hands. Kirkpatrick *v.* Winans, 1 Green (N. J.), 407.

[1] Infra, § 507.

[2] See Bright *v.* Hutton, 3 H. L. C. 341.

[3] Page 249.

[4] Flemyng *v.* Hector, 2 M. & W. 172; compare Cockerell *v.* Aucompte, 26 L. J. 194, C. P.; 2 C. B. N. S. 440.

[5] Todd *v.* Emly, 7 M. & W. 405. See, however, infra, § 507.

[6] "I think," said Alderson, B., "that as the members of a club generally are to be considered as not having authorized anybody to deal with them upon credit, so here the committee were authorized only to deal as a body for ready money. But at the same time, if any of the members of the committee choose to contract, not for ready money, those members of the

ruled that the members of a volunteer corps,[1] or of a provisional committee, may or may not, according to circumstances, be liable to persons who supply goods or render other services to the members of the corps or of the committee. In each case the question is one of fact, and not of law; and the matter to be decided is, whether the persons sued did or did not allow the goods, &c., for the price of which the action is brought, to be supplied on their credit.[2]

§ 462. *Agent becomes liable when drawing credit to himself, or where ostensibly the contracting party, or where money is paid to the agent by mistake, or the contract can only be enforced by making agent liable, or where the agent acts without authority.* — These points are the subjects of discussion in a succeeding chapter.[3]

§ 463. *Third party may estop himself from proceeding against principal.* — A third party dealing with an agent may unquestionably bind himself to have recourse to the agent and the agent alone; and in such case he is estopped by his own act from going behind the contract and attacking an undisclosed principal.[4] And this exclusive acceptance of the agent may be inferred from the fact that the contract is based on certain personal adaptations of the agent, he being the only person known in the transaction.[5]

committee who have so contracted are liable upon their own contract, and the members who have not concurred in it are not liable unless that be the common purpose for which the committee was appointed." Todd *v.* Emly, 435. If there is a division of opinion in the committee, and the majority only give authority to the agent to contract, those only are, it seems, liable on the contract who voted for it. Ibid. 505. As, however, the reason why individual members of a club are not liable for the price of goods supplied to the club is that the rules of subscription clubs ordinarily show that it is not the intention of the members that the dealing of the club should be on credit, or that the individual credit of the members should be pledged. See Todd *v.* Emly, 7 M. & W. 432, judgment of Abinger, C. B. The liability of individuals, supposing they have done nothing to make themselves personally liable, depends ultimately upon the rules of the club. If they show that goods are intended to be procured upon the credit of the members, the members will be liable to pay for the goods so procured. Cockerell *v.* Aucompte, 26 L. J. 194, C. P.; 2 C. B. N. S. 440.

[1] Cross *v.* Williams, 7 H. & N. 675; 31 L. J. 145, Ex.

[2] Bright *v.* Hutton, 3 H. L. C. 341.

[3] Infra, § 490 *et seq.*

[4] Lucas *v.* De la Cour, 1 M. & S. 249. Infra, § 469, 496, 788.

[5] Humble *v.* Hunter, 12 Q. B. 310; Robson *v.* Drummond, 2 B. & Ald. 303. Infra, § 467, 469, 470, 491 *et seq.* See supra, § 431.

§ 464. *Where agent acts for undisclosed principal, third party, on discovering the principal, may sue either principal or agent.*[1]

§ 465. *Third persons dealing with an agent, supposing him to be principal, can take advantage of any set-off against agent.* — For instance, A. being indebted to T., T. purchases goods of A., T. intending in payment to set off A.'s debt to T. Supposing that T., in making this contract, acted *bonâ fide*, and without notice express or implied that A. represented in the transaction P., T. cannot be precluded from using his set-off by the subsequent disclosure of P. as principal.[2]

§ 466. It should be remembered, however, that the term "un-

[1] Addison *v.* Gandasequi, 4 Taunt. 574; Paterson *v.* Gandasequi, 15 East, 62; Priestley *v.* Fernie, 3 H. & C. 977; Thomson *v.* Davenport, 9 B. & C. 78; Beckham *v.* Drake, 9 M. & W. 79; Jones *v.* Littledale, 6 A. & E. 490; Smethurst *v.* Mitchell, 1 E. & E. 622; Rayner *v.* Grobe, 13 M. & W. 359; Dutton *v.* Marsh, L. R. 6 Q. B. 361; Hutton *v.* Bulloch, 9 Q. B. 572; Clark *v.* Van Reimsdyk, 9 Cranch, 153; Ford *v.* Williams, 21 How. 288; Vermont R. R. *v.* Clayes, 21 Vt. 30; Baldwin *v.* Leonard, 39 Vt. 266; Gilmore *v.* Pope, 5 Mass. 491; Jones *v.* Bixby, 11 Mass. 34; Southard *v.* Sturtevant, 109 Mass. 390; M'Graw *v.* Godfrey, 14 Abb. (N. Y.) Pr. 397; Meeker *v.* Claghorn, 44 N. Y. 349; Youghiogheny Iron Co. *v.* Smith, 66 Penn. St. 340; Thomas *v.* Atkinson, 38 Ind. 248; Wheeler *v.* Reed, 36 Ill. 82. See supra, § 206; infra, § 496–505.

Modern Roman law subordinates principal to agent in contracts made by agent in agent's own name. — Where the principal is not named, a contract made by the agent, in the agent's own name, does not primarily charge the principal; it is simply an obligation accessory to that of the principal. The principal, as Pothier declares (Oblig. § 487, cited 1 Bell's Com. 7th ed. 540), being considered "as having, by the commission which he has given the agent, consented in advance to all the engagements which the agent shall contract in all matters within the scope of the agency, and as having rendered himself responsible for them. In order that this accessary obligation of the principal shall take place, it is necessary that the agent contract in his own name, though on account of the principal's business; for when the agent contracts expressly in his quality of factor, and per procuration of his principal, it is not the agent who contracts: it is the principal alone who contracts by his ministry a principal and not an accessary obligation." See supra, § 4, 5, 119.

[2] Paley's Agency, 325; Coates *v.* Lewes, 1 Camp. 444; Coppin *v.* Walker, 7 Taunt. 239; Coppin *v.* Craig, 7 Taunt. 243; Rabone *v.* Williams, 7 T. R. 360; Dresser *v.* Norwood, 17 C. B. N. S. 466; Warner *v.* M'Kay, 1 M. & W. 595; Turner *v.* Thomas, L. R. 6 C. P. 610; Traub *v.* Milliken, 57 Me. 63; Kingsley *v.* Davis, 104 Mass. 178; Lime Rock Bk. *v.* Plimpton, 17 Pick. 159; Huntington *v.* Knox, 7 Cush. 371; Taintor *v.* Prendergrast, 3 Hill, 72; Merrick's Est. 5 W. & S. 9; *S. C.* 2 Ashm. 485; Conklin *v.* Leeds, 58 Ill. 178; Koch *v.* Willi, 63 Ill. 144, and cases cited infra, § 496–505.

disclosed" is ambiguous, and may be made to include not only those cases in which A. acts as ostensible principal, but cases in which A. acts as agent for a principal *unnamed*. In the latter case, T. having notice that A. claims to act only as agent, cannot avail himself of his set-off against A.[1] It must also be kept in mind that any other circumstances which should put the third party on his guard should tell against him; for "if by due diligence the buyer could have known in what character the seller acted, there would be no justice in allowing the former to set off a bad debt at the expense of the principal."[2]

§ 467. *Third person employing agent on account of the latter's peculiar qualifications cannot be defeated, in a suit against the agent on the contract, by the defence that the agent acted as agent for an undisclosed principal.* — For instance, I employ an expert to do a particular work for which he has peculiar qualifications. If I sue him for neglect or non-performance, I cannot be barred by the intervention of an undisclosed principal.[3]

§ 468. *Private agreement between principal and agent that agent shall be exclusively liable cannot divest liability of principal.* — In other words, P., who is the virtual party to a contract, cannot protect himself by setting up A., a man of straw, as contractor. If P. is the real party who will reap the benefits of the contract, if successful, he cannot protect himself from the losses by making A., his secret agent, the ostensible principal.[4] Nor can a set-off which the principal has against the agent be by such secret bargain used against the creditor.[5]

§ 469. *Creditor, by giving exclusive credit to agent, may exonerate undisclosed principal so far as to give effect to any defences arising before the disclosure of the principal.*[6] — Thus it has recently been held in England that if the principal has *bonâ*

[1] Semenza *v.* Brinsley, 18 C. B. N. S. 467. Supra, § 405, 432–7; infra, § 499, 723, 762.

[2] Evans *v.* Waln, 71 Penn. St. 71; Hurlburt *v.* Ins. Co. 2 Sumner, 471; Young *v.* White, 7 Beav. 506; Miller *v.* Lea, 35 Md. 396.

[3] See supra, § 28, 432; infra, § 490–496, 755, 788.

[4] See Paley's Agency, 245, 334; Waring *v.* Favenc, 1 Camp. 85; Kymer *v.* Suwercropp, 1 Camp. 109; Rich *v.* Coe, Cowp. 636; Beckham *v.* Drake, 9 M. & W. 79; Speering *v.* De Grave, 2 Vern. 643; Brettel *v.* Williams, 4 Ex. 630; Richards *v.* Farmer, 36 Mo. 35; Mitchell *v.* Dall, 2 Harris & G. 172.

[5] Story's Agency, § 446; citing Waring *v.* Favenc, 1 Camp. 85; Heald *v.* Kenworthy, 10 Exch. 739.

[6] See supra, § 298, 431, 463.

fide paid the agent at a time when the creditor still gave credit to the agent and knew of no one else as principal, the principal is relieved.[1] And further: the creditor loses his right to sue the principal, when the creditor has so dealt with the agent as to place the principal in a worse situation than he ought to be in.[2] "Although the person who has dealt with an agent believing him to be a principal may elect to treat the after-discovered principal as having contracted with him, still, if the principal, following the ordinary course of business, have, after his liability to the contractor is complete, altered the state of his accounts with the agent, this right of the contractor exists subject to the state of those accounts."[3] It has been consequently declared, that "if the principal has paid the agent, or if the state of the accounts between the agent and the principal would make it unjust that the seller should call upon the principal, the fact of payment or such a state of accounts would be an answer to an action brought by the seller, where he had looked to the responsibility of the agent."[4] The law on the subject is thus recapitulated by Lord Ellenborough, C. J.: "A person selling goods is not confined to the credit of a broker who buys them, but may resort to the principal on whose account they are bought. . . . . If he lets the day of payment go by he may lead the principal to suppose that he trusts solely to the broker; and if in this case the price of the goods has been paid to the broker, on account of the deception the principal shall be discharged."[5] The principal, in order to be protected from the creditor, must be put by the creditor in a worse position than he otherwise would have been in.[6]

[1] Armstrong *v.* Stokes, 7 L. R. Q. B. 598; 41 L. J. Q. B. 253.

[2] See Heald *v.* Kenworthy, 10 Exch. 745, judgment of Pollock, C. B.; Dicey on Parties, 258; Cheeves *v.* Smith, 15 Johns. 276; Johnson *v.* Cleaves, 15 N. H. 332; French *v.* Price, 24 Pick. 13.

[3] Thomson *v.* Davenport, 2 Smith L. C. 6th ed. 347, notes. See Filter *v.* Com. 31 Penn. St. 406; Clealand *v.* Walker, 11 Ala. 1058.

[4] Thomson *v.* Davenport, 2 Smith, L. C. 6th ed. 435, judgment of Bayley, J.

[5] Kymer *v.* Suwercropp, 1 Camp. 112, judgment of Ellenborough, C. J.

[6] In Heald *v.* Kenworthy, 10 Exch. 745, 746, the law is thus laid down by Parke, B.: "The plea simply states that after the contract was entered into between the plaintiffs and a third party, the agent of the defendant, under circumstances which rendered the defendant liable upon it, the latter paid the agent. I am of opinion that this is no defence to the action. There are no doubt cases and dicta which, unless they be understood with some qualification, afford ground for the po-

§ 470. *Creditor who intelligently elects and takes security from agent as debtor, cannot afterwards recover against principal.* — In other words, if I accept A. exclusively as my debtor, I cannot afterwards, on A. proving insolvent, discard him, and turn to B., as his supposed principal.[1] Thus in an English case, decided in 1812, the evidence was that Gandasequi, a Spanish merchant, being in London, employed Larrazabal & Co. to buy for him goods for the foreign market. They bought from Paterson, Gandasequi being present and examining the goods. They were invoiced to Larrazabal & Co., as on their credit, and Larrazabal & Co. debited Gandasequi with the amount. Larrazabal & Co. failed before the credit expired, and the sellers brought an action against Gandasequi. Lord Ellenborough directed a nonsuit, and this was confirmed by the court. "The court have not the least doubt," said Lord Ellenborough, "that if it distinctly appeared that the defendant was the person for whose use and on whose account the goods were bought, and that the plaintiff knew that fact at the time of the sale, there would not be the least pretence in charging the defendant in this action." And the court being clear that the jury did right in finding the election to have been made in knowledge of that fact, the rule was made absolute.[2] So in a Scotch case, determined in 1816, it appeared that goods were furnished for Sir A. Cochrane's estates in Trinidad, on the order of Scott, Moncrieff & Robertson, his agents in Scotland. The agents became bankrupt, and Sir A. Cochrane settled accounts with them. The sellers of the goods sued Sir A. Cochrane; but the court, following the English cases just given, held

sition taken by the counsel for the defendant" (that the mere fact of payment to the agent discharged the principal). But "there is no case where the plaintiff has been precluded from recovering, unless he has in some way contributed either to deceive the defendant, or to induce him to alter his position." Heald *v.* Kenworthy, 10 Exch. 745, 746, judgment of Parke, B.; Dicey on Parties, 260. So in Macfarlane *v.* Giannacopulo, 3 H. & N. 859, T., a ship-owner, employed A., a broker, to effect an insurance on the ship, and A. signed a policy on behalf of P., the underwriter. The ship was lost, and A. settled with P., giving him a credit note, it being usual to pay such notes in a month. A. had, at the time of signing the policy and the giving of the credit note, funds sufficient to pay the loss. Three months after the credit note was given, and while it was still unpaid, A. failed. It was held that P. was still liable to T.

[1] See supra, § 463.

[2] Paterson *v.* Gandasequi, 15 East, 62; to the same effect, see Addison *v.* Gandasequi, 4 Taunt. 594.

that the sellers, having intelligently elected the agent as their debtor, would be held to their election.[1] The same view as to the finality of election was subsequently enforced by Lord Tenterden. "If," he says, "at the time of the sale, the seller knows, not only that the person who is nominally dealing with him is not principal, but agent, and also knows who the principal really is, and, notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him, *and with him alone*, then, according to the cases of Addison *v.* Gandasequi and Paterson *v.* Gandasequi, the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other."[2]

§ 471. But on this doctrine it is desirable to keep in mind the following criticism by Mr. M'Laren.[3] "It is certainly intelligible that if the facts go to disclose an *election*, or choice between the agent and the principal, and a preference of the one and an abandonment of the other, this election, if ever made, should be irrevocable. But it is difficult to understand why — apart from facts indicating a deliberate intention not merely to charge the agent, but to discharge the principal — the creditor should be put to an election at all, or why there should be a presumption from charging the agent that he exonerated the principal altogether. It is one thing to say, that where the principal is known, the presumption is that the agent does not mean to be bound personally; for that presumption is founded on reason, in so far as the agent is not the party interested. It is quite a different thing to say that, because the agent is bound, the party interested is not bound, *i. e.* as neither having meant to be bound, nor having been held bound by the creditor. Surely he may be bound as an accessary, although the agent be bound as principal obligant. The fact of the principal being known or unknown at the time of the contract may influence the question of construction of the facts as evidence of the agent's intention to be bound; but assuming it is clear that the agent has bound himself in his own name, why should the principal be released where the creditor knows him, and be bound where the creditor

[1] Hood *v.* Cochrane, cited 1 Bell's Com. 7th ed. 537.

[2] Thomson *v.* Davenport, 9 B. & C. 78; 2 Smith's Lead. Cas. 309.

[3] 1 Bell's Com. 7th ed. 541, note.

only discovers him afterwards, unless in cases where the creditor, knowing him to be liable, positively renounces his liability, and exonerates him? It appears to be very doubtful indeed, whether the doctrine of election as laid down by Lord Tenterden and others, whatever authority it may have in England, is not altogether repugnant to the principles of the law of Scotland. The principal is, by the civil law, as it rather appears, always liable, either as the direct obligant, or as the accessary obligant, according to Pothier's doctrine." [1]

§ 472. *Merely proceeding against agent is not such an election.* — In order to relieve the principal, there must be something equivalent to an election not to charge the principal; and whether there is such an election is a question of fact, which is not determined by charging the agent after knowledge of the principal.[2] As will presently be seen, after the agent has been sued to judgment, the right to revert to the principal, by the technical rules of the English common law, is lost.[3] But an affidavit of proof in bankruptcy, filed but not further proceeded upon, and countermanded, is not an election precluding recourse to the principal. And it is intimated though not decided that merely commencing suit against the agent does not operate as an election which discharges the principal.[4] But if the third party accepts the individual obligation of the agent under circumstances indicating an intent, with full knowledge of all the facts, to give sole credit to the agent, and to abandon all claim against the principal, then his election will bind him, and he cannot subsequently resort to the principal. Unless this distinctly appears, however, he is not concluded by the form of the contract.[5]

§ 473. *When principal and agent are severally liable, and one is sued, and judgment is obtained against him, this extinguishes the remedy against the other.* — There is much reason for the position that the mere taking judgment against the agent, under such circumstances, should not, when the judgment is unsatisfied, extinguish the debt. Judge Story[6] has given his opinion

[1] See, also, argument of Brett, J., in Fowler *v.* Hollins, L. R. 7 Q. B. 616. Infra, § 730.

[2] Coleman *v.* Bank, 53 N. Y. 397; McGraw *v.* Moody, 14 Abb. N. Y. Pr. 397; Garrard *v.* Moody, 48 Ga. 96; Calder *v.* Dobell, L. R. 6 C. P. 466.

[3] Priestley *v.* Fernie, 3 H. & C. 977. Infra, § 473.

[4] Curtis *v.* Williamson, L. R. 1 Q. B. 57.

[5] Coleman *v.* Nat. Bank, 53 N. Y. 388.

[6] Agency, § 295.

to this effect; and he cites Mr. Livermore as authority. But a subsequent English case [1] has rejected this conclusion, maintaining that if the agent be sued to judgment, this judgment, though unsatisfied, is a bar to proceedings against the principal. The case before the court was a suit against the master on a bill of lading; but the rule was declared to apply to all suits based on the relation of master and servant. The Roman law on this point is contained in a fragment which has been the subject of much criticism. "Est autem nobis electio, utrum exercitorem, an magistrum, convenire velimus. *Sed ex contrario exercenti navem adversus eos, qui cum magistro contraxerunt, actio non pollicetur, quia non eodem auxilio indigebat, sed aut ex locato cum magistro, si mercede operam ei exhibet, aut si gratuitam, mandati agere potest.* . . . . Haec actio ex persona magistri in exercitorem dabitur, et ideo, si cum utro eorum actum est, cum altero agi non potest. *Sed si quid sit solutum, si quidem a magistro, ipso jure minuitur obligatio: sed et si ab exercitore, sive suo nomine id est propter honorariam obligationem, sive magistri nomine solverit, minuetur obligatio, quoniam et alius pro me solvendo me liberat.*" [2] Judge Story, omitting in his quotation the passages in italics, concedes that a mere suit against either master or owner destroys the right to proceed against the other; [3] but this interpretation is not consistent with the last lines quoted in italics, and is rejected by high authorities among the older commentators,[4] though supported by Vinnius.[5]

II. ON TORTS.

§ 474. *A principal who directs torts to be performed by an agent is liable for such torts.* — If the agent is irresponsible, the principal is exclusively liable; [6] if the agent is responsible, then the principal and agent are severally liable.[7] They may be sued jointly where the agent acts with either the direction or the counsel of the principal; [8] but such coöperation is essen-

[1] Priestley *v.* Fernie, 3 Hurl. & C. 977; 34 L. T. Ex. 173.

[2] L. 1, § 17, 24. D. de exerc. act. 14. 1.

[3] Agency, § 295.

[4] See 2 Emer. Ass. ch. 4, § 10, cited by Judge Story.

[5] Not. ad Comm. de Re Naut. p. 149, ed. 1647.

[6] Whart. on Neg. § 90–95.

[7] M'Laughlin *v.* Prior, 4 M. & G. 48. See Gass *v.* Coblentz, 43 Mo. 377.

[8] Nicoll *v.* Glennie, 1 M. & S. 588; Petrie *v.* Lammont, 1 C. & M. 96; Hewett *v.* Swift, 3 Allen, 420; Wheatley *v.* Patrick, 2 M. & W. 650; Gal-

tial if they be so sued.[1] Between the parties defendant there can be in such case no contribution.[2] It should be kept in mind that a master is to be viewed as directing a wilful trespass which is a necessary incident of an act which a servant is directed to perform. But where such trespass is the result of the negligence of the servant, then the master is liable in case.[3]

ena R. R. *v.* Rae, 18 Ill. 488; Hunter *v.* Hudson, 20 Barb. 493; Phelps *v.* Wait, 30 N. Y. 78; Carman *v.* R. R. 4 Oh. 399; Severin *v.* Eddy, 52 Ill. 189. See infra, § 541, 546, 611–613.

[1] Coryeton *v.* Lithebye, 2 Wms. Saund. 117 *e;* Wilbraham *v.* Snow, 2 Wms. Saund. 47 *a;* Nicholl *v.* Glennie, 1 M. & S. 588. See infra, § 546.

[2] Merryweather *v.* Nixon, 2 Smith L. C. 6th ed. 481; Dicey on Parties, 431. See supra, § 420–1.

[3] Gregroy *v.* Piper, 9 B. & C. 591; M'Manus *v.* Cricket, 1 East, 106; Sharrod *v.* R. R. 4 Ex. 365; Seymour *v.* Greenwood, 6 H. & N. 359; Dicey on Parties, 443. In a late interesting English case, the question was discussed on the following facts. The plaintiff, in an action for assault, proved that he was present in the gallery of a large hall where there was a meeting convened by members of an association, and that the defendant acted as chairman. There was an interruption in the gallery near to the place where the plaintiff was standing, upon which the defendant said, "I shall be obliged to bring those men to the front who are making the disturbance. Bring those men to the front." The plaintiff was making no disturbance; but, according to his statement, he was seized by a man with a white ribbon in his coat, and two policemen, and dragged over some benches to the front part of the gallery, and thereby injured. There was nothing to show the position or duty of those who seized him, or whether any instruction as to keeping order had been given them by the defendant, before the act complained of. Held, that there was no evidence to go to the jury of any liability on the part of the defendant, as there was not the ordinary relation of master and servant between him and those who assaulted the plaintiff; but only a particular direction as to a particular matter, and that the words used by the defendant did not authorize the officers to act upon their judgment as to who were the persons making the disturbance. Lucas *v.* Mason, L. R. 10 Ex. 251. Pollock, B. "Where the trespass complained of is the direct and necessary consequence of an order given for its committal, the person who gives the order is clearly liable for the consequences, as much as if the trespass were done by his own hand; and where the relation of master and servant exists, the former is liable for the tortious acts of the latter wherever they are such as come within the scope of the servant's general duty, although in doing the particular act complained of he may have exceeded his authority, provided what he does is in the honest belief that he is executing his master's orders; for in most cases where a duty is to be performed or an act done by a servant, some discretion must be vested in him to whom the doing of it is committed, and where this is so the master cannot enjoy the benefit of his servant's acts which involve this discretion without being responsible for the result. This rule holds especially where the master is absent, and the duty to be performed vicariously is general in character, as

§ 475. *Where the relation is that of master and servant, then the act must be in the "scope" or "course" of employment.* —

in the case of conductors of public vehicles, railway servants, and the like. Thus, in Seymour *v.* Greenwood (7 H. & N. 355), the court of exchequer chamber held the defendant, who was the owner of an omnibus, liable for the act of his guard in removing a passenger whom he supposed to be drunk, for, as was said by the court: 'The master, by giving the guard authority to remove offensive passengers, necessarily gave him authority to determine whether any passenger had misconducted himself.' In the present case there was no relation of master and servant, or of principal and general agent, or agent for such cases as might occur in the absence of the principal, but a particular direction as to a particular matter, and this, in our judgment, not only prevents the decisions referred to binding us as authorities, but makes them inapplicable in principle. In the case of master and servant, the character and duties attaching to the employment are known and defined beforehand; the servant who is to perform them is selected accordingly. In the present case no such relationship existed in the first instance, nor did it arise during the transaction. It is no doubt the duty of the chairman of a meeting, where a large body of people are gathered together, to do his best to preserve order, and it is equally the duty of those who are acting as stewards or managers to assist him in so doing; but the nature and extent of this duty on both sides cannot be very closely defined *à priori*, and must necessarily arise out of, and in character and extent depend upon, the events and emergencies which may from time to time arise. There is no such preëxisting relationship as exists in the case of master and servant, and there is, we think, no ground for extending by implication an express authority limited in its terms. The disturbance which gave rise to the defendant's words took place in the presence of those who acted upon them. They were nearer to the plaintiff than was the defendant, and, if in doubt, might have referred to the defendant for further instructions. It does not, therefore, seem to us that there was any evidence which should have been submitted to the jury of a general or implied authority going beyond the limit of that which was created by the express words used, or of any authority to the persons ordered to bring the disturbers forward to exercise a discretion as to who were disturbers. The rule must therefore be discharged." Lucas *v.* Mason, L. R. 10 Ex. 253.

"It is of importance to distinguish the direct liability of a person who orders a wrong to be committed, and, therefore, is looked upon as a joint wrong-doer with the person through whose instrumentality the injury is done, from the direct liability of a master from the acts of his servants. In the first case, the principal is liable, because the act complained of is his own act; in the second case the employer is liable, not because he did, or authorized, the particular act, but because his employment of a negligent servant has led to the act complained of being done. The distinction is very nearly equivalent to that between trespass and case. Wherever a master can be sued in trespass he must be considered as directly authorizing the wrong done, and where he is only indirectly responsible he must be sued in case. There are, however, torts for which the principal is directly responsible, but for which the only form

What "scope" or "course" of employment means, we have already seen.[1] In what cases the master is liable for the servant's negligence is discussed in another work.[2]

§ 476. *Principal is not liable for agent's mistake of law.* — When this is honest and non-negligent, and the question is one of doubt, then, as we have seen,[3] the agent is not liable to the principal. On the same reasoning the principal is not in such case liable to third parties. "It cannot be assumed from the mere fact of a master employing a servant, that he has empowered him to do acts which the master himself is not competent to perform. Hence it has been held, that an employer is responsible for the wrongful acts of his servant when they arise from a mistake of fact, but is not responsible for them when they arise from a mistake of law on the servant's part. A., the servant of a railway company, arrested T. under circumstances which, if his view of the facts had been correct, would have justified the arrest; the company were held responsible for the assault.[4] But where A., the servant of a railway company, took a mistaken view of the law, and hence arrested T. under circumstances which would under no view of the facts have justified the arrest, the company were held not to be liable."[5] "In this case an act was done by the station master completely out of the scope of his authority, which there can be no possible ground for supposing the railway company authorized him to do. Hav-

of action against either principal or agent is case, *e. g.* an action for fraud or for conversion (since trover is a species of case). See Smith Master & Servant, 2d ed. 207; Scott *v.* Shepherd, 1 Smith, L. C. 6th ed. 417; Sharrod *v.* London and North Western Rail. Co. 4 Exch. 580." Dicey on Parties, 442.

[1] Supra, § 129, 158.

[2] Whart. on Neg. § 156. See, also, Holmes *v.* Mather, L. R. 10 Exch. 361; Abbott *v.* Rose, 62 Me. 194; Grandy *v.* Ferebee, 68 N. C. 356; Hynes *v.* Jungren, 8 Kan. 391. In a Tennessee case, which may be given as an illustration, the evidence was that the plaintiff's mare jumped over the defendant's fence into his field. The defendant being away from home, his wife requested a relative to turn the mare out. After trying in vain to catch the mare, he threw a stone at her and broke her leg. It was ruled that the defendant was not liable for the injury; the act of violence by which the loss was occasioned not being done in the execution of the authority given by the wife. Cantrell *v.* Colwell, 3 Head (Tenn.), 471.

[3] Supra, § 248. See infra, § 597, 611.

[4] Dicey on Parties, 458, citing Goff *v.* Great Northern Rail. Co. 30 L. J. 148, Q. B.; 3 E. & B. 672.

[5] Dicey on Parties, 458, citing Poulton *v.* London and South Western Rail. Co. L. R. 2 Q. B. 534; 36 L. J. 294, Q. B.

ing no power themselves, they cannot give the station master any power to do the act; therefore the wrongful imprisonment is an act for which the plaintiff, if he has a remedy at all, has it against the station master personally, but not against the railway company." [1] "If the station master had made a mistake in committing an act which he was authorized to do, ... the company would be liable, because it would be supposed to be done by their authority. Where the station master acts in a manner in which the company themselves would not be authorized to act, and under a mistake or misapprehension of what the law is, ... the rule is very different, and . . . . that is the distinction on which the whole matter turns." [2]

§ 477. *Principal bound by agent's malicious or fraudulent torts when ratified by himself.* — Wherever a principal takes advantage of his agent's torts, he ratifies them, although he would not otherwise be liable for them; and this rule applies to wilful torts of all kinds, including force as well as fraud.[3] Even though the principal does not take advantage of the fraud, still he is bound by it, so that he cannot sue on any contract based on it.[4] He is of course liable for the fraud if directed by himself.[5]

§ 478. *Principal liable for agent's deceit of which principal takes advantage.* — We have already seen that a principal, though not cognizant of his agent's representations, cannot enforce a contract induced by such representations.[6] Whether a company is

[1] Ibid.; L. R. 2 Q. B. 540, judgment of Blackburn, J. See infra, § 526.

[2] Ibid., judgment of Mellor, J. See, also, Moore *v.* R. R. L. R. 8 Q. B. 36; Bayley *v.* R. R. L. R. 7 C. P. 415.

[3] Wilson *v.* Tumman, 6 Man. & G. 236; Hall *v.* Smith, 2 Bing. 160; Kern *v.* Nichols, 1 Salk. 289; Hewett *v.* Swift, 3 Allen, 420; Bryant *v.* Rich, 106 Mass. 180; Atlantic Co. *v.* Merchants' Co. 10 Gray, 532; Jeffrey *v.* Bigelow, 13 Wend. 518; Smout *v.* Ilbery, 10 M. & W. 1; Griswold *v.* Haven, 25 N. Y. 595; Smith *v.* Tracy, 36 N. Y. 79; Durst *v.* Barton, 47 N. Y. 167; Woodward *v.* Webb, 65 Penn. St. 254; Fox *v.* N. Lib. 3 W. & S. 103; Priester *v.* Augley, 5 Rich. 14; Bank *v.* State, 13 Rich. 291; Exum *v.* Brister, 35 Miss. 391; Wallace *v.* Morgan, 23 Ind. 399; Evansville *v.* Baum, 26 Ind. 70; Nicoll *v.* American Co. 3 Wood. & M. 529. See as to what amounts to ratification, Lyons *v.* Martin, 3 Nev. & P. 509; and see § 68–76.

[4] Concord Bk. *v.* Gregg, 14 N. H. 331; Cassard *v.* Hinman, 6 Bosw. 8; Robinson *v.* Bealle, 20 Ga. 275; Wright *v.* Calhoun, 19 Tex. 412. See supra, § 90, 165–6.

[5] Chandler *v.* Broughton, 3 Tyr. 220; McLaughlin *v.* Pryor, 4 Man. & Gr. 48; Wheatley *v.* Patrick, 2 M. & W. 650; Hunter *v.* Hudson, 20 Barb. 493; Galena R. R. *v.* Rae, 18 Ill. 488.

[6] Supra, § 158 *et seq.*

liable, in an action of deceit, for its directors' fraudulent misrepresentations, such misrepresentations not being within the scope of the agent's mandate, or not being ratified by the acceptance of their fruits, has been much discussed. Undoubtedly the company cannot maintain an action on a contract so obtained.[1] But a distinction has been taken between the right of a principal to enforce a contract so obtained, and its liability to an action for a deceit which it did not authorize.[2] This distinction, however, though adopted by the English house of lords, on a Scotch appeal,[3] has not been followed by the queen's bench,[4] which court has gone so far as to hold that a bank is liable for its managers' unauthorized fraudulent representations, though it reaped no benefit from the transaction; the ground being that the signature of the manager to such representations was the signature of the bank. On the last point the ruling of the queen's bench was reversed in the exchequer chamber,[5] where, however, it was admitted that the principal is liable in such case for fraudulent representations of which he takes advantage. And in 1875 the privy council has affirmed his liability in an action for deceit for representations thus ratified by him; and that consequently a bank is thus liable for its managers' fraudulent representations of which it reaps the fruits.[6] Whether the principal, if there is no such ratification, and the representations were not authorized by him expressly or constructively, is liable in deceit, is a question left open in the later cases. Such liability was assumed, perhaps hurriedly, in the earlier authorities,[7] and is affirmed by several of our American courts.[8] In most of the cases of deceit, however, based upon an agent's misrepresentations, the facts show an adoption by the principal of the agent's fraud; and in such a state

[1] See supra, § 165.

[2] See to this effect Western Bank *v.* Addie, L. R. 1 H. L. Scotch, 145 (1867); and see Bigelow's Cases on Torts, p. 30 *et seq.*, where the cases in this connection are discussed with discriminating industry.

[3] Addie *v.* Western Bank, *ut supra.*

[4] Swift *v.* Winterbotham, L. R. 8 Q. B. 244 (1873). See supra, § 171.

[5] *S. C.* by name of Swift *v.* Jewesbury, 30 L. T. (N. S.) 31.

[6] Mackay *v.* Commercial Bk. L. R. 5 P. C. 391; 30 Law T. (N. S.) 180, discussed supra, § 171.

[7] See Hern *v.* Nichols, 1 Salk. 289; Willet *v.* Chamber, 2 Cowp. 814; Att'y Gen. *v.* Siddon, 1 Tyrw. 46.

[8] Locke *v.* Stearns, 1 Metc. 560; Jeffrey *v.* Bigelow, 13 Wend. 518; Sandford *v.* Handy, 23 Wend. 260; Tome *v.* R. R. 39 Md. 36; Madison R. R. *v.* Norwich, 24 Ind. 457. See King, J., in Bank of Ky. *v.* Sch. Bk. 1 Parsons's Eq. Cas. 216.

of facts the principal is unquestionably liable.[1] It has indeed been argued that the principal cannot be held liable for a false representation by an agent who makes the representation believing it to be true. It is "impossible to sustain a charge of fraud when neither principal or agent has committed any: the principal, because, though he knew the fact, he was not cognizant of the misrepresentation being made, nor even directed the agent to make it; and the agent, because, though he made a misrepresentation, yet he did not know it to be so at the time he made it."[2] But it is plain that while the principal cannot be thus held liable in an action of deceit, he can under such circumstances take no advantage of a contract so induced.[3]

§ 479. *A principal is not liable for an independent unauthorized tort by his agent.* — When the relation of master and servant exists, then the master, as we have occasion elsewhere to notice,[4] is liable for the negligences of the servant, but not for the latter's independent unauthorized torts. *A fortiori* is this the case in the relation of principal and agent; a relation which involves, as we have seen, more or less liberty of action on the part of the agent in respect to matters for which the principal is not liable.[5]

[1] Mackay *v.* Com. Bank, L. R. 5 P. C. 394; Bolingbroke *v.* Local Board, L. R. 9 C. P. 575; Doggett *v.* Emerson, 3 Story, 700; Cook *v.* Castner, 9 Cush. 266; Kibbs *v.* Ins. Co. 11 Gray, 163; Sandford *v.* Handy, 23 Wend. 260; Elwell *v.* Chamberlin, 31 N. Y. 619; Sharp *v.* N. Y. 40 Barb. 257; Davis *v.* Bemis, 40 N. Y. 453; Durst *v.* Burton, 2 Lans. 137; 47 N. Y. 167; Chester *v.* Dickinson, 52 Barb. 349; Allerton *v.* Allerton, 50 N. Y. 670; Merton *v.* Scull, 23 Ark. 289; Veazie *v.* Williams, 8 Howard U. S. 138. As to the chancery English practice, see supra, § 171.

[2] Alderson, B., in Cornfoote *v.* Fowke, 6 M. & W. 358. See § 158.

[3] Supra, § 167.

[4] Supra, § 276, 475; Whart. on Neg. § 156.

[5] M'Manus *v.* Crickett, 1 East, 106; Bowcher *v.* Noidstrom, 1 Taunt. 568; Roe *v.* R. R. 7 Ex. 36; Holmes *v.* Mather, L. R. 10 Ex. 261; Wilson *v.* Fuller, 3 Q. B. 1008, reversing Fuller *v.* Wilson, 3 Q. B. 68; M'Gowan *v.* Dyer, L. R. 8 Q. B. 141; Wilson *v.* Peverly, 2 N. H. 548; McClenaghan *v.* Brock, 5 Rich. 17; Fisk *v.* Framingham Co. 14 Pick. 491; Kerns *v.* Piper, 4 Watts, 222; Repsher *v.* Wattson, 17 Penn. St. 365; Richmond St. Co. *v.* Vanderbilt, 1 Hill, 480; Isaacs *v.* R. R. 47 N. Y. 122; Jackson *v.* R. R. 47 N. Y. 274; Brown *v.* Purviance, 2 Har. & G. 316; Harris *v.* Nicholas, 5 Munf. 483. See as to damages, Mendelsohn *v.* Lighter Co. 40 Cal. 657; Hagan *v.* R. R. 3 R. I. 88; Kirkpatrick *v.* Winans, 1 Green (N. J.), 407; Kennedy *v.* Parke, 2 Green (N. J.), 415; Echols *v.* Dodd, 20 Tex. 190. See as extending such liability to wilful trespasses of servant, Day *v.* Owen, 5 Mich. 520; Craker *v.* R. R. 36 Wisc. 657. Infra, § 550.

§ 480. *Even when the relation of master and servant exists, an injury, to be imputable, must, where the servant is rightfully free to act, involve either malice or negligence on the part of the principal.* — Of this we have an illustration in an interesting English case decided in England in 1875.[1] The defendant's horses, while being driven by his servant in the public highway, ran away, and became so unmanageable that the servant could not stop them, but could, to some extent, guide them. The defendant, who sat beside the servant, was requested by him not to interfere with the driving, and complied. While turning a corner safely, the servant guided them so that, without his intending it, they knocked down and injured the plaintiff, who was in the highway. The plaintiff having sued the defendant for negligence and in trespass, the jury found that there was no negligence in any one. It was held that, even assuming the defendant to be as much responsible as his servant, no action was maintainable; for since the servant had done his best under the circumstances, the act of alleged trespass in giving the horses the direction toward the plaintiff was not a wrongful act. It was not, indeed, directly ruled that, supposing the servant was guilty of negligence, the master would, under the circumstances, have been liable. But on this point the remarks of Cleasby, B., are significant: "I understand the case to be this: The master not having the same capacity for managing the horses, and being perhaps alarmed and anxious to interfere, the servant says, 'Leave it to me; do not take any part.' The master complies. That would absolve him as far as any question of personal negligence is concerned; and at that moment I think the act of the servant ceased to be the act of the master." And whatever we may think of this reasoning in its relation to the particular case, we must hold it to be settled that where an agent has independent liberty of action, there the principal, if not guilty of *culpa in eligendo*, is not liable for the agent's torts.[2]

§ 481. *When principal is otherwise liable for an act done by the agent in the course of his agency, it is no defence that the agent was specifically directed not to do the particular thing.* — This rule is fully established in those cases in which the

[1] Holmes *v.* Mather, L. R. 10 Ex. 261. See, also, Sharrod *v.* London & North Western Railway Co. 4 Ex. 586.

[2] See supra, § 277; infra, § 538, 601.

agent stands to the principal in the relation of a servant to a master.[1] The same rule holds good in cases where a principal is held to be estopped from setting up secret instructions by which the apparent authority of an agent is qualified so as to injuriously affect third persons dealing *bonâ fide* with the agent.[2] So, if a person is permitted to act as *de facto* agent of a corporation, the latter, as against an innocent third party, cannot set up that the agent, in acting, violated the private statutes of the corporation; the agent's acts being *infra vires*.[3]

[1] Smith's Master & Servant, 2d ed. 183; Dicey on Parties, 446; Whart. on Neg. § 171; Limpus *v.* Omnibus Co. 1 H. & C. 520; Whatman *v.* Pearson, L. R. 3 C. P. 422; Bayley *v.* R. R. L. R. 8 C. P. 153; L. R. 7 C. P. 445; Burns *v.* Poulson, L. R. 8 C. P. 563; Joel *v.* Morrison, 6 C. & P. 501; Goddard *v.* R. R. 57 Me. 202; Cosgrove *v.* Ogden, 49 N. Y. 255; Weed *v.* R. R. 17 N. Y. 362; Locke *v.* Stearns, 1 Metc. 500; Howe *v.* Newmarch, 12 Allen, 49; Bryant *v.* Rich, 106 Mass. 180; Southwick *v.* Estes, 7 Cush. 385; Priester *v.* Augley, 5 Rich. 44; Moir *v.* Hopkins, 16 Ill. 213; Penn. Steam Nav. Co. *v.* Hungerford, 6 Gill & J. 291; Phil. R. R. *v.* Derby, 14 How. 468; Garretson *v.* Duenckel, 50 Mo. 104; Passeng. R. R. *v.* Young, 21 Oh. St. 518; Sherley *v.* Billings, 8 Bush, 147; Oliver *v.* Trans. Co. 3 Oregon, 84. See infra, § 535.

[2] See supra, § 40, 130–139, and cases cited infra, § 685.

[3] Mahoney *v.* Mining Co. 33 L. T. (N. S.) 383 (1875). In this case the articles of association of a joint stock company contained provisions as to the appointment of directors and the drawing of checks; they also contained a clause validating the acts of the directors, notwithstanding any defect in their appointment. Certain persons assumed the office of directors without having been properly appointed, and communicated to the bankers of the company an alleged resolution, in accordance with the articles, as to the form in which checks were to be drawn. The bank acted upon this communication, and honored the checks so drawn, paying away almost the whole amount in its hands. In an action by the official liquidator of the company to recover the amount paid on these checks, held, that even without the validating clause the bank was not liable to refund the money so paid, as it had dealt *bonâ fide* with persons who were the *de facto* directors of the company, and suffered by the shareholders to occupy that position. This was the unanimous opinion of the house of lords, opinions being delivered by the Lord Chancellor, Lords Chelmsford, Hatherley, and Penzance, and these being supported by the assisting judges. The principle underlying the case is, that all persons dealing with a joint stock company are bound to take notice of its external position, as evidenced by its articles of association; but they are not bound to inquire into its internal management, provided that their transactions with it are such as might legally take place and be consummated under the articles of the association. See Alb. L. J. Dec. 17, 1875, citing in addition Baird *v.* Bank, 11 S. & R. 411; Miller *v.* Ins. Co. 27 Iowa, 203; Angell & Ames on Corp. § 286. See S. P. Bank U. S. *v.* Dandridge, 12 Wheat. 64.

§ 482. *Where agent is at liberty to take his own way of executing commission, there the agent is, and the principal is not liable for the agent's independent torts in the course of his agency.* — Where there is liberty, as is illustrated in another section, there is liability;[1] and where, in actions for negligent injuries, an independent responsible cause interposes between an alleged cause and the injury, then the causal relation between such alleged cause and the injury is broken.[2] Hence a contractor engaging to do a particular work is liable for torts to third persons in the performance of such work; and where the contractor is so liable, the principal, with certain limitations to be presently expressed, is not liable.[3] In such case it follows that the principal is not liable for the negligence of the agent's employees.[4]

§ 483. *Where, however, principal retains the right of personal interference in the work, then he is personally liable for torts in th course of its performance.*[5] — *A fortiori*, when the tort is committed by a sub-agent in general execution of the principal's orders, then the principal and sub-agent may be severally responsible.[6] The interposition of middlemen does not vary the law as

[1] See § 279, 537–8. In De Forrest *v.* Wright, 2 Mich. 388, as approved in Hilliard *v.* Richardson, 3 Gray, 349, the rule is stated to be that where the person employed is in the exercise of an independent and distinct employment, and not under the immediate direction or supervision of the employer, the latter is not responsible for the negligence of the former. See Bigelow's Cases on Torts, 626.

[2] Whart. on Neg. § 134.

[3] Cuthbertson *v.* Parsons, 12 C. B. 304; Rapson *v.* Cubitt, 9 M. & W. 710; Hole *v.* R. R. 6 H. & N. 488; Welfare *v.* R. R. 4 Q. B. 698; Reedie *v.* R. R. 4 Ex. 243; Allen *v.* Hayward, 7 Q. B. 960 (overruling Bush *v.* Steinman, 1 B. & P. 403); Clark *v.* R. R. 28 Vt. 103; Hilliard *v.* Richardson, 3 Gray, 349; Linton *v.* Smith, 8 Gray, 147; Forsyth *v.* Hooper, 11 Allen, 419; Kelly *v.* Mayor, 11 N. Y. 432; Pfau *v.* Williamson, 63 Ill. 16; Cincinnati *v.* Stone, 5 Oh. St. 38; Barry *v.* St. Louis, 17 Mo. 121. A special receiver or assignee of the property of a railroad corporation, appointed in bankruptcy proceedings, involuntary on its part, is not an agent or servant of the corporation, and it is not liable for damages occasioned by his negligence. Metz *v.* Buffalo, Corry & Pittsburg R. R. Co. 58 N. Y. 61.

[4] Reedie *v.* R. R. 4 Ex. 244; Rapson *v.* Cubitt, 9 M. & W. 710; Sadler *v.* Hancock, 4 E. & B. 570; Milligan *v.* Wedge, 12 Ad. & E. 739; Hilliard *v.* Richardson, 3 Gray, 349. Supra, § 279 *et seq.*

[5] Murphy *v.* Caralli, 3 H. & C. 462; Quarman *v.* Burnett, 6 M. & W. 499; Burgess *v.* Gray, 5 C. B. 778; Murray *v.* Currie, L. R. 6 C. P. 24; Stone *v.* Codman, 15 Pick. 297; Luttrel *v.* Hazen, 3 Sneed, 20; Chicago *v.* Joney, 60 Ill. 383; Chicago *v.* Dermothy, 61 Ill. 431.

[6] Sproul *v.* Hemmingway, 14 Pick. 1; Sewall *v.* St. Paul, 20 Minn. 511;

just stated. "The fact that there is an intermediate party, in whose general employment the person whose acts are in question is engaged, does not prevent the principal or master from being held liable for the negligent conduct of the sub-agent or under-servant, unless the relation of such intermediate party to the subject matter of the business in which the under-servant is engaged be such as to give him exclusive control of the means and manner of its accomplishment, and exclusive direction of the persons employed therefor." [1]

§ 484. *So, also, is he personally liable for nuisances on his premises though produced by the contractor.* — Such nuisances it is the principal's duty to abate.[2] "When a thing is in itself a nuisance, and must be prejudicial, the party who employs another to do it is responsible for all the consequences that may have arisen. But when the mischief arises, not from *the thing itself*, but from the mode in which it is done, then the person ordering it is not responsible unless the relation of master and servant can be established." [3]

Dunlap *v.* Findlater, 6 Cl. & F. 894; Ellis *v.* Gas Co. 2 E. & B. 767; Creed *v.* Hartman, 29 N. Y. 591. "An action for tort may be brought either against the principal, or against the immediate actor in the wrong, but cannot be brought against an intermediate agent." Dicey on Parties, 466, citing Mersey Docks Co. *v.* Gibbs, L. R. 1 H. L. 93; 35 L. J. 225, Ex. (H. L.) If P. employs X. to act as manager of his business, and X. hires A., who commits a wrong against T., T. can, as a general rule, either sue P. on the ground of the wrong being committed by A. in the course of his employment, or sue A. as being the actual wrong-doer. But he cannot sue X., who is neither A.'s principal, nor himself the doer of the wrong. "If an action were brought by the owner of goods against the manager of the goods traffic of a railway company, for some injuries sustained on the line, it would fail, unless it could be shown that the damage were done by his orders or directions; for the action must be brought either against the principal or against the immediate actors in the wrong. . . . . The principle is the same as that on which the surveyor of the highways is not responsible to a person sustaining injury, from the parish ways being out of repair, though no action can be brought against his principals, the inhabitants of the parish." Mersey Docks Co. *v.* Gibbs, L. R. 1 H. L. 111, per Blackburn, J. See Young *v.* Davis, 7 H. & N. 760; 31 L. J. 250, Ex.

[1] Bigelow's Cases on Torts, 658, citing Kimball *v.* Cushman, 103 Mass. 194; Fenton *v.* Packet Co. 8 Ad. & E. 835; Dalyell *v.* Tyrer, El., B. & E. 899.

[2] Gray *v.* Pullen, 5 B. & S. 970, 981; Ellis *v.* Gas Co. 2 E. & E. 767; Upton *v.* Townend, 17 C. B. 71; Hardrop *v.* Gallagher, 2 E. D. Smith, 523; Silvers *v.* Nordinger, 30 Ind. 53.

[3] Pollock, C. B. in Butler *v.* Hunter, 31 L. J. Ex. 217. See, also, Stone *v.*

§ 485. *So, also, when the act is done by the contractor as the principal's substitute.* — The rule that the principal is not liable for the contractor's torts is "inapplicable to cases where the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned." [1]

§ 486. *So, also, for torts which are necessarily incident to the agency.* [2]

§ 487. *Principal who contracts to do a particular thing is liable for agent's torts which prevent the performance of the contract.* — This point is discussed in a subsequent section.[3]

§ 488. *Public officer is not ordinarily liable for his subaltern's torts.* — This topic is also reserved for subsequent examination.[4]

R. R. 19 N. H. 100; Lowell *v.* R. R. 23 Pick, 24.

[1] Pickard *v.* Smith, 10 C. B. N. S. 470, per Curiam. Supra, § 157.

[2] Peachy *v.* Rowland, 13 C. B. 182; Ellis *v.* Gas Co. 2 E. & B. 767; Detroit *v.* Corey, 9 Mich. 165; Darmstetter *v.* Moynahan, 27 Mich. 188. A railway company was empowered to build a bridge over a river, and employed a contractor, who built a bridge which obstructed the navigation. The plaintiff's vessels were thereby prevented from navigating the river. The company were held liable in an action by the plaintiff. "When one comes to consider the exact distinction between this case and other cases, there is some little difficulty in deciding it. . . . . The real distinction is that where an accident happens by reason of the negligence of the servant of a contractor, so as to cause injury to a third person, that being a matter entirely collateral to that which the contractor had contracted to do, there the liability turns on the relation of master and servant; but where the thing to be done is the thing that causes the mischief, and the mischief can only be said to arise without the direct authority of the person ordering, because the thing has been imperfectly done, — in other words, where the injury arises from the imperfectly doing the thing ordered to be done, — there the party giving the order becomes responsible. That is the distinction. The present defendants ordered a bridge to be constructed across a navigable river. They were authorized to take land for the purpose, and to throw a bridge across the river, but the bridge was to be so built as not to interfere with the navigation. If they put a bridge that did interfere with the navigation, they would be liable. . . . . They ordered the contractor to build the bridge, and when built, it turns out to be ill constructed. Does this appear at all different from the case where a man puts up a structure upon his land, which structure, when put up, injures some one? . . . . The man who orders the structure is liable, and it is no answer to say, I ordered it to be put up in a way which should cause no injury. In that case, as in this, the very thing done, though imperfectly done, has been ordered to be done, and the injury has arisen from the thing so imperfectly done." Hole *v.* Sittingbourne R. R. Co. 30 L. J. 86 Ex., judgment of Wilde, B. See supra, § 157.

[3] See infra, § 543.

[4] Infra, § 550.

CHAPTER XI.

THIRD PERSON AGAINST AGENT.

I. Where the Agent draws Credit to himself by Statements or Acts.

Agent who interposes his own credit becomes personally liable, § 490.

When contract is unwritten, agent's liability depends upon circumstances, § 491.

Parol evidence is admissible on part of third party to charge principal, though not admissible on behalf of agent, § 492.

Agent receiving goods on consignment is not liable for freight when acting merely as agent, § 493.

II. Where Agent is ostensibly the Contracting Party.

Agent who does not disclose fact of agency, is personally liable on contract, § 496.

Where the agent contracts as "agent," the principal not being known, the agent is personally liable, when such is the custom of merchants or understanding of parties, § 499.

When no credit is given agent, he is not personally liable, § 503.

Bills, notes, and writings under seal, signed by agent in his own name, bind him exclusively, § 504.

An agent, using his own name in written instrument, is *primâ facie* bound, § 505.

But not bound to those who knew he acts only as agent, § 506.

III. Where Agent is Committee for Voluntary Society.

Committee for voluntary society is liable when receiving personal credit, § 507.

IV. When Agent is Public Officer.

Public officer liable to repay money extortionately collected, § 510.

May make himself personally liable on governmental contracts, § 511.

May become liable by signing inoperative security, § 512.

But ordinarily not personally liable on governmental contracts, § 513.

V. Where the Principal is a Foreigner.

Agent for foreign principal liable, § 514.

VI. Where Money is paid to Agent by Mistake, or through Fraud or Force.

Money paid by mistake to an agent may be recovered back, § 515.

But otherwise where the money was paid intentionally and without mistake, § 517.

Same rule applies to cases of compulsory payment, § 518.

Money illegally collected by public agents may be recovered back, § 519.

And so of money received fraudulently by agent, § 520.

Agent cannot defend unless he received the money specifically for principal, § 521.

Stakeholder bound to retain funds, § 522.

VII. Where the Contract can only be enforced by making Agent liable.

In cases of doubt that construction will be preferred which gives effect to contract, § 523.

VIII. When the Agent acts without Authority.

Agent acting without authority may be sued either for breach of warranty or deceit, § 524.

In such case money paid may be recovered back, § 526.

Warranty is not so to be extended to facts of which agent is not presumed to be cognizant, § 529.

Nor to cases where the opposite con-

tracting party has the same opportunities of knowledge as the agent, § 530.
Agent not directly liable on instrument he executes without authority in another's name, § 532.
Contract, to be enforced against agent, must be valid as to principal, § 534.
IX. Liability of Agent for Torts.
Servant not liable personally to third person for negligence, § 535.
But where agent who has liberty of action injures a third person, then the agent is liable, § 537.
Where there is liberty there is liability, § 538.
Agent is personally liable for malicious or fraudulent acts done by him in his principal's service, § 540.
Agent liable personally for deceit, § 541.
Agent obeying illegal orders cannot set up agency as a defence, § 542.
Agent bound by contract to do a particular thing, liable for his subagent's torts in doing such thing, § 543.
So as to persons undertaking to collect debts, § 544.
Agent is liable for negligence of immediate subaltern, but not of ancillary agent, § 545.
When agent and principal are severally liable on same tort, they may be joined in the same suit, § 546.
Public ministerial officer liable for negligence, § 547.
And so for malicious torts, § 549.
But not generally for negligence of subalterns, § 550.

I. WHERE THE AGENT DRAWS CREDIT TO HIMSELF BY STATEMENTS OR ACTS.

§ 490. *Agent becomes personally liable who interposes his credit.* — If an agent, instead of explicitly or implicitly avowing his agency, draws credit to himself, he becomes personally liable to the third party with whom he thus deals.[1] Numerous cases have

[1] Iveson *v.* Conington, 1 B. & Cr. 160; Fenn *v.* Harrison, 4 T. R. 177; Talbot *v.* Godbolt, Yelv. 137; Kennedy *v.* Gouveia, 3 D. & R. 503; Burrell *v.* Jones, 3 B. & Ald. 47; Magee *v.* Atkinson, 2 M. & W. 440; Hollins *v.* Fowler, L. R. 7 Q. B. 616; affirmed in H. of Lords, 33 L. T. N. S. 73; Newhall *v.* Dunlap, 2 Shepl. 180; Goodwin *v.* Bowden, 54 Me. 424; Bell *v.* Mason, 10 Vt. 509; Savage *v.* Rix, 9 N. H. 263; Despatch Line *v.* Bellamy, 12 N. H. 229; Simonds *v.* Heard, 23 Pick. 120; Ballou *v.* Talbot, 16 Mass. 461; Taber *v.* Cannon, 8 Metc. 460; Fullam *v.* W. Brookfield, 9 Allen, 1; Cent. Bridge *v.* Butler, 2 Gray, 130; Haverhill Ins. Co. *v.* Newhall, 1 Allen, 130; Gay *v.* Bates, 99 Mass. 263; Wilder *v.* Cowles, 100 Mass. 487; Southard *v.* Sturtevant, 109 Mass. 390; Evans *v.* Dunbar, 117 Mass. 546; Hovey *v.* Magill, 2 Conn. 680; Reed *v.* Latham, 40 Conn. 452; Hall *v.* Bradbury, 40 Conn. 32; Pentz *v.* Stanton, 10 Wend. 271; Spencer *v.* Field, 10 Wend. 87; Taintor *v.* Prendergrast, 3 Hill, 72; Waring *v.* Mason, 18 Wend. 425; Fellows *v.* Northrup, 39 N. Y. 119; Meyer *v.* Barker, 6 Binn. 228; Campbell *v.* Baker, 2 Watts, 83; Harper *v.* Hampton, 1 Harr. & J. 622; York Co. Bk. *v.* Stein, 24 Md. 447; Deming *v.* Bullitt, 1 Black. 241; Rosenthal *v.* Myers, 25 La. An. 463; M'Clellan *v.* Parker, 27 Mo. 162; McCurdy *v.* Rogers, 21 Wisc. 197; Saveland *v.* Green, 36 Wisc. 612; Farrell *v.* Campbell, 3 Ben. 8.

H. was working for F. & Sons at a stipulated price *per diem*, and was employed by their clerk and agent to

already been cited in which it has been held that where, in framing an instrument, an agent contracts for himself, he becomes personally liable.[1] The same rule exists in respect to ordinary informal business engagements. Thus in an old case, where a servant acting for his master engaged an attorney, and promised that he should be paid, it was held that the servant was liable for the attorney's fees ;[2] and the principle is the same, as will presently be seen, whether the agent's promise is express or implied.[3]

§ 491. *When contract is unwritten, agent's liability is dependent upon circumstances.* —An agent may notoriously exhibit himself as such, and may buy goods only as such, and direct the goods to be sent direct to the principal. Or an agent may con-

continue working after hours for extra compensation. Held, that the promise to pay extra was an express undertaking on the part of the agent, and that the suit was properly brought against him to recover it. Fisher *v.* Haggerty, 36 Ill. 128.

[1] See supra, § 280 *et seq.;* and see infra, § 496, 499.

[2] Haines *v.* French, Aleyn, 6.

[3] Towle *v.* Hatch, 43 N. H. 270.

In an action to recover money lent to the defendant, who receipted for it in his individual name, he contended that it was lent to him as agent for a third person. At the trial, after instructing the jury, by the defendant's request, that the receipt was not conclusive of his individual liability, and the burden was on the plaintiff to prove it, the judge further instructed them that the defendant was not liable if he was known by the plaintiff to be an agent and the plaintiff dealt with him as such, and that on the question whether he acted as agent or as principal they were to consider what took place at the time of the negotiation, and also the prior dealings of the parties, and all evidence in the case bearing on this issue. Held, that the instructions were not open to exception on the ground that they permitted the jury to return a verdict for the plaintiff even although they might find that the defendant acted as agent in the transaction, and was known by him to be acting so. Southard *v.* Sturtevant, 109 Mass. 390.

"A person who is acting for another, and known by him with whom he deals to be so acting, may and will be personally liable if he contracts as a principal, and that whether he contracts by word of mouth or in writing. The difference is, that, if the contract is by word of mouth, it is not possible to say from the agent using the words 'I' and 'me' that he meant to bind himself personally; whereas, if the contract is in writing, signed in his own name, and speaking of himself as contracting, the natural meaning of the words is that he binds himself personally, and, accordingly, he is taken to do so. . . . . It is well settled that an agent is responsible, though known by the other party to be an agent, if, by the terms of the contract, he makes himself the contracting party." Williamson *v.* Barton, 31 L. J. N. S. 174, Ex., judgment of Bramwell, B.; Higgins *v.* Senior, 8 M. & W. 834; 11 L. J. 199, Ex.; Parker *v.* Winlow, 7 E. & B. 942; 27 L. J. 49, Q. B.; Fisher *v.* Marsh, 6 B. & S. 411.

ceal his agency, may buy the goods exclusively on his own credit, and have the goods delivered to himself. Between these two extreme cases lie innumerable combinations. Viewing the question on principle, it must be shown, as Pothier demonstrates,[1] in order to exclusively charge the principal with liability, that the principal was so disclosed as to make the obligation attachable directly to him. "The creditor must have the name of the principal before he can have the opportunity of contracting with him directly instead of with the agent; otherwise the unavoidable consequence is that he credits the agent primarily and not the principal.[2] But the same result may follow, though the agent has disclosed his character as agent and the name of his principal, at the time of the contract. The whole circumstances may evidence that credit has not been given to the principal alone, or to the principal at all, and may show either that the third party has contracted on the credit of the agent alone, or on the credit of the principal alone, or, as it shall seem, on the joint credit of both agent and principal. The question is one for a jury: to whom was the credit given."[3]

§ 492. *Parol evidence is admissible on part of third party to charge principal; though such evidence is not admissible on behalf of agent.* — Suppose in a suit against a contracting party he should offer to prove by parol that, though the ostensible, he is not the real party contracting. If such evidence goes to deny the fact of contract, it is admissible, for it then traverses one of the plaintiff's material allegations. The plaintiff undertakes to prove by parol that the defendant made a certain contract; and it is therefore proper for the defendant to prove by parol or otherwise that he made no such contract. But it is otherwise, as has been seen, when evidence is offered by the agent, who is the ostensible party to a written instrument, to prove that he was not the real party to the instrument, for this would be enabling him to take advantage of his own wrong, as well as to contradict by parol, in his own favor, his own writing.[4]

[1] Poth. Oblig. § 448; 1 Bell's Com. 7th ed. 541.

[2] Addison *v.* Gandasequi, 4 Taunt. 574; 2 Smith L. C. 5th ed. 302; Thomas *v.* Davenport, 9 B. & C. 78.

[3] 1 Bell's Com. 7th ed. 541, note.

[4] Beckham *v.* Drake, 9 M. & W. 79; Leadbetter *v.* Farrer, 3 M. & S. 345; Higgins *v.* Senior, 8 M. & W. 440; Jones *v.* Littledale, 5 Ad. & El. 486; Bradlee *v.* Glass Co. 16 Pick. 347; Bank of N. A. *v.* Hooper, 5 Gray, 567; Anderton *v.* Shoup, 17 Ohio St. 128; Lindo *v.* Castro, 43

On the other hand, such evidence, when offered for the plaintiff, is admissible for the purpose of introducing a new party, or of strengthening the evidence of the liability of either principal or agent.[1] As has been already seen,[2] on commercial informal contracts, when the agent is *primâ facie* the contracting party, unless it should appear that the agent is exclusively privileged or bound, the principal can sue or be sued; and in the latter case the other contracting party can sue either principal or agent.

§ 493. *Agent receiving goods on consignment is not liable for freight when acting merely as agent.* — If goods are consigned to an agent, by indorsement of a bill of lading, when the consignment is accepted by the agent personally, the terms being that the consignee shall pay freight, the agent, thus receiving the goods, and putting himself in the position of a principal, becomes liable for the freight.[3] It is otherwise, however, when the agent acts avowedly in his capacity as agent, and is known by the other contracting party to intervene only as agent. In such case he is not liable for freight.[4]

§ 494. On this point it is correctly argued by a learned commentator: "It is not the mere indorsation (of the bill of lading), but the receipt of the goods, which creates liability for the freight and raises a new contract to pay it.[5] There is therefore no difficulty about contradicting any written obligation of the indorsee, even where his character as agent does not appear in the indorsement; and it is competent to show by parol what the circumstances and terms of the new contract were. Where the captain knows the receiver of the goods to be a mere agent for a known principal, the ordinary rule as to any promise implied in the transaction being a promise meant to bind his principal, and not himself, should *primâ facie* apply.[6] But if he obtain the

Cal. 497. Supra, § 296, 298, 409; infra, § 729.

[1] Ibid.; Elbing. Act. Ges. *v.* Claye, L. R. 8 Q. B. 317; Jones *v.* Ins. Co. 14 Conn. 501; James *v.* Bixby, 11 Mass. 36; Wolfley *v.* Rising, 12 Kans. 535.

[2] Supra, § 298.

[3] Coek *v.* Taylor, 13 East, 399; Wilson *v.* Keymer, 1 M. & S. 157; Dougal *v.* Kemble, 3 Bing. 383; Amos *v.* Temperley, 8 M. & W. 798. Judge Story holds (Ageney, § 274) to a more extended liability; but in this he is not sustained by later cases. See infra, next note, and Maclachlan on Shipping, p. 427.

[4] Boston & Me. R. R. *v.* Whitehcr, 1 Allen, 497; Du Peirat *v.* Wolfe, 29 N. Y. 436.

[5] Smurthwaite *v.* Wilkins, 31 L. J. C. P. 214, per Parker, B., in Moller *v.* Young, 25 L. J. Q. B. 94, 96.

[6] Per Parke, B., in Amos *v.* Temperley, supra.

goods under bill of lading, so as to be personally liable for the freight, he will continue liable, although he have delivered over the goods or their proceeds to his principal, without deducting the freight."[1]

§ 495. So personal liability may afterwards emerge, when he has as agent received money under his principal's contract on his principal's behalf, and for the purpose of being paid over to him, but under circumstances where the third party paying is entitled to countermand the payment over to the principal.[2]

II. WHEN AGENT IS OSTENSIBLY THE CONTRACTING PARTY.

§ 496. *Agent who does not disclose the fact of agency is personally liable on contract.* — This is a necessary consequence of the fact that the agent invites credit to himself, and that credit is given him by the other contracting party. In such case the agent is personally liable.[3] Ordinarily in such cases the third party may sue either principal or agent.[4] And such other contracting party may by his acts estop himself from falling back upon the principal.[5]

§ 497. Nor does the fact that the agent is in the habit of acting as agent in other matters for disclosed principals relieve the agent from liability, in cases where his principal is undisclosed,

[1] 1 Bell's Com. 7th ed. 544; Bell *v.* Kymer, 5 Taunt. 477; 3 Camp. 545.

[2] 1 Bell's Com. 7th ed. 544, note.

[3] Hollins *v.* Fowler, L. R. 7 Q. B. 616; aff. in H. of Lords, 33 L. T. (N. S.) 73; Hardman *v.* Booth, 1 H. & C. 803; Priestley *v.* Fernie, 3 H. & C. 977; Paterson *v.* Gandasequi, 15 East, 62; Calder *v.* Dobell, L. R. 6 C. P. 486; Armstrong *v.* Stokes, L. R. 7 Q. B. 598; Dutton *v.* Marsh, L. R. 6 Q. B. 361; Baldwin *v.* Leonard, 39 Vt. 266; Upton *v.* Gray, 2 Greenl. 373; James *v.* Bixby, 11 Mass. 34; French *v.* Price, 24 Pick. 13; Raymond *v.* Crown Mills, 2 Metc. 319; Paige *v.* Stone, 10 Metc. 160; Southard *v.* Sturtevant, 109 Mass. 390; Jones *v.* Ins. Co. 14 Conn. 501; Hall *v.* Bradbury, 40 Conn. 32; Mauri *v.* Heffermann, 13 Johns. 58; Brockway *v.* Allen, 17 Wend. 40; Waring *v.* Mason, 18 Wend. 425; M'Graw *v.* Godfrey, 14 Abb. (N. S.) 397; Baltzen *v.* Nicolay, 53 N. Y. 467; Meyer *v.* Barker, 6 Binn. 228; Parker *v.* Donaldson, 2 Watts & S. 9; Youghiogheny Iron Co. *v.* Smith, 66 Penn. St. 340; York Co. Bk. *v.* Stein, 24 Md. 447; Wheeler *v.* Reed, 36 Ill. 82; M'Clellan *v.* Parker, 27 Mo. 162; Einstein *v.* Holt, 52 Mo. 340; Wolfley *v.* Rising, 8 Kans. 297; Séré *v.* Faurés, 15 La. An. 189; Tiernan *v.* Andrews, 4 Wash. C. C. 567; Farrell *v.* Campbell, 3 Ben. 8.

[4] Ibid. See more fully supra, § 296, 298, 470; infra, § 788.

[5] Calder *v.* Dobell, L. R. 6 C. P. 486; Paige *v.* Stone, 10 Metc. 160; French *v.* Price, 24 Pick. 13; Jones *v.* Ins. Co. 14 Conn. 501; Priestly *v.* Fernie, 3 H. & C. 977. See supra, § 463, 469; infra, § 788.

and where the credit is given personally to himself. This has been frequently ruled as to factors.[1] And it has been held in New York that the rule that an agent, in order to shield himself from liability, must disclose his agency, is applicable to an express company, and is unaffected by the fact that it is the general business of such a company to act as agent for others.[2]

§ 498. The modern Roman law is to the same effect; it being settled that an agent who contracts in his own name is bound personally, and may sue personally on the contract. The third party contracting has no claim on such a contract against an undisclosed principal, unless it should appear that the principal has reaped the benefit of the contract.[3]

§ 499. *Where the agent contracts as "agent," the principal not being known, the agent is personally liable, when such is the custom of merchants, or the understanding of the parties.* — In England this liability is limited to cases where it is sustained by the custom of merchants. An agent contracting and signing as such, for an undisclosed principal, it has been ruled, may be rendered personally liable on the contract, if a custom among merchants in the course of ordinary trade constantly entering into similar contracts can be shown to exist, that an agent so signing shall be personally liable in the event of his not disclosing his principal's name within a reasonable time; and evidence is admissible to prove the existence of such a custom, and, by inference, the implied presence of such a term in the written contract, — a liability so incurred not being considered as inconsistent with the general term of such a contract.[4] "Apart from the evidence of custom," said Bovill, C. J., "it is quite clear that upon a contract framed as is this the defendants could not be personally liable. It appears on the face of the contract that they are contracting on behalf of others. It is analogous to the case of a contract in which a broker says that he sells on account of somebody else as principal, and signs himself broker, which was the form of the contract in Fleet *v.* Murton.[5] There is no distinction in principle, as it seems to me, between the contract

[1] See infra, § 788.

[2] Holt *v.* Ross, 54 N. Y. 472. Reynolds, C., dissenting. And see Hanson *v.* Roberdeau, Peake, 120; Gillett *v.* Offer, 18 C. B. 905.

[3] See Ihering, Jahrb. I. 312; Thöl, Handelsrecht, I. § 72.

[4] Hutchinson *v.* Tatham, 22 W. R. 18; 29 L. T. N. S. 103; L. R. 8 C. P. 482; 42 L. J. C. P. 260.

[5] L. R. 7 Q. B. 126.

in that case and the present. The contract in either case shows on the face of it that the party signing it is acting as agent. This was the view taken by Blackburn, J., in Fleet *v.* Murton,[1] when he says, 'I take it that there is no doubt at all on principle that a broker, as such, merely dealing as broker and not as a purchaser of the article, makes a contract, from the very nature of things, between the buyer and seller, and he is not himself buyer or seller, and that consequently when the contract, as in the present case, in terms says, "Sold to A. B.," or "Sold to my principals," and the broker signs himself simply as broker, he does not make himself either purchaser or seller of the goods. He is simply the broker making the contract.' The same point was decided in Fairlie *v.* Fenton."[2] That evidence, however, is admissible in such case to show that by custom of merchants the defendant may be made liable, was regarded by the court as established.[3]

§ 500. By Judge Story, the liability of the agent who contracts simply as agent is stated without the qualification above noticed: "The same principle," he says,[4] "will apply to contracts made by agents, where they are known to be agents, and acting in that character, but the name of their principal is not disclosed; for until such disclosure, it is impossible to suppose that the other contracting party is willing to enter into a contract exonerating the agent, and trusting to an unknown principal, who may be insolvent or incapable of binding himself."[5]

§ 501. No doubt, as we will presently see, whoever takes, without further inquiry, a note signed by "A., agent," with no other indications of agency, holds A. only on such note.[6] It is also plain that "where," to use the words of Erle, C. J., in 1866,[7] "a contract is signed by one who professes to be signing 'as

[1] L. R. 7 Q. B. 126.

[2] L. R. 5 Ex. 169. See supra, § 290 *et seq.*; infra, § 504, note 2, 728.

[3] Bovill, C. J., in Hutchinson *v.* Tatham, L. R. 8 C. P. citing Humfrey *v.* Dale, 7 E. & B. 266; E., B. & E. 1004; Fleet *v.* Murton, L. R. 7 Q. B. 126.

[4] Story on Agency, § 267.

[5] This view is affirmed in Winsor *v.* Griggs, 5 Cush. 210; a case where "George Griggs, agent," signed a submission to an award, his principal at the time not being disclosed, or known to the plaintiff. Griggs was held liable to the plaintiff on the award; and the same broad statement is approved by Erle, C. J., in Kilner *v.* Baxter, L. R. 2 C. P. 174, cited supra, § 64; infra, § 501.

[6] See infra, § 504.

[7] Kilner *v.* Baxter, L. R. 2 C. P. 183.

agent,' *but who has no principal existing at the time*, and the contract would be wholly inoperative unless binding upon the person who signed it, he is bound thereby; and a stranger cannot, by a subsequent ratification, relieve him from that responsibility." But in an informal business contract, it is my duty, if a person comes to me as "agent," to inquire who he is agent for; and if it be understood between us that he is simply agent, then I cannot pursue him personally.[1] Thus in a Massachusetts case,[2] the defendant signed "for the corporations" a receipt for goods for "the several railroad companies between Boston and Zanesville," but did not disclose for what corporations he acted, it being notorious that there were numerous combinations of lines of railroad between Boston and Zanesville, and the evidence being that the plaintiff did not know which lines the defendant represented, and the defendant actually not representing all the companies on the line over which the goods were sent. It was argued for the plaintiff that this was an agency for an undisclosed principal, and that therefore the defendant was liable. But Dewey, J., giving the opinion of the court, said: "No doubt, in many cases, the agent, by the recitals in the contract, and by the form of his signature to the contract, imposes upon himself the responsibility of the performance of the contract. But here the written contract is in direct terms that of others, and not of the defendant. . . . . *But it is said that the names of these corporations is not stated. This is true, but they are capable of being made certain by proper inquiry*, and the plaintiff was content to take a contract thus generally designating the parties with whom the liability was to rest for the safe and proper conveyance of the goods." There was, indeed, in this case, a general designation of the principals, but a designation so vague as to be valueless without inquiry; and the question, therefore, upon the whole contract is, as we have had already occasion to notice, whether personal credit was actually given to the agent, or whether he was dealt with merely in a representative character.[3]

§ 502. It is argued that because an auctioneer or factor, selling without reference to a principal, becomes personally liable,[4] agents generally, when acting as agents, are personally liable.

[1] See Fleet *v.* Murton, L. R. 7 Q. B. 126; Deslandes *v.* Gregory, 2 E. & E. 602, 607.

[2] Lyon *v.* Williams, 5 Gray, 557.

[3] See supra, § 296 *et seq.*; infra, § 728.

[4] See infra, § 651, 788.

But the rulings as to auctioneers and factors, which are elsewhere cited,[1] are far from saying that contracts by an agent who declares himself to be only an agent, necessarily bind the agent personally. These cases rest partly on the usage of trade and partly on the fact that the parties charged acted without authority.[2] It is in any view allowable for the opposite party to show by parol what is the real intent of the parties; though the agent himself cannot thus limit his signature.[3] Whether there be an election between principal and agent, and how this election is to be exercised, is elsewhere discussed.[4]

§ 503. *When no credit is given the agent he is not personally liable.*[5] — The Roman law, in determining the institorial relation, holds, as we will elsewhere see, that the institor, or shopman, is in no case to be treated as principal.[6] I go into a shop and purchase goods from the shopman; I may at the time be ignorant who is the owner of the shop; but nevertheless I deal with the shopman only as a shopman, my contract being really with the principal whom he represents. Emerigon declares to the same effect: "It is the rule that he who acts *pour compte d'ami*, or for a person to be named, is not personally bound, and acquires nothing for himself, from the time he names the person for whom he has declared himself to act. This nomination has a retroactive effect back to the period of the contract, which is considered as if it had been passed by the person named." Such, he says, is the theory of the civil law; but he observes that in certain cases the usage of commerce has introduced exceptions in maritime affairs; and he quotes two decisions by the parliament of Aix, holding that an agent chartering a vessel *pour compte et risque* of a principal named, — a foreign principal, however, — was

[1] Infra, § 651, 788.

[2] Bush *v.* Cole, 28 N. Y. 261, for instance, was the case of an auctioneer who, knowing that he was unauthorized to sell under a particular limit, sold under such limit. He was held liable for damages to the plaintiff because he acted for an undisclosed principal *without authority*. To same effect is Mills *v.* Hunt, 20 Wend. 431; Simpson *v.* Gerard, 2 Bosw. 607. Thomas *v.* Kerr, 3 Bush, 619, apparently extends the liability of the auctioneer in such cases; but on examination of the opinion of the court it will be found that the vendee at an auctioneer's sale who was misled as to the ownership of the goods might repudiate the sale.

[3] Supra, § 296; infra, § 684; Benj. on Sales, 164; Elbinger Act. Ges. *v.* Claye, L. R. 8 Q. B. 317.

[4] Supra, § 469 *et seq.*

[5] Buck *v.* Amidon, 41 How. N. Y. Pr. 370; and see supra, § 454.

[6] See supra, § 41, 43; infra, § 799.

personally bound for implement of the contract.[1] "Whether," says Mr. McLaren, in commenting on the above, "in such a case (of foreign principal) the law of Scotland would hold the agent bound only conditionally in the event of his not naming his principal, or whether it would follow the English doctrine of an absolute liability on the part of the agent from the first, appears not to be certain, any more than the question whether, when the principal is named, the creditor has or has not the election between principal and agent then accorded to him by the English law." But it is important to keep in mind, as a mode of solving an apparent conflict of authority in the Roman standards as well as in our own, that the prominence to be assumed in the transaction by the unknown principal varies with the nature of the business. I go into a shop, to take the illustration of the Roman *institor* just noted, and there, where I see one or more salesmen, I know from the usual way of conducting this kind of business that they are mere irresponsible instruments of the owner's will; and although I may not know who this owner is, I never think of treating the shopman or salesman as liable to me on the contract. He neither contracts with me nor do I with him.[2] There is no period in which I regard him as a responsible person, liable to me and I to him. On the other hand, when a person whom I know to be a business man in his own right comes to me "for a friend," declining to say more, I have a right to look upon this business man as the real responsible party, and to view the "friend" either as a mere mask, or as a variable character, or as a person who, if real, may not at any time be disclosed. In the latter class of cases, the understanding between the parties is as strong to the effect that the agent is the real party to be dealt with, as in the former class the understanding is strong that the principal is the real party to be dealt with. So, also, in maritime law, from the necessities of the case, as well as from settled usage, the master of a ship is always, in the absence of express limitation to the contrary, personally bound, in all matters that he undertakes in the owner's absence; while, on the other hand, when a contract is made by the owners them-

[1] See summary by Mr. McLaren, 1 Bell's Com. 542, note.

[2] This is supposing that the salesman is a mere servant without discretion. If with discretion, the case presents complications which are elsewhere noticed. Supra, § 6.

selves, or by the master, under circumstances inviting credit to the owners exclusively, then the master is not liable.[1]

§ 504. *Bills and notes and writings under seal, signed by an agent in his own name, bind him exclusively.* — So far as concerns bills and notes, the rule that the undisclosed principal may be pursued does not apply. On these instruments, by Anglo-American law, the agent, if personally liable, is liable exclusively. It is necessary, to shift such liability on the principal, even in cases where the principal is known as such to the creditor, that the agent should sign *per procurationem*, or on behalf of the principal.[2] To deeds and other contracts under seal the same rule applies.[3] As has been already noticed, an instrument under seal, to bind the principal, must be in the principal's name,[4] and the language, to bind the principal, must be distinct.[5]

§ 505. *Agent using his own name in written instrument is primâ facie bound.* — An officer of a corporation, who uses his own name in the body of the instrument, as the person undertaking the obligation, and signs "A. B.," "President of," &c., is personally bound; the statement of the office being mere description.[6] *A fortiori*, the agent by signing his name, without an

[1] Rich *v.* Coe, 2 Cowp. 636; Hussey *v.* Christie, 9 East, 436; Farmer *v.* Davis, 1 T. R. 108.

[2] Beckham *v.* Drake, 9 M. & W. 79; Siffkin *v.* Walker, 2 Camp. 308; Sowerby *v.* Butcher, 2 C. & M. 368; Emly *v.* Lee, 15 East, 17; Leadbitter *v.* Farrar, 5 M. & S. 345; Bottomly *v.* Fisher, 31 L. J. Ex. 417; but see Hovey *v.* M'Grath, 2 Conn. 680. A note in which no principal is mentioned, but signed "A. C., agent," has been held to bind A. C. only, though A. C.'s employers had previously become responsible for notes similarly signed. Williams *v.* Robbins, 82 Mass. (16 Gray) 77; Dubois *v.* Canal Co. 4 Wend. 285; Woodbury *v.* Blair, 18 Iowa, 572; Bickford *v.* Bank, 42 Ill. 238; Rand *v.* Hale, 3 W. Va. 495. See fully for other cases, supra, § 290.

[3] Supra, § 283; Appleton *v.* Burks, 5 East, 148; Einstein *v.* Holt, 52 Mo. 340.

[4] Supra, § 280, 283.

[5] Supra, § 286. A promissory note was signed "B. F. Fisher, agent," and nothing on its face indicated who the principal was. Held, that demand of payment on Fisher personally was sufficient, and that a demand on his principal was not necessary. And held that it made no difference that Fisher had ceased to be agent for the principal before the note fell due. Hall *v.* Bradbury, 40 Conn. 32. See supra, § 290–4.

[6] Dutton *v.* Marsh, L. R. 6 Q. B. 361; Brinley *v.* Moore, 2 Cush. 237; Simonds *v.* Heard, 23 Pick. 120; Morrell *v.* Codding, 4 Allen, 403; Fullam *v.* W. Brookfield, 9 Allen, 1; Evans *v.* Dunbar, 117 Mass. 546; Collins *v.* Ins. Co. 17 Oh. St. 215; Bingham *v.* Stewart, 13 Minn. 106; Pratt *v.* Beaupre, 13 Minn. 187. Supra, § 280–86, 297.

averment of agency, binds himself.[1] At the same time it must be kept in mind that, as has been already seen, the fact of agency must appear on the instrument,[2] that the question is one largely of notice to third parties,[3] that when the agent signs his own name it must be shown that it was not intended that he should be bound,[4] and that there are cases in which the third party may elect to sue either principal or agent.[5]

The mere attaching a title, as "treasurer," or "manager," or agent, does not divest liability unless the other contracting party knows that the party signing signs for another.[6] And the signers, W. & A., were held by the English court of exchequer personally liable on the following instrument, "Sold A. 200 quarters of wheat (as agents for J. S. & Co., of Dantzig). W. & A." [7]

§ 506. *Agent not bound to those who know he acts as agent.*[8]

III. WHEN AGENT ACTS AS COMMITTEE FOR VOLUNTARY SOCIETY.

§ 507. *Committee of voluntary society is liable when receiving personal credit.* — More difficult are the cases where persons acting as a committee for a voluntary society, charitable or religious, make purchases or execute obligations on behalf of such society. On the one side it is argued that if such committee is not liable nobody else is, and hence that as nobody else is, such committee is liable; and also that it would put an end to such societies if they could not obtain credit, and that they cannot obtain credit except through the responsibility of their committees. On the other hand it is insisted [9] that no one will act on committees for such societies if personal liability is the consequence, and that if this liability be enforced such societies must come to an end for the want of committees. In England the courts have pushed this

[1] Bradlee *v.* Glass Man. Co. 6 Pick. 347. See De Witt *v.* Walton, 5 Selden, 571; Hovey *v.* Magill, 2 Conn. 680; and see Means *v.* Swormstedt, 32 Ind. 87, where it was held that in such case the sealing with the seal of the corporation may relieve agent's liability.

[2] Supra, § 284 *et seq.*

[3] Supra, § 289.

[4] Supra, § 297.

[5] See supra, § 298, 470.

[6] Downman *v.* Jones, 4 Q. B. 235; Childs *v.* Monino, 2 Brod. & B. 460; Dutton *v.* Marsh, L. R. 6 Q. B. 361; Paice *v.* Walker, L. R. 5 Exch. 173; Moss *v.* Livingston, 4 Comst. 208; Pentz *v.* Stanton, 10 Wend. 271; Hills *v.* Bannister, 8 Cow. 31; Forster *v.* Fuller, 6 Mass. 58; Pratt *v.* Beaupre, 13 Minn. 187.

[7] Paice *v.* Walker, L. R. 5 Ex. 173. See this case reported at large supra, § 297.

[8] Supra, § 295.

[9] See Story on Agency, § 287.

liability so far as to hold that a member of a committee for managing the affairs of a charitable society, though giving his services gratuitously, is personally liable for goods supplied by tradesmen for the society, though he is not proved to have given any orders, or to have been even known in his capacity as a member to the tradesman.[1] This, however, goes a great way; and it is safer to say that members of such a committee are not in such cases responsible unless credit is given them personally.[2] If the person furnishing goods or money to such a society do so trusting to funds that may come in, and not regarding at the time the committee as liable, its members not holding themselves out as liable, then he cannot proceed against such members.[3] Nor, on the other hand, are the members of a voluntary society agreeing to pay annually a certain sum to be laid out by the treasurer, liable *on their subscription* for articles purchased in their name by the treasurer, though they would be liable, if approving the ordering of the articles, for goods sold and delivered.[4]

§ 508. But wherever (as in case of goods furnished to a club at the request of an agent, and on his credit) the agent is the

[1] Burls *v.* Smith, 7 Bing. 705. See Doubleday *v.* Muskett, 7 Bing. 110.

[2] When an action is brought against a defendant on a contract, made with the agent or steward of a club, "the plaintiff must prove that the defendant, either himself or by his agent, has entered into that contract. That should always be borne in mind in cases of this class, for on most questions of this kind the real ground of liability is apt to be lost sight of. As the defendant did not enter into the contract personally, it is quite clear that the plaintiff cannot recover against the defendant unless he shows that the person making the contract was the agent of the defendant, and by him authorized to enter into the contract on his behalf, and the question is . . . . whether there is . . . . evidence . . . . that the person who actually ordered the goods was the authorized agent of the defendant in making the contract, and that really is the question in all cases of this kind, — in all cases of principal and agent, master and servant, wherever the contract is not made personally by the defendant." Flemyng *v.* Hector, 2 M. & W. 183, judgment of Parke, B. See supra, § 461.

[3] See Devoss *v.* Gray, 22 Ohio St. 159, a case where it was ruled that the deacons of an unincorporated religious society could not, though *ex officio* agents for the business affairs of the society, be held personally liable for a contract made by other independent agents of the society. See Tobey *v.* Claflin, 3 Sumner, 379. So a trustee of a voluntary association, in whose name bibles are taken for convenience, is not liable personally for acts done within the scope of his authority as such trustee. Stevenson *v.* Mathers, 67 Ill. 123.

[4] Ridgely *v.* Dobson, 3 Watts & S. 118.

party primarily trusted, then he is personally liable.[1] And all the members of a society who concur in an order of goods are liable for the goods.[2]

§ 509. When goods are ordered by a committee, "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." [3] Hence it was held that all the members of a committee, appointed by a political meeting to provide a free dinner, were personally liable for the dinner ordered by the committee, the minority who voted against the dinner being liable equally with the majority.[4]

IV. WHERE AGENT IS A PUBLIC OFFICER.

§ 510. *Public officer liable to repay money extortionately collected.* — As will be presently more fully shown, a public officer may be compelled to pay back money extortionately collected by him; and when such money is paid under protest, and after notice that suit will be brought for its recovery, he cannot defend himself on the ground that subsequently to such notice the money was handed by him to his superior.[5] Were it otherwise, those thus unjustly compelled to pay money would be often precluded from redress. A government can only be sued by its own permission, and when sued it may not have property which can be available to an execution plaintiff. And the government is itself interested in preventing extortion by its subordinates. Its political success, under a system of popular elections, is endangered if they oppressively exceed their powers; and its financial stability is dependent on their strict adhesion to law. Hence in what they do outside of law they are to be regarded as acting on their own responsibility, personally liable for any excess, whether they be sued in contract or in tort.

[*For suits against public agents for money illegally collected, see infra*, § 519.]

§ 511. *Public officer may make himself personally liable for*

[1] Delauney *v.* Strickland, 2 Stark. 416; Braithwaite *v.* Skofield, 9 B. & C. 401; Cockerell *v.* Aucompte, 2 C. B. N. S. 440; St. James's Club, in re, 2 De G., M. & G. 383; Eichbaum *v.* Irons, 6 Watts & S. 67. Supra, § 461.

[2] Ridgely *v.* Dobson, 3 Watts & S. 118. Supra, § 461.

[3] Gilson, C. J., in Eichbaum *v.* Irons, 6 Watts & S. 69.

[4] Ibid.

[5] See infra, § 519.

governmental contracts. — It may happen that a government may be in such straits that it may be unable to sustain itself unless its debts be assumed by its officers. Such cases occurred in our own revolutionary history ; and onerous as may be the weight to officers thus intervening, to hold to their non-liability would be to prevent government from seizing the only instrument by which its ruin can be averted. By Franklin, when minister at Paris, by Robert Morris, when treasurer to the Continental Congress, personal credit was in this way pledged ; and by their energy and devotion the government paper was saved from protest. In such case the agent has recourse to the government for his advances. That he should be himself liable on his engagement, public as well as juridical policy requires.[1] The same result follows when the officer indirectly draws credit to himself ; though evidence to this effect should be jealously scrutinized.[2]

§ 512. *Public officer is personally liable on contract when he obtains money on a government security signed by himself but not binding the government.* — We will hereafter notice that when an instrument is of doubtful meaning, and when by one construction its efficiency can be preserved and by another its efficiency will be destroyed, then that construction will be adopted by which its efficiency will be preserved.[3] This rule has been extended, as we have seen, to contracts entered into by officers of boards for public improvement when credit was given to the officer personally,[4] and to municipal officers who, undertaking to sign a contract binding the municipality, negligently fail in this, and obtain credit on the faith of the instrument they thus inadequately execute.[5]

[1] Brown *v.* Rundlett, 1 T. R. 172; Jones *v.* La Tombe, 3 Dall. 384 ; Freeman *v.* Otis, 9 Mass. 272; Gill *v.* Brown, 12 Johns. 385; Walker *v.* Swartwout, 12 Johns. R. 444; Osborne *v.* Kerr, 12 Wend. 179; Johnson *v.* Council, 16 Ind. 227 ; Copes *v.* Matthews, 10 Sm. & M. 398 ; Sanborn *v.* Neal, 4 Minn. 126.

[2] Fox *v.* Drake, 8 Cow. 191; Freeman *v.* Otis, 9 Mass. 272; Osborne *v.* Kerr, 12 Wend. 179.

[3] See infra, § 523 ; supra, § 223.

[4] Horsley *v.* Bell, Amb. 769; 1 Brown Ch. 101, note ; Parrott *v.* Eyre, 10 Bing. 292; Meriel *v.* Wymondsold, Hard. 205 ; Furnivall *v.* Coombes, 5 M. & G. 736 ; Doubleday *v.* Muskett, 7 Bing. 110; Yealy *v.* Fink, 43 Penn. St. 212. Supra, § 490.

[5] Ives *v.* Hulett, 12 Vt. 314.

The fact that a contract made relates to a subject within the general scope of a public agent's powers, does not make it obligatory upon his principals, if there was a want of specific power to make it. Though a private agent acting in violation of specific

§ 513. *Public officer not pledging his credit not personally liable on contract within scope of his authority.* — But independently of these exceptions, it is a maxim dictated at once by public necessity as well as by sound jurisprudence, that a public officer, who does not interpose his own credit, is not liable on a contract executed by him on behalf of the government even though he would have been liable had he represented a private individual. Were it otherwise, no man of substance could undertake a government office which involves the making of contracts or issuing of obligations; and if bonds should be required for such officers, no bondsmen could be obtained. Nor would the effect on public credit be less disastrous. Government, ceasing to feel an undivided liability, would hide itself behind its officers; and the payment of public debts, instead of being a matter of honor bearing primarily upon each citizen, would become a private duty, mixed with party considerations relative to the particular officers by whom the obligations might be executed. Hence the courts have uniformly held, that no personal liability of public officers, with the limitations already given, can be maintained.[1] Even where the officer acts without authority, and dis-

instructions, yet within the scope of a general authority, may bind his principal, the rule as to the effect of a like act of a public agent is otherwise. The authority of a private agent is necessarily known only to the principal and agent; but that of a public agent is a matter of record in the books of the corporation or of public law. Baltimore *v.* Reynolds, 20 Md. 1.

Where commissioners of highways, in a proceeding to lay out a highway, being unable to agree with a landowner as to the damages he would sustain, submitted the matter of damages to arbitration, and executed their bond in their individual names containing an express covenant to abide by and perform the award, they having no power to bind their town in this manner, it was held, that they were not individually liable on such bond. Mann *v.* Richardson, 66 Ill. 481.

[1] Bowen *v.* Morris, 2 Taunt. 374; Unwin *v.* Woolseley, 1 T. R. 674; Goodwin *v.* Robarts, 33 L. T. R. 272; Lee *v.* Munroe, 7 Cranch, 366; Hodgson *v.* Dexter, 1 Cr. C. C. 109; *S. C.* 1 Cr. 345; Parks *v.* Ross, 11 How. 362; Pierce *v.* U. S. 1 N. & H. 270; Davis *v.* Garland, 5 Cr. C. C. 570; Parks *v.* Ross, 11 How. 362; Brown *v.* Austin, 1 Mass. 208; Simonds *v.* Heard, 23 Pick. 124; Dawes *v.* Jackson, 9 Mass. 490; Adams *v.* Whittlesey, 3 Conn. 560; Ogden *v.* Raymond, 22 Conn. 379; Rathbon *v.* Budlong, 15 Johns. 1; Walker *v.* Swartwout, 12 Johns. 444; Fox *v.* Drake, 8 Cow. 191; Crowell *v.* Crispin, 4 Daly, 100; Yealy *v.* Fink, 43 Penn. St. 212; Baltimore *v.* Reynolds, 20 Md. 1; Enloe *v.* Hall, 1 Humph. 303; Amison *v.* Ewing, 2 Cold. (Tenn.) 366; Houston *v.* Clay, 18 Ind. 396; Mann *v.* Richardson, 66 Ill. 481; Tutt *v.* Hobbs, 17 Mo. 486; Hodges *v.* Runyan, 30 Mo. 491; Dwi-

closes to the party with whom he is acting his want of authority, or the want of authority is known to such party, the same presumption of law arises.[1] And this immunity is held not to be divested by the fact that the contract is executed by the officer under seal;[2] nor is a public officer liable to actions at common law to recover funds placed in his hands for distribution.[3] Nor will a mandamus lie to compel a public officer to do any act not merely ministerial, but involving discretion;[4] nor will the writ be issued to compel the secretary of the navy to pay a subordinate officer.[5] Where, however, the credit given to the officer is not within the line of his duty, and when he has no legal authority then he is personally liable.[6]

V. WHERE THE PRINCIPAL IS A FOREIGNER.

§ 514. *Agent for foreign principal liable.* — Where an agent contracts at home for a foreign principal, the presumption is that the contract is on the credit of the agent and not of foreign principal; and hence on such contract the agent is exclusively liable.[7] The extent and qualifications of this rule are fully discussed in another section.[8] It should be observed, however, that this reasoning does not apply to the extra-territorial relations of the states of the American Union, and hence it has been held that agents or factors acting for merchants residing in another state are not personally liable for contracts made by them for their employers.[9]

VI. WHERE MONEY IS PAID TO AGENT BY MISTAKE, OR THROUGH FRAUD OR FORCE.

§ 515. *Money paid by mistake to an agent for use of principal may be recovered back.* — The general rule is that where one per-

nelle *v.* Henriquez, 1 Cal. 379; Ghent *v.* Adams, 2 Kelly (Ga.), 214; Yulee *v.* Canova, 11 Fla. 9.

[1] McCurdy *v.* Rogers, 21 Wisc. 197.

[2] Hodgson *v.* Dexter, *ut supra;* Bowen *v.* Morris, 2 Taunt. 371; Macbeath *v.* Haldimand, 1 T. R. 172; Yulee *v.* Canova, 11 Florida, 9.

[3] Gidley *v.* Lord Palmerston, 3 Brod. & B. 275. Though see Thompson *v.* Pearce, 1 Brod. & B. 25.

[4] Decatur *v.* Paulding, 14 Pet. 497; U. S. *v.* Seaman, 17 How. 225; U. S. *v.* Commissioner, 5 Wallace, 563.

[5] Brashear *v.* Mason, 6 Howard, 92; U. S. *v.* Guthrie, 17 How. 284.

[6] Yulee *v.* Canova, 11 Florida, 9; Baltimore *v.* Reynolds, 20 Md. 1.

[7] Supra, § 456; infra, § 791. See Hutton *v.* Bulloch, L. R. 8 Q. B. 331; aff. L. R. 9 Q. B. 572; Elb. Act. Ges. *v.* Claye, L R. 8 Q. B. 315.

[8] Supra, § 403, 456; infra, § 791–3.

[9] Vawter *v.* Baker, 23 Ind. 63.

son deposits money with another for the use of a third, the money may be recovered by the party depositing in all cases in which there could have been a recovery from the third person, provided there be no appropriation by the agent of the money to the third person, and provided no intermediate conflicting equities have attached to the fund.[1]

§ 516. Notice to the agent not to pay over is necessary to fix the agent; but if the money has not been paid over, and no equities have intermediately attached, the suit is notice enough.[2] "When the money is paid voluntarily and by mistake to an agent, and he has paid it over to his principal, he cannot be made personally responsible; but if before paying it over," says Thompson, J.,[3] speaking of cases in which the agent pays over after notice, "he is apprised of the mistake, and required to pay it over, he is personally responsible." "An agent," says Mr. Smith, in his Mercantile Law,[4] "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 in circumstances by his having paid over the money to his principal, or done what is equivalent to it." Thus, where the defendant[5] received a bar of silver from his principal, and sold it to the plaintiff, at a price calculated with reference to the number of ounces which, on assay, it was thought to contain, but it turned out afterwards that the bar contained fewer ounces than had been supposed, it was ruled that the plaintiff was entitled to recover the money overpaid from the defendant, who had not yet handed it to his principal, although he had forwarded an account to him, in which he was credited with the full sum, but which was still unsettled. In another leading case on this point,[6] the defendant was an insurance broker, and the money sought to be recovered was paid by the plaintiff, an underwriter, in his charge of a loss, which turned out to be foul. "It will be observed," says Mr.

[1] Buller *v.* Harrison, Cowp. 565; Cox *v.* Prentice, 3 M. & S. 344; Carey *v.* Webster, Str. 480; Paley on Agency, 389; Holland *v.* Russell, 1 B. & S. 424; Carew *v.* Otis, 1 Johns. R. 418; Hearsey *v.* Pruyn, 7 Johns. R. 179; La Farge *v.* Kneeland, 7 Cow. 456; Mowatt *v.* M'Lellan, 1 Wend. 173; Herrick *v.* Gallagher, 60 Barb. 566; Granger *v.* Hathaway, 17 Mich. 500.

[2] Hearsey *v.* Pruyn, 7 Johns. R. 179.

[3] Elliott *v.* Swartwout, 10 Peters, 137.

[4] Smith's Merc. Law, 143.

[5] Cox *v.* Prentice, 3 M. & S. 344.

[6] Buller *v.* Harrison, Cowp. 565.

Smith, in commenting on these authorities, "that in neither of these cases could the principal himself, ever, by possibility, have claimed to retain the money for a single instant, had it reached his hands; the payment having been made by the plaintiff under pure mistake of facts, and being void, *ab initio*, as soon as the mistake was discovered, so that the agent would not have been estopped from denying his principal's title to the money, any more than the factor of J. S. of Jamaica, who has received money paid to him under the supposition of his employer being J. S. of Trinidad, would be estopped from retaining that money against his employer, in order to return it to the person who paid it to him. Besides which, in Buller *v.* Harrison, had the agent paid the money he received from the underwriter, in discharge of the foul loss, over to his principal, he would have rendered himself an instrument of fraud, which, as we have already seen, no agent can be obliged to do."

§ 517. *But if the money was intentionally paid (there being no mistake as to the facts) to the agent for the principal, then the principal alone is suable.*[1] — A. constitutes B. his agent to receive money, and C. pays B. for A. This, supposing the payment is not made under a mistake as to the person or the thing paid, is a payment to A., and if C. is entitled to recover back the money, he must sue A. Thus where the defendant, an attorney's clerk, received, by his principal's orders, rents for the plaintiff, a client of the principal, it was ruled that the defendant could not be compelled to repay these rents to the plaintiff, though the attorney had intermediately become bankrupt.[2] Whenever the agent is estopped from disputing the principal's title to the fund, then the agent cannot be compelled to pay it back to the third party, contesting the principal's right.[3] So an action will not lie against a mere collector or receiver, for the purpose of trying a right against the principal.[4] The agent must be loyal to his principal, accounting to him alone; and this rule applies to all cases in which the agent holds a particular fund for a particular principal, provided the case be one in which the principal could recover from the agent.[5] And under such cir-

[1] Horsfall *v.* Handley, 8 Taunt. 136; Bamford *v.* Shuttleworth, 11 Ad. & E. 926; Colvin *v.* Holbrook, 2 Comst. 126.

[2] Stephens *v.* Badcock, 3 B. & Ad. 354.

[3] Staplefield *v.* Yewd, Bull. N. P. 133; Sadler *v.* Evans, 4 Burr. 1984.

[4] Paley's Agency, 389.

[5] Supra, § 242.

cumstances, no notice given intermediately to the agent by the opposing party can turn the agent into trustee for such opposing party.[1]

§ 518. *Recovery may be had from an agent in cases of compulsory payment.* — It has been ruled that a payment to A., expressly as the agent of B., for the purpose of redeeming goods wrongfully detained by B., and a receipt by A. expressly for B., will be sufficient ground for the maintenance of an action against A. for money had and received.[2] So when the defendants, agents for the carriers, refused to deliver the plaintiff's goods to him unless he paid an excessive charge, it was held that he could recover from the defendants the excess.[3]

§ 519. *Money illegally collected by public agent may be recovered from such agent.* — Thus it has been ruled by the supreme court of the United States[4] that a collector of the revenue is personally liable in an action to recover back an excess of duties paid to him as collector, and by him paid over in good faith, in the regular and ordinary course of his duty, into the public treasury; it appearing that a notice had been given him at the time of payment, that the duties charged were too high, and that the party paying so paid in order to get possession of his goods, and intended to take measures to recover the over-payment, there being at the same time a formal notice to the collector not to pay over the amount to the treasury.[5] And notice not to pay over is not necessary, when the money is not expressly for the use of the alleged principal.[6] But, in case of duties, there can be no recovery if the duties were paid before protest.[7] And under the act of 1857, there must be, besides a protest, an appeal to the secretary of the treasury.[8] The same rule applies where money is taken by a public agent by mistake. Thus, where a post-office clerk receives from T. a letter to be registered, he

[1] Bank U. S. *v.* Bank of Washington, 6 Peters, 8.

[2] Anon. cited in Smith *v.* Sleap, 12 M. & W. 588.

[3] Parker *v.* R. R. 7 E. L. & E. 528.

[4] Elliott *v.* Swartwout, 10 Peters, 137.

[5] See, to same point, Bend *v.* Hoyt, 13 Pet. 263; Drake *v.* Redfield, 4 Bl. C. C. 116; Beatty *v.* U. S. Dev. Ct. Claims, 231. See Lawrence *v.* Caswell, 13 How. 488; Snowdon *v.* Davis, 1 Taunt. 359; Smith *v.* Sleap, 12 M. & W. 588; supra, § 510.

[6] Ripley *v.* Gelston, 9 Johns. R. 201; Frye *v.* Lockwood, 4 Cow. 456.

[7] Schlesinger *v.* U. S. 1 N. & H. 16; Crocker *v.* Redfield, 4 Bl. C. C. 379.

[8] Reimer *v.* Schell, 4 Bl. C. C. 328.

and T. at the time erroneously believing that letters could be registered to the point of destination, and then, on discovering his mistake, sends the letter without registry, by direction of his superior officer, and the money in the letter is lost, both the clerk and his superior are liable in contract for the value.[1]

§ 520. *Money received fraudulently by agent for principal may be recovered back.* — An agent who illegally and corruptly extorts money on behalf of his principal can be compelled to refund the amount, even though he has paid it over.[2] This rule has been held to apply to a case where the money was obtained *mala fide* from the plaintiff.[3]

§ 521. *Agent cannot defend unless he receives the money specifically for principal.* — If the agent, in receiving the money, does not do so in specific trust for a particular principal, then he cannot defend, if the money was paid him by mistake, on the ground that he had paid the money over to an alleged principal.[4] The rule that a *bonâ fide* payment to a principal excuses does not cover the case of a factor paying over to an undisclosed principal when the factor himself received the money as principal.[5]

§ 522. *Stakeholder is bound to retain until conditions are fulfilled.* — An agent who receives money as a stakeholder is bound to keep the deposit until the conditions are fulfilled upon which it is to be paid; and hence payment is no defence if such payment be premature.[6] This is eminently the case with auctioneers as to deposits, which they hold as stakeholders; and as to which, if vendor and vendee differ, a bill of interpleader should be filed.[7] So, also, when an auctioneer sells goods which he has notice are claimed by a third party. If he pay over after such

[1] Fitzgerald *v.* Burrell, 106 Mass. 446.

[2] Miller *v.* Avis, 1 Selw. N. P. 103. See Townson *v.* Wilson, 1 Camp. 396; Watkins *v.* Hewlett, 1 Ball & B. 1; 3 Moore, 211; Elliott *v.* Swartwout, 10 Peters, 137, *ut supra.*

[3] Shipherd *v.* Underwood, 55 Ill. 475; Cox *v.* Prentice, 3 Maule & S. 345; La Farge *v.* Kneeland, 12 Cow. 456; Mowatt *v.* M'Lellan, 1 Wend. 173; Herrick *v.* Gallagher, 60 Barb. 566; Seidell *v.* Peckworth, 10 S. & R. 443; M'Donald *v.* Napier, 14 Ga. 89.

[4] Ripley *v.* Gelston, 9 Johns. R. 201; Snowdon *v.* Davis, 1 Taunt. 359; Carew *v.* Otis, 1 Johns. R. 418.

[5] Newall *v.* Tomlinson, L. R. 6 C. P. 405.

[6] Paley's Agency, 391, Waterman's ed., citing Bamford *v.* Shuttleworth, 11 Ad. & E. 926; Carew *v.* Otis, 9 Johns. R. 418.

[7] Edwards *v.* Hodding, 5 Taunt. 815; 1 Marsh. 377. Infra, § 653.

notice, he is liable to the third party for the amount.[1] The same rule is applied to prize agents, paying over prize money after an appeal is entered.[2]

VII. WHERE THE CONTRACT CAN ONLY BE ENFORCED BY MAKING AGENT LIABLE.

§ 523. *In cases of doubt that construction will be preferred which gives effect to contract.* — In all cases of doubt, it is an accepted rule of interpretation, that the construction which is most favorable to the execution of the contract will be enforced.[3] It is always presumed that persons intend effectually to do that which they contract; and when there is a conflict of constructions, the parties are presumed to adopt that construction most favorable to the performance of their engagements.[4] Therefore, when the only way of enforcing a contract entered into by an agent is by making him liable, his liability will be assumed, provided it does not appear that it was intended in the transaction that he should not be liable.[5] Hence, where a note is accepted by a married woman in her own name, she not being *capax negotii*, it was held that evidence might be received charging her husband as the principal and party really interested;[6] *a fortiori* when a guardian signs a note as A. B., "guardian of C. D.," C. D. being an infant, and A. B. having no power thus to bind the estate.[7] So an officer of a corporation, signing in such an informal way as not to bind the corporation, may bind himself;[8] and so where he signs as agent for any other person who on the instrument cannot be made liable.[9] This same principle has been extended to engagements made by officers of boards for public improvement when credit was given to the officer personally.[10]

[1] Hardacre *v.* Steward, 5 Esp. Cas. 103; Jacob's case, 2 Bay, 84.

[2] Penhallow *v.* Doane, 3 Dall. 54.

[3] Savigny, Röm. Recht, VIII. 372; Eichhorn, Deutches Recht, § 37; Whart. Confl. of Laws, § 429.

[4] 2 Parsons on Cont. 95; 2 Kent's Com. 460. Supra, § 223, 512.

[5] Edings *v.* Brown, 1 Richards. 255; Bank *v.* Wray, 4 Strobh. 87; and see remarks of Gibson, C. J., in Eichbaum *v.* Irons, 6 Watts & S. 69; Kilner *v.* Banter, L. R. 2 C. P. 174, cited supra, § 64.

[6] Lindus *v.* Bradwell, 5 C. B. 583; though see Minard *v.* Reed, 7 Wend. 68.

[7] Hill *v.* Bannister, 8 Cow. 31.

[8] See supra, § 280–295; and see Mann *v.* Richardson, 66 Ill. 481.

[9] See supra, § 295, 499.

[10] Eaton *v.* Bell, 5 B. & Ald. 34; Horsley *v.* Bell, Ambl. 769; 1 Brown Ch. 101, note; Parrott *v.* Eyre, 10 Bing. 292; Meriel *v.* Wymondsold, Hardr. 205; Cullen *v.* Duke of Queens. 1 Br. Ch. Rep. 101; Furnivall *v.* Coombes, 5 M. & G. 736; Doubleday

VIII. WHEN THE AGENT ACTS WITHOUT AUTHORITY.

§ 524. *Agent acting without authority may be sued either for breach of warranty or for deceit.* — A person who without authority makes a contract in the name of another to do a particular thing, may be viewed in two very distinct lights. It may be said to him, "You, A. B., have contracted that C. D., whom you claimed to represent, should do a particular thing; C. D. has disavowed your agency, and cannot be made liable on your contract; I therefore sue you on your implied warranty of your agency, and I claim from you the damages I have sustained from the failure on your part to bind your alleged principal."[1] Or he may be addressed as follows: "You, A. B., falsely pretended to me that you were authorized by C. D. to represent him in this contract; by your false pretences I was induced to perform my part in the contract; C. D. disavows you as agent, and cannot be made legally responsible for your acts; now I sue you for the loss to which I have been subjected by your fraud."[2] Assumpsit for breach of warranty may be regarded as a concurrent remedy with an action for deceit.[3]

§ 525. It should be observed, however, that such liability cannot be based on an assumption of agency resting on a mistake of *law*. "Where an agent makes a contract on behalf of his principal he impliedly warrants that he has authority to bind that principal, and if it turns out that he has no authority to

v. Muskett, 7 Bing. 110. See supra, § 512.

[1] Randall *v.* Trimen, 18 C. B. 786; Simons *v.* Patchett, 7 E. & B. 568; Collen *v.* Wright, 7 E. & B. 301; 8 E. & B. 647; Pow *v.* Davis, 1 E., B. & S. 220; Cherry *v.* Bank, L. R. 3 P. C. 24; Spedding *v.* Newell, L. R. 4 C. P. 212; Weeks *v.* Propert, L. R. 8 C. P. 427; Godwin *v.* Francis, L. R. 5 C. P. 295; Kelner *v.* Baxter, L. R. 2 C. P. 174; Richardson *v.* Williamson, L. R. 6 Q. B. 276; Noyes *v.* Loring, 55 Me. 408; Coit *v.* Sheldon, 1 Tyler, 304; Ballou *v.* Talbot, 16 Mass. 461; Johnson *v.* Smith, 21 Conn. 627; Smith *v.* Bowditch, 7 Pick. 138; White *v.* Madison, 26 N. Y. 117; Baltzen *v.* Nicolay, 53 N. Y. 467; Dusenbury *v.* Ellis, 3 Johns. Cas. 70; Rossiter *v.* Rossiter, 8 Wend. 494; Munnikuyson *v.* Dorsett, 2 Harr. & G. 374; Campbell *v.* Hillman, 5 B. Mon. 515.

[2] Infra, § 541; Noyes *v.* Loring, 55 Me. 408; Long *v.* Colburn, 11 Mass. 97; Ballou *v.* Talbot, 16 Mass. 461; Jefts *v.* York, 4 Cush. 371; 10 Cush. 392; Bartlett *v.* Tucker, 104 Mass. 336; White *v.* Madison, 26 N. Y. 117; M'Curdy *v.* Rogers, 21 Wisc. 197; Lander *v.* Castro, 43 Cal. 497. See Bigelow's Cases on Torts, 22. As to liability of attorneys for unauthorized appearance, see infra, § 613.

[3] Mahurin *v.* Harding, 28 N. H. 128.

bind his principal, and the principal repudiates the obligation, and loss is thereby occasioned, then an action on the warranty can be maintained." [1] "But if those cases are examined, it will be found in all of them that there was a misrepresentation in point of fact as to the agent having power to bind his principal, and though I have not found any case in the courts of law on the question, I have no doubt myself that it would be held that if there is no misrepresentation in point of fact, but merely a mistake or misrepresentation in point of law, that is to say, if the person who deals with the agent is fully aware in point of law what the extent of the authority of the agent is to bind his principal, but makes a mistake as to whether that authority is sufficient in point of law or not, under these circumstances I have no doubt the agent would not be liable." [2] So far as concerns the matter of deceit, this topic will be hereafter further noticed.[3]

§ 526. *So in such case money or goods may be recovered back.* — Or, when money is obtained by a pretended agent on behalf of another by whom the act is not authorized, the tort may be waived, and the person receiving the money may be sued for money had and received,[4] provided he be guilty of no laches, and has not acquiesced in the fraud.[5]

§ 527. But in such case it must be shown that the agent acted without authority. Thus, in an action to recover the value of a lost package which had been delivered by the plaintiff to the defendant to be forwarded by an express company, of which he was supposed by the plaintiff to be the agent, it appeared that an agent of the company occupied a store with the defendant, and being obliged to be out frequently on the company's business, he arranged with the defendant to give the company's receipt for packages received in his (the agent's) absence. The company was aware of this arrangement, which had continued a long time before the plaintiff's package was received, and made

[1] Mellish, L. J., in Beattie *v.* Lord Ebury, L. R. 7 Ch. 800, citing Collen *v.* Wright, 8 E. & B. 647; Richardson *v.* Williamson, L. R. 6 Q. B. 276; Cherry *v.* Bank, L. R. 3 P. C. 24.

[2] Ibid. To same effect, see Rashdall *v.* Ford, L. R. 2 Eq. 750; and see supra, § 476.

[3] Infra, § 541.

[4] Steel *v.* Brown, 1 Taunt. 381; Deady *v.* Harrison, 1 Stark. 60; Lander *v.* Castro, 43 Cal. 497. See 1 Story on Contracts, § 622.

[5] Vigers *v.* Pike, 8 Cl. & Finn. 580; Parsons *v.* Hughes, 9 Paige, 591; Campbell *v.* Fleming, 1 Ad. & El. 40; Selway *v.* Fogg, 5 M. & W. 83; and see cases cited infra, § 530, 531.

no objection thereto. The defendant gave the plaintiff a receipt for the package on one of the company's blank forms, to which he affixed the agent's name as signed by himself, but he made no entry of the package on the company's books. It was ruled by the supreme court of Vermont that the defendant's acts were binding upon the company, and therefore that he was not personally liable.[1]

§ 528. So when A. on an executory contract undertakes that B. shall do a particular act, then, though if A. is without authority, the consideration can be recovered back from A., yet A. cannot be compelled to do something which it was not in the intention of either party he should do, and as to the doing which by B., C. had as much opportunity of determining as had A. It is otherwise, however, when on a mistake of fact (*e. g.* as to such agency) money or goods are placed by C. in the hands of A. Here, on an executed transaction, in which nothing is to be done as to which there can be future inquiries, the contract, if based on mistake, is voidable, and the money, or the goods (or their value), recovered back.[2]

§ 529. *Warranty in such cases is not to extend to facts of which a good business agent could not ordinarily be presumed to be cognizant.* — Yet the warranty of an agent that he is duly authorized is not absolute. If he believes himself to be authorized, and if in coming to this conclusion he has exercised the prudence usual among good business men, he cannot be held liable, if, by some circumstance out of his power to discover, his author-

[1] Landon *v.* Proctor, 39 Vt. 78.

[2] Townsend *v.* Crowdy, 8 C. B. N. S. 477; Mitchell *v.* Lapage, Holt N. P. 253; Hampton *v.* Specknagle, 9 Serg. & R. 212; Un. Nat. Bk. *v.* Sixth Nat. Bank, 43 N. Y. 452; Lander *v.* Castro, 43 Cal. 497.

According to Thöl (Handelsrecht, 1875, § 71), as a general business rule, he who, claiming to be an authorized agent for another, concludes a contract for such other without authority, is personally liable on the contract, and may either be sued for damages, or compelled to perform the contract if this is within his power. But this liability does not arise when the third person contracting has notice, before the closing of the transaction, of the want of authority. The supposititious agent in such case becomes liable to the same effect as if he were the real principal. If it is true he has contracted, not in his own name, but in the name of the pretended principal, then technically he is liable for damages for the fraud, but cannot be sued in an action on the contract. So far as concerns the contract, he declares that he contracts not for himself, but for another person: and both he and the party with whom he contracts agree to treat such pretended principal as the party whom the contract technically binds.

ity, at the time he set it up, did not exist.[1] Thus, in a leading English case, a husband went abroad, leaving his wife with authority to order goods on his credit for the use of herself and her family. He died while absent, whereby the wife's authority ceased. Between the period of his death and that of notice being received by the wife, she continued to order and receive goods as before. It was held that she was not liable for the goods received after her husband's death but before the reception of the notice.[2] "In this case there was clearly no ground of liability on the part of the wife. There was no fraud, for she had got the authority, and did not know of its revocation. In supposing it to continue, she and the creditor were *in pari casu*, the creditor as well as she virtually contracting upon the condition that she had received authority, and that, so far as she knew, it was not withdrawn. She could not be understood to warrant or affirm more than that; and so there appears to be no possible ground of liability on her part, either on fraud, or on an implied warranty of her authority continuing." [3]

§ 530. *Nor can agent be held liable if the other contracting party have the same opportunity of knowledge as has the agent.* — Suppose A. says, "This is my authority; take it for what it is worth," there being no fraud or negligence on the part of A.; and B. says, "On the basis of this authority, I engage C., your supposed principal, to do the thing you promise he shall do;" A. cannot be bound personally to do what he engaged that C. should do.[4]

§ 531. It has also been ruled that in such case if the plaintiff has full knowledge of the facts, or of such facts as fairly and fully put him upon inquiry, and he fails to avail himself of such knowledge, or the means of knowledge reasonably accessible, he cannot, in the absence of fraud, say that he was misled, simply on the ground that the defendant assumed to act as agent without authority.[5]

[1] See Polhill *v.* Walter, 3 B. & Ad. 114.

[2] Smout *v.* Ilberry, 10 M. & W. 1. See Blades *v.* Free, 9 B. & C. 167; Carriger *v.* Whittington, 26 Mo. 313.

[3] 1 Bell's Com. 7th. ed. 543.

[4] Jones *v.* Downman, 4 Q. B. 435; Smout *v.* Ilberry, 10 M. & W. 1; Aspinwall *v.* Torrance, 1 Lansing (N. Y.), 381; Tiller *v.* Spradley, 39 Ga. 35; Story Agency, § 265; 1 Bell's Com. 7th ed. 544, note. Supra, § 526.

[5] Newman *v.* Sylvester, 42 Ind. 106. An agent negotiated a sale of land, and received from the purchaser a $500 U. S. bond in part payment of

§ 532. *Agent not directly liable on instrument he executes without authority in another's name.* — In such case the agent cannot be sued on the contract as contract. The opposite contracting party, when setting up agency as the basis of his action against the agent, cannot dispute such agency by saying, "You, A. B. (the agent), are identical with C. D. (the principal). I therefore sue you as the real party on the contract you have executed in C. D.'s name." [1] Thus only the persons whose names are signed to negotiable paper can be sued thereon.[2] Of course, as has been observed, this rule "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." [3] But a person who signs the name of another without authority to a negotiable note is not liable on such note.[4] Under such circumstances the liability of the agent is created by the wrong he has done in procuring the money for which the instrument was given, by false representations, and thus committing a fraud; or the tort may be waived, and he held as for money loaned.[5]

§ 533. In New Hampshire,[6] it is held, indeed, that a person

the price, disclosing his principal at the time. *Held*, that the agent was not liable for the bond at the suit of the purchaser after the principal had declined to execute the contract, if he received the bond merely as agent, whether he had delivered the bond or its equivalent to his principal or not. McCubbin *v.* Graham, 4 Kansas, 397.

[1] Jenkins *v.* Hutchinson, 13 Q. B. 744; Lewis *v.* Nicholson, 18 Q. B. 503; Grafton Bank *v.* Flanders, 4 N. H. 237; Underhill *v.* Gibson, 2 N. H. 352; North Bk. *v.* Pepoon, 11 Mass. 292; Jefts *v.* York, 4 Cush. 371; 10 Cush. 392; Abbey *v.* Chase, 6 Cush. 54; Draper *v.* Mass. Steam Heat Co. 5 Allen, 338; Ogden *v.* Raymond, 22 Conn. 379; Taylor *v.* Shelton, 30 Conn. 122; Meek *v.* Smith, 7 Wend. 315; White *v.* Madison, 26 N. Y. 117; Baltzen *v.* Nicolay, 53 N. Y. 467 (qualifying earlier N. Y. cases); Hampton *v.* Specknagle, 9 S. & R. 212; Hopkins *v.* Mehaffy, 11 S. & R. 126; Locke *v.* Alexander, 1 Hawks, 416; Lazarus *v.* Shearer, 2 Ala. 718; Duncan *v.* Niles, 32 Ill. 532.

[2] Bank *v.* Hooper, 5 Gray, 567; Williams *v.* Robbins, 16 Gray, 77; Brown *v.* Parker, 7 Allen, 337; Tucker Man. Co. *v.* Fairbanks, 98 Mass. 101.

[3] Gray, J., in Bartlett *v.* Tucker, 104 Mass. 336, citing Merchants' Bk. *v.* Spicer, 6 Wend. 443; George *v.* Surrey, M. & M. 516; Williamson *v.* Johnson, 2 D. & R. 281; *S. C.* 1 B. & C. 146; Fuller *v.* Hooper, 3 Gray, 334.

[4] Bartlett *v.* Tucker, 104 Mass. 336; Lander *v.* Castro, 43 Cal. 497, and cases cited above.

[5] Lander *v.* Castro, 43 Cal. 497.

[6] Grafton Bank *v.* Flanders, 4 N. H. 239.

who uses another's name in making a note is liable himself directly on the note. The same opinion was at one time intimated in New York.[1] But to quote from an opinion of Selden, J., in 1862,[2] "the authority of these cases has been somewhat shaken by the remarks of the judges who delivered opinions in the case of Walker *v.* The Bank of the State of New York;[3] and in England, as well as in several of the United States, the principle on which they rest, if they are supposed to present the only ground of liability of the agent, has been substantially repudiated. . . . . If it were necessary, in disposing of the present case, to decide the question, whether as a general principle one entering into a contract in the name of another, without authority, is to be himself holden as a party to the contract, I should hesitate to affirm such a principle."[4]

§ 534. *Contract must have been valid against principal.* — If the suit be on implied breach of warranty, in order to make the agent liable, the unauthorized contract must be one that could be enforced against the principal if authorized.[5] If the contract, in other words, is void against the principal, it cannot be enforced against the agent as guarantor.[6]

IX. LIABILITY OF AGENT FOR TORTS.

§ 535. *Servant not liable personally to third person for negligence.* — By Anglo-American law, a servant who by negligence in the discharge of his duties injures a third person is not personally liable to such third person. The maxim *respondeat superior* prevails; the principal is liable for the injury, and the agent is then liable to the principal for damages which the latter may have sustained;[7] and this liability attaches even where the

[1] Dusenbury *v.* Ellis, 3 Johns. Cas. 70; White *v.* Skinner, 13 Johns. 307; Feeter *v.* Heath, 11 Wend. 477; Rossiter *v.* Rossiter, 8 Wend. 494; Palmer *v.* Stephens, 1 Denio, 480; Plumb *v.* Milk, 19 Barb. 74.

[2] White *v.* Madison, 26 N. Y. 117.

[3] 5 Seld. 582.

[4] See, as inclining to the earlier New York rule, Weare *v.* Grove, 44 N. H. 196; which, however, holds that the difference of opinion is merely as to form of action.

[5] Baltzen *v.* Nicolay, 53 N. Y. 467.

[6] Carrington *v.* Roots, 2 M. & W. 248; Scorell *v.* Boxall, 1 Y. & J. 396; White *v.* Madison, 26 N. Y. 117; Dung *v.* Parker, 52 N. Y. 494; McKubin *v.* Clarkson, 5 Minn. 247; Bozza *v.* Rowe, 30 Ill. 198; Davis *v.* Moore, 9 Rich. L. 299.

[7] 1 Chitty Pl. 4th Am. ed. 75; Paley on Ag. 396; Lane *v.* Cotton, 12 Mod. 488; Cameron *v.* Reynolds, Cowp. 406; Williams *v.* Cranston, 2 Stark. 82; Milligan *v.* Wedge, 12 Ad. & E.

servant, as to the particular act complained of, modifies the principal's secret orders.[1]

§ 536. The reasons that have been given for this conclusion are various. It has been said that there is no privity of contract between the agent and the party injured. No doubt this is true, and were the suit brought on a contract the objection would be fatal. But it is not necessary that the suit should be brought on a contract. A suit based on the maxim *sic utere tuo ut non alienum laedas* would be as effective for the plaintiff's purposes as would be a suit on a contract. Every man is obliged to take such care of dangerous instruments in his hands that they inflict no injury; and this principle is independent of contract, and applies to agents as well as principals. It is said, also, that the maxim before us rests on the distinction between omissions and positive acts; the principal being primarily liable for his agent's omissions, while the agent is primarily liable for his positive acts.[2] But, as we have already seen, the distinction taken between acts of omission and acts of commission is illusory.[3] For acts of omission which do not constitute imperfections in the discharge of a legal duty no one is liable; for acts of omission which do constitute a defect in the discharge of a legal duty all independent agents are liable. A more logical explanation may be found in the fact that where a wrong occurs through a servant's negligence in performing his master's orders, the causal connection between the master's orders and the wrong is unbroken. Wherever human service is resorted to for the purpose of effecting a particular end, there such negligences in the performance of such service as are, by ordinary natural laws, incident to human labor under the circumstances, are imputable to the service. No man can use a master's prerogatives without accepting a master's burdens. When the servant is absorbed in

737; Gidley *v.* Lord Palmerston, 3 Brod. & B. 275; Cavanagh *v.* Such, 1 Price, 328; Randelston *v.* Murray, 3 N. & P. 239; *S. C.* 8 Ad. & E. 109; Clark *v.* Mayor, 12 Wheat. 40; Tuttle *v.* Love, 7 Johns. R. 472; Denny *v.* Manh. Co. 2 Denio, 115; Colvin *v.* Holbrook, 2 Comst. 129. See supra, § 276–475. As to servant's duty to indemnify principal, see supra, § 306.

[1] Limpus *v.* Omnibus Co. 1 H. & C. 526; Barwick *v.* English Joint Stock Bk. L. R. 2 Ex. 259; Whatman *v.* Pearson, L. R. 2 C. P. 422; Burns *v.* Poulsom, L. R. 8 C. P. 563. See supra, § 277, 481.

[2] See this reason given in Story on Agency, § 309, and incidentally accepted in Smith's Mast. & Serv. 338.

[3] Supra, § 384, and see Whart. on Neg. § 79.

the master, then it is proper that the servant should be only suable through the master. If the servant's negligence is only one of those instinctive aberrations common to the labor of one man when absolutely under another's control, then the master is the sole person responsible for such aberrations, and the servant is irresponsible civilly, unless to the master himself. Not inconsistent with this view is the argument often cited from Lord Holt.[1] "It was objected," he said, "at the bar, that they have this remedy against Breese (the servant). I agree if they could prove that he took out the bills they might sue him for it: so they might anybody else on whom they could fix that fact: *but for a neglect in him they can have no remedy against him, for they must consider him only as a servant, and then his neglect is only chargeable on his master or principal;* for a servant or deputy *quatenus* such cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not *quatenus* a deputy or servant but as a wrong-doer." For *negligences*, Lord Holt tells us, the servant is not liable; for *misfeasances* he is liable. If we are to understand by negligences, in Lord Holt's sense, those imperfections in the discharge of duty which are incident to the labor of all men when under the control of others, and if we are to regard as misfeasances those torts which are committed by the servant out of the line of his employment, when acting on his own responsibility, then we can reconcile the famous passage just quoted not only with the principles here advocated, but with the analogies of the law in other relations. If in the ordinary course of business certain casualties may be looked forward to as incident to labor, then, in employing labor, we must be considered as employing it with this very liability attached, burdening ourselves, therefore, with the liability; conceding that the servants by whose unintended and instinctive vibrations or defects of action when executing our commands these casualties are occasioned, are responsible only to ourselves.[2] The same rule applies to other branches of the law of negligence. If I do anything that, in the ordinary course of things, is likely to produce on men acting in masses certain involuntary effects, then I am liable for such effects, but they are not liable. If, for instance, I throw a squib into a market place, causing confusion

[1] Lane *v.* Cotton, 12 Mod. 488.

[2] See supra, § 277.

among those who are there collected, so that one of them injures another, then I am liable for the damage, for it was the natural and probable consequence of my act; nor would the person who, in the confusion produced by the squib, injured other persons, be liable, supposing that he act without malice.[1] So is it with regard to the employment of machinery. If I employ machinery, which in the long run is likely, while doing much good, to do some incidental mischief, through those imperfections which are incident to all forms of mechanism, then, while I reap the profits of the machine, I must bear its burdens; and if I start such a machine, the causal relation between my starting it, and an injury inflicted by it, is direct, though a year may have intermediately elapsed. In the sense with which we are now concerned we have to view labor, when stripped of all discretion or liberty as to mode of action, as a machine, throwing upon its employer the same responsibility as a machine throws upon him who runs it, and relieving the employee from liability to anybody but his master for injuries to third persons arising from the employee's negligence. It is but proper that if I should undertake to control the action of another in a particular line, I should stand between him and third persons, so far as he confines himself to such line, and inflicts no malicious injuries. I have extinguished his relations to others, so far as concerns this line, and others, therefore, as long as he keeps within the line, cannot reach him except through myself. No doubt this immunity of the servant was adopted by the Romans because with them service was the service of slaves; and because, as the slave had no free will of his own, so his acts, in the scope of his employment, were properly imputable to his master. No doubt, also, it conflicts with our modern views to speak of employees as mechanisms, whose negligences, for which they are themselves collaterally irresponsible, are imputable to their masters. But this rebuke is averted by the observation that it is only the negligences of the employee that are so averted; not his malicious wrongs, or his torts out of the line thus guarded.[2]

[1] See Scott *v.* Shepherd, 2 W. Blacks. 892; discussed Whart. on Neg. 95.

[2] See supra, § 389; and see, also, supra, § 276–7.

As touching the topic of the text we may understand the reasoning of Willes, J., in Limpus *v.* London Omnibus Co. 1 Hurl. & C. 526. "There ought to be a remedy," he says, "against some person capable of paying damages to those injured by im-

§ 537. *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.* — Here, again, we advert to the distinction between a servant and an agent. A servant is supposed to be constantly under his master's control, and to pursue the end his master appoints, by the ways his master directs.[1] An agent, no doubt, has the end appointed by his principal in view, but pursues it by his own way. Hence, if an agent, thus pursuing his own way, injure other persons, he may be made personally liable for the injury. Thus in a Massachusetts case, decided in 1855,[2] it was ruled, that an agent who negligently directed water to be admitted to the water pipe in a room of his principal's house, over which he had general management, thereby flooding a tenement below, was personally liable, and although the reasoning of the court rests on the now exploded distinction between misfeasances and nonfeasances, the ruling is unquestionably right. So an inferior officer, who digs a hole in the street, whereby a traveller is injured, cannot defend himself on the ground that this was incidental to a service in which he was engaged by the state.[3] So if an agent who undertakes to build a trap-door does the work so negligently as to cause injury to a third party, he is liable in damages to such person.[4]

§ 538. *Wherever there is liberty there is liability.* — Hence, to strike at the general principle that lies at the basis of the adjudications 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.

proper driving." Mr. Bigelow, in an interesting note on this point (Leading Cases on Torts, p. 35), says: "These cases are not easily understood, except upon the principle of a special public policy, which finds it important to hold the master responsible for the extraordinary conduct of his agent within the line of the agency;" and he refers to the "impecuniosity" of this class of servants, as making, in the opinion of Willes, J., such a rule politic. But placing the employers on one side, and the employees on the other side, we will find that the capital that can be pursued in a suit at law is mainly with the employers. On the other hand, wherever the agent assumes the position of an independent business man (*e. g.* a contractor), then the reason ceasing, he may be made individually liable. Whart. on Neg. § 181.

[1] See supra, § 19, 126.

[2] Bell *v.* Josselyn, 3 Gray, 309. See, also, Hardrop *v.* Gallagher, 2 E. D. Smith, 523; Gray *v.* Pullen, 5 B. & S. 970, 981.

[3] Bliss *v.* Schaub, 48 Barb. 339.

[4] Harriman *v.* Stowe, 57 Mo. 93.

We are to view the relation of principal and agent, therefore (using the terms in their larger and less technical sense), in two lights. The first is when the agent's individuality is absorbed in that of the principal, in which case only the principal is liable, which occurs when the servant, by negligence in the performance of his ordinary duties as servant, injures a third person. We can only sustain this conclusion, as has been already seen, by holding that the servant is a part of the machinery by which the master works; that the service is but an irresponsive appurtenance to the motive power; that negligence, instead of showing, as does a malicious act, any positive independent emancipated action on the part of the servant, is only one of the ordinary incidents to all mechanical action; that capital should bear its due burdens, and that among these burdens are the necessary instinctive irregularities and remissions which attend all human conduct; that in such matters, as the master absolutely directs the servant, the master should be the person to answer to the outer world, reserving to himself all claims against the servant, which he more efficaciously than any one else can enforce; and that hence it is proper to relieve the servant, when injuring third persons by a negligent act, from liability to such third persons, giving them immediate redress to the master. But this reasoning does not apply to agents who have liberty of action. They are not so absorbed in the principal as to be necessarily regarded as parts of a machine which he absolutely directs. They are not either constructively or actually under the principal's direct control. They have an orbit of their own in which, though it may be subordinate, they move free. We are familiar with this principle in its application to lawyers and physicians, whose negligences, even when in the performance of their mandates, are not imputable to their principals. So is it with regard to contractors. Wherever a contractor, or other special agent, takes entire control of a work, the employer not interfering, the latter, supposing there was no negligence in the selection of the agent, is not liable to third parties for the agent's negligence, the liability resting exclusively on the contractor.[1]

[1] Whart. on Neg. § 181, citing Cuthbertson *v.* Parsons, 12 C. B. 304; Rapson *v.* Cubitt, 9 M. & W. 710; Hole *v.* Sittingbourne R. R. 6 H. & N. 488; Welfare *v.* Brighton R. R. 4 Q. B. 698; Readie *v.* R. R. 4 Exch. 243, overruling Bush *v.* Steinman, 1 B. & P. 403; Steel *v.* R. R. 16 C. B. 550; Sadler *v.* Henlock, 4 E. & B. 570; Murray *v.* Currie, L. R. 6 C. P.

§ 539. "It may now be considered," says Sharswood, J., in a case before the supreme court of Pennsylvania, "that if a person employs others, not as servants, but as mechanics, or contractors in an independent business, and they are of good character, if there was no want of due care in choosing them, he incurs no liability for injuries to others from their negligence or want of skill. If I employ a well known and reputable machinist to construct a steam-engine, and it blows up from bad materials or unskilful work, I am not responsible for any injury which may result, whether to my own servant or to a third person. The rule is different if the machine is made according to my own plan, or if I interfere and give directions as to the manner of its construction. The machinist then becomes my servant, and *respondeat superior* is the rule."[1] So as to bank directors. They are but agents of the bank; and did the rule *respondeat superior* apply, then, for their negligences the bank would be alone liable to third parties. But as they act, in the scope of their agency, with liberty as to their particular mode of action, they are personally liable to third parties for the consequences of their misconduct.[2] So, also, as to directors of business corporations in general;[3] and so as to telegraph agents.[4] To the simplest forms of agency the same distinction penetrates. Thus where a butcher employed a licensed and competent drover, in the way of his calling, to drive a bullock to Smithfield to the butcher's slaughter-house, and the drover negligently sent an inexperienced boy with the bullock, which was driven by the boy into the plaintiff's show-room, it was held that the butcher was not liable for the damage, though the drover was.[5]

25; Overton *v.* Freeman, 11 C. B. 867; Hilliard *v.* Richardson, 3 Gray, 349; Barry *v.* City, 17 Mo. 121; Kelly *v.* Mayor, 11 N. Y. 432; Forsyth *v.* Hooper, 1 Allen, 419; Scammon *v.* Chicago, 25 Ill. 424; Felton *v.* Deall, 22 Vt. 171; Blake *v.* Ferris, 5 N. Y. 48; Burke *v.* R. R. 34 Conn. 474; Clark *v.* Craig, 29 Mich. 398. See fully supra, § 277, 480, 482.

[1] Ardesco Oil Co. *v.* Gilson, 63 Penn. St. 150, citing Painter *v.* Mayor, 46 Penn. St. 213. See Repsher *v.* Wattson, 17 Penn. St. 365.

[2] Infra, § 680; United Society of Shakers *v.* Underwood, 9 Bush, 609; Conant *v.* Bank, 1 Oh. St. 310. See Bigelow's Cases on Torts, 609.

[3] Hodges *v.* New Eng. Trust Co. 1 R. I. 312; Salmon *v.* Richardson, 30 Conn. 360.

[4] See cases collected in Whart. on Neg. § 757; and Bigelow's Cases on Torts, 619.

[5] Milligan *v.* Wedge, 4 Ad. & E. 737. See, also, Bissell *v.* Torrey, 65 Barb. 188. And see, for a fuller discussion, supra, § 277.

§ 540. *Agent is personally liable for malicious or fraudulent acts done by him in his principal's service.*[1] — Here must we hold with peculiar tenacity to the distinction between negligence and malice, the former involving a defect in intelligence, the latter a defect in heart; the former marked by withdrawal of due attention to the discharge of duty, the latter by the introduction of an independent evil intent. Negligence is incidental in the long run to labor, and the employer of laborer is chargeable with it; nor, supposing the negligence to be only such as is one of the ordinary incidents of labor, is the employee chargeable with it except to his master. But the introduction of malice breaks, as we have just seen, this causal connection, and makes the servant directly liable to the injured party for the malicious act, relieving the master, except in conditions already stated.[2] Of the practical application of this distinction the English books give us several apposite illustrations. The servant of a blacksmith, in shoeing a horse, negligently (*i. e.* without malice, but by one of those imperfections in the discharge of duty which is incident to all labor) injures the horse. For this injury the master and not the servant is responsible to the owner of the horse, for this negligence is one of the accompaniments of service for which the servant is accountable only to the master. But if the blacksmith's servant maliciously prick the horse's foot, then the servant and not the master is liable, supposing that the master did not direct the malicious act, and did not knowingly employ a servant who he knew was addicted to such displays of malice.[3] So, to adopt an illustration of Lord Holt,[4] "if a bailiff, who has a warrant from the sheriff to execute a writ, suffer his prisoner, by neglect, to escape, the sheriff shall be charged for it, and not the bailiff. But if the bailiff turn the prisoner loose, the action may be brought against the bailiff himself; for then he is a kind of wrong-doer, or rescuer, and it will lie against any other that will rescue in like manner." In the latter case the bailiff acts wilfully; in the former only negligently. Where the agent

[1] See Udell *v.* Atherton, 7 H. & N. 172; Archbold *v.* Howth, Irish R. 1 C. L. 608; Hardrop *v.* Gallagher, 2 E. D. Smith, 523; Burnap *v.* Marsh, 13 Ill. 535; Campbell *v.* Hillmann, 15 B. Monr. 508. Supra, § 276, and cases cited in notes at close of section. That an attorney will in such cases be liable, see infra, § 611.

[2] Supra, § 483–7; Repsher *v.* Wattson, 17 Penn. St. 365.

[3] 1 Black. Com. 431; Paley's Agency, 397.

[4] Lane *v.* Cotton, 12 Mod. 488.

is thus personally liable for fraudulent or malicious torts, they are not imputable to the principal. To charge him it is necessary either that the torts should in some way have been authorized by him, or that he should have reaped their fruits.[1] When the suit, however, is against the principal for the violation of a contract, the action being contractual, then it is no defence that the breach arose from a wilful and unauthorized act of the defendant's agent.[2]

§ 541. *Agent liable personally for deceit.* — So, in conformity with the views just expressed, an agent is personally liable for deceitful and false statements on his principal's behalf, whereby third persons are defrauded. Thus, to take a case already noticed,[3] an agent who without authority uses the name and credit of another to obtain money or goods, is liable in an action of deceit for the injury thus caused.[4] Hence, the officer of a corporation who, in contracting with a third person, misrepresents his authority, is liable in damages to a person dealing with him *bonâ fide* on the faith of such misrepresentation.[5] Thus, where two directors of a company without authority informed a bank that they had appointed C. to be the manager of the company, with power to draw checks, they were held liable for the checks drawn by C.[6] But if the third party dealing with such officers knew, or had the means of knowing by inspection of the charter of the company, that the officers were without such power,

[1] Hern *v.* Nichols, 1 Salk. 289; Croft *v.* Alison, 4 B. & Ald. 590; Atlantic Co. *v.* Merch. Co. 10 Gray, 532. Howe *v.* Newmarch, 12 Allen, 49; Griswold *v.* Haven, 25 N. Y. 595; Smith *v.* Tracy, 36 N. Y. 79; Durst *v.* Barton, 47 N. Y. 167; Fox *v.* N. Lib. 3 W. & S. 103; Moore *v.* Sanborne, 2 Mich. 519; Evansville *v.* Baum, 26 Ind. 70. Supra, § 474–485; infra, § 611.

[2] Infra, § 543; Weed *v.* Panama R. R. 17 N. Y. 362; Milwaukee R. R. *v.* Finney, 10 Wisc. 388; Barrett *v.* Malden R. R. 3 Allen, 101.

[3] Supra, § 524.

[4] Noyes *v.* Loring, 55 Me. 408; Lang *v.* Colburn, 11 Mass. 97; Ballou *v.* Talbot, 16 Mass. 461; Jefts *v.* York, 4 Cush. 371; 10 Cush. 392; Bartlett *v.* Tucker, 104 Mass. 336; People *v.* Johnson, 12 Johnson's R. 292; M'Curdy *v.* Rogers, 21 Wisc. 197; Lander *v.* Castro, 43 Cal. 497; Campbell *v.* Hillman, 15 B. Monr. 508; Pewtress *v.* Austin, 2 Marsh. 217; R. *v.* Bulmer, L. & C. 476; 9 Cox C. C. 492; R. *v.* Archer, Dears. C. C. 449; 6 Cox C. C. 515; R. *v.* Crab, 11 Cox C. C. 85; Com. *v.* Drew, 19 Pick. 179; Com. *v.* Whitcomb, 107 Mass. 486.

[5] Cherry *v.* Bank of Australasia, L. R. 3 P. C. 24. See Eastwood *v.* Bain, 3 H. & N. 738; Edmunds *v.* Bushell, L. R. 1 Q. B. 97; Rashdall *v.* Ford, L. R. 2 Eq. 750.

[6] Cherry *v.* Bank, *ut supra.*

then the action fails.[1] And no action lies when the misrepresentation is simply a mistake of law.[2] Thus in England the exchequer chamber has ruled that an action will not lie against the chairman of a railway company, upon a promise by him that the company should do an act outside of its corporate power. "It is a promise," said the court, "that an act should be done contrary to the public law of the country, of which both parties are bound to take notice. The act is, therefore, illegal, and the promise that it should be done is a void promise."[3] Yet, in a much later case in the queen's bench,[4] two of the directors of a benefit building society were held liable to the plaintiff for damages for a breach of warranty of authority, they having received £70 as directors, on deposit, from the plaintiff, the company having no authority to receive money on deposit. It was said by Cockburn, C. J., that "it cannot be supposed that the plaintiff, on lending money to the society, did so with knowledge that the society had not authority to borrow; and it was not until she wanted her money back that she ascertained the real position of affairs, and is met by the defence that the society is not liable." Mr. Brice holds that "it is scarcely possible to reconcile this decision with Rashdall *v.* Ford, and Macgregor's case."[5] By Mellish, L. J., the ruling is explained on the ground that "their" (the directors') "power to borrow money depended upon whether they had made a rule to borrow money, because a benefit building society may receive money, at any rate to a certain amount on deposit, if it has a rule enabling it so to receive money."[6]

§ 542. *Agent obeying illegal orders cannot defend on account of agency.* — An agent who obeys an illegal command does so at his own risk, for as the right of the master over the servant exists only as to things lawful, as to things unlawful the servant is free to act, and, being free, becomes liable for the consequences

[1] Brice on Ultra Vires, 537; Wilson *v.* Miers, 10 C. B. N. S. 348.

[2] Beattie *v.* Lord Ebury, L. R. 7 Ch. 777; aff. in H. of Lords, cited Brice on Ultra Vires, 538; Ellis *v.* Colman, 25 Beav. 662; Rashdall *v.* Ford, L. R. 2 Eq. 750; in which case Sir W. Page Wood, V. C., said: "It seems to me impossible to extend the principle of relief arising out of misrepresentation to a statement of law which turns out to be incorrect."

[3] Macgregor *v.* Dover R. R. 18 Q. B. 215.

[4] Richardson *v.* Williamson, L. R. 6 Q. B. 276.

[5] Brice on Ultra Vires, 543.

[6] L. R. 7 Ch. 801.

of his action.[1] Thus the defendant, in an action for false imprisonment cannot defend himself on the ground that in arresting he acted as agent for another party.[2] So an agent who has wrongfully obtained property cannot defend against the injured party on the ground that he acted only as agent, and has paid over the money to his principal.[3] So a cartman who, under the orders of another, takes goods and carries them off in his cart, under circumstances sufficient to put him on his inquiry, is liable equally with his employer to an action for trover.[4]

§ 543. *An agent who is bound by contract to do a particular thing is liable for the trespasses, frauds, and misfeasances of his ancillary agents in the doing of such thing; and this is applicable to carriers.* — Such an agent receives the fruits of the contract, or at least the confidence of the other contracting party; and with this he must take the corresponding burden. Independently of this he may be regarded as guaranteeing that the thing shall be well done; and he is liable for torts, which he could have prevented, on the other contracting party. Common carriers, for instance, contract that their passengers shall have good treatment as well as transportation; and the carrier is therefore liable for any injuries, malicious as well as non-malicious, which may be inflicted on the passenger by persons under the carrier's control.[5] A carrier, consequently, is liable for the wilful insults offered by

[1] See supra, § 25; Smith's Mast. & Serv. 339; Perkins *v.* Smith, Sayer, 40; 1 Wils. 328; Cork & Yonghal R. R. in re, L. R. 4 Ch. 748; Smith *v.* Stotesbury, 1 W. Bl. 204; 2 Bur. 924; Forbes *v.* Cochran, 2 B. & C. 448; Merryweather *v.* Nixan, 8 T. R. 186; 2 Smith's L. C. 481; Stephens *v.* Elwell, 4 M. & S. 259; Greenway *v.* Fisher, 1 C. & P. 190; Bennett *v.* Hayes, 5 Hurl. & N. 391; Richardson *v.* Kimball, 28 Me. 463; Blanchard *v.* Russell, 13 Mass. 1; McIntyre *v.* Parks, 3 Metc. 207; Brown *v.* Howard, 14 Johns. 118; Wright *v.* Wilcox, 19 Wend. 343; Ford *v.* Williams, 24 N. Y. 359; Johnson *v.* Barber, 5 Gilm. 425; Wright *v.* Eaton, 7 Wisc. 595; Gaines *v.* Briggs, 4 Eng. Ark. 46; Perminter *v.* Kelly, 18 Ala. 716; Burnap *v.* Marsh, 13 Ill. 537; Scruggs *v.* Davis, 5 Sneed, 265; Luttrell *v.* Hazen, 3 Sneed, 20; Childress *v.* Ford, 1 Heisk. 466; Elmore *v.* Brooks, 6 Heisk. 45.

[2] Josselyn *v.* M'Allister, 22 Mich. 300.

[3] Wright *v.* Eaton, 7 Wisc. 595.

[4] Thorp *v.* Burling, 11 Johns. 285.

[5] Chamberlain *v.* Chandler, 3 Mason, 242; Nieto *v.* Clark, 1 Cliff. 145; Simmons *v.* Steamboat Co. 97 Mass. 361; 100 Mass. 34; Ramsden *v.* R. R. 104 Mass. 117; Bryant *v.* Rich, 106 Mass. 180; Goddard *v.* R. R. 57 Me. 202; Pittsburg, Fort Wayne, &c. R. R. *v.* Hinds, 53 Penn. St. 512; Balt. & O. R. *v.* Blocher, 27 Md. 277; New Orleans R. R. *v.* Allbritton, 38 Miss. 242; Shevley *v.* Billings, 8 Bush, 147.

his subordinates to passengers,[1] and female passengers are in this way especially protected.[2] So a bailee contracting to safely keep money is liable even for the felonies of his servants, in respect to such deposits.[3] So, where a bank undertakes to act as transfer agent of another bank, it is liable for its cashier's frauds in the management of the agency.[4] That the agent is liable to his master for a breach of contract in doing the tortious act, is no defence to an action brought against the agent by a third person for injury by such act.[5]

§ 544. *So, also, to persons undertaking to collect debts.* — So, also, is it with persons undertaking to collect debts. Such persons are liable, if they engage to superintend the collection, not only for negligence in the selection of sub-agents (*culpa in eligendo*), but for the negligence of sub-agents. In a Pennsylvania case on this point, the defendants had a "mercantile agency" in Pittsburg, and the plaintiffs delivered acceptances at defendants' office, payable in Memphis, and took a receipt for them "for collection," signed in defendants' name, from a person acting in their business. Two years afterwards a person from defendants' office obtained from plaintiffs a power of attorney to enable defendants to collect the money, which defendants sent to their agent in Memphis. The defendants denied that they received the drafts for *collection*. It was ruled by the supreme court that by giving the receipt "for collection" the defendants undertook themselves to *collect*, not merely to remit for collection to some responsible attorney. The evidence being that the defendants had agents in different parts of the country, and that one of them collected the money and failed to pay it over; it was held that the defendants having given a receipt "for collection" were liable for collections made by their agents, unless they expressly limited their liability.[6] But where the agent does not contract to

[1] Seymour *v.* Greenwood, 7 H. & N. 355; Bayley *v.* R. R. L. R. 7 C. P. 415; Goddard *v.* R. R. 57 Me. 202; Weed *v.* R. R. 17 N. Y. 362; Day *v.* Owen, 5 Mich. 520; Craker *v.* R. R. 36 Wisc. 657.

[2] Craker *v.* R. R. 36 Wisc. 659; Nieto *v.* Clark, 1 Clif. 145; Chamberlain *v.* Chandler, 3 Mas. 242; Com. *v.* Power, 7 Metc. 596.

[3] Ray *v.* Bank, 10 Bush, 344; Taber *v.* Parrott, 2 Gall. 565; Clark *v.* Bank, 17 Penn. St. 222.

[4] Bank of Ky. *v.* Schuylkill Bk. 1 Parsons Eq. Ca. 226.

[5] Lane *v.* Cotton, 12 Mod. 488; Bell *v.* Josselyn, 3 Gray, 309; New Yk. Tel. Co. *v.* Dryburg, 35 Penn. St. 298; Bigelow's Cases on Torts, 619.

[6] Bradstreet *v.* Everson, 72 Penn. St. 124.

Agnew, J.: "It is argued, not-

collect, but simply to put in the course of collection, then he is liable only for *culpa in eligendo*.[1]

withstanding the express receipt 'for collection,' that the defendants did not undertake for themselves to collect, but only to remit to a proper and responsible attorney, and made themselves liable only for diligence in correspondence, and giving the necessary information to the plaintiffs; or, in briefer terms, that the attorney in Memphis was not their agent for the collection, but that of the plaintiffs only. The current of decision, however, is otherwise as to attorneys at law sending claims to correspondents for collection, and the reasons for applying the same rule to collection agencies are even stronger. They have their selected agents in every part of the country. From the nature of such ramified institutions we must conclude that the public impression will be, that the agency invited customers on the very ground of its facilities for making distant collections. It must be presumed from its business connections at remote points, and its knowledge of the agents chosen, the agency intends to undertake the performance of the service which the individual customer is unable to perform for himself. There is good reason, therefore, to hold that such an agency is liable for collections made by its own agents, when it undertakes the collection by the express terms of the receipt. If it does not so intend, it has it in its power to limit responsibility by the terms of the receipt. An example of this limited liability is found in the case of Bullitt *v.* Baird, decided at Philadelphia in 1870, the only case in this state upon the subject of such agencies. There the receipt read, 'For collection according to our direction, and proceeds, when received by us, to be paid over to King & Baird.' Across the face of the receipt was printed these words: 'N. B. The owner of the within mentioned taking all the risks of the mail, of losses by failure of agents to remit, and also of losses by reason of insurrection or war.' The limitation of the liability of Bullitt & Fairhorn, by Mr. Bullitt, himself a good lawyer, is evidence of his belief that a greater liability would arise without the restriction.

"Recurring to the analogy of attorneys at law, the first point to be considered is the interpretation given by the courts to the terms of a receipt 'for collection.' In our own state we have several decisions in point. In Riddle *v.* Hoffman's Ex'r, 3 Penna. Rep. 224, Riddle, an attorney in Franklin County, gave a receipt in these words: 'Lodged in my hands a judgment bill granted by Henry H. Morwitz to Henry Hoffman, for the sum of $1,200, due with interest since the 15th of May, 1811, which is entered up in Bedford County, which I am to have recovered if it can be accomplished.' Riddle sent this bill to his brother, a practising lawyer in Bedford. The money was made by the sheriff, but by the neglect of the Bedford Riddle was not received from the sheriff, who became insolvent, and the money was thus lost. Hoffman sued the Franklin County Riddle on his receipt and recovered. On a writ of error it was contended that the words of the receipt, 'which I am to have recovered if it can be accomplished,' imported only a limited undertaking to have it collected by another, and

[1] Ibid.

§ 545. *Agent liable for negligence of immediate subaltern but not of ancillary agent.* — This topic has been already considered.[1]

not to collect it himself. But this court held that the receipt contained an express and positive undertaking for the collection of the money if practicable, and not merely for the employment of another to that end; and that the defendant was bound by every principle of moral and legal obligation to make good the collection of the judgment by the application of reasonable diligence, skill, and attention.

"The next case is Cox *v.* Livingston, 2 W. & S. 103. This was the receipt: 'Received of Mr. Thos. Cox, of Lancaster, Pa., *for collection*, a note drawn in his favor by Mr. Dubbs, calling for $497.65, payable three months after date.' The note was left with an instruction to bring suit. The receipt was dated August 30, 1837, and Livingston died in January following, without having brought suit. Dubbs became insolvent. It was held that Livingston was liable for the collection, though only two terms intervened between the receipt and his death.

"Krause *v.* Dorrance, 10 Barr, 462, was assumpsit against two attorneys for money collected and not paid by another attorney, to whom they sent their note for collection. The liability of the original attorneys for the collection was admitted, but the point was made and succeeded, that a demand before suit was necessary. Rogers, J., says expressly they were liable for the acts of the agent whom they employed, but being without fault themselves, a demand was necessary before a resort to an action.

"In Rhines *v.* Evans, 16 P. F. Smith, 192, the receipt was: 'Received for collection of A. Rhines one note on Lukens & Beeson, of Rochester, dated October 30, 1857, for $365.' The liability of Evans, the attorney, was conceded, and the question was on the statute of limitations, and it was held the action was barred by the lapse of seven years and five months from the date of the receipt.

"These cases show the understanding of the bench and bar of this state upon a receipt of claims for collection. It imports an undertaking by the attorney himself to collect, and not merely that he receives it for transmission to another for collection, for whose negligence he is not to be responsible. He is therefore liable by the very terms of his receipt for the negligence of the distant attorney, who is his agent, and he cannot shift responsibility from himself upon his client. There is no hardship in this, for it is in his power to limit his responsibility by the terms of his receipt, when he knows he must employ another to make the collection. Bullitt *v.* Baird, supra.

"We find cases in other states holding the same doctrine. In Lewis & Wallace *v.* Peck & Clark, 10 Alabama Rep. 142, both firms were attorneys. The defendants gave their receipt to the plaintiffs for certain notes for collection, and after collecting the money transmitted it to the payees in the notes instead of the attorneys who had employed them, the payees having, however, indorsed the notes. Held, that Peck & Clark were liable to their immediate principals, the plaintiffs, there being no evidence that the payees had given them notice not to pay over to Lewis & Wallace, the original attorneys. This is a direct recognition of the liability of the

[1] Supra, § 276–9, 538.

§ 546. *Where agent and principal are severally liable for tort they may be joined in the same suit.* — We have already observed that where the agent acts freely within the range of his mandate, he is personally liable for his tort. It does not follow, however, that this relieves the principal. On the contrary, the principal, and all others concerned in the instigation or direction of the tort, may be made liable for its consequences either separately or in the same suit.[1] On torts founded on contract it has been held that the plaintiff may be met by a plea in abatement if he omit any defendant, or by a nonsuit if he join too many;[2] but the first point is one which it is unlikely defendants would make, and the second, in most jurisdictions, may be cured by amendment.

§ 547. *A public ministerial officer liable for injuries worked by*

collecting attorney to the transmitting attorney. The case of Pollard *v.* Rowland, 2 Blackford, Ind. Rep. 22, is more directly in point. Rowland received from Pollard claims for collection, and sent them to Stephen, an attorney in another county. Stephen obtained judgment, and collected the money. Held, that Rowland was accountable to Pollard for the acts of Stephen to the same extent that Stephen was, and could make no defence that Stephen could not; and that Rowland was liable to Pollard for the money. Cummins *v.* McLain et al. 2 Pike, Ark. Rep. 402, was a case nearly similar to the Pennsylvania case of Krause *v.* Dorrance, supra. The attorney sent the claim to another attorney at a distance, and was held liable, but for the omission of the plaintiff to make a demand, he failed to recover. The court say the attorney is liable for the acts of the attorney he employs. In a Mississippi case, two lawyers, Wilkinson and Willison, received of plaintiff a claim for collection, and brought suit and obtained judgment. They dissolved partnership, Wilkinson retiring from the practice; and Willison took another partner, Jennings, who received the money from the sheriff. In a suit against Wilkinson, as surviving partner of Willison, he was held liable for the receipt of the money by Jennings. Wilkinson *v.* Griswold, 12 Smedes & Mar. Rep. 669.

"In view of these reasons and authorities, we hold that a collecting agency, such as the defendants have been held to be, receiving and remitting a claim to their attorney, who collects the money and fails to pay it over, is liable for his neglect." Bradstreet *v.* Everson, 72 Penn. St. 133.

[1] Wilson *v.* Peto, 6 Moore, 47; Burrows *v.* Gas Co. L. R. 5 Ex. 67; *S. C.* L. R. 7 Ex. 96; Hewett *v.* Swift, 3 Allen, 420; Gillett *v.* R. R. 8 Allen, 560; Bartlett *v.* Gas Co. 117 Mass. 633; Newbury *v.* Lee, 3 Hill N. Y. 523; Ford *v.* Williams, 24 N. Y. 359; Phelps *v.* Wait, 30 N. Y. 78; Livingston *v.* Bishop, 1 Johns. R. 290; Carman *v.* R. R. 4 Oh. 399; Severin *v.* Eddy, 52 Ill. 189; Guerry *v.* Keston, 2 Rich. 507. See Harriman *v.* Stowe, 57 Mo. 93; Lewis *v.* State, 21 Ark. 209. See more fully, § 474–488.

[2] Cabell *v.* Vaughan, 1 Wms. Saund. 291, f.

his personal negligence. — An individual who has suffered harm from the negligence of a ministerial officer, within the range of the latter's official duty, may recover compensatory damages from the officer.[1] Nor in such case is it necessary to prove malice.[2]

§ 548. *Judicial* officers, however, are not thus liable.[3] And as to ministerial officers, special damage to an individual is necessary to sustain such suit. Loss of mere contingent profits is not enough.[4] The subalterns of a public officer are directly liable to the persons whom they may injure.[5] The distinctive law in this respect as to postmasters, sheriffs, and public receivers, is elsewhere discussed.[6]

§ 549. *Public officers liable to individuals for malicious torts.* — A public officer cannot use his office for the malicious injury of others. If he do, he is liable to indictment at common law, and to private suit for special injury incurred by individuals through such misconduct on his part.[7]

§ 550. *Public officer not generally liable for negligence of subaltern.* — To this rule there are exceptions in cases such as those of sheriffs and constables, in which the policy of the law is to make the superior officer responsible, within a specific range, for the action of his inferior.[8] So a collector is personally liable for

[1] Whart. on Neg. § 285; Burnett *v.* Lynch, 5 B. & C. 589; Farrant *v.* Barnes, 11 C. B. (N. S.) 655; Leader *v.* Moxton, 3 Wils. 461; *S. C.* 2 W. Bl. 924; Kendall *v.* Stokes, 3 How. 87; Tyler *v.* Alfred, 38 Me. 530; Nowell *v.* Wright, 3 Allen, 166; Bartlett *v.* Crozier, 15 Johns. 250; Adsit *v.* Brady, 4 Hill, 630; Robinson *v.* Chamberlain, 34 N. Y. 389; Hover *v.* Barkhoff, 44 N. Y. 113. See Moore *v.* Pye, 10 Kans. 247.

[2] Brasyer *v.* Maclean, 33 L. T. (N. S.) 1. The assignee of a judgment intrusted the plaintiff of record in the suit in which it was recovered with the execution, for the purpose of having it extended upon the debtor's land, and paying the expenses of the levy. The agent having the execution in his custody delivered it to a deputy sheriff, who made a levy, and then, by direction of the judgment plaintiff, handed the execution to an attorney, who promised to see that it was seasonably recorded, but failed to do so; held, that the officer and his principal, the sheriff, were not liable for neglect, in not procuring the record to be made within three months after the extent. Thompson *v.* Goding, 63 Me. 425.

[3] Whart. on Neg. § 286.

[4] Butler *v.* King, 19 Johns. 223; Bank *v.* Mott, 17 Wend. 556.

[5] Harris *v.* Baker, 4 M. & S. 27; Hall *v.* Smith, 2 Bing. 156; Jones *v.* Bird, 5 B. & Ald. 837.

[6] Whart. on Neg. § 289–297.

[7] See Whart. Cr. L. 7th ed. § 1288, 2517, 2534; Story on Agency, § 308, 320; Fitzgerald *v.* Burrill, 106 Mass. 446; Leader *v.* Moxton, 3 Wils. 446; *S. C.* 2 W. Bl. 924.

[8] See Whart. on Neg. § 289.

the illegal acts of a deputy in exacting compensation not authorized by law.[1] But where this policy does not apply, a superior public officer, if liable at all for the negligence of an inferior officer, who is not a personal servant, is liable in principle only for *culpa in eligendo*.[2] Thus a superior postmaster is held not to be liable for the negligence of a deputy.[3] It has been held that the trustees of public works (whether controlled by the state or by a corporation) are not liable for the torts of subalterns, supposing there be not *culpa in eligendo*.[4] But the better opinion is that such trustees, even though their services be gratuitous, are liable in all cases in which private persons, *mutatis mutandis*, would be liable.[5]

[1] Ogden *v.* Maxwell, 3 Blatchf. C. C. R. 319.

[2] Whart. on Neg. § 288; Lane *v.* Cotton, 1 Salk. 17; 1 Ld. Raym. 646; Nicholson *v.* Mauncey, 15 East, 384; Mersey Docks *v.* Gibbs, L. R. 1 H. L. 111; Hall *v.* Smith, 2 Bing. 156; Canterbury's case, 1 Phil. 306; Scott *v.* Manchester, 1 H. & N. 61; Bayley *v.* Mayor, 3 Hill, 531; Duncan *v.* Findlater, 6 Cl. & F. 903; McMillen *v.* Eastman, 4 Mass. 378.

[3] Rouning *v.* Goodchild, 3 Wilson, 443; *S. C.* 5 Burr. 2715; Whitfield *v.* Le Despencer, Cowp. 765; Franklin *v.* Low, 1 Johns. R. 396; Wiggins *v.* Hathaway, 6 Barb. 632; Schroyer *v.* Lynch, 8 Watts, 453; Richmond *v.* Long, 17 Grat. 375. As to mail contractors, see Sawyer *v.* Corse, 19 Grat. 230; Whart. on Neg. § 296.

[4] Hall *v.* Smith, 2 Bing. 156; Harris *v.* Baker, 4 M. & Sel. 27; Jones *v.* Bird, 5 B. & Ald. 837; Findlater *v.* Duncan, 6 Cl. & F. 903; McMillan *v.* Eastman, 4 Mass. 378; Metcalf *v.* Hetherington, 5 H. & N. 719; Franklin *v.* Low, 1 Johns. R. 396; Holliday *v.* St. Leonards, 11 C. B. N. S. 192.

[5] Clothier *v.* Webster, 12 C. B. (N. S.) 790; Mersey Docks *v.* Gibbs, L. R. 1 H. L. 93; Whart. on Neg. § 176, 256, 272, 274, 279, 288.

CHAPTER XII.

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I. WHO MAY BE.

§ 555. *Term "attorney at law" to be regarded as comprehending all grades of practicing lawyers.* — In England the term "attorney" is technically restricted so as to exclude not only solicitors in chancery, and proctors in admiralty, but counsel in proceedings at common law. In this country there are no cases of counsellors at law who are not admitted to practise as attorneys at law; and so far as concerns the leading principles hereafter to be announced, solicitors and proctors are governed by the same rule as attorneys. The term attorney at law, therefore, will be used as a *nomen generalissimum*, to cover all cases of persons, experts in law, appointed to represent others in litigation.[1] An attorney at law, in this sense, is an officer authorized to represent parties in courts of public justice. His quali-

[1] See Ingraham *v.* Richardson, 2 La. An. 839; Trowbridge *v.* Weir, 6 La. An. 706.

fications are determined by the state, and are limited by local legislation.

§ 556. *Distinctive views of Roman law.* — According to the Roman law, the work undertaken by the attorney is the direction of a suit at law, in which the mandant (or locator, as in one aspect we may view him) is either plaintiff or defendant. When the attorney receives his power to act, the contract is complete. A written power is only a mode of proving authority, so far as the attorney himself is concerned; but so far as concerns the opposite party, such power of attorney may be called for as essential to the right of the attorney to appear in the suit.[1] The contract is complete, either on the reception of an *honorarium* in advance by the attorney, or upon his acceptance of the power, he reserving the right to charge such fees as may be established by law. In the last case, payment is made for each particular service rendered. In this sense the service may be treated as subject to the law of *locatio conductio operis.* The attorney is entitled, in addition to his *merces*, to recover any costs or other necessary expenses advanced by him; and a mandate from his client to himself is always assumed for this purpose.

§ 557. *To constitute an attorney at law admission and permission to practise are essential.* — The office of attorney at law is public, so far as concerns the necessity of a license from the state for its exercise, and the duty imposed upon the attorney of subserving the interests of public justice in the mode pointed out by his oath of admission.[2] Due admission to practise, according to the *lex fori*, is essential to enable a person to practise either as attorney, solicitor, or counsel, in a particular court.[3]

[1] Dankwardt's Essay on Locatio Conductio operis, in 12 Jahrbücher für Privatrecht, 367.

[2] See Waters *v.* Whittemore, 22 Barb. 505; Austin's case, 5 Rawle, 191; Byrne *v.* Stewart, 3 Dessaus. 466.

[3] Hobby *v.* Smith, 1 Cow. 588; Seymour *v.* Ellison, 2 Cow. 13; Robb *v.* Smith, 4 Ill. 46; Hallowell's case, 3 Dall. 410; State *v.* Garesche, 36 Mo. 256; Champion *v.* State, 3 Cold. 111; McKoan *v.* Devries, 3 Barb. 196; Hunter, ex parte, 2 W. Va. 122; Thorn *v.* Lawson, 6 Tex. 240; Rader *v.* Snyder, 3 W. Va. 414.

A client is not bound to ascertain whether a party ostensibly acting as attorney, whom he employs in that capacity, is duly qualified; Hilleary *v.* Hungate, 3 Dowl. 62; and proceedings taken by practitioners, whose qualification is defective, have repeatedly been held to be neither void nor even irregular on that account. Thus the courts have refused to set aside a judgment obtained by an uncertificated (see Smith *v.* Wilson, 1 Dowl.

An attorney may be suspended or removed from office by a rule to show cause why he should not be disbarred, or by proceedings in the nature of attachment in contempt;[1] but without regular process, the presenting of specific and pertinent charges, and judgment entered on such process against him, he cannot be so suspended or removed.[2]

§ 558. *Bound to integrity and honor.* — An attorney, as we will see,[3] is not only bound to avoid gross misconduct and blunders,[4] but to conduct himself with integrity and professional decorum. He is justified, for instance, in refusing to follow his client's instructions to do what is merely designed for delay.[5] It has been even ruled that entering a false plea will subject him to personal penalties and the costs of the proceeding.[6] So he should scrupulously refrain from attempting to influence the opposite party in the absence of his own professional adviser, for any admissions obtained in that way will be rejected or rendered nugatory by the court.[7] And *a fortiori* is it culpable for him to in-

545; Anon. *v.* Sexton, Ibid. 180) attorney, or one who, having been uncertificated for a whole year, has renewed his certificate without leave of the court; Hilleary *v.* Hungate, 3 Dowl. 56; or to quash a *habeas corpus;* Glynn *v.* Hutchinson, 3 Dowl. 529; or a rule to set aside proceedings sued out by an uncertificated attorney; Harding *v.* Purkess, 2 Marsh. 228; or cancel a bail bond, because the *capias* was sued out by such a person; Welch *v.* Pribble, 1 D. & R. 215; or to deprive the client of his costs in cases of this kind; Reader *v.* Bloom, 3 Bingh. 9; 10 Moore, 261. See Pulling on Attorneys, *in loco.*

[1] Whart. Cr. Law, 7th ed. § 3430; King, in re, 8 Q. B. 129; Palmer, in re, 1 Harr. & W. 55; Townley, ex parte, 3 Dowl. 40; Grant, ex parte, 3 Dowl. 320; Mills, ex parte, 1 Mich. 392; Percy, in re, 36 N. Y. 651; Paul *v.* Purcell, 1 Browne (Pa.), 348; U. S. *v.* Porter, 2 Cranch, 60; Perry *v.* State, 3 Iowa, 550; Rice *v.* Com. 18 B. Monr. 472; Brown, ex parte, 2 Miss. 303; State *v.* Holding, 1 McCord (S. C.), 379; Smith *v.* State, 1 Yerg. 228; Baker *v.* Com. 10 Bush, 592; Gehrke *v.* Jod, 59 Mo. 522.

[2] Withers *v.* State, 36 Ala. 252; State *v.* Start, 7 Iowa, 499; State *v.* Watkins, 3 Mo. 388; Beene *v.* State, 22 Ark. 149; Bryant, ex parte, 24 N. H. 149; Com. *v.* Newton, 1 Grant, 453; Fisher's case, 6 Leigh, 619; Saxton *v.* Stowell, 11 Paige, 526; People *v.* Harvey, 41 Ill. 277. For cases in which no sufficient ground for disbarring was laid, see Fletcher *v.* Dangerfield, 20 Cal. 427; State *v.* Kirke, 12 Fla. 278; Perry *v.* State, 3 Iowa, 550; State *v.* Foreman, 3 Mo. 602; State *v.* Chapman, 11 Ohio, 430; Jackson *v.* State, 21 Tex. 668.

[3] See infra, § 596.

[4] See Jones *v.* E. of Bath, 4 Mod. 367.

[5] See Johnston *v.* Alston, 1 Camp. 176.

[6] See Vincent *v.* Groom, 1 Chit. Rep. 182.

[7] See In re Oliver, 4 Nev. & M. 471; 1 Harr. & W. 79, *S. C.* See supra, § 245.

fluence any of the witnesses, or suppress any evidence in the cause.[1]

II. HOW THE RELATIONSHIP OF CLIENT AND ATTORNEY MAY BE CONSTITUTED.

§ 559. *Formal authorization is by letter or warrant of attorney.* — The technical mode of constituting the relationship of client and attorney is by a power or warrant of attorney issuing from the client to the attorney. In ordinary practice, however, this formality is rarely observed.[2] A client asking advice is never called upon to create this technical relationship between himself and the counsel whom he desires to consult; and among reputable members of the bar, the entering of an appearance by an attorney is accepted as an adequate voucher of his right and power to appear.[3] Two contingencies, however, exist, in which it may be desirable to have produced the voucher on which the attorney acts; *first*, it may be important to determine who is the actual party who is represented; *secondly*, it may be possible

[1] It is the duty and policy of solicitors, therefore, in a chancery suit, to avoid unnecessary proceedings, and not only to avoid dilatory conduct on their own part, but to consult the interests of their clients by generally expediting the proceedings, and enforcing expedition in the performance of their several duties by the various officers, receivers, and parties concerned. The solicitor, moreover, should avoid being made the instrument of the bad passions of his employer, both with respect to harsh and scandalous or unjustifiable proceedings against the adverse party; see Bishop *v.* Willis, cited 5 Beav. 83, note, where a solicitor was committed and ordered to pay the costs for scandalous matter contained in an answer prepared by him; or a stranger; see Williams *v.* Douglas, 5 Beav. 83; or useless litigation, which cannot be beneficial to any party in the result; see Ottley *v.* Gilby, 8 Beav. 602; for the solicitor is not regarded as the mere *agent* of his client, but a responsible officer, who may be made liable for disregarding the rights and interests of others; Ezart *v.* Lister, 5 Beav. 585; 12 L. J. (N. S.) 10, Ch.; where the master of the rolls remarked: "There is no doubt of the principle, that if a solicitor, knowing that money which is in court belongs to one person, presents a petition in the name of another, and obtains payment, he is personally chargeable with the amount. I go further: if he has not the knowledge of the fact, but has knowledge of circumstances, which, if duly considered, would lead to a knowledge of the fact, he must be made personally answerable for that loss, which his want of due consideration has occasioned." See Pulling on Attorneys, *in loco*, and infra, § 585.

[2] See Leslie *v.* Fischer, 62 Ill. 118. Parties, who appear for themselves, may appoint attorneys at any stage of the proceeding. Kerrison *v.* Wallingborough, 5 Dowl. 565.

[3] See Wright *v.* Castle, 3 Meriv. 12; Buckle *v.* Roach, 1 Ch. 193; Anderson *v.* Watson, 3 C. & P. 214.

that attorneys, no matter how honorable, may misunderstand their client's instructions as to the particular procedure. In addition to these contingencies, the case may arise of an intermeddler officiously appearing whose interference it is important summarily to exclude. In view of these contingencies, it is well to keep in mind the caution of Lord Tenterden, that to take from the client a formal written authority is "better for the attorney, because it gets rid of all difficulty about proving his retainer; and it would also be better for some clients, as it would put them on their guard, and prevent them from being drawn into lawsuits without their express direction." [1]

[1] Owen *v.* Ord, 3 C. & P. 349. As to inferential authority being sufficient, see Dawson *v.* Lawley, 4 Esp. 65; Anderson *v.* Watson, 3 C. & P. 214; Crook *v.* Wright, R. & M. 278; Tabram *v.* Horn, 1 M. & R. 228; Cameron *v.* Baker, 1 C. & P. 268; Heywood *v.* Fiott, 8 C. & P. 59.

"The appointment of an attorney is strictly personal, and cannot be made by deputy, or be assumed from the mere relation of the parties, nor can an attorney appear for the tenant in possession in ejectment by order of the landlord; Doe dem. Cooke *v.* Roe, 1 Barnes, 39; 2 Sellon, 176; one executor cannot authorize an attorney to defend the other; 9 Edw. 3, c. 3; Elwell *v.* Quash, 1 Str. 20; Lepard *v.* Vernon, 2 Ves. & B. 54; Bellew *v.* Inchledon, 1 Roll. Abr. 929, pl. 8; Williams on Executors, 756, 1514; nor has one partner any implied authority to retain an attorney to appear and *defend;* Hambridge *v.* De la Crouee, 10 Jur. 1096; 8 L. T. 163; 16 L. J. C. P. 85; 3 C. B. Rep. 742; see M'Culloch *v.* Guetner, 1 Binn. (N. S.) Rep. 214; for the firm, though the contrary rule prevails as to *suing* a debtor to the firm, &c.; see Harrison *v.* Jackson, 7 T. R. 207; Collett *v.* Hubbard, 2 P. Coop. 94; but of course the acquiescence of a party in the retainer of an attorney on his behalf is equivalent to a direct retainer, *i. e.* where a son knows of, and does not disprove of, the retainer by his father of an attorney to act on his behalf; Cameron *v.* Baker, 1 Car. & P. 268; and where a party is legally entitled to sue in the name of another, he is *de facto* empowered to appoint an attorney to do so. See Pickford *v.* Ewington, 4 Dowl. 453, P. C." Pulling on Attys. *in loco.*

It was formerly necessary, not only that the appearance by attorney, but the authority or warrant of attorney itself, should appear upon the pleadings. See Gilb. Com. Pl. The entry of the warrant of attorney, though in course of time it came to be a mere form, was at first absolutely necessary to inform the court whether the party appeared in person or not. Previous to the Stat. of Westminster 2, c. 10, the *dedimus potestatem*, which was then neeessary to enable a party to appear by attorney, was required to be entered with the officer, afterward called the clerk of the warrants, and by him to be enrolled in the court. The same course was afterward adopted with the warrant of attorney; and if this were not entered, the common law presumption prevailed, that the party appeared in person; Ibid.; an omission or mistake in which, it has been stated, was ground of error at common law; Com. Dig. Amendment, E. 1, and see

§ 560. *Distinctive views of the Roman law.* — The Roman law authorized persons standing in particular intimate relations to an absent principal to appear for and represent such principal, when *cautio rati* was given, in a suit in which such principal was actor, without an express power of attorney. From such attorneys a power of attorney could not be subsequently exacted, as the opposite party was made secure by the *cautio rati.* So far as concerned defendants, no question existed but that any person might appear who gave the *cautio rati.* "Sed et si forte ex liberis vel parentibus aliquis interveniat vel vir uxoris nomine, a quibus mandatum non exigitur, an committatur stipulatio, quaeritur: magisque erit, ne committi debeat, nisi fuerit ei mandatum vel ratum habitum: quod enim eis agere permittitur edicto praetoris, non facit eos procuratores."[1] "Sed et hae personae procuratorum debebunt defendere, quibus sine mandatu agere licet: ut puta liberi, licet sint in potestate, item parentes et fratres, et adfines, et liberti."[2] "In his autem personis, in quibus mandatum non exigimus, dicendum est, si forte evidens sit contra voluntatem eos experiri eorum pro quibus interveniunt, debere eos repelli. Ergo non exigimus ut habeant voluntatem vel mandatum, sed ne contraria voluntas probetur: quamvis de rato offerant cautionem."[3] On this is based the *mandatum praesumtum* of the later jurists.

§ 561. The German Code recognizes this form of mandate, with the reservation that when practicable a power of attorney may be required.

As presumed attorneys, who, in cases where delay would be mischievous, are not required to produce powers of appointment, the Roman law enumerates: —

Descendants and ascendants in direct line;[4] husband and wife;[5] brothers, though even of half blood, or illegitimate;[6]

41 Edw. 3, Ibid.; though of this there appears to be some doubt; see Coke *v.* Allen, 8 Mod. 77, and Calverley *v.* Bieseley, Dy. 180 *a;* Killegrew *v.* Trewynard, Ibid. 225 *a*, 230 *a*, 363 *a;* 41 Edw. 3 Ibid., and see Wood *v.* Plant, 1 Taunt. 45. It would seem that the appearance of a party by attorney, instead of in person, as the common law requires, will now in every case be judicially noticed by the mere formal statement at the commencement of the pleadings already alluded to. Ibid.

[1] L. 3, § 3. D. jud. sol. XLVI. 7.
[2] L. 35, pr. D. de proc. III. 3.
[3] L. 40, § 4. D. de proc. III. 3.
[4] L. 35, pr. D de proc. III. 3.
[5] L. 3, § 3. D. jud. sol. XLVI. 7.
[6] L. 35, pr. D. de proc. III. 3.

nephews and uncles;[1] brothers-in-law, so long as the matrimonial connection lasts;[2] co-plaintiffs in the same common interest; co-parties in a particular process in reference to the subject-matter of the suit;[3] stewards, book-keepers, and secretaries, in reference to business intrusted to them by their master.[4]

§ 562. The principal who is implicated by the acts of an agent of this class must be notified at once by the agent of the procedure, which the opposite party has a right to require; and the principal who, without unnecessary delay, repudiates such agency, is not bound by the acts of the agent, however intimate may be the relations between the two.[5]

§ 563. *Appearance of attorney in suit presumed to be authorized.* — An appearance in a suit by an attorney of the proper court is presumed to be authorized.[6] The opposite party, however, may meet the question *in limine* by calling on the attorney to produce his warrant of attorney.[7] For this motion, due cause must be shown.[8]

§ 564. But in some jurisdictions it will be *primâ facie* sufficient if the attorney declares that he was duly employed by the plaintiff,[9] or that he was the party's general legal representative.[10] Nor will the court arrest proceedings if satisfied by parol evidence of the attorney's authority.[11]

[1] Glück, Th. V. s. 228; but see Koch, III. 544.

[2] L. 35, pr. L. 43. D. de proc. III. 3. L. 3, § 1. D. de proc. III. 1.

[3] L. 2. C. de consort. ejus. lit. III. 40.

[4] Koch, III. 544.

[5] L. 40, § 3. D. de proc. III. 3.

[6] Hamilton *v.* Wright, 37 N. Y. 502; Proprietors *v.* Bishop, 2 Vt. 231; Osborn *v.* Bk. U. S. 9 Wheat. 231; Post *v.* Haight, 1 How. (N. Y.) Pr. 171; 2 Ibid. 32; Thomas *v.* Steele, 22 Wisc. 207; Pillsbury *v.* Dugan, 9 Ohio, 117; Leslie *v.* Fischer, 62 Ill. 118; Wiggins *v.* Pippin, 2 Beav. 403; Emmens *v.* Elderton, 13 C. B. 495; 4 H. L. Ca. 624.

[7] Silkman *v.* Boiger, 4 E. D. Smith, 236; Standefer *v.* Dowlin, Hempst. 209; Lynch *v.* Com. 16 S. & R. 358; Campbell *v.* Galbreath, 5 Watts, 423; Gillespie's case, 3 Yerg. (Tenn.) 325; O'Flynn *v.* Eagle, 7 Mich. 306; McAlexander *v.* Wright, 3 T. B. Monr. 194; Clark *v.* Willett, 35 Cal. 534. See Knowlton *v.* Plantation No. 4, 14 Me. 20.

[8] Savery *v.* Savery, 8 Iowa, 217; Hellman *v.* Whennie, 3 Rich. S. C. 364; Barnes *v.* Profilet, 5 La. An. 117.

[9] Manchester Bk. *v.* Fellows, 28 N. H. 302; Farrington *v.* Wright, 1 Minn. 241; Field *v.* Proprietors, 1 Cush. 11; Bridgton *v.* Bennett, 23 Me. 420; Henck *v.* Todhunter, 7 Har. & J. 275; Hardin *v.* Ho-yo-po-nubby, 27 Miss. 567.

[10] Bogardus *v.* Livingston, 2 Hilt. (N. Y.) 236.

[11] Cartwell *v.* Manifee, 2 Ark. 355; Commis. *v.* Purdey, 36 Barb. 266; Boutlier *v.* Johnson, 2 Browne, Pa. 17; Allen *v.* Green, 1 Bailey, 448; West *v.* Houston, 3 Harr. (Del.) 15;

§ 565. *Unauthorized process may be set aside or proceedings stayed.* — Where it appears that process was issued by an attorney without authority, such process may be set aside on motion of the opposite party;[1] or the court will stay the proceedings, and order the attorney to pay the costs.[2] To such a rule the plaintiff should be made party.[3] The motion may emanate from the plaintiff himself.[4]

§ 566. *Unauthorized appearance may be collaterally impeached on proof of fraud or collusion.* — If, in defraud of the rights of a *bonâ fide* party, two nominal parties to a suit procure a judgment to be entered by means of a fraudulent unauthorized appearance, such judgment may be impeached collaterally, so far as concerns any persons tainted with knowledge or bound to inquire into the fraud.[5] It has been held by the supreme court of the United States that while the party against whom an unauthorized appearance has been entered, when sued on a record in which judgment has been entered against him on such attorney's appearance, may prove that the attorney had no authority to appear; yet he can do this only on a special plea, or on such plea as, under systems which do not follow the common law system of pleading, is the equivalent of a special plea.[6]

§ 567. *A defendant against whom judgment is taken in favor of innocent plaintiff upon an unauthorized appearance is bound*

Ninety Nine Plaintiffs *v.* Vanderbilt, 4 Duer, 632; Hirshfield *v.* Landman, 2 E. D. Smith, 208; Rogers *v.* Park, 4 Humph. 480; King of Spain *v.* Oliver, 2 Wash. 429; Bush *v.* Miller, 13 Barb. 481; Farm. & Mech. Bk. *v.* Troy Bk. 1 Dougl. (Mich.) 457. See, however, under North Carolina act, Day *v.* Adams, 63 N. C. 254.

[1] Frye *v.* Calhoun Co. 14 Ill. 132; Crichfield *v.* Porter, 3 Ohio, 518; Powell *v.* Spaulding, 3 Iowa, 443; Hess *v.* Cole, 23 N. J. L. (3 Zab.) 116; Handely *v.* Statelor, 6 Litt. (Ky.) 186; Boykin *v.* Holden, 6 La. An. 120.

[2] Hubbart *v.* Phillips, 2 D. & L. 707; 13 M. & W. 703. See Hammond *v.* Thorpe, 1 C., M. & R. 64; 2 D. P. C. 721.

[3] Thatcher *v.* D'Aguilar, 11 Exch. 436; Norton *v.* Cooper, 3 Sm. & G. 375; Jenkins *v.* Fereday, L. R. 7 C. P. 358.

[4] Reynolds *v.* Howell, L. R. 8 Q. B. 398.

[5] Beckley *v.* Newcomb, 24 N. H. 359; Mexico *v.* De Arangoix, 5 Duer, 643; Jackson *v.* Stewart, 6 Johns. 34; Henck *v.* Todhunter, 7 Har. & J. 275; Turner *v.* Carruthers, 17 Cal. 431; Hayes *v.* Shattuck, 21 Cal. 51; Dalton *v.* Dalton, 33 Ga. 243; Tally *v.* Reynolds, 1 Ark. 99; Williams *v.* Butler, 35 Ill. 544; Kent *v.* Richards, 3 Md. Ch. 392; Norris *v.* Douglass, 5 N. J. L. (2 South.) 817; Conrey *v.* Brenham, 1 La. An. 397; Bank Com. *v.* Bank of Buffalo, 6 Paige, 497; Fowler *v.* Morrill, 8 Tex. 153; Cox *v.* Hill, 3 Ohio, 411. See, however, Pillsbury *v.* Dugan, 9 Ohio, 117.

[6] Hill *v.* Mendenhall, 21 Wall. 453.

by such judgment if it is in any way attributable to his laches. — A party who has been guilty of no laches may repudiate the acts of a pretended unauthorized attorney.[1] Where, however, the adverse party has acquired rights by proceedings in the name of a party who denies the authority of the attorney, the proceedings, it has been ruled, will be permitted to stand, if the attorney is responsible, leaving the party injured to his remedy against the attorney.[2] The court, in a case of this kind, is to determine which of two innocent parties has been guilty of the greatest laches. The cases fall into two classes.

§ 568. *First where the defendant was served with process.* — In this case, the defendant who after being summoned permits an unauthorized attorney to enter an appearance in his name, or who, in other words, does not inquire as to who has appeared in the suit, is guilty of negligence which postpones him to an innocent plaintiff, who, relying on such appearance by a responsible attorney, enters judgment and takes title under such judg-

[1] Am. Ins. Co. *v.* Oakley, 9 Paige, 496; Legere *v.* Richard, 10 La. An. 669.

[2] Bayley *v* Buckland, 1 Ex. 1; Am. Ins. Co. *v.* Oakley, 9 Paige, 496; see Denton *v.* Noyes, 5 Johns. (N. Y.) 296; Blodget *v.* Conklin, 9 How. (N. Y.) Pr. 442; Cyphert *v.* McClune, 22 Penn. St. 195; Walworth *v.* Henderson, 9 La. An. 339. But it is otherwise if the attorney is irresponsible. Campbell *v.* Bristol, 19 Wend. 101; Bayley *v.* Buckland, *ut supra*.

The courts have said that where the proceedings in an action are, upon the face of them, regular, and the attorney who has acted in them for a party without authority is apparently solvent, the party will be left to his remedy against the attorney; but where the attorney is in *insolvent circumstances*, a different course will be pursued; Anon. 1 Salk. 86, 88; Anon. 6 Mod. 16; Stanhope *v.* Firmin, 3 Bing. N. C. 303; see Mudry *v.* Newman, 1 C., M. & R. 402; Hammond *v.* Thorpe, 1 C., M. & R. 64; and if the remedy against the attorney is in any way inadequate for the purposes of justice, as where the party is imprisoned by reason of the unauthorized act, the courts will immediately interfere; see Hambridge *v.* Dela Crouee, 3 C. B. 742; 4 D. & L. 400; Anon. 1 Chitty, 193 *a*. See *contra*, Alleley *v.* Colley, Cro. Jac. 694; as they will if the proceedings are taken in the name of a party not in existence; Hoskins *v.* Phillips, 16 L. J. (N. S.) 339. Q. B. This non-responsibility, or suspiciousness of the attorney, is, however, but a vague sort of criterion of safety to the defendant, and in England the court of exchequer laid down the rule, that the liability of a defendant for the acts of an attorney appearing for him without authority, whether solvent or not, should be confined to cases in which the course of the proceedings has given him notice of the action being brought against him, and he has not interfered. Bayley *v.* Buckland, 1 Exch. Rep. 1; 16 L. J. (N. S.) 204, Exch.; Norton *v.* Cowper, 3 Sm. & G. 375. See Pulling on Attorneys, *in loco*.

ment. On the other side, if the appearance was entered by an irresponsible attorney, the facts may be such as to require that the plaintiff should inquire whether such attorney, so irresponsible, could have been employed by the defendant.

§ 569. *Secondly where the defendant was not served with process.* — A plaintiff who, without giving the defendant legal notice by summons, accepts a waiver of summons and an agreement for an amicable action from an attorney, is bound to satisfy himself as to the attorney's authority; and if he omits so to satisfy himself, the loss must be on himself.[1]

§ 570. *Separate attorneys for joint parties represent such parties severally.* — When there are several defendants, and each appears by his own attorney, the proceedings on behalf of defendants must be conducted by their respective attorneys, and the attorney for one defendant cannot give notice of motion, or accept service of notice, or stipulate for another.[2]

§ 571. *Attorney appointed by agent represents not agent but principal.* — If one, as the agent of another, employ an attorney for such other, it does not establish the relation of attorney and client between the agent and attorney.[3] Such attorney represents the original principal.[4]

III. ATTORNEY'S DUTIES TO CLIENT.

§ 572. *Must notify client of any circumstances requiring action on his part.* — Whatever is important for the client to know, it is the duty of the attorney, if within his power, to report to the client. A failure to do so not only reduces his claim for compensation, but is a ground for an action against him by his client for negligence.[5]

[1] See argument of court in Bayley *v.* Buckland, 1 Ex. 1, cited supra, § 567.

[2] Hobbs *v.* Duff, 43 Cal. 485; Buckland *v.* Conway, 16 Mass. 366. Supra, § 141.

[3] Porter *v.* Peckham, 44 Cal. 204.

[4] Supra, § 277–307, 349; infra, § 579, 604.

[5] Hoopes *v.* Burnett, 26 Missis. 428; Jett *v.* Hempstead, 25 Ark. 462; Fox *v.* Cooper, 2 Q. B. 237. Supra, § 216, 302.

As to accounts. — The liability to render correct accounts, says Mr. Pulling, is one generally arising from the character of an agent; but in the peculiar case of attorneys it is even more imperative. See Lee, in re, L. R. 4 Ch. 43. This liability may be at any time enforced against an attorney; see cases collected in Pulling's Laws of Accounts, p. 41; for as it is deemed the duty of attorneys to apprise their clients of their true interests in transactions between them, and if an attorney appear to have taken advantage of his confidential position to impose upon the client in any pe-

§ 573. *Cannot accept interests conflicting with those of his client.* — Once engaged in a case, the attorney's loyalty in such case should be kept sacred. It may be a very small case, and the client may be entitled personally to but little consideration; but the lawyer, when once retained in the case, is bound to it by the highest considerations, and must bestow on it not only such care as high-toned and competent men under the circumstances are accustomed to bestow, but must permit no other interest to divert him from his allegiance. Any deviation in this respect, as we have seen, exposes him not only to an action for damages on the part of his client, but to discipline on the part of the court.[1] An attorney cannot act in the suit in which he is employed as commissioner to take testimony,[2] nor as solicitor for the receiver for whose appointment he moves,[3] nor as master to execute decree;[4] nor as administrator of an estate against which he is pressing a hostile claim.[5] At the same time it must be remembered that there are cases in which one party may agree to refer a matter to the opposite party's counsel as umpire. In such a case counsel may act as such at the same time for both parties to a transaction; and the fact that a contract is drawn by and under the advice of one, who at the time is counsel for one of the parties, when such fact is known to the other party, does not, in the absence of evidence of fraud or unfairness, invalidate or affect the contract.[6] But as a rule an attorney cannot represent both sides, even though proceedings be amicable;[7] nor can he,

cuniary transaction, a court of equity will open the accounts, though many years have elapsed and the vouchers have been given up. Lewis *v.* Morgan, 3 Anst. 769; 4 Dowl. 29; 5 Price, 42; 3 Y. & J. 230; see Brown *v.* Pring, 1 Ves. Sen. 407; Newman *v.* Payne, 2 Ves. Jun. 199; Rosse *v.* Sterling, 4 Dowl. 442; Drapers' Co. *v.* Davis, 2 Atk. 295; Abbey *v.* Petch, 1 Y. & Coll. C. C. 258.

[1] See supra, § 231, 242; Com. *v.* Gibbs, 4 Gray, 146; Price *v.* Grand Rapids R. R. 18 Ind. 139; Gaulden *v.* State, 11 Ga. 47; Wilson *v.* State, 16 Ind. 392; Herrick *v.* Catley, 1 Daly, 512; 30 How. Pr. 208; Sherwood *v.* R. R. 15 Barb. 650; Howel *v.* Baker, 4 Johns. Ch. 118; McArthur *v.* Fry, 10 Kansas, 231. See Johnson *v.* Marriott, 2 C. & M. 183; 2 D. P. C. 343; Grissell *v.* Peto, 2 M. & Scott, 2; 9 Bing. 1; Masonic Co. *v.* Nokes, 22 L. T. N. S. 503; Mare *v.* Lewis, 4 Ir. Rep. Eq. 219.

[2] Taylor *v.* Bank, 14 Ala. 633.

[3] Warren *v.* Sprague, 4 Edw. (N. Y.) 416.

[4] White *v.* Haffaker, 27 Ill. 349.

[5] Spinks *v.* Davis, 32 Missis. 152.

[6] Joslin *v.* Cowee, 56 N. Y. 626. Supra, § 56, 244; infra, § 655.

[7] Sherwood *v.* Saratoga R. R. 15 Barb. 650; Valentine *v.* Stewart, 15 Cal. 387. Supra, § 244.

having been retained by one side, obtain, under such circumstances, compensation for his services from the other.[1]

§ 574. *Cannot purchase his client's property without the latter's intelligent and free consent.* — Sometimes it has been said that a lawyer cannot under any circumstances take a title from his client which the latter cannot subsequently at his election invalidate. So far as this, however, it is not wise to push the rule. There are many cases in which if the lawyer does not help the

[1] Herrick *v.* Catley, 1 Daly, 512; 30 How. Pr. 208. See supra, § 336.

In chancery suits it is not unusual for the same solicitor to be concerned for several parties, some of whom may be plaintiffs and some defendants. Ordinarily speaking, no inconvenience necessarily follows from such a course. Indeed, in the case of what are called *friendly suits*, it often tends to avoid delay and expense. A solicitor, however, who is concerned for two parties having distinct interests, binds each client by notice which he receives on behalf of the other; and the courts will often deal differently in such cases than they would do under ordinary circumstances. See Partington *v.* Bailie, 5 Sim. 667.

In cases of loans, grants of annuities (see Adamson *v.* Evitt, 2 Russ. & Myl. 66), and the like, it is often found, for the convenience of all parties, that only one solicitor should be employed, who is ordinarily selected by the party advancing the money. In family settlements and arrangements, &c., the terms of which are definitely concluded, it is also often the interest and the wish of all parties to intrust the conduct of the mere legal formalities to one solicitor only. Wherever, however, anything in the shape of negotiation remains open, when a solicitor's services are called in, it would be prudent in all practitioners to refuse to interfere in any way in the negotiation, without the intervention of a second solicitor. On an occasion of this kind, when a solicitor acted for both parties, in the matter of a voluntary settlement, which was set aside for undue influence, in a suit in which the solicitor was made defendant, the court, though exonerating him from culpability in the matter, made him bear his own costs, *because he had not acted with proper prudence in the matter.* Harvey *v.* Mount, 8 Beav. 439.

Communications made to the solicitor in such cases are, generally speaking, not privileged. Perry *v.* Smith, 9 M. & W. 681; Shore *v.* Bedford, 12 L. J. 138, C. P. Pulling on Attorneys, *in loco.*

Mixing clients' funds with his own. — As has been already seen (supra, § 243; see infra, § 783), attorneys are liable for any loss a client may sustain by their client's money not being immediately handed over when received, *e. g.* the failure of a bank into which it was *paid in the attorney's own name;* for, however hard this may be on the latter, it is a clear rule of law that, if he mix up money belonging to his client with his own, he thereby renders himself the client's debtor. Robinson *v.* Ward, 1 Ry. & M. 274. See Knight *v.* Lord Plymouth, 3 Atk. 480; Rowth *v.* Stowell, 3 Ves. 656; Adams *v.* Claxton, 6 Ves. 226. Sums negligently paid out may be recovered back from the attorney. Harris *v.* Rees, 16 W. R. 91.

client by buying or agreeing to buy the client's property, the client will be ruined. By no one are his affairs better known than by his lawyer; in many cases it is by his lawyer that he is best understood, and from whom he receives most intelligent sympathy; very often the fact of his being in litigation prevents him from obtaining credit from any one except his lawyer; to preclude the client from being aided by the lawyer in this way would often preclude the client from being aided at all. He might be unable even to bring suit without such aid; and hence to deprive all suitors of such aid might make the right of obtaining justice by a lawsuit the privilege only of those who are rich enough to pay the expenses of the suit. At the same time we must remember that to sustain sales of this class two conditions are essential: The sale must be fair. The client must know the value of the thing sold, and, if there be an exchange, the value of the thing offered for it. And the sale must be free. The client must not be constrained to it by his position. If so constrained the contract will be avoided by the court; and of such constraint, unfairness of terms is strong presumptive proof.[1]

On the same principle the attorney cannot be permitted to buy for himself property at a sale at which he represents the execution plaintiff at less than the execution debt.[2] If he purchases he will be held to be trustee for his client.[3] The burden is on the lawyer to prove that the transaction was fair, intelli-

[1] Hunter *v.* Atkyns, 3 Myl. & R. 113; Gibson *v.* Jeyes, 6 Ves. 277; Jenkins *v.* Gould, 3 Russ. 385; Edwards *v.* Meyrick, 2 Hare, 60; Tyrrell *v.* Bank, 10 H. of L. Cas. 26; Simpson *v.* Lamb, 7 El. & B. 54; Lewis *v.* Hilman, 3 H. of L. Cas. 607; Savery *v.* King, 7 H. of L. Cas. 627; Surget *v.* Byers, Hempst. 715; Mott *v.* Harrington, 12 Vt. 199; Mills *v.* Mills, 26 Conn. 213; Arden *v.* Patterson, 5 Johns. (N. Y.) Ch. 44; Howel *v.* Baker, 4 Johns. Chan. 118; Story *v.* Vanderheyden, 9 Johns. R. 253; Howley *v.* Cramer, 4 Cow. 718; Lewis *v.* J. A. 4 Edw. (N. Y.) 599; Berrien *v.* McLane, 1 Hoff. N. Y. 421; Poillon *v.* Martin, 1 Sandf. 1; Barry *v.* Whitney, 3 Sandf. 696; Howell *v.* Ransom, 11 Paige, 538; Evans *v.* Ellis, 5 Denio (N. Y.), 640; Ford *v.* Harrington, 16 N. Y. 285; Bibb *v.* Smith, 1 Dane, 582; Jennings *v.* McConnel, 17 Ill. 148; Gray *v.* Emmons, 7 Mich. 533; Valentine *v.* Stewart, 15 Cal. 387; Miles *v.* Ervin, 1 McCord, 524; Buffalow *v.* Buffalow, 2 Dev. & B. Eq. 241. Supra, § 232, 233, 532.

[2] Leisenring *v.* Black, 5 Watts, 303.

[3] Howell *v.* Baker, 4 Johns. Ch. 118; Downey *v.* Gerrard, 3 Grant (Penn.), 64; Moore *v.* Bracken, 27 Ill. 23; Giddings *v.* Eastman, 5 Paige, 561; Stockton *v.* Ford, 11 How. U. S. 232; Case *v.* Carroll, 35 N. Y. 385.

gent, and free.[1] But there can be no recovery unless actual damage to the client be proved.[2]

§ 575. It is true that if the client chooses to permit the lawyer to accept and retain an interest more or less conflicting with that of the client, this may afterwards estop the client from disputing the lawyer's right so to act.[3] But to work such an estoppel, the client must have acted with a full knowledge of all the circumstances, must have been competent so to act, and must have acted without restraint.[4]

§ 576. *So far as concerns third parties such sales are valid.* — It must be remembered, at the same time, that the privilege of disannulling such sales belongs to the client. A third person, after such sale, cannot set up the client's interest in opposition to the lawyer.[5]

§ 577. *No extortionate agreement as to compensation will be sustained by the courts.* — The limits of the compensation to be allowed to counsel are hereafter discussed. It is enough now to say that while generous allowances are made to counsel struggling on behalf of a helpless client to maintain a claim ultimately pronounced to be just; and while fees are proportioned to responsibility as well as skill and labor; yet if a lawyer takes advantage of his position to obtain excessive or oppressive gifts or fees, not only may they be recovered back by the client, but the act may be punished by the court.[6]

§ 578. *An attorney cannot be permitted to use information received by him from his client in opposition to his client.* — Thus an attorney who has been consulted respecting the title to lands cannot afterwards become a purchaser of such lands from the

[1] Howell *v.* Ransom, 11 Paige, 538; Jennings *v.* McConnell, 17 Ill. 148; Hawley *v.* Cramer, 4 Cowen, 717; Evans *v.* Ellis, 5 Denio, 640. See Wendell *v.* Rensselaer, 1 Johns. Ch. 344. Supra, § 232.

[2] Miles *v.* Irwin, 1 McCord, 524; Kisling *v.* Shaw, 33 Cal. 425. Supra, § 251, 391.

[3] See supra, § 66. Where an attorney sold bonds of a client at public sale, and bought them in himself, at their full value at the time, and the client was aware of the purchase and acquiesced in it for twelve years, it is then too late for the client to attempt to impeach the validity of the sale. Marsh *v.* Whitmore, 21 Wall. 178.

[4] Supra, § 65; Williams *v.* Reed, 3 Mason, 405.

[5] Leach *v.* Fowler, 22 Ark. 143; supra, § 255. See Wall *v.* Cockerell, 10 H. L. Cas. 229.

[6] See infra, § 618; Gardner *v.* Ennor, 35 Beav. 549; Richards *v.* French, 22 L. T. N. S. 327; Phillips *v.* Overton, 4 Hayw. 291; Rose *v.* Mynett, 7 Yerg. 30; Lecatt *v.* Salbe, 3 Porter, 115; Downing *v.* Major, 2 Dane, 228.

state, or from a third party, to use against his client.[1] Such a purchase will be held to enure to the benefit of the client.[2] But if an attorney at law is consulted as to the legal effect of a power of attorney given to A. who seeks his advice, and is directed, as a conveyancer, to prepare a deed of land to be executed by B. who gave the power of attorney, and the attorney at law performs the duty devolving upon him by the employment, and in so doing derives no information from his employer relative to the land, and the parties refuse to execute the deed, these facts do not make the lawyer the trustee of his employer if he afterwards buy the land.[3] And it has been said that the fact that in other independent suits an attorney became acquainted with the business of the adverse party, will not prevent him from acting professionally against such party.[4]

IV. POWERS AND RIGHTS OF ATTORNEYS.

§ 579. *Attorney may employ subalterns but not substitutes.* — According to the modern Roman practice the power of attorney contains the *clausula substituendi;* and without such a specific reservation, this power is considered as implied. But while for the issuing of process this right can be exercised as an ordinary matter of office mechanism[5] (the attorney being liable for its abuse); in matters involving discretion there can be no substitution except in cases of necessity, or in cases (as where the expenses of a journey can be thereby saved) in which the interests of the client are thereby promoted.[6] The office is considered one of special trust, and cannot ordinarily be delegated without the client's assent.[7] Even the employment of assist-

[1] See supra, § 241; Carter *v.* Palmer, 1 Dru. & Walsh, as cited in Dunlap's Paley's Agency, 34, n.; Galbraith *v.* Elder, 8 Watts, 81. See Cleavinger *v.* Reimar, 3 W. & S. 486; Taylor *v.* Blacklow, 3 B. N. C. 235; 3 Scott, 614; Williamson *v.* Moriarty, 19 W. R. 818.

[2] Henry *v.* Raman, 25 Penn. St. 354. See Reed *v.* Norris, 2 Myl. & Cr. 374. Supra, § 236.

[3] Porter *v.* Peckham, 44 Cal. 204.

[4] Price *v.* R. R. 18 Ind. 137.

[5] Power *v.* Kent, 1 Cowen, 211; Birkbeck *v.* Stafford, 14 Abb. (N. Y.) 285; 23 How. Pr. 236.

[6] McEwen *v.* Mazyck, 3 Rich. S. C. 210; Cook *v.* Ritter, 4 E. D. Smith (N. Y.), 253.

[7] Bleakly, in re, 5 Paige (N.Y.), 311; Hitchcock *v.* McGehee, 7 Port. 556; Johnson *v.* Cunningham, 1 Ala. 249; Kellogg *v.* Norris, 10 Ark. 18; Ratcliff *v.* Baird, 14 Tex. 43; Polland *v.* Rowland, 2 Blackf. 22. Supra, § 28, 544.

ant counsel cannot bind the client without his authority or assent.[1] But subsequent acquiescence will be treated as ratification.[2] And if the client be absent, and the appointment of a substitute be necessary to protect the client's interests, the client is bound by the appointment.[3]

§ 580. *Law of principal and agent generally applicable to that of client and attorney.* — The client is bound, according to the ordinary rules of agency, by the acts of his attorney within the scope of the latter's authority.[4] This includes the right to demand and receive payment in money of the client's debt;[5] and part payments are within his power to receive, as well as payments in full.[6] As long as he appears as attorney on record, *bonâ fide* payments to him discharge the debt, no matter what private instructions he may have received from his client.[7]

§ 581. *Attorney to bind client must be expressly authorized.* — The principle before us will not sustain the payment of the principal of a mortgage to a solicitor employed to procure its assignment, the client retaining possession of the instrument;[8] nor payment to a deceased person's attorney of a debt due the estate of the deceased;[9] nor a collusive receipt based on private arrangements between the attorney and the opposite side;[10] nor payment to an attorney in the cause who is not the attorney on record;[11] nor the sale or assignment of a claim to a stranger with-

[1] Paddock *v.* Colby, 18 Vt. 485.

[2] Johnson *v.* Cunningham, 1 Ala. 249; King *v.* Pope, 28 Ala. 601; Smith *v.* Lipscomb, 13 Tex. 532.

[3] Briggs *v.* Georgia, 10 Vt. 68; Fenno *v.* English, 22 Ark. 170.

[4] Russell *v.* Lane, 1 Barb. 519; Lawson *v.* Bettison, 12 Ark. 401; Sampson *v.* Obleyer, 22 Cal. 200; Greenlee *v.* McDowell, 4 Ired. 481; Fairbanks *v.* Stanley, 18 Me. 296; Rice *v.* Wilkins, 21 Me. 558; Bethel *v.* Carmack, 2 Md. Ch. 143; Chambers *v.* Hodges, 23 Tex. 104; Nave *v.* Baird, 12 Ind. 318; Painter *v.* Abel, 8 L. T. N. S. 287. Supra, § 129.

[5] Miller *v.* Scott, 21 Ark. 396; Heard *v.* Lodge, 20 Pick. 53; Bryans *v.* Taylor, Wright (Ohio), 245; Langdon *v.* Potter, 13 Mass. 320; McCarver *v.* Nealey, 1 Greene, Iowa, 360; Brackett *v.* Norton, 4 Conn. 517; Gray *v.* Wass, 1 Greenl. 257; Branch *v.* Burnley, 1 Call (Va.), 127; Ducett *v.* Cunningham, 39 Me. 386; Commiss. *v.* Rose, 1 Desaus. (S. C.) 469. Supra, § 206.

[6] Pickett *v.* Bates, 3 La. An. 627.

[7] Ibid.; State *v.* Hawkins, 28 Mo. 366. See supra, § 130.

[8] Williams *v.* Walker, 2 Sandf. (N. Y.) Ch. 535.

[9] Clark *v.* Richards, 3 E. D. Smith (N. Y.), 89.

[10] Child *v.* Dwight, 1 Dev. & Bat. Eq. 171; Chambers *v.* Miller, 7 Watts, 63; Craig *v.* Ely, 5 Stew. & Port. 354.

[11] Wurt *v.* Lee, 3 Yeates, 7.

out express authority;[1] nor the transfer of a promissory note put into his hands for collection.[2]

§ 582. *Attorney cannot bind his client in matters collateral.* — The attorney is not competent

To bind his client by a sale of the land sued for;[3]

To purchase land for his client at a judicial sale under the client's execution;[4]

To control the business of even foreign clients in matters extra forensic.[5]

§ 583. *Cannot receive anything but money in payment of debt.* — The relationship of principal and attorney will not authorize the attorney to receive anything else than money in payment of a debt, unless expressly authorized.[6] Hence a payment in depreciated bank paper does not bind the client.[7] But permission to receive payment on stocks or goods may be inferred from acquiescence in this mode of payment of prior instalments of the same debt.[8]

§ 584. *Notice to attorney is notice to client.* — The client is bound by notice received by the attorney.[9] But the mere em-

[1] Penniman *v.* Patchen, 5 Vt. 346; Campbell's appeal, 29 Penn. St. 401; Rowland *v.* State, 58 Penn. St. 196; Fassit *v.* Middleton, 47 Penn. St. 214; Heed *v.* Gervais, Walk. Mich. 431; Card *v.* Wallridge, 18 Oh. 411.

[2] Terhune *v.* Colton, 10 N. J. Eq. (2 Stock.) 21; White *v.* Hildreth, 13 N. H. 104; Child *v.* Eureka, 44 N. H. 354; Goodfellow *v.* Landis, 36 Mo. 168. Supra, § 208.

[3] Corbin *v.* Mulligan, 1 Bush (Ky.), 297.

[4] Beardsley *v.* Root, 11 Johns. (N. Y.) 464.

[5] Clark *v.* Kingsland, 9 Missis. (1 S. & M.) 248.

[6] Gullett *v.* Lewis, 3 Stew. (Ala.); Cost *v.* Genette, 1 Port. (Ala.) 212; Kent *v.* Ricards, 3 Md. Ch. 392; Wilkinson *v.* Holloway, 7 Leigh, 277; Wright *v.* Daily, 26 Tex. 730; Walker *v.* Scott, 13 Ark. 252; Lord *v.* Burbank, 18 Me. 178; Patten *v.* Fullerton, 27 Me. 58; Child *v.* Dwight, 1 Dev. & Bat. (Eq.) 171; Treasurers *v.* McDowell, 1 Hill (S. C.), 184; Perkins *v.* Grant, 2 La. An. 328; Phelps *v.* Preston, 9 La. An. 488; Campbell *v.* Bailey, 19 La. An. 172; Garvin *v.* Lowry, 15 Miss. 24; Jeter *v.* Haviland, 24 Ga. 252; Huston *v.* Mitchell, 14 Serg. & R. 307. See fully supra, § 210. In Livingston *v.* Radcliff, 6 Barb. 201, a payment, part in cash and part in a short note of a person of undoubted responsibility, was sustained.

[7] West *v.* Ball, 12 Ala. 340; Chapman *v.* Cowles, 41 Ala. 103; Davis *v.* Lee, 20 La. An. 248; Trumble *v.* Nicholson, 27 Ill. 189. See fully supra, § 210.

[8] Patten *v.* Fullerton, 27 Me. 58; Baldwin *v.* Merrill, 8 Humph. 132.

[9] Bierce *v.* Red Bluff Hotel Co. 31 Cal. 160; Allen *v.* McCalla, 25 Iowa, 464; Williams *v.* Tatnell, 29 Ill. 553; Haven *v.* Snow, 14 Pick. 28; Singleton *v.* Kent, 8 Ala. 691. Though such notice does not bind when received

ployment of a solicitor to do a ministerial act does not bind the client by notice to the solicitor outside of such act.[1]

§ 585. *Attorney has control of suit in which he is generally retained.* — The attorney has vested in him the free and independent control of the case,[2] nor as to this control, so far as concerns its ordinary incidents, is he bound to consult his client. In important matters, however, his duty is to take his client's instructions; and as to all matters to render an account when required. The client is bound by the attorney's acts, and, unless there be collusion with the opposing party, can have redress, in case of injury, from the attorney alone.[3] At the same time, agreements

in an independent prior transaction. Hood *v.* Fahnestock, 8 Watts, 489; Spaight *v.* Cowne, 1 H. & M. 359. See supra, § 179 and note.

Notices should be served on the attorney, and not on the client, who cannot be supposed to know their effect; Wardell *v.* Eden, 2 Johns. Cas. 121. In England, the courts require that the attorney shall always be at his office, or have some competent person there during office hours, for the purpose of receiving them; and as to these the attorney is regarded not merely as the mere agent of the client, but rather as a substituted principal. What is required upon a notice of this kind to be done or communicated is, that there ought to be a clerk at the office sufficiently skilled and intrusted to be able to do or communicate, or take the necessary step upon, if the attorney himself be absent; and the client must suffer if his attorney be guilty of any default in not employing such clerk. See Pulling on Attorneys, *in loco.*

So notice does not bind if attorney tells the opposing party that he will not communicate it to his client. Sharpe *v.* Foy, 17 W. R. 65.

[1] Wyllie *v.* Pollen, 32 L. J. Ch. 782; 11 W. R. 1081.

[2] Nightengale *v.* R. R. 2 Sawyer, 339; Commissioners *v.* Younger, 29 Cal. 147; Simpson *v.* Lombas, 14 La. An. 103; Ward *v.* Hollins, 14 Md. 158; Pierce *v.* Strickland, 2 Story, 292; Clark *v.* Randall, 9 Wisc. 135. See Lord Brougham's course, when advising Queen Caroline, as detailed in his autobiography and in the Greville Memoirs. See, also, § 558, 590.

[3] Greenlee *v.* McDowell, 4 Ired. Eq. 481; Chambers *v.* Hodges, 23 Tex. 104; Bethel Church *v.* Carmack, 2 Md. Ch. 143; Lawson *v.* Betterson, 12 Ark. 401; Sampson *v.* Oblcyer, 22 Cal. 200; Foster *v.* Wiley, 27 Mich. 244. See Collett *v.* Foster, 2 H. & N. 356; Crook *v.* Wright, R. & M. 278; Becke *v.* Penn. 7 C. & P. 397. The following opinion, on this topic was given in the U. S. Dist. Ct. for Oregon, in Jan. 1873, by Deady, J.: This motion was made by plaintiffs' counsel, Mr. E. D. Shattuck, with whom was Mr. W. H. Effinger, on December 13, 1872, to set aside an order theretofore made, continuing the cause until April 25, 1873, upon the ground that the stipulation therefor was signed on behalf of said plaintiffs, without authority. Time was given to file affidavits for and against the motion until Jan. 22, 1873, when it was argued and submitted. The material facts proven are as follows: 1. That on May 26, 1871, the plaintiffs commenced this suit by David Logan, their solicitor, and E. D. Shattuck, their counsel; and that

by the attorney which are so unreasonable as to imply bad faith,

at the end of the complaint, which is in print, the names of J. B. Felton, and W. H. Patterson, are printed as "of counsel for complainant;" and that neither said Felton or Patterson were then or since attorneys or counsellors of this court; but were, on May 29, 1871, by order of this court, allowed to appear as counsel therein for plaintiffs in this suit. 2. That on November 30, 1872, while the cause was pending upon exceptions to the complaint for impertinence, a stipulation for a continuance until April 25, 1873, theretofore signed in San Francisco, by said Felton and Patterson, as attorneys for plaintiffs, was filed by the attorney for defendants, upon which stipulation, and on motion of said defendants' attorney, the order for continuance was then and there granted, without notice to said Logan or Shattuck. 3. That prior to the commencement of this suit it was agreed between plaintiff Elliott and said Felton, that the latter would furnish the sum of $20,000 to prosecute this suit, and should receive therefor 33½ per centum of whatever sum might be recovered therein; and that afterwards, and soon after the commencement of this suit, said Elliott, at the special instance and request of said Felton, assigned to him for the use of himself and said Patterson, $\frac{48}{100}$ of the cause of suit, in consideration that said F. and P. would furnish the remainder of said $20,000 and give their professional service and attention in the conduct and maintenance of this suit; and that said F. and P. have not furnished the remainder of said $20,000, nor rendered any professional service in and about said suit, since the commencement thereof. Upon this state of facts the motion to set aside the order must he allowed. Neither Felton or Patterson being attorneys or counsellors of this court had any authority to sign the stipulation. The order admitting them, as a matter of comity, to appear as counsel in this case, only authorized them to represent the plaintiff before the court in the argument or hearing of the same, and not in the written proceedings or out of court. Nor does the fact that their names are printed on the complaint as "of counsel for the complainant" affect the matter one way or the other. These printed names are not their *signatures*. Besides, not being counsellors of this court, they are not authorized to sign the complaint as counsel. Again, an attorney who appears only as counsel in a case is not authorized to sign a stipulation for a continuance, even if he be an attorney and counsellor of the court in which the suit is pending. The conduct of a suit, except in a matter arising in the argument or hearing before the court, is exclusively under the control of the attorney. Counsel for defendants seek to avoid the force of these conclusions by maintaining that it appears from the facts that F. and P. are interested in the subject matter of the suit, and therefore are entitled to control it, and that in any event having undertaken to carry on and prosecute this suit, they are the attorneys in fact, or agents of the plaintiff for that purpose, and therefore had authority to sign the stipulation. The parties on the record or their attorneys are the only ones which the court can recognize as having power to continue or discontinue the suit. Whatever interest F. and P. may have in the event of the suit or the subject matter of it, as between them and the plaintiffs, so far as this motion and the conduct of the suit is concerned, they are strangers to the proceeding. Upon the second proposi-

are notice of such bad faith to the opposing side, and will not bind the client.[1]

An attorney of record has power, —

To verify papers by affidavit ; [2]

To waive such verification ; [3]

To accept service ; [4]

To discontinue the suit ; [5]

To appeal from a decision ; [6]

To accept a statement of evidence instead of a formal deposition ; [7]

tion, counsel for plaintiffs insist that it appears from the evidence that F. and P. have abandoned their contract with the plaintiffs, and refused to perform the same, and therefore they are no longer, if ever, attorneys in fact or agents of the plaintiffs. From the view I take of the matter it is not necessary to decide this question. Section 35 of the judiciary act (1 Stat. 92), provides that, "In all the courts of the United States the parties may plead and manage their own cases personally, or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein." When, in this court, a party does not choose to manage his cause personally, as permitted by this section, he can only do so by an attorney thereof. He cannot appoint an agent not an attorney of this court, and authorize such agent to represent him in the suit. But when a party makes his choice and selects an attorney of this court to conduct and manage his case, the attorney stands in his place. Until such attorney is changed or discharged he has the *exclusive* control of the conduct and management of the suit. He cannot give a *release* or discharge the cause of action. But he has exclusive control of the *remedy*, and may continue or discontinue it. Gaillard *v.* Smart, 6 Cow. 383; Kellogg *v.* Gilbert, 10 Johns. 220. His client cannot control him in the due and orderly conduct of the suit. Anon. 1 Wend. 108. Such being the legal effect of the plaintiff's selecting Messrs. Logan and Shattuck to bring and manage this suit and represent them therein before this court, it follows that Elliott could not authorize F. and P. to sign this stipulation for a continuance or otherwise control the conduct thereof, because he no longer had power to do so himself. If a client cannot control his attorney in the conduct of a suit, he certainly cannot constitute or authorize an agent to do so. It matters not, then, what the true relation is between the plaintiffs and F. and P.; they not being parties to this suit or attorneys therein, had no authority to sign the stipulation for a continuance. The order for continuance based thereon is set aside.

[1] Ball *v.* Leonard, 24 Ill. 146; Howe *v.* Lawrence, 22 N. J. L. (2 Zab.) 99.

[2] Wright *v.* Parks, 10 Iowa, 342; Bates *v.* Pike, 9 Wisc. 224.

[3] Smith *v.* Mulliken, 2 Minn. 319.

[4] Hofferman *v.* Burt, 7 Iowa, 320. Supra, § 580.

[5] Gaillard *v.* Smart, 6 Cow. 385.

[6] Adams *v.* Robinson, 1 Pickering, 462.

[7] Lacoste *v.* Robert, 11 La. An. 33.

To direct and control an attachment on mesne process;[1]

To release before judgment an attachment of real estate;[2]

To restore an action after a *non pros.* though without his client's consent;[3]

To limit the effect of a judgment;[4]

To admit facts on trial of cause;[5]

To admit facts by writings out of court;[6]

To agree, during pendency of action, that after judgment execution shall be postponed;[7]

To waive technical advantages;[8]

To confess judgment.[9]

§ 586. On the other hand, the general retainer of the attorney has been held not to authorize him, —

To release the interest of witnesses;[10]

[1] Jenney *v.* Delesdernier, 20 Me. 183.

[2] Moulton *v.* Bowker, 115 Mass. 36.

[3] Reinhold *v.* Alberti, 1 Binney, 469.

[4] Union Bank *v.* Geary, 5 Peters, 98.

[5] Talbot *v.* MeGee, 7 T. B. Monr. 377; Pike *v.* Emerson, 5 N. H. 293; Gilkeson *v.* Snyder, 8 W. & S. 200; Farmers' Bk. *v.* Sprigg, 11 Md. 389; Smith *v.* Dixon, 3 Mete. Ky. 438; Wenans *v.* Lindsay, 1 How. Missis. 557; Starke *v.* Kenan, 11 Ala. 819; Lewis *v.* Sumner, 13 Mete. Mass. 269. See supra, § 158.

[6] Lewis *v.* Sumner, 13 Metc. 269.

Such admissions are evidence against his client, though his mere statements in the course of conversation are not. Young *v.* Wright, 1 Camp. 140; Milward *v.* Temple, Ibid. 375; Gainsford *v.* Grammar, 2 Camp. 9. See, also, Elton *v.* Larkins, 1 Mood. & Rob. 196; 5 Car. & P. 385, *S. C.;* Marshall *v.* Cliffs, 4 Camp. 133. "If a fact is admitted by the attorney on the record with intent to obviate the necessity of proving it, he must be supposed to have authority for this purpose, and his client will be bound by the admission; but it is clear that whatever the attorney says in the course of conversation is not evidence in the cause." Per Lord Ellenborough, in Young *v.* Wright, supra; and see Parkins *v.* Hawkshaw, 2 Stark. N. S. C. 240. Admissions made previous to the commencement of the proceedings, are inadmissible without express proof of authority from his principal. Wagstaff *v.* Wilson, 4 B. & Ad. 339.

[7] Wieland *v.* White, 109 Mass. 392; Union Bk. *v.* Georgetown, 5 Peters, 99.

[8] Hanson *v.* Hoitt, 14 N. H. 56; Alton *v.* Gilmanton, 2 N. H. 520; Pieree *v.* Perkins, 2 Dev. N. C. 250; Hart *v.* Spalding, 1 Cal. 213.

[9] King *v.* Cartee, 1 Penn. St. 147; Gray *v.* Gray, 2 Roll. 63; Denton *v.* Noyes, 6 Johns. 296; Alton *v.* Gilmanton, 2 N. H. 293; Pike *v.* Emerson, 5 N. H. 293; Talbot *v.* M'Gee, 4 T. B. Monr. 377; though see People *v.* Lamborn, 2 Ill. (1 Scam.) 123.

[10] Murray *v.* House, 11 Johns. R. 464; East River Bank *v.* Kennedy, 9 Bosw. 573; York Bank *v.* Appleton, 17 Me. 55; Bell *v.* Bank, 8 Ala. 590; Bowne *v.* Hyde, 6 Barbour, 392; Springer *v.* Whipple, 17 Me. 351; Marshall *v.* Nagle, 1 Bailey, 308; Shores *v.* Caswell, 13 Metc. 413.

To enter a *retraxit*, when it is a final bar ;[1]

To assign the suit to a third party ;[2]

To release a garnishee from attachment ;[3]

To release indorsers on a note ;[4]

To admit, in such a way as to bind his client, erroneous positions of law ;[5]

To stipulate not to appeal or move for a new trial.[6]

§ 587. *After judgment attorney may open but cannot vacate judgment.* — After judgment is entered, an attorney may bind his client by consenting to open the judgment, though if he does so without consulting his client he is liable for any loss which his negligence in this respect may have caused.[7] But this does not cover a right to vacate and annul a judgment; an act which is outside of the general power of an attorney.[8]

§ 588. *Authority of attorney of record is qualified after judgment.* — But the presumption of authority, based upon his general employment, fades, when he undertakes acts which are out of the usual range of an attorney's duties. Parties dealing with him are in such case put on their inquiry as to whether the attorney was authorized to do the particular act; and if they do not inquire, the loss is imputable to their negligence.[9] So far as concerns the judgment debtor, such acts (*e. g.* releases without payment) are void if unauthorized.[10] But here an important distinction springs up. An attorney may do an act which would be collusive and void as to the opposing party, yet good as to innocent strangers. A. may enter satisfaction, for instance, on his client's judgment, and if he does so corruptly or negligently, there being no consideration, this will not release B., the judg-

[1] Lambert *v.* Sandford, 2 Blackf. Ind. 137.

[2] Weathers *v.* Rae, 4 Dana, Ky. 474; Head *v.* Gervais, Walk. Mich. 431; Mayer *v.* Blease, 4 S. Car. 10.

[3] Quarles *v.* Porter, 12 Mo. 76.

[4] Varnum *v.* Bellamy, 4 McLean, 87.

[5] Mitchell *v.* Cotten, 3 Fla. 136.

[6] People *v.* Mayor of N. Y. 11 Abb. Pr. 66.

[7] Clussman *v.* Merkel, 3 Bosw. N. Y. 402; Read *v.* French, 28 N. Y. 285.

[8] Quinn *v.* Lloyd, 5 Abb. Pr. N. S. 281; 36 How. Pr. 378.

[9] See Harrow *v.* Farrow, 7 B. Monr. 126; Jewett *v.* Wadleigh, 32 Me. 110; Banks *v.* Evans, 18 Miss. 10 S. & M. 35; Union Bk. *v.* Govan, 18 Miss. (10 S. & M.) 333; Averill *v.* Williams, 4 Denio, 295; Webb *v.* White, 18 Tex. 572; Lovegrove *v.* White, L. R. 6 C. P. 253.

[10] Kellogg *v.* Gilbert, 10 Johns. R. 220; Simonton *v.* Barrell, 21 Wend. 362; Givens *v.* Briscoe, 3 J. J. Marsh. 532.

ment debtor. But it will be otherwise as to *bonâ fide* purchasers from the judgment debtor, buying his real estate, when the judgment on it is certified to be satisfied. Such purchasers are entitled to regard the entry as releasing the judgment creditor's lien, in all jurisdictions in which the practice is to enter such satisfaction by attorney.[1]

§ 589. Yet it must be remembered that the authority of the attorney, after judgment, depends upon the nature of his mandate. If he is employed to try a litigated issue, his general authority may be regarded as terminated with the trial of the case.[2] If he is employed to collect a debt, this implies as great a discretion vested in him after judgment as before.[3] In any view, the continued employment of the attorney after judgment may be regarded as vesting in him authority to collect the judgment by the usual modes, and to use the usual expedients, hostile or otherwise, for this purpose.[4] In such cases it may be argued that promises by the attorney (*e. g.* to stay execution on consideration of a third party undertaking to pay the debt) bind the creditor, though not assented to by him at the time.[5]

§ 590. *Attorney may compromise litigated claim.* — To execute a compromise is often the highest duty of an attorney, — viewing the term attorney, in this sense, as embracing counsel, or solicitor having charge of a case. Litigation is from its nature uncertain. The witnesses on the one side may die; may forget; may be tampered with; or testimony may be produced on the other side which no degree of sagacity could anticipate. The verdict of a jury, especially when unliquidated damages are sought, can never be accurately calculated in advance. Courts sometimes lay down rules of law which surprise a whole bar, and sometimes adopt distinctions which counsel, wedded to a particular conception of a case, would not conceive possible. All this is uncertain; but however this may be, there is one paramount

[1] Wycoff *v.* Bergen, 1 Coxe, 214.

[2] Supra, § 588.

[3] McDonald *v.* Todd, 1 Grant, 17; Butler *v.* Knight, L. R. 2 Exch. 109.

[4] Jenney *v.* Delesdernier, 20 Me. 183; Read *v.* French, 28 N. Y. 285; Erwin *v.* Blake, 8 Pet. 18; Scott *v.* Seiler, 5 Watts, 235; Lynch *v.* Com. 16 S. & R. 388; Nelson *v.* Cook, 19 Ill. 440; Corning *v.* Sutherland, 3 Hill N. Y. 552; Hyams *v.* Michel, 3 Rich. S. C. 303; Hopkins *v.* Willard, 14 Vt. 474; Gorham *v.* Gale, 7 Cowen, 739; Willard *v.* Goodrich, 31 Vt. 597; Day *v.* Welles, 31 Conn. 344; Steward *v.* Biddlecum, 2 N. Y. 2 Comst. 103.

[5] Silvis *v.* Ely, 3 Watts & S. 420; Hollington, ex parte, 43 L. J. Ch. 99; but see Jewett *v.* Wadleigh, 32 Me. 110.

certainty in every case, — that there will be costs and charges in proportion to the length of its litigation. An attorney or counsel, in charge of a case, who does not effect a judicious compromise when open to him, is untrue not only to his client, but to the great cause of public justice of which he is a minister; and in no relation does the lawyer occupy so lofty a position as when, in disregard of his own interests, he thus protects not only his client, but public justice. It may be said that it is his duty to advise his client and take instructions. Of course this is prudent and desirable, if there be opportunity, and the client can be made to understand the case. But this cannot always be. The client may be absent; or he may be a minor, or a person incapable of business; or his mind may be so prejudiced or perverted as to be incapable of a right judgment, even supposing he has sufficient capacity to be capable of weighing the difficulties of the situation. But even admitting all these qualifications exist, yet after all the client is the non-expert, and the lawyer the expert; and the object of the employment of the lawyer is to obtain an independent, dispassionate, and skilful judgment in the management of the client's cause. A good deal is said about obedience to the client's instructions; but there are many cases in which obedience to the client's instructions involves a ruin of the client's cause. To try a case on personal and not on public grounds, — to infuse into it the bitterness and narrowness of feeling by which parties to litigation are so often controlled, — this may wreck the client, yet this is what the client often instructs the lawyer to do. No counsel would take his client's instructions as to the admission of a particular piece of evidence, however vital such a question might be. A., for instance, might instruct his counsel to call B. as a witness; but A.'s counsel would be derelict to duty if they should call B., if, viewing the case from a professional stand-point, they hold that B. should not be called. The office of lawyer is a high one, charged with great responsibilities, and these responsibilities he is trained and employed to take. The penalties on his misconduct are serious. He is not only liable to a suit for damages, but he may be disbarred, and his means of professional support in this way destroyed. It would be an unequal rule which would allow him to exercise his discretion in the more hazardous processes of trying a case, and yet to withdraw this

discretion from him, and exclude him from responsibility in the less hazardous and more beneficent process of settling a case. He has, it is admitted, power, without instructions and even against instructions, to mould a case during litigation, and by his course of management either to win or lose it; he has power to protract it by vexatious litigation which the law abhors; if so, he certainly has power, without instructions, and even (as to third parties without notice) against instructions, to accept a judicious settlement.

§ 591. Such is the conclusion now reached by the English courts. Of this we have a marked illustration in a case in which one of the most eminent of English lawyers was concerned as party. An issue of *devisavit vel non* was directed by the court of chancery to determine the title to a large estate.[1] On the trial before Cresswell, J., Sir Frederick Thesiger (afterwards Lord Chelmsford), counsel for the plaintiff, agreed with Sir Alexander Cockburn (afterwards chief justice of the king's bench) to a compromise, by which the plaintiff, in consideration of an annuity, should give up the litigated estates to the defendants. Sir F. Thesiger knew at the time of the compromise that it was contrary to the wishes of his client, Mrs. Swinfen; and in her absence, but during the trial, the settlement was made a rule of court, and a juror withdrawn. Upon the plaintiff refusing compliance with the rule, she was called upon to show cause why an attachment should not issue against her for contempt. At the close of the hearing, Cresswell, J. strongly affirmed the right of counsel to compromise a suit. "I think it would be most fatal to the due administration of justice," he said, "if we were to allow the authority of counsel to be thus questioned. And there is no hardship or inconvenience in this; for if the client, or the attorney, has reason to think that the counsel is taking a course that will prejudice his interests, he may withdraw his brief, and so put an end to his authority to represent the client before the court. But if counsel, duly instructed, take upon himself to consent to a compromise which he, in the exercise of a sound discretion, judges to be for the interest of his client, the court will not inquire into the existence or the extent of his authority. I am extremely happy to find that the decisions abundantly bear us out in thinking this objection

[1] Swinfen *v.* Swinfen, 18 C. B. 485; 1 C. B. N. S. 364.

cannot be permitted to prevail." On the matter coming again before the court, this view was reaffirmed by the judges, with the exception of Crowder, J., who held that while the *attorney* might have this power, it did not belong to *counsel*. The motion, in consequence of this view, was refused. A bill was subsequently filed against the plaintiff to compel her specifically to perform the compromise; but the bill was dismissed by the master of the rolls, on the ground that Sir F. Thesiger had exceeded his authority in making the compromise, and that it did not bind the plaintiff.[1] This was affirmed on appeal.[2] The issue *devisavit vel non* being again necessitated, a verdict and judgment was had for Mrs. Swinfen. She then brought suit against Sir F. Thesiger, then Lord Chelmsford, for the loss accruing to her from his mismanagement of the case.[3] The court of exchequer held that the action could not be maintained; and Pollock, C. B., went so far as to say that "provided an advocate acts honestly, with a view to the interests of his client, he is not responsible at all in an action." In a subsequent case, the same prerogative, so far as concerns the right to settle without specific instructions from the client, was sustained as to attorneys.[4] The compromise before the court, in the case last mentioned, appeared to have been prudent, and was agreed to *bonâ fide* by the attorneys in the belief that it would be beneficial to their clients. The suit being against the attorneys for misconduct in making the compromise, the court held that the plaintiffs had no case. "I apprehend," said Erle, C. J., "that the rule of law is well established, that the general authority to conduct a cause gives the attorney authority to compromise. The reason why the compromise is held to be binding upon the client is because the attorney is his general agent for that purpose. I think that is established by Fray *v.* Voules, 1 El. & El. 839, where it was held that an attorney, who makes a compromise in defiance of the express instructions of his client not to do so, is guilty of a breach of duty. . . . . The action lay against the attorney there because he was prohibited, which would seem to imply that, if he had not been expressly prohibited from compromising, the compromise would

[1] Swinfen *v.* Swinfen, 24 Beav. 549.

[2] Swinfen *v.* Swinfen, 2 De G. & J. 381.

[3] Swinfen *v.* Lord Chelmsford, 5 H. & N. 890.

[4] Chown *v.* Parrott, 14 C. B. N. S. 74.

have been a lawful act on his part." In a subsequent case before the same court, the right of attorneys *bonâ fide* to compromise a suit, without the client's instructions, was still more emphatically affirmed.[1] "I think it would be most unfortunate for clients as well as for attorneys," said Montague Smith, J., "if the latter had not power to make compromises. There may be, in the progress of a cause, a moment when an opportunity to settle a matter advantageously for the client presents itself, which may not occur again, *and so the advantage would be lost if the attorney delayed in order to consult his client's wishes upon the subject.* Upon principle, therefore, as well as upon authority, I am of opinion that this compromise must be upheld." The same authority was by a subsequent judgment of the queen's bench, declared to exist in counsel.[2] The true line is struck in the following opinion of the court: "Counsel being ordinarily retained to conduct a cause without any limitation, the apparent authority with which he is clothed when he appears to conduct the cause is to do everything which, in the exercise of his discretion, he may think best for the interests of his client in the conduct of the cause; and if, within the limits of this apparent authority, he enters into an agreement with the opposite counsel as to the cause, on every principle this agreement should be held binding." The remark of Crowder, J., in Swinfen *v.* Swinfen, which has been already noticed, is thus explained: "Crowder, J., in Swinfen *v.* Swinfen, only dissented on the ground that the compromise was against the assent of the client, and was in a matter collateral to the action: that at once distinguishes that case from the present."[3] Even where the attorney acts in defiance of his client's instructions, we may therefore hold that his settlement binds the client so far as concerns the opposing interest, unless the latter had notice of the restriction; though the attorney may be made answerable to the client if the settlement was indiscreet.[4]

§ 592. In several instances we find in our American reports

[1] Prestwich *v.* Poley, 18 C. B. N. S. 806.

[2] Strauss *v.* Francis, L. R. 1 Q. B. 379.

[3] See Mr. Green's note in the 8th edition of Story on Contracts, § 24, note, for these authorities expanded. The following additional cases are cited to the same point: Thomas *v.* Harris, 27 L. J. N. S. Ex. 353; Wanham, ex parte, 21 W. R. 104; Brady *v.* Curran, Ir. Rep. 2 C. L. 314; Berry *v.* Mullen, Ir. Rep. 5 Eq. 368; Butler *v.* Knight, L. R. 2 Ex. 109.

[4] Chambers *v.* Mason, 5 C. B. N. S. 59; Berry *v.* Mullen, Ir. R. 5 Eq. 368.

rulings apparently inconsistent with the conclusions reached in England.[1] As a rule, however, we have accepted the results reached in the English courts, bringing out at the same time in more prominent notice qualifications which will be presently specified.[2] Thus an agreement by counsel to refer or arbitrate will be sustained against the client's dissent.[3] Acquiescence, of course, ratifies such a compromise.[4] Such power of compromise,

[1] See as apparently denying the attorney's right to compromise, Derwort *v.* Loomer, 21 Conn. 245; Vail *v.* Jackson, 13 Vt. 314; Nolan *v.* Jackson, 16 Ill. 272; Doub *v.* Barnes, 1 Md. Ch. 127; Maddux *v.* Bevan, 39 Md. 485; Smith *v.* Dixon, 3 Metc. Ky. 438; Smock *v.* Dude, 5 Rand. Va. 639; Marhourg *v.* Smith, 11 Kans. 562.

[2] Wieland *v.* White, 109 Mass. 392; Peru Steel Co. *v.* Whipple File Co. 109 Mass. 464; Holker *v.* Parker, 7 Cranch, 436; Abbe *v.* Rood, 6 McLean, 106; Gordon *v.* Coolidge, 1 Sumn. 537; Potter *v.* Parsons, 14 Iowa, 286; Fogg *v.* Sanborn, 48 Me. 432; McDowell *v.* Second Av. R. R. 5 Bosw. N. Y. 670; Mallory *v.* Mariner, 15 Wisc. 172; Christie *v.* Sawyer, 44 N. H. 298; Reinhold *v.* Alberti, 1 Binney, 469; North Mo. R. R. *v.* Stephens, 36 Mo. 150.

[3] Cahill *v.* Benn, 6 Binney, 99; Smith *v.* Bassard, 2 McCord, 406; Stokely *v.* Robinson, 34 Pa. St. 315; Wader *v.* Powell, 31 Ga. 1; though see Markley *v.* Amos, 8 Rich. S. C. 468, where it was said that an arbitration would only be enforced when by rule of court.

[4] Mayor *v.* Foulkrod, 4 Wash. 511. See supra, § 76.

An attorney retained hy the landlord to prosecute a suit to evict a tenant has authority, by his retainer, to bind his client by an agreement with the tenant's attorney, that, if the latter will submit to a default, execution shall not issue for a week afterwards, or if issued not be served within that time. Wieland *v.* White, 109 Mass. 392.

Where counsel for defendant, in an action alleged to have been prosecuted maliciously, agreed, without any authority from their client, that the dismissal of said action should be a bar to an action for malicious prosecution, held, that such agreement was and is a nullity. Marhourg *v.* Smith, 11 Kan. 554. Valentine, J., said: "We suppose it will hardly be contended that when counsel are employed to defend in one action they can barter away their client's rights in another. Counsel employed to defend an action have no right to even compromise or settle that action without special authority therefor from their client; much less have they authority to compromise or settle some other action. Such a proceeding does not come within the scope of their employment. Davidson *v.* Rozier, 23 Mo. 387; Falker *v.* Parker, 7 Cranch, 436, 452; Dodd *v.* Dodds, 9 Penn. St. 315. Hence said supposed agreement between counsel was a nullity." An attorney at law, as such, has no power to compromise claims of his client by taking a bond, or anything except money, in satisfaction of them, or by receiving a less sum, or any security for a less sum, than is due on them; and such a compromise, if not expressly authorized, will not be binding on the client unless he has, with full knowledge, ratified it. Such a compromise will be governed by the general law of principal and agent. Maddux *v.* Bevan, 39 Md. 485.

however, is to be confined to the settlement of the particular suit, and does not include matters collateral.[1]

§ 593. *Attorney liable to client for negligent compromise.* — For in any view it is plain that if the attorney acts without due diligence and discretion in making the settlement, he may, if he has proceeded without the client's authority, be liable for damages for any loss the client may have sustained.[2] In this country the rule is well established. The test is, did the attorney, in making the settlement, act as good and diligent business men of his class are accustomed to act? If so, he is protected, no matter how unfortunate may have been the result. If, on the other hand, he did not show the care and diligence which good business men of his class are accustomed to show, then he is liable for the loss.[3]

§ 594. *Compromise not binding on client if the opposite party have notice of the attorney's want of authority, or if the terms of the compromise are such as to put the opposing party on inquiry.* — If the opposite party knows that the attorney is without authority or acts in disobedience to his client, the compromise will not be enforced to the injury of the client. The reasoning hinges on the term "apparent," as given above. Had the attorney *apparent* authority to compromise? If he had, then his client is bound, unless the compromise was of so unfair a character as to imply fraud. If he had not, then the compromise ceases to bind the principal, who it was known declined to give it his assent. That he had not, the compromise itself may be invoked to show. Was it so flagrantly unfair to the client as to

The plaintiffs in a suit instructed their attorney to settle the case on certain terms, coupled with a certain condition, and afterwards spoke to the defendants of the terms as terms of settlement, without saying anything about the condition; the attorney never mentioned the condition, but settled upon the terms proposed, and the defendants believed and had reason to believe that the attorney had authority to settle as he did. Held, that the plaintiffs were bound by the settlement. Peru Steel Co. *v.* Whipple File Co. 109 Mass. 464. It was ruled where a suit settled by the plaintiffs' attorney, upon the defendants paying a sum as damages and also his fees, that the plaintiffs could not rescind the settlement as unauthorized upon tendering to the defendants only the amount paid by them as damages. Ibid.

[1] Strauss *v.* Francis, L. R. 1 Q. B. 379; Wenham, ex parte, 21 W. R. (1875) 104; Dodd *v.* Dodd, 9 Penn. St. 315; Davidson *v.* Rozier, 23 Mo. 387; 7 Cranch, 436, and cases in prior note.

[2] This is conceded in England. Chambers *v.* Mason, 5 C. B. N. S 359.

[3] See Whart. on Negligence, § 749.

make it impossible that the latter would have agreed to it? Then, the courts, where it appears that a want of authority should have been known to the opposing party, will refuse to execute the compromise.[1] Otherwise, the compromise binds.[2]

§ 595. *After judgment power to compromise is at an end.* — The power is based solely on the uncertainties of litigation. If these uncertainties are over, and a judgment obtained, this judgment cannot be released by the attorney without authority.[3] The same remark applies to all releases of liens.[4] Yet, as we have seen, an attorney, in order to collect part of a desperate judgment, may be justified, even without authority, in releasing the remainder of the lien; and if he be authorized to proceed by execution, he is authorized to compromise execution.[5]

V. ATTORNEY'S LIABILITY TO CLIENT.

§ 596. *Attorney required to show the diligence of a good specialist in his particular department.* — A lawyer, as is elsewhere shown,[6] no matter in what department of practice he acts, is required to exhibit the skill and diligence usual to good professional men in that particular department. The diligence required must be in his *professional* relations; and an erroneous answer, to a mere casual inquiry to one not a client, does not subject the lawyer to suit.[7] He is not required to possess *perfect* skill, for that is impossible in a profession whose philosophy is so profound, whose branches are so numerous, and whose literature is so copious.[8] He is not required to possess the skill of the best men of his profession. But if he practises without the skill usual to good practitioners in his particular department in his particular place, then he is chargeable with the consequences of such

[1] Holker *v.* Parker, 7 Cranch, 436; Stackhouse *v.* O'Hara, 14 Pa. St. 88; Filby *v.* Miller, 25 Pa. St. 264; Potter *v.* Parsons, 14 Iowa, 286.

[2] Supra, § 590–3; Brady *v.* Curran, Ir. R. 2 C. L. 314; Berry *v.* Mullen, 5 Ir. R. (5 Eq.) 368.

[3] Jones *v.* Ransom, 3 Ind. 327; Jenkins *v.* Gillespie, 18 Missis. (10 S. & M.) 31; Pendexter *v.* Vernon, 9 Humph. 84. Supra, § 587.

[4] Wilson *v.* Jennings, 3 Oh. St. 528; though see Monson *v.* Hawley, 30 Conn. 51; Moulton *v.* Bowker, 115 Mass. 36.

[5] Supra, § 589.

[6] Whart. on Negligence, § 744.

[7] Fish *v.* Kelly, 17 C. B. N. S. 194.

[8] Hence he is not liable for an error of opinion as to an open and doubtful point of law. Morrill *v.* Graham, 27 Texas, 646; Kemp *v.* Burt, 1 N. & M. 262; 4 B. & Ad. 424; Montriou *v.* Jefferys, 2 C. & P. 113; Marsh *v.* Whitman, 21 Wall. 178. See supra, § 245.

want of skill.[1] So with regard to diligence. *Perfect* diligence is not required of him; since as no lawyer is perfectly diligent, if perfect diligence is required to release from liability for loss, no lawyer could lose a case without liability, for no lawyer who is

[1] Whart. on Neg. § 749; Crosbie *v.* Murphy, 8 Ir. C. L. R. 301; Hatch *v.* Lewis, 4 F. & F. 407.

As to degree of competency required, see supra, § 272. And see White *v.* Washington, 1 Barnes, 302; 2 Barnes, 4. "Every person who enters a learned profession, undertakes to bring to the exercise of it a reasonable degree of care and skill." Per Tindal, C. J., in Lanphier *v.* Phipos, 8 Car. & P. 479. The same judge continues: "An attorney does not undertake, *at all events* you shall gain your cause, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable, and competent degree of skill." See, also, Holmes *v.* Peck, 1 R. I. 242. Were attorneys liable upon every occasion for ignorance, their responsibility would far exceed that of any other class of professional men; and to exempt them from any such liability, on account of the difficulty and delicacy of their ordinary vocation, would be to encourage ignorance and inattention in the administration of justice. The law steers a middle course, and lays it down, that to render an attorney or solicitor amenable for the consequences of a mistake, he must exhibit a failure in the diligence common to good practitioners of his class. See Purvis *v.* Landall, 12 Cl. & F. 91.

If he negligently make an erroneous statement to the court, whereby a wrongful order is procured, he is liable to the parties injured by such order. Spencer, in re, 21 L. T. N. S. 808; 39 L. J. Ch. 841.

"It would be extremely difficult," said Chief Justice Tindal in Godefroy *v.* Dalton, 6 Bing. 568, "to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause is bounded; or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertakings, and that *crassa diligentia* or *lata culpa* mentioned in some of the cases for which he is undoubtedly responsible. The cases, however, appear to establish in general, that he is liable for the consequences of ignorance or non-observance of the rules of practice of this court, for the want of care in the preparation of the cause for trial, or of attendance thereon with his witnesses, and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. While, on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction." See fully Whart. on Neg. § 749; and see Mercer *v.* King, 1 F. & F. 490; Crosbie *v.* Murphy, 8 Ir. C. L. R. 301; Hart *v.* Frame, 6 Cl. & F. 210; Purvass *v.* Landell, 12 C. & F. 91; Wilson *v.* Luss, 20 Me. 421; Goodman *v.* Walker, 30 Ala. N. S. 482; Walpole *v.* Carlisle, 32 Ind. 415; Stephens *v.* Walker, 55 Ill. 151; Pidgeon *v.* Williams, 21 Grat. 251; Lynch *v.* Com. 16 S. & R. 368; Holmes *v.* Peck, 1 R. I. 242; Bowman *v.* Tallman, 27 How. (N. Y.) Pr. 212; Cox *v.* Sullivan, 7 Ga. 144; O'Barr *v.* Alexander, 37 Ga. 195.

perfectly diligent is to be found. To diligence the same test is to be applied as is applied to skill; a lawyer is required to apply to a case the diligence usual to good practitioners of his class and of his locality. If he fail in this diligence and if loss to his client consequently accrue, he is liable for this loss.[1]

[1] Ibid. See remarks of Lord Campbell, in Purves *v.* Landell, 12 Cl. & F. 91, and of Abbott, C. J., in Montriou *v.* Jefferys, 2 C. & P. 113; and see, also, Baikie *v.* Chandless, 3 Camp. 17; Pitt *v.* Galden, 4 Burr. 2066; Elkinton *v.* Holland, 9 M. & W. 661; Bulmer *v.* Gilman, 4 M. & G. 108; North W. R. R. *v.* Sharp, 10 Exch. 451; Thwaites *v.* Mackersen, 3 C. & P. 341; Gilbert *v.* Dynely, 3 Scott N. R. 364; 3 M. & G. 12; Hart *v.* Frame, 6 C. & J. 193; Mercer *v.* King, 1 F. & F. 490; see Lee *v.* Dixon, 3 F. & F. 744; Parker *v.* Rolls, 14 C. B. 691; Williams *v.* Gibbs, 6 N. & M. 788; Cox *v.* Leech, 1 C. B. N. S. 617; Wilson *v.* Coffin, 2 Cush. 316. As illustrating the general position just stated, see Hart *v.* Frame, 6 Cl. & Fin. 210; Allen *v.* Clark, 1 N. R. 358, Q. B.; Parker *v.* Rolls, 14 C. B. 691; Purvass *v.* Landell, 12 C. & F. 91; Witson *v.* Russell, 20 Me. 421; Holmes *v.* Peck, 1 R. I. 242; Watson *v.* Muirhead, 57 Penn. St. 161; Lynch *v.* Com. 16 S. & R. 368; Bowman *v.* Tallman, 27 How. (N. Y.) Pr. 212; Harter *v.* Morris, 18 Oh. St. 492; Pidgeon *v.* Williams, 21 Grat. 251; Goodman *v.* Walker, 30 Ala. N. S. 482; Cox *v.* Sullivan, 7 Ga. 144; Nisbet *v.* Lawson, 1 Ga. 275; O'Barr *v.* Alexander, 37 Ga. 195; Stubbs *v.* Beene, 37 Ala. 627; Spiller *v.* Davidson, 4 La. An. 171; Gambert *v.* Hunt, 44 Cal. 542; Walpole *v.* Carlisle, 32 Ind. 415; Hastings *v.* Halleck, 13 Cal. 203; Stevens *v.* Walker, 55 Ill. 151.

An attorney, when employed, is bound to conduct suit to close. Nicholls *v.* Wilson, 2 D. N. S. 1031; 11 M. & W. 106; Harris *v.* Osborn, 2 C. & M. 629; Whitehead *v.* Lord, 7 Exch. 691; Van Sandau *v.* Browne, 9 Bing. 402; 2 M. & Scott, 543; 1 D. P. C. 715; Hoby *v.* Built, 3 B. & Ad. 350; and he cannot recover compensation until suit is closed. Ibid. See infra, § 637. But he is not bound to proceed if his intermediate expenses are not paid. Wandsworth *v.* Marshall, 2 C. & J. 665.

He is liable if he abandon the cause without reasonable cause and notice. Nicholls *v.* Wilson, 11 M. & W. 106; 12 L. J. (N. S.) 266, Exch; and if he so abandons at all. it seems he would be liable for the consequences, even though proper funds are not provided him for the conduct of it; see 1 Sid. 31, Mordecai *v.* Solomon, Sayer R. 173; Menzies *v.* Rodrigues, 1 Price, 92; but though he may not be at liberty suddenly to give up his employment, because a client does not, upon every occasion, yield to his demand for money, he may at any time give such notice on any reasonable cause, as the want of funds; Rowson *v.* Erle, 1 Mo. & Malk. 538; Van Sandau *v.* Brown, 9 Bing. 402; 2 M. & Scott, 543, S. C.; Wadsworth *v.* Marshall, 2 C. & J. 665; Hoby *v.* Built, 3 B. & Ad. 350; a dissolution of partnership, or his retirement from business, or the insolvency of his client, and may recover his costs for what he has done.

He is also liable in case he should make erroneous or negligent statements of any affidavits proper in the case; Rowbotham *v.* Dupree, 5 Dowl. P. C. 557; see, as to this, Brown *v.* Austin, 4 Dowl. 161; Nash *v.* Swin-

§ 597. *Defective advice as to titles constitutes negligence involving liability.* — Whether a professional adviser as to titles takes rank as a conveyancer or as a counsel, his liability is the same. He is not bound to *perfect* accuracy. He is not expected to anticipate rulings by which current law may be reversed; it is enough if he accept the law which is accepted by good professional men of his particular class at his particular place. He is not bound to *perfect* care. He is not insurer, as will presently be seen, of the papers committed to him; nor is he insurer of their accuracy. But he must apply a degree of diligence commensurate to the importance of the interests committed to him; and if through his carelessness or that of his clerks loss ensues, he is liable for the loss.[1] If searches as to title are required, then omission to make such searches is inculpatory negligence;[2]

burn, 4 Scott N. S. 326; 1 Dowl. N. S. 190; or in respect to the truth of a plea in abatement; Lumley *v.* Foster, Barnes, 344; or to any fact which comes to his knowledge in a professional character. See Merrington *v.* A'Becket, 2 B. & C. 81.

If an attorney negligently commence or defend an action or suit, without authority, he is liable for the consequences to the principal; Anon. 1 Salk. 88; Hubbard *v.* Phillips, 13 M. & W. 702; 2 D. & L. 707; and may be made to pay the costs; Hollington, *ex parte*, 29 L. T. N. S. 502; Baker *v.* Loader, 42 L. J. Ch. 113; and so if, in the conduct of the proceedings, he take any step out of the ordinary routine of his professional duty, without or contrary to such instructions; Ibid.; Rolfe *v.* Rogers, 4 Taunt. 191; but attorneys, being invested with liberty of action (supra, § 274), are not generally amenable for acting in such matters which do come within their legitimate province, though contrary to the instructions of the client. Cox *v.* Livingston, 2 Watts & Serg. 103; Pike *v.* Emerson, 5 N. H. 393; Alton *v.* Gilmanton, 2 Ibid. 520.

An attorney cannot be charged with negligence when he accepts as a correct exposition of the law a decision of the supreme court of his state upon the question of the liability of stockholders of corporations of the state, in advance of any decision thereon by this court. Marsh *v.* Whitmore, 21 Wall. 178. See cases cited to § 596.

[1] Fotts *v.* Dutton, 8 Beav. 493; Taylor *v.* Gorman, 4 Ir. Eq. Rep. 550; Wilson *v.* Tucker, 3 Stark. 154; D. & R. N. P. C. 30; Knights *v.* Quarles, 4 Moore, 532; 2 B. & B. 102; Allen *v.* Clark, 7 L. T. N. S. 781; 1 N. R. 358; Drax *v.* Scroupe, 1 D. P. C. 69; 2 B. & A. 581; Stannard *v.* Ullathorne, 10 Bing. 491; 4 M. & Scott, 359; Ireson *v.* Pearman, 5 D. & R. 687: 3 B. & C. 799; Howell *v.* Young, 5 B. & P. 259; 8 D. & R. 14; 2 C. & P. 238; Whitehead *v.* Greetham, 2 Bing. 464; 10 Moore, 183; Dartnell *v.* Howard, 6 D. & R. 438; 4 B. & C. 345; Brumbridge *v.* Massey, 28 L. J. Ex. 59; Cooper *v.* Stephenson, 21 L. J. Q. B. 292; Hayne *v.* Rhodes, 8 Q. B. 342.

[2] Cooper *v.* Stephenson, 21 L. J. N. S. (Q. B.) 292; Watts *v.* Porter, 3 E. & B. 743; Miller *v.* Wilson, 24 Penns. St. 114; Gilman *v.* Hovey, 26

though a conveyancer is justified in taking, as to the existence of incumbrances, the opinion of counsel of standing, and counsel are not bound to anticipate as to such applicability an unexpected decision of the supreme court of the state.[1] Certainly a professional man employed to examine title is not required to consider the value of the property incumbered;[2] nor is he bound to caution his client against improbable contingencies of loss.[3]

§ 598. *Attorney liable for blunders in process.* — The attorney's duty is to see that the papers prepared by him are correct in form. He does not *insure* them; latent errors in the records from which he copies he is not bound to scent out; but he must have his own papers properly prepared; and if they are defective from lack of diligence on his part or the part of his subordinates, he is liable for the loss.[4] This same liability extends to the issuing of

Mo. 280; Gore *v.* Brazier, 3 Mass. 543; Sprague *v.* Baker, 17 Mass. 586; Clark *v.* Marshall, 34 Mo. 429.

[1] Watson *v.* Muirhead, 57 Penns. St. 161. See supra, § 245. The case, however, must be fairly put to counsel. Andrew *v.* Hawley, 26 L. J. Exch. 323.

[2] Hayne *v.* Rhodes, 8 Q. B. 342; Chapman *v.* Chapman, L. R. 9 Ex. 276.

[3] Brumbridge *v.* Massey, 28 L. J. (N. S.) Ex. 59.

[4] Bolton, in re, 9 Beav. 272; Spencer, in re, 18 W. R. (Ch.) 240; Varnum *v.* Martin, 15 Pick. 450; McWilliams *v.* Hopkins, 4 Rawle, 382; Dearborn *v.* Dearborn, 15 Mass. 316; Roobes *v.* Stone, 2 Leigh, 650; Reilly *v.* Cavanaugh, 29 Ind. 435; Oldham *v.* Sparks, 28 Tex. 425.

An attorney is liable for injuries to his client arising from a mistake made in the preparation of the writ; Varnum *v.* Martin, 15 Pick. 450; and from failure to notify the client of essential facts; McWilliams *v.* Hopkins, 4 Rawle, 382; and from other acts of negligence in suing out the claim; Dearborn *v.* Dearborn, 15 Mass. 316; Rootes *v.* Stone, 2 Leigh, 650; Reilly *v.* Cavanaugh, 29 Ind. 435; Oldham *v.* Sparks, 28 Tex. 425. He is liable for mistakes in suffering judgment to go by default; Godefroy *v.* Jay, 7 Bing. 413; 5 M. & P. 213; Benton *v.* Craig, 2 Miss. 198; Evans *v.* Watrous, 2 Porter, 205; Anon. 1 Wend. 108; Gaillar *v.* Smart, 6 Cow. 385; in misdescription in process; Taylor *v.* Gorman, 4 Ir. Eq. Rep. 550; in neglect in drawing up decree; Bolton, in re, 9 Beav. 272; see Spencer, in re, 18 W. R. Ch. 240; in neglecting to duly enter up a judgment; Flower *v.* Bolingbroke, 1 Str. 639; Fitch *v.* Scott, 3 How. Miss. 314; Hogg *v.* Martin, Riley, 156; Cox *v.* Livingston, 2 Watts & Serg. 103; in neglecting to set aside irregular proceedings; Godefroy *v.* Jay, supra; in neglecting to prevent the claim being barred by the lapse of time, to prepare for the trial; Roufigny *v.* Peale, 3 Taunt. 484; Lowry *v.* Guildford, 5 C. & P. 234. So, also, he is liable for negligence subpœnaing the requisite witnesses; Reece *v.* Rigby, 4 B. & Ald. 202; see Price *v.* Bullen, 3 L. J. 39 K. B.; in attending the trial at the time appointed; Nash *v.* Swinburne, 3 M. & G. 630; 4 Scott (N. S.), 326; Roufigny *v.* Peale, 3 Taunt. 484; or the referee in case of a reference; Swannell *v.*

executions. He is bound to show the diligence of good practitioners in the prompt issuing of the writs proper to make good a judgment when obtained.[1] And so as to registry of securities.[2]

§ 599. *Liable for negligence in preparation for or trial of cause.* — Here the same distinction is to be maintained that has been already noticed; the distinction between that perfect dili-

Ellis, 1 Bing. 347; Atcheson *v.* Maddock, Peake, 163; or at any stage of the cause where the attorney's presence may be requisite. Dauntley *v.* Hyde, 6 Jur. 163. So as to preparation of evidence; Long *v.* Orsi, 18 C. B. 610. It is for the jury to say, on the trial of an action against him for negligence, what damages his client has sustained by it. See Jones *v.* Lewis, 9 Dowl. 143; Hogg *v.* Martin, Riley, 156; Evans *v.* Watrous, 2 Porter, 205; Crooker *v.* Hutchinson, 2 Chip. 117.

[1] Phillips *v.* Bridge, 11 Mass. 246; Dearborn *v.* Dearborn, 15 Mass. 316; Crooker *v.* Hutchinson, 2 D. Chipm. (Vt.) 117. See, generally, Hunter *v.* Caldwell, 10 Q. B. 69; 10 Q. B. 83; Curlewis *v.* Broad, 1 H. & C. 322; Godefroy *v.* Jay, 7 Bing. 413; 5 M. & P. 284; Harrington *v.* Binns, 3 F. & F. 942.

The attorney is liable for negligence, both as to the proper parties to be sued (see Davies *v.* Jenkins, 11 M. & W. 745; 1 Dowl. & L. 321; 12 L. J. N. S. 386, Exch.), and the form and order of proceeding. White *v.* Washington, 1 Barnes, 302; 2 Barnes, 4.

See Stephenson *v.* Rowland, 2 Dow & Clark, 119; where it was laid down that though a solicitor is not liable for a mistake in a nice and difficult point of law, yet, if he depart from the ordinary mode of preparing a security, he must be considered as undertaking to do what was necessary to render the mode adopted effectual for the purpose; and if, from ignorance or inadvertence, he failed to do so, he would be held responsible for the consequences. An attorney, in a purchase or a mortgage transaction, for instance, undertakes to investigate only the legal requisites of a title, and not, like a surveyor, its value. See Green *v.* Dixon, 1 Jur. 137. An attorney is, in the language of pleaders, retained and employed, in a mortgage transaction, to "use due and proper care and diligence in and about ascertaining the title;" and, secondly, to take due and proper care that the same should be a *sufficient security* for such repayment; see Chitty on Pleading, 282, 7th ed.; Howell *v.* Young, 5 B. & C. 259; *i. e.* a sufficient security in point of law. Hayne *v.* Rhodes, 8 Q. B. Rep. 342.

Where, indeed, the attorney is employed to invest the money and find the proper security, a different rule prevails; see Dartnall *v.* Howard, 4 B. & C. 345; and of course it is the duty of an attorney, as of every other agent, to apprise his employer of any peculiar circumstances coming to his knowledge, in the transaction in which he is retained; *i. e.* the obvious insufficiency of value appearing on the title deeds, &c. Where, also, a transaction in which an attorney or solicitor is engaged creates a case of combined agency and trust, he would be liable for any loss, like an ordinary trustee; see Craig *v.* Watson, 8 Beav. 427; and the authority of an attorney or solicitor, in private transactions (such as loans, mortgages, &c.), is very great. See Pulling on Attorneys, *in loco.*

[2] Valpy *in re* L. R. 7 Ch. 289; Miller *v.* Wilson, 24 Penn. St. 114.

gence which is unattainable, and that appropriate diligence which is usual among good practitioners of the particular class in the particular place. This distinction is well expressed by Tindall, C. J. "He," the attorney, "is liable generally for the consequences of ignorance of the rules of practice of the court (where he practises); for the want of care in the preparation of the cause for trial, or of attendance thereon with his witnesses; and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. Whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or such as are usually intrusted to men in the higher branch of the profession of the law."[1] Hence, it has been held inculpatory negligence for an attorney to prejudice a cause by his ignorance of the rules of the court in which he is practising;[2] by his defective instruction of counsel;[3] by his defective preparation for trial;[4] by his defective advice to his client as to preparation,[5] and by his delay in bringing suit.[6] After having appeared in a suit, his duty is faithfully to conduct it, until relieved by the court.[7]

[1] Godefroy *v.* Dalton, 6 Bing. 468.

[2] Cox *v.* Leach, 1 C. B. (N. S.) 617; Hunter *v.* Caldwell, 10 Ad. & El. (N. S.) 69; Frankland *v.* Cole, 2 Cr. & J. 590; Huntley *v.* Bulwer, 6 Bing. N. C. 511; Dearborn *v.* Dearborn, 15 Mass. 316.

[3] De Roufigny *v.* Peale, 3 Taunt. 484; Hawkins *v.* Harwood, 4 Ex. 503.

[4] Long *v.* Orsi, 18 C. B. 610; Reeve *v.* Rigby, 4 Barn. & Ald. 902. See generally Mercer *v.* King, 1 F. & F. 490; Parker *v.* Rolls, 14 C. B. 691; Lewis *v.* Collard, 14 C. B. 208; Williams *v.* Gibbs, 6 N. & M. 788; 2 H. & W. 241; Cox *v.* Leach, 1 C. B. N. S. 617; Lee *v.* Dixon, 3 F. & F. 744; Scannell *v.* Ellis, 8 Moore, 340; 1 Bing. 347; Lowry *v.* Guilford, 5 C. & P. 234; Townley *v.* Jones, 8 C. B. N. S. 289; Fray *v.* Foster, 1 F. & F. 681; Hawkins *v.* Harwood, 4 Exch. 503; 7 D. & L. 181.

The attorney, or solicitor, who undertakes the conduct of an action, is liable for the consequences of not fully investigating the facts and evidence in support of it. Thwaites *v.* Mackerson, 3 Car. & P. 341; Gill *v.* Lougher, 1 C. & J. 170; Montgomery *v.* Devereaux, 7 Cl. & F. 188; Wilson *v.* Russ, 7 Shep. 421; Kane *v.* Van Vranken, 5 Paige C. R. 62; Gihon *v.* Albert, 7 Paige C. R. 278; Salisbury *v.* Gourgas, 10 Met. 442.

[5] Allison *v.* Raynor, 7 B. & C. 441.

[6] Walpole *v.* Carlisle, 32 Ind. 415; Rhines *v.* Evans, 66 Penn. St. 192; Hoppin *v.* Quin, 12 Wend. 517; Smedes *v.* Elmendorff, 3 Johns. R. 185; Stevens *v.* Walker, 55 Ill. 151; Fitch *v.* Scott, 4 Miss. (3 How.) 314.

[7] See Lorimer *v.* Hollister, 1 Str. 693; Mould *v.* Roberts, 4 D. & R. 719; Wigg *v.* Rook, 6 Mod. 86; Menzies *v.* Rodrigues, 1 Price, 92, and cases cited supra, § 596; infra, § 637.

The attorney should, either previous

§ 600. *No defence that services were gratuitous.* — Confidence bestowed and accepted is a sufficient consideration to sustain an action of this class ;[1] and when a lawyer undertakes to conduct a suit gratuitously he is as liable for damages arising from his neglect as he would be if he were regularly retained. *A fortiori* is he liable for damages arising from his officious intermeddling with a case.[2]

§ 601. *Not liable for negligence of associate.*[3] — When a substitute is appointed, an important distinction is to be observed. If a case from its nature requires the assistance of other attorneys or counsel, and this is or ought to be known by the client, then the primary attorney is liable only for *culpa in eligendo*, except in those cases in which he participates in the negligence of his substitute or associate. In all such cases it is proper to consult the client as to the substitution, and if he intelligently accede to the appointment, then the primary attorney is relieved even from *culpa in eligendo*. But supposing that to the primary attorney is reserved the right of selecting such substitutes, then he must exercise the diligence of a good specialist in the selection, and is liable for negligence in case he fail to exercise such diligence. Beyond this, his liability, in cases of this class (*i. e.* in cases where the assistance of an independent expert or professional man is by the nature of the transaction implied, or in cases where there is authority expressly given to employ such

to the commencement, or at an early stage of every cause, obtain satisfactory information, both as to the law and the evidence, in support of his client's case, by a careful perusal and examination of the various papers and documents in the cause. See Thwaites *v.* Mackerson, 3 Car. & P. 341; M. & M. 199. Lord Tenterden is reported to have remarked on this subject, "An attorney who allows his client to proceed without pointing out to him the expediency of ascertaining the evidence, and that in the *very first instance*, is guilty of *grossly absurd and culpable negligence.*" Anon. case at Kingston Assizes, 1828, cited 2 Chitty's General Practice, ch. 11, p. 22, note. He is liable for negligence in personal communication with the client (see Hopkinson *v.* Smith, 7 Moore, 237; 1 Bing. 13), and examination of the witnesses and proofs. See Harvey *v.* Mount, 8 Beav. Ch. Rep. 439. He should in due time make the necessary preparations for the trial or hearing, by preparing briefs of the pleadings, proofs, and observations (see De Roufigny *v.* Peale, 3 Taunt. 484), procuring the production of the requisite documents, and subpœnaing the requisite witnesses. See Reeve *v.* Rigby, 4 B. & Ald. 202.

[1] Whart. on Neg. § 436.

[2] Bradt *v.* Walton, 8 Johns. R. 298; O'Hara *v.* Brophy, 24 How. Pr. 279.

[3] See supra, § 277.

assistance), does not extend. Suppose, for instance, the attorney is required to employ a representative to take depositions in a foreign state. Here the attorney's duty is discharged if he exercises *diligentia in eligendo*.[1] Or suppose he is required to employ in a trial counsel distinguished for skill in cross-examination. Here, also, *diligentia in eligendo* is enough. It is otherwise, however, as to the assistants employed by an attorney in the conduct of his office business. Such assistants are regarded as his servants, and he is liable for all their acts within the circuit of their employment.[2]

§ 602. *When attorney contracts to collect a debt, then he is liable for the negligence of his agents by which debt is lost.* — This presents a specific contract on the part of the attorney, by which he virtually guarantees the collection.[3]

§ 603. *Liable for papers.* — As to all papers committed to him by his client, the attorney is liable for *levis culpa in custodiendo*. He is not the *insurer* of such papers. But he must exercise towards them such care and diligence as good experts in his department are under similar circumstances accustomed to apply.[4]

§ 604. *Liable for negligence of clerks, subalterns, and partners.* — A lawyer, as we have just seen, is liable for the negligence of his clerks,[5] of his subalterns,[6] and of his partners.[7] But this is not to be considered as imposing on him liability for the negligent acts of associate counsel or ancillary agents, experts in particular departments, employed by him, when they are charged with a special discretion of their own.[8]

[1] See supra, § 276, 545.

[2] See supra, § 276, 543–5; infra, § 604.

[3] Riddle *v.* Hoffman, 3 Penn. R. 224; Bradstreet *v.* Everson, 72 Penn. St. 124. Supra, § 543–4.

[4] Reeve *v.* Palmer, 5 C. B. N. S. 91; North W. R. R. *v.* Sharp, 10 Exch. 451; Wilmoth *v.* Elkinton, 1 N. & M. 749. See Thompson, in re, 20 Beav. 545.

[5] Supra, § 276; Floyd *v.* Nangle, 3 Atk. 568.

[6] Collins *v.* Griffin, Barnes, 37; Simmons *v.* Rose, 31 Beav. 11; Whitney *v.* Ex. Co. 104 Mass. 152; Bradstreet *v.* Everson, 72 Penn. St. 124; Lewis *v.* Peck, 10 Ala. 142; Pollard *v.* Rowland, 2 Blackf. (Ind.) 22; Wilkinson *v.* Griswold, 12 Sm. & M. 669; Power *v.* Kent, 1 Cowen, 211; Birbeck *v.* Stafford, 14 Abb. (N. Y.) Pr. 285; 23 How. Pr. 236.

[7] Norton *v.* Cooper, 3 Sm. & G. 375; Warner *v.* Griswold, 8 Wend. 665; Livingston *v.* Cox, 6 Penn. St. 360; Mardis *v.* Shackleford, 4 Ala. 493; Morgan *v.* Roberts, 38 Ill. 65; Smyth *v.* Harvie, 31 Ill. 62; Dwight *v.* Simon, 4 La. An. 490; Poole *v.* Gist, 4 McCord, 250. Supra, § 276.

[8] See Watson *v.* Muirhead, 57 Penn. St. 247; Godefroy *v.* Dalton, 6 Bing. 468; Porter *v.* Peckham, 44 Cal. 204. Supra, § 276, 543–5, 570, 601.

§ 605. *When there is an action at common law, a client cannot obtain relief in equity for losses received through attorney's negligence.* — The liability of a solicitor to his client for losses received through the solicitor's negligence has lately been reëxmained in England, and it has been held that when an action at law can be maintained against the solicitor, the client cannot proceed in equity.[1] The distinction was first clearly put by Lord Thurlow, who held that though in cases of fraud chancery would take jurisdiction, yet, if the case is one of mere negligence, the client is limited to a suit at common law.[2] Where the solicitor merges himself in a general agent, there he is equitably responsible for negligence in investing in inadequate securities.[3] The same responsibility attaches when the solicitor invests as a general trustee.[4] Where there is fraud, there it is clear that equitable relief may be granted.[5] But for a single act of negligence by a solicitor (*e. g.* in examining a title) the remedy is exclusively at common law.[6]

[1] British Mutual Investment Co. *v.* Cobbold, L. R. 19 Eq. 627.

[2] Brooks *v.* Day, 2 Dick. 572. Dicta intimating jurisdiction in cases of negligence are found in Floyd *v.* Nangle, 3 Atk. 568; and ——— *v.* Jolland, 8 Ves. 72; Dixon *v.* Williamson, 4 D. G. & J. 208; Chapman *v.* Chapman, L. R. 9 Eq. 276.

[3] Smith *v.* Pococke, 2 Drew. 197.

[4] Craig *v.* Watson, 8 Beav. 427.

[5] Blair *v.* Bromley, 5 Hare, 542; 2 Phil. 354.

[6] Brooks *v.* Day, supra; British Investment Co. *v.* Cobbold, supra. In the latter case the court was asked to exercise a jurisdiction to make a solicitor take an insufficient mortgage security which he had effected for a client off his hands, on the ground that "the court of chancery has a concurrent jurisdiction with the courts of law against its own officers." Vice-Chancellor Hall unequivocally repudiated the jurisdiction. "It would, in my opinion," he said, "be an alarming thing to solicitors who prepare mortgage deeds for clients to say that, if they are guilty of negligence, the clients would be entitled in this court to a remedy additional to that which they have by an action at law; that this court would compel a solicitor to take a mortgage security off his client's hands, and find the money necessary for the purpose — it may be a sum of £100,000. There is no jurisdiction in this court to enable it to do that." And he added that he knew of no authority in support of the proposition that there is jurisdiction in the court of chancery, in a case of ordinary negligence on the part of a solicitor, in reference to the investigation of a title, to make such solicitor responsible. See, also, Mare *v.* Lewis, Ir. L. R. 4 Eq. 235, where it was said that this was not a mere technical question as to form of action, but that it "involves a substantial difference as to the rights of the litigants. To such an action in a court of law the statute of limitations would be a good defence if six years had elapsed from the time the default was actually made; whereas, if the ground of com-

§ 606. *Attorney is liable to pay over moneys received by him after demand.* — An attorney is bound to notify his client of the receipt of money for the latter a reasonable time after its receipt;[1] and if the attorney gives this notice, the client has no cause of action against the attorney until after demand and refusal.[2] If the attorney has doubts as to whether the money collected for the client belongs to the client, he cannot (unless the fund be attached or enjoined in his hands) refuse to pay over the money, where the client agrees to indemnify him. If the client indemnifies him, he must pay over.[3] But where the money received is dependent upon a relation involving a series of acts and duties, the attorney is not liable until this relationship is closed.[4]

§ 607. Demand, however, is not necessary if the attorney does not account to the client, or is guilty of negligent detention of the fund,[5] or of culpable negligence in collection;[6] nor where the

plaint comes within the jurisdiction of the court of chancery, as being founded on fraud or trust, the statute of limitations either does not apply to the case, or requires a very different application." See, also, article from Solicitors' Journal, as reprinted in Albany Law Journal of July 31, 1875.

In gross cases of neglect or misconduct the courts will interfere summarily, as where the transaction is tainted with fraud; Re William Jones, 1 Chit. 651; Hill, in re, L. R. 3 Q. B. 543; or the attorney has been expressly paid beforehand for what he has omitted to do; Garner *v.* Lawson, 1 Barnard, 101; Rex *v.* Tew, Say. Rep; 50; and when the summary jurisdiction is resorted to, the attorney may be proceeded against by attachment; Collins *v.* Griffin, Barnes, 37; Floyd *v.* Nangle, 3 Atk. 568; by an order to reimburse the client; Rex *v.* Bennett, Say. 169; but without some proof of fraud the courts will generally leave the client to his remedy by action. Barker *v.* Butler, 2 W. Bl. 780; Frankland *v.* Lucas, 4 Sim. 586. As to costs, see Rex *v.* Tew, Say. 50; Rex *v.* Bennett, Ibid. 169; De Roufigny *v.* Peale, 3 Taunt. 484; Brown *v.* Dawson, 2 Hogg, 76. See supra, § 596 *et seq.*

[1] Glenn *v.* Cuttle, 2 Grant, Penn. 273; Bougher *v.* Scoby, 16 Ind. 152. Supra, § 572.

[2] Evans *v.* King, 16 Mo. 525; Beardslee *v.* Boyd, 37 Mo. 180; Krause *v.* Dorrance, 10 Penn. St. 462; Denton *v.* Embury, 10 Ark. 228; Cummins *v.* M'Lean, 2 Pike, 402; Jett *v.* Hempstead, 25 Ark. 462; Black *v.* Hersch, 18 Ind. 342; Taylor *v.* Armstead, 3 Call, 200; Rathburn *v.* Ingalls, 7 Wend. 320; Taylor *v.* Bates, 5 Cow. 596; Satterly *v.* Frazer, 2 Sandf. 141; People *v.* Brotherson, 36 Barbour, 662; Mardis *v.* Shakelford, 4 Ala. 493. See *contra*, Coffin *v.* Coffin, 7 Greenl. 298.

[3] Marvin *v.* Ellwood, 11 Paige, 365; Dunn *v.* Vannerson, 8 Missis. 7 How. 579.

[4] Glenn *v.* Cuttle, 2 Grant, Penn. 273.

[5] Denton *v.* Embury, 10 Ark. 228; Glenn *v.* Cuttle, 2 Grant, Penn. 273. See Coffin *v.* Coffin, 7 Greenl. 298.

[6] Cummins *v.* M'Lain, 2 Ark. 402; Mardis *v.* Shakelford, 4 Ala. 493.

attorney denies his agency.[1] The attorney, in case of conversion, is liable to an action of trover.[2] When he accounts to his client for a balance, a promise to pay the balance is inferred.[3] He is liable for money belonging to his client, as his client's garnishee, even though his client has not demanded the money.[4] Summary proceedings against the attorney for payment of funds in his hands are governed by local practice, and are not within the range of the present discussion.

§ 608. *Attorney is bound carefully to transmit funds when collected.* — The attorney is liable for due diligence in forwarding to his client the latter's funds. Losses arising from forwarding by an unauthorized and unusual mode must be borne by the attorney.[5]

§ 609. *Cannot set off collateral claims.* — An attorney employed by a corporation cannot set off, in a suit brought against him by the corporation, a private debt due him by the treasurer of the corporation.[6] And so he is liable for the amount of the debt if he receive in discharge of the debt debts due himself.[7]

§ 610. *Cannot set up illegal taint in claim.* — He cannot set up as a defence the illegal acquisition of the claim by the plaintiff;[8] though if the contract is executory, the plaintiff cannot recover.[9]

VI. ATTORNEY'S LIABILITY TO THIRD PARTIES.

§ 611. *Attorney acting in good faith not personally liable to third parties.* — An attorney who acts in good faith, and in conformity with law is not personally liable for acts done in pursuance of his client's directions.[10] It is otherwise, however, when

[1] Tillotson *v.* McCrillis, 11 Vt. 477.

[2] Houston *v.* Frazier, 8 Ala. 81; Colton *v.* Sharpstein 14 Wisc. 446.

[3] Cameron *v.* Clark, 11 Ala. 259.

[4] Staples *v.* Staples, 4 Greenl. 533; Thayer *v.* Sherman, 12 Mass. 441.

[5] Grayson *v.* Wilkinson, 13 Missis. (5 Sm. & M.) 268.

[6] Newcastle *v.* Bellard, 3 Me. (3 Greenl.) 369.

[7] Houx *v.* Russell, 10 Mo. 246.

[8] Fogerty *v.* Jordan, 2 Robt. N. Y. 319. Supra, § 250.

[9] Supra, § 223, 249.

[10] Allaway *v.* Duncan, 16 L. T. N. S. 264; Wigg *v.* Simonton, 12 Rich. S. C. 583; Hunt *v.* Printup, 28 Ga. 297; De Grey, C. J., in Barker *v.* Braham, 2 Bl. Rep. 867; but see Ford *v.* Williams, 24 N. Y. 359, where it was held that the attorney, by taking responsibility on himself exclusively, may estop himself from denying his liability.

An attorney is not liable for commencing legal proceedings on behalf of another on a groundless claim; Anon. 1 Mod. 209; or by mistake and without malice taking proceedings against the wrong party. See Davies *v.* Jenkins, 11 M. & W. 745; 1 D. & L. 321; 12 L. J. (N. S.), 386, Exch.; or such as

the attorney, knowing that there is no cause of action and that his client is acting maliciously, becomes the instrument by which this malice is executed.[1] So an attorney who deliberately issues or enforces an irregular or void writ, is liable in trespass to the party injured.[2] And for the attorney's illegal act in issuing pro-

are erroneous and without jurisdiction. See Carratt *v.* Morley, 1 Q. B. 18, 28. No such action will lie, Lord Abinger observes, unless the declaration charges the attorney with acting *maliciously.* Davies *v.* Jenkins, *ub. sup.* See Carratt *v.* Morley, 1 Q. B. 18, 28.

[1] Burnap *v.* Marsh, 13 Ill. 535. See apparently *contra*, Anon. 1 Mod. 210, as accepted in Barker *v.* Braham, 2 Bl. Rep. 869, but doubted in Bac. Abr. Master & Servant, L.; and see Hazelrigg *v.* Brenton, 2 Duvall, 525.

Fraud or deceit in an attorney in issuing legal process may make him liable to party injured. — Gibson *v.* Mudford, 1 Roll. Rep. 408; F. N. B. *writ of deceit.*

[2] Where the attorney issues process on behalf of his client which he knows is irregular or illegal, or executed against the wrong party, both the attorney and the client, who put it in force, are liable in trespass. Barker *v.* Braham, 3 Wils. 368; 2 W. Bl. 866; Codrington *v.* Lloyd, 8 Ad. & E. 449; 3 Nev. & P. 442; 1 W. W. & H. 358; the latter, because the act of the attorney is, in point of law, his own act; Parsons *v.* Lloyd, 2 W. Bl. 845; 3 Wils. 341; King *v.* Harrison, 15 East, 615, note (*c*); Loton *v.* Devereaux, 3 B. & Ad. 343; Bates *v.* Pilling, 6 B. & C. 38. See Jarmaine *v.* Hooper, 13 L. J. (N. S.) 63, C. P.; see, also, People *v.* Montgomery, Common Pleas, 18 Wendell, 633; 7 Paige Ch. Reports, 615; Child *v.* Dwight, 1 Dev. & Bat. Ch. 171. Liability in such case, by force of the authorities just cited, attaches to the attorney, because he has acted under proceedings which it was incumbent on him to see were absolutely void, and there appears to be no authority for any distinction between the liability of the client and that of the attorney. Liv. Law. Mag. Jan. 1856.

"On examining the books," Lord Denman observes (Green *v.* Elgie, 5 Q. B. 113, which was an action against an attorney for deliberately issuing a bad warrant), "only one such authority will be found: a *nisi prius* case in 3 Espinasse." Sedley *v.* Sutterland, 3 Esp. N. P. C. 202. "We must say that that report is at variance with many well considered cases in law, of which it will be enough to mention Braham *v.* Barker," 3 Wils. 369, "where the point was learnedly discussed, and Codrington *v.* Lloyd," 8 Ad. & E. 449. "The distinction is not between attorney and client, but between both of them, and the officer whom they employ to execute his known duty in giving effect to the judgments and orders of competent courts. This distinction is just and reasonable, and has been expounded in Carratt *v.* Morley, 1 Q. B. 18, and several other cases lately decided in the court. It is not impossible," Lord Denman continued to say, "that an attorney may be in the nature of an officer handing over paper which may be afterward acted upon, with no more concurrence than that of a postman who conveys a letter; when such is his conduct, the principle may protect him; but if he deliberately directs the execution of a bad warrant, he takes upon himself the chance of all consequences."

cess under his client's directions, both client and attorney are liable.[1] And so an attorney makes himself liable by suing out a writ in a court which he knows has no jurisdiction.[2] But an action on the case is not maintainable against an attorney who by mistake and without malice issues process against a wrong person.[3]

When an attorney is sued for an illegal act, advice of counsel is no defence unless such advice was taken on a fair and full statement of facts.[4]

§ 612. *Attorney may assume personal liability.* — An attorney may make himself personally liable to third persons by acting independently of his client, and assuming obligations on his own account.[5]

See fully Codrington *v.* Lloyd, 8 A. & E. 449; 3 N. & P. 442; Croser *v.* Pilling, 6 D. & R. 129; 4 B. & C. 26; Bates *v.* Pilling, 2 D. & R. 129; Somell *v.* Champion, 6 A. & E. 407; 2 N. & P. 627; Green *v.* Elgie, 5 Q. B. 99; D. & M. 199; Bowles *v.* Senior, 8 Q. B. 677. See Williams *v.* Smith, 14 C. B. N. S. 596.

[1] Ibid.; Newbury *v.* Lee, 3 Hill N. Y. 523; Ford *v.* Williams, 24 N. Y. 359. Supra, § 546. Barker *v.* Braham holds that in such case the attorney is liable.

[2] Goodwin *v.* Gibbons, 4 Burr. 2108. See Bates *v.* Pilling, 6 B. & C. 38.

[3] Davies *v.* Jenkins, 1 D. & L. 321; 11 M. & W. 745, and cases cited supra.

[4] Andrews *v.* Hawley, 26 L. J. Exch. 323.

[5] Bell *v.* Mason, 10 Vt. 509. See Respass *v.* Morton, Hard. (Ky.) 226; Hazelrigg *v.* Brenton, 2 Duv. (Ky.) 525; Ford *v.* Williams, 13 N. Y. 597; Jones *v.* Wolcott, 2 Allen, 247. Supra, § 490.

Attorneys and solicitors, as is stated by Mr. Pulling, are, in ordinary cases, excused from liability to third parties for what they do in the name and on behalf of their principals; Co. Litt. 52 *a*; Johnson *v.* Ogilby, 3 P. Wms. 277; but they may also, like other agents, render themselves personally liable by acting without authority, or exceeding it, practising fraud or collusion, or acting under illegal, informal, or irregular proceeding; and the same rules as to the liability of attorneys appear to apply both in matters of contract and of tort. In matters *ex contractu* the law has been thus laid down as to the liability of attorneys and solicitors: "The attorney is known merely as the agent, — the attorney of the principal, — and is directed by the principal himself. The agent acting for and on the part of the principal does not bind himself, unless he offers to do so, by express words; he does not make himself liable for anything, unless it is for those charges which he is himself bound to pay, and for which he makes a charge." Lord Abinger, in Robins *v.* Bridge, 3 M. & W. 119.

An attorney in a cause is not personally liable to a witness, whom he subpœnas to give evidence in a cause, for his expenses of attendance; Robinson *v.* Bridge, 3 M. & W. 114; *S. C.* 6 Dowl. 140; Sargeant *v.* Pettibone, 1 Aik. 355; nor for his tavern bill while in attendance on the trial; Fendall *v.* Noakes, 7 Scott, 647; and even an express promise by the attorney after the trial to pay a witness a compensation for his loss of time cannot be enforced either by action or a sum-

§ 613. *Unauthorized attorney liable to third parties for damages.* — An attorney who enters an appearance without authority is liable in damages to a party who is injured by such unwarranted appearance.[1]

VII. RATIFICATION.

§ 614. *Ratification by client, to be effective, must be after full knowledge of facts.* — The limitations holding good as to the ratification of the agent's acts by the principal apply to the ratification of the attorney's acts by the client. A ratification by a client of his attorney's acts outside of the latter's authority is invalid if made without knowledge of the facts.[2]

VIII. COMPENSATION AND LIEN.

§ 615. *Attorney may obtain by suit compensation for services rendered.* — The principle of the English common law, that counsel cannot recover by suit compensation for their services, does not obtain in the United States.[3] With us, lawyers of all

mary application to the court; Bates *v.* Sturges, 2 M. & Scott, 172; nor is the attorney liable to the sheriff for his fees on an execution issued in the regular course of an action, in the absence of any special circumstances showing that he had made himself personally liable. Maberry *v.* Mansfield, 16 L. J. 102, Q. B. See Benson *v.* Whitfield, 4 McCord, 149.

An attorney may be summarily compelled to perform a personal undertaking given by him in the course of an action; and in the course of other transactions, an attorney may render himself liable to an action on an express undertaking, or agreement in his own name; Foster *v.* Blakelock, 5 B. & C. 328; 8 D. & R. 48; see Iveson *v.* Corington, 1 B. & C. 160; Burrell *v.* Jones, 3 B. & Ald. 47; *e. g.* to give up documents; Kendry *v.* Hodgson, 5 Esp. 228; to pay the costs on the compromise of a prosecution; Watson *v.* Murrell, 1 Car. & P. 307; to pay the extra expenses in a proceeding incurred at his express request. Hall *v.* Ashurst, 1 C. & M. 714; 3 Tyr. 420.

[1] Coit *v.* Sheldon, 1 Tyler, 304; Smith *v.* Bowditch, 7 Pick. 138; Munnikuyson *v.* Dorsett, 2 Har. & G. 374; Jenkins *v.* Fereday, L. R. 7 C. P. 358; Field *v.* Gibbs, Pet. C. C. 155. Supra, § 524, 565–7.

[2] Williams *v.* Reed, 3 Mass. 405; Garvin *v.* Lowry, 13 Miss. (7 S. & M.) 24. See Narraguagus *v.* Wentworth, 36 Me. 339; Brooks *v.* Poirier, 10 La. An. 512; Chatauque County Bk. *v.* Risley, 4 Denio, 480. Supra, § 65.

[3] The English law as to Champerty, has been thus stated. (See Living. Law Mag. Jan. 1856; and see Vin. Abr. tit. Maintenance, Com. Dig. eo. tit.) According to a case reported in one of the *year books*, it seems formerly to have been deemed illegal for an attorney to lay out his own proper money for maintenance of the suit of his client; 11 Hen. 6, fol. 11; but the existing practice of attorneys and solicitors making the necessary advances for fees, and other necessary expenses incident to the proceedings in which they are employed, with a view to future repay-

branches, counsel as well as attorneys and solicitors, may maintain a suit at law for such compensation.[1] It makes no difference

ment and remuneration, has long been considered free from any legal objection ; 2 Inst. 484, 564; 1 Hawk. P. C. 254, sect. 27; the attorney being usually employed, not simply to pay money, but to conduct the cause, and to decide whether particular payments are necessary or not. Lewis *v.* Samuel, 8 Q. B. 485.

It has been held to be champerty for an attorney to agree to be paid in gross when the suit is recovered. Box *v.* Barnaby, Hob. 117; Com. Dig. Attorney, B. 14. And it is laid down, that an attorney ought not in any case to carry on a cause at his own expense, with a promise never to expect a repayment; 1 Hawk. P. C. c. 27, ss. 29, 30; and the courts have, in various modern instances, refused their sanction to agreements on the parts of attorneys or solicitors, to indemnify clients against the expenses of proceedings taken in their name; *e. g.* only to charge costs as taxed between party and party, in successful cases, and costs out of pocket in unsuccessful ones. See McEgan *v.* Cochrane, 10 L. T. 37 (Ir. Eq.). The attorney appears, in these cases, to be precluded from suing for the fees he would, in ordinary cases, be entitled to; Thwaites *v.* Mackerson, 3 Car. & P. 341; M. & M. 199; Jones *v.* Nanney, 1 M. & W. 333; Jones *v.* Read, 5 Dowl. 216; Ashford *v.* Price, 3 Stark. 185; Lewis *v.* Samuel, 8 Q. B. 218; 10 Jur. 429; 1 New Prac. Ca. 424; or, indeed, from any return whatever, in case of an agreement to the effect, "No cure no pay;" Turner *v.* Tennant, 1 New Prac. Ca.; see Insol. Debtors, C., Cooke's Pr. 15; but the client, while he has thus the means of taking advantage of such an arrangement, seems at liberty to refuse to perform any condition annexed to it; *e. g.* that the attorney shall have a share in the property recovered; Saunderson *v.* Glass, 2 Atk. 298; Wood *v.* Downes, 18 Ves. 120; Wells *v.* Middleton, 4 Bro. P. C. 26; Bellew *v.* Russell, 1 Ball & B. 96; such agreements coming strictly within the laws against champerty and maintenance; 2 Inst. 208, 484, 564, and Statutes Westm. 1, c. 25; Westm. 3, c. 29; 28 Edw. 1, c. 11; see the mode of setting up maintenance in the pleadings; Flight *v.* Leman, 4 Q. B. Rep. 883; Pechell *v.* Watson, 8 M. & W. 691. In a case where an attorney agreed with two persons to recover, at his own risk and expense, some property for them, on the terms of receiving a third of the proceeds, and having succeeded and carried out the agreement, the transaction was, eleven years afterward, impeached by the clients, Mr. Justice Littledale refused to interfere, though intimating that it might have been different if the application had been made shortly after the transaction occurred; Ex parte Yeatman, 1 Dowl. 304; 1 Har. & W. 510; and in a later English case, where an attorney, on being retained in an action, gave an undertaking *to charge costs out of purse only, should damages or costs not be recoverable*, he was held entitled to full costs on a favorable verdict being returned and the defendant becoming insolvent. Re Stretton, 14 M. & W. 806; 3 Dowl. & L. 278; 15 L. J. 16 Exch. See, generally, Hutley *v.* Hutley, L. R. 8 Q. B. 112.

That the statutes as to maintenance are not in force in the United States, see Richardson *v.* Rowland, 40 Connect. 565; Whart. C. L. § 2804.

[1] Law *v.* Ewell, 2 Cranch C. C. 144; Wylie *v.* Coxe, 15 How. U. S. 416; Smith *v.* Davis, 45 N. H. 566;

as to such compensation whether the services rendered were successful or unsuccessful.[1] If, however, the ill success is attributable to the lawyer's negligence or ill faith (defining negligence in the sense already given) then he cannot recover.[2] Nor can

Nichols *v.* Scott, 12 Vt. 47; Clendinen *v.* Black, 2 Bailey (S. C.), 488; Miller *v.* Beal, 26 Ind. 234; Webb *v.* Browning, 14 Mo. 353; Sanford *v.* Ruckman, 24 How. (N. Y.) Pr. 521; Stevens *v.* Monges, 1 Harr. Del. 127; Van Atta *v.* McKinney, 16 N. J. L. (1 Harr.) 235; Foster *v.* Jack, 4 Watts, 339. In Brady *v.* Mayor, 1 Sandf. 559, it was ruled that to make out the defence that the attorney undertook to perform the services for little or no compensation, requires proof of a positive contract. In Lichty *v.* Hugus, 1 Penn. St. 434, it was ruled to be a fraud for the client to settle a suit without the counsel's knowledge, to withhold fees, and then set up the statute of limitations. — An attorney, properly qualified and practising as such, in the absence of a statutory provision or of a rule of court prohibiting it, can recover for services rendered upon the employment of a client, although he may not have been formerly admitted to practise in the court where the services were rendered. Even if there be a statute or rule prohibiting such a recovery unless there has been a formal admission, yet, if the services are rendered by a firm, one of whom is duly admitted, the partners may recover in a joint action for such services. Harland *v.* Lilienthal, 53 N. Y. 438.

[1] Rush *v.* Cavanaugh, 2 Penn. St. 187; Brackett *v.* Sears, 15 Mich. 244. See supra, § 321–4. Though it is said that when he undertakes a suit he cannot recover compensation till the suit is closed. Supra, § 596; infra, § 627.

[2] Supra, § 338-9; infra, § 621; Pearson *v.* Darrington, 32 Ala. 227; Maynard *v.* Briggs, 26 Vt. 94; Nixon *v.* Phelps, 29 Vt. 198; Bredin *v.* Kingland, 4 Watts, 420; Brackett *v.* Norton, 4 Conn. 517; Gleason *v.* Clark, 9 Cowen, 57; Runyan *v.* Nichols, 11 Johns. R. 547; Hopping *v.* Quin, 12 Wend. 517; Porter *v.* Ruckman, 38 N. Y. 210; Wills *v.* Kane, 2 Grant (Penn.) 60. But such negligence or ill faith in one matter will not, it is said, deprive him of compensation in another; Currie *v.* Cowles, 6 Bosw. 542, *sed quære;* if the client pleads damage as set-off. In an Illinois case the evidence was that an attorney was employed to recover real estate for his client, under a special contract that he was to receive as a fee one fourth of the land recovered, and he was afterwards authorized to compromise the litigation upon certain terms, and in that event his fee was to be one fourth of what he might thus secure; but he neither recovered the land nor effected any compromise, he not being prevented from so doing by any act of his client; and it appeared that the attorney failed to use reasonable diligence in the performance of his undertaking, and had never brought the action commenced by him to trial, or prepared for trial, although the suit had been pending about four years. On these facts it was ruled that such neglect of duty authorized the client to seek other aid, and, having done so, he could not be required to execute the original agreement. Walsh *v.* Shumway, 65 Ill. 471. Supra, § 339.

A lawyer cannot recover for useless work. Hill *v.* Featherstonhaugh, 7 Bing. 569; 5 M. & P. 541; Shaw *v.* Arden, 9 Bing. 287; 2 M. & Scott,

he recover when the service rendered by him was the maintenance of a procedure either illegal or immoral.[1]

§ 616. To make out his case, it is necessary for the plaintiff to prove a retainer.[2] That his services, when employed for another party, were beneficial to the defendant, is no ground of action, unless a retainer be proved;[3] but this may be inferred from all the circumstances of the case.[4] The burden is also on the plaintiff to prove the extent and value of his services,[5] and the fairness of his charge.[6] This proof may be by parol;[7] and the opinion of professional witnesses is receivable, though not conclusive, as to value.[8] Where he sues upon a *quantum meruit*, his professional standing is a proper subject of inquiry as affecting the value of his services, and the amount of his business may be inquired into, as tending to show his professional standing.[9] The measure of compensation depends not only on the legal knowledge and professional activity required, but upon the responsibility taken.[10]

341; Huntley *v.* Bulwer, 8 Scott, 325; 6 B. N. C. 111; Braccy *v.* Carter, 12 Ad. & E. 373; Symes *v.* Nepper, 12 A. & E. 337 *a*; Stokes *v.* Trumper, 2 Kay & J. 232; Fletcher *v.* Winter, 3 F. & F. 138.

As to negligence as a defence, see Bulmer *v.* Gilman, 4 M. & G. 108; 4 Scott N. R. 781; Cliff *v.* Prosser, 2 D. P. C. 21; Stokes *v.* Trumper, 2 Kay & J. 232; Long *v.* Orsi, 18 C. B. 610; Chapman *v.* Van Toll, 8 E. & B. 396; Dunn *v.* Hallen, 2 F. & F. 642.

[1] Supra, § 334; Treat *v.* Jones, 28 Conn. 334; Hallet *v.* Oakes, 1 Cush. 296; Arrington *v.* Sneed, 18 Tex. 135; Trist *v.* Child, 21 Wallace, 441.

[2] Supra, § 330; Turner *v.* Myers, 23 Iowa, 391; Barker *v.* York, 3 La. An. 90; Burghart *v.* Gardner, 3 Barb. 64.

[3] Chicago R. R. Co. *v.* Larned, 26 Ill. 216; Roselins *v.* Delachaise, 5 La. An. 482; Michen *v.* Gravier, 11 La. An. 596; Savings Bk. *v.* Benton, 2 Metc. (Ky.) 240.

[4] Supra, § 331; Hood *v.* Ware, 34 Ga. 328; Graves *v.* Lockwood, 30 Conn. 276; Hotchkins *v.* Le Roy, 9 Johns. R. 142; Bowman *v.* Tallman, 27 How. (N. Y.) 212; Goodal *v.* Bedel, 20 N. H. 205; Bogardus *v.* Livingston, 7 Abb. (N. Y.) Pr. 428; Fore *v.* Chandler, 24 Tex. 146. See Seely *v.* North, 16 Conn. 92; Briggs *v.* Georgia, 15 Vt. 61; Smith *v.* Dougherty, 37 Vt. 530.

[5] Stow *v.* Hamlin, 1 How. (N. Y.) Pr. 452.

[6] Planters' Bank *v.* Heinberger, 4 Cold. 578; McMahon *v.* Smith, 6 Heisk. 167.

[7] Brewer *v.* Cook, 11 La. An. 637.

[8] Brewer *v.* Cook, 11 La. An. 637; Vilas *v.* Downer, 21 Vt. 419.

[9] Phelps *v.* Hunt, 40 Conn. 97. Infra, § 622.

[10] Vilas *v.* Downer, 21 Vt. 419; Macarty's Succession, 3 La. An. 518; Lee's Succession, 4 La. An. 578; Virgin's Succession, 18 La. An. 42; Kentucky Bk. *v.* Cowles, 7 Penn. St. 543; Duncan *v.* Yancy, 1 McCord S. C. 149.

That an attorney may recover his expense from his principal follows from the general rule already stated.[1]

§ 617. *Attorney is entitled to commissions on collections.* — Hence an attorney, collecting a debt, is entitled to commissions, dependent not only on the skill and care applied, but on the amount collected.[2]

§ 618. *Attorney may sustain a special agreement with his client for fees.* — Even where a fee bill is established by law, an attorney may make a special agreement with his client for compensation.[3] That such agreement if extortionate will be repudiated by the courts, has been already shown.[4] And an assignment by the client to his lawyer by way of security for services actually rendered will be sustained ;[5] though it is otherwise as to a sale.[6]

§ 619. *Such an agreement may secure to the attorney a fee proportionate to the amount collected, but is invalid if it amounts to a partnership by the attorney in the venture of a contested litigation.* — We strike here on a distinction based on sound ethical as well as juridical principle. On the one side, in obedience to the rules already announced, that an attorney is entitled to a commission on collections, and that he is justly to be compensated in proportion, not only to the skill and industry applied by him, but to the responsibility assumed, it is properly held that he may lawfully contract, in addition to his retainer, for a percentage on the amount recovered by him.[7] On the other side, it

[1] Supra, § 311, 319, 340. As to attorney's right to recover expenses, see Hayward *v.* Fiott, 8 C. & P. 59; Grissell *v.* Robinson, 3 B. N. C. 10; 3 Scott, 329; 2 Hodges, 138; Helps *v.* Clayton, 17 C. B. N. S. 553; Baker *v.* Meryweather, 2 C. & K. 737; Campion *v.* King, 6 Jur. 35.

[2] Supra, § 324; Morel *v.* New Orleans, 12 La. An. 485; Commandeur *v.* Carrollton, 15 La. An. 7; State *v.* Hawkins, 28 Mo. 366; Quint *v.* Ophir Co. 4 Nev. 304; Gordon *v.* Miller, 14 Md. 204; Leach *v.* Strange, 3 Hawks, 121; Farmers' Loan Co. *v.* Mann, 4 Roberts. N. Y. 356.

[3] Wallis *v.* Loubat, 2 Denio, 607; Easton *v.* Smith, 1 E. D. Smith, 318; Jenkins *v.* Williams, 2 How. N. Y. Pr. 261; Lander *v.* Caldwell, 4 Kans. 339; Major *v.* Gibson, 1 Patt. & H. Va. 48; Lecatt *v.* Sallee, 3 Port. Ala. 115. Supra, § 527. See, however, Merritt *v.* Lambert, 10 Paige, 352; Simpson *v.* Lamb, 7 El. & B. 84.

[4] Supra, § 577.

[5] Anderson *v.* Radcliffe, E., B. & E. 805, 817. See supra, § 627–8.

[6] Simpson *v.* Lamb, 7 E. & B. 84.

[7] Wylie *v.* Coxe, 15 How. U. S. 416; Plitt, ex parte, 2 Wall. Jr. 453; Tapley *v.* Coffin, 12 Gray, Mass. 420; Major *v.* Gibson, 1 Patt. & H. Va. 48; Fogerty *v.* Jordan, 2 Roberts. N. Y. 319; Ogden *v.* Des Arts, 4 Duer, 275; Benedict *v.* Stuart, 23 Barbour, 420;

is clear that for him to become a partner with his client in the results of a speculative suit, tends not only to the undue stimulation of litigation, but to rob the bar of its independence, dispassionateness, and authority, by destroying the distinction between counsel and parties. Hence the courts will not lend their aid to a contract by which client and counsel try a case on shares.[1]

§ 620. The line between these two groups of cases may be often faint; but the distinction is on principle clear. The Roman law, recognizing this distinction, divided contingent fees into the *pactum de quota litis*, in which the attorney shares the proceeds of the suit, and the agreement that in case of success, there shall be an extra remuneration, *palmarium victoriae*. The *pactum de quota litis* is absolutely null. The reservation of such a share in the proceeds of a suit was held so reprehensible as to be a ground for disbarring the attorney.[2] It was otherwise, however, with the *palmarium victoriae*. This was not considered dishonorable. The agreement to pay such a reward was, however, only a natural obligation, and to be efficacious had to be ratified after the termination of the process. It was held, at the same time, that such fee should not, with other payments, exceed a hundred gold pieces for each process. Ulpian, in his statement to this effect, joins in reprobating unliquidated contingent fees.[3]

§ 621. A similar spirit, though no doubt with great fluctuation of expression, has directed the deliberations of our own courts. A raiding adventure by client and counsel in pursuit of a speculative claim will be repelled. An agreement by which the counsel is to receive a percentage on an honest claim will be sustained; for, independently of other reasons, if no such arrangement were permissible, many honest claims would be lost, and injustice would prevail, because counsel could not be retained. And, in any view, compensation as a *palmarium victoriae* may be lawfully promised.

§ 622. *When special agreement is rescinded, or is held void for*

Bayard *v.* McLane, 3 Harr. Del. 139; White *v.* Roberts, 4 Dana, 172; Evans *v.* Bell, 6 Dana, 479; Ryan *v.* Martin, 18 Wisc. 672. See supra, § 324.

[1] Merritt *v.* Lambert, 10 Paige, 352; Satterlee *v.* Frazer, 2 Sandf. 141; Boardman *v.* Thompson, 25 Iowa, 487; Halloway *v.* Lowe, 7 Port. Ala. 488; Elliott *v.* McClelland, 17 Ala. 206; Stanton *v.* Haskins, 1 M'Arthur, 558.

[2] See decree of Constantinus, L. 5. C. d. post. (2. 6.)

[3] L. I. § 12. D. de extr. cogn. (50. 13.)

champerty, services may be recovered on a quantum meruit. — It may happen that a special agreement for fees may be set aside by the parties;[1] or that it may be ruled to be champertous by the court.[2] In such case the lawyer is entitled to recover on a *quantum meruit* for his services.[3] But he is limited, in such suit, to the valuation he himself attached to his services in the special agreement. Beyond that sum he cannot recover.[4]

§ 623. *Attorney's liens may be to retain or to charge.* — Liens (*ligamenta*) are twofold: first the *retaining* lien, which authorizes the creditor to retain the debtor's property in the creditor's hands, to pay a debt due the creditor; and secondly the *charging* lien, which gives the creditor the right to collect such debt, as a priority, out of property in the hands of another. The first of these forms of lien is distinctively considered in a succeeding chapter.[5] The whole topic, in its relation to attorneys, may be briefly recapitulated in the following propositions.

§ 624. *Attorney has a retaining lien on funds in his hands.* — That such a lien, as a security to the attorney for his labor, exists on the thing to which that labor relates, is hereafter demonstrated.[6] So far as concerns attorneys, the right to such a lien has never been questioned.[7] By the Roman law, as now practised, the attorney (Sachwalt) has a lien for his expenses and honorarium in his client's papers, as well as on the funds of the client he may have in his hands.[8]

§ 625. *Attorney has retaining lien on papers.* — Such lien, as we have seen, is not distinctive to attorneys, but belongs to all persons in respect to things on which they bestow labor. If a deed, so argues Gibbs, J.,[9] is delivered to any one for work or advice, "by the general law of the land, he has a lien upon it, whether he is an attorney or not." What is distinctive of attor-

[1] Coopwood *v.* Wallace, 12 Ala. 790; Lewis *v.* Yale, 4 Fla. 418. Supra, § 616.

[2] Thurston *v.* Percival, 1 Pickering, 415; Caldwell *v.* Shepherd, 6 T. B. Monr. 392; Rust *v.* Larue, 4 Litt. Ky. 416.

[3] Ibid.; Quint *v.* Ophir, 4 Nev. 304. Supra, § 616.

[4] Coopwood *v.* Wallace, 12 Ala. 790; Lewis *v.* Yale, 4 Fla. 418. As qualifying above, see Lecatt *v.* Sallee, 3 Port. Ala. 115; Morgan *v.* Roberts, 38 Ill. 65.

[5] See infra, § 813.

[6] Infra, § 813

[7] See Welsh *v.* Hole, Doug. 238; Miller *v.* Atlee, 3 Exch. 799; Hanson *v.* Reece, 3 Jur. N. S. 1204, cited in Stokes on Liens, 8. Paschal, in re, 10 Wallace, 483, was a case of lien of this class.

[8] Glück, Comment. V. § 372.

[9] Hollis *v.* Claridge, 4 Taunt. 809.

neys is that, by the usage of business, they have a lien for professional claims on all documents of their clients coming into their hands in the regular course of business.[1] At common law this lien has been held to cover papers placed in the attorney's hands for collection or other professional action.[2] The client cannot recover back the papers without paying all that is due to the lawyer in his professional character.[3] "I cannot see," says Lord Cottenham, "how there can be any sound distinction between the case of a solicitor claiming a lien on the papers of his client, and the case of any other creditor who holds a security for his debt. It was suggested at the bar, that the existence of a special contract could make a difference; but there is in fact, no ground for such a distinction. Liens existing by the custom of trade, or the practice of a profession, are equivalent to contracts; and I know of no distinction in the law of lien, between that of a solicitor and that of any other party."[4] The lien does not attach to papers received by the lawyer in other than a professional capacity.[5]

[1] By the English law the particular lien of an attorney is not confined to the single deed or document which he has himself been employed to prepare, but attaches on all the deeds, papers, and documents of his client coming to his hands in the regular course of business in the transaction in which he is employed. See observations of Gibbs, J., in Hollis *v.* Claridge, 4 Taunt. 809. Nesbitt, ex parte, 2 Sch. & Lef. 279; Gibson *v.* May, 4 D. M. & G. 512; Taunton *v.* Goforth, 6 D. & R. 384; R. *v.* Williams, 2 Har. & Wol. 277; R. *v.* Sankey, 6 N. & M. 839; and see Lord Mansfield, 1 Dougl. 104; see Anon. case cited in Spark *v.* Spicer, 1 Lord Raym. 322, 738. The lien applies when the papers are given to the lawyer for the purpose of perusal, copying, abstracting, or merely exhibiting to a witness on the trial of an action. See Friswell *v.* King, 15 Sim. 191.

[2] Warburton *v.* Edge, 9 Sim. 508; 1 Sim. & S. 457; Sterling, ex parte 16 Ves. 258; Cowell *v.* Simpson, 16 Ves. 275; Nesbitt, ex parte, 2 Sch. & Lef. 279; Stevenson *v.* Blakelock, 1 M. & S. 535; Friswell *v.* King, 15 Sim. 191; Kemp *v.* King, 2 M. & R. 437; C. & M. 396; Champertown *v.* Scott, 6 Madd. 93; Ogle *v.* Storey, 1 N. & M. 474; 4 B. & Ad. 735; Dennett *v.* Cutts, 11 N. H. 163; Howard *v.* Osceola, 22 Wisc. 453; Stewart *v.* Flowers, 44 Miss. 513; White *v.* Harlow, 5 Gray, 463. *Contra*, Walton *v.* Dickerson, 7 Penn. St. 376; Dubois's appeal, 38 Penn. St. 231. See Newton *v.* Porter, 5 Lansing, 416.

[3] By Plumer, V. C. 2 Jac. & Walk. 218. And see to same effect Blunden *v.* Desart, 2 Dr. & War. 423; Prendergrast *v.* Eyre, cited Stokes on Lien, 29; Turner *v.* Deane, 3 Exch. 839; Moss, in re, 35 Beav. 526.

[4] Richards *v.* Platet, Cr. & Ph. 458.

[5] Wickens *v.* Townsend, 1 Russ. & M. 361; Bozon *v.* Bolland, 4 Myl. & Cr. 354; Nesbit, ex parte, 2 Sch. & Lef. 279; 1 Hoff. Ch. Pr. 35.

And the fortuitous professional possession of papers will not sustain such lien.[1] If delivered to the lawyer for only a specific purpose he can have a lien only in respect to such purpose, and not in respect to other transactions.[2] Yet if after such specific purpose is abandoned, the lawyer is permitted to retain the papers, then a general lien may attach.[3]

The lien of the attorney cannot affect the adverse rights of a third party;[4] the attorney's lien being only coextensive with his client's title.[5]

It should be remembered that if the lawyer accept other adequate security for his claim, his lien is waived.[6] Nor can a lien be regarded as attaching to real estate recovered by a lawyer for his client.[7] A solicitor has no lien on his client's will.[8]

The tendency now is to hold that the lawyer whose authority is revoked during the progress of the suit will be compelled, if he have no interest in the suit, to surrender the papers.[9]

§ 626. *Attorney has charging lien on fund to be recovered by his exertions.* — We now approach an application of the law of lien peculiar to the relations of attorney and client. At common law, so it is held in England, an attorney or solicitor is entitled to recover his taxable costs from a fund recovered by his aid.[10] The supreme court of the United States, in 1853,

[1] Moseley, in re, 15 W. R. 975; County Ass. Co. in re, 38 L. J. Ch. 231; Pulbrook, in re, L. R. 4 Ch. 627; Berrie *v.* Howitt, 39 L. J. Ch. 119; Belaney *v.* Ffrench, L. R. 8 Ch. 918.

[2] Balch *v.* Symes, 1 Turner, 192; Lawson *v.* Dickinson, 8 Mod. 306. See, however, Bowling Green Savings Inst. *v.* Todd, 52 N. Y. 489; Colmer *v.* Ede, 40 L. J. Chanc. 185; Foxon *v.* Cascoigne, 9 L. R. Ch. 654.

[3] Pemberton, ex parte, 18 Ves. 282. See Stirling, ex parte, 16 Ves.. Jr. 258.

[4] Hoare *v.* Parker, 2 T. R. 376; Furlong *v.* Howard, 2 Sch. & Lef. 115; Nesbitt, ex parte, 2 Sch. & Lef. 115; Walker *v.* Sergeant, 14 Vt. 247.

[5] Symons *v.* Blake, 2 C., M. & R. 416; 4 D. P. C. 263; Pratt *v.* Vizard, 2 N. & M. 455; 5 B. & Ad. 808.

[6] Cowell *v.* Simpson, 16 Ves. Jr. 275. See infra, § 821.

[7] Shaw *v.* Neale, 6 H. L. Cas. 581; Smally *v.* Clark, 22 Vt. 598. See, however, Barnesley *v.* Powell, Ambl. R. 102; Cozzens *v.* Whitney, 3 R. I. 79; Smith *v.* Young, 62 Ill. 210, and Stokes on Liens, 122.

[8] Balch *v.* Symes, 1 Turn. & Rus. 87. See Law, ex parte, 2 Ad. & E. 45; and see Mr. Stokes's criticisms on these rulings in Stokes on Liens, 9.

[9] Belaney *v.* French, 43 L. J. Chan. 312; 29 L. T. N. S. 706; though see, as qualifying this, if the dismissal be unreasonable, Lord *v.* Wormley, Jacob, 580; Faithfull, in re, L. R. 6 Eq. 325; Farhall *v.* Farhall, L. R. 7 Eq. 286; Dyer *v.* Bowley, infra, § 635; Maugham on Attorneys, 305.

[10] That a lien attaches to fruits of

went so far as to say that an attorney, employed to prosecute a claim before the Mexican commission for a contingent fee of five *per cent.*, had a lien for this amount on the fund recovered, and that the court would enforce this lien by bill in equity.[1] In several of our states the courts have maintained the existence of a charging lien, and have held the lien to cover not merely costs and advances, but fees.[2] In other jurisdictions the existence of such

proceedings in equity, see Turwin *v.* Gibson, 3 Atk. 720; Kellett *v.* Kelly, 5 Ir. Eq. R. 274; Bawtree *v.* Watson, 2 Keen, 713; Skinner *v.* Sweet, 3 Madd. 244. See Stokes on Liens, 142-6, Infra, § 629.

As to fruits of suit in law, see Barker *v.* St. Quentin, 12 M. & W. 461. Among the later cases, see Vaughan *v.* Davies, 3 T. R. 665; Smith *v.* Winter, 18 W. R. 447; Freehold Co. in re, 21 L. T. N. S. 195; Bank of Hindustan, in re, 3 L. R. Ch. 125; Jeff. Davis, in re, L. R. Adm. 1.

A charging lien attaches on the fruits of a judgment or decree; Ex parte Price, 2 Ves. Sen. 407; Turwin *v.* Gibson, 3 Atk. 720; Mitchell *v.* Oldfield, 4 T. R. 123; Read *v.* Dupper, 6 T. R. 361; Randle *v.* Fuller, Ibid. 456; Skinner *v.* Sweet, 3 Madd. 244; on the money payable to the client thereunder, or by virtue of an award; Tabran *v.* Horn, M. & R. 228; Omerod *v.* Gate, 1 East, 404; or paid or payable into court in the course of an action or suit, or in fact in any other way, the proceeds of the labor and skill of the attorney; see Irving *v.* Viana, 2 Y. & Jer. 70. On a bill of discovery in aid of a defence at law, and an injunction having been obtained on the terms of paying the money into court, and the defendant afterward succeeding at law, it was held that the solicitor in equity had a lien on the fund for the costs of such discovery; including even a real estate which had been recovered by a solicitor prosecuting a suit in equity to a decree; Barnesley *v.* Powell, Ambl. 102.

The lien has been held to attach on sums received or payable by way of compromise to the client in a cause, even where the verdict and judgment are against him, for the money payable is regarded as the fruit of the labor and skill of the attorney, more particularly when he has taken up the cause of a poor person. Per Maule, J., in Davis *v.* Lowndes, 3 Com. Bench R. 827; Hopewell *v.* Amwell, 2 Halst. 4. The attorney's lien for costs has been sufficient to prevent a defendant taken in execution being discharged from custody; Pyne *v.* Erle, 8 T. R. 407; Marr *v.* Smith, 4 B. & A. 466; see Martin *v.* Francis, 2 B. & A. 402; 1 Chit. Rep. 241.

A general lien on the fund in court, &c., is recognized in the case of lunacy. Barnesley *v.* Powell, Ambl. 102; Ex parte Price, 2 Ves. Sen. 407.

The lien ceases where the attorney or solicitor declines to act; Creswell *v.* Byron, 14 Ves. 271; see 6 Ves. 2, note; or discontinues practice; see Colegreaves *v.* Manley, 1 Turn. & R. 400; but not, it would seem, by his death, which, being the act of God, leaves the lien valid in the hands of his representatives. See Redfern *v.* Sowerby, 1 Swanst. 84.

[1] Wylie *v.* Coxe, 15 How. 415.

[2] Stratton *v.* Hussey, 62 Me. 286 (qualifying Potter *v.* Mayo, 3 Greenl. 34; Newbert *v.* Cunningham, 50 Me. 231; Cooley *v.* Patterson, 52 Me. 472); Andrews *v.* Morse, 12 Conn. 444; Benjamin *v.* Benjamin, 17 Conn. 110; Walker *v.* Sargeant, 14 Vt. 247; Hutch-

a lien is denied, though the lawyer is admitted to have a right to defalcate or deduct from funds in his hands.[1] By other courts it is held that such lien extends only to statutory costs and disbursements.[2] The lien, according to the prevailing opinion, does not attach until judgment.[3] By the English practice, a creditor who has attached a judgment recovered in favor of the client

inson *v.* Howard, 15 Vt. 544; Hutchinson *v.* Pettes, 18 Vt. 616; Power *v.* Kent, 1 Cowen, 172; Martin *v.* Hawks, 15 Johns. 405; Rooney *v.* R. R. 18 N. Y. 368; Bowling Green Bank *v.* Todd, 52 N. Y. 489; Sexton *v.* Pike, 13 Ark. 193; Waters *v.* Grace, 23 Ark. 118; Carter *v.* Davis, 8 Fla. 183. See infra, § 815, 816.

In Massachusetts the lien is settled by statute. Baker *v.* Cook, 11 Mass. 236. At common law there is no lien for fees, either before or after judgment. Getchell *v.* Clark, 5 Mass. 309; S. P. Simmons *v.* Almy, 103 Mass. 33. "By the General Stats. c. 121, § 37, he (the attorney) has such lien only when he is lawfully possessed of an execution, or has prosecuted a suit to final judgment in favor of his client, and not then, as against a payment to the judgment creditor without notice of the lien." Colt, J., in Simmons *v.* Almy, *ut supra.*

In Citizens' National Bank *v.* Culver, 54 N. H. 327, it was held that the lien of an attorney upon a judgment will be enforced according to the law of the state where the lien attached. By the law of Vermont, it seems that an attorney has a lien upon a judgment recovered by him, not only for his fees but also for his reasonable charges for arguments, thus covering all claims as attorney in the suit. It was held that this lien could be enforced in New Hampshire, notwithstanding the rule as to the lien of attorneys was somewhat different in that state from the rule in Vermont. It was also held that, by the law of Vermont, the attorney's lien cannot be defeated by trustee process, even though no notice of the lien has been given by the attorney to the debtor.

[1] Hill *v.* Brinkley, 10 Ind. 102; Frissel *v.* Haile, 18 Mo. 18; Irwin *v.* Workman, 3 Watts, 357; Walton *v.* Dickerson, 7 Penn. St. 376; Dubois's appeal, 38 Penn. St. 231; Newbaker *v.* Alricks, 5 Watts, 183.

[2] Wright *v.* Cobleigh, 21 N. H. 339; Young *v.* Dearborn, 27 N. H. 324; Currier *v.* R. R. 37 N. H. 223; Wells *v.* Hatch, 43 N. H. 246 (though see Dennett *v.* Cutts, 11 N. H. 163; Citizens' Nat. Bank *v.* Culver, 54 N. H. 327); Cozzens *v.* Whitney, 3 R. I. 79; McDonald *v.* Napier, 14 Ga. 89; Humphrey *v.* Browning, 46 Ill. 476; Elwood *v.* Wilson, 21 Iowa, 523; Kyle, ex parte, 1 Cal. 331; Mansfield *v.* Dorland, 2 Cal. 507; Dodd *v.* Brott, 1 Min. 270. And see to this effect, Stephens *v.* Weston, 3 B. & C. 538; Hough *v.* Edwards, 1 H. & N. 171; Lann *v.* Church, 4 Madd. Ch. 391; Bozon *v.* Bolland, 4 Myl. & Cr. 354; Perkins *v.* Bradley, 1 Hare, 23.

[3] Potter *v.* Mayo, 3 Green. 34; Hobson *v.* Watson, 34 Me. 20; Getchell *v.* Clark, 5 Mass. 309; Foot *v.* Tewksbury, 2 Vt. 97; Hutchinson *v.* Howard, 15 Vt. 247; Hutchinson *v.* Pettes, 18 Vt. 616; Pinkerton *v.* Easton, L. R. 16 Eq. 257; Foxon *v.* Gascoigne, L. R. 9 Ch. 654; Sweet *v.* Bartlett, 4 Sandf. 661; Henchey *v.* Chicago, 41 Ill. 136. See infra, § 629, as to diverging practice.

cuts out the general lien of the attorney for the balance due him from his client.[1]

No lien exists in favor of the attorneys of distributees, on a fund brought into a court of equity or probate for distribution.[2]

§ 627. *Lawyer can claim the equitable interference of the court to protect a charging lien.* — Supposing that when the lawyer has an unsatisfied claim against the client, the client settles the case with the opposite party, has the lawyer any redress? That he can have redress from his own client is clear,[3] but can he recover from the opposite party? If he notify the opposite party that he has an unsatisfied claim, he can recover the amount of such claim, where the settlement is collusive;[4] but he has no such right if he give no such notice.[5] It is sufficient, however, if the notice be informal and constructive.[6] Where the judgment is for costs, the record is sufficient notice to all the parties in the action.[7] The lawyer may in such case be viewed as having a right to claim the interposition of the court to secure his costs in the particular action,[8] though an application on his

[1] Hough *v.* Edwards, 1 Hurlst. & N. 171. *Contra*, Citizens' Bk. *v.* Culver, 54 N. H. 327. See infra, § 630.

[2] McCaa *v.* Grant, 43 Ala. 262; Dubois's appeal, 38 Penn. St. 231; Lamberson, in re, 63 Barb. 297.

Fees of attorneys for services rendered, in enforcing the payment, on a decree of the probate court, on a guardian's final settlement, are not a lien on such decree in that court, when the money so paid is not paid to them. McCaa *v.* Grant, 43 Ala. 262.

[3] See supra, § 327.

[4] Welsh *v.* Hole, 1 Douglass, 237; Barker *v.* St. Quintin, 12 M. & W. 440; Nelson *v.* Wilson, 6 Bing. 568; Hart *v.* Chapman, 2 Aiken, 162; Foot *v.* Tewksbury, 2 Vt. 97; Quimby *v.* Quimby, 6 N. H. 79; Currier *v.* R. R. 37 N. H. 223; Martin *v.* Hawks, 15 J. R. 405; Power *v.* Kent, 1 Cow. 172; Haight *v.* Holcomb, 16 How. Pr. 160, 173; Sherwood *v.* R. R. 12 How. Pr. 136; Dietz *v.* M'Callum, 44 Ibid. 493; Rooney *v.* R. R. 18 N. Y. 368; M'Gregor *v.* Comstock, 28 N. Y. 237. See Am. Law Reg. for 1871, 418; McKenzie *v.* Wardwell, 61 Me. 136; Hunt *v.* M'Clanahan, 1 Heisk. 503; Pleasants *v.* Kontrecht, 5 Heisk. 694.

[5] Chapman *v.* How, 1 Taunt. 341; Graves *v.* Eades, 5 Taunt. 429; Matt *v.* Smith, 4 B. & Ald. 466; Walsh *v.* Hole, 1 Doug. 238; Barker *v.* St. Quintin, 12 M. & W. 440; Hough *v.* Edwards, 1 H. & N. 171; Hawkins *v.* Layless, 39 Ga. 5; Green *v.* Exp. Co. 39 Ga. 20; Pinder *v.* Morris, 3 Caines, 165; People *v.* Hardenburgh, 8 J. R. 335; McDowell *v.* R. R. 4 Bosw. 670.

[6] Abel *v.* Potts, 3 Esp. Cas. 242; Young *v.* Dearborn, 7 Fost. 324; Lake *v.* Ingham, 3 Vt. 158. See Reed *v.* Dupper, 6 T. R. 361; Cole *v.* Bennett, 6 Price, 15.

[7] M'Gregor *v.* Comstock, 28 N. Y. 237; Haight *v.* Holcomb, 16 How. Pr. 173; Lesher *v.* Roessner, 3 Hun, 217.

[8] See Sherwood *v.* R. R. 12 How. Pr. 136; Haight *v.* Holcomb, 16 How. Pr. 160; Wright *v.* Cobleigh, 1 Fost. 339. Lord Mansfield observes, in

part, to vacate the satisfaction of the judgment must be promptly made.[1]

§ 628. The lawyer, when such collusive settlement is of record, may move to set it aside;[2] or, if the settlement be before judgment, may treat it as a nullity, and proceed with the suit.[3] From what has just been said it will be seen that a *bonâ fide* settlement of a case, after judgment, is good against the lawyer (except for costs), in cases where the lawyer has not given notice of his claim to the opposite party. *A fortiori* is this the case where the settlement is made *before* judgment.[4] To sustain the lawyer's claim in such case to set aside a settlement, it must appear that the settlement was collusive, in order to cheat the lawyer.[5] And even when the lawyer gives notice of his claim before settlement, it would seem that if the suit be for unliqui-

Welsh *v.* Hole, 1 Dougl. 238: "An attorney has a lien on the money recovered by his client for his bill of costs; if the money come to his hands he may retain to the amount of his bill. He may stop it *in transitu* if he can lay hold of it. If he apply to the court they will prevent its being paid over till his demand is satisfied. I am inclined to go still farther, and to hold that, if the attorney give notice to the defendant not to pay till his bill should be discharged, a payment by the defendant after such notice would be in his own wrong, and like paying a debt which has been assigned after notice." See, also, as to this, Read *v.* Dupper, 6 T. R. 361. As is seen in the text, the parties to a cause have been prevented defeating the attorney's claim for the costs of the action by a private arrangement between themselves; see Moore *v.* Angell, 11 Jur. 485; though the courts will not in general interfere at the instance of the attorney to prevent parties amicably adjusting an action; Ex parte Hart, 1 B. & Ad. 666; 1 Dowl. 324; Quested *v.* Callis, 10 M. & W. 18; 1 Dowl. N. S. 888; 11 L. J. N. S. 345, Exch.; Clark *v.* Smith, 1 Dowl. & L. 960; 6 M. & G. 1051; 13 L. J. N. S. 97, C. P., and cases cited supra. As to cases of parties suing in *formâ pauperis*, see Wright *v.* Burrough, 3 C. B. R. 344; 4 Dowl. & L. 226; Davies *v.* Lowndes, 3 C. B. 827; Bryant, ex parte, 2 Rose, 237, 1 Madd. 49. By the 23 & 24 Vict. c. 127, § 28, "all conveyances and acts operating to defeat" such charge shall, unless made to a *bonâ fide* purchaser for value without notice, be absolutely void against such charge.

[1] Quimby *v.* Quimby, 6 N. H. 79.

[2] Jones *v.* Bonner, 2 Exch. 229; Rooney *v.* R. R. 18 N. Y. 368.

[3] Talcott *v.* Bronson, 4 Paige, 501; Swain *v.* Senate, 5 B. & P. 99.

[4] Simmons *v.* Almy, 103 Mass. 33; M'Dowell *v.* R. R. 4 Bosw. 670; Carpenter *v.* R. R. Am. Law Reg. 1871.

[5] Jones *v.* Bonner, 2 Exch. 229; Waight *v.* Burrows, 3 C. B. 343; Francis *v.* Webb, 7 C. B. 731; Jordan *v.* Hunt, 3 Dowl. P. C. 666; Nelson *v.* Wilson, 6 Bing. 568; Clark *v.* Smith, 1 D. & L. 960; Henchey *v.* Chicago, 41 Ill. 136; Sullivan *v.* Pearson, 19 L. T. N. S. 430; L. R. 4 Q. B. 153; 9 B. & S. 960.

dated damages, the court will not grant a rule on the opposite party to pay the lawyer his charges.[1]

§ 629. *What is protected by such charging lien.* — On few questions are our American cases in such confusion as they are on that which relates to the extent to which an attorney's charging lien is to be sustained. In the supreme court of the United States, for instance, in a case already noticed, decided in 1853,[2] it was ruled that an attorney had a lien for a contingent fee on a fund in the hands of the administrator of his deceased client. In 1870,[3] the rule that the attorney had a charging lien for a contingent fee was reiterated; though in the case before the court the fund was in the attorney's hands, and the question was therefore that of a *retaining*, not a *charging* lien. In both cases the claims are called by the common term *liens;* in neither case is the distinction between the two kinds of liens noticed. The same may be remarked of the rulings of several of the state courts. A line of cases, for instance, will be found, deciding that an attorney may *retain* his fees and expenses out of the funds in his hands; and then these decisions are treated as authority for the position that an attorney has a lien for his fees and expenses on the fruits of a judgment not yet realized. Yet the distinction between the *retaining* lien and the *charging* lien, in this respect, is plain. In the one case the fund is in the attorney's hands, and the law of lien properly applies, and the attorney can charge for his general balance. In the other case, the fund is not yet recovered, and the attorney, not having the fund in hand, ought, if he have a lien at all, to be restricted to that for statutory fees. Much of the difficulty, indeed, arises from the use of the term *lien*. Thus the decision of the supreme court of the United States, in Wylie *v.* Coxe, though it nominally relates to liens, does not really decide any question peculiar to liens, but rules only that a client who has realized a fund, the collection of which is attributable to his attorney's exertions, may be compelled, by bill of equity, to pay his attorney out of this fund the fee he agreed to pay.[4] When we come, however, to

[1] Tovery *v.* Payne, 1 B. & Ad. 660; Carpenter *v.* R. R. American Law Register, April, 1871; Hutchinson *v.* Pettis, 18 Vt. 614; People *v.* Tioga C. P. 19 Wend. 73; Jones *v.* Bonner, 2 Exch. 229. See an excellent criticism in Am. Law Reg. 1871, 422.

[2] Wylie *v.* Cox, 15 How. 415.

[3] Paschal, in re, 10 Wall. 483.

[4] Far more consistent with sound phraseology are the rulings of the su-

questions peculiar to liens (*i. e.* conflicts with other lien creditors), we will find that even those courts who hold that the attorney may include his fees in a charging lien, shrink from extending such fees beyond what the statutes, either expressly or impliedly, authorize.[1] And it is ruled that when there is no fund in hand, and when there is no specific agreement for a particular sum, the mere employment of an attorney in a suit in tort for damages gives him no lien upon what the suit may produce.[2] "Should such a lien be held valid," said Grover, J., in 1873, "it would not be in the power of the parties to settle their controversy until it was satisfied; and it would be in the power of the attorney to continue the litigation for his own benefit in case of a favorable result, without incurring any liability should it be adverse."[3] At the best, a charging lien can only cover remuneration in the particular case.[4]

In England, the stat. of 23 & 24 Vict. c. 127, § 28, gives an attorney a charging lien for his "taxed costs, charges, and expenses," on property recovered or preserved through his exertions;[5] the court being authorized to make order for such taxation. Before the passing of this statute, it was held that the charging lien does not include interest on the attorney's bill for costs, to which it is limited;[6] nor a sum paid by a solicitor in discharge of his predecessor's charging lien;[7] nor to money lent to the client.[8] A charging lien, it must be remembered, attaches to the fruits of proceedings in equity (though it cannot

preme court of Pennsylvania, declaring that such claims by the attorney are not *liens*, but equitable assignments, which the courts will protect. See Patten *v.* Wilson, 34 Penn. St. 299.

[1] Rooney *v.* R. R. 18 N. Y. 368; Bowling Green Bk. *v.* Todd, 52 N. Y. 489; and so Warfield *v.* Campbell, 38 Ala. 527; Ward *v.* Syme, 9 How. Pr. 16; Marshall *v.* Meech, 51 N. Y. 140. See as denying charging lien for fees, Forsythe *v.* Beveridge, 52 Ill. 268; Syle, ex parte, 1 Cal. 331; Mansfield *v.* Dorland, 2 Cal. 331.

[2] Kirby *v.* Kirby, 1 Paige, 565; Shank *v.* Shoemaker, 18 N. Y. 489; Pulver *v.* Harris, 53 N. Y. 73. See Wood *v.* Anders, 5 Bush, 601.

[3] See, also, Henchey *v.* Chicago, 41 Ill. 136; Pulver *v.* Harris, 53 N. Y. 73.

[4] Cases cited supra, and Pope *v.* Armstrong, 3 Sm. & Marsh. 214.

[5] See for rulings under this statute, Smith, ex parte, 16 W. R. 170; 17 L. T. N. S. 339; L. R. 3 Ch. 125; Sullivan *v.* Pearson, L. R. 4 Q. B. 153; Twynam *v.* Porter, L. R. 11 Eq. 181; Jones *v.* Frost, 42 L. J. Ch. 47; Baile *v.* Baile, L. R. 13 Eq. 497.

[6] Barnsley *v.* Powell, Ambl. 103; Griffin *v.* Eyles, 1 H. Bl. 122; Hobson *v.* Shearwood, 8 Beav. 486.

[7] Irving *v.* Viana, 2 Y. & J. 70.

[8] Jones *v.* Turnbull, 5 D. P. C. 591. See Stokes on Liens, 141.

interfere with the equities between the parties);[1] to funds available to proceedings in equity;[2] to funds in bankruptcy, insolvency, and lunacy;[3] to the fruits of proceedings at law;[4] to the fruits of an award;[5] and to the fruits of a compromise.[6]

§ 630. *Set-off by opposite party, when protected by statute, is superior to charging lien.* — In England, when the right of set-off could only be equitably applied, there was for some time a conflict of opinion how far such set-off affects the lawyer's lien. The better opinion was that the set-off overcame and extinguished the lien;[7] though now by rules of the three courts of common law, no set-off between the parties to the suit can prejudice the attorney's claim to costs in such suit.[8] But where a statute provides that a set-off shall extinguish a debt, then, when the debt is thus extinguished, there is nothing on which the attorney's lien can act.[9]

[1] Stokes on Liens, 86.

[2] Ibid. 96.

[3] Ibid. 98.

[4] Ibid. 101.

[5] Ibid. 117.

[6] Ibid. 120.

[7] See infra, § 822. Vaughan *v.* Davies, 2 H. Bl. 440; Bawtree *v.* Watson, 3 Mylne & Cr. 713, and cases cited.

By the earlier English practice, the lien, as stated by Mr. Pulling, only attaches on the general result or balance of the costs *of the cause*, and may therefore be defeated by a counter claim for costs, &c., which the losing party has against the successful party in the cause; Howell *v.* Harding, 8 East, 362; Figes *v.* Adams, 4 Taunt. 632. In the queen's bench the lien of the attorney for costs in an action cannot be defeated by the party liable to pay in such action being entitled to receive costs *in a counter action;* Mitchell *v.* Oldfield, 4 T. R. 124; even though the same attorney be concerned in both actions. Moreland *v.* Pasley, 2 H. Bl. 441, note. See Randle *v.* Fuller, 6 T. R. 456; Glaister *v.* Heaver, 8 T. R. 70; Middleton *v.* Hill, 1 M. & S. 240; 1 D. & R. 168. In the court of chancery, however, the solicitor's lien for costs appears only to attach on the general balance due after adjusting the equitable rights of the parties, whether in respect of counter claims for debts or for costs; see Taylor *v.* Popham, 15 Ves. Jr. 72; Ex parte Rhodes, Ibid. 539; Schoole *v.* Noble, 1 H. Bl. 23; Nunez *v.* Modgliani, Ibid. 217; Roberts *v.* Mackoul, 2 Bl. 827; Vaughan *v.* Davies, 2 H. Bl. 440; Symonds *v.* Mills, 8 Taunt. 526; Webber *v.* Nicholas, 5 L. J. 19, P. C.; Hall *v.* Ody, 2 B. & P. 28; Emdin *v.* Darley, 1 New Rep. 22. As to set-off, see text. As to private *bonâ fide* compromise being concluded between the parties, see text.

[8] 1 El & Bl. App. xiii.

The following cases disallow such set-off: Stratton *v.* Hussey, 62 Me. 288; Currier *v.* R. R. 37 N. H. 223; Johnson *v.* Ballard, 44 Ind. 270; Boyer *v.* Clark, 3 Neb. 161; Carter *v.* Davis, 8 Fla. 183; Am. Law Reg. (1871), 423.

[9] Infra, § 822; 2 Kent's Com. 641; Walker *v.* Sargeant, 14 Vt. 247; Porter *v.* Lane, 8 Johns. 357; Mohawk Bk. *v.* Burrows, 6 Johns. Ch. 317;

IX. DISSOLUTION OF RELATION.

§ 631. The special relation of attorney and client is terminated, —

1. *By the termination of the particular process* for which the attorney was employed.[1] Yet, if appointed to try a particular case, he cannot be regarded as entitled to withdraw when the trial is over, if it is prudent that an appeal or new trial should be moved, and if his client is at such a distance or in such a condition that he cannot be consulted. The attorney in such case is bound to take measures to have the judgment reviewed.[2]

§ 632. 2. *By the attorney's death.* — When an attorney dies, the opposite party, before taking any new proceedings, must give to the party who is thus left unrepresented notice to appoint a new attorney.[3] By the Roman law, the representatives of the deceased attorney were in such case entitled to recover not only the sums paid by him in his conduct of the case, but the honorarium so far as earned. If, however, there was an agreement for a round sum as an honorarium, it could be recovered in gross from the client; and if the honorarium had been prepaid, it could not be recovered back by the client.[4] It was otherwise, however, with advances made by client to attorney to meet expenses of suit. Any unexpended surplus of such advances might be recovered by the client from the representatives of the attorney.

§ 633. 3. *By the death of the client.* — This, by the Roman law, does not dissolve the relationship. The attorney is bound

Nicoll *v.* Nicoll, 16 Wend. 446; Benjamin *v.* Benjamin, 17 Conn. 110. See Gridley *v.* Garrison, 4 Paige, 647, overruled by Nicoll *v.* Nicoll, supra; S. P. Firmerick *v.* Bovee, 4 Thomp. & Cook (N. Y.), 98; Tillman *v.* Reynolds, 48 Ala. 365; Neil *v.* Staten, 7 Heisk. 290; Mitchell *v.* Milhoan, 11 Kans. 617.

In Kentucky the lien of the attorney attaches at the commencement of the suit, and cannot be affected by subsequently acquired set-offs, though it is otherwise as to previously acquired set-offs. Stephens *v.* Farrar, 4 Bush, 13; Robertson *v.* Shutt, 9 Bush, 660.

[1] Supra, § 96; Adams *v.* Bank, 23 How. N. Y. Pr. 45; Bathgate *v.* Haskin, 59 N. Y. 533; Love *v.* Hall, 3 Yerg. (Tenn.) 408; Langdon *v.* Castleton, 30 Vt. 285; Jackson *v.* Bartlett, 8 Johns. R. 361; Richardson *v.* Talbot, 2 Bibb, 382; Gray *v.* Wass, 1 Greenl. 257.

[2] Bathgate *v.* Haskin, 59 N. Y. 533; Bach *v.* Ballard, 13 La. An. 487. Infra, § 637.

[3] Ryland *v.* Noakes, 1 Taunt. 342; Ashley *v.* Brown, 1 L. M. & P. 451; 15 Jur. 399; Lord *v.* Wardle, 3 C. B. 295; Given *v.* Driggs, 3 Caines, 150; Hildreth *v.* Harvey, 3 Johns. Cas. 300. Supra, § 108.

[4] L. 13. D. de extraord. cogn. L. 13.

to continue the direction of the case unless removed by the representatives of the deceased client. But by our own law, the client's death seems to be regarded as an absolute termination of the attorney's authority.[1]

§ 634. 4. *By the attorney's incapacity.* — If absolute and permanent this dissolves the relationship. As illustrations may be noticed insanity, and disbarring of the attorney.[2]

§ 635. 5. *By revocation of authority.* — If the lawyer is simply an agent without interest, then, in conformity with the rule[3] already expressed, the client may withdraw his authorization from the lawyer, and the mandate will be thereby terminated.[4]

[1] Gleason *v.* Dodd, 4 Metc. (Mass.) 333; Putnam *v.* Van Buren, 7 How. (N. Y.) Pr. 31; Beach *v.* Gregory, 2 Abb. (N. Y.) Pr. 206; Balbi *v.* Duvet, 3 Edw. (N. Y.) 418; Risley *v.* Fellows, 10 Ill. 531; Judson *v.* Love, 35 Cal. 463; Whitehead *v.* Lord, 7 Exch. 691. See this question, however, generally discussed, supra, § 101–106.

[2] See supra, § 108.

[3] Supra, § 94.

[4] Chitty's Archbold's Pr. 10th ed. § 79, 80; Lovegood *v.* Dymond, 1 Taunt. 669; Cholmondely *v.* Clinton, 19 Ves. 272; Johnson *v.* Marriott, 2 Cr. & Mee. 183; Carver *v.* U. S. 7 Ct. of Cl. 499; Paschal, in re, 10 Wall. 483; Wells *v.* Hatch, 43 N. H. 246; Hazlett *v.* Gill, 5 Robt. (N. Y) 611; Wolf *v.* Trochelman, 5 Robt. (N. Y.) 611; Faust *v.* Repoor, 15 How. N. Y. 570; Hunt's Est. 1 Tuck. (N. Y.) 55; Gibbons *v.* Gibbons, 4 Harr. (Del.) 105.

"The authority of an attorney, like that of any other agent, is in its nature revocable. Glanville, lib. xi. c. 3. See case of Walcott *v.* Vouchee, 3 Bingham's Reports, 423. "The essoin of the procurator only shall have place until the procuratory be revoked." Reg. Maj. l. 3, c. 16, cited in Beame's Glanville, p. 280; and the courts, or a judge, will, on due proof of the client's authority, make an order to change the attorney at any stage of the cause; Pr. Reg. 2, 4 (see Davies *v.* Lowndes, 3 Com. B. Rep. 808, where the attorney was changed after final judgment); except where the revocation of the attorney's authority would affect the rights of others. Without a rule or order, however, the attorney in an action (Ray. 69; and see Oates *v.* Woodward, 1 Salk. 87, pl. 6) cannot, in any case, be changed; "no attorney shall be changed without the order of a judge" (Reg. Gen. H. 16 Vict. R. 4; see former rules; Mich. 1654, R. 10, K. B.; C. P. R. 13; and the practice in the Exchequer, Dax, 28; May *v.* Pike, 4 M. & W. 197; 6 Dowl. 667); whether the entry of the attorney's name appears of record (Ginders *v.* Moore, 1 B. & C. 654; Bro. Attorney, pl. 37, citing 8 Hen. 6, 8; 24 Edw. 3, fol. 37) or not, if he have taken any formal step as the attorney in the cause; but the omission to obtain the order does not render the subsequent proceedings invalid, so as to justify their being treated as a nullity; Doe d. Bloomer *v.* Bransom, 6 Dowl. P. C. 490; May *v.* Pike, Ibid. 667; Gilmour *v.* Brindley, 7 D. & R. 259; the object of the practice being that there may be some person whom the adverse party may look to, when a party appears in court by a new attorney, to show cause against a rule

But the client cannot in this way divest the lawyer of his compensation.[1] The lawyer, as has been just seen,[2] if not entitled to hold on to the papers in the case until compensated, has such an equitable lien on the claim for costs as the court will enforce.[3]

§ 636. *Attorney cannot be changed without leave of court.* — But whatever we may say as to the elementary right of a client to dismiss his lawyer, a different question presents itself where the dismissal involves the substitution of one attorney of record for another. It is clear that this can only be done by leave of court; and even though the court consent to the change, "the con-

served on him, it has been held, the omission to serve the order to change the attorney cannot be objected to (Lovegrove *v.* Deymond, 4 Taunt. 609); and the order to change is only necessary with respect to proceedings which were strictly within the province of the attorney before employed in the action.

The usual mode of changing an attorney is by a rule, calling on the former attorney in the cause to show cause why a new attorney should not be appointed in his stead. Notice of the order, &c., changing the attorney, must be given to the adverse party. This is usually done by service of the order. See Com. Dig. Attorney, B. 9.

The order is usually drawn up on payment of the attorney's bill of costs, &c., in the action to be taxed; Arch. Pr. by Chitty, p. 74, ed. 8; and perhaps, strictly speaking, the attorney may insist on their being immediately paid; see Langley *v.* Stapleton, Barnes, 40; and his lien on the papers and the action seem to continue, so that he has a right to insist on the costs in the cause being taxed, &c., in order to secure the fruits to himself; see Newton *v.* Harland, 4 Scott N. S. 769; and he may refuse to produce any of the papers; Lush's Practice, p. 222, &c. The courts, perhaps, would not permit him, in such a case, to prevent the cause proceeding; see Merryweather *v.* Mellish, 13 Ves. 161; Twort *v.* Dayrell, Ibid. 295; though it was not formerly the practice to make an order to change the attorney without a previous payment of his bill; see Langley *v.* Stapleton, Barnes, 40; and, it is said, the attorney may at the present day apply to rescind the order and proceed in the action, if his costs are not paid within a reasonable time. Lush's Practice." Pulling on Attorneys, *in loco.*

The client must, on obtaining the order to change his solicitor, undertake to pay the amount of his bill of costs. Moire *v.* Mundie, 1 Stu. 312. The new solicitor may, however, proceed before the former solicitor's claim for costs is actually satisfied or even taxed; but the former solicitor retains his lien on the papers (see Merewether *v.* Mellish, 13 Ves. 161, &c.) for the amount of his bill, though he cannot stop the progress of the cause; see Twort *v.* Dayrell, 13 Ves. 195; O'Dea *v.* O'Dea, 1 Sch. & Lef. 315; Creswell *v.* Byron, 14 Ves. 272; and is compelled to produce the papers, &c., whenever required for the purposes of the cause; Mayne *v.* Watts, 3 Swanst. 93; or for the inspection of the client. Moire *v.* Mundie, 1 Stu. 282.

[1] Supra, § 327.

[2] See supra, § 626.

[3] See supra, § 625.

sent must be filed on an order entered substituting in his place the new attorney, and notice of the order must be served upon the opposite party."[1] Where one attorney appears and pleads, another cannot make any application to the court without such an order of substitution.[2] Unless the substitution be properly effected, the acts of the substituted attorney are invalid,[3] and may be treated as such by the court,[4] though this will not be done where the effect would be to oppress a party acting meritoriously.[5] Notice of the substitution must be given to the opposite party, and must be served personally on such party or his counsel.[6] Yet when it is objected that an interlocutory proceeding has been taken by an attorney not on the record, such an objection, when it is purely technical, must be fully sustained in fact.[7] But a substitution will not be permitted unless the costs of the first attorney have been paid.[8] "It is the invariable practice not to permit the attorney on the record to be changed, unless his costs were paid."[9] The court is to determine as to the validity of the cause for substitution, when the client applies for the substitution and the lawyer resists.[10]

[1] Daly, C. J., in Krekeler *v.* Thaule, 49 How. Pr. 138, citing Ryland *v.* Noakes, 1 Taunt. 342; Robertson *v.* M'Clellin, 1 How. Pr. 90; Dalon *v.* Lewis, 7 How. Pr. 132. See, also, Macpherson *v.* Robinson, 1 Dougl. 217; Davies *v.* Lowndes, 3 C. B. 808; Wynne *v.* Wynne, 2 Scott N. R. 615; 9 D. P. C. 396; Farley *v.* Hebbs, 3 D. P. C. 538; Rex *v.* Middlesex, 2 D. P. C. 147; Darnell *v.* Harrison, 1 Har. & J. 139, and cases cited in note, § 635. In England this is now settled by rule of court. 1 El. & Bl. App. xxvi.

[2] Ginders *v.* Moore, 1 B. & C. 654.

[3] Jerome *v.* Bowman, 1 Wend. 393.

[4] King *v.* Archer, 2 B. C. Rep. 192; 5 D. & L. 412.

[5] Perry *v.* Fisher, 6 East, 549; Margaren *v.* Makilwaine, 2 N. R. 509; Bloomer *v.* Branson, 6 D. P. C. 490; Fuller *v.* Brown, 10 La. An. 350; Thorp *v.* Fowler, 5 Cow. 446; State *v.* Gulick, 17 N. J. L. 435; M'Laren *v.* Charrier, 5 Paige, 530.

[6] Given *v.* Driggs, 3 Caines, 300; Hildreth *v.* Harvey, 3 Johns. Ca. 300; Dorlon *v.* Lewis, 7 How. N. Y. Pr. 132; Bogardus *v.* Richtmeyer, 3 Abb. N. Y. Pr. 179; Grant *v.* White, 6 Cal. 55; Roussin *v.* Stewart, 33 Cal. 208.

[7] Lord *v.* Wardle, 3 C. B. 295.

[8] Witt *v.* Ames, 11 W. R. 751; 8 L. T. N. S. 425.

[9] Ibid., per Curiam. See to same effect, Sloo *v.* Law, 4 Blatch. 268; Mumford *v.* Murray, Hopk. N. Y. 369; Hoffman *v.* Van Nostrant, 14 Abb. N. Y. 336; Stevenson *v.* Stevenson, 3 Edw. N. Y. 340; Gardner *v.* Tayler, 5 Abb. N. Y. N. S. 83; *S. C.* 36 How. Pr. 63; Supervisors *v.* Broadhead, 44 How. Pr. 411; Carver *v.* U. S. 7 Ct. of Cl. 499; Pleasants *v.* Kortrecht, 5 Heisk. 694; Walton *v.* Sugg, Phill. N. C. 98. See Paschal, in re, 10 Wall. 483.

[10] See Sloo *v.* Law, 4 Blatch. 268;

§ 637. 6. *By withdrawal of attorney.* — An attorney or solicitor of record can only withdraw from a case by leave of court,[1] and, in any view, he is bound, on withdrawal, to notify the opposing counsel; and should he fail to do this, service on him will be good, and he will be held responsible to his client for the consequences.[2]

Arrington *v.* Sneed, 18 Tex. 135. Negligence is a good ground for sustaining such discharge. Walsh *v.* Shumway, 65 Ill. 472. Supra, § 94, 596.

[1] U. S. *v.* Curry, 6 How. 100. See Martinis *v.* Johnson, 21 N. J. L. 1 Zab. 239.

[2] Boyd *v.* Stone, 5 Wisc. 240; Bach *v.* Ballard, 19 La. An. 487. See supra, § 596, 599, where it is shown that an attorney is bound to see a case through, and see § 596, *note.*

Duration of authority of attorney. — The attorney, once appointed in an action, continues in that character till judgment, or the termination of the suit by other means (1 Roll. Abr. 295, Pl. 25; Lawrence *v.* Harrison, Comb. 40; Payne *v.* Chute, 1 Roll. R. 366; Style, 426; Bathgate *v.* Haskin, 59 N. Y. 533; 8 Pet. 113), or his death, or removal by the client (Lill. Pr. Reg. 141; 1 Chit. Rep. 193), or the client's own death (Co. Lit. 52 *b;* see Palmer *v.* Reiffenstein, 1 M. & G. 96, and note; 2 Pen. 689; 3 Monr. 566), for the courts will not recognize a retainer expiring in the middle of the proceedings. Vin. Abr. Att. M. According to Lord Coke, the authority of the attorney in a cause extends to the suing out execution on the judgment as long as it remains in force, *i. e.* a year and a day from its date, and such further time as the process is continued (2 Inst. 378; Lee *v.* Ayrton, Peake, 119; Russell *v.* Palmer, 2 Wils. 325; 4 Burr. 2061; see, also, Bevins *v.* Hulme, 15 M. & W. 88; 3 D. & L. 722; 15 L. J. 226, Exch.), the award of execution on the roll being usually entered as prayed by the plaintiff, *by his attorney aforesaid;* see Lush's Practice, 221, note; and the attorney on the record being the proper hand to receive the fruits of the execution. Crozer *v.* Pilling, 4 B. & C. 34, *S. C.;* 6 D. & R. 26. And he cannot at any other stage of the cause abandon his client and act for the opposite side. Lawrence *v.* Harrison, Style, 426. Where, however, a *scire facias* is necessary to revive the judgment, a fresh authority to the attorney is required, for this is in the nature of a new action; see Hussey *v.* Welby, Say. Rep. 218; Cro. Eliz. 177; 2 Lord Raym. 1048; and such authority is of course also necessary to justify the bringing a writ of error. Batchelor *v.* Ellis, 7 T. R. 337; per Holt, Ch. J., in Parsons *v.* Gill, 2 Lord Raym. 896. Indeed, after final judgment, the attorney in the cause has not, without a fresh warrant, any authority to take any fresh step except the issuing execution. Pulling on Attys. *in loco.* See Jenkins Rep. C. 53; Davis *v.* Jones, 5 Dowl. 503; *vide* 1 Rol. Rep. 366, 367.

CHAPTER XIII.

AUCTIONEERS.

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Auctioneer has lien on goods for commissions and may sue for same, § 665.

I. WHO CAN BE.

§ 638. *Auctioneer is a person authorized to sell by auction.* — An auctioneer is a person employed to sell at public sale, after public notice, property to the highest bidder. Apart from statute, the appointment may be made in the same way as may that to any special agency. But by statutes in force in most states,[1]

[1] See Waterhouse *v.* Door, 4 Me. (4 Green.) 333; Clark *v.* Cushman, 5 Mass. 505; Hunt *v.* Philadel. 35 Penn. St. 277; Florence *v.* Richardson, 2 La. An. 663; State *v.* Conkling, 19 Cal. 501; State *v.* Poulterer, 16 Cal. 514.

an auctioneer has his duties more or less limited; and is required to take out a license from the state.[1]

II. HIS POWER AND DUTIES.

§ 639. *Neither bidder nor vendor is bound until the bidder's bid is accepted by the fall of the hammer.* — Under the Roman law the question has been much discussed whether a bidder at an auction is bound by his bid until the bid is definitely accepted by the auctioneer. Suppose, for instance, A. bids $1,000 for a piece of property, and B. bids $1,100, and B.'s bid turns out to be illusory; can A. be resorted to, after the property is knocked down to B., and the sale to B. is vacated? In Anglo-American law the negative was for a long time firmly settled, it being held that the bidder is not bound until the bidding is closed and the property knocked down to him by the auctioneer. "Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But, according to what is now contended for (that the bidder could not retract a bid once offered), one party would be bound by the offer and the other not, which can never be allowed."[2]

§ 640. Usage prescribes knocking down by the hammer as the exclusive mode of signifying the vendor's assent. If he lets the time for this pass, and the auction is adjourned, it has been held too late for the vendor to accept the bid.[3] Doubts, however,

[1] The following provisions with respect to auctioneers are embodied in the 8th Vict. c. 15.

Every auctioneer must take out a license (renewable annually on July 5), for which he is to be charged £10. The duty collected in the United Kingdom in 1865–6 amounted to £49,080.

An auctioneer who declines to disclose the name of his principal at the time of the sale makes himself responsible. But if he discloses the name of his principal, he ceases to be responsible, either for the soundness of or title to the thing sold, unless he have expressly warranted it on his *own* responsibility.

If an auctioneer pay over the produce of a sale to his employer, after receiving notice that the goods were not the property of such employer, the real owner of the goods may recover the amount from the auctioneer.

An auctioneer who has duly paid the license duty is not liable in the city of London, to the penalties for acting as a *broker* without being admitted agreeably to the 6th Anne, c. 16. McCulloch's Commercial Dict. tit. "Auctioneer."

[2] Payne *v.* Cave, 3 T. R. 148, per Curiam; Warlow *v.* Harrison, 1 E. & E. 295; 29 L. J. Q. B. 14; Benj. on Sales, § 42, 471; 1 Sug. Vend. & P. 8th Am. ed. 11, 12; Ives *v.* Trigent, 29 Mich. 390.

[3] See Routledge *v.* Grant, 4 Bing. 453; Humphries *v.* Carvalho, 16 East, 45; Head *v.* Diggon, 3 M. & R. 97.

have been thrown upon this conclusion by a ruling in the English exchequer chamber, elsewhere discussed.[1] It was in that case declared by Martin, B., "that the highest *bonâ fide* bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve. We think that an auctioneer who puts up property for sale upon such a condition pledges himself that the sale shall be without reserve; and that this contract is made with the highest *bonâ fide* bidder, and in case of a breach of it, he has a right of action against the auctioneer." If so, we must hold that the auctioneer has a reciprocal action against the highest *bonâ fide* bidder, or otherwise, to adopt the language quoted above from an earlier case, "one party would be bound by the offer and the other not, which can never be allowed." If there is a contract between the auctioneer and the highest *bonâ fide* bidder by which the auctioneer is bound, the highest *bonâ fide* bidder is bound by the same contract. The highest *bonâ fide* bidder may under such circumstances be liable to the auctioneer; but for what? If the offer be not accepted by the vendor (and it cannot be, according to the law hereafter stated, until the falling of the hammer) only for the personal losses of the auctioneer by the failure of the sale.

§ 641. The bidder not being bound to pay until his bid is accepted by the fall of the hammer, until that moment the vendor is not bound to sell.[2] This point has been expressly affirmed in England, by the queen's bench and the exchequer chamber, under the following circumstances.[3] The defendant, an auctioneer, having advertised for sale at his auction a mare, "the property of a gentleman, without reserve," the plaintiff bid at the sale sixty guineas. A., the owner, being present at the sale, then bid sixty-one guineas; whereupon the mare was knocked down to A. for sixty-one guineas. The plaintiff, understanding that A. was the owner, immediately claimed the mare, alleging that he was the highest *bonâ fide* bidder, and he tendered sixty guineas as the price. The conditions of the sale, of which the plaintiff had notice, contained the following: "First, the highest bidder to be the buyer, and if any dispute arose between two or more bidders before the lot is returned into the stables, the lot so

[1] Warlow *v.* Harrison, 1 E. & E. 295; 29 L. J. Q. B. 14. Infra, § 641, 648.

[2] Payne *v.* Cave, 3 T. R. 148.

[3] Warlow *v.* Harrison, 1 E. & E. 295; 29 L. J. Q. B. 14.

disputed shall be put up again, or the auctioneer may declare the purchaser. Third, the purchaser being declared, must immediately give in his name and address, with, if required, a deposit of 5*s.* in the pound on account of his purchase, and pay the remainder before such lot is delivered. Eighth, any lot ordered for this sale, and sold by private contract by the owner, or advertised 'without reserve' and bought by the owner, to be liable to the usual commission of £2 *per cent.*" The plaintiff's declaration averred (1) that he was the highest bidder, and that thereupon (2) the defendant became "the agent of the plaintiff to complete the contract." The defendant traversed both these allegations. Lord Campbell, C. J., announced the following points as the unanimous judgment of the court. (1) The auctioneer is not the bidder's agent until the acceptance of the bid by the knocking down of the hammer; and that until such moment the auctioneer is exclusively the plaintiff's agent. (2) Either party may retract till the hammer is knocked down. (3) The auctioneer cannot be bound when both the vendor and bidder remain free. On the two first points the judgment was affirmed by the exchequer chamber. On the last, although the judgment was held right on the pleadings, yet on principle it was ruled that the auctioneer, by violating, in the way shown in the case before the court, the conditions of a sale which was announced to be without reserve, made himself liable to the highest *bonâ fide* bidder. This point, however, will be more fully stated in a subsequent section.

§ 642. *Auctioneer is agent to receive payment.* — An auctioneer, being in possession of goods which he is employed to sell under the usual conditions, is authorized to receive payment for the same from the purchaser;[1] though it is otherwise if the conditions of the sale provide that the payment should be made to the vendor,[2] or that the auctioneer is to receive only the deposit.[3] An auctioneer must sell for cash, and has no authority to receive a bill of exchange instead of cash.[4] But it would be otherwise as

[1] Capel *v.* Thornton, 3 C. & P. 352; Williams *v.* Evans, L. R. 1 Q. B. 352; Yourt *v.* Hopkins, 24 Ill. 326. See supra, § 187, 206.

[2] Sykes *v.* Giles, 1 M. & W. 645.

[3] See Mynn *v.* Joliffe, 1 M. & R. 326.

[4] Williams *v.* Evans, L. R. 1 Q. B. 352. See Bridges *v.* Garrett, L. R. 4 C. P. 580; L. R. 5 C. P. 451; Townes *v.* Birchett, 12 Leigh, 173. See supra, § 210.

to a check, if due discretion is used by the auctioneer.[1] But it is at the auctioneer's own risk to give credit.[2]

§ 643. *Has no authority to warrant.* — Unless implied by his instructions, or by the usage of trade, the auctioneer cannot bind the vendor by a warranty.[3]

§ 644. *Auctioneer's agency is limited to perfecting sale by auction.* — After the auction is over, the auctioneer ceases to represent the vendor except for the purpose of perfecting the auction sale. His authority as auctioneer does not extend to the subsequent negotiation of a private sale.[4] Though he may sell on parol authority, he cannot execute a deed except on due written power.[5]

§ 645. *Auctioneer cannot transfer his duties to a subaltern.* — The trust given to an auctioneer being special, involving distinctive discretion, he cannot transfer it to a clerk or subaltern.[6] But he may employ another person to use the hammer and make the outcry under his immediate direction and superintendence, even though he may himself be occasionally absent.[7]

§ 646. *Vendor is liable for auctioneer's statements.* — The vendor is liable for the auctioneer's statements in conducting the sale, in the same sense that the principal is liable for the agent's statements.[8] But two qualifications are here to be observed: (1) oral statements of the auctioneer cannot be received as modifying the written conditions;[9] (2) if the purchaser gets substantially what he bargained for, "he may generally be held to abide by the purchase, with the allowance of some deduction from the price, by way of compensation for any small deficiency in the value by reason of the variation" between the description and the article sold.[10]

[1] Thorold *v.* Smith, 11 Md. 89; apparently affirmed in Williams *v.* Evans, L. R. 1 Q. B. 352; Benj. on Sales, § 744. Supra, § 210.

[2] Williams *v.* Millington, 1 H. Bl. 81.

[3] Dodd *v.* Farlow, 11 Allen, 426. Supra, § 187.

[4] Seton *v.* Slade, 7 Ves. 276. See Pinckney *v.* Hagedorn, 1 Duer, 89; Boinest *v.* Leignez, 2 Rich. S. C. 464; Paley's Agency, 208.

[5] Yourt *v.* Hopkins, 24 Ill. 326.

[6] Coles *v.* Trecothick, 9 Ves. 234; Stone *v.* State, 12 Mo. 400. Supra, § 28.

[7] Com. *v.* Harnden, 19 Pick. 482; Poree *v.* Bonneval, 6 La. An. 386. See supra, § 33.

[8] Ives *v.* Trigent, 29 Mich. 390; Dent *v.* McGrath, 3 Bush, 174. Supra, § 158.

[9] Wright *v.* Deklyne, Pet. C. C. 199. But see Rankin *v.* Matthews, 7 Ired. 286; Satterfield *v.* Smith, 11 Ired. 60.

[10] 2 Kent's Com. 537, citing Calcraft

§ 647. *Auctioneer may sue for purchase money in his own name as well as in that of principal.* — As to personal estate, this is plain, as he has a special property in such cases.[1] As to real estate, though he has no special property, yet when the conditions of the sale require a deposit, he may sue for such deposit.[2]

III. HIS LIABILITIES.

§ 648. *Auctioneer may make himself liable to highest bonâ fide bidder by knocking down to a nominal illusory bidder.* — This point was determined in an English case of which the facts have been already given.[3] It was held in the exchequer chamber, by

v. Roebuck, 1 Ves. 221; Dyer *v.* Hargrave, 10 Ves. 502; King *v.* Bardeau, 6 Johns. Ch. 38. See Rodman *v.* Zilley, 1 N. J. Eq. 320; Plume *v.* Small, 5 N. J. Eq. 460; Ives *v.* Trigent, 29 Mich. 390.

[1] Supra, § 428. See Robinson *v.* Rutter, 4 El. & B. 954; Beller *v.* Block, 19 Ark. 566; Hulse *v.* Young, 16 Johns. N. Y. 1; Minturn *v.* Main, 7 N. Y. 220; 3 Sandf. 590; Girard *v.* Taggart, 5 S. & R. 19; Bogart *v.* O'Regan, 1 E. D. Smith, 590; Williams *v.* Millington, 1 H. Bl. 84; Coppin *v.* Craig, 7 Taunt. 243.

[2] Thompson *v.* Kelly, 101 Mass. 291. And so as to fees. Bleecker *v.* Franklin, 2 E. D. Smith, 93. "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 at 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 coupled with a lien for the charges of the sale, the commission and the auction duty which he is bound to pay. In the common course of auctions there is no delivery without actual payment; if it be otherwise, the auctioneer gives credit to the vendee entirely at his own risk." Williams *v.* Millington, 1 H. Bl. 84, 85. Judgment of Loughborough, C. J. "The plaintiff says, 'I, as auctioneer, that is, as agent, let the land, and I contract that on the price being paid to me the person paying the price shall have the enjoyment of the land.' The agreement was not reduced to writing, but that is the effect of the conditions of the auction, and what took place at the auction. It may be that it was known that the plaintiff was not acting for himself, but under the directions of the race or some other committee, but that is immaterial for the present purpose, if the contract be made with the agent, notwithstanding he is known to be an agent. There were numerous reasons why the contract should be made by and with the plaintiff himself, and at all events there was evidence for the jury that the contract was made with him." Fisher *v.* Marsh, 34 L. J. 178, Q. B. Judgment of Blackburn, J. See Evans *v.* Evans, 3 A. & E. 132; Higgins *v.* Senior, 8 M. & W. 834; 11 L. J. 199, Ex.

[3] Warlow *v.* Harrison, 1 E. & E. 295; 29 L. J. Q. B. 14; 1 Sugd. V. &

the unanimous judgment of Martin, Bramwell, and Watson, BB., and Willes and Byles, JJ. (differing in this respect from the unanimous opinion of the queen's bench), that an auctioneer under the circumstances might make himself independently liable by preferring an illusory bid to a *bonâ fide* bid for a less sum. Martin, B., in the course of his opinion, said: "In a sale by auction there are three parties: namely, the owner of the property to be sold, the auctioneer, and the portion of the public who attend to bid, which includes of course the highest bidder. In this, as in most cases of auction, the owner's name was not disclosed: he was a concealed principal. The names of the auctioneers, of whom the defendant was one, alone were published, and the sale was announced by them to be 'without reserve.' This, according to all the cases both in law and in equity, means that neither the vendor nor any person in his behalf may bid at the auction, and that the property be sold to the highest bidder, whether the sum be equivalent to the real value or not. . . . . Upon the same principle, it seems to us that the highest *bonâ fide* bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve. We think that the auctioneer who puts up property for sale upon such a condition pledges himself that the sale shall be without reserve; or, in other words, contracts that it shall be so, and that this contract is made with the highest *bonâ fide bidder*, and in case of a breach of it, he has a right of action against the auctioneer." . . . . "We entertain no doubt that the owner may at any time before the contract is legally complete interfere and revoke the auctioneer's authority, but he does so at his own peril; and if the auctioneer has contracted any liablility in consequence of his employment and the subsequent revocation or conduct of the owner, he is entitled to be indemnified."

§ 649. *Auctioneer is bound to apply the diligence usual to good men of business of his branch and place; and is liable on default of such diligence.* — The diligence required from an auctioneer is determined by what is usual among good auctioneers in his particular neighborhood.[1] He is liable for any losses to his principal from the lack of such diligence.[2]

P. 8th Am. ed. 11, 12; Benjamin on Sales, § 471. Supra, § 640, 641.

[1] Supra, § 272–4. See Whart. on Neg. § 46.

[2] Hicks *v.* Minturn, 19 Wend. 550. Supra, § 273.

§ 650. *If he deviates from instructions he is in like manner liable.* — This results from his position as agent for the vendor.[1] Hence he is liable to the vendor in damages if he sell below the price limited by the vendor.[2]

§ 651. *Auctioneer selling for undisclosed principal makes himself liable under the ordinary limitations.* — An auctioneer, selling without reference to a principal, assumes the liabilities which belong, by the general law of principal and agent, to an agent acting for an undisclosed principal.[3] If he sell goods below the limit fixed by the principal, he is liable in damages to the purchaser, though the owner is not bound.[4] At the same time the bidder may repudiate his bid if the auctioneer refuses to disclose the principal.[5]

§ 652. *Auctioneer liable for stolen goods innocently sold by him.* — The title to such goods never being out of the owner, and the auctioneer being bound to inquire as to such title, he is liable for the goods at the owner's suit.[6] But after sale and payment of proceeds to employer, no notice having previously been given, it seems that it is too late for the owner to recover.[7]

§ 653. *Auctioneer liable as stake-holder.* — As is elsewhere seen, an auctioneer may be liable as stake-holder, as to the deposit money, or as to proceeds of an article claimed by contending parties.[8]

IV. HOW AUCTIONS ARE AFFECTED BY THE STATUTE OF FRAUDS.

§ 654. *Auction sales are within the statute of frauds.* — By the 17th section of the statute of frauds, "no contract for the sale of any goods, wares, or merchandise for the price of ten pounds sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part

[1] Wilkinson *v.* Campbell, 1 Bay S. C. 169. Supra, § 247.

[2] Wolfe *v.* Lyster, 1 Hall (N. Y.), 146; Steele *v.* Ellmaker, 11 Serg. & R. 86. See Bush *v.* Cole, 28 N. Y. 261. Supra, § 260.

[3] Hansou *v.* Roberdeau, Peake's Cas. 120; Jones *v.* Littledale, 6 Ad. & El. 486. See supra, § 496–505; and see Mills *v.* Hunt, 20 Wend. 431; Franklin *v.* Lamond, 4 C. B. 637.

[4] Bush *v.* Cole, 28 N. Y. 261.

[5] Thomas *v.* Kerr, 3 Bush, 619. See supra, § 496–505.

[6] Hoffman *v.* Carow, 20 Wend. 21; 22 Wend. 285; Chambers *v.* M'Cormick, 4 N. Y. Leg. Obs. 342.

[7] Jacob's case, 2 Bay S. C. 84.

[8] See supra, § 521–22.

payment, or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract, *or their agents thereunto lawfully authorized.*" Doubts existed for some time whether auction sales were within the range of this statute.[1] But these doubts were summarily dismissed by Lord Ellenborough,[2] who emphatically declared that the statute covered such sales, and his opinion has been subsequently adopted without dissent.[3]

§ 655. *Auctioneer is agent for both parties at public sale for the purpose of signing so as to take the case out of the statute.* — It is now settled beyond controversy that the auctioneer, when he enters in his books the bid of the highest bidder, does so as agent of both parties; and that this is a memorandum which satisfies the demands of the statute of frauds.[4] The same sanction applies to the memorandum of a commissioner conducting a sale by direction of a court of equity.[5] "A memorandum by the auctioneer's clerk has the same effect as a memorandum by the auctioneer."[6]

§ 656. But this double agency, essential to bring the case within the statute, does not exist when the auctioneer sells the goods at private sale,[7] nor when the sale was virtually made before the

[1] Simon *v.* Motivos, 3 Burr. 1921; 1 W. Bl. 599.

[2] Hinde *v.* Whitehouse, 7 East, 558; followed by Kenworthy *v.* Schofield, 2 B. & C. 945.

[3] For rulings to the same point in this country, see Pike *v.* Balch, 38 Me. 302; O'Donnell *v.* Leemann, 43 Me. 158; Davis *v.* Rowell, 2 Pick. 63; Morton *v.* Dean, 13 Metc. 385; People *v.* White, 6 Cal. 75; Brent *v.* Green, 6 Leigh, 16; Burke *v.* Haley, 7 Ill. 614; Talman *v.* Franklin, 3 Duer, 395; M'Comb *v.* Wright, 4 Johns. N. Y. Ch. 659; Arden *v.* Brown, 4 Cranch C. C. 121.

[4] Hinde *v.* Whitehouse, 7 East, 558; Emmerson *v.* Heelis, 2 Taunt. 38; White *v.* Proctor, 4 Taunt. 209; Kenworthy *v.* Schofield, 2 B. & C. 945; Walker *v.* Constable, 1 B. & P. 306; Farebrother *v.* Simmons, 1 B. & Ald. 333; Cleaves *v.* Foss, 4 Greenl. 1; Pike *v.* Balch, 38 Me. 302; Smith *v.* Arnold, 5 Mason, 414; Bent *v.* Cobb, 9 Gray, 397; Morton *v.* Dean, 13 Metc. 388; M'Comb *v.* Wright, 4 Johns. Ch. 659; Johnson *v.* Buck, 6 Vroom, 338; Pugh *v.* Cheseldine, 11 Oh. 109; Hart *v.* Woods, 7 Blackf. 568; Burke *v.* Haley, 7 Ill. 614; Brent *v.* Green, 6 Leigh, 19; Cherry *v.* Long, Phill. N. C. L. 466; Gordon *v.* Sims, 2 McCord, 164; Epis. Church *v.* Leroy, Riley S. C. Ch. 156; White *v.* Crew, 16 Ga. 416; Adams *v.* McMillan, 7 Port. 73. See supra, § 18, 244, 513. The memorandum must, however, be in writing, and so proved. Baltzen *v.* Nicolay, 53 N. Y. 467.

[5] Jenkins *v.* Hogg, 2 Mill S. C. Const. 281.

[6] Bird *v.* Boulter, 4 B. & Ald. 443. See Cathcart *v.* Keirnaghan, 5 Strobh. 129; Pope *v.* Chafee, 14 Richs. Eq. 69; Smith *v.* Jones, 4 Leigh, 165.

[7] Mews *v.* Carr, 1 H. & N. 484.

auction, the auction being used merely to fix the price;[1] nor when the memorandum was made after the sale was adjourned.[2] The memorandum must state or refer to the conditions of the sale.[3] And it is conceded that down to the moment of knocking down the hammer the auctioneer is exclusively the agent of the vendor. Down to such moment the bidder may retract his bid, and the vendor his offer.[4] When the sale is over, the auctioneer is agent of the vendor alone.[5] If he himself is vendor and party in interest, he is not authorized to sign the memorandum.[6]

V. HOW SALES ARE AFFECTED BY PUFFING, AND BY COMBINATIONS AMONG BIDDERS.

§ 657. *Illusory bids will vitiate a sale, if the object be to work upon bidders fraudulently in order to sell at an excessive price.* — It was declared by Lord Mansfield, in a case where the published condition was "that the highest bidder shall be the purchaser," that it was a fraud upon the public, and therefore upon the buyer, for the vendor to bid at such sale by himself or his agents,[7] and this opinion was subsequently emphatically approved by Lord Kenyon.[8]

§ 658. No doubt if a sale is advertised to be to the highest bidder, without restriction or reserve, this view still obtains.[9]

§ 659. *Sales at mock auctions invalid.* — The employment of *puffers*, or mock bidders, to raise the value of the articles sold by their apparent competition, *a fortiori* invalidates the sale as to parties believing such bidders to be genuine; the cases cited

[1] Bartlett *v.* Purnell, 4 Ad. & El. 792. See Burke *v.* Haley, 7 Ill. 614; O'Donnel *v.* Leeman, 43 Me. 158; Alna *v.* Plummer, 4 Greenl. 258.

[2] Horton *v.* McCarty, 53 Me. 394; Gill *v.* Bicknell, 3 Cush. 355. See Episcopal Church *v.* Leroy, Riley S. C. Ch. 156.

[3] Morton *v.* Dean, 12 Metc. 385; Coles *v.* Boune, 10 Paige, 526.

[4] Warlow *v.* Harrison, 1 E. & E. 295. See supra, § 639.

[5] Horton *v.* McCarty, 53 Me. 394.

[6] Bent *v.* Cobb, 9 Gray, 397.

[7] Boswell *v.* Christie, 1 Cowp.

[8] Howard *v.* Castle, 6 T. R. 642.

[9] See Warlow *v.* Harrison, 1 E. & E. 295; 29 L. J. Q. B. 14. Supra, § 638–9; Green *v.* Baverstock, 14 C. B. N. S. 204; Crowder *v.* Austin, 3 Bing. 368; Baham *v.* Bach, 13 La. 287; Towle *v.* Leavitt, 23 N. H. 360; Trust *v.* Delaplaine, 3 E. D. Smith (N. Y.), 219; Donaldson *v.* McRoy, 1 Browne Penn. 346; Haines *v.* Shore, 16 Penn. St. 200; Veazie *v.* Williams, 8 How. U. S. 134. See *S. C.* 3 Story, 623; Moncrief *v.* Goldsborough, 4 H. & M. (Md.) 282; Hinde *v.* Pendleton, Wythe (Va.), 144; Morehead *v.* Hunt, 1 Dev. L. 65; Smith *v.* Greenlee, 2 Dev. L. 126.

showing that if the owner of property put up to sale by auction employ puffers to bid for him, it is a fraud on the real bidder.[1] A combination to inveigle purchasers by means of fraudulent bids, declared fraudulently to be real by the auctioneer, in a sale announced to be without reserve, may be treated as an indictable conspiracy at common law.[2]

§ 660. *Owner may limit the price below which the property must not be sold.* — The auctioneer in such case is bound by the instructions of the owner. He must set up the property at the limited price; if it cannot be sold at this price, then it must be withdrawn.[3]

§ 661. *Where there is no statement that the sale is without limit or reserve, then if illusory bids be given simply to bring the property up to a fair limit, they do not vitiate the sale.* — In all auction sales there are two rights to be considered: those of the vendor and those of the bidder. It is hard for the bidder to be stimulated, by a fraudulent manufacture of false public valuation, to pay an improvident price. It is hard for the vendor, if by some misfortune bidders fail to be present, to have his property sold at a ruinous sacrifice. In the former case relief is given; in the latter case the courts have been inclined to permit a prevention of the mischief by allowing bids from the owner or his agents up to an amount which will prevent a sacrifice.[4] It is true

[1] See supra, § 657–8.

[2] See Whart. Cr. Law, 9th ed. § 2297, 2322–7. The establishment of mock auctions is a common practice among swindlers in London. "Persons are frequently placed at the doors of such auctions, denominated *barkers*, to invite strangers to come in; and puffers are in wait to bid up the article much beyond its value. A stranger making an offer at such an auction is almost sure to have the article knocked down to him. Plated goods are often disposed of at these auctions; but it is almost needless to add, they are of very inferior quality. Attempts have sometimes been made to suppress mock auctions, but hitherto without much success." M'Culloch's Commercial Dict. "Auctioneer."

[3] Williams *v.* Poor, 3 Cranch C. C. 221; Towle *v.* Leavitt, 23 N. H. 360; Wolfe *v.* Lyster, 1 Hall (N. Y.), 146; Hazul *v.* Dunham, 1 Hall (N. Y.), 659.

[4] Conolly *v.* Parsons, 3 Ves. 625, n.; Smith *v.* Clarke, 12 Ves. 477; Bramley *v.* Alt, 3 Ves. 620; Woodward *v.* Miller, 2 Coll. 279; Reynolds *v.* Dechaums, 24 Tex. 174; Millar *v.* Campbell, 3 A. K. Marsh. 526; Steele *v.* Ellmaker, 11 S. & R. 86; Veazie *v.* Williams, 3 Story, 623; but see *S. C.* 8 How. U. S. 134. So the court will not interfere when the price is not exorbitant, and there was a temporary acquiescence by the purchaser. Latham *v.* Morrow, 6 B. Mon. 630; Backenstoss *v.* Stahler, 33 Penn. St. 251; McDowell *v.* Simms, Busb. N. C. 130; McDowell *v.* Simms, 6 Ired. Eq. 278.

that it may be said that the vendor, when a sacrifice is imminent, may withdraw the thing to be sold; but to concede this is to concede that he may place a limit on the sale. To withdraw the thing if it does not bring a designated price, and to employ a bidder to bid up to such price, have virtually the same effect, — if the price be a fair auction valuation, and if nothing be done, by a combination of puffers, to create a false estimate of value, especially if there be a real bidder between the illusory bidder and the purchaser. The same remark may be made as to the vendor's right to start at a fixed price; a right which, as we have just seen, is uncontested. In an interesting case in England, decided before the passage of Lord St. Leonards's act, presently to be noticed, the auctioneer gave notice that the sale would be "without reserve," *and* that the parties interested had liberty to bid. The highest bidder bid £19,000. The next disinterested *bonâ fide* bidder below him bid £14,000. The intermediate bids were made by the purchaser and a mortgagee in possession of the estate. It was held by Lords Justices Turner and Cairns that the purchaser was bound by his bid for £19,000.[1]

§ 662. *In England doubts settled by statute.* — But the English courts of equity appear to have advanced somewhat beyond this line, and to have held that even in sales without reserve it is lawful to employ a "puffer," to prevent a sacrifice.[2] By the statute of 30 & 31 Vict. c. 48, offered by Lord St. Leonards, it was provided, that "whereas there is at present a conflict between her majesty's courts of law and equity, in respect of the validity of sales of auction of land where a puffer has bid, although no right of bidding on behalf of the owner was reserved, *the courts of law holding that all such sales are absolutely illegal, and the courts of equity under some circumstances giving effect to them, but even in courts of equity the rule is unsettled;* and whereas it is expedient that an end should be put to such conflicting and unsettled opinions: be it therefore enacted, that from and after the passing of this act, whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law." It is further directed that where land is announced to be sold with-

[1] Dimmick *v.* Hallett, L. R. 2 Ch. Ap. 31.

[2] See comments of Willes, J., in Green *v.* Baverstock, 14 C. B. N. S. 204; and of Lord Cranworth, in Mortimer *v.* Bell, L. R. 1 Ch. App. 10.

out reserve, it shall not be lawful for the bidder to bid, or for the auctioneer to accept, a bid from him or any one employed by him; and where the sale is subject to the right of a seller to bid, it shall be lawful for the seller or any *one* person in his behalf to bid. The act also forbids courts of equity from opening biddings in sales made under their orders; so that in future the highest *bonâ fide* bidder at such sales shall be the purchaser, in the absence of fraud or improper conduct in the sale.[1]

§ 663. *Conspiracy between several persons to unite bids vitiates the sale to one of them; but otherwise as to a mere understanding between two or more that they will not bid against each other.* — Suppose that when a number of articles are offered for sale at auction those present should agree to divide the articles among themselves; A. bidding unopposed for lot No. 1, B. for lot No. 2, and so on. In this case the agreement would be a fraudulent conspiracy, vitiating the sale; and the same taint of fraud would apply to all cases in which bids are consolidated in order that the parties consolidating should hold the purchase in common.[2] But when a lot is offered so large that neither A., B., nor C., attending the sale, can afford to purchase it, it is lawful for A., B., and C. to unite in its purchase by one bid.[3]

§ 664. So we must regard with at least equal indulgence cases in which A., from regard to B., declines to bid against B.: for (1) we here make the result depend upon A.'s motives in not bidding, a psychological question the courts have no means of determining; and (2) if on this ground we vitiate a sale, few sales could stand, for there are few sales in which some one not bidding may not be affected by motives of this kind.[4] But it is a fraud for a bidder to attempt, by addressing the public attending

[1] As commenting on this statute, see Gilliat *v.* Gilliat, L. R. 9 Eq. 60.

[2] Cocke *v.* Izard, 7 Wall. 559; Gardiner *v.* Morse, 25 Me. 140; Phippen *v.* Stickney, 3 Metc. 387; Troup *v.* Wood, 4 Johns. Ch. 228; Jones *v.* Caswell, 3 Johns. Cases, 29; Doolin *v.* Ward, 6 Johns. 194; Thompson *v.* Davies, 13 Johns. 112; Gulick *v.* Ward, 5 Halst. 87; Singluff *v.* Eckel, 24 Penn. St. 472; Dick *v.* Lindsay, 2 Grant, 431; Loyd *v.* Malone, 23 Ill. 43; Hook *v.* Turner, 22 Miss. 333; Wooton *v.* Hinkle, 20 Mo. 290.

[3] Smith *v.* Greenlee, 2 Dev. 116; Phippen *v.* Stickney, 3 Metc. 387; Kearney *v.* Taylor, 15 How. U. S. 494; Switzer *v.* Skiles, 8 Ill. (3 Gilm.) 529.

[4] See Galton *v.* Emmos, 1 Coll. 243; Carew's Est. 26 Beav. 197; Kearney *v.* Taylor, 15 How. U. S. 519; Small *v.* Jones, 1 Watts & S. 128; Dick *v.* Cooper, 24 Penn. St. 217; Allen *v.* Stephanes, 18 Tex. 658; Jenkins *v.* Frink, 30 Cal. 586.

the sale, to suppress competition; for this is a positive act on his part, capable of legal cognition, the object of which is for his own benefit to destroy the vendor's right to competition in bidding.[1]

VI. HIS COMPENSATION.

§ 665. *Auctioneer has lien on goods for his commissions, and may sue for same.* — An auctioneer, having a special property in goods committed to him for sale, has a lien on them for his commissions.[2] He may appropriate as much of the purchase money as is due himself to the payment of his individual debts to the purchaser,[3] as well as sue directly for his commissions.[4] Where his commissions are fixed by statute, they go to compensate him for the act of selling, at public sale, to the highest bidder; and to this commission he is entitled to add charges for disbursements and expenses, as well as for special collateral services.[5]

[1] Fuller *v.* Abrahams, 3 B. & B. 116; 6 Moore, 316; Martin *v.* Raulett, 5 Richards. 542. See, as qualifying this, Haynes *v.* Crutchfield, 7 Ala. 189.

[2] Robinson *v.* Rutter, 4 El. & B. 954. See Hone *v.* Henriquez, 13 Wend. 240. See infra, § 813.

[3] Harlow *v.* Sparr, 15 Mo. 184.

[4] Robinson *v.* Green, 3 Metc. Mass. 159; Muller *v.* Maxwell, 2 Bosw. 355. See Cochrane *v.* Johnson, 2 McCord, 21; The Amy Warwick, 2 Sprague, 260, for rulings as to amount of commissions.

[5] Russell *v.* Miner, 5 Lans. 537; *S. C.* 61 Barb. 534. See *contra* Leeds *v.* Bowen, 1 Rob. 10; *S. C.* 2 Abb. Pr. (N. S.) 43.

CHAPTER XIV.

BANK OFFICERS.

I. Bank Officers in general.
- Incorporated bank acts only through its agents, § 670.
- Bank officer only binds bank within the range of his duties, § 671.
- Bank officers regarded as *institors*, § 672.
- Knowledge of proper officer is knowledge of bank, § 673.
- Bargains of officer with bank subject to same checks as are bargains of agent with principal, § 674.
- Distribution of powers among officers determinable by law and usage, § 675.
- Usage qualifies contracts of such officers, § 676.
- Bank liable for fraud or negligence of officer when in the range of his duties, § 677.
- Bank officer is bound to exhibit due diligence, § 678.
- Bank bound by declarations of its officers within their range, § 679.

II. Directors.
- Directors liable for lack of diligence of good business men, § 680.
- Directors have supreme control of bank, § 682.

III. President.
- President binds bank by action within his range, § 683.

IV. Cashier.
- Cashier is financial executive of bank, § 684.
- But not so as to matters out of his sphere, § 687.

V. Lien of Bankers.
- Banker has lien on deposits of customer, § 688.

I. BANK OFFICERS IN GENERAL.

§ 670. *Incorporated bank acts only through its agents.* — A bank, like all other corporations, can only act through agents;[1] and among these agents must be distributed all the rights and liabilities which attach to the corporation itself. This distribution varies in different institutions. In one bank the president may have a greater degree of power; in another a less degree of power. In one section of the country the cashier may be the exclusive agent to whom the mechanism of the negotiation of paper must be committed; in another section of the country this duty is shared by others. But however the mode of distribution may vary, distributed in some mode the power must be. The bank can do nothing by itself. All it can do must be done by agents. And in these agents are deposited all the rights and liabilities which are incident to banks, whether public or pri-

[1] Supra, § 57, 59.

vate, unless qualified by statute.[1] Even in undertaking a business forbidden by the charter of the bank, the bank becomes responsible for the acts of its officers.[2]

§ 671. *Bank officer only binds bank within the range of his duties.* — From the necessary subdivision of the powers of a bank among its several officers, it follows that each officer can bind the bank only when acting within the apparent range of his duties. When acting outside of such range, he imposes no obligation on the bank.[3] Thus where the charter vests the control of a bank in its board of directors, the president and cashier have no power, *virtute officii*, to make an assignment under seal without the assent of the board.[4] So bank officers, having no authority to indorse accommodation paper, cannot bind the bank, so far as concerns holders with notice, by such indorsement.[5]

§ 672. *Bank officers to be regarded as institors.*[6] — "The manager of a bank," so is the rule properly expressed by Mr. Bell,[7] "the officers placed there to deal with the public, or the agent managing a branch of the banking house at a distance from the head establishment, are all institors by whose acts the bank is bound. In this case, however, particular attention is necessary to avoid stretching this implied authority too far, considering the peculiar dangers attending money transactions, the precaution of the law in requiring written proof as evidence of payment in money, and the very particular regulations and checks under which banks always place their officers, especially in regard to their power of receiving money so as to charge the bank. When the question first occurred, the court of session applied the

[1] See supra, § 57. Atlantic Bk. *v.* Merchants' Bk. 10 Gray, 532; Commercial Bk. *v.* Bonner, 21 Miss. (13 S. & M.) 649.

[2] Badger *v.* Bank of Cumberland, 26 Me. 428; Bank of Ky. *v.* Schuylkill Bk. 1 Pars. (Phil.) Sel. Cas. 180; Hagerstown Bk. *v.* London Soc. 3 Grant (Penn.), 135.

[3] Supra, § 129. New Hamp. Sav. Bk. *v.* Downing, 16 N. H. 187; Foster *v.* Essex Bk. 17 Mass. 479; Austin *v.* Daniels, 4 Denio, 299; Leavitt *v.* Beers, Hill & Denio, 221; Hoyt *v.* Thompson, 5 N. Y. (1 Seld.) 320; Leggett *v.* N. J. Bk. Co. 1 N. J. Eq. 541; United States *v.* City Bk. 21 How. U. S. 356; Blackman *v.* Bk. 7 Ala. 205; Spyker *v.* Spence, 8 Ala. 333; Mitchell *v.* Cook, 29 Barb. 243.

[4] Hoyt *v.* Thompson, 5 N. Y. (1 Selden, 320). See Gibson *v.* Goldthwaite, 7 Ala. 281; Merrick *v.* Trustees, 8 Gill, 59.

[5] Bank of Genesee *v.* Patchin, 13 N. Y. 309; 19 N. Y. 312; Farmers' Bk. *v.* Troy Bk. 1 Dougl. Mich. 457. As to powers of officers, see supra, § 165, 182.

[6] As to the institorial relation, see infra, § 799.

[7] Bell's Com. 7th ed. 514.

strict rules of the *actio institoria*, without any very critical examination of the vouchers on which money was paid into the hands of the bank agent. Taking his official place and station, as institor of the bank, to imply sufficient authority as a general agent to receive money for his principal, they held the bank chargeable with money so received.[1] On the next occasion on which the question arose, the court at first viewed the matter differently, and held the bank chargeable only where the powers delegated to the agent were correctly exercised. But afterwards nearly the same views prevailed as in the former case.[2] On appeal to the house of lords, a doctrine considerably different was applied to this class of cases. The notion of a general agency, or implied authority, as in the *actio institoria*, was rejected, and the case of a bank agent placed on the footing of a limited agency, like any other limited mercantile agent or factor, his power being measured by his commission, and his principals not

[1] Paisley Banking Co. *v.* Gillon, 20 June, 1798. In this case the bank had a branch at Alloa, under the care of Birnie, with whom, as agent for the bank, Gillon discounted several bills. They were indorsed to the bank and transmitted, and when due were returned to Birnie to recover payment of them. In this situation Gillon remitted various sums to Birnie for the purpose of paying those bills; but Birnie did not enter those sums in the bank books, and the bills remained in his hands to be cancelled. He became bankrupt and absconded, and in the repositories of the bank the bills were found. The bank sued the parties in the bills, and the defence was payment. The question therefore was, whether the bank was chargeable with the remittances sent to Birnie? The court held it was, and dismissed the bank's action.

[2] Watson *v.* Bank of Scotland, 1806. The Bank of Scotland had a branch at Brechin, under the management of James Smith & Sons, as their agents. The place of business was in a room, over the door of which was painted "The Bank of Scotland's Office." Receipts for money paid the bank were engraved with blanks for sums and dates, and were signed "James Smith & Sons, Agents for the Bank of Scotland." "The agents did much business, and in particular discounted bills, and as bankers received deposits of money on their own account. They transacted their business in the bank office, and they gave notes for sums deposited, engraved as the bank receipts were, dated 'bank office,' and signed James Smith & Sons. Watson placed £60 in the bank and received a receipt of the latter description, and on the failure of Smith & Sons raised an action for the money as deposited with the bank. The court found the bank liable for the contents of the receipt, chiefly on the ground 'that it would be of dangerous consequence to the public, as well as contrary to the implied nature of such a business, if banks were not answerable for the transactions at their known office by the clerks and servants employed by them in the common operations of banking.'"

otherwise chargeable than as the authority granted to the agent gave him power to bind them.[1]

§ 673. *Knowledge of proper officer is knowledge of bank.* — Whatever the bank knows through its proper officer is known by the bank. Thus notice to a board of directors binds future boards.[2] But the knowledge must be through the proper officer.[3] Thus the knowledge by a clerk, not charged with such duties, as to the residence of an indorser of a particular note, cannot be imputed to the bank.[4] So the uncommunicated private knowledge of a single director is not the knowledge of the board as a body.[5] It is otherwise when the matter is communicated to the board.[6]

§ 674. *Bargains of bank officers with bank are subject to the same checks as bargains of agent with principal.* — The bargains made by an agent with his principal, as is elsewhere seen, are jealously scrutinized, for the reason that the agent, having his principal's property in his hands, if not his principal's honor, has a power which will enable him, if unrestrained, to unduly press the principal. The same considerations peculiarly apply to the dealings for their own benefit by bank officers with the bank.[7]

§ 675. *Distribution of powers among officers determinable by*

[1] Bank of Scotland *v.* Watson, 1 Dow, 40. The Lord Chancellor said, "There was nothing peculiar that he knew of in bank agency to take it out of the rule that the agent could not bind the principal beyond the limits of his authority. The Lord Chief Justice Ellenborough had sat at the table at the hearing of the case, and had observed that if it had come before him, it would not have occupied more than ten minutes. There was a variety of considerations and circumstances stated to raise a presumption in favor of the respondent, but all of them appeared to him insufficient to show that this was an instrument by which the bank could be bound. Lord Redesdale concurred in this opinion. And it is a strong confirmation of this view, that in all bank transactions, being dealings in money, the law requires correct legal evidence, the terms and import of which the party is bound to examine."

[2] Mechanics' Bk. *v.* Seton, 1 Pet. 299. See Lyman *v.* U. S. Bk. 12 How. U. S. 225; 1 Blatch. 297. See supra, § 177, 183, 184.

[3] Fulton Bank *v.* N. Y. & Sharon Canal Co. 4 Paige, 127. Supra, § 178.

[4] Goodloe *v.* Godley, 21 Missis. 233; New Hamp. Savings Bk. *v.* Downing, 16 N. H. 187.

[5] Terrell *v.* Bank, 12 Ala. 502; Farmers' Bk. *v.* Payne, 25 Conn. 444; Washington Bk. *v.* Lewis, 22 Pick. 24; Custer *v.* Bank, 9 Penn. St. 27; otherwise if the director is at the time officially acting for the bank. Bank U. S. *v.* Davis, 2 Hill N. Y. 27.

[6] Bank of Pittsburg *v.* Whitehead, 10 Watts, 397. See supra, § 178–183.

[7] Conyngham's appeal, 57 Penn. St. 494. See supra, § 183.

law and usage. — When there is no broad line of demarcation established by such law as is notice to every one, usage may settle the line so as to be notice.[1] Thus where the usage is that in the absence of the cashier the president signs drafts and checks, the signature of the president under such circumstances binds the bank.[2]

§ 676. *Usage qualifies contracts of such officers.* — The usage of banks, in respect to the powers and duties of their officers, so far as such usage is known to the business public, enters into and qualifies the contracts made by such banks through their officers.[3]

§ 677. *Bank is liable for fraud or negligence of officer when in the range of his duties.* — This necessarily results from the relation of the officer to the bank. If, in matters within his range, he is guilty of fraud or negligence by which an innocent customer is wronged, the bank is liable for his misconduct.[4] So if fraud on the part of an individual would avoid a contract made by him, such fraud on the part of the officers of a bank will avoid a contract made by the bank.[5] How far a bank is liable in an action for deceit for the fraudulent representations of its agents is elsewhere discussed.[6]

§ 678. *Bank officer is bound to exhibit the diligence usual with good officers of his class under the circumstances.* — Whatever, under the same circumstances, a good officer of the particular grade and responsibility is accustomed to do, that must be done;

[1] Mussey *v.* Bank, 9 Metc. 306; Bank of Genesee *v.* Patchin, 13 N. Y. 309; Potter *v.* Bank, 28 N. Y. 641; Farmers' & M. Bk. *v.* Bank, 16 N. Y. 126; Pope *v.* Bank, 57 N. Y. 131.

[2] Neiffer *v.* Bank, 1 Head, 162; Palmer *v.* Yates, 3 Sandf. 137.

[3] Jones *v.* Fales, 4 Mass. 245; Widgery *v.* Monroe, 6 Mass. 449; Lincoln Bk. *v.* Page, 9 Mass. 155; Blanchard *v.* Hillard, 11 Mass. 88; Smith *v.* Whiting, 12 Mass. 6; Whitwell *v.* Johnson, 17 Mass. 449; City Bk. *v.* Cutter, 3 Pick. 414; Hartford Bk. *v.* Stedman, 3 Conn. 489; Yeaton *v.* Bank, 5 Cranch, 52; Brent *v.* Bank, 1 Peters, 89; Bank of Metrop. *v.* Bank, 1 How. 234; 6 How. 212. Supra, § 131. "When there is no authority for the act called in question, a general or particular usage in a given direction will bind the bank to respond to a third party who deals with it in good faith." Reynolds C., in Pope *v.* Bank, 57 N. Y. 131.

[4] Salem Bk. *v.* Gloucester Bk. 17 Mass. 1; Gloucester Bk. *v.* Salem Bk. 17 Mass. 33; Foster *v.* Essex Bk. 17 Mass. 479; Andrews *v.* Suffolk Bk. 12 Gray, Mass. 461; Daly *v.* Bank, 56 Mo. 93.

[5] Atlantic Bk. *v.* Merchants' Bk. 10 Gray, 532.

[6] See supra, § 164–175, 478.

and the officer is liable to the bank for any loss occasioned by a failure to apply such diligence.[1]

§ 679. *Bank is bound by the declarations of its officers within their particular range.* — This is a conclusion from a familiar principle in the law of agency. It must appear, however, that the declarations are within the range of the officer's duty.[2]

[1] See Wharton on Negligence, § 46; Austin *v.* Daniels, 4 Denio, 299; Franklin Ins. Co. *v.* Jenkins, 3 Wend. 130.

The defendant, the salaried manager of a bank, was appointed treasurer to guardians of the poor under the Poor Law Consolidated Order. A treasurer's account between him and the guardians was duly kept according to the poor law orders; moneys were from time to time paid into the bank of which he was manager to the account of the guardians, and orders signed by the guardians in conformity with the orders were cashed like checks payable to order. The defendant received no salary or remuneration, and the guardians received interest on their balance when it exceeded £3,000. A person in the service of the clerk to the guardians, who was employed to fill up the orders for signature by them, drew a number of orders in such a way that the amounts for which they were drawn could be increased by the insertion of words and figures in the blank spaces; and after signature of the orders, he increased the amounts accordingly. He also forged indorsements to orders so increased in amount, and to others not so increased, and obtained payment of them at the bank. On a case stated by an arbitrator in an action brought by the guardians against the defendant for the amount of the orders so paid, it was found as a fact that the payment by the treasurer's clerks of the excess was due solely to the fact that they were misled by want of proper caution on the part of the plaintiffs and their clerk in signing the orders fraudulently prepared for their signature. Held, first, that the negligent drawing of the orders disentitled the plaintiffs to complain of the payment of the excess; secondly, that as to the payment on forged indorsements the account at the bank was in effect the plaintiffs' account; that the bank was protected by 16 & 17 Vict. c. 59, s. 19; and that as by the act and direction of the plaintiffs the only receipt of moneys on their behalf was a receipt by the bank, the defendant was not chargeable in any other way than as the bank was chargeable; and further, that if the account at the bank were regarded as the defendant's account, still being so kept by the order of the plaintiffs, they could not make any claim against him which he could not enforce against the bank. The Guardians of Halifax Union *v.* Wheelwright, L. R. 10 Ex. 183.

Where, by the failure of the cashier of a banking firm to demand payment of a note from the maker, the indorser, who was the only solvent and responsible party to the note, was discharged, it was held that the cashier was liable to his employers for the damages arising from such failure, and that the subsequent payment of his salary did not discharge his liability. Bidwell *v.* Madison, 10 Minn. 13.

[2] Supra, § 158, 165, 478. Stewart *v.* Huntingdon Bk. 11 Serg. & R. 267; Bank of Monroe *v.* Field, 2 Hill (N. Y.), 445; Spalding *v.* Bank, 9 Penn.

II. DIRECTORS.

§ 680. *Directors of banks liable for lack of diligence such as good business men in the particular capacity are accustomed to apply.* — A man holding himself out to the public capable of properly acting as a bank director, is liable if loss to others results from his not showing the diligence of a good bank director. What this diligence is, is to be determined in part by the charter of the bank, in part by commercial law, in part by business usage. It is such diligence as is usual among good business men under the circumstances in which the parties in question are placed.[1] But a director is trustee for his constituents only so far as concerns such diligence.[2]

§ 681. *Directors have supreme control of bank.* — Either directly or through their agents, the directors of a bank exercise over it supreme control. They alone have power to order discounts and determine the conditions of loans,[3] though this may be done by a committee by a division of the duties among the directors.[4] They are the agents of the banks for the issue of paper, and by an over issue bind the bank to innocent holders.[5] They have power to settle with a defaulting cashier;[6] to direct the assignment of its securities;[7] to order the borrowing of money, and in New York this power belongs to them exclusively.[8] Under the act of Congress, the directors of a national bank may remove the president.[9]

St. 28; Harrisburg Bk. *v.* Tyler, 3 Watts & S. 373; Merchants' Bk. *v.* Marine Bk. 3 Gill, 96; Bank of Metropolis *v.* Jones, 8 Pet. 12.

[1] United Society of Shakers *v.* Underwood, 9 Bush, 609; Percy *v.* Millaudon, 20 Martin, 68; *S. C.* 3 La. 568–591; Godbold *v.* Bk. 11 Ala. 198; Hargroves *v.* Chambers, 30 Ga. 580; Maisch *v.* Savings Fund, 5 Phil. R. 30; Whart. on Neg. § 510.

[2] Board of Commis. *v.* Reynolds, 44 Ind. 509; Carpenter *v.* Danforth, 52 Barb. 581. For decisions under N. Y. Rev. Stat. see Gaffney *v.* Colvill, 6 Hill, 567; Branch *v.* Roberts, 50 Barb. 435.

[3] Bank U. S. *v.* Dunn, 6 Peters, 51; Bank Commis. *v.* Bank of Buffalo, 6 Paige, 497. See supra, § 477.

[4] Ridgway *v.* Bank, 12 Serg. & R. 256; Palmer *v.* Yates, 3 Sandf. (N. Y.) 137. See supra, § 477.

[5] McDougald *v.* Bellamy, 18 Ga. 411.

[6] Frankfort Bk. *v.* Johnson, 24 Me. 490.

[7] Stevens *v.* Hill, 29 Me. 133; Northampton Bk. *v.* Pepoon, 11 Mass. 288; Burrill *v.* Nahant Bk. 2 Metc. (Mass.) 163.

[8] Leavitt *v.* Yates, 4 Edw. (N. Y.) 134.

[9] Taylor *v.* Hutton, 43 Barb. 195; *S. C.* 18 Abb. Pr. 16.

§ 682. So far as concerns a third party dealing with the bank, directors who negligently permit the distribution in dividends (of which such directors take part) of money deposited by such third party, are liable to him for their misconduct in permitting such dividends.[1]

III. PRESIDENT.

§ 683. *President binds bank by acts within his range.* — The *president's* power may either be defined by general statute, by the charter of the bank,[2] or by the action of the directors;[3] and what he does within this range binds the bank.[4] Thus the president, from the nature of things, has implied power to employ attorneys to represent the bank in litigation, as well as to institute and defend suits.[5] But his acts without authority (*e. g.* release of debts due bank) are void.[6] The declarations of the president, within his range, bind the bank.[7] Official notice to the president is official notice to the bank.[8] But the president of a corporation is not such an agent for a stockholder as to make him a trustee for such stockholder in case he purchases the stockholder's stock without disclosing to him its real value.[9]

IV. CASHIER.

§ 684. *Cashier financial executive of the bank.* — The cashier of a bank is the executive of its financial department. By him are its debts received and paid; its notes negotiated and transferred; to his custody are its paper and bullion committed. In fine, whatever is necessary to be done either to receive or pass away the funds of the bank, for banking purposes, is done by

[1] United Society of Shakers *v.* Underwood, 9 Bush, 609.

[2] Boisregard *v.* Bank. Co. 2 Sandf. Ch. 23; Jones *v.* Hawkins, 17 Ind. 550; Allison *v.* Hubbell, 17 Ind. 559.

[3] Spear *v.* Ladd, 11 Mass. 94; Northampton Bk. *v.* Pepoon, 11 Mass. 288.

[4] Ibid.; Valk *v.* Crandall, 1 Sandf. N. Y. Ch. 179; Leavitt *v.* Fisher, 4 Duer, 1; Leavitt *v.* Blatchford, 5 Barb. 9; Bank Commis. *v.* St. Lawrence Bk. 8 Barb. 436; Neiffer *v.* Bank, 1 Head, 162; Tremont Bk. *v.* Paine, 28 Vt. 24. Acting with the cashier he may assign a mortgage of the bank. Gillett *v.* Campbell, 1 Den. 520.

[5] Amer. Ins. Co. *v.* Oatley, 9 Paige, 496; Mumford *v.* Hawkins, 5 Denio, 355.

[6] Olney *v.* Chadsey, 7 R. I. 224; Hazleton *v.* Bank, 32 Wisc. 34.

[7] Bank of Monroe *v.* Field, 2 Hill (N. Y.), 445; Spalding *v.* Bank, 9 Penn. St. 28. Infra, § 685.

[8] Porter *v.* Bank, 19 Vt. 410.

[9] Board of Commis. *v.* Reynolds, 44 Ind. 509. See Carpenter *v.* Danforth, 52 Barb. 581.

him or under his direction. In the usual division of duties, to the president it belongs to direct and represent the bank in its collateral business relations; to the cashier to direct and represent the bank in the reception or emission of money for banking objects.[1] "The cashier of a bank," says Judge King, in 1846, in a decision afterwards affirmed by the supreme court of Pennsylvania,[2] "while carrying into execution, under orders of the directors, a lawful contract, ... is in no sense of the word a sub-agent of the board of directors. He is a statute officer, not of the directory, but of the corporation, lawfully empowered to carry the contracts of the corporation into execution, as the directors are lawfully authorized to make them, when acting within the sphere of their authority derived from the corporation.[3] Although a bank corporation is compelled, by the incorporeal nature of its essence, to act by others, yet, when these are part of its organic machinery, like its cashier, it is as much responsible for their omissions and commissions, as is a natural person who employs assistants in the execution of any commission. .... The cashier is the executive officer of the bank. Though chosen by the directors, he is as much the statute agent of the corporation as the directors themselves. This was so directly ruled by Mr. Justice Rogers in the Bank of Washington *v.* Barrington, and his opinion was sustained by the supreme court in banc. If the corporation is under only the limited liability for his acts as contended, by parity of reason, it is no further responsible for the acts of its other statute agents, its directors. .... So in our opinion, the acts and doings of a cashier, carrying into execution a lawful contract entered into by the bank, that is by its board of directors, are the acts and doings of the bank itself, for which the corpora-

[1] United States *v.* City Bk. 21 How. 356; Wild *v.* Bank, 3 Mason, 505; Smith *v.* Northampton Bk. 4 Cush. 1; Town of Concord *v.* Concord Bk. 16 N. H. 26; St. Louis Ins. Co. *v.* Cohen, 9 Mo. 416; Barnes *v.* Ontario Bk. 19 N. Y. 152; Ballston Spa Bk. *v.* Marine Bk. 16 Wisc. 120; Bank of Kentucky *v.* Schuylkill Bk. 1 Parsons (Phil.), Sel. Cas. 180; Bank *v.* Irvine, 3 Penn. 250; Durkin *v.* Exch. Bk. 2 Patt. & H. 277; Cary *v.* McDougald, 7 Ga. 84; Cook *v.* State Bk. 52 N. Y. 96; Pratt *v.* Bank, 12 Kansas, 570. See, also, Sturges *v.* Bank, 11 Ohio St. 153; Bank of Penn. *v.* Reed, 1 W. & S. 101; Baldwin *v.* Bank, 1 Wall. 234; United States *v.* Bank, 21 How. 256. See, as criticising the above conclusion, 3 Am. Law Rev. 612.

[2] Bank of Ky. *v.* Schuylkill Bk. 1 Pars. Eq. Cas. 240.

[3] Bank of Washington *v.* Barrington, 2 Penn. R. 40.

tion is responsible to all parties aggrieved by them."[1] So also Judge Swayne, in the supreme court of the United States in 1870, declares: "The cashier is the executive officer, through whom the whole financial operations of the bank are conducted. He receives and pays out its moneys, collects and pays its debts, and receives and transfers its commercial securities. Tellers and other subordinate officers may be appointed, but they are under his direction, and are, as it were, the arms by which designated portions of his various functions are discharged. A teller may be clothed with the power to certify checks, but this would not affect the right of the cashier to do the same thing. The directors may limit his authority if they think proper, but this would not affect those to whom the limitation was unknown."[2]

§ 685. In discharge of these comprehensive functions it has been ruled that the cashier may bind the bank as to *bonâ fide* third persons by certifying that a check is good, even though the certificate is untrue, and is in violation of his private instructions from the bank.[3] It has been further held that he has the charge of the books and movable property of the bank;[4] that having control of the securities of the bank he may discharge a mortgage

[1] Hence it was held that where the directors of the Schuylkill Bank had ratified the acceptance by their cashier of the post of transfer agent for the Bank of Kentucky, the Schuylkill Bank was liable for the frauds of the cashier in performance of the agency. Bank of Ky. *v.* Schuylkill Bank, 1 Pars. Eq. Cas. 240, aff. in Sup. Ct. Penn. Jan. 1849.

[2] Merchants' Bk. *v.* State Bk. 10 Wall. 604, citing Commercial Bk. *v.* Norton, 1 Hill, 501; Bank of Vergennes *v.* Warren, 7 Hill, 91; Beers *v.* Glass Co. 14 Barb. 358; Farmers' & Mechanics' Bk. *v.* Butchers' Bk. 14 N. Y. 624; North River Bk. *v.* Aymer, 3 Hill, 262; Barnes *v.* Ontario Bk. 19 N. Y. 156.

[3] Merchants' Bk. *v.* State Bk. 10 Wall. 604; Farmers' & Mech. Bk. *v.* Butchers' Bk. 16 N. Y. 727; *S. C.* 4 Duer, 219; 14 N. Y. 624; Clarke Bank *v.* Bank, 52 Barb. 592. See Wild *v.* Bank, 3 Mason, 505; Burnham *v.* Webster, 19 Me. 332; Badger *v.* Bank, 26 Me. 428; Barnett *v.* Smith, 10 Foster, 256; Elliott *v.* Abbott, 12 N. H. 549; Bank of Vergennes *v.* Warren, 7 Hill, 91; Lloyd *v.* Bank, 15 Penn. St. 172; Girard Bk. *v.* Bank of Penn. 39 Penn. St. 92; Bickford *v.* Bank, 42 Ill. 238; Brown *v.* Léckie, 43 Ill. 497. The cashier may give a binding certificate of deposit, even when there was no deposit. Barnes *v.* Bank, 19 N. Y. 152; Cook *v.* Bank, 52 N. Y. 96. In Mussey *v.* Bank, 9 Metc. 306, the supreme court of Massachusetts held that the *teller* has no such power, and that a usage to this effect would be bad, and could not be upheld; the reasoning of the court applying equally to *cashiers*. See a thoughtful article on this point in 3 Am. Law Rev. 612.

[4] Baldwin *v.* Bank, 1 Wall. 234; Franklin Bk. *v.* Stewart, 37 Me. 519.

securing a note due the bank;[1] and *a fortiori*, may transfer by indorsement the paper securities of the bank in payment of its debts.[2] Even his written guaranty, without indorsement, binds the bank.[3] To him may the directors, by a mere vote, confide the issuing of notes and bills of exchange which bind the corporation.[4] Whatever appertains to his office it is within his range to perform; and all such acts are binding on the bank unless he is under special restrictions, which restrictions the party setting up his authority knows.[5] Plainly where for years he is permitted by the directors to conduct all the business affairs of the bank, this power continues as to innocent third persons until it is publicly withdrawn.[6]

The payment by a cashier to a *bonâ fide* holder of forged paper cannot be recalled by the bank, on the ground that the cashier has no implied authority from the bank to decide as to the genuineness of handwriting.[7]

As the executive financial officer of the bank, the cashier is

[1] Ryan *v.* Dunlap, 17 Ill. 40. See Emo *v.* Crooke, 10 N. Y. 60.

[2] Wild *v.* Bank, 3 Mason, 505; State Bank *v.* Fox, 3 Blatch. 431; Lafayette Bk. *v.* State Bank, 4 McLean, 208; Everett *v.* United States, 6 Porter, 166; Cooper *v.* Curtis, 30 Me. 488; Kimball *v.* Cleveland, 4 Mich. 606; Crocket *v.* Young, 9 Missis. 1 Sm. & M. 24; Potter *v.* Bank, 28 N. Y. 641; City Bank *v.* Perkins, 29 N. Y. 554; Bank of the State *v.* Wheeler, 21 Ind. 90; Hartford Bk. *v.* Barry, 17 Mass. 94. Otherwise as to a transfer of securities in mass. Gillet *v.* Phillips, 13 N. Y. 114.

[3] Sturgess *v.* Bank. 11 Oh. St. 153. It is sufficient if the indorsement be made in the cashier's name, with the designation of his office, without adding "for the bank of," &c. See supra, § 280 *et seq.*; Robb *v.* Bank, 41 Barbour, 586; State Bank *v.* Fox, 3 Blatch. 431. See Jackson *v.* Claw, 18 Johns. R. 346; Barbour *v.* Litchfield, 4 Abb. (N. Y.) App. Dec. 655. If it is doubtful whether on the face of the paper the signature was private or official, parol evidence is admissible to show that it was official. Mechanics' Bk. *v.* Bk. of Columbia, 5 Wheat. 326; Merchants' Bank *v.* Central Bk. 1 Ga. 418; Bank *v.* Baldwin, 1 Cliff. 519. Supra, § 296.

[4] R. *v.* Bigg, 3 P. Wms. 419; Murray *v.* East India Co. 5 Barn. & Ald. 204.

[5] Fleckner *v.* Bank U. S. 8 Wheat. 338; Wild *v.* Bank, 3 Mason, 505; State Bk. *v.* Fox, 3 Blatch. 431; Carey *v.* Giles, 10 Ga. 9; Cochecho Bank *v.* Haskell, 51 N. H. 116; State *v.* Commercial Bank, 14 Miss. 6 Sm. & M. 218; Payne *v.* Commercial Bank, 14 Missis. 6 Sm. & M. 24; Northern Bank *v.* Johnson, 5 Coldw. Tenn. 88.

[6] City Bank *v.* Perkins, 4 Bosw. N. Y. 420.

[7] See Bank of U. S. *v.* Bk. of Ga. 10 Wheat. 333; Salem Bk. *v.* Gloucester Bk. 17 Mass. 1; Merchants' Bk. *v.* Marine Bk. 3 Gill, 96; Levy *v.* Bank U. S. 1 Binn. 27.

authorized to take such measures (by suit or otherwise) as he may deem best for the collection of its debts.[1]

Notice to the cashier, within the range of his duties, is notice to the bank.[2]

If the directors of a bank permit the cashier to act without due qualification they cannot set up this want of qualification against third parties.[3]

§ 686. In conformity with the rule already announced,[4] it is no defence to the bank that the cashier's act was in violation of the charter of the bank, if the act was ordered by the directors. In such matters the bank, as between itself and third parties dealing with it *bonâ fide*, is bound by its agents, and must make their acts good.[5] Even when the cashier's act is forbidden by the directors, it binds the bank, if the act be *infra vires* and the party relying on it is ignorant that it is forbidden.[6] "Where a party deals with a corporation in good faith, — the transaction is not *ultra vires*, — and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists."[7] The same principle is applied to

[1] Hartford Bank *v.* Barry, 17 Mass. 94; Bridenbecker *v.* Lowell, 32 Barbour, 9; Bank of Pennsylvania *v.* Reed, 1 Watts & S. 101; Payne *v.* Commer. Bk. 14 Missis. 6 S. & M. 24; though see Branch Bank. *v.* Poe, 1 Ala. 396. See supra, § 683.

[2] New Hope Bridge Co. *v.* Phœnix Bk. 3 N. Y. 156; Trenton Bk. *v.* Woodruff, 2 N. J. Eq. 1 Green, 117; Branch Bank *v.* Steele, 10 Ala. 915; Weld *v.* Gorham, 10 Mass. 366. Supra, § 177.

[3] Bank U. S. *v.* Dandridge, 12 Wheat. 64; Minor *v.* Bank, 1 Pet. 46. Supra, § 481.

[4] Supra, § 130, 481.

[5] Badger *v.* Bank of Cleveland, 26 Me. 428; Reynolds *v.* Kenyon, 43 Barb. 585; Caldwell *v.* Bank, 64 Barb. 333; Hagerstown Bank *v.* London, &c. Soc. 3 Grant, Penn. Cas. 135; Bank of Kentucky *v.* Schuylkill Bk. 1 Pars. Sel. Cas. Phil. 180; Northern Bank *v.* Johnson, 5 Coldw. Tenn. 88. See supra, § 130, 481.

[6] See supra, § 130, 481; Merchants' Bank *v.* State Bank, 10 Wall. 604; Commercial Bank *v.* Norton, 1 Hill, 501; Bank of Vergennes *v.* Warren, 7 Hill, 91; Beers *v.* Glass Co. 14 Barb. 358; Farmers' & Mechanics' Bk. *v.* Butchers' Bk. 14 N. Y. 624; Barnes *v.* Ontario Bank, 19 N. Y. 156.

[7] Swayne, J., in Merchants' Bank *v.* State Bank, 10 Wall. 604, in 1870; citing Supervisors *v.* Schenck, 5 Wall. 772; Knox Co. *v.* Aspinwall, 21 How. 539; Bissell *v.* Jeffersonville, 24 How. 288; Moran *v.* Miami Co. 2 Black, 722; Gelpcke *v.* Dubuque, 1 Wall. 175; Mercer Co. *v.* Hackett, 1 Wall. 83; Mayor *v.* Lord, 9 Wall. 409, and other cases. See, also, Baird *v.* Bank,

the directors of a joint stock corporation by the unanimous judgment of the house of lords in 1875;[1] and the reasoning pursued is equally applicable to acts of cashiers.[2]

§ 687. *But otherwise as to matters out of the cashier's sphere.* — A cashier cannot, by his own action, impose on the bank any liability not already imposed by law or usage; and as to such liability he cannot bind the bank by his action.[3] Thus he cannot make a contract for future action without special power;[4] nor pay over drafts;[5] nor create any agency for the bank;[6] nor sell or mortgage the property of the bank;[7] nor transfer a judgment of the bank;[8] nor transfer non-negotiable assets;[9] nor indemnify an officer levying an execution on behalf of the bank;[10] nor as against parties with notice, accept accommodation paper;[11] nor bind the bank by declarations out of the range of his duties.[12] Hence the declaration of a cashier that certain notes are genuine, does not estop the bank from disputing the notes.[13]

V. LIEN OF BANKERS.

§ 688. *Banker has lien on deposits of customer.* — A banker has a lien on all securities deposited with him by his customers;

11 S. & R. 411; Miller *v.* Ins. Co. 27 Iowa, 203.

[1] Mahoney *v.* Mining Co. 33 L. T. N. S. 383, cited supra, § 481.

[2] See argument to this effect by King, J., in Bank of Ky *v.* Schuylkill Bk. *ut supra*, § 684, as affirmed by the supreme court of Pennsylvania.

[3] Supra, § 129; Bank of East Tennessee *v.* Hooke, 1 Coldw. Tenn. 156; Foster *v.* Essex Bank, 17 Mass. 479; Austin *v.* Daniels, 4 Denio, 299; Frankfort Bk. *v.* Johnson, 24 Me. 490; British Tel. Co. *v.* Albion Bank, 26 L. T. N. S. 257.

[4] U. S. *v.* City Bank, 21 How. U. S. 356. *E. g.* a sub-cashier cannot accept a post-dated check. Pope *v.* Bank, 57 N. Y. 126.

[5] Bank of St. Mary's *v.* Calder, 3 Strobh. 403.

[6] U. S. *v.* City Bank, 21 How. U. S. 356. See Bk. of Ky. *v.* Schuylkill Bk. 1 Parsons Eq. Cases, 240.

[7] U. S. *v.* City Bank, 21 How. U. S. 356; Leggett *v.* N. J. Man. & Bank. Co. 1 N. J. Eq. 441; Holt *v.* Bacon, 25 Missis. 567; though see Bank *v.* Warren, 7 Hill N. Y. 91.

[8] Holt *v.* Bacon, 25 Missis. 567.

[9] Barrick *v.* Austin, 21 Barbour, 241; Hoyt *v.* Thompson, 1 Seld. 320.

[10] Watson *v.* Bennett, 12 Barbour, 196.

[11] Farmers' Bk. *v.* Troy Bk. 1 Dougl. Mich. 457; Bk. of Genesee *v.* Patchin, 13 N. Y. 309; 19 N. Y. 312.

[12] Bank U. S. *v.* Dunn, 6 Peters, 51; Bank of Metropolis *v.* Jones, 8 Pet. 12; Stewart *v.* Huntington Bank, 11 S. & R. 267; Harrisburg Bank *v.* Tyler, 3 Watts & S. 373; Spalding *v.* Bank, 9 Penn. St. 28; Cocheco Bank *v.* Haskell, 51 N. H. 116. See supra, § 165.

[13] Salem Bank *v.* Gloucester Bank, 17 Mass. 1. See Franklin Bank *v.* Stewart, 37 Me. 519.

and such lien covers the general balance due from the customer to the banker on their banking transactions.[1] "I think there is no question," says Lord Lyndhurst, following Lord Campbell to the same effect in the house of lords,[2] "that by the law merchant a banker has a lien upon securities deposited with him for his general balance." But if the banker accepts a particular security as a pledge for a specific loan, he is limited by this agreement to such loan, and cannot claim for a general balance on such security outside of such loan.[3] So far as concerns securities deposited as general collaterals, the banker is to be considered as holder so far as necessary to meet any cash balance due him; and may for this purpose put them in suit.[4] A banker's lien, it must be remembered, may be extended by agreement or custom, though not so as to affect the rights of third parties.[5]

§ 689. A banker may by special agreement have a lien on the shares of a shareholder to the amount of money due the bank.[6]

[1] Paley's Agency, 131; Davis *v.* Boucher, 5 T. R. 448; Giles *v.* Perkins, 9 East, 14; Bolland *v.* Bygrave, Ry. & M. 271; European Bank, in re, L. R. 8 Ch. 41; Berry *v.* Gibson, L. R. 8 Ch. 747; Manchester Bank Co. 18 L. R. Eq. 249. See Burton *v.* Gray, 43 L. J. Chanc. 229; Maxfield *v.* Burton, 43 L. R. Eq. 15; Cavander *v.* Bulteel, 9 L. R. Ch. 79. Such lien does not extend to mere casual deposits of securities, which were not intended to be left for business purposes with the banker; Lucas *v.* Dorrien, 7 Taunt. 277; nor to papers of third parties. Brandao *v.* Barnett, infra; Sweeny *v.* Easter, 1 Wallace, 166. See Burton *v.* Gray, L. R. 8 Ch. 932.

[2] Brandao *v.* Barnett, 3 Man., Gr. & Scott, 535.

[3] Mountford *v.* Scott, Turn. & Russ. 274; Vanderzee *v.* Willis, 3 Bro. C. C. 21; Downer *v.* Zanesville Bk. Wright, 477; Randel *v.* Brown, 2 Howard, 406. See infra, § 820–5.

[4] Bosanquet *v.* Dudman, 1 Stark. N. P. 1; Bolland *v.* Bygrave, 1 Ry. & M. 271.

[5] Brandao *v.* Barnett, 2 Scott N. R. 113; *S. C.* 1 M. & G. 908; reversed in Excheq. Chamb. Barnett *v.* Brandao, 6 M. & G. 630, but aff. in H. of L. 3 Man., G. & S. 519. Sweeny *v.* Easter, 1 Wallace, 166. The lien above noticed belongs to bankers in the strict sense of the term. "If there be a usage giving to persons engaged in discounting, buying, advancing on, or selling bills or notes, a lien for a general balance against their customer, such a usage should be proved. . . . . Courts have judicially taken notice of the lien of '*bankers*' who are strictly such, and who are dealers in money. But even the lien of a *banker* does not exist if there be circumstances in any case inconsistent therewith." Van Vorst, J., in Grant *v.* Taylor, 35 N. Y. Sup. Ct. 351, citing Brandao *v.* Barnett, 3 Man., G. & S. 519.

[6] General Exch. Bank, in re, 6 L. R. Ch. 818.

CHAPTER XV.

BROKERS.

I. Meaning and Limits of Brokerage.
- A broker is a specialist employed as a business middleman, § 695.
- Brokerage moulded by usage, § 696.
- Brokerage coextensive with business, § 697.
- Brokerage not allowable for immoral or illegal purposes, § 698.
- Distinction between direct and indirect participation in illegal dealing, § 699.

II. Different Kinds of Brokers.
- Brokerage divided according to specialty, § 700.
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- Stock-brokers, § 702.
- Custom-house brokers, § 703.
- Ship and insurance brokers, § 704.
- Insurance brokers to do what is necessary to make their work effective, § 705.
- No difference in *del credere* engagements, § 706.
- Have a lien for their general balance, § 707.
- Misstatement of broker binds his principal, § 708.

III. Powers and Duties of Brokers.
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- Broker has implied authority to take steps necessary to effect or protect the end for which he is appointed, § 710.
- Principal may clothe broker with powers of factor, § 711.
- Broker appointed for special transaction can only bind his principal as to such transaction, § 712.
- May see to delivery of goods, but does not ordinarily receive payment, § 713.
- Payment to broker does not release principal, § 714.
- While a broker represents both parties in making the memorandum of sale, he represents in other matters exclusively the party originally employing him, and can represent no other without breach of trust, § 715.
- Brokers dealing on their own account cannot avail themselves of the privileges of brokers, § 717.
- Broker's entries bind both parties, and comply with the statute of frauds, § 718.
- Obligatory character of bought and sold notes, § 719.
- Primary evidence of contract is broker's original entry, § 720.
- When bought and sold notes vary, and there is no entry, there is no binding contract, § 721.
- Undisclosed principal may sue vendee, § 722.
- Against an undisclosed principal, when suing on his broker's contract the broker's debt cannot be set off, § 723.

IV. Remuneration and Reimbursement.
- Broker entitled to remuneration and reimbursement, § 724.
- But only from the party originally employing him, § 725.

V. Liability to Principal.
- Required to show the diligence and skill of a good business man, § 726.

VI. Liability to Third Parties.
- General principles of agency applicable to this relation, § 727.
- Liable for torts as are other agents, § 730.

I. MEANING AND LIMITS OF BROKERAGE.

§ 695. *A broker is a specialist employed as a business middleman.* — A broker is a specialist employed as a middleman to

negotiate between the parties a sale or other business contract.[1] A broker differs from a factor in that a broker does not have possession of the goods he is to sell, while a factor has such possession, and hence a factor has interests in the goods (*e. g.* lien) which the broker has not.[2] A broker differs from an attorney in fact in that (1) the attorney in fact represents only his immediate principal, while the broker, so far as concerns the memorandum of sale, represents both parties to a particular bargain; (2) the attorney acts generally as agent for any transaction the principal may desire to effect, while the business of a broker is to negotiate a business contract for a particular end. Brokerage is a necessity of all large business centres. For articles which cannot be stored and priced for inspection, it is essential that there should be a mode by which the buyer and the seller can be brought together. A., for instance, wishes to purchase a certain amount of cotton. B. wishes to sell the same amount of cotton. In a large city, A. does not know B., or B.'s wants, and if there is no way of bringing the two together, neither A. can buy nor B. sell. C., however acts as a medium of intercourse. He is known to carry on the business of cotton brokerage, and he is visited by both those who sell and those who buy. In addition to this, he is acquainted with those who deal largely with the staple; and he can himself, if he has an order for either buying or selling, find out at once whether a purchaser or a seller is to be found. For this purpose the broker must be both an expert and a man of strict integrity. He must be acquainted, as an expert, with the specialty with which he is to deal; with the principal persons dealing with it, so that he can fairly judge of the value of the commodity he is employed to dispose of, and the business responsibility of those with whom he treats. He must be possessed of strict integrity, for he may be a referee between two opposing interests, sometimes in matters involving very large sums. Hence it is that in most countries a broker, to be entitled to act as such, must take out a license, and, in some countries is placed, in some branches of business, under bonds.[3]

[1] Coddington *v.* Goddard, 16 Gray, 442; Hinckley *v.* Arey, 27 Me. 362; Benjamin on Sales, § 273; Story on Agency, § 28, 31.

[2] See Baring *v.* Corrie, 2 B. & Ald. 137; Fairlee *v.* Fenton, L. R. 5 Ex. 169; Hollins *v.* Fowler, L. R. 7 Q. B. 616, aff. in H. of Lords, 33 L. T. (N. S.) 73; Rutenberg *v.* Main, 47 Cal. 213.

[3] In France the brokers who deal in money, exchange, merchandise, insur-

§ 696. *Brokerage moulded by usage.* — It will be at once seen that although the general law of brokerage is applicable to each of the multitudinous forms of agency which we have here to notice, each particular kind of brokerage must take its type from the usage of the business with which it deals. A. wants to sell cotton, for instance, and B. wants to buy cotton, and C. is the broker through whom the one buys and the other purchases. But how? As will presently be seen, the contract is reduced to a few words, representing a transaction which rests upon the usage of the particular business; and that usage would be a part of the contract, should that contract be written out in full.[1] It is not written out in full; being only the notes of a contract incorporating this usage. Hence it is that when the contract to which the broker binds the parties is under investigation, it is admissible, in order to show what the contract was, to prove the usage of the particular business, so far this usage is fair and reasonable.[2] Thus if goods in the city of London be sold by a broker, to be paid for by a bill of exchange, the vendor has a right, *within a reasonable time*, if he be not satisfied with the sufficiency of the purchaser, to annul the contract, provided he intimate his dissent as soon as he has an opportunity of inquiring into the solvency of the purchaser. In a case of this sort[3] Lord Ellenborough was, at first, rather inclined to think that the contract concluded by a broker must be absolute, unless his authority were limited by writing, of which the purchaser had notice. But the special jury found, that "unless the name of the purchaser has been previously communicated to the seller, if the payment is to be by bill, the seller is always understood to reserve to himself the power of disapproving of the sufficiency of the purchaser, and annulling the

ance, and stock, are called *agents de change*, and their number at Paris is limited to *sixty*. The company of *agents de change* is directed by a chamber of syndics (*chambre syndicale*) chosen annually by the company. They are severally obliged to give bonds to the amount of 125,000 francs for the prevention of abuses. They are also obliged to keep books; are restricted to a charge of from $\frac{1}{8}$ to $\frac{1}{4}$ per cent; and are interdicted from carrying on, or having any interest in, any commercial or banking operations. Code de Commerce, s. 74, &c. Bordeaux; M'Culloch's Com. Dict. "Brokers." A salaried agent, who does not act for a fee or rate per cent., is not a broker. Portland *v.* O'Neill, 1 Oregon, 218.

[1] Supra, § 134.

[2] Sutton *v.* Tatham, 10 Ad. & E. 27; Young *v.* Cole, 3 Bing. N. C. 724; Russell *v.* Hankey, 6 T. R. 12.

[3] Hodgson *v.* Davies, 2 Camp. 536.

contract." Lord Ellenborough allowed that this usage was reasonable and valid; but he clearly thought that the rejection must be intimated as soon as the seller has had time to inquire into the solvency of the purchaser. The jury found, in the case in question, that *five* days was not too long a period for making the necessary inquiries.[1] Yet, at the same time, we must remember that while the authority of a broker to bind his principal may by special agreement be carried to any extent that the principal may choose, the customary authority of brokers is in its main branches so settled as to become a part of the common law known as the law-merchant, or the custom of merchants. When such it is taken notice of by the courts, and is not to be proved as a question of fact. In branches of business, however, for which the law-merchant has settled no notorious rules, and in other branches of business where these rules are still indefinite, evidence of known usage is admissible to prove what the contract really was.[2] And a usage which is unjust or immoral will not be recognized by the courts.[3]

§ 697. *Brokerage coextensive with business.* — We shall presently specify some of the prominent forms of brokerage; but these are far from embracing all the lines of agency to which the law of brokerage is applicable. Wherever the interposition of a middleman or go-between is used to effect a contract, there brokerage exists. The keeper of an intelligence office is a broker of domestic service; he receives applications from those desiring to employ and those desiring to be employed, and he settles between the two. An emigrant agent is a broker in the same line; though in some countries the trusts imposed on him are so delicate that he is a government officer, placed under bonds. Of a similar character is the agent who undertakes the settlement of contracts for field labor in the South.

§ 698. *Brokerage for illegal or immoral purposes will not be*

[1] The rule that a broker cannot bind his principal, except in the manner recognized by the custom of the trade, is applied to a sale of oil made in non-compliance with the custom of oil dealers to consider a sale a nullity when the seller's name is submitted to the principal for confirmation, and rejected. Sumner *v.* Stewart, 69 Penn. St. 321. See, also, Fleet *v.* Murton, L. R. 7 Q. B. 124; Mollett *v.* Robinson, L. R. 5 C. P. 646, cited infra, § 719, 730.

[2] Benjamin on Sales, § 273, citing Dickinson *v.* Lilwall, 4 Camp. 279; Baines *v.* Ewing, L. R. 1 Ex. 320.

[3] Farnsworth *v.* Hemmer, 1 Allen, 494; Evans *v.* Waln, 71 Penn. St. 69.

sustained. — It need scarcely be said that the legal character of the brokerage takes its type from the transactions which it proposes to negotiate. To brokerage to effect illegal or immoral ends (*e. g.* for stock-jobbing or smuggling, or to procure divorces or lobby legislation, supposing in the two latter cases the object be to reach the end by clandestine or corrupt means) [1] the law will give no countenance.

Stock-jobbing contracts have, in this light, been frequently subjected to judicial inspection. Neither party, it would seem, can recover on a brokerage tainted with what under the statute is illegal stock-jobbing.[2] But dealing with stocks for speculation, if the stocks are to be delivered, is not such a gambling or stock-jobbing operation as to be unlawful. Thus in a Pennsylvania case, the evidence was that T., not owning stock, employed a broker to sell stock for him at a named price, to be delivered at a particular day. The stock was sold, and at the time of delivery, prices having risen, the broker borrowed stocks to meet the engagement. He afterwards, under instructions from T., bought at a higher rate to replace the stock borrowed. It was ruled by the supreme court that the transaction was not illegal, and that T. was liable to the broker for the difference in the prices.[3]

§ 699. *Distinction between direct and indirect participation in illegal dealing.* — A distinction [4] has been taken between direct and indirect connection with illegal transaction. No doubt neither party can maintain an action against the other based upon an illegal contract. It was once, however, supposed in England,[5] that where money is knowingly advanced collaterally to an illegal transaction, though ultimately based on such transaction, it may be recovered back; and such has been recognized to be the law in the United States.[6] This, however, is now denied to be the law in England.[7]

[1] As to illegal insurance, see Brown *v.* Turner, 7 T. R. 631. As to lobbying, see Trist *v.* Child, 21 Wall. 441. And see fully, § 21, 249, 250, 319.

[2] Steers *v.* Lashley, 6 T. R. 61; Brown *v.* Turner, 7 T. R. 631.

[3] Smith *v.* Bouvier, 70 Penn. St. 325; Brua's appeal, 5 P. F. Smith, 294, recognized and distinguished. See infra, § 724.

[4] See supra, § 229–250.

[5] Petrie *v.* Hannay, 3 T. R. 418; following Faikney *v.* Reynous, 4 Burr. 2069.

[6] Armstrong *v.* Toler, 1 Wheat. 258; Story on Agency, § 347.

[7] Brown *v.* Turner, 7 T. R. 631; Steers *v.* Lashley, 6 T. R. 61; Mather, ex parte, 3 Ves. 373; Mitchell *v.* Cockburne, 2 H. Bl. 379; Amory *v.* Meryweather, 2 B. & C. 575.

II. DIFFERENT KINDS OF BROKERS.

§ 700. *Brokerage is divided according to specialty.* — "Brokers," says Mr. McCulloch,[1] "are divided into different classes; as bill or exchange brokers, stock-brokers, ship and insurance brokers, pawnbrokers, and brokers simply so called, or those who sell or appraise household furniture distrained for rent. Exclusive, too, of the classes now mentioned, the brokers who negotiate sales of produce between different merchants usually confine themselves to some one department or line of business; and by attending to it exclusively, they acquire a more intimate knowledge of its various details, and of the credit of those engaged in it, than could be looked for on the part of a general merchant; and are consequently able, for the most part, to buy on cheaper and to sell on dearer terms than those less familiar with the business. It is to these circumstances — to a sense of the advantages to be derived from using their intervention in the transaction of business — that the extensive employment of brokers in London and all other large commercial cities is wholly to be ascribed."

§ 701. *Bill-brokers* "propose and conclude bargains between merchants and others in matters of bills and change. They make it their business to know the state of the exchange, and the circumstances likely to elevate or depress it. They sell bills for those *drawing* on foreign countries, and buy bills for those *remitting* to them; and from their knowledge of the mutual wants of the one class as compared with those of the other, a few of the principal brokers are able to fix the rate of exchange at a fair average, which it would not be possible to do if the merchants directly transacted with each other. Their charge, as brokerage is 2*s.* per cent. 'Those,' says Mr. Windham Beawes, 'who exercise the function of bill-brokers, ought to be men of honor and capable of their business; and the more so, as both the credit and fortune of those who employ them may, in some measure, be said to be in their hands; and, therefore, they should avoid babbling, and be prudent in their office, which consists in one sole point, that is, *to hear all and say nothing;* so that they ought never to speak of the negotiations transacted by means of their intervention, or relate any ill report which they may have

[1] Commercial Dict. tit. "Brokers."

heard against a drawer, nor offer his bills to those who have spread it.'" [1]

§ 702. *Stock-brokers* "are employed to buy and sell stock in the public funds or in the funds of joint stock companies. Their business is regulated by certain acts of parliament, by which, among other things, it is enacted, that contracts in the nature of wagers, or contracts apparently framed for the sale or purchase of stock, but really intended only to enable the parties to speculate on contingent fluctuations of the market, without any stock being actually sold, shall be void, and those engaging in them subjected to a penalty of £500.[2] And by the same act, any one contracting to sell stock of which he is not actually possessed, or to which he is not entitled, forfeits £500. Brokers not keeping a book in which all contracts are regularly inserted, are liable in a penalty of £50 for each omission; half to the king and half to those who sue for it. The charge for brokerage on all public funds, except exchequer bills and India bonds, is 2*s.* 6*d.* per cent.; on these it is 1*s.* per cent. No transaction with respect to the purchase and sale of stock in the public funds can be concluded except by the intervention of a licensed broker, unless by the parties themselves." [3]

§ 703. *Custom-house brokers.* — "It is enacted by the Customs Consolidation Act of 1853, s. 15–17, that no person shall be authorized to act as an agent for transacting business at the custom-house in the port of London, relative to the entrance or clear-

[1] McCulloch's Commercial Dict. *in loco.*

[2] 7 Geo. II. c. 8, made perpetual by 10 Geo. II. c. 8.

[3] M'Culloch's Com. Dict. *in loco.* A stock-broker who has purchased stock for a customer is bound to keep at all times on hand or under his control ready for delivery to his customer, upon his paying the amount due from him thereon, either the particular shares purchased or an equal amount of other shares of the same kind. This obligation is the same whether the relation of pledgor and pledgee exists between the parties, or whether the broker holds the stock under a special contract. Whenever the broker sells, failing to keep stock enough on hand to meet this obligation, the customer can ratify and claim the benefit of the sale, or can claim the value of the stock on the day of sale. A subsequent acquisition by the broker of a sufficient amount of the stock to replace that which he held for account of his principal, does not relieve him from liability. It is further ruled that the engagement of a broker and his principal, under an agreement to buy and carry stock, is not to procure and furnish the stock when required; but to purchase and hold the number of shares ordered, subject to the payment of the purchase price. Taussig *v.* Hart, 58 N. Y. 425.

ance of any ship, &c., unless authorized by license of the commissioners of customs, who are to require bond with one surety for £1,000, for the faithful conduct of such person and his clerks. This regulation does not, however, apply to the clerk or servant of any person or persons transacting business at the custom-house on his or their account."[1]

§ 704. *Ship and insurance brokers.* — "The chief employment of this class of brokers is in the buying and selling of ships, in procuring cargoes on freight, and adjusting the terms of charter parties, settling with the master for his salary and disbursements, &c. Their charge as ship-brokers is about two per cent. on the gross receipts. When they act as insurance brokers, they charge five per cent. on the premium, exclusive of a discount allowed them on settling with the underwriter. The merchant looks to the broker for the regularity of the contract and a proper selection of underwriters. To him also the underwriters look for a fair and candid disclosure of all material circumstances affecting the risk, and for payment of their premiums. From the importance of their employment, ship and insurance brokers ought to be, and indeed generally are, persons of respectability and honor, in whom full confidence may be reposed. A ship-broker is not within the various acts for the regulation and admission of brokers."[2]

§ 705. *Insurance brokers to do what is necessary in order to make their work effective.* — Insurance brokers, in particular, as has already been incidentally observed,[3] are to take all the steps upon which a successful execution of their powers depends. Thus they have authortiy to adjust losses, and to receive payment on them;[4] they may abandon in case of loss;[5] they may arbitrate a disputed loss;[6] they are required to see that the insurance covers the proposed voyage and risks, and that the insurers are at the time of the insurance responsible;[7] and in order to enable

[1] M'Culloch's Com. Dict. *in loco.*

[2] M'Culloch's Com. Dict. *in loco.*

[3] Supra, § 202; infra, § 710.

[4] Supra, § 202; Paley's Agency, 281–5; Richardson *v.* Anderson, 1 Camp. 43; Bousfield *v.* Creswell, 2 Camp. 545; Todd *v.* Reid, 4 B. & Ald. 210; Scott *v.* Irving, 1 B. & Adol. 605. Infra, § 710.

[5] Supra, § 202; Chesapeake Ins. Co. *v.* Stark, 6 Cranch, 268.

[6] Goodson *v.* Brooke, 4 Camp. 163.

[7] Supra, § 205. Moore *v.* Morgue, Cowp. 479; Park *v.* Hammond, 6 Taunt. 495; 4 Camp. 344; Mallough *v.* Barber, 4 Camp. 150; Mayhew *v.* Forrester, 5 Taunt. 615. Infra, § 710. As to negligence, see supra, § 251, 393.

them to exercise effectively the large discretion with which they are clothed, they may make the contract of insurance in their own name, and in their own name sue it out.[1] But an insurance broker employed by the insurer has no implied authority to pay losses to the insured on behalf of the insurer.[2]

§ 706. *No difference worked by a del credere engagement.* — It was at one time supposed that an insurance broker who acted under a *del credere* commission is liable to his principal (the insured) for all losses covered by the policy; and that consequently in such case he is entitled to recover from the insurer the amount which he has thus paid his principal for such losses.[3] But a closer examination of *del credere* agency has shown this to be an error. A *del credere* insurance broker is not the principal debtor on the insurance contract, but simply guarantees that if the insurer does not pay, he, the broker, will pay.[4] Hence an insurance broker on a *del credere* contract, if he pay the loss to his principal, cannot recover the amount from the insurer.[5] *A fortiori* the broker who does not act on a *del credere* contract cannot recover from the insurer such payments.[6]

707. *Insurance brokers have a lien for their general balance.* — This arises from the usage of this kind of brokerage, which intrusts to brokers the possession of the policies they have effected, in order to enable them to adjust losses on such policies.[7] A broker, therefore, is entitled to retain the policy effected by him for his principal, if the principal be indebted to him on the balance of their insurance accounts.[8] Even though the lien may be lost by parting with the possession, yet it revives when the policy comes again into the possession of the broker, if it comes as the property of the same principal, and there be

[1] Baring *v.* Corrie, 2 B. & Ald. 137; Paley on Ageney, 362. Supra, § 405.

[2] Bell *v.* Auldjo, 4 Doug. 48.

[3] Grove *v.* Dubois, 1 T. R. 113.

[4] Morris *v.* Cleasby, 4 M. & S. 566; Wolff *v.* Koppel, 2 Denio, 368; Hurlburt *v.* Ins. Co. 2 Sumner, 480.

[5] Morris *v.* Cleasby, *ut supra.*

[6] Wilson *v.* Creighton, 1 T. R. 113; *S. C.* 3 Dougl. 132; Bell *v.* Auldjo, 4 Dougl. 48.

[7] Russell on Factors, 194. See infra, § 813.

[8] Whitehead *v.* Vaughan, Cook's Bankrupt Law, 579; Parker *v.* Carter, Cook's Bankrupt Law, 579; Castling *v.* Aubert, 2 East, 325, 526; Mann *v.* Shiffner, 2 East, 523; Godin *v.* London Assur. Co. 1 Bl. Rep. 102; Spring *v.* Ins. Co. 8 Wheat. 268; Cranston *v.* Ins. Co. 5 Binn. 538; Moody *v.* Webster, 3 Pick. 454.

no intervening equities.[1] A sub-agent employed by an insurance broker to effect policies has not, as against the principal, a lien on the policies for the general balance due him from the broker, but only a particular lien for premiums and commissions.[2] An insurance broker who has effected a policy without notice that it is not on account of the person from whom he has received the order, has a lien upon the policy for the general balance due from such person; and has a right to apply to the satisfaction of such balance money received upon the policy, as well after as before the notice that it belongs to a third person.[3] It is otherwise, however, when the broker knows that his employer is simply agent for another party. In such case the lien is limited to charges against such other party.[4] Nor does the lien extend to debts due the agent from the principal outside of their relations in respect to insurance brokerage.[5]

§ 708. *Misstatements by broker bind principal.* — The misstatement, or suppression by the broker of any fact which is likely to influence the judgment of the insurer prejudices the principal as much as if these misstatements had been made by himself. Nor does it matter that the wrong was exclusively the broker's; the principal having put the broker in possession of all due information, and the broker having withheld such information on his own motion.[6] But the misrepresentation or suppression must be so connected with the underwriting of the policy as to influence such underwriting.[7]

[1] Ibid.; Paley's Agency, 145, 146; Story's Agency, § 370. See, however, Burn *v.* Brown, 2 Starkie N. P. 272; Hartley *v.* Hitchcock, 1 Stark. 408; Jones *v.* Pearl, 1 Stark. 556. Infra, § 825.

[2] Snook *v.* Davidson, 2 Camp. 218; Lanyan *v.* Blanchard, 2 Camp. 218; Maanss *v.* Henderson, 1 East, 335.

[3] Mann *v.* Forrester, 4 Camp. 60; Mann *v.* Shiffner, 2 East, 523; Westwood *v.* Bell, 4 Camp. 349; Rabone *v.* Williams, 7 T. R. 361; Maynard *v.* Rhode, 1 C. & P. 360; Foster *v.* Hoyt, 2 Johns. Cas. 327.

[4] Ibid.; Snook *v.* Davidson, 16 Peters, 1; Bank of Met. *v.* N. E. Bk. 17 Peters, 174; 1 How. 234.

[5] Paley's Agency, 134, 136, 147; Walker *v.* Birch, 6 T. R. 258; Houghton *v.* Matthews, 3 B. & P. 485; Olive *v.* Smith, 5 Taunt. 56; Jarvis *v.* Rogers, 15 Mass. 396.

[6] Seaman *v.* Fonnereau, Str. 1183; Roberts *v.* Fonnereau, Beawes, 266; Fitzherbert *v.* Mather, 1 T. R. 12.

[7] Dawson *v.* Atty, 7 East, 367; Edwards *v.* Footner, 1 Camp. 530. See more fully supra, § 158–160, 167.

III. POWERS AND DUTIES OF.

§ 709. *Broker cannot act by substitute.* — A broker, like an attorney, is selected as a specialist, on account of his presumed skill and discretion, and of the confidence consequently bestowed on him by the principal. He therefore cannot depute his duties, so far as they are discretionary, to another, except in cases of necessity, or in cases in which such deputation is sustained by usage of which it may be implied that the principal is cognizant. But he may, when this is usual, employ a clerk for the discharge of the mechanical part of his duties.[1]

§ 710. *Broker has implied authority to take steps necessary to effect or protect the end for which he is appointed.* — From what has been said it will be seen that a broker being a specialist, employed to negotiate and consummate a business transaction with which he is familiar, is vested with the power necessary to enable him to perform the work satisfactorily. Whatever be the usage in the particular business with which he professes to be experienced, he may adopt, provided such usage be not unjust or immoral. If employed to sell goods, he may sell them with warranty or by sample, if such be the usage;[2] if an insurance broker, he may insure in his own name (though this is not permissible in other cases of brokerage),[3] and may, if employed to attend to an insurance, adjust losses under such insurance, or arbitrate such losses,[4] and may, as is elsewhere seen, receive payment on loss.[5]

§ 711. *Principal may clothe broker with powers of factor.* —

[1] Supra, § 28–33. See Henderson *v.* Barnwall, 1 Y. & J. 387 (where it was held that a broker's clerk employed by the parties to enter their agreement could not delegate his authority to his principal); Cochran *v.* Islam, 2 M. & S. 301; Locke's appeal, 72 Penn. St. 491. An action for the proceeds of property sold by one agent by orders of another can be maintained by the owner against seller. Evans *v.* Waln, 71 Penn. St. 69.

[2] Supra, § 160; Story on Agency, § 109, citing The Monte Allegre, 9 Wheat. 643–4; Andrews *v.* Kneeland, 6 Cowen, 354. See, however, *contra*, Dodd *v.* Farlow, 11 Allen, 426. The right of a broker to make a sale of goods for another, does not include the right of the broker to rescind the sale without the knowledge or consent of the principal, in the absence of any such commercial usage. Saladin *v.* Mitchell, 45 Ill. 79.

[3] Story, § 109, citing Domat, b. 1, tit. 17, § 1. See supra, § 134, 696.

[4] Ibid.; Richardson *v.* Anderson, 1 Camp. 43, note; Goodson *v.* Brooks, 3 Camp. 163. Supra, § 705.

[5] Russell *v.* Bangley, 4 B. & Ald. 395; Todd *v.* Reid, 4 B. & Ald. 210; Scott *v.* Irving, 1 B. & Adolp. 605. Supra, § 705, and see § 202.

This may either be impliedly, by accepting a local custom, or expressly, by giving such powers to the agent specifically. The first of these conditions we have already noticed. With regard to the second, it may be remarked that a principal, if he invest the broker with the office of a factor, and the indicia of title, necessarily authorizes the broker, so far as concerns innocent third parties, to charge the property as could a factor.[1] At the same time we must remember that the functions of a broker differ in essence from those of a factor. A factor, as we will have occasion to observe,[2] is a person to whom goods are consigned for sale by a merchant residing abroad, or at a distance from the place of sale; and he usually sells in his own name, without disclosing that of his principal; the latter, therefore, with full knowledge of these circumstances, trusts the factor with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is not intrusted with the possession of the goods, and he cannot either pledge or sell in his own name.[3] The principal, therefore, who employs a broker, has a right to expect that he will not sell in his own name.[4] And there must be a clear case of enlargement by the principal of the broker's powers, to make the principal chargeable beyond the limit which a broker's ordinary functions prescribe.[5]

§ 712. *Broker appointed for special transaction can only bind his principal as to such transaction.* — A broker, unless employed

[1] See Moore *v.* Clementson, 2 Camp. 22; Martini *v.* Coles, 1 M. & S. 140; Whitehead *v.* Tuckett, 15 East, 400; Brown *v.* Boorman, 11 Cl. & F. 1; Neil *v.* Nat. Bk. 46 N. Y. 325; Jeffrey *v.* Bigelow, 13 Wend. 518; Andrews *v.* Kneeland, 6 Cowen, 354; Morton *v.* Scull, 23 Ark. 289; Morey *v.* Webb, 65 Barb. (N. S.) 22; Rutenberg *v.* Main, 47 Cal. 213. A broker who has bought stock for another with money advanced by himself, and holds it in his own name, may, so long as he has not been paid or tendered the amount of his advances, pledge it as security for his own debt to a third person, without making himself liable to an action by his employer. Wood *v.* Hayes, 15 Gray, 375. If there is notice that the holder is only a broker, he can pass no lien to a third party. Fisher *v.* Brown, 104 Mass. 259.

[2] Infra, § 736.

[3] Fisher *v.* Brown, 104 Mass. 259.

[4] Abbott, C. J., in Baring *v.* Corrie, 2 Barn. & A. 137.

[5] If the language of the principal, used in making the employment, clearly shows that he intended to give the agent a power more extensive than that of a mere broker, and to authorize him to make a written memorandum of sale, the court will so find, and will enforce the written contract made by him. Rutenberg *v.* Main, 47 Cal. 213.

notoriously as his principal's general representative, cannot bind his principal by the purchase of goods of a different description or on different terms from those prescribed by the principal.[1] This results from the distinction between general and special agencies which is elsewhere expressed. If P. constitutes and recognizes B. as his general broker, then P. is bound by B.'s brokerage contracts in P.'s name. But if P. simply authorizes B. to act for him in a particular transaction in a particular way, then P. will not be bound if B. transcends his authority. Whoever deals with B. must see that B. acts in conformity with his powers.[2] The same reasoning applies to the sale of stock on credit. It is not usual, as has been seen, to sell stock on credit; and whoever purchases stock on credit from a broker is bound to inquire whether the broker has authority to sell in this unusual way.[3] So an authority to a broker to buy and load upon a vessel a cargo of produce, does not by implication and in the absence of any sufficient custom give to the broker the power to borrow, upon the credit of the principal, the money with which to make the purchase.[4]

§ 713. *Broker may see to the delivering of the goods, but does not ordinarily receive payment.* — In addition to the functions of the broker, as they are stated above, he is in the habit, according to the present English practice, of passing a delivery order to the vendor to sign, and on the order being signed, of handing it to the vendee. This transfers the possession of the goods to the vendee.[5] But, unless so warranted by the custom of a particular

[1] East India Co. *v.* Hensley, 1 Esp. Cas. 111. He cannot, for instance, recover from his principal money paid for purchases which transcend the principal's instructions. Pickering *v.* Demerritt, 100 Mass. 416; Day *v.* Holmes, 103 Mass. 306. Supra, § 247–55.

[2] See supra, § 128.

[3] Wiltshire *v.* Sims, 1 Camp. 258; State *v.* Delafield, 8 Paige, 527.

[4] Bank of the State *v.* Bugbee, 1 Abb. (N. Y.) App. Dec. 86. A broker to whom a certificate of shares in a corporation has been intrusted by their owner, with written directions to sell under circumstances specified, has no right to transfer the shares, for any other purpose, to the name of another person or to his own name; and evidence is inadmissible of a custom among brokers so to do; and the owner may treat such transfer as a sale, and recover of the broker the market price of the shares on the day of the transfer, although the broker afterwards tenders him another certificate of an equal number of such shares, which he refuses to receive, and does not retransfer to the broker. Parsons *v.* Martin, 11 Gray, 111.

[5] See remarks of Brett, J., in Fowler *v.* Hollins, 7 Q. B. 616, infra, § 731. And see Brown *v.* Boorman, 11 Cl. & F. 44.

business, a broker cannot receive payment of goods sold by him for his principal.[1] Certain exceptions to this rule are to be traced to the usage of particular lines of business. Thus stock-brokers are accustomed to recover and remit cash for stocks sold by them ;[2] and insurance brokers may receive payment in money on losses adjusted by them ;[3] but they cannot receive payment otherwise than in cash.[4]

§ 714. *Payment to broker does not release principal's liability.* — The broker not having authority to receive payment, it follows, ordinarily, that payment to a broker does not release the party paying from liability.[5] This is eminently the case where the vendee pays his own broker, unless the vendor, by giving credit to the broker, should lead the vendee to conclude that the broker is treated as the sole debtor. In a trial before Lord Ellenborough, in which this point arose, the evidence was that the plaintiffs sold the goods to K. & Co. to be taken away and paid for in a month. K. & Co. were really brokers for the defendants ; but this was not known by the plaintiffs till after the sale. The defendants paid K. & Co. for the goods before the maturity of the debt, and K. & Co. afterwards became insolvent. It was argued that the plaintiff could not recover, since the defendant, though really principal, had paid the debt to the broker before notice. But Lord Ellenborough said : "A person selling goods is not confined to the credit of a broker who buys them, but may resort to the principal on whose account they are bought ; and he is not affected by the state of accounts between the two. If he let the day of payment go by, he may lead the principal into the supposition that he relies solely on the broker ; and if in that case, the price of the goods have been paid to the broker on account of this deception, the principal shall be discharged. But here pay-

[1] Baring *v.* Corrie, 2 B. & Ald. 137; Campbell *v.* Hassell, 1 Stark. 233; Higgins *v.* Moore, 34 N. Y. 417, reversing *S. C.* 6 Bosw. 344; Doubleday *v.* Kress, 50 N. Y. 410; Peck *v.* Harriott, 6 S. & R. 149; Seiple *v.* Irwin, 30 Penn. St. 513; Morris *v.* Ruddy, 5 C. E. Green (20 N. J. Eq.), 236.

[2] See Higgins *v.* Moore, 6 Bosw. 344; Evans *v.* Waln, 71 Penn. St. 69. It is said, that where one, employed as a broker to sell goods, takes a note for their price, his principal, after discharging his claim for commissions, may maintain trover for the note if he refuse to deliver it. Bliss *v.* Bliss, 7 Bosw. 339.

[3] See Paley on Agency, 281–5, 291; Russell *v.* Bangley, 4 B. & Ald. 395; Bousfield *v.* Cresswell, 2 Camp. 545.

[4] Supra, § 210. Paley on Agency, 281. See Kingston *v.* Kincaid, 1 Wash. C. C. 454.

[5] Baring *v.* Corrie, 2 B. & A. 137.

ment was demanded on the day it became due, and no reason was given the defendant to believe that the broker alone was trusted."[1] The vendor had a right to ratify the sale on credit, and to claim the debt when the credit expired. The same principle applies to a vendee claiming a balance due him from his own broker. Such balance he cannot set up to defeat a suit against him by the vendor.[2]

§ 715. *While a broker represents both parties in making the memorandum of sale, he represents in other matters exclusively the party originally employing him, and can represent no other without breach of trust.* — It has been already stated that the broker, so far as concerns the memorandum of sale, is the agent of both parties. Questions relative to this memorandum arise principally, as will presently be seen, under the statute of frauds, by which, in order to bind parties to an executory contract beyond a certain amount, it is necessary that the contract should be signed by the parties or their agents. For this purpose, by decisions which we will soon examine more fully, the broker is ruled to be the agent of both parties.[3] But in all other respects he is the agent of the party by whom he is first employed. I employ a broker, for instance, to buy for me a cargo of a particular kind of wheat. I may give him any reward I choose for his services, and I may make this reward large on the supposition that he will apply peculiar skill and sagacity to the selection of the article and to the negotiation for the price. This is all well and fair. He makes his inquiries as my agent; he negotiates as my agent; it is only when he makes the memorandum of sale and delivers the bought and sold orders, as will be hereafter detailed, that he acts as agent of both parties. But when acting as my agent, he cannot, except for the single purpose just mentioned, enter upon any fiduciary relations with the other side.[4] He may receive a reward from his employer for getting for that employer a good customer, but he cannot take a reward (beyond the ordinary and fixed commission for the entry of the terms of the negotiation) from the customer for obtaining for the latter the patronage of the employer.

[1] Kymer *v.* Suwercropp, 1 Campb. 109. See supra, § 405, 466; infra, § 723.

[2] Waring *v.* Favenck, 1 Campb. 85.

[3] Infra, § 718; Hinde *v.* Whitehouse, 7 East, 558; Henderson *v.* Barnwall, 1 Y. & J. 387; Greaves *v.* Legg, 2 Hur. & N. 210; and see Coddington *v.* Goddard, 16 Gray, 442; Hinckley *v.* Arey, 27 Me. 362; Evans *v.* Waln, 71 Penns. St. 69; Bell's Com. 7th ed. 508. See supra, § 56, 244.

[4] See supra, § 56, 244, 519.

Should the broker in this way receive a reward from the customer, the contract could not be enforced by the customer against the broker's employer.[1] In such case also an action would lie against the broker on behalf of the person so employing him to recover what the broker so received from the opposing party.[2]

A case involving this topic has been carefully considered in Pennsylvania. F., desiring to find a purchaser for a tract of land owned by him, employed S. as broker to find such purchaser, the agreement being that S. should receive as compensation whatever he could obtain over $125 per acre. S. found E., a purchaser, desirous of buying the land, and E. agreed, in writing, to pay S. $500 for "services in assisting to negotiate" the purchase. S. brought E. and F. together, and a contract was made between the two for the sale of the land from F. to E. at $150 per acre. This contract was completed by F. and E. acting independently of S. S. (the broker) then sued E. (the vendee) for the $500 agreed to be paid by E. to S. It was held by the court that the agreement, the consideration being the preference alleged to be given to E. in making the bargain, was against public policy, and would not be enforced, and it made no difference that F. (the vendor) suffered no loss by the transaction.[3]

[1] Supra, § 245, 336, 573; Wright *v.* Dannah, 2 Camp. 203. See Everhardt *v.* Searle, 71 Penns. St. 256, hereafter cited; Pugsley *v.* Murray, 4 E. D. Smith (N. Y.), 245; Coddington *v.* Goddard, 16 Gray, 436.

[2] Infra, § 716.

[3] Everhardt *v.* Searle, 71 Penns. St. 256. The following is from the opinion of the court by Thompson, C. J.: "'It matters not,' it is said, p. 210, of Hare & Wallace's Notes, 1 Lead. Cases in Eq., 'that there was no fraud meditated and no injury done; the rule is not intended to be remedial of actual wrong, but preventive of the possibility of it.' This was said of 'any one who acts representatively, or whose office is to advise or operate, not for himself but for others. The principle is general, that a trustee, so far as the trust extends, can never be a purchaser of the property embraced under the trusts without the assent of all persons interested; and this principle applies to executors, administrators, guardians, attorneys at law, general and special agents, ... and to all persons, judicial or private, ministerial or counselling, who in any respect have a concern in the sale of the property of others; it extends to sales by public auction, and to judicial sales as well as to private;' Ibid. 209; and for this innumerable authorities, English and American, are cited. To the same effect is Campbell *v.* The Pennsylvania Life Insurance Co. 2 Whart. 55; Paley on Agency, 32. 'It is a fundamental rule, applicable to both sales and purchases, that an agent employed to sell cannot make himself the purchaser; nor if employed to purchase can be himself the seller. The expediency and justice of this rule are too obvious to require expla-

In case the broker has received a commission from the opposite interest, he cannot, as will presently be seen, receive commissions from his own original employer.[1]

§ 716. *A broker employed by purchaser, who takes a commission from the seller, thereby increasing the price of the goods, is liable to account to his employer for the amount so received.*[2] — Thus in a late English case, the plaintiff authorized defendant, as his broker, to negotiate for the purchase of a particular ship on the basis of an offer of £9,000, but eventually the ship was purchased through defendant for £9,250. Prior to the sale, an arrangement was made between the vendor and a broker, S., that if S. could sell the ship for more than £8,500, he might retain for himself the excess; and it was arranged between S. and the defendant, without the knowledge or sanction of the plaintiff, that the defendant should receive from S. a portion of such excess; and accordingly the defendant received £225, part of the excess over £8,500. On discovering this, the plaintiff brought an action for money had and received for the £225. In addition to the above facts, the jury found that the defendant was the agent of the plaintiff to purchase the ship as cheaply as she could be got, and that plaintiff could have got her cheaper but for the arrangement between the vendor and S. On this state of facts

nation. For with whatever fairness he may deal between himself and his employer, yet he is no longer that which his services require and his principal supposes and retains him to be.' It is clear from all the authorities, not only those referred to, but those cited in the notes to Fox *v.* Mackreth and Pott *v.* The Same, 1 Lead. Cases in Eq. 172, not here specially referred to, as also in numerous cases in our reports from Lazarus & others *v.* Bryson, 3 Binn. 54, that an agent to sell cannot become an agent to buy. It is against the policy of the law that such a principle should hold. Ex parte Bennett, 10 Vesey, 381. 'The ground on which the disqualification rests,' it was said in 8 Tomlin's Brown, 72, 'is no other than that principle which dictates that a person cannot be both judge and party. No man can serve two masters. He that is intrusted with the interests of others cannot be allowed to make the business an object of interest to himself, because, from a frailty of nature, one who has the power will be too readily seized with the inclination to use the opportunity for serving his own interest at the expense of those for whom he is intrusted. The danger of temptation from the facility and advantage for doing wrong which a particular situation affords, does, out of the mere necessity, work a disqualification.'"

[1] Farnsworth *v.* Hemmer, 1 Allen, 494. See supra, § 336, 573.

[2] Pender *v.* Henderson, 2 Macph. 1428, cited Bell's Com. 7th ed. 508. Supra, § 236, 306, 336.

it was held by the queen's bench that the action would lie on the part of the plaintiff against the defendant.[1]

§ 717. *Brokers dealing on their own account cannot avail themselves of the privileges of brokers.* — The brokerage statutes are meant to cover the cases of brokers acting as agents of others. Consequently a broker who, while claiming to represent another, is really acting for himself, is guilty of a fraud which precludes him from taking any advantage of his alleged representative capacity.[2] So a stock-broker employed to purchase stock for a customer cannot buy of himself, and when such a transaction comes to the knowledge of the customer he can repudiate it. It is no answer that the intention of the broker was honest, and that he did better for his principal by selling him his own stock than he could have done by purchasing in open market.[3]

§ 718. *Broker's entries bind both parties and comply with the statute of frauds.* — Until 1870, the brokers of London were under the control of the London corporation, — the powers and jurisdiction of the corporation being defined by statute.[4] In pursuance of this authority, the corporation adopted a series of regulations, requiring a bond and prescribing an oath. In addition to this, by a regulation which is frequently referred to in subsequent litigation, it was required of the broker that he "keep a book or register, entituled The Broker's Book, *and therein truly and fairly enter all such contracts, bargains, and agreements, on the day of the making thereof, together with the Christian name and surname at full length of both the buyer and seller, and the quantity and quality of the articles sold or bought, and the price of the same, and the terms of credit agreed upon, and deliver a contract note to both buyer and seller, or either of them, upon being requested so to do, within twenty-four hours after such request, respectively containing therein a true copy of such entry;* and shall upon demand made by any or either of the parties, buyer or seller, concerned therein, produce and show such entry to them or either of them, to manifest and prove the truth and certainty of such contracts and agreements." No doubt this regulation

[1] Morison *v.* Thompson, L. R. 9 Q. B. 480.

[2] Dyster, ex parte, 1 Meriv. R. 155; 2 Rose B. C. 349.

[3] Taussig *v.* Hart, 58 N. Y. 425. Supra, § 239.

[4] See Chitty's Stat. vol. I. 426, 464.

expressed the mercantile usage of the day as to brokerage; and what it expressed it perpetuated. It is true that by the London Brokers' Relief Act, passed in 1870, the jurisdiction of the London corporation in this respect was terminated, and in its place was adopted the provision that brokers are to be admitted by the corporation, and may be removed on proof of fraud or other offences. But while the regulations, as such, are no longer binding as a code imposed by the city of London, their injunctions, so far as concerns the point immediately before us, are accepted as part of the commercial law of England and of the United States.

§ 719. *Obligatory character of bought and sold notes.* — A broker, therefore, when he closes a negotiation as the common agent of both parties, enters it in his business book, and gives to each party a copy of the entry. If there be no entry, he gives simply notes or memoranda of the transaction to the parties. The note he gives to the seller is called the *sold* note; that which he gives to the buyer is called the *bought* note. To adopt Mr. Benjamin's classification,[1] there are four varieties of these notes used in practice. "The *first* is where on the face of the note the broker professes to act for both the parties whose names are disclosed in the note. The sold note, then, in substance, says, 'Sold for A. B. to C. D.,' and sets out the terms of the bargain; the bought note begins, 'Bought for C. D. of A. B.,' or equivalent language, and sets out the same terms as the sold note, and both are signed by the broker. The *second* form is where the broker does not disclose in the bought note the name of the vendor, nor in the sold note the name of the purchaser, but still shows that he is acting as broker, not principal. The form then is simply, 'Bought for C. D.,' and 'Sold for A. B.' The *third* form is where the broker, on the face of the note, appears to be the principal, though he is really only an agent. Instead of giving to the buyer a note, 'Bought for you by me,' he gives it in this form, 'Sold to you by me.' By so doing he assumes the obligation of a principal, and cannot escape responsibility by parol proof that he was acting only as broker for another, although the party to whom he gives such a note is at liberty to show that there was an unnamed principal, and to

[1] Benjamin on Sales, § 276.

make this principal responsible.[1] The fourth form is where the broker professes to sign as a broker, but is really a principal, as in the cases of Sharman *v.* Brandt,[2] and Mollett *v.* Robinson,[3] in which cases his signature does not bind the other party, and he cannot sue upon the contract, except upon proof of such usage as was shown in Mollett *v.* Robinson."

§ 720. *The primary evidence of the contract is the broker's original entry.* — Supposing the bought note and the sold note differ from each other, or differ from the broker's original entry, which is the standard? Or, to take up the question which lies behind, what constitutes the contract between the parties? On these points the English courts have been much divided, nor can they be regarded as having reached an authoritative conclusion. A minute examination of these conflicting opinions it is not within the range of the present treatise to give.[4] It may be sufficient to say that the weight of opinion now is that the bought and sold notes do not constitute the contract between the parties,[5] but that the signed entry by the broker in his book does constitute such contract, and is binding on both parties.[6] Either the bought or the sold note will take the case out of the statute, when there is no entry, or an unsigned entry in the broker's book;[7] or, supposing there be a signed entry, when there is no material variance between it and the other note, or between it and the signed entry in the book.[8]

§ 721. *Whether, in cases of variance, between notes and entry,*

[1] See notes to Thomson *v.* Davenport, 2 Smith's Leading Cases, 349; Higgins *v.* Senior, 8 M. & W. 834; Williams *v.* Bacon, 2 Gray, 387; Fuller *v.* Hooper, 3 Gray, 341; Eastern R. R. *v.* Benedict, 5 Gray, 561; Dykers *v.* Townsend, 24 N. Y. 57. See Merritt *v.* Clason, 12 Johns. R. 102; Clason *v.* Bailey, 14 Johns. R. 484.

[2] L. R. 6 Q. B. 920.

[3] L. R. 5 C. P. 648; 7 C. P. 84. See infra, § 730.

[4] The work is well done by Mr. Benjamin in his work on Sales, 2d ed. § 276–294, with whose conclusion the text in the main accords.

[5] Thornton *v.* Charles, 9 M. & W. 802; Heyman *v.* Neale, 2 Camp. 337; Sievewright *v.* Archibald, 17 Q. B. 115; overruling Thornton *v.* Meux, 1 M. & M. 43; Goom *v.* Affalo, 6 B. & C. 117; Trueman *v.* Loder, 11 Ad. & E. 509.

[6] Heyman *v.* Neale, 2 Camp. 337; Thornton *v.* Charles, 9 M. & W. 802; Sievewright *v.* Archibald, 17 Q. B. 115, overruling Cumming *v.* Roebuck, Holt, 174; Thornton *v.* Meux, 1 M. & M. 43; Townend *v.* Drakeford, 1 C. & K. 20; Thornton *v.* Charles, 9 M. & W. 802.

[7] Sievewright *v.* Archibald, 17 Q. B. 115.

[8] Hawes *v.* Forster, 1 Mood. & R. 368; Parton *v.* Crofts, 16 C. B. N. S. 11.

there be a new contract, is a question of fact, but when the bought and sold notes vary materially, and there are no other writings, there is no contract. — In case of variance between the bought and sold notes on the one side and the signed entry in the book on the other side, it is a question of fact for the jury whether the acceptance of the bought and sold notes constitutes evidence of a *new* contract modifying that of the book entry.[1] But when the bought and sold notes vary, and there are no writings (either by book entry or otherwise) to show the terms, then there is no valid contract.[2]

§ 722. *Undisclosed principal may sue vendee.* — As a broker, known to be such, is supposed to represent a principal, the maxim *caveat emtor* applies to his sales, and the principal has the same remedy against the vendee as he would have had if his (the principal's) name had been disclosed to the vendee.[3] Where, however, B., a broker, was instructed to buy for A. 50 bales of cotton, and received from A. £800 as part of the purchase money, but subsequently made a contract in his own name, for the purchase of 300 bales, on account of A. and other principals, it was held that A. was entitled to recover back the £800 paid to B., on the ground that B.'s contract for the 300 bales was one on which A. could not sue as principal.[4]

§ 723. *Against an undisclosed principal when suing on his broker's contract, the broker's debt cannot be set off.* — This results from the very nature of the broker's office. He is *broker; i. e.* he does not act for himself; he has not even a possession in the goods to which possessory title could attach.[5] Hence any

[1] Hawes *v.* Forster, 1 Mood. & R. 368; Thornton *v.* Charles, 9 M. & W. 802; Sievewright *v.* Archibald, 17 Q. B. 115. See, also, Heyworth *v.* Knight, 17 C. B. N. S. 298, which extends this principle to a bargain made by correspondence.

[2] Thornton *v.* Kempster, 5 Taunt. 786; Cumming *v.* Roebuck, Holt, 172; Thornton *v.* Meux, 1 M. & M. 43; Townend *v.* Drakeford, 1 C. & K. 20; Fisenden *v.* Levy, 11 W. R. 258; Grant *v.* Fletcher, 5 B. & C. 436; Gregson *v.* Rucks, 4 Q. B. 747; Sievewright *v.* Archibald, 17 Q. B. 115.

[3] Supra, § 398–403; Baring *v.* Corrie, 2 B. & Ald. 137; Henderson *v.* Barnwall, 1 Y. & J. 387; Evans *v.* Waln, 71 Penn. St. 69; Locke's appeal, 72 Penn. St. 491.

[4] Bostock *v.* Jardine, 34 L. J. Ex. 142. This case is according to Mellor, J., in Mollett *v.* Robinson, L. R. 7 C. P. 101, incorrectly reported in 3 H. & C. 700.

[5] Paley on Agency, 340–2; Foss *v.* Robertson, 46 Ala. 483; De Bouchout *v.* Goldsmid, 5 Vesey, 211; Boyson *v.* Coles, 6 M. & S. 14. See supra, § 398, 405.

one dealing with him deals with him as broker, and cannot set up any claim against him as broker to defeat or reduce a suit brought by the principal. An interesting illustration of this is found in a recent Pennsylvania case. W. having employed M., a broker in Philadelphia, to sell stock, E., a broker in New York, sold the stock by order of A., another Philadelphia broker, under M., with assent of W., without naming the owner. A., however, failed before the proceeds were remitted by E. A., at the time of the failure, was in debt to E. It was ruled by the supreme court that E. could not retain the debt from the proceeds. It was, however, put in evidence that after A.'s failure E. asked M. to send certificates and he would remit to M. less A.'s debt; whereupon M. answered, the stock was a customer's. E. replied: "Send stock in any event;" "will give you net balance to-morrow." M. sent the stock. The court ruled that "net balance" meant proceeds after deducting expenses of sale. It was further ruled that evidence that it was the custom of brokers, in their dealings with brokers of other cities, to put all transactions between them into one account and settle for the general balance, was inadmissible. It was in addition determined that the action for the amount retained by E. was properly brought in the name of W.[1]

IV. REMUNERATION AND REIMBURSEMENT.

§ 724. *Broker is entitled to remuneration and reimbursement.* — A broker, from the nature of his employment, is entitled to remuneration, which is usually spoken of as commissions.[2] From the person originally employing him he may receive a reward contingent on success;[3] and in fact, commissions, when graduated in proportion to the purchase money of an article bought or sold, are a contingent reward. Consequently, when a gross contingent sum is agreed upon in place of commissions, this is not a departure from the principle by which commissions are allowed.[4] He may also recover the expenses he has incurred in his agency.[5]

§ 725. *But only from the party originally employing him.* — But, though he may receive fixed fees for that part of his duties

[1] Evans *v.* Waln, 71 Penn. St. 69.

[2] See supra, § 321; Jannen *v.* Green, 4 Burr. 2103; Howland *v.* Coffin, 47 Barb. N. Y. 658; Lockwood *v.* Levick, 8 C. B. N. S. 603; Biggs *v.* Gordon, 8 C. B. N. S. 638.

[3] Supra, § 324.

[4] See Everhardt *v.* Searle, 71 Penn. St. 256.

[5] Supra, § 340; Sentance *v.* Hawley, 13 C. B. N. S. 458.

in which he acts as agent for both sides, he cannot, without the consent of the principal originally employing him, receive a commission from the opposite party; and if he receive such commission, he cannot maintain a suit against his original employer for commissions, even though it should appear that such double commissions were warranted by custom.[1] Nor can he recover the sum agreed to be paid him by the party with whom he was employed to negotiate.[2]

Reimbursement for rightful advances he is also entitled to receive.[3]

The following points in relation to this topic are elsewhere discussed:—

The terms of brokerage may be settled by custom;[4]

Before commissions are earned transaction must be complete;[5]

The principal is not liable if the sale was effected without the intervention of the broker;[6]

The principal, when the broker has found a purchaser, cannot evade paying commissions;[7]

There must be specific proof of the broker's appointment;[8]

No commissions can be earned on an illegal or immoral transaction;[9]

A broker who is untrue to his trust forfeits his commissions;[10]

The broker's negligence may be set off against his claim for commissions.[11]

[1] Morison *v.* Thompson, L. R. 9 Q. B. 480; Salomans *v.* Pender, 3 H. & C. 639; Walker *v.* Osgood, 98 Mass. 348; Kerfoot *v.* Hyman, 52 Ill. 512; Parker *v.* Vose, 45 Me. 54; Farnsworth *v.* Hemmer, 1 Allen, 494, citing Copeland *v.* Merc. Ins. Co. 6 Pick. 198; Pugsley *v.* Murray, 4 E. D. Smith, 245; Rupp *v.* Sampson, 16 Gray, 98; Raisin *v.* Clark, 41 Md. 158. See more fully supra, § 336, 573, 715.

[2] Everhardt *v.* Searle, *ut supra.*

[3] Supra, § 316.

[4] Supra, § 323.

[5] Supra, § 325.

[6] Supra, § 326.

[7] Supra, § 327.

[8] Supra, § 330.

[9] Supra, § 334, 615.

[10] Supra, § 336.

[11] Supra, § 339.

A broker was employed by his principal to sell, and as selling broker he sold for him "to arrive" goods, on the terms that they were "fair average quality in opinion of selling broker." The buyers having, on arrival of such goods, refused to take them, the broker inspected them and gave his opinion that they were not of fair average quality, according to the contract. It was ruled that he was not liable to an action at the suit of his principals for not using due skill in order to form a correct opinion of the quality of the goods, as there was no contract by him, express or implied, to exercise any skill whatever in forming such

V. LIABILITY TO PRINCIPAL.

§ 726. *Required to show the diligence and skill of a good business man.* — A broker, being a specialist, is required to employ in his principal's service the diligence and skill which good business men of the same grade and locality are accustomed to apply under similar circumstances.[1]

VI. LIABILITY TO THIRD PARTIES.

§ 727. *General principles of agency applicable to this relation.* — It has been already noticed that a broker is regarded as the exclusive agent of his first employer in all matters except that of the entry of the memorandum of the final terms agreed upon by the parties, and in giving the bought and sold notes. Hence, in all matters except those last noticed, the broker is liable to parties with whom he deals on behalf of his principal,

opinion. Pappa *v.* Rose, 41 L. J. C. P. 11; 7 L. R. C. P. 32; affirmed on appeal, 41 L. J. C. P. 187; 7 L. R. C. P. 525. The ground of the decision was that the defendant acted as a sort of referee for both parties, and having acted *bonâ fide* and to the best of his judgment, he was not liable to an action. It would have been otherwise had he claimed to possess skill in which he was deficient. Jenkins *v.* Betham, 16 C. B. 168.

[1] Supra, § 272; Wharton on Negligence, § 32; Greenleaf *v.* Moody, 13 Allen, 362; Stewart *v.* Drake, 46 N. Y. 449; Schepeler *v.* Eisner, 3 Daly, 11.

Where a person purchases bills of exchange of a broker, knowing him to be such, and the bills turn out to be worthless, the broker cannot be held responsible for the loss unless he expressly bound himself. Buddecke *v.* Alexander, 20 La. An. 563. Brokers, except in cases of fraud, are not answerable for the insolvency of those to whom they procure sales of negotiable paper, although they receive a reward for their agency, or speak in favor of him who buys. Buddecke *v.* Alexander, 20 La. An. 563.

Stock-brokers cannot revoke their general agreement to buy, hold, and sell stocks for a commission, without notice, and if they do so revoke they are liable for damages sustained by their employers by reason of such revocation. White *v.* Smith, 6 Lans. (N. S.) 5.

In a late case in Pennsylvania, the evidence was that Esser employed brokers to buy stock and "carry it." The brokers wrote him for further security or they would not carry his stock. The stock remained with them unsold till it was worthless. In a suit by the brokers for the money advanced by them, his defence being that they should have sold the stock, it was ruled that he could not testify that he believed from the letter that they would not sell without further orders from him. It was, however, declared that if the brokers had sold the stock without giving further notice, and it had risen, they would have been responsible. Esser *v.* Linderman, 71 Penn. St. 76.

in the same way that an agent under such circumstances is generally liable. If he interposes his own credit he becomes personally liable,[1] and so if he does not disclose the fact of agency;[2] and so if he acts without authority;[3] and he is liable in an action of tort for any injuries he may inflict on third parties.[4] But it seems to be agreed that a broker, signing as such, subjects himself to no personal liability to third parties, even though in the body of the sale note his description of his position is ambiguous.[5]

§ 728. Yet even if the broker is known to be only broker, he makes himself personally liable if he signs the contract in his own name; no principal being declared, and the broker drawing credit to himself personally.[6] So where a broker buys goods in his own name for his principal, he is liable, in all cases where the fact of his agency is not known, to the vendor for the price.[7] And so where a broker in buying goods as broker adds his personal promise to pay.[8]

§ 729. Parol evidence is not admissible, where B. has signed a note or memorandum, to show, in order to release B. from liability, that he acted only as agent of P.,[9] though such evidence can be received to charge P.[10]

[1] Supra, § 490.

[2] Supra, § 499.

[3] Supra, § 524.

[4] See supra, § 535, 631.

[5] Fairlee *v.* Fenton, L. R. 5 Ex. 169. Supra, § 503.

[6] Higgins *v.* Senior, 8 M. & W. 834; Short *v.* Spakeman, 2 B. & Ad. 962; Jones *v.* Littledale, 6 A. & E. 486; Reid *v.* Draper, 6 H. & N. 813; Fowler *v.* Hollins, L. R. 7 Q. B. 616; aff. in H. of L. 33 L. T. (N. S.) 73; McGraw *v.* Godfrey, 14 Abb. (N. S.) 397. See Benjamin on Sales, 1st Am. ed. § 242, citing Cabot Bank *v.* Morton, 4 Gray, 156; Raymond *v.* Crown & Eagle Mills, 2 Met. 319; Royce *v.* Allen, 28 Vt. 234; Merrill *v.* Wilson, 6 Ind. 426; Canal Bk. *v.* Bk. of Albany, 1 Hill (N. Y.), 287; Taintor *v.* Prendergrass, 3 Hill (N. Y.), 72; Wilder *v.* Cowles, 100 Mass. 487; Sumner *v.* Williams, 8 Mass. 198; Torry *v.* Holmes, 10 Conn. 500; Cunningham *v.* Soules, 7 Wend. 106; Bebee *v.* Robert, 12 Wend. 413; Mauri *v.* Hefferman, 13 Johns. 58; McCords *v.* Wright, 4 Johns. Ch. 669; Waring *v.* Mason, 18 Wend. 425; Mills *v.* Hunt, 20 Wend. 434; Allen *v.* Rostain, 11 S. & R. 362; Bacon *v.* Sandley, 3 Strobh. 403; Keen *v.* Sprague, 3 Greenl. 77; Scott *v.* Mesick, 4 Monroe, 535; Wilkins *v.* Duncan, 2 Litt. 168. See supra, § 499.

[7] Morgan *v.* Cadar, cited Paley on Agency, 371–2; Calder *v.* Dobell, L. R. 6 C. P. 486; 19 W. R. 409. Supra, § 490, 499.

[8] Talbot *v.* Godbolt, Yelv. 137; Harvey *v.* French, Alleyn, 6.

[9] Higgins *v.* Senior, 8 M. & W. 834; Cropper *v.* Cook, L. R. 3 C. P. 194; Calder *v.* Dobell, L. R. 6 C. P. 486; Hancock *v.* Fairfield, 3 Me. 299; Huntington *v.* Knox, 7 Cush. 371–4; Benj. on Sales, § 219. See supra, § 492.

[10] Supra, § 492; Trueman *v.* Loder,

§ 730. Where the paper was signed "A. B. & Co., Brokers," and purported to be a purchase by them for "our principals," not naming the principals, parol evidence was received to show a usage that in such cases the brokers were personally liable.[1]

11 Ad. & E. 589; and Mr. Perkins's note to Benj. on Sales, § 219, citing Sanborn *v.* Flagler, 9 Allen, 477; Salmon Man. Co. *v.* Stoddard, 14 How. U. S. 446; Williams *v.* Bacon, 2 Gray, 387; Dykers *v.* Townsend, 24 N. Y. 57; East. R. R. Co. *v.* Benedict, 5 Gray, 561; Hunter *v.* Giddings, 97 Mass. 41; Winchester *v.* Hunter, 97 Mass. 303; Lerned *v.* Johns, 9 Allen, 417; Hubbard *v.* Borden, 6 Wharton, 79; Baldwin *v.* Bank of Newbury, 1 Wallace, 234.

[1] Humphrey *v.* Dale, 7 E. & B. 266; E., B. & E. 1004; Fleet *v.* Murton, L. R. 7 Q. B. 126. Supra, § 499. In the last named case the evidence was that M. & W., fruit brokers in the city of London, gave to wholesale grocers there the following contract note, addressed to them: "We have this day sold for your account to our principal 50 to 70 tons of raisins, M. & N. brokers." Held, in an action against the purchasers, first, that evidence was admissible of a usage in the fruit trade by which, in a contract thus worded, without mentioning the buyer, the broker was liable to make good any loss through the fault of his principal. Fleet *v.* Murton, 41 L. J. Q. B. 49; 7 L. R. Q. B. 124; 26 L. T. N. S. 181. Held, secondly (dubitante Cockburn, Chief Justice), that evidence of a similar usage in the colonial market was also admissible, as showing the liability of brokers in a trade of a similar character. Ibid.

In a case remarkable for the division of sentiment by which it was attended, the defendant, a merchant in Liverpool, employed the plaintiffs, tallow brokers in London, to buy tallow for him in the London market. In an action by them against the defendant to recover the loss upon the resale of the tallow, which he had refused to accept, it was proved "that there exists an established custom in the London tallow trade for brokers, when they receive an order from a principal for the purchase of tallow, to make a contract or contracts in their own name without disclosing their principals, and also to make such contracts either for the specific quantity of tallow so ordered, or to include such order with others they may receive in a contract for the entire quantity, or in any quantities at their convenience, at the same time exchanging bought and sold notes with the selling brokers, and passing to their principals a bought note for the specific quantity ordered by them; and that, when a broker so purchases in his own name, he is personally bound by the contract; and that, on the usual settling days, the brokers balance between themselves the purchases and sales so made, and make or receive deliveries to or from their principals, as the case may be, or, if their principals refuse to accept or deliver, then to sell or buy against them, as the case may be, and charge them with the loss, if any, or, if delivery is not required on either side, then any difference which may arise from a rise or fall in the market is paid by the one to the other." All the dealings between the plaintiffs and the defendant were carried out in accordance with this custom, which, however, does not exist in Liverpool, and was unknown to the defendant. Held, by Kelly, C. B., Channell, B.,

§ 731. *Brokers are liable for torts in the same degree as are other agents.* — As has been elsewhere seen, the principal is liable to third parties for the negligences of his agent within the scope of the latter's employment, leaving to the principal an action over against the agent. This, however, does not relieve the broker, in cases in which he has liberty of action, from liability for any torts he may commit while in the exercise of such liberty.[1] Thus, a broker is liable to third parties in trover if he wrongfully obtains and converts their goods, even though under the direction of his own principal.[2]

and Blackburn, J., that the employment of the plaintiffs by the defendant was an employment to buy according to the usages of the London tallow market, and that the defendant was bound by those usages, notwithstanding he was ignorant of their existence; but by Mellor and Hannen, JJ., and Cleasby, B., that the plaintiffs, having been employed as brokers to make the contract for the defendant, and having professed to act as brokers, and charged brokerage for their services as such, were not entitled, as against a person unconnected with the London tallow market and ignorant of its usages, to set up a custom or usage that they should fill a different character and become themselves principals in the transaction instead of brokers. Mollett *v.* Robinson, L. R. 7 C. P. 84; 41 L. J. C. P. 65; 26 L. T. N. S. 207; Exch. Ch. *S. C.* in C. P. 5 C. P. 646.

[1] Supra, § 198, 537.

[2] See Sharland *v.* Mildon, 5 Hare, 469; Stevens *v.* Elwell, 4 M. & S. 259; Cranch *v.* White, 1 Bing. N. C. 414; Davies *v.* Vernon, 6 Q. B. 443; McCombie *v.* Davies, 6 East, 538; Kimball *v.* Billings, 55 Me. 147; Spaights *v.* Hawley, 39 N. Y. 441. In a late English case, in which the broker's liabilities were examined with great care and thoroughness, Fowler *v.* Hollins, L. R. 7 Q. B. 616; 41 L. J. Q. B. 277 aff. in H. of Lords, 33 L. T. N. S. 75, the evidence showed that the plaintiffs, after refusing to sell cotton to a broker *personally*, sold to him on the fraudulent and false statement by him that he was acting for a principal. The sale note was made to the principal. The broker at once sold the cotton for cash to the defendants, who were also brokers, acting *bonâ fide* for principals, but who took a purchase note in their own names, beginning, "We sell you," &c. The defendants on the same day sent a delivery order for the cotton in favor of their principals, whom they named in the order, and paid for the cotton. They were reimbursed the price by their principals, together with their commissions and charges. All these transactions took place on the 23d of December, 1869. The cotton was at once sent by the defendants to the railway station, whence it was taken to the mills of the principals at Stockport. There it was at once turned into yarn. On January 10, 1870, the defendants received a letter from the plaintiff's attorneys stating the fraud that had been perpetrated on them, and demanding back the cotton. The defendants replied, "The cotton was bought by one of our spinners, Messrs. Micholls, Lucas & Co., for cash, and has been made up into yarn long ago, and as everything is settled up, we regret that we cannot render your clients any as-

sistance." Trover being then brought by the plaintiffs against the defendants, Willes, J., left it to the jury to determine whether the defendants had acted only as agents in the course of the business, and had dealt with the goods only as agents. Upon the jury finding these facts in favor of the defendants, a verdict was entered for them with leave to the plaintiffs to move to enter a verdict for the value of thirteen bales. This rule was made absolute in the queen's bench, and this was affirmed in the exchequer chamber by a divided court. Martin, Channell, and Cleasby, BB., for affirming; Kelly, C. B., and Byles and Brett, JJ., for reversing. For affirming it was argued that although the defendants had acted as brokers, they had made themselves principals by acting for an undisclosed principal. And Martin, B., went further, saying that "they (the plaintiffs) are entitled to treat the defendants as wrong-doers, wrongfully intermeddling with their cotton, which they had no legal right to touch; and that when they removed the cotton from the warehouse, where it was deposited, to the railway station to be forwarded to Stockport to be spun into yarn, and received the price of it, they committed a trespass." He held, consequently, that it made no difference as to the result whether the defendants acted as agents or as principals. Brett, J., on the other hand, argued with great force, not only that the defendants were acting as brokers, but that as brokers they were not personally liable to the plaintiffs. "The true definition of a broker," he said, "seems to be that he is an agent employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation. Properly speaking, a broker is a mere negotiator between the other parties. If the contract which the broker makes between the parties be a contract of purchase and sale, the property in the goods, even if they belong to the supposed seller, may or may not pass by the contract. The property may pass by the contract at once, or may not pass till a subsequent appropriation of the goods has been made by the seller, and has been assented to by the buyer. Whatever may be the effect of the contract as between the principals, in either case no effect goes out of the broker. If he signs the contract, his signature has no effect as his, but only because it is in contemplation of law the signature of one or both the principals. No effect passes out of the broker to change the property in the goods. The property changes either by a contract which is not his, or by an appropriation and assent, neither of which is his. In modern times, in England, the broker has undertaken further duty with regard to the contract of the purchase and sale of goods. If the goods be in existence, the broker frequently passes a delivery order to the vendor to be signed, and on its being signed, he passes it to the vendee. In so doing, he still does no more than act as a mere intervener between the principals. He himself, considered only as a broker, has no possession of the goods; no power, actual or legal, of determining the destination of the goods; no power or authority to determine whether the goods belong to buyer or seller, or either; no power, legal or actual, to determine whether the goods shall be delivered to the one or kept by the other. He is throughout merely the negotiator between the parties; and, therefore, by the civil law, brokers were not treated as ordinarily incurring any personal responsibility by their intervention, unless there was some fraud on their part. And if all a broker has done be what I have hitherto described, I apprehend

it to be clear that he would have incurred no personal liability to any one according to English law. He could not be sued by either party to the contract for any breach of it. He could not sue any one in any action in which it was necessary to assert that he was the owner of the goods. He is dealing only with the making of a contract which may or may not be fulfilled, and making himself the intermediary passer on or carrier of a document (the delivery order), without any liability thereby attaching to him towards either party to the contract. He is, so long as he acts only as a broker in the way described, claiming no property in or use of the goods, or even possession of them, either on his own behalf, or in behalf of any one else. Obedience or disobedience to the contract, and its effects upon the goods, are matters entirely dependent upon the will and conduct of one or both of the principals, and is in no way within his cognizance. Under such circumstances, — and so far it seems to me clear, — a broker cannot be sued with effect by any one. If goods have been delivered under a contract so made, and a delivery order so passed, still he has had no power, actual or legal, of control either as to the delivery or non-delivery; and probably no knowledge of the delivery; and he has not had possession of the goods. It seems to me impossible to say, that for such a delivery, he could be held liable by the real owner of the goods for a wrongful conversion. But then in some cases a broker, though acting as agent for a principal, makes a contract of sale and purchase in his own name. In such case he may be sued by the party with whom he has made such contract for a non-fulfilment of it. But so, also, may his undisclosed principal; and, although the agent may be liable on the contract, yet I apprehend nothing passes to him by the contract. The goods do not become his. He could not hold them, even if they were delivered to him, as against his principal. He could not, as it seems to me, in the absence of anything to give him a special property in them, maintain any action in which it was necessary to assert that he was the owner of the goods. The goods would be the property of his principal. And although two persons, it is said, may be liable on the same contract, yet it is impossible that two persons can each be the sole owner of the same goods. Although the agent may be held liable as a contractor on the contract, he is still only an agent, and has acted only as agent. He could not be sued, as it seems to me, merely because he had made the contract of purchase and sale in his own name with the vendor, — even though the contract should be in a form which passes property in goods by the contract itself, — by a third person, as if he, the broker, were the owner of the goods; as if, for instance, the goods were a nuisance, or an obstruction, or as it were trespassing, he would successfully answer such an action by alleging that he was not the owner of the goods, and by proving that they were the goods of his principal till then undisclosed." And see supra, § 471. In the house of lords, on September 15, 1875, the opinion of the Q. B. was sustained by the unanimous opinion of Lords Chelmsford, Cairns, Hatherley, and O'Hagan, the ground taken being that where a person, however innocently, obtains possession of the goods of another who has fraudulently been deprived of them, and then disposes of these goods for his own benefit, or for that of others, he is guilty of conversion. Hardman *v.* Booth, 1 H. & C. 803, was held to be directly in point, and was reaffirmed.

CHAPTER XVI.

FACTORS.

I. Definition of Terms.
- A factor is a specialist employed to receive and sell goods for a commission, § 735.
- Factor as distinguished from broker, § 736.
- Factor as distinguished from institor, § 737.

II. Powers of Factor.
- May do whatever is usual to effect sale, § 739.
- May sell on credit, § 740.
- Cannot receive anything but money, nor can his own debts be set-off, § 741.
- Securities taken by, belong to principal, § 743.
- Cannot barter, § 744.
- At common law cannot pledge, § 745.
- But this is qualified in Roman law, § 747.
- In English law ownership is necessary to hypothecate, § 748.
- Parliamentary modification of rule, § 749.
- Adjudications under statute, § 750.
- Law in the United States, § 752.
- American legislation authorizing factor to pledge, § 753.
- Factor may pledge in any view to amount of his lien, § 754.
- Factor may sue in his own name for price of goods, § 755.
- Cannot act by substitute, § 756.
- Goods held by him not liable to execution for his debts, § 757.

III. Duties of Factor.
- Must obey instructions as to sale, but may at his discretion sell to prevent ruin, § 758.
- Cannot purchase or sell on his own account, § 760.
- Cannot dispute his principal's title, § 761.

IV. Principal's Rights against Vendee and against Goods.
- Principal may sue vendee in his own name, § 762.
- May follow his goods or their proceeds into hands of factor's representatives, § 763.

V. Joint Principals and Joint Factors.
- Consignors employing the same agent run *pro rata* risks, § 764.
- Joint factors have independent powers, but are jointly liable, § 765.

VI. Lien.
- Factor has possession of goods, and a property to the extent of his advances, but no more, § 766.
- Lien covers advances, commissions, and expenses, § 767.
- But not independent charges, § 768.
- He must be in possession of goods, § 769.
- Purchaser's set-off against vendor no defence to factor's claim for lien, § 770.
- Factor may set off his lien against debt due him from purchaser, § 771.
- Lien yields to private agreement between parties, § 772.
- Lien attaches to goods in transit at time of consignor's death, § 773.
- Factor does not lose his lien in surrendering possession if he retain control, § 774.
- Lien attaches to whatever sale produces, § 775.
- Lien good against consignors, bankrupt assignees, or attaching creditors, § 776.
- Purchaser of goods who pays over the whole purchase money to vendor is liable to factor for his lien, § 777.

VII. Liability of Factor to Principal.
- Factor bound to the diligence of good business man of his class and position, § 778.
- Bound to exercise diligence as to vendee and price, § 780.
- Not liable for *casus*, § 781.
- Bound to insure when required by course of dealing, § 782.

Liable for balance of running account, § 783.
A *del credere* commission makes factor a guarantor, § 784.
Does not relieve factor from diligence, § 785.
Del credere engagement not within statute of frauds, § 786.
Factor cannot be sued without notice, § 787.
VIII. Liability of Factor to Third Persons.
Factor dealing in his own name makes himself personally liable, § 788.
In such case his own debts may be set-off, § 789.
When taking exclusive credit, may become exclusively liable, § 790.
Factor for foreign principal may be personally liable, § 791.
Foreign principal cannot sue on such contract, § 793.
IX. Commissions receivable by Factor, § 794.

I. DEFINITION OF TERMS.

§ 735. *A factor is a specialist employed to receive and sell goods for a commission.* — He must be a *specialist*, that is to say, he must be a proficient in this particular business, pursuing it as a trade. A person undertaking out of his line of business to sell a particular piece of goods for another is not a *factor*. So the goods, to constitute factorship in its true sense, must be *received*, either in bulk or by sample, for on this depends one of the incidents of factorship, that the goods should be in the *possession* of the factor. So there must be a power to *sell*;[1] and so descriptive of factorship is this power regarded that while the power to sell is treated as a necessary incident of a factor's office, he is not, as will presently be seen, supposed to have at common law a power to *pledge*. And again, the work is undertaken for a *commission*. We can conceive of a factor remunerated in some other way, and such cases occasionally occur. But they are exceptional; and, unless it be otherwise determined by special agreement, the factor is entitled, as a matter of law, to be remunerated by commissions.[2] One other common though not universal feature remains to be considered. "The factor," says Mr. McCulloch,[3] "is not generally resident in the same place as his principal, but usually in a foreign country." "A very large proportion of the foreign trade of this and most other countries is now carried on by means of factors or agents."

§ 736. *Factors distinguished from rokers.* — "Factors and brokers," says Mr. McCulloch,[4] "are in some respects nearly identical, but in others they are radically different. 'A factor,'

[1] Drinkwater *v.* Goodwin, Cowp. 251; Hornby *v.* Lacy, 6 M. & S. 166; Fish *v.* Kempton, 7 C. B. 687.

[2] Supra, § 321. See McCulloch's Commercial Dict. tit. "Factor." 2 Kent's Com. 622.

[3] Com. Dict. *in loco*.

[4] Com. Dict. *in loco*.

said Mr. Justice Holroyd, 'differs materially from a broker. The former is a person to whom goods are sent or consigned; and he has not only the possession, but in consequence of its being usual to advance money upon them, has also a special property in them, and a general lien upon them. When, therefore, he sells in his own name, it is within the scope of his authority; and it may be right, therefore, that the principal should be bound by the consequences of such sale. But the case of a broker is different; he has not the possession of the goods, and so the vendor cannot be deceived by the circumstance; and besides, the employing a person to sell goods as a broker does not authorize him to sell in his own name. If, therefore, he sells in his own name, he acts beyond the scope of his authority, and his principal is not bound.'" This distinction, accepted as part of modern commercial law, is now universally recognized by the courts.[1]

§ 737. *Factor distinguished from Institor.* — The Roman term *institor*, which will be presently considered,[2] is sometimes translated *factor*;[3] but this requires us to use the term factor in a sense more extensive than that it has acquired in Anglo-American law. An *institor*, as we will presently see, is a person charged by a principal with the management of the latter's shop, or other business depot.[4] In such case the possession of the goods remains in the principal, and merely the bare custody is in the institor. "Institor appellatus est ex eo, quod negotio gerendo instet; nec multum facit, tabernae sit praepositus, an cuilibet alii negotiationi,"[5] . . . . "institores eorum, qui cauponam vel stabulum exercent; cauponae, in cauponio instit."[6]

§ 738. *Factor's powers defined by usage.* — What has been said as to brokers, applies with equal pertinency to factors. The office springs from the necessities of business, and is moulded by those necessities. When a particular power is by usage conceded to factors, then the law recognizes the existence of such power.[7]

[1] See supra, § 695, 711, 713. And see Goodenow *v.* Tyler, 7 Mass. 36; Van Allen *v.* Vanderpool, 6 Johns. 69; Emery *v.* Gerbier, 2 Wash. C. C. 413; Frank *v.* Jenkins, 22 Ohio St. 597; Capes *v.* Phelps, 24 La. An. 562; Weed *v.* Adams, 37 Conn. 378; 1 Bell's Com. 7th ed. 506.

[2] Infra, § 799.

[3] See Heumann's Handlexicon, tit. Institor.

[4] Infra, § 800.

[5] § 2. I. 4. 7, tit. Dig. 14. 3.

[6] L. 15, § 5. D. 4. 9. L. 13, pr. 15, pr. D. 33. 7.

[7] Johnson *v.* Usborne, 11 Ad. & El. 549. Supra, § 134, 676, 696.

And such usage, when proved to be general, becomes part of the law of the land.[1]

II. POWERS OF FACTOR.

§ 739. *Factor authorized to sell may do whatever is necessary to effect sale.* — A factor with authority to sell may, as has been already stated,[2] do whatever is usual to effect the sale; and it is for the jury to determine what is usual.[3] Thus where a warranty is usual, the factor may give a warranty.[4] But usage will not relieve a factor from a duty or liability which would otherwise be imposed upon him, unless he shows his principal had or ought to have had knowledge of such usage, or that he assented to that method of doing his business.[5]

§ 740. *Factor by usage may sell on credit.* — No doubt it is stated as a general rule that a factor must sell for cash; though even by Chancellor Kent, who expresses himself to this effect most unequivocally, it is admitted that the factor may "sell in the usual way, and consequently it is implied that he may sell on credit without incurring risk, provided it be the usage of the trade at the place, and he be not restrained by his instructions, and does not unreasonably extend the term of credit, and provided he use due diligence to ascertain the solvency of the purchaser."[6] That "a factor may sell goods on credit, *that being the ordinary course of conducting mercantile affairs*," is expressly stated by Mr. McCulloch,[7] and that such is the custom we may

[1] See Maxted *v.* Paine, L. R. 4 Ex. 81, 403; 6 Ex. 132; Duncan *v.* Hill, L. R. 6 Ex. 255.

[2] See supra, § 126, 187, 258, 270.

[3] Bayliffe *v.* Butterworth, 1 Ex. 425; Graves *v.* Legg, 2 H. & N. 210; Pickering *v.* Buck, 15 East, 38.

[4] Supra, § 120, 187. See Schuchardt *v.* Allens, 1 Wall. 359; Randall *v.* Kehlor, 60 Me. 37; Upton *v.* Suffolk Co. Mills, 11 Cush. 586; Smith *v.* Tracy, 36 N. Y. 79; Palmer *v.* Hatch, 46 Mo. 585; Brady *v.* Todd, 9 C. B. N. S. 592. As to enlarged powers in case of necessity, see supra, § 255. Joslin *v.* Cowee, 52 N. Y. 90.

[5] Farmers', &c. Bk. *v.* Sprague, 52 N. Y. 615. See R. *v.* Lee, 12 Mod. 514. Supra, § 134.

[6] 2 Kent's Com. 622, citing Van Allen *v.* Vanderpool, 6 Johns. 69; Goodenow *v.* Tyler, 7 Mass. 36; James *v.* M'Credie, 1 Bay, 297; Emery *v.* Gerbier, 2 Wash. C. C. 413, and other cases cited in Whart. Dig. of Penn. tit. Agent & Factor, A, 24; Burrill *v.* Phillips, 1 Gal. 360; Willes, C. J., in Scott *v.* Surman, Willes, 400. To same effect see Paley's Agency, 26; Chambre, J., in Houghton *v.* Matthews, 3 Bos. & P. 489; Leverick *v.* Meigs, 1 Cowen, 645; Greely *v.* Bartlett, 1 Greenl. 172; Forestier *v.* Bordman, 1 Story C. C. 43; Story on Agency, § 110, 209. Supra, § 192.

[7] Com. Dict. *in loco.*

regard as an established fact, to be qualified only by proof of an inconsistent local law.[1] Of course this custom is to be limited to those who are technically factors, and cannot be extended to cover the case of brokers, or of persons employed by a principal to effect special and peculiar sales.[2]

§ 741. *Unless authorized by principal, the factor cannot receive payment in anything but money; nor can the vendee set off the factor's debt to him as part payment to the principal.* — The sale must be for money or cash, to be paid at the end of such credit as is allowed by the agreement of the parties or the custom of the trade.[3] The factor, unless authorized by the principal, cannot set off his private debt to the vendee against the vendee's debt on the sale; nor will the principal be bound by such a set-off,[4] unless he permit the factor to hold himself out as principal.[5] Nor can the factor, at the expiration of the usual credit, take a note payable to himself at a future day,[6] nor extend beyond the usual credit, by note or otherwise, the payment to his principal;[7] nor by any process whatever release the vendee without making himself personally liable.[8]

§ 742. Yet a factor, in cases where usage or authority enables him to sell on credit, is justified, if he exercised due prudence as to the security, in taking negotiable paper in payment;[9] nor,

[1] Supra, § 740. Frank *v.* Jenkins, 22 Ohio St. 597; Robertson *v.* Livingston, 5 Cowen, 473; Hall *v.* Storrs, 7 Wisc. 253; Griffith *v.* Fowler, 18 Vt. 390; Byrne *v.* Schwing, 6 B. Monr. 199; Forestier *v.* Bordman, 1 Story R. 43; Daylight Co. *v.* Odlin, 51 N. H. 56. See Williams *v.* Evans, L. R. 1 Q. B. 352; Marshall *v.* Williams, 2 Biss. 255.

[2] Wiltshire *v.* Sims, 1 Camp. 258; State *v.* Delafield, 8 Paige, 527; *S. C.* 26 Wend. 192.

[3] See supra, § 210.

[4] Catterall *v.* Hindall, L. R. 1 C. P. 186, reversed on appeal, but not as to the point here stated. Stewart *v.* Aberdein, 4 M. & W. 224; Guy *v.* Oakeley, 13 Johns. 332. Supra, § 400–5.

[5] Dresser *v.* Norwood, 17 C. B. N. S. 466; Turner *v.* Thomas, L. R. 6 C. P. 610; Westwood *v.* Bell, 4 Camp. 349; Lime Rock Bk. *v.* Plimpton, 17 Pick. 159; Miller *v.* Lea, 35 Md. 396. Supra, § 405, 722.

[6] Hosmer *v.* Bebee, 14 Mart. (La.) 368. Supra, § 210.

[7] Myers *v.* Entrikin, 6 Watts & S. 44. See supra, § 209.

[8] Arrott *v.* Brown, 6 Whart. 9.

[9] Supra, § 134, 739. A remittance by a factor in Buffalo to his principal in Illinois, of a draft from a banker in Buffalo on a house in New York city, on the day of sale of the consigned goods, in compliance with the custom of commission merchants at Buffalo, was ruled to be an exercise of due diligence, and upon protest to exempt the factor from liability for the loss. Chandler *v.* Hogle, 58 Ill. 46. See Rich *v.* Monroe, 14 Barb. 602. See, how-

supposing him to have exercised such prudence as to the security, does he becomes personally liable for the debt, even though he took the note in his own name.[1]

§ 743. *Securities taken by factor belong to principal.* — Whatever securities the factor takes, in payment of his principal's goods, are in trust for the principal, and are subject to the principal's order.[2] Nor is the principal's right to such securities defeated by the fact that the factor sold in his own name,[3] nor by the factor's guarantee of the sale; and in the latter case the principal may waive the guarantee, and fall back on the note.[4] And in the case of the intermediate insolvency of the factor, the securities thus taken do not pass to the factor's assignees, but revert to the principal.[5]

§ 744. *Factor has no authority to barter.* — The authority of a factor being limited to selling, by bartering his principal's goods he passes no title to the same. In such case the principal may maintain trover for the goods against the party with whom they were bartered, though the latter did not know that in the particular transaction he was dealing only with a factor.[6]

§ 745. *Factor at common law cannot pledge.* — Has a factor, intrusted by a principal with goods to sell in his own name on the principal's account, the power to pledge such goods to a *bonâ fide* creditor? This important question which has been the cause of much conflict of opinion, will now be examined in detail.

ever, Farmers' Bk. *v.* Sprague, 52 N. Y. 615.

[1] Scott *v.* Surman, Willes, 400; Russell *v.* Hankey, 6 T. R. 12; Knight *v.* Plymouth, 3 Atk. 480; Messier *v.* Amery, 1 Yeates, 540; Goodenow *v.* Tyler, 7 Mass. 36; Gorman *v.* Wheeler, 10 Gray, 362. Where a factor has been induced by fraud to part with the goods of his principal to an insolvent purchaser, who, before discovery of the fraud, has placed them in such a condition that it is difficult if not impossible to follow them, and where the factor, acting in good faith, takes security for the price of the goods, and thus affirms the sale, he is acting within the scope of his powers, and his principal is bound. Joslin *v.* Cowee, 52 N. Y. 90.

[2] Supra, § 201, 236, 240, 412–414. Scott *v.* Surman, Willes, 400; Messier *v.* Amery, 1 Yeates, 540; Goodenow *v.* Tyler, 7 Mass. 36; Gorman *v.* Wheeler, 10 Gray, 362.

[3] See supra, § 348, 409, 412.

[4] See infra, § 786.

[5] Godfrey *v.* Furzo, 3 P. Wms. 185; Kip *v.* Bank, 10 Johns. R. 63; Dumas, ex parte, 1 Atk. 234; Tooke *v.* Hollingsworth, 5 T. R. 226; Thompson *v.* Perkins, 3 Mason, 232. Supra, § 201, 412.

[6] Supra, § 194. Guerriero *v.* Peile, 3 B. & Ald. 616.

§ 746. *General rule is that ownership is essential to create lien.* — At the first glance we would say that a person cannot pledge that which he has not, and that as a factor only holds goods consigned to him for the purpose of sale, he can exercise over them no other power of alienation. We fall back, therefore, in this view, upon the well known maxim of Ulpian: "Nemo plus juris ad alium transferre potest quam ipse haberet." [1] No doubt we must accept it as an elementary principle that property in a thing is essential to subject such thing to a valid lien.[2] And so is it specially determined in the standard Roman authorities. "Si debitor rem pignori datam vendidit et tradidit tuque ei nummos credidisti, quos ille solvit ei creditori cui pignus dederat, tibique cum eo convenit, ut ea res, quam jam vendiderat, pignori tibi esset, nihil te egisse constat, quia rem alienam pignori acceperis: ea enim ratione emptorem pignus liberatum habere coepisse neque ad rem pertinuisse, quod tua pecunia pignus sit liberatum." [3] It is true that as may be inferred from the passages last cited, a person who, when not owner of a thing, pledges such thing to another, is equitably bound to establish the lien when the thing falls into his possession. But this confirms the general principle that ownership technically is essential to the creation of a lien.

§ 747. *Rule, however, applied with the qualification that possession, by third persons dealing bonâ fide with possessor, may be held to be ownership.* — Even under the strict Roman rule, the pawnee is entitled to sell in order to reimburse his advances; [4] and the pawnee being possessor with power of sale, has logically as well as practically, so it is held, the power to hypothecate to a *bonâ fide* third party who receives possession of the goods. So universally is this accepted, that by the committee of the English house of commons, referred to in a following section, it was reported, and with substantial correctness, that in foreign countries, the rule of lien, as applied to movable property, is, that "possession constitutes title;" and that persons making advances

[1] L. 54. D. 50. 17.

[2] The best treatise on this topic is Dernburg's Pfandrecht nach der Grundsätzen des heutigen römischen Rechts. See also Gesterding's Pfandrecht; Windscheid's Pandekten, § 224.

[3] L. 2. D. XIII. 7. See, also, I. 2. 4. 6. 8. c. XIII. 16. And see particularly L. 18. D. XX. 1.

[4] See this fully exhibited in Dig. 20. 5. de distractione pignorum et hypothecarum; Cod. 8. 28. de distractione pignorum. Dernburg, *ut supra*, II. p. 95, 124; Windscheid, Pandekt. § 237.

of money upon such property are not required to inquire to whom it belongs, and are fully protected for the advances they make. "This," the committee add, "may be taken to be the law of France, Portugal, Spain, Sardinia, Italy, Austria, Holland, the Hanse Towns, Prussia, Denmark, Sweden, and Russia." [1]

§ 748. *English common law adopts without qualification the rule that ownership is necessary to hypothecate.* — The maxim that ownership is necessary to enable a lien to be instituted is adopted in its rudimental shape, detached from the qualifications just stated, as part of the English common law. In a case tried in 1783, before Chief Justice Lee, the court is reported to have held that though a factor has power to sell, and thereby bind his principal, yet he cannot bind or affect the property of the goods, by pledging them as security for his own debt, though there is the formality of a bill and receipt.[2] It is true that the authority of this case was shaken by a ruling of Lord Eldon in 1800. Sir W. Pultney had employed Petrie & Campbell as his agents in London for the sale of West India produce. Sugars were consigned to them, and they placed them with Keymer as a broker. Keymer advanced to Petrie & Campbell money and bills on account of the sugars to the amount of £18,000. Sir W. Pultney gave notice to Keymer not to sell, and offered indemnification for any demand or advance on account of the sugars; but he did not offer to indemnify against the acceptances. He was nonsuited by Lord Eldon, then chief justice, on the ground that he was bound to relieve them of the bills as well as of the cash, both being charges on the sugars; the court implying in this the right of the factor to charge the goods with a lien in favor of the broker.[3] But Lord Eldon's qualified recognition of the right of the factor, under such circumstances, to pledge, was not sufficiently emphatic or persistent to check the current of authority to the contrary. So far as concerns the English common law, such a right we must regard to be judicially negatived.[4]

[1] Report as cited in 1 Bell's Com. 7th ed. 520. See, also, Windscheid's Pandekt. § 240; Goldschmidt's Handels. II. p. 957.

[2] Paterson *v.* Tash, 2 Strange, 1178.

[3] Pultney *v.* Keymer, 3 Esp. 182.

[4] Daubigny *v.* Duval, 5 T. R. 604; Newsom *v.* Thornton, 6 East, 17; Martini *v.* Coles, 1 Maule & S. 140; Jolly *v.* Rathbone, 2 Maule & S. 298; Pickering *v.* Busk, 15 East, 38; Queiroz *v.* Trueman, 3 B. & C. 342, in which the king's bench argued for the policy as well as the authority of the rule. So,

§ 749. *Parliamentary modification of rule.* — It was soon found, however, that business would be greatly obstructed if the factor was to be precluded from subjecting the goods consigned to him to hypothecation. On principle it seemed extraordinary why, if he was entitled to sell to repay his advances, even though he should sell below the limit fixed by his principal,[1] he should not be allowed to hypothecate, when hypothecation would be generally more for the principal's interests than an immediate sale under such unauspicious conditions as a forced sale by the factor often imposes. In practice it was found that the business of a factor, receiving goods from a foreign principal on commission, was, in great commercial centres, very different from that of the broker or auctioneer by whom it is usual to put such goods directly into the market. To get a fair price for the goods, for instance, the factor would be obliged to send them to an auctioneer; and, by the custom of trade, the auctioneer has a lien on the goods for his advances, and for the expenses of the sale. To send the goods to the auctioneer subjects them to such a lien, yet, very often, unless the goods are sent to the auctioneer, they cannot be sold. So, also, as to brokers or selling agents. The moment a broker or selling agent obtains possession of the goods, his lien for advances and expenses, by the custom of trade, attaches; and the custom of trade is in such cases to control.[2] Yet, to sell the goods, if auction be not resorted to, it is necessary, in many places, to resort to a broker or selling agent, as an independent party. So, also, to take a still more common case, a factor in London, who receives from a foreign principal, goods to be sold in England, is obliged to make use of agents in a series of subordinate distributing centres, each of these agents taking possession of his share of the goods, and subjecting such share to his particular lien; and unless resort be had to such agents, no general sale for the goods could be secured. So pressing were these difficulties, that the interposition of parliament was invoked. A committee of inquiry was raised by the house of commons; and that committee reported that

also, First Bk. *v.* Nelson, 38 Ga. 391. In Williams *v.* Barton, 3 Bing. 139, Best, C. J., argued that the rule was not adapted to the wants of modern commerce, and was inconsistent with a liberal commercial polity. As to Pennsylvania practice, see Mackey *v.* Dillinger, 73 Penn. St. 85.

[1] See Frothingham *v.* Everton, 12 N. H. 239.

[2] See Frank *v.* Jenkins, 22 Ohio St. 597.

"if no easy mode suggested itself for the alteration of the law, so as to remove the present inconvenience, consistent with other principles of our jurisprudence, it would not be unwise to adopt the principle of foreign laws, that 'possession constitutes title;' because, though your committee are aware that some frauds would be the consequence of such an alteration of the law, yet the great and almost universal benefit to be derived by trade from the removal of injurious restrictions, would so enormously overbalance the disadvantage as to render it of comparatively little importance." By the act of 6 Geo. IV. c. 94 (modifying that of 4 Geo. IV. c. 83, which was the first legislative consequence of the report of the committee), it was provided that: "1. Any person intrusted for consignment or sale with goods, wares, or merchandise, who shall have shipped them in his own name, or any one in whose name goods shall be shipped by another, shall be deemed the true owner, to enable the consignee of such goods to a lien thereon for money, &c., advanced for the use of such person, as if he were the true owner; provided the consignee have no notice by bill of lading or otherwise, at or before the time of advance, that such person is not the true owner. 2. Persons intrusted and in possession of bills of lading, dock-warrants, &c., shall be deemed owners, &c., if there be no notice to the contrary. 3. No one is to acquire by deposit, pledge, &c., of goods in the hands of an agent or factor, for any debts previously due, any better title than that of such agent or factor at the time of the pledge or deposit." It was further provided that goods may be taken in pledge from known agents, but only to the effect of acquiring such interest as the agent has. Decisions having been rendered under these acts limiting their application,[1] the act 5 & 6 Vict. c. 39, enacted that the stat-

[1] See Evans *v.* Trueman, 1 Mood. & R. 10; Taylor *v.* Kymer, 3 B. & Ad. 320; Fletcher *v.* Heath, 7 B. & C. 517; Phillips *v.* Huth, 6 M. & W. 572; 9 M. & W. 647; Bonzi *v.* Stewart, 4 M. & G. 295, cited 1 Bell's Com. 7th ed. 521.

"Under the law with respect to the transactions of factors or agents on third parties that prevailed down to the Act 6 Geo. IV. c. 94, it was held that a factor, as such, had no authority to *pledge*, but only to *sell*, the goods of his principal; and it was repeatedly decided that a principal might recover back goods on which a *bonâ fide* advance of money had been made by a third party, without his being bound to repay such advance, and notwithstanding this third party was wholly ignorant that the individual pledging the goods held them as a mere factor or agent. It used also to be held that *bonâ fide* purchasers of goods from

utory powers above specified are extended to "any agent who shall thereafter be intrusted with the possession of goods, or of the documents of title to goods;" and agreements under the powers of the statute are declared to be binding, "notwithstanding the person claiming such pledge or lien may have notice that the person with whom such contract or agreement is made is only an agent." By the third section of the same act, if the pawnee is aware that the agent has not authority to pledge, or is otherwise guilty of *mala fides*, the pledge is not valid.

§ 750. *Adjudications under statutes.*— It has been held, under these statutes, that a picture dealer, whose ordinary business is not to sell pictures, but who nevertheless has particular pictures put in his hands to sell under his own name, is an agent intrusted with goods who can pledge the same; though it was admitted that the statutes do not cover the case of a mere servant or caretaker, or one who has possession for carriage, but not in order to sell.[1] And as an accepted interpretation we may hold that wherever the goods are sent by a principal to an agent for the purpose of selling, selling goods being in any way a part of the agent's business, then the agent is a person intrusted with the goods under the statutes.[2] But it is competent for the owner to show that the former agency for sale, under which the agent had got possession, had been withdrawn prior to the pledge, although the revocation was unknown to the *bonâ fide* pledgee, to the effect of defeating the pledge; the mere apparent ownership not being sufficient to conclude the question.[3] In any view the statutes do not cover pledges made by factors in satisfaction or

factors or agents not vested with the power of sale might be made liable to pay the price of the goods a second time to the real owner.

"The extreme hardship and injurious influence of such regulations are obvious. It is the business of a principal to satisfy himself as to the conduct and character of the factor or agent he employs; and if he make a false estimate of them, it is more equitable, surely, that he should be the sufferer than those who have no means of knowing anything of the matter. The injustice of the law in question, and the injury it did to the commerce of the country, had frequently excited attention, and were very ably set forth by the late Lord Liverpool, in his speech in the house of lords, on moving the second reading of the bill referred to." McCulloch's Commercial Dict. "Factor," p. 601.

[1] Heyman *v.* Flewker, 13 C. B. N. S. 519, per Willes, J.

[2] Baines *v.* Swanson, 4 B. & S. 270; Wood *v.* Rowcliffe, 6 Hare, 183; Fuentes *v.* Montis, L. R. 3 C. P. 268; L. R. 4 C. P. 93.

[3] Fuentes *v.* Montis, *ut supra.*

security of antecedent debts;[1] nor to meet contingent liabilities.[2] But accruing advances may be thus protected.[3] Whether the pawnee has such notice as to charge him with *mala fides* is to be determined from all the circumstances of the case.[4] If he has notice, — in other words, if he has reasonable grounds to conclude that the party pledging has no authority to pledge, — then his lien does not attach.[5]

§ 751. A vendee is not a person intrusted as agent under the acts.[6] In fine, the acts apply only to persons whose business it is to sell as factors;[7] nor do they apply to other than mercantile transactions,[8] and they do not cover, therefore, sales of furniture in possession of a tenant or bailee.[9]

[1] Learoyd *v.* Robinson, 12 M. & W. 745; Jewan *v.* Whitworth, L. R. 2 Eq. 692.

[2] Macnee *v.* Gorst, L. R. 4 Eq. 315.

[3] Portalis *v.* Tetley, L. R. 5 Eq. 315.

[4] Evans *v.* Trueman, 2 Mood. & M. 10; Goodman *v.* Harvey, 4 Ad. & El. 870; 1 Bell's Com. 7th ed. 523; Paley's Ag. by Lloyd, 227.

[5] See Cole *v.* N. W. Bank, infra, § 751, n. 9; Paley on Agen. by Lloyd, 226; and see Stevens *v.* Wilson, 6 Hill, 512; 3 Denio, 472. Supra, § 137.

[6] Jenkyns *v.* Usborne, 7 M. & G. 678; Van Casteel *v.* Booker, 2 Ex. 691; Fuentes *v.* Montis, L. R. 3 C. P. 268; *S. C.* L. R. 4 C. P. 93.

[7] See Monk *v.* Wittenbury, 2 B. & Ad. 484; Cooper *v.* Willomat, 1 C. B. 672; Warner *v.* Martin, 11 How. U. S. 209; Ullman *v.* Barnard, 7 Gray, 554; Mich. State Bk. *v.* Gardner, 15 Gray, 362; De Wolf *v.* Gardner, 12 Cush. 19; but see Heyman *v.* Flewker, 15 C. B. N. S. 519; Baines *v.* Swainson, 4 B. & S. 270.

[8] Loeschman *v.* Machin, 2 Stark. 311; Cooper *v.* Willomat, 1 C. B. 672; Galvin *v.* Bacon, 2 Fairf. 28; Stanley *v.* Gaylord, 1 Cush. 536; Gilmore *v.* Newton, 9 Allen, 171.

[9] Loeschman *v.* Machin, 2 Stark. 311. See on this whole question, as illustrating the difficulty of reaching a satisfactory construction of the statutes, Fuentes *v.* Montis, L. R. 3 C. P. 268; *S. C.* L. R. 4 C. P. 93; Shepherd *v.* Bk. of London, 7 H. & N. 661; Vickers *v.* Hertz, L. R. 2 Sc. App. 113; Benj. on Sales, § 20.

The questions mooted in the text are examined with much subtlety in an English case, decided in 1875. Cole *v.* N. W. Bk. 32 L. T. N. S. 742. The evidence showed that S. carried on the business of a warehouseman, and also that of a sheep's wool broker, at Liverpool. The plaintiffs, wool importers, were in the habit of sending to him bills of lading of cargoes about to arrive, requesting him to take charge of the wool as usual for their account, and send report and valuation, following their instructions as regards sale or disposal. These wools were both goats' and sheep's wool. S. used accordingly to land the cargoes and warehouse the wool. The plaintiffs then usually sent S. specific instructions for the sale of the sheep's wool, which instructions he carried out in his capacity of a sheep's wool broker, and having delivered it to the purchasers, he charged the plaintiffs with the warehouse rent for the time during which he had had the charge of it. The goats' wool he never sold, and the sheep's wool only upon the specific in-

§ 752. *Law in the United States.* — So far as concerns the

structions mentioned. On this occasion, having wool of both kinds belonging to the plaintiffs in his warehouse, but having received no instructions for sale or disposal, S. obtained an advance from the defendants' bank upon giving them a letter undertaking to hold all the wool as trustee for them, specifying the cargoes, and promising to lodge warrants for the same; S. then absconded, and the defendants took possession of the wool. Held, on appeal (affirming the decision of the court of common pleas), that S. was not an "agent intrusted with the possession of goods" within the true meaning of the Factors' Acts, so as to be able to create a valid pledge of any of the wool to the defendants as against the plaintiffs. It was ruled in the exchequer chamber that in order that a person may be an "agent intrusted with the possession of goods," within sec. 1 of 5 & 6 Vict. c. 39, he must be intrusted with them in his character of an agent for sale, or of an agent who as such ordinarily has a power of sale or pledge. If he has an independent business as warehouseman, and he is in possession of goods intrusted to him in that capacity, the Factors' Acts do not entitle a pledgee to assume that he has been intrusted in the one capacity rather than the other; and the fact of his carrying on the two trades will not bring a pledge made by him within the protection of the Factors' Acts, if it have been in fact made without the authority of his principal to sell or pledge. Blackburn, J.: "We think, however, that every case that has been decided since the passing of the statute confirms our view. In Wood *v.* Rowcliffe (6 Hare, 183), Wigram, V. C., held that a person intrusted to keep in her own house furniture belonging to the plaintiff, though in one sense an agent for the owner, was not an agent within the meaning of the act, and consequently could not make a good pledge. In Lamb *v.* Attenborough (1 B. & S. 831), it was held that a clerk who as such was possessed of delivering orders, was not an agent intrusted within the meaning of the act, and could not make a good pledge. In Heyman *v.* Flewker (13 C. B. N. S. 527), Willes, J., in delivering judgment, says, that what the case decided 'may be stated thus, that the term "agent" does not include a mere servant or caretaker, or one who has possession of the goods for carriage, safe custody, or otherwise, as an independent contracting party, but only persons whose employment corresponds to that of some known kind of commercial agent like that class (factors) from which the act has taken its name.' So it has been repeatedly decided that a sale or pledge of a delivery order, or other document of title (not being a bill of lading), by the vendee, does not defeat the unpaid vendors' rights, because the vendee is not intrusted as an agent. Jenkyns *v.* Usborne, 7 M. & G. 897, and McEwan *v.* Smith, 2 H. L. 310. And it may be observed, that in many of such cases, in which money has been advanced to the buyer on the faith of the document of title, the buyer must have been a person who carried on business as a commission merchant, yet it never seems to have occurred to any one that that fact made any difference. So it has been repeatedly held that where either the goods or documents of title are obtained from the owner (not on a contract of sale good till defeated, though defeasible on account of fraud, but) by some trick, a purchaser or pledgee acquires no title, for the trickster is

reaffirmation of the general doctrine of the English common law,

not an 'agent intrusted' with the possession. Kingsford *v.* Merry, 1 H. & N. 503; Hardman *v.* Booth, 1 H. & C. 803. Quite consistently with these latter decisions it was held first by the exchequer on demurrer, in Shephard *v.* The Union Bk. of London (7 H. & N. 761), and afterwards by the court of queen's bench on the facts in Baines *v.* Swainson (4 B. & S. 270), that if the true owner did in fact intrust the agent, as an agent, though he was induced to do so by fraud, a pledge by the agent would be good. In Fuentes *v.* Montis (L. Rep. 3 C. P. 268), it was decided first by the common pleas, and afterwards by the exchequer chamber, that after the true owner had demanded back his goods from the factor, who wrongfully refused to give them up, the factor ceased to be 'intrusted,' and a pledge subsequently made by him was not good. In delivering judgment, Willes, J., speaks of Baines *v.* Swainson as going to the extreme of the law, but does not express any dissent from it. Against this great mass of authority, Mr. Benjamin could produce nothing but some observations of Lord Westbury's in Vickers *v.* Hertz (4 L. Rep. 2 Scotch App.); but we think when those are rightly understood, they are not in conflict with the other decisions. The facts in Vickers *v.* Hertz have a very close resemblance to those in Baines *v.* Swainson. Campbell, who was a Glasgow broker, had represented to Vickers that he had made for him a sale to a principal of a large quantity of iron. This it seems was a falsehood. Vickers was induced by this falsehood to send a delivery order to Campbell. He did not intrust him with the delivery order with a view to his making a sale, for he thought it was already made; but he did intrust him in the course of his business as agent, with the document of title, that he might as such agent deliver the goods. The decision of the house of lords was that a pledge by Campbell was good under the Factors' Acts. Lord Westbury seems to have understood Willes, J., in Fuentes *v.* Montis, as expressing an opinion that the act did not embrace the case of any but a factor who was intrusted for the purpose of effecting a sale not yet made. Had Willes, J., expressed such an opinion, it would no doubt have been inconsistent with Baines *v.* Swainson, and been overruled by the house of lords in Vickers *v.* Hertz. We think, however, that he expressed no such opinion, and consequently that all authorities are in unison with the decision of the common pleas in this case, which we therefore affirm." Bramwell, B.: "I find as a fact in this case that Slee was in possession of this wool, only as a warehouseman. He certainly was in possession of the goats' wool in that and in no other character. He got and kept possession of the sheep's wool first in the same way as he did of the goats', and though he usually sold the sheep's wool, it was under specific instructions. I infer that as he did it usually, he did not do it always, and that there was nothing in the dealings between the parties to prevent the plaintiffs from having the sheep's wool sent to London, or employing somebody else to sell it. Moreover, his possession of the sheep's wool was not necessary to his selling it as a broker; nor I suppose a thing ordinarily the case with sheep's wool brokers, — nothing of the sort is stated. His possession of both classes of wool was accounted for in the same way unconnected with his being a broker, viz., by Liverpool

that ownership is necessary to the creation of a lien, we have several authoritative American decisions.[1] Chancellor Kent, indeed, treats this maxim as elementary. "Though a factor," he declares, "may sell and bind his principal, he cannot pledge the goods as a security for his own debt, not even though there be the formality of a bill of parcels and a receipt. The principal may recover the goods of the pawnee; and his ignorance that the factor held the goods in the character of factor is no excuse. 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 debt."[2] Yet even while professing to accept this prin-

being the port of landing, his having warehouses there, and being employed to land the wool, and warehouse it in his own warehouses. I may add, though it is not material, that it does not appear that the defendants knew he had the wool, nor documents of title to it. Indeed as to the Grecian's parcel they could not know it. These being the facts as I view and find them, was he an agent intrusted with the possession of goods within the meaning of 5 & 6 Vict. c. 39. sec. 1? The argument is that he is an agent, and that he is intrusted with the possession of goods. But unless we adopt a verbal construction that leads to absurdities, some limitations must be put on these words, some such limitation as 'agent, intrusted as such, and ordinarily having, as such agent, a power of sale or pledge.' Otherwise the words would include the case of an agent for the sale of one thing, — say a metal broker, intrusted with a thing unconnected with his agency, say wool, — and also the case of an agent for some purpose which neither in fact gave him power to sell or pledge, nor, according to the usage of business, appeared to give such power. For instance, a packer intrusted with goods, though known to be a packer by the lender of money, might pledge the goods to such lender. So a carrier, who is an agent to deliver goods from A. to B., would have power to pledge to C., who knew he was a carrier only, and as such only had possession. Because the conclusion of sec. 1 protects the transaction, though the pledgee 'may have had notice that the person is only an agent.' But only an agent in what sense? Surely only an agent such as the pledgee might well suppose had power to pledge. This clause and this part of it being intended to protect persons who deal with agents known to be such, who in reason may pledge because they usually make advances to those who have intrusted them with the goods. It may be said that these difficulties are met by the provision that the transaction must be *bonâ fide* in the man advancing the money. But the answer is not sufficient." *S. C.* in C. P. 30 L. T. N. S. 684; L. R. 9 C. P. 470.

[1] See Warner *v.* Martin, 11 How. 200; Michigan St. Bk. *v.* Gardner, 15 Gray, 362; Kinder *v.* Shaw, 2 Mass. 398; Bowie *v.* Napier, 1 McCord, 1; Rodriquez *v.* Hefferman, 5 Johns. Ch. 429; First Bank *v.* Nelson, 38 Ga. 391; Mackey *v.* Dillinger, 73 Penn. St. 85.

[2] Kent's Com. 12th ed. 626.

ciple, the courts, feeling its inconvenience, were ready to modify it by compelling it to yield to local usage. A factor receives goods from a foreign principal; and it is expedient that these goods should be sold at auction. By local usage the auctioneer may make advances on the goods in anticipation of the sale; and such advances, the auctioneer receiving the goods for the purpose, it has been held by the supreme court of Pennsylvania, are a lien on the goods.[1] Chancellor Kent, in accepting this decision as law, distinguishes it from the case where the auctioneer, receiving goods from the factor to sell, instead of advancing money upon them in immediate reference to the sale, according to usage, becomes, independently of usage, a pawnbroker, and advances money on them by way of loan, and in the character of pawnee instead of auctioneer. In the latter case, Chancellor Kent argues that the auctioneer has no lien, though he admits that between the two characters (that of the auctioneer acting as pawnbroker, and that of the auctioneer acting as salesman) it is difficult to discriminate.

§ 753. *American legislation authorizing factor to pledge.* — In many of the States of the American Union, statutes have been passed, similar in object to those in England first quoted, declaring that factors intrusted with goods to sell have a right to pledge to parties dealing *bonâ fide* with such factors, as owners. It is not within the range of this book to notice the discriminating features of these numerous statutes. In New York it is held that the statute applies to cases of contracts by factors, though the money or negotiable instrument was not given until after the contract was executed.[2] It is said generally that factors may pledge goods consigned to them for the payment of duties and other customary charges.[3] But when the pledge is for antecedent debts of the factor, or for debts due him out of the ordinary course of business, the pawnee has such notice as to put him on his inquiry, and defeat his claim.[4] And under the New York and Pennsylvania statutes, if the pawnee knows, or ought to know, the factor is not the owner, the pledge is void.[5]

[1] Laussat *v.* Lippincott, 6 Serg. & R. 386.

[2] Jennings *v.* Merrill, 20 Wend. 1.

[3] See Story on Agency, 8th ed. § 113; Evans *v.* Potter, 2 Gall. 13; Foss *v.* Robertson, 46 Ala. 483.

[4] Van Amringe *v.* Peabody, 1 Mason, 440; Kelly *v.* Smith, 1 Blatch. 290; Rodriquez *v.* Hefferman, 5 Johns. Ch. 429; Benny *v.* Rhodes, 18 Mo. 147.

[5] Stevens *v.* Wilson, 6 Hill, 512;

§ 754. *Factor may pledge in any view to amount of his lien.* — Such is unquestionably the rule under the English statute.[1] It is true that a factor cannot *tortiously* transfer his principal's goods by a transfer of his own lien to a pawnee;[2] but he can without doubt deliver over the actual possession of the goods to a third person, with notice of his lien, in which case the lien will be kept alive, and may be used as security for the third person.[3] And his right to do this may be inferred from the nature of his instructions, or the usages of trade.[4] If the pawnee knows, or has reason to know, that the goods do not belong to the factor, then, aside from the statutes, he acquires no lien.[5] Yet even though the factor should claim simply to be factor and nothing else, and though this should be fully known to the pawnee, it is still open to the pawnee to show that the power to pledge could be inferred from the nature of the owner's transactions with the factor.[6]

A mere clerk or subordinate agent cannot be regarded as a factor under the statutes;[7] nor does the statute protect pledges by warehousemen,[8] or by mere naked bailees.[9]

§ 755. *Factor may sue in his own name for price of goods sold by him.* — As a factor has a special ownership in goods consigned to him, it follows that he may sue in his own name for the price of such goods when sold by him.[10] So he may maintain suit in

S. C. 3 Denio, 472; Covill *v.* Hill, 6 N. Y. 374; Wilson *v.* Nason, 4 Bosw. 155; Bonito *v.* Mosquera, 2 Bosw. 40; Mackey *v.* Dillinger, 73 Penn. St. 85.

The New York act provides that when a factor has such documentary evidence as gives him exclusive control, he shall be deemed true owner, provided the true owner has intrusted him with the evidence for the purpose of disposing of the property. And if the warehouse receipt shows the factor to be so intrusted, third parties dealing with him are not prejudiced by the fact that the *invoice* would have shown that the goods belonged to the shipper. Cartwright *v.* Wilmerding, 24 N. Y. 521.

[1] Infra, § 766; Story on Agency, § 113, citing, in addition to cases above given, Urquhart *v.* McIver, 4 Johns. 103; McCombie *v.* Davis, 7 East, 5. See, as denying right, Walther *v.* Wetmore, 1 E. D. Smith, 7.

[2] Daubigny *v.* Duval, 5 T. R. 604.

[3] McCombie *v.* Davis, 7 East, 7; Man *v.* Shifner, 2 East, 523.

[4] Laussatt *v.* Lippincott, 6 S. & R. 386; Newbold *v.* Wright, 4 Rawle, 195; Graham *v.* Dyster, 2 Stark. 21.

[5] Stevens *v.* Wilson, 6 Hill, 512; 3 Denio, 472. Supra, § 150.

[6] See supra, § 40, 127.

[7] Zachrisson *v.* Ahman, 2 Sandf. 68; Bonito *v.* Mosquero, 2 Bosw. 401; Florence Sewing Machine Co. *v.* Warford, 1 Sweeny, 433, and cases cited in note to § 754.

[8] Cook *v.* Beal, 1 Bosw. 497; Covill *v.* Hill, 4 Den. 333, reversed on another point, 1 N. Y. 522.

[9] Pegram *v.* Carson, 10 Bosw. 505.

[10] Supra, § 425; Russel on Fact. & Brokerage, 241; Sadler *v.* Leigh, 4

his own name for trespasses and torts committed on the goods while in his possession.[1] He cannot, however, as against other claimants, recover more than his own lien.[2] The principal, by suing in his own name, may absorb the suit, so as to leave to the factor the right to pursue only for his advances and other personal claims.[3] But when suit is brought by the factor, the defendant is entitled to make any defence in such suit that he could have made had the suit been brought by the principal.[4]

§ 756. *Factor being a specialist cannot transfer his authority to another.* — What has just been said as to brokers, applies equally to factors. A factor, being selected on account of his skill and discretion, cannot ordinarily transfer his powers to another, or substitute another in his place.[5] But in cases of necessity such substitution may be made; and it is always lawful in respect to matters requiring the labor of subordinates.[6]

§ 757. *Goods held by factor not liable to execution for his debts.* — A factor holds a mass of goods which he is capable of disposing of in his own name. Has he such an ownership as can be passed by adverse process directed against him? This question was agitated in England under the statute of James I. c. 19, § 10, 11, which provides that goods in a bankrupt's possession, order, and disposition, with consent and permission of the true owner, and whereof the bankrupt is reputed owner, and of which he takes upon himself the sale, alteration, or disposition as owner, may be treated as his own. It was held that this statute does not cover the property held by a factor on account of his principal.[7] A

Camp. 195; Toland *v.* Murray, 18 Johns. 24; Murray *v.* Toland, 3 Johns. Ch. 573; White *v.* Chouteau, 10 Barb. 202; De Forest *v.* Ins. Co. 1 Hall, 84; Ladd *v.* Arkell, 5 Jones & Sp. 35; Girard *v.* Taggart, 5 Serg. & R. 27; Graham *v.* Duckerell, 8 Bush, 12.

[1] See supra, § 444; Short *v.* Spackman, 2 Barn. & Ad. 962.

[2] See United States *v.* Villalonga, infra, § 766.

[3] Supra, § 446; Russ. on Fact. & Brok. 245; Sadler *v.* Leigh, 4 Camp. 194; Taintor *v.* Prendergrast, 3 Hill, 72; Paley's Agency, 111, note 3.

[4] Atkyns *v.* Amber, 2 Esp. 493; Coppin *v.* Walker, 5 Taunt. 237; Leeds *v.* Marine Co. 6 Wheat. 565. Supra, § 447–8.

[5] Supra, § 28; Story Agency, 813, citing Catlin *v.* Bell, 4 Camp. 183; Soley *v.* Rathbone, 2 M. & S. 298; Cockran *v.* Irlam, 2 M. & S. 301, note; Schmaling *v.* Thomlinson, 6 Taunt. 146; Loomis *v.* Simpson, 13 Iowa, 532.

[6] See supra, § 30, 31; McMorris *v.* Simpson, 21 Wend. 610.

[7] L'Apostre *v.* Plaistrier, 1 P. Wms. 318; 1 Atk. 175; Godfrey *v.* Furzo, 3 P. Wms. 185; Tooke *v.* Hollingworth, 5 T. R. 226.

factor, so correctly argued Buller, J.,[1] being notoriously an agent for his consignors, and not pretending to hold out the goods in his possession as a bait by which to attract credit, is not within the reason of the statute; the object of which was to make a man's apparent means liable for his real debts.[2] Nor is this conclusion affected by the fact that the factor or commission merchant sells, in connection with the goods of his principal, his own goods.[3] So, also, goods sent for sale to a factor are exempted from a distress issued by the factor's landlord.[4] Yet if there is probable cause that the goods are the factor's, particularly if the principal is guilty of any laches in permitting the goods to appear to be the factor's, a contrary conclusion may be drawn.[5]

III. DUTIES OF FACTORS.

§ 758. *Factor must obey instructions as to mode of sale, but may sell at his discretion to prevent ruin.* — Ordinarily the factor is required to obey his principal's instructions as to the time and form of sale.[6] An interesting question here arises as to the rights of a factor who is limited to a minimum price by his principal. He has advanced on the goods, and the market is falling, or the goods are perishable. Are the goods to be sacrificed, and with them the factor's lien on them be impaired? The answer is that the principal in such case is to be notified that unless the advances are repaid by him within a reasonable time, the goods will be sold.[7] "If, however," such is the opinion of the supreme court

[1] Bryson *v.* Wylie, 1 B. & P. 83.

[2] See Horn *v.* Baker, 9 East, 245.

[3] Whitfield *v.* Brand, 16 M. & W. 282; Carruthers *v.* Payne, 2 M. & P. 441; Hamilton *v.* Bell, 10 Exch. 545; Bell's Com. 7th ed. 507, from whence these citations are borrowed.

[4] Joule *v.* Jackson, 7 M. & W. 451.

[5] Livesay *v.* Hood, 2 Camp. 83; Shaw *v.* Harvey, 1 Ad. & El. 920.

[6] Supra, § 247; Paley on Agency, 28; Smart *v.* Sanders, 5 C. B. 895; De Comas *v.* Prost, 3 Moore P. C. N. 158; Cornwall *v.* Wilson, 1 Ves. 509; Mann *v.* Laws, 117 Mass. 293; Evans *v.* Root, 13 Seld. 186; Millbank *v.* Dennistown, 21 N. Y. 386; Scott *v.* Rogers, 31 N. Y. 676; Williams *v.* Littlefield, 12 Wend. 362; Day *v.* Crawford, 13 Ga. 508; Atkinson *v.* Burton, 4 Bush, 299; Phillips *v.* Scott, 43 Mo. 86; Gray *v.* Bass, 42 Ga. 270; Capes *v.* Phelps, 24 La. An. 562.

[7] See supra, § 258. See Kemp *v.* Prior, 7 Ves. Jr. 240; Blot *v.* Boiceau, 1 Sandf. Sup. Ct. 111; Porter *v.* Patterson, 15 Penns. St. 229; Field *v.* Farrington, 10 Wall. 171; Ward *v.* Bledsoe, 21 Tex. 251.

"A factor who sells a commodity under the price he is ordered may be obliged to make good the difference, unless the *commodity be of a perisha-*

of the United States, "the factor makes advances, or incurs liabilities on account of the consignment, by which he acquires a special property therein, then the factor has a right to sell so much of the consignment as may be necessary to reimburse such advances or meet such liabilities; unless there is some existing agreement between himself and the consignor, which controls or varies this right. Thus, for example, if contemporaneous with the consignment and advances or liabilities, there are orders given by the consignor, which are assented to by the factor, that the goods shall not be sold until a fixed time, in such a case the consignment is presumed to be received by the factor subject to such orders; and he is not at liberty to sell the goods to reimburse his advances or liabilities, until after that time has elapsed. The same rule will apply to orders not to sell below a fixed price; unless, indeed, *the consignor shall, after due notice and request*, refuse to provide any other means to reimburse the factor. And in no case will the factor be at liberty to sell the consignment contrary to the orders of the consignor, although he has made advances or incurred liabilities thereon, *if the consignor stands ready, and offers to reimburse and discharge such advances and liabilities.* On the other hand, where the consignment is made generally without any specific orders as to the time or mode of sale, and the factor makes advances or incurs liabilities on the footing of such consignment, there the legal presumption is, that the factor is intended to be clothed with the ordinary rights of factors to sell in the exercise of a sound discretion, at such time and in such mode as the usage of trade and his general duty require; and to reimburse himself for his advances and liabilities out of the proceeds of the sale: and the consignor has no right, by any subsequent orders, given after advances have been made or liabilities incurred by the factor, to suspend or control this right of sale except so far as respects the surplus of the consignment, not necessary for the reimbursement of such advances or liabilities. Of course, this right of the factor to sell to reimburse himself for his advances and liabilities applies with stronger force to cases where

ble nature and not in a condition longer to be kept; and if he purchase goods for another at a fixed rate, and their price having afterwards risen, he fraudulently takes them himself, and sends them somewhere else, in order to secure an advantage, he will be found, by the custom of merchants, liable in damages to his principal." M'Culloch's Commercial Dict. *in loco.*

the consignor is insolvent, and where, therefore, the consignment constitutes the only fund for indemnity." [1] This distinction has been generally accepted in the United States.[2]

§ 759. In England it has been held that a factor who advances on his consignor's goods does not hold such goods as a pawnee, until he is in possession.[3] And it is said that even when a factor is in possession, he cannot sell contrary to his principal's orders, although the latter has refused, when called upon, to pay the advances, and although the factor should show due diligence in the ordering of the sale.[4] At the same time, when goods are perish-

[1] Brown *v.* M'Gran, 14 Peters, 480; Field *v.* Farrington, 10 Wall. 141.

[2] See Parker *v.* Brancker, 22 Pick. 40; Upham *v.* Lefavour, 11 Metc. 174; Frothingham *v.* Everton, 12 N. H. 239; Weed *v.* Adams, 37 Connect. 378; Marfield *v.* Goodhue, 3 Comst. 62; Blot *v.* Boiceau, 3 Comst. 78; Hinde *v.* Smith, 6 Lansing, 464; Wheelan *v.* Lynch, 65 Barb. 327; Gihon *v.* Stanton, 9 N. Y. (5 Seld.) 476; Milliken *v.* Dehon, 27 N. Y. 364; Blackman *v.* Thomas, 28 N. Y. 67; Stall *v.* Meek, 70 Penn. St. 181; Whitney *v.* Wyman, 24 Md. 131; Ward *v.* Bledsoe, 21 Tex. 251.

Where goods were consigned to a factor for sale, without instructions as to the price for which they were to be sold, and the factor advanced money to the consignor to an amount greater than the value of the goods, and, after such advances, the consignor instructed the factor not to sell for less than a certain price, as he could do better by having the goods returned, and the factor thereupon informed the consignor that the goods had not been sold, and that it was doubtful whether they could be sold at the price fixed, and that he would await further instructions, stating that if the consignor wished to remove the goods, an account of the advances would be rendered, and the amount could be remitted at the time the goods were ordered to be removed, to which the consignor made no response. Held, that after the lapse of a reasonable time, the factor might sell the goods for the best price he could get in the market. Mooney *v.* Musser, 45 Ind. 373.

[3] Donald *v.* Suckling, 7 B. & S. 783; *S. C.* L. R. 1 Q. B. 585; Benj. on Sales, § 769, 793.

[4] Smart *v.* Sanders, 5 Man., G. & S. (5 C. B.) 895; De Comas *v.* Prost, 3 Moore P. C. N. S. 158. See Graham *v.* Ackroyd, 10 Hare, 192; and Kent's Com. 12th ed. 642, note.

A commission merchant wrote to a manufacturer of goods, requesting a consignment of his goods, invoiced at the lowest rates, stating what the charges would be, promising to pay the return freight if satisfactory prices could not be obtained, and to be responsible for any neglect by him to deal with the goods according to the manufacturer's orders. The manufacturer replied, in a letter accompanying the shipment of goods, that he had invoiced the goods at the lowest selling prices, and that "the small shipment" then made "will be duplicated if prices obtained warrant." The invoice contained no direction to sell the goods at the invoiced prices. The consignees sold for a less price. The consignor wrote him that the price obtained was not satisfactory, but made no claim that any order had

ıle, the factor is not bound to retain them until the market is ·er; but rather than see their value thus lost, he is at liberty

en violated, and afterwards brought action to recover the difference beeen the invoice price and that for ıich the goods were sold, in which e declaration contained no averment at the consignee had acted unfaithlly or injudiciously. Held, that the tion could not be maintained. Mann Laws, 117 Mass. 293.

Devens, J.: "The question prented by the report in this case ises upon the declaration and the nstruction of the correspondence hich constituted the contract beeen the parties, and brings before only the inquiry whether the dendants were bound by any direction the plaintiffs, in accepting the congnment of their goods, not to sell ıem for less than the invoice prices ıntained in the plaintiffs' bills. The eclaration contained no averment that ıe defendants had not acted faithfully ıd judiciously in the sale made by ıem. The plaintiffs did not desire amend their pleadings, and while ertain evidence was offered and reıcted by the court as immaterial to ıe issue raised, no exception appears have been taken to its exclusion.

"We are of opinion that the court orrectly ruled that the defendants ere not limited in their sales to the ıvoice prices. While the plaintiffs ad a right to fix definitely the prices f their goods, and to direct positively ıat none should be sold for less than ıey thus fixed, the giving of prices ıerely in the invoice which accomanied the shipment cannot be considred such a direction. In their letter equesting the consignment of August 4, 1872, while the defendants desire he plaintiffs to invoice the goods as ow as they can, they inform the plainiffs what the charges are to be, what they will do as to payment of return freight if satisfactory prices cannot be obtained, and that they will be responsible for any neglect of duty or of the orders which the plaintiffs may give. In the reply of the plaintiffs of August 19, 1872, which accompanied the shipment of goods, they state that they have invoiced the goods at the lowest selling prices, and that the invoice inclosed 'will be duplicated if the prices obtained warrant.' The correspondence on both sides, and especially the promise of the plaintiffs to duplicate 'the small shipment' actually sent, 'if prices obtained warrant,' indicate that the goods were sent in order to make an experiment upon the market, and that the invoice prices were for the information, and, to some extent, perhaps, for the guidance of the consignees, but there is no direction to them to hold the goods if these prices cannot be obtained. Upon a declaration, therefore, which alleges no misconduct on the part of the defendant, but simply a violation of an order not to sell at less than the invoice prices, the plaintiffs cannot recover.

"While the contract between the parties is to be determined by the letters of August 14 and August 19, 1872, as tending to show that the construction given by the court is the natural one, it is to be observed that the construction which the plaintiffs originally gave themselves was the same. This is sufficiently shown by their letter of September 11, 1872, in which, while they say that the prices are not satisfactory, they make no claim that any order has been violated by selling at less than the invoice prices, but object only to the commissions, which they think higher than have been agreed to." Ibid. 296.

to sell at a price below that limited in his instructions.[1] So, a factor may disregard instructions to sell immediately, if it is manifest that his security will be thereby ruined, or if, in the exercise of a sound discretion, he believes that indemnity for advances made or liabilities incurred will depend upon withholding the goods from market.[2]

H., employed as agent to negotiate sales for a foreign company, received from it a lot of goods with an order not to deliver them out of his possession or control till he should receive the price thereof from S., but caused them to be transshipped on board a vessel named by S., taking the mate's receipt in his, H.'s name, which S., on presentation, deferred to pay, and without paying, escaped with the goods to Melbourne. Held, that H. was liable to his principal for their value. Stearine, &c. Co. *v.* Heintzman, 17 C. B. N. S. 56.

An agent to buy and ship wheat to Nashville, shipped a quantity to Sander's Ferry, on the Cumberland River. The boat containing it sank when near its destination, and the agent sold the wheat to the carrier. Held, that the emergency did not authorize the sale. Foster *v.* Smith, 2 Cold. 474.

When goods are consigned to a factor without limiting him as to price, he may sell them whenever, in the exercise of a sound discretion, he thinks it advantageous to do so; and in such case, when the price does not equal the advances made by the factor, the shipper will be responsible for the difference. Given *v.* Lemoine, 35 Mo. 110.

[1] See supra, § 258, 260; Chapman *v.* Morton, 1 Mees. & W. 540. As to the Roman law, see supra, § 156, 258–269, 747.

[2] Supra, § 259. Weed *v.* Adams, 37 Conn. 378. A., the lessee of a cotton plantation, contracted with W., a commission merchant, for advances, and agreed to give W. a special lien on all the crops, and to consign them, as fast as prepared for market, to him for sale, the proceeds to be applied in payment of the advances, expenses, and commissions, and the balance to be paid to A. Advances were made to A. and the goods consigned to W. pursuant to the contract. A. instructed W. to sell the cotton as fast as received, but the order was not obeyed. At the time of the first shipment, cotton was $1.85 per pound. Soon after the last shipment it was $1.15 per pound, at which price the whole was sold. The avails were insufficient to pay the advances. If the order had been obeyed there would have been sufficient to pay the advances, commissions, and all expenses, and leave a considerable balance for A. It did not appear that the order, if complied with, would have impaired W.'s security, nor that he had any fears that such would be the result; but he held the cotton in good faith, with the expectation of obtaining higher prices for the benefit of all concerned. Held: 1. That W. was not justified in disobeying the orders of A. 2. That W. had no right under the contract to retain the cotton till all was shipped, for the purpose of preserving his lien on the accumulated shipments. 3. That the special lien by contract conferred upon W. no additional rights and powers, after the property came into his possession by consignment. Weed *v.* Adams, 37 Conn. 378. See, also, Field *v.* Farrington, 10 Wallace, 141. The meas-

§ 760. *Factor cannot purchase or sell on his own account.* — s we have already seen, an agent employed to sell is not lowed to be the purchaser,[1] unless he make known that he tends to be such, and furnish his employer with all the knowlge he himself possesses,[2] or unless the court, perceiving that ıe principal would lose by a resale, think fit on that account to ɔhold the transaction. Nor can an agent employed to purıase be himself the seller, unless there be a plain and intelligent ıderstanding between him and the principal.[3] And if an agent ho is employed to purchase, purchase for himself, he will be ınsidered a trustee for his principal.[4]

§ 761. *Cannot dispute his principal's title.* — A factor cannot spute the title of his principal;[5] and he is bound to assume at his principal is the owner of goods consigned to him for le, and his allegiance is alone due to his principal. He cannot stify the refusal to pay over the proceeds of such sale upon the ound that the same have been seized by virtue of an attachent against a third person, which attachment is void.[6]

IV. PRINCIPAL'S RIGHTS AGAINST VENDEE AND AGAINST GOODS.

§ 762. *Principal may sue vendee in his own name.* — This cessarily follows from what has been stated; and the suit may either for the price of the goods, or for damages for non-perrmance of the contract.[7] This right exists though the factor himself entitled to sue on the contract;[8] or though the vendee

ɜ of damages recoverable from a nmercial factor or agent who sells ɔds intrusted to him for sale at a ɛcified price, at less than the price ɛhorized, has been ruled to be the ıual damage sustained. Hence, in action against a factor to recover such a sale where no increased rket value for the goods was shown ɛr the price realized, it has been d that there was no damage, and ıld be no recovery. Hinde *v.* Smith, Lans. (N. S.) 464. See Wheelan Lynch, 65 Barb. (N. S.) 327.

[1] Supra, § 232, 594.

[2] Supra, § 232, 235.

[3] Supra, § 239.

[4] Smith's Mercantile Law, 114; Massey *v.* Davies, 2 Ves. Jr. 317; Charter *v.* Trevellyan, 11 Cl. & Fin. 714; Bunker *v.* Miles, 30 Me. 431; Walker *v.* Palmer, 24 Ala. 358; White *v.* Ward, 26 Ark. 445; Leake *v.* Sutherland, 25 Ark. 219, and cases cited fully supra, § 231–244.

[5] Roberts *v.* Ogilvy, 9 Price, 269; Kievan *v.* Sanders, 6 Ad. & El. 515; Marvin *v.* Elwood, 11 Paige, 365. See supra, § 242.

[6] Barnard *v.* Kobbe, 54 N. Y. 516.

[7] See supra, § 398, 400–402. Girard *v.* Taggart, 5 Serg. & R. 19; Brewster *v.* Saul, 8 La. 296.

[8] Supra, § 402.

supposed the factor to be the real vendor, the true principal being unknown.[1] This right, however, is subject to the equities which the vendee has acquired by dealing *bonâ fide* with the agent as principal, or which the agent may have acquired from the course of the dealing between him and the vendee.[2] A foreign principal's rights are noticed elsewhere.[3]

§ 763. *Principal may follow his goods or their proceeds into the hands of the factor's representatives.* — Whoever represents the factor, whether assignee, administrator, or agent, stands in this respect in his shoes, taking the goods subject to the same liabilities as they were subject to in the hands of the factor himself.[4] It is otherwise, however, as to *bonâ fide* vendees without notice.[5]

V. JOINT PRINCIPALS AND JOINT FACTORS.

§ 764. *Consignors employing the same factor run pro rata risks.* — It is said that merchants employing the same factor run the joint risk of his actions, although they are strangers to each other: thus, if different merchants remit to a factor different bales of goods, and the factor sell them as a single lot to an individual who is to pay one moiety of the price down and the other at six months' end; if the buyer fail before the second payment each merchant must bear a proportional share of the loss, and be

[1] Grojan *v.* Wade, 2 Stark. 443; supra, § 403; Small *v.* Atwood, 1 Younge, 407; Shurr *v.* Case, L. R. 5 Q. B. 650; Walter *v.* Ross, 2 Wash. C. C. 283; Kelley *v.* Munson, 7 Mass. 319; Ilsey *v.* Merriam, 7 Cush. 242; Hogan *v.* Short, 24 Wend. 461; Leverick *v.* Meigs, 1 Cowen, 646; Taintor *v.* Prendergrast, 3 Hill, 72; Conklin *v.* Leeds, 58 Ill. 178; Girard *v.* Taggard, 5 Serg. & R. 19; Merrick's Est. 5 Watts. & S. 9; *S. C.* 2 Ashmead, 485.

[2] Stracy *v.* Decy, 7 T. R. 361; Coates *v.* Lewes, 1 Camp. 444; Carr *v.* Hinchliff, 4 B. & Cres. 547; Hudson *v.* Granger, 5 B. & Ald. 27; Merrick's Est. 5 Watts & S. 9; *S. C.* 2 Ashmead, 485; Taub *v.* Millikin, 57 Me. 63. See for other cases supra, § 405, 723, 741.

[3] Infra, § 793. See Taintor *v.* Prendergrast, 3 Hill, 72.

[4] Walker *v.* Burnell, 1 Doug. 317; Bolton *v.* Puller, 1 Bos. & P. 539; Taylor *v.* Plummer, 3 M. & S. 562; Jackson *v.* Clarke, 1 Y. & J. 216; Parke *v.* Eliason, 1 East, 544; Conard *v.* Ins. Co. 1 Peters S. C. 386; Houraquebie *v.* Girard, 2 Wash. C. C. 212; Thompson *v.* Perkins, 3 Mason, 232; Le Breton *v.* Pierce, 2 Allen, 8; Farmers' & Mech. Bk. *v.* King, 57 Penns. St. 202; Sheffer *v.* Montgomery, 65 Penns. St. 329; Green *v.* Haskell, 5 R. I. 467. Supra, § 201, 412.

[5] Taylor *v.* Plumer, 3 M. & S. 562; Veil *v.* Mitchell, 4 Wash. C. C. 105. See this question discussed more fully supra, § 201.

content to accept his dividend of the money advanced.[1] But whether the factor in this or any other case is at liberty to sell on credit, depends upon circumstances already discussed.[2] If he can sell for credit, it would seem to be within his power to take a lumping note for the whole sale, such note being payable to himself on behalf of his several principals.[3] In a Virginia case, where a factor took a lumping note of this character, it was proved that it was the usage in Petersburg for a factor, when selling on credit, to take one note, payable to himself, for the goods of several principals sold to one vendee, and to have this note discounted for the benefit of his principals. It was held by the supreme court that by this process the factor made the note his own, and was liable for the amount to his principals, though the maker of the note became insolvent.[4] The more correct course undoubtedly is for the factor to keep the goods of each principal distinct, and, in cases of credit, have a distinct security for each.[5]

§ 765. *Joint factors have independent powers, but are jointly liable.* — Where goods are consigned to two factors jointly, each is said to have entire control and power over the goods consigned,[6] though this must yield to any indications from the consignment that the two are to act jointly. But however this may be, it is clear that each of such factors is liable for the other's acts.[7]

VI. FACTOR'S LIEN.

§ 766. *Factor has possession in goods, and property to the extent of his advances, but nothing more.* — The factor has the possession of the goods committed to him by the owner, and with this possession he is entitled to the management and control of the goods. He has, it has been correctly said, a special property in the goods,[8] he being, to the extent of his advances, a purchaser

[1] Beawes, Lex Merc.; Maline, Lex Merc. 80; Corlies *v.* Cumming, 7 Cowen, 154.

[2] See supra, § 740; Jackson *v.* Baker, 1 Wash. C. C. 395.

[3] Corlies *v.* Widdifield, 6 Cowen, 181.

[4] Johnson *v.* O'Hara, 5 Leigh, 456.

[5] Ibid.; Clarke *v.* Tipping, 9 Beav. 284. See supra, § 141–143.

[6] Godfrey *v.* Saunders, 3 Wils. 94, 114; Willett *v.* Chambers, Cowp. 814. Supra, § 141–143.

[7] Godfrey *v.* Saunders, 3 Wils. 94, 114.

[8] Infra, § 813; Story on Agency, § 34, citing Bryce *v.* Brooks, 26 Wend. 367; Jordan *v.* James, 5 Hamm. Ohio, 99; Marfield *v.* Douglass, 1 Sandf. Sup. Ct. 360. See, also, Weed *v.* Adams, 37 Conn. 378; Sawyer *v.* Lorillard, 48 Alab. 332.

for value;[1] but this cannot be understood as going further than claiming for him a right to retain the goods until his commissions, expenses, and advances are repaid.[2] An interesting case to this effect was decided by the supreme court of the United States in 1875. Under the third section of the act of Congress of March 12, 1863 (12 Stat. 820), which authorizes a suit against the United States for the recovery of the proceeds of sale of captured or abandoned property, the claimant in the case before the court sought to recover the proceeds of four hundred and ninety-three bales of cotton, which were seized by the army of the United States at Savannah, in December, 1864. After its seizure the cotton was turned over to the agents of the treasury department and sold, and the proceeds of the sale were paid into the treasury. Of the whole number of bales captured, one hundred and ninety-six belonged to the claimant, but the remainder he had received as a cotton factor from various persons, and had made advances thereon in money of the Confederate States. The aggregate of these advances was $51,153.17. It does not appear from the finding of facts who these different owners were, how much had been advanced to each, or what was the value of the advances in money of the United States. Upon this state of facts the court of claims gave judgment in favor of the claimant, not only for the proceeds of sale of the cotton which belonged to him in his own right, but also for the entire proceeds of that which he had received as a factor, and upon which he had made advances. The question submitted to the supreme court of the United States was whether, as to the cotton upon which the claimant had made partial advances as a factor, he can be considered the owner thereof, and having a right to its proceeds within the meaning of the act of Congress. "No doubt," such is the opinion of the court on this question, "a factor who has made advances upon goods consigned to him may be regarded in a limited sense, and to the extent of his advances, as an owner. Yet, in reality, he has but a lien with a right of possession of the goods for its security. He may protect that possession by suit against a trespasser upon it, and he may sell the property to reimburse advances, remaining, however, accountable to his con-

[1] Hall *v.* Hinks, 21 Md. 406; Williams *v.* Tilt, 36 N. Y. 319; Ohio & M. R. R. *v.* Kasson, 37 N. Y. 218.

[2] See Beebe *v.* Mead, 33 N. Y. 587.

signor for any surplus. But after all he is not the real owner. He is only an agent of the owner for certain purposes. The owner may, at any time before his factor has sold the goods, reclaim the possession upon paying the advances made with interest and expenses. He has not lost his ownership by committing the custody of the goods to a factor and by receiving advances upon them. He is still entitled to the proceeds of any sale which may be made, even by his agent, the factor, subject to a charge of the advances and expenses. A factor, therefore, notwithstanding he may have made advances upon the property consigned to him, has but a limited right. That right is sometimes called a special property, but it is never regarded as a general ownership. At most it is no more than ownership of a lien or charge upon the property. Such is unquestionably the doctrine of the common law, and there is nothing in any statute affecting this case that changes the doctrine. In this view of the case in hand it is clear that the claimant is not the 'owner of the captured property,' having a right to the 'proceeds thereof,' within the meaning of the Captured or Abandoned Property Act. He owns of the cotton consigned to him nothing but a lien for his advances and expenses, and he is, therefore, not entitled to the entire proceeds of the sale of the property."[1]

§ 767. *Lien covers advances, expenses, and commissions.* —A factor, being in possession of goods consigned to him for sale, is entitled to retain the goods until his advances, expenses, and commissions are repaid. Nor is this right limited to charges on the particular consignment of goods. It covers a general balance on the accounts between the factor and the principal, so far as concerns the business of factorage.[2]

[1] United States *v.* Villalonga, July 12, 1875.

[2] Smith's Merc. Law, 338; Paley's Agency, 128; Story's Agency, § 576; Kruger *v.* Wilcox, Ambler, 252; Godin *v.* London Ins. Co. 1 W. Bl. 104; *S. C.* 1 Burr. 489; Hudson *v.* Granger, 5 B. & Ald. 22; Gibson *v.* Stevens, 8 How. U. S. 384; Jarvis *v.* Rogers, 15 Mass. 389; Winter *v.* Coit, 7 N. Y. (3 Seld.) 559; Peisch *v.* Dickson, 1 Mason, 10; Sewall *v.* Nicholls, 34 Me. 582; Hoy *v.* Reede, 1 Sweeny, 626; Myer *v.* Jacobs, 1 Daly, 32; Winne *v.* Hammond, 37 Ill. 99. And this includes debts, connected with the agency, which the factor has undertaken as surety for the principal. Drinkwater *v.* Goodwin, Cowp. 251; Hammond *v.* Barclay, 2 East, 227. Infra, § 813–820. It includes interest on subsequent advances. Heins *v.* Peine, 6 Rob. 420.

If the consignee of a cargo, by agreement with the owner, charters a ship, and expends the money to enable her

768. *Lien does not cover charges not incidental to factorage.* — The lien undoubtedly covers all charges based on the factorship relation; but it cannot be stretched so as to protect charges outside that relation. It does not include, therefore, debts due from the principal to the factor before the relation of principal and factor began, unless such debts were contracted in anticipation of the relation and in preparation for it.[1]

§ 769. *Factor must be in possession of goods.* — To enable the factor's lien to attach, he must be in possession of the goods with the owner's consent.[2] But the possession of an agent of the factor is the possession of the factor himself;[3] and delivery of produce to a common carrier consigned to factors under a contract before that time made, is such a delivery to the latter as will cause their lien to attach for advances made.[4] The question is, was the possession out of the consignor, and did he intend to vest the possession in the factor? If so, the lien of the latter attaches to the goods while still in transit.[5]

to fetch the cargo, he is, without any special agreement, entitled to a lien on the proceeds of such cargo in his hands for the advance so made; and a person who is not the consignee has, under such circumstances, a similar lien on the proceeds of the cargo, if he can arrest such proceeds before they come to the hands of the shipper of the cargo. Young *v.* Neill, 32 Beav. 529. The factor has no lien for specific charges when the balance of the account is against him. Enoch *v.* Wehrkamp, 3 Bos. 398.

[1] Infra, § 818; Smith's Merc. Law, 340; Stevens *v.* Robins, 12 Mass. 182; Jarvis *v.* Rogers, 15 Mass. 389; Walker *v.* Birch, 6 T. R. 258; Houghton *v.* Matthews, 3 Bos. & P. 485; Olive *v.* Smith, 5 Taunt. 56.

[2] Brown *v.* Wiggin, 16 N. H. 312; Rice *v.* Austin, 17 Mass. 197; Byers *v.* Danley, 27 Ark. 77; Legg *v.* Evans, 6 Mees. & W. 41; Hallett *v.* Barsfield, 18 Ves. 188; Milliken *v.* Shapleigh, 36 Mo. 596. See infra, § 822.

[3] Infra, § 822–3; Clemson *v.* Davidson, 5 Binn. 392; Gainsford *v.* Detillet, 13 Mart. 284; McCombie *v.* Davies, 7 East, 5; Kent's Com. 12th ed. 639.

[4] Holbrook *v.* Wight, 14 Wend. 169; Wade *v.* Hamilton, 30 Ga. 450; Elliott *v.* Cox, 48 Ga. 39. But see Bryan *v.* Nix, 4 Mees. & W. 775; Kinloch *v.* Craig, 3 T. R. 119, 783; Holland *v.* Humble, 1 Starkie, 143; Bank of Rochester *v.* Jones, 4 Comst. 497; Lewis *v.* R. R. 40 Ill. 281; Strahorn *v.* Stock Co. 43 Ill. 424; and see generally, Cator *v.* Merrill, 16 La. An. 137; Valle *v.* Cerre, 36 Mo. 575; but see as to conflicting parties, § 773.

After the consignor of goods has changed their destination while *in transitu*, the first consignee, if he does not obtain possession of them before the carrier has received notice thereof, acquires no lien on them for any general balance against the consignor. Strahorn *v.* Union, Co. 43 Ill. 424.

No lien accrues until there is an acceptance of the goods. Winter *v.* Coit, 7 N. Y. 288.

[5] Gibson *v.* Stevens, 8 How. U. S. 384; Elliott *v.* Cox, 48 Ga. 39; Davis

§ 770. *Purchaser's set-off against vendor no defence to factor's claim for lien.* — In a case before Lord Mansfield, it was declared, that in an action brought by the factor, to compel the payment of the price of the goods sold by him, it would be no defence for the buyer, that as between him and the principal, he, the buyer, ought to have the money, because the principal is indebted to him in more than that sum; for the principal cannot make such a defence, except where the factor has nothing due him.[1] And it may be generally held that the purchaser cannot set up a debt due to himself by the vendor so as to defeat the factor's lien.[2] But it is said that if the set-off has attached before notice of lien to the purchaser, the lien cannot avail.[3]

§ 771. *Factor may set off his lien against a debt due him from the purchaser.* — As the factor is absolutely entitled to receive

v. Bradley, 28 Vt. 118; Nesmith *v.* Drying Co. 1 Curtis, 130; Sumner *v.* Hamblet, 12 Pick. 76; Winter *v.* Coit, 7 N. Y. 3 Seld. 288.

The plaintiffs were merchants in London and Melbourne. The defendant consigned goods to the Melbourne house, on an agreement that the advances made to him by the plaintiffs in London and Melbourne should be retained out of the proceeds of the goods, and that the surplus should be handed over to the defendant. The Melbourne house remitted to the defendant a sum as the balance, but omitted to retain the advances made in London. Held, that the plaintiffs had merely a right of lien or of retainer, which they had abandoned by remitting the balance. Bligh *v.* Davies, 28 Beav. 211.

A. being interested in a moiety of a cargo, and having entered into a contract with B. to let him have half his share, wrote to C. and D., the consignees, informing them, and authorizing them to sell the cargo, and carry the proceeds to their separate accounts. The consignees acted upon this, and made advances to B., and B. also charged his interest in favor of E. It had been agreed between A. & B. that they should pay for the cargo by two bills, each to be paid by one of them. B. did not pay his bill; it did not appear whether A. had paid it or not. Held, that A. had no lien on the proceeds of B.'s share, either as against him, or as against C. and D., or against E. Holroyd *v.* Griffiths, 3 Drew, 428.

In Louisiana, by the act of March 28, 1867, the factor has a lien for money advanced to the planter to enable him to raise a crop. The General Quitman *v.* Packard, 22 La. An. 70; Moore *v.* Gray, 22 La. An. 438; Smith *v.* Williams, 22 La. An. 268. So in Georgia, Tift *v.* Newsom, 44 Ga. 600.

[1] Drinkwater *v.* Goodwin, Cowp. 256.

[2] Atkyn *v.* Amber, 2 Esp. Cas. 493; Paley's Agency, 364. See Morris *v.* Cleasby, 1 Maule & S. 576; Hudson *v.* Granger, 5 B. & Ald. 27. Infra, § 813–820.

[3] Story's Agency, § 407, citing Drinkwater *v.* Goodwin, Cowp. 251; Coppin *v.* Walker, 7 Taunt. 237; Coppin *v.* Craig, 7 Taunt. 243. See infra, § 813–821.

his advances and expenses out of the goods, it follows that if he is indebted to the purchaser for the amount of such advances and expenses, he may set-off his lien against such debt, and this will operate as an extinguishment of the debt as against the principal or his representatives.[1]

§ 772. *Lien yields to private agreement between the parties.* — While a factor's lien, to the extent just stated, is based not only on convenience but on principle, it may, like all other similar securities, be waived by the factor himself.[2] Nor is it necessary to produce an express agreement to establish such waiver. It may be inferred from usage,[3] or the prior dealings between the parties.[4] A factor cannot set up a general lien against the express directions of the consignor, given to him at the time the cargo is accepted.[5]

[1] Hudson *v.* Granger, 5 B. & Ald. 27; Paley's Agency, 285. Infra, § 820.

[2] Infra, § 820; Kirkman *v.* Shawcross, 6 T. R. 14; Walker *v.* Birch, 6 T. R. 258; Paley's Agency, 128; Story's Agency, § 378; Mabar *v.* Massias, 2 W. Bl. 1072. See Bryce *v.* Brooks, 29 Wend. 367.

[3] Rushford *v.* Hadfield, 7 East, 224.

[4] See Paley's Agency, 128, citing Hockenden, ex parte, 1 Atk. 236; 4 Burr. 2221; 6 East, 28; Bennett *v.* Johnson, 2 Chitty R. 455; *S. C.* 3 Doug. 387; Fergusson *v.* Norman, 5 Bing. N. C. 76; Cumpston *v.* Haigh, 2 Bing. N. C. 449; Simmond *v.* Hibbert, 1 Russ. & M. 719; and see Jardine *v.* Roberts, 15 Mass. 394. See infra, § 813–20.

[5] Frith *v.* Forbes, 4 De G., F. & J. 409.

H. and P. & Co. purchased a quantity of tobacco from T. & Co. of New York, and shipped it, in the name of P. & Co., to F. & Co., factors, at Mobile, for sale on commission. Afterwards P. & Co. and H. disclosed to F. & Co. the interest of H. in the tobacco, and informed them that it had been purchased of T. & Co. on time, and that H. and P. & Co. were unable to pay, at maturity, notes given for the tobacco, and desired to retransfer it to T. & Co., and with that view desired a bill of charges on the tobacco, in order that T. & Co. might know exactly what burdens it was subject to. Thereupon F. & Co. gave H. and P. & Co. a receipt, stating, in substance, that F. & Co. had received the tobacco on account of H. and P. & Co., and that it "would be delivered on return of the receipt indorsed by them, and payment of charges and commissions incurred thereon." At the same time F. & Co. made out and delivered to H. and P. & Co. an itemized bill of the charges, &c., upon the tobacco. H. went to New York, and with the consent of P. & Co. transferred the tobacco, and duly indorsed the receipt to T. & Co., and gave them the bill of charges. T. & Co. immediately notified F. & Co. by telegraph and by letter, and shortly afterwards sent an agent to get possession of the tobacco, who tendered the receipt, duly indorsed, paid the bill of charges, and demanded the tobacco. F. & Co. refused to deliver, on the ground that

§ 773. *Lien attaches to goods in transit to factor at the time of consignor's death, but not to goods in transit at time of secret act of bankruptcy.* — A distinction is here taken based on the effect of a secret act of bankruptcy under the English statutes. If goods are in transit to a factor while a secret act of bankruptcy is committed by the principal, the goods vest at once in the assignees of the bankrupt, to the exclusion of any lien the factor might otherwise have claimed for advances, although the act of bankruptcy was unknown to him;[1] and this seems to be the case even as to advances by the factor prior to the act of bankruptcy, while the goods were in transit to him.[2] But, on the other hand, it is clear that the death of the principal, while the goods are in transit, does not prevent his lien from attaching, where he has actually made advances or incurred expenses, on faith of the consignment.[3]

§ 774. *Factor does not lose his lien on surrendering possession if he retains control of the goods.* — A shipment of goods by a factor to his own order does not divest his lien, as he still, after such shipment, retains control of the goods, and the carrier may be regarded as his servant.[4]

§ 775. *Lien attaches to whatever sale produces.* — If a factor who receives goods for sale should upon sale lose his claim on the goods for his advances and expenses, this would be a great hindrance to business; since the factor, by the very act of discharging his duty, would forfeit his security for the repayment of his principal's debt to himself. Nor would it be just to limit the

they had a lien on the tobacco for commissions, &c., other than those stated in the itemized hill. Held: 1st. That the receipt must be construed in connection with the itemized bill of charges and the proof showing the reason why both were given. 2d. That thus construed, the receipt amounted to an agreement, on the part of F. & Co., to deliver the tobacco to T. & Co., if it should be retransferred to them, upon payment of the charges in the itemized bill, and the return of the receipt, duly indorsed, within a reasonable time. 3d. That the receipt was a waiver by F. & Co. in favor of T. & Co. of any lien F. & Co. may then have had on the tobacco for commissions or charges not contained in the itemized bill. Sawyer *v.* Lorillard, 48 Alab. 332.

[1] Infra, § 822. Copland *v.* Stein, 8 T. R. 199.

[2] Paley on Agency, 121–3; Story on Agency, § 377, and cases there cited. Infra, § 822.

[3] Paley's Agency, 140; Hammond *v.* Barclay, 2 East, 227; Lempriere *v.* Pasley, 2 T. R. 485.

[4] Infra, § 822–4. Paley on Agency, 145; 1 East, 4.

factor's lien to the right to retain his claim out of money received; for, if so, he would be tempted to make undue sacrifices to obtain a cash sale. It is consequently held that after a sale the factor's lien attaches to whatever the sale produces, whether cash or securities, so far as the latter are in his possession, or in the possession of his representatives.[1] Where, however, the factor intends to make the purchaser personally liable, he must notify the purchaser, before the latter has made payment to the principal.[2]

§ 776. *Factor's lien is good as against consignors' bankrupt assignees, or attaching creditors.* — Hence also, in case of bankruptcy of the consignor, after the reception of the consignment, the lien of the factor remains intact. It attached from the nature of the transaction before the bankruptcy, and the bankruptcy cannot divest it.[3] By the same reasoning the lien is superior to a subsequent attaching creditor.[4]

§ 777. *Purchaser of goods subject to factor's lien, if he pay over purchase money to principal, is liable to factor for the amount of the latter's lien.* — The goods owe the factor the amount of his lien; whoever takes the goods, takes them with this burden. It is true that it is said that not only must the purchaser have notice of this lien, but that, to charge him, the factor must indemnify him, or at least offer to indemnify him, from the consequences of an adverse suit from the principal.[5] Whether such

[1] Paley's Agency, 147, citing Drinkwater *v.* Goodwin, Cowp. 251; Houghton *v.* Matthews, 3 Bos. & P. 489; Dodsley *v.* Varley, 12 Ad. & El. 632; Spring *v.* Ins. Co. 8 Wheat. 368; Brander *v.* Phillips, 16 Peters, 121; Jarvis *v.* Rogers, 15 Mass. 389; State *v.* Levy, 1 M'Mullin, 431; Burrill *v.* Phillips, 1 Gallis. 360; Morris *v.* Cleasby, 1 M. & Sel. 576; Hudson *v.* Granger, 5 B. & Ald. 27. Commission merchants, who have a lien upon moneys received as the proceeds of goods consigned to them for sale, to secure them against loss upon acceptances and indorsements for the consignors, are at liberty to mingle such moneys with other funds in their hands; and if they have done so, the subsequent assignment of their estate in insolvency will not enable the consignors to maintain an action therefor, as long as the liability upon the acceptances and indorsements continues. Vail *v.* Durant, 7 Allen, 408.

[2] Drinkwater *v.* Goodwin, Cowp. 251; Atkyns *v.* Amber, 2 Esp. 493; Coppin *v.* Walker, 7 Taunt. 237.

[3] Hudson *v.* Granger, 5 B. & Ald. 27; Morris *v.* Cleasby, 1 M. & S. 576; Houghton *v.* Matthews, 3 B. & P. 489. See Huntington *v.* Knox, 7 Cush. 374; Eaton *v.* Truesdail, 52 Ill. 307. See infra, § 826.

[4] Maxon *v.* Landrum, 21 La. An. 366.

[5] Drinkwater *v.* Goodwin, Cowp. 251; Paley's Agency, 365–6.

indemnity, however, is essential, is a matter of some dispute. Lord Mansfield's authority, in the case last cited, is to the affirmative, and such is the view of Mr. Paley.[1] On the other hand, Mr. Russell[2] says: "It appears to be taken for granted that in such cases third persons are entitled to an offer of indemnity from the factor; and it is believed that in practice such indemnity is usually offered; although whether this be absolutely essential in order to the security of the factor's rights may admit of question." And Judge Story speaks even more doubtfully:[3] "It seems at least a questionable point whether there is any principle of law which positively requires such an indemnity, or offer of indemnity."

VII. LIABILITY OF FACTOR TO PRINCIPAL.

§ 778. *Factor bound to the diligence of good business men of his class and position.* — Mr. McCulloch, in his Commercial Dictionary, gives the following general statement of the business fidelity which factors are by mercantile usage expected to apply: "The office of a factor or agent being one of very great trust and responsibility, those who undertake it are bound, both legally and morally, to conduct themselves with the utmost fidelity and circumspection. A factor should take the greatest care of his principal's goods in his hands; he should be punctual in advising him as to his transactions on his behalf, in sales, purchases, freights, and more particularly bills of exchange; he should deviate as seldom as possible from the terms, and never from the *spirit and tenor* of the orders he receives as to the sale of commodities; in the execution of a commission for purchasing goods, he should endeavor to conform as closely as practicable to his instructions as to the quality or kind of goods; if he gives more for them than he is authorized, they may be thrown on his hands; but he is bound to buy them for as much less as he possibly can. After the goods are bought, he must dispose of them according to order. If he send them to a different place from that to which he was directed, they will be at his risk, unless the principal, on getting advice of the transaction, consent to acknowledge it." Mr. McCulloch proceeds to quote the following from Dr. Paley: "Whoever undertakes another man's business makes it his own; that is, promises to employ upon it the same care, attention, and

[1] Agency, 365–6. [2] Fact. & Brok. 247. [3] Agency, § 409.

diligence that he would do if it were actually his own; for he knows that the business was committed to him with that expectation. And he promises nothing more than this. Therefore an agent is not obliged to wait, inquire, solicit, ride about the country, toil, or study, whilst there remains a possibility of benefiting his employer. If he exert as much activity, and use such caution as the value of the business in his judgment deserved, — that is, as he would have thought sufficient if the same interest of his own had been at stake, — he has discharged his duty, although it should afterwards turn out that by more activity and longer perseverance he might have concluded the business with greater advantage." [1] On this Mr. McCulloch comments as follows: "There seems to be a good deal of laxity in this statement. It is necessary to distinguish between those who, in executing a commission, render their services for the particular occasion only, without hire, and those who undertake it *in the course of business*, making a regular charge for their trouble. If the former bestow on it that ordinary degree of care and attention which the *generality of mankind* bestow on similar affairs of their own, it is all, perhaps, that can be expected; but the latter will be justly censurable if they do not execute their engagements on account of others with that care and diligence which a '*provident and attentive father of a family*' uses in his own private concerns. It is their duty to exert themselves proportionately to the exigency of the affair in hand; and neither to *do* anything, how minute soever, by which their employers may sustain damage, nor omit anything, however inconsiderable, which the nature of the act requires. Perhaps the best general rule on the subject is, to suppose a factor or agent bound to exert that degree of care and vigilance which may *be reasonably expected of him by others*. At all events, it is clear he is not to be regulated by his own notions of the 'value of the business.' A man may neglect business of his own, or not think it worth attending to; but he is not, therefore, to be excused for neglecting any similar business he has undertaken to transact for others."

§ 779. But while Mr. McCulloch is right in regarding Dr. Paley's exposition as too lax, we must remember that there is an opposite extreme which we are to avoid. An unduly severe standard may be as destructive of business as an unduly lax

[1] Moral and Political Philosophy, c. 12.

standard. To say that a factor shall be liable for the slightest negligence would be to prevent any prudent man from being a factor. The true test is, the diligence which good business men of the particular class are accustomed to apply.[1] The expression borrowed by Mr. McCulloch from Sir W. Jones no longer adequately expresses this idea. *Paterfamilias* in Roman law is convertible with "man of affairs;" and a *bonus paterfamilias* is therefore a good man of affairs, or good business man. Nor must we forget the importance of the word "solet" in the Roman definition. The diligence required is not such as an exceptional business man may occasionally show, but such as good business men are as a class accustomed to show. Here we fall back upon usage as moulding the duties of agents of this class. That diligence which good business men of their order and place are accustomed to apply they must apply. They are required to apply no more; but they are liable for any loss occurring from their applying less.[2]

[1] See supra, § 272–4.

[2] Supra, § 123–4. A factor is liable for a want of due diligence in shipping a cargo in a sailing vessel to a foreign port, while acting under a qualified consent of his principal so to ship. McCants *v.* Wills, 3 S. C. 569.

To the exposition which I have given in another work of the Roman law on this topic (see Wharton on Negligence, § 32–60) may be here added the opinion of Windscheid, a commentator whose work on the Pandects is now regarded by German jurists as of the highest authority. Lehrbuch des Pandektenrechts, von Dr. Bernhard Windscheid, II. (3d ed.) 1873. "When I employ the services of a person who professes to conduct a business which requires peculiar skill and experience, I have a right to expect that he possesses such skill and experience to the extent to which it may be attained by ordinary industry and ordinary conscientiousness. To exceptional capacity I have no right." . . . . It must be remembered, however, that the term "ordinary," as here used, does not mean the diligence exercised by *ordinary persons*. It means the diligence such as is ordinarily (*i. e.* by the common rule) applied by proficients in the particular business. See Milbank *v.* Dennistown, 21 N. Y. 386; Deshler *v.* Beers, 32 Ill. 368; Grieff *v.* Cowgill, 2 Disney, 58; Huff *v.* Hatch, 2 Disney, 63; Babcock *v.* Orbison, 25 Ind. 75, and cases cited infra, § 782.

Where a factor takes a promissory note for goods sold on account of his consignor, and gives him due notice of this and of the subsequent insolvency of the purchaser, he does not, by proving the note under the insolvent laws, and taking a dividend thereon, render himself liable for the full amount of the note, if he uses proper care and skill; even though the consignor resides in another state, and his claim against the purchaser, if not proved, would not be barred by the insolvent discharge. Gorman *v.* Wheeler, 10 Gray, 362.

Where commission merchants are

§ 780. *Bound to exercise diligence as to vendee and price.* — In cases where the factor is authorized to sell on credit, his duty is to inquire into the character and credit of the vendee, applying to this object the diligence customary with good business men under similar circumstances.[1] His diligence in his own affairs is not an absolute test, for a man may be either unduly lax or unduly stringent in his own affairs, when neither would such laxity be permitted nor such stringency required if he were dealing with the affairs of others.[2] But if he exact security from the purchasers of his own goods, and fail to exact such security as to the goods of which he is factor, this is a circumstance from which may be inferred a want of loyalty on his part to his trust.[3] Yet even in such case we must be careful to remember that the *diligentia quam suis* is not to be applied as an inexorable standard. It is enough if the factor take the securities usually required among good business men of his class; and if he do so, he discharges his duty, even though it should appear that in his private affairs, from excessive caution, he applied additional checks.[4] So as to price, he is bound, if without instructions,[5] to obtain the best in the market, and is required to exercise in this respect a sound judgment, such as good business men of his class are accustomed to exercise; avoiding on the one hand that timidity which would stop almost all sales, and on the other hand that boldness which would make a sale without due circumspection.[6] He must render just and true accounts, and keep his principal's property separate from his own or from that of others.[7]

§ 781. *Factor not liable for loss of goods unless negligently induced.* — If a factor buy, conformably to his instructions, goods of which he is *robbed*, or which suffer some unavoidable injury, he is discharged, and the loss falls on the principal. But if the

employed in Charleston to ship cotton to Liverpool, and sell it there for the owner, and they use due skill and diligence in the selection of a vessel, and in placing the cotton on board, they are not responsible to the owner for the negligence and delay of the master whereby loss occurs. McCants *v.* Wells, 4 S. Car. 381.

The agency of cotton factors is limited to cotton, and unless they undertake it, they are not liable on an extraneous commission. Thompson *v.* Woodruff, 7 Coldw. 40.

[1] Supra, § 247, 260.

[2] Supra, § 275.

[3] Deshler *v.* Beers, 32 Ill. 368.

[4] Whart. on Neg. § 54.

[5] See supra, § 260, 650, 758.

[6] Bigelow *v.* Walker, 24 Vt. 149.

[7] Clarke *v.* Tipping, 9 Beavan, 284. Supra, § 299. See Parkhill *v.* Imlay, 15 Wend. 431.

goods be *stolen* from the factor, he will not be so easily discharged; for the fact of their having been abstracted by *stealth*, and not by *violence*, raises a strong presumption that he had not taken that reasonable care of them which was incumbent upon him. If, however, he can prove that the goods were lodged in a place of security, and that he had not been guilty of positive negligence, nor exercised less care towards them than towards his own property, he will not be held responsible even for a theft committed by his servants.[1] Or, to expand this illustration, the factor is not liable, if he use the diligence customary to good business men of his class, for accidents or casualties occurring without his default.[2]

§ 782. *Factor bound to insure when required by course of dealing.* — A factor, it is said, is not, under a bare commission, required to insure his principal's goods,[3] and no doubt for a factor to be forced to insure every parcel as it arrives would sometimes unnecessarily check business, and sometimes impose on the principal vexatious costs. But it requires very slight proof of usage or of understanding between the parties to impose this duty on the factor.[4] And a power given to insure must be executed as it is expressed.[5] If the factor insure in his own name (which he is always entitled to do), then he may, in case of loss, recover the whole loss from the underwriters, holding the surplus beyond his own interest in trust for the owner,[6]

§ 783. *Where usage is for factor to keep running accounts with principal, then factor assumes debts of vendees, and becomes liable to the principal only for balance.* — It frequently happens

[1] Jones on Bailments, 76; 3 Chitty on Commercial Law, 368.

[2] Nicholson *v.* Willan, 5 East, 513; Bridge *v.* Austin, 4 Mass. 114; Whart. on Neg. § 116, 553; Wyckoff *v.* Irvine, 6 Minn. 496; Milbank *v.* Dennistown, 10 Bosw. 382; Duncan *v.* Boye, 17 La. An. 273; Reid *v.* Dreaper, 6 H. & N. 813; Deshler *v.* Beers, 32 Ill. 368; Zwilchenbart *v.* Alexander, 1 B. & S. 234; Mummy *v.* Haggerty, 15 La. An. 268.

[3] See supra, § 204.

[4] Supra, § 204. Paley's Agency, 18; Smith *v.* Lascelles, 2 T. R. 189; Cranford *v.* Hunter, 8 T. R. 13; French *v.* Banckhouse, 5 Burr. 2727; Tickell *v.* Short, 2 Ves. 239; Columbia Ins. Co. *v.* Lawrence, 2 Peters, 49; Randolph *v.* Ware, 3 Cranch, 503; Lee *v.* Adsit, 37 N. Y. 87; Ralston *v.* Barclay, 6 Miller La. 653; Berthoud *v.* Gordon, 6 Miller La. 583; French *v.* Reed, 6 Binn. 308; De Tastet *v.* Crousillat, 2 Wash. C. C. 132.

[5] White *v.* Madison, 26 N. Y. 117.

[6] Ibid.; Story on Agency, § 111; Sargent *v.* Morris, 3 B. & Ald. 277; Usparicha *v.* Noble, 13 East, 332; Shack *v.* Anthony, 1 M. & S. 573.

that a factor, employed permanently as such for a principal who produces a particular staple (*e. g.* cotton or corn), keeps a running account, crediting the principal with the cash received from successive vendees, and settling with the principal at stated periods for the cash balance due the principal at such periods. In such cases, where the principal is shown to have either expressly or impliedly approved this usage, the vendees are held to be discharged, and the factor to become the sole debtor to the principal for the balance so due.[1]

§ 784. *A del credere commission makes the factor a guarantor.* —A *del credere* commission is declared to be "the premium or price given by the principal to the factor for a guaranty."[2] A factor, therefore, engaging on such a commission, guarantees the solvency of the vendees in such sales.[3] Some of the earlier cases[4] no doubt treat the factor on such a commission as a principal debtor; but these cases are not consistent with the present current of adjudication.[5]

[1] Stewart *v.* Aberdein, 4 M. & W. 211; Todd *v.* Reid, 4 B. & A. 210; Catterall *v.* Hindle, L. R. 2 C. P. 368; White, ex parte, in re Nevill, L. R. 6 Ch. 397; Warner *v.* Martin, 11 How. U. S. 209. See supra, § 783. Where a factor accepts the bills of his principal, drawn upon him on the credit of consignments to him, as between them, the bills are the proper debts of the drawer, and the acceptor stands as surety simply, the merchandise in the hands of the latter constituting a fund for the payment of the bills, all that the factor can require of his principal is indemnity, and the amount actually paid by him, if any, beyond the proceeds of the consignments. Where, therefore, the holder of such bills receives from the factor, in full payment thereof, goods so consigned of a less value than the amount of the bills, the principal is entitled to the benefit of the transaction, and the factor cannot charge him the difference between the amount of the bills and the value of the merchandise. Hidden *v.* Waldo, 55 N. Y. 294.

[2] Per Lord Ellenborough in Morris *v.* Cleasby, 4 M. & S. 566; White, ex parte, L. R. 6 Ch. 403; Couturier *v.* Hastie, 8 Ex. 40, qualifying the *dicta* in Grove *v.* Dubois, 1 T. R. 112, and in Houghton *v.* Matthews, 3 Bos. & Pul. 489. See Underwood *v.* Nichols, 17 C. B. 239; Gall *v.* Comber, 7 Taunt. 558; Lewis *v.* Brehme, 33 Md. 412; Cartwright *v.* Greene, 47 Barb. 9; Dalton *v.* Goddard, 104 Mass. 497; Thompson *v.* Perkins, 3 Mason, 232.

[3] Ibid.

[4] Grove *v.* Dubois, *ut supra;* Leverick *v.* Meigs, 1 Cowen, 645. See Cartwright *v.* Greene, 47 Barb. 9.

[5] See Wolff *v.* Kopell, 5 Hill, 458; 2 Denio, 368; Holbrook *v.* Wight, 24 Wend. 169; Thompson *v.* Perkins, 3 Mason, 236; Ex parte White, L. R. 6 Chan. 403; Couturier *v.* Hastie, 8 Exch. 40; Morris *v.* Cleasby, *ut supra.* A *del credere* agent is distinguished from other agents by the fact that he guarantees that those persons to whom he sells shall perform the contracts which he makes with them. Per Mellish, L. J., Ex parte White, L. Rep. 6

§ 785. *Such a commission does not relieve the factor from the diligence of factors under ordinary circumstances.* — Thus in a case already stated, where the factor undertook to receive a payment out of the usual course of business,[1] it was argued that the factor, acting under a *del credere* commission, was not bound to the strict rule of factorship. But Keating, J., said: "We think this makes no material difference as to the facts raised in the case. The agent selling under a *del credere* commission receives an additional consideration for extra risk incurred, but is not thereby relieved from any of the obligations of an ordinary agent as to receiving payments on account of his principal." So, also,

Ch. 403. He is virtually a surety, although he differs from a surety in that a note in writing signed by him is not necessary to charge him. Wickham *v.* Wickham, 2 K. & J. 478; Couturier *v.* Hastie, 8 Ex. 40. It may sometimes be difficult, so argues a writer in the London Law Times for July 31, 1875, to distinguish between a *del credere* agent and a person who was an agent only up to a certain point in a transaction. In Ex parte White, supra, the question was fully discussed, and much light thrown upon the nature of the contract of agency by the learned lords justices. N., a partner in the firm of N. & Co., was in the habit of receiving goods on his private account from T. & Co., accompanied by a price-list. No restrictions were placed upon N. in selling the goods, but he sent a monthly account of his sales to T. & Co., debiting himself with the price named in the price-list. In paying T. & Co., no reference was made to the price at which the goods were sold by N. He bought the goods on his own credit, and sold them on his own account. It was argued that N. was a *del credere* agent in such transactions; but the argument fell to the ground. "If it had been his duty," said Lord Justice Mellish, "to sell to his customers at that price (that is, the price fixed by T. & Co.), then the course of dealing would be consistent with his being merely a *del credere* agent. . . . . But if the consignee is at liberty, according to the contract between him and his consignor, to sell at any price he likes, and receive payment at any time he likes, but is to be bound, if he sells the goods, to pay the consignor for them at a fixed price, and at a fixed time, in my opinion, whatever the parties may think, their relation is not that of principal and agent."

Where there was an agreement between manufacturers and factors that the latter were to sell goods and guarantee all sales, at a commission of six per cent. to first-class customers, and were to receive an additional commission on goods sold to second-class customers, equal to the difference in prices paid by the two classes, it was held, that it was the duty of the defendants, as factors, to discriminate in their accounts rendered, so as to show what was received, — whether from first or second-class customers. Boston Carpet Co. *v.* Journeay, 36 N. Y. 384.

A *del credere* commission does not guarantee remittance. Heubach *v.* Rother, 2 Duer, 227; Leverick *v.* Meigs, 1 Cow. 645.

[1] Catterall *v.* Hindle, L. R. 1 C. P. 186. See *S. C.* reversed on collateral grounds, 2 C. P. 368. See, also, Graham *v.* Ackroyd, 10 Hare, 192.

a factor, under a *del credere* commission, who takes depreciated paper in payment, is liable for the loss on such depreciation.[1] So the principal of a *del credere* factor may sue in his own name when the principal's name is disclosed.[2]

§ 786. *Del credere guarantee not within the statute of frauds.* — A distinction, however, is to be observed between *del credere* guarantees and ordinary promises to pay the debt of another. The latter are within the statute of frauds; the former are not within that statute, being original agreements of suretyship.[3]

§ 787. *Factor cannot be sued without notice.* — A factor to whom goods have been sent for sale on commission cannot be sued, until after demand made or instruction to remit.[4]

VIII. LIABILITY OF FACTOR TO THIRD PERSONS.

§ 788. *Factor dealing in his own name makes himself personally liable.* — The same rule that applies to other forms of agency applies to the relation of factor or consignor. A factor who deals in his own name, without intimation that he is acting for a principal, becomes personally liable on his contract,[5] though

[1] Dunnell *v.* Mason, 4 Story, 543.

[2] Bramwell *v.* Spiller, 21 L. T. N. S. 672. See Fairlee *v.* Fenton, L. R. 5 Ex. 169.

[3] Wolff *v.* Koppell, 5 Hill, 458; 2 Denio, 368; Bradley *v.* Richardson, 23 Vt. 720; Sivan *v.* Nesmith, 7 Pick. 220; Couturier *v.* Hastie, 8 Exch. 40.

[4] Topham *v.* Braddick, 7 Taunt. 572; Burns *v.* Pillsbury, 17 N. H. 60; Ferris *v.* Paris, 10 Johns. R. 285; Cooley *v.* Betts, 24 Wend. 203; Halden *v.* Crafts, 4 E. D. Smith, 490; Brink *v.* Dolsen, 8 Barb. 337. In Massachusetts it has been intimated that demand is not necessary, in cases of suits against foreign factors; Clark *v.* Moody, 17 Mass. 145; Dodge *v.* Perkins, 9 Pick. 368; but this is controverted, with much justice, in Cooley *v.* Betts, 24 Wend. 203. Where a principal applied to his factor, to whom he had intrusted goods for sale under an agency of indefinite duration, for return of goods, and notified him of a termination of the agency, and the factor, claiming a lien for advances and commissions, declined to surrender, and upon the principal's offer to pay the amount of the claims, substantially refused to make a statement of them. Held: 1. That the rules in relation to tender as between debtor and creditor were not applicable. 2. That a selling factor is bound, when reasonably requested, to make and present to his principal a full and complete statement of his dealings and the accounts between them. Terwilliger *v.* Beals, 6 Lans. (N. S.) 403.

[5] See Smith on Merc. Law, 78-9; Gillett *v.* Offor, 18 C. B. 913; Story on Agency, § 266. See supra, § 490, 496.

without releasing the principal, when he is disclosed, from liability.[1] But the party dealing with the agent of an undisclosed principal may estop himself from falling back on the principal, and may thus confine himself exclusively to the agent.[2]

§ 789. *In such case his own debts may be set off.* — As is elsewhere shown, if T. deals with A. on the honest and just belief that A. is principal, the interposition of P. as principal cannot prevent T. from using a just set-off against A.[3]

§ 790. *When exclusive credit is given to the factor, the principal and the factor being both known, the factor is exclusively liable.* — Supposing a party dealing with the factor, knowing that there is a principal behind the factor, should intelligently elect to give sole credit to the factor, this election is irrevocable, even though the factor should turn out to be insolvent.[4]

§ 791. *Factors for foreign principals are personally liable.* — Where a foreign principal is disclosed, and there is evidence to indicate that credit was given to the factor, the usage is to treat the factor as personally liable; and this usage is sanctioned by law.[5] Nor is this usage without strong practical arguments for its support. If the credit of the foreign purchaser is solely to be resorted to to effect such sales, few such sales would be effected, for few foreign purchasers are sufficiently well known to obtain

[1] See supra, § 468, 470, 472; Thompson *v.* Davenport, 9 B. & C. 78; Paterson *v.* Gandasequi, 15 East, 62; Jones *v.* Littledale, 6 Ad. & El. 486; Fowler *v.* Hollins, L. R. 7 Q. B. 616; McGraw *v.* Godfrey, 14 Abb. (N. S.) 397.

[2] Supra, § 463, 469, 496; Calder *v.* Dobell, L. R. 6 C. P. 486; Priestley *v.* Fernie, 3 H. & C. 977; Tiernan *v.* Andrews, 4 Wash. C. C. 567; Jones *v.* Ins. Co. 14 Conn. 501; Paige *v.* Stone, 10 Metc. 160; French *v.* Price, 24 Pict. 13.

[3] Supra, § 465; Hogan *v.* Shorb, 24 Wend. 458.

[4] Shelton *v.* Bulloch, L. R. 9 Q. B. 572; Kymer *v.* Suwercropp, 1 Campb. 109; Rich *v.* Coe, Cowp. 637; Addison *v.* Gandasequi, 4 Taunt. 574; Wilson *v.* Hart, 7 Taunt. 295; Paley's Agency, 245–6. See supra, § 463, 469, 496, 788.

[5] Supra, § 456, 514; Houghton *v.* Matthews, 3 Bos. & P. 485; Thomson *v.* Davenport, 9 B. & Cress. 98; Wilson *v.* Zulueta, 14 Q. B. 405; Gillett *v.* Offor, 18 C. B. 917; Hutton *v.* Bulloch, L. R. 8 Q. B. 331; Kirkpatrick *v.* Stainer, 22 Wend. 244; Merrick's Est. 5 Watts. & S. 9; *S. C.* 2 Ashmead, 485; Rogers *v.* March, 33 Me. 106. See Smyth *v.* Andersen, 7 C. B. 21; Paterson *v.* Gandasequi, 15 East, 62; Peterson *v.* Ayre, 13 C. B. 353; De Gaillon *v.* L'Aigle, 1 Bos. & P. 358; Addison *v.* Gandasequi, 4 Taunt. 574; Tiernan *v.* Andrews, 4 Wash. C. C. 567; Paley's Agency, 248; New Castle Man. Co. *v.* R. R. 1 Robins. (La.) 145; Miller *v.* Lea, 35 Md. 396.

general credit, and still fewer have their property so placed as to enable them to give security in countries other than their own. It is otherwise with the factor who acts for such foreign principals. His property, if he has any, can be easily exhibited. He is able, if necessary, to put tangible collaterals in his vendor's hands. He is personally liable for any false statements he may make. To treat him and not his principal, therefore, as responsible, is for the benefit of both, so far as concerns the purposes of legitimate trade. That such is the English rule, deducible from the authorities above given, is stated with great positiveness by Mr. Smith. "It seems," says this accurate writer, "that when a British subject contracts for a foreign principal, the agent is liable."[1] But it must be remembered that this conclusion rests upon usage and the intent of parties; not upon any inexorable rule of law. The presumption is that the factor, known to be such, and trusted as such, is accepted as the exclusive debtor; but this presumption dies away if it be shown that the creditor intended to hold liable the foreign principal.[2] If the factor is thus exclusively looked to, then he is not only the person to be sued, but the person to bring suit on such a contract.[3] It is true that where credit can be shown to have been personally given to the foreign principal, there he may be subsequently pursued.[4] It is true, also, that where the foreign principal is not disclosed, it may be held that the creditor has a concurrent remedy against such principal, on his disclosure.[5] But even this right to fall back on the principal cannot be maintained against a custom to the contrary, supposing such custom to be put in evidence. At the same time it must be observed that while in some senses the States of the North American Union are foreign to each other, yet so far as concerns the reason of the rule that is just given, they do not bear the same reciprocal relations as does one of these states to a transatlantic country.[6] A New York vendor, for instance, dealing with the New York agent of a Connecticut principal, can readily acquaint himself with the standing

[1] Smith's Mercantile Law, p. 78.

[2] Green *v.* Kopke, 18 C. B. 549; Price *v.* Walker, L. R. 5 Ex. 173; Elbinger *v.* Claye, L. R. 8 Q. B. 313; Oelricks *v.* Ford, 23 How. (U. S.) 49.

[3] Infra, § 793.

[4] Trueman *v.* Loder, 11 Ad. & El. 589; and see Green *v.* Kopke, supra; Bray *v.* Kettell, 1 Allen, 80.

[5] See remarks of Cowen, J., in Taintor *v.* Prendergrast, 3 Hill, 72, 73; Barry *v.* Page, 10 Gray, 398.

[6] See Barry *v.* Page, 10 Gray, 398.

of the Connecticut principal, can obtain from the latter collaterals with the same facility that collaterals could be obtained from a New York debtor, and can secure a judgment in New York which, under the peculiar provision of the Constitution of the United States, cannot be impeached in Connecticut. Hence in such a case the courts will not presume exclusive credit to the factor unless on proof of usage that such credit is exclusive, or on evidence of a disclaimer by the creditor of recourse to the non-resident principal.[1] In any view, such a contract yields to the express terms of a written agreement.[2]

[1] See this distinction taken by Senator Verplanck, in Kirkpatrick *v.* Stainer, 22 Wend. 244; and by Judge Story, Agency, § 268, note.

[2] Mahoney *v.* Kekule, 14 C. B. 390; Oglesby *v.* Ygleseas, 1 E., B. & E. 920. "We are inclined to think," says Bigelow, C. J., when, discussing the rule as given by Judge Story, "that a careful examination of the cases which are cited in support of this supposed rule will show that this statement is altogether too broad and comprehensive. Certain it is that if it ever was received as a correct exposition of the law, it has been essentially modified by the more recently adjudged cases. It doubtless has its origin in a custom or usage of trade existing in England, by which the domestic factor or agent was deemed to be the contracting party to whom credit was exclusively given; and it was confined to cases where the claim against the agent was for goods sold, and was not extended to written instruments. But it is going quite too far to say that this usage or custom is so ingrafted into the common law as to become a fixed and established rule, creating a presumption in all cases that the agent is exclusively liable, to the entire exoneration of his employer. The more reasonable and correct doctrine is that when goods are sold to a domestic agent, or a contract is made by him, the fact that he acts for a foreign principal is evidence only that the agent and not the principal is liable. *It is in reality, in all cases, a question to whom credit was in fact given.* Where goods are sold, it is certainly reasonable to suppose that the vendor trusted to the credit of a person residing in the same country with himself, subject to laws with which he is familiar, and to process for the immediate enforcement of a debt, rather than to a principal residing abroad, under a different system of laws, and beyond the jurisdiction of the domestic forum. But even in such a case, the fact that the principal is resident in a foreign country is only one circumstance entering into the question of credit, and is liable to be controlled by other facts. So, in the case of a written contract, it depends on the intention of the parties. . . . . If, by the language of the contract, the agent and not the principal is bound, such must be its construction; and on the other hand, if it clearly binds the principal, and is in form a contract with him only, the agent must be exonerated, without regard to the fact that the principal is resident in a foreign country." Bray *v.* Kettell, 1 Allen, 80. This conclusion, however, rests, as the text shows, upon English cases which were afterwards qualified. Mr. M'Laren, in the 7th

§ 792. What has been said applies with peculiar force when the principal is undisclosed.[1] And it has been lately ruled in England that the presumption that foreign principals do not give an English commission merchant any authority to pledge their credit to those from whom the commission merchant buys on their account, covers a case in which a foreign firm agrees that an English firm shall purchase and ship goods on the joint account of the two firms, the foreign firm not being disclosed.[2]

edition of Bell's Com., after stating the earlier law, says: "But the better opinion now is that there is no absolute presumption that an agent, transacting business *factoris nomine* for a foreign house, is personally liable." Miller *v.* Mitchell, 22 D. 833, cited 1 Bell's Com. 7th ed. 536; Heald *v.* Kenworthy, 24 L. J. Ex. 76; 10 Ex. 739.

[1] Supra, § 456, 469.

[2] Hutton *v.* Bullock, L. R. 8 Q. B. 331; aff. L. R. 9 Q. B. 572. In this case H., F. & Co. were merchants in London, and the defendant was a partner in the firm of H. B. & Co., carrying on business at Rangoon. Goods were supplied by the plaintiff to H. F. & Co. on their order, given in consequence of an arrangement between the two firms, as disclosed in letters, that H. F. & Co. should purchase and send out goods on the joint account of the two firms, two per cent. to be charged on the invoice by the London firm, and five per cent. by the Rangoon firm, including guarantees. The plaintiff had no knowledge of the defendant, or that the Rangoon firm was in any way interested in the transaction, until after the goods were supplied. Held, that the defendant was not, as an undisclosed principal, a party to the contract under which the goods were supplied by the plaintiff; for that, on the true construction of the correspondence, the Rangoon firm did not give authority to the London firm to establish a privity of contract, and pledge its credit with the English suppliers of the goods.

"Where a foreigner has instructed English merchants to act for him, I take it that the usage of trade, established for many years, has been that it is understood that the foreign constituent has not authorized the merchants to pledge his credit to the contract, to establish privity between him and the home supplier. On the other hand, the home supplier, knowing that to be the usage, unless there be something in the bargain showing the intention to be otherwise, does not trust the foreigner, and so does not make the foreigner responsible to him, and does not make himself responsible to the foreigner." . . . . "In the case of a foreign principal, there are dicta of Sir James Mansfield, Addison *v.* Gandasequi, 4 Taunt. 580; Lord Tenterden, Thompson *v.* Davenport, 9 B. & C. 87, 89; and Bayley, J., Ibid., that when acting for a foreign principal, the agent or commission merchant does not *primâ facie* pledge the principal. And this is clearly laid down in the late case of Armstrong *v.* Stokes, L. R. 7 Q. B. 605." Blackburn, J., in Elbinger Act. Ges. *v.* Claye, L. R. 8 Q. B. 316–7.

"The great inconvenience," so speaks Blackburn, J., giving a judgment of the queen's bench, in 1872, Armstrong *v.* Stokes, L. R. 7 Q. B. 606, and afterwards, in 1873, Hutton *v.* Bullock, L. R. 8 Q. B. 334; aff. in Ex. Ch. *S. C.* L. R. 9 Q. B. 572, "that

§ 793. *On the same reasoning foreign principal cannot sue on such contract.* — Thus, it has been ruled in England, when a foreign correspondent instructs his English agents to order goods for him in this country, the person contracting with the agent to supply such goods is not, although he knew for whom the goods were intended, liable to an action for breach of his contract at the suit of the principal.[1] But this rule cannot, under the federal Constitution, be applied to the citizens of the States of the American Union, who are not in this sense to be regarded as "foreign" to each other.[2] It is on this distinction that we can reconcile a decision in Massachusetts in 1858, where it was held that the princi-

would result were there privity of contract established between the foreign constituents of a commission merchant and the home suppliers of the goods, has led to a course of business, in consequence of which it has been long settled that a foreign constituent does not give the commission merchant any authority to pledge his credit to those from whom the commission merchant buys them by his order and on his account. It is true that this was originally (and in strictness, perhaps, still is) a question of fact; but the inconvenience of holding that privity of contract was established between a Liverpool merchant and the grower of every bale of cotton which is forwarded to him in consequence of his order to a commission merchant at New Orleans, or between a New York merchant and the supplier of every bale of goods purchased in consequence of an order to a London commission merchant, is so obvious and so well known, that we are justified in treating it as a matter of law, and saying that, in the absence of evidence of an express authority to that effect, the commission merchant cannot pledge his foreign constituent's credit."

[1] Wilson *v.* Zulietta, 14 Q. B. 405; Elbinger Actien Gesellschaft *v.* Claye, 42 L. J. Q. B. 151; L. R. 8 Q. B. 313. A foreign company entered into negotiations through S. & Co., London commission merchants, for the supply, by C., of certain railway wheels and axles; and he, in consequence, had an interview, on the 29th of January, at S. & Co.'s office, with S., one of the partners, and H., the managing director of the foreign company; and C. signed in a diary of S. the following entry: "Mr. C. offers to supply 150 sets of wheels and axles (describing them), at £31 per set, to be delivered free on board at Hull during February and March. This offer to remain open until the 3d of February." On the 3d of February, S. & Co. telegraphed and wrote, "We confirm the order for 150 sets of wheels and axles," repeating the terms of the offer. Some of the sets were delivered by C. the invoices being made out to S. & Co., and they paid for them; but the delivery of most of the sets was after March, and the company sued for a breach of the contract. At the trial it was objected that the contract was with S. & Co., and not with the company. The judge left it with the jury to say whether the contract was with S. & Co. or with the company. The jury found for C. Held, that the direction and verdict were right. Ibid.

[2] See remarks supra, § 791; Taintor *v.* Prendergrast, 3 Hill, 72.

pal, domiciled in one state, could bring suit against a vendee, domiciled in another state, though the contract was with the factor. It is true that Bigelow, J., does not rest the case on this distinction. "It has been sometimes said," he argues, "that when a sale is made by a factor for a foreign principal, the latter cannot sue for the price. This supposed exception has been put on the ground that in such case the presumption at law is that exclusive credit was given to the agent, and therefore the principal cannot be treated in any manner whatever as a party to the contract. But the later and better opinion is that there is no such absolute presumption, and that a principal, whether foreign or domestic, may sue to recover the price of goods sold by his factor, unless it is made affirmatively to appear that exclusive credit was given to the agent, by proof other than the mere fact that the principal resided in another state or country."[1] But so far as concerns the precise point ruled, the case is authority only for the position that a principal is not, in the United States, precluded from suing a vendee, by the fact that he is domiciled in a state other than that to which the contract of sale is subject. On the general question of the right of a foreign principal to sue, the English courts do not now (1875) recognize the qualifications stated by Judge Bigelow.

VIII. COMMISSIONS RECEIVABLE BY FACTOR.

§ 794. The factor is entitled to receive a commission, or factorage, as it is sometimes called, which is a percentage on the goods purchased or sold on account of the principal. This percentage varies in different countries and as it refers to different articles. When the factor insures the debts due the principal for an additional, or *del credere* commission, the allowance in England averages from one and a half to two per cent. Factorage or commission is also frequently charged at a certain rate per cask, or other package, measure, or weight, especially when the factor is only employed to receive or deliver.[2]

The law with regard to commissions is fully discussed in a prior chapter.[3]

[1] Bigelow, J., in Barry *v.* Page, 10 Gray, 388.

[2] McCulloch's Commercial Dict. tit. "Factor."

[3] Supra, § 321 *et seq.* See § 573, 616, 715, 721.

CHAPTER XVII.

INSTITOR: SALESMAN: FOREMAN.

Powers of Institor under Roman Law, § 799.
Institor is a foreman or salesman, § 800.
When a salesman binds principal, § 801.
Selling agent liable as institor, § 805.
Travelling agent binds prineipal, § 806.

§ 799. *Powers of the Institor, under the Roman law.* — The conspicuousness of the institorial relation in the Roman law is due to two circumstances. In the first place, it was the policy of that law to require each capitalist, when engaged in trade, to superintend his own establishment. He was not permitted to acquire either rights or duties through an independent agent.[1] What he was to do, in a business way, he must do either directly, or through his slaves or unemancipated sons. In this way, it was thought that the undue accumulation of business power in the hands of a few great capitalists would be avoided, and the number of persons obtaining independent support by trade would be thereby increased; while additional strength would be given to the theory that the Roman citizen could not be bound except by his own immediate will. Nor, in the second place, can we fail to see how much the peculiar meaning attached by the Roman jurists to the idea of *debt* had to do with this limitation of the right to extend indebtedness at the option of another. How can I be said to bind myself to an act not yet defined, and which is hereafter to be defined at another's election and limitation?[2] Hence it was that agency, so far as it concerns the unlimited right of an independent agent to bind the principal, had no place in the Roman law. And hence it was that in that law, the relation of the salesman or foreman to a principal supposed to be present acquired peculiar prominence.

§ 800. *The institor is a foreman or salesman.* — The institor, to adopt Thöl's definition, conducts, in another's name, a particular business, or a branch of a particular business.[3] The work

[1] See supra, § 147.
[2] See supra, § 5, 6.
[3] Das Handelsrecht, von Dr. H. Thöl (Leipzig, 1875), I. § 55.

undertaken by him, therefore, is not a single transaction, but a line of transactions. He is therefore a business manager (Gewerbsverwalter). His management, however, consists essentially in this, that what he undertakes, he undertakes by way of legal obligation; that is to say, he either assumes an obligation, or pays a debt, or receives a payment. The institor is therefore essentially a juridical character. The authorities exhibit to us several classes of institors, without giving us an express definition; but the leading feature in each case was this, that the institor represents in business a man of business, either for the whole of the latter's concerns or for a branch thereof. Most of the cases of institors mentioned in the Corpus Juris are those of persons undertaking the management of a particular local business for another. Institor est, qui tabernae locove ad emendum vendendumve praeponitur, quique sine loco ad eundem actum praeponitur.[1] The institor, therefore, may be viewed as a foreman or salesman.

§ 801. *Institor, when a salesman, binds principal.* — A salesman, selling goods in his principal's store, occupies a position in which those dealing with him are entitled to regard him as the agent of such principal.[2] The salesman exhibits himself as agent; appeals as agent to his principal; and contracts in the name of his principal. No verbal declaration of agency is necessary to protect the person dealing in such a store, and to enable him to have recourse to the principal. The circumstances of the agent standing in the store and selling are sufficient to bind the principal in everything within the range of the authority of agents of this class. Under such a state of facts, the third party is to be regarded as exclusively dealing with the principal, and in no sense with the agent. The subjection of the salesman to the principal, and his line of business, is important, as otherwise the third person has no other means of determining whether the contract relates to the business the agent is employed to conduct. For if the contract does not relate to such business then the presumption of agency expires. Thus in a case noticed in the Digest, a *servus merci oleariae praepositus* borrowed gold; but the creditor could not show, *mercis gratia eum accepisse*, as he had groundlessly believed. It was held that the creditor

[1] L. 18. D. h. t.

[2] Supra, § 129. See Hutchings *v.* Ladd, 16 Mich. 493.

had no claim.[1] So in a Scotch case it was held that an authority granted to a managing clerk, or institor, to issue delivery orders for goods in the course of business, does not make the employer responsible for orders fraudulently issued, and not for value.[2] So payment to a salesman, who is authorized only to receive money at the counter, does not bind the principal, if made elsewhere than in the shop.[3] So a salesman, employed for the purpose, has no authority to borrow money, or issue negotiable paper.[4]

§ 802. To make a contract concluded by the institor, therefore, valid, it is necessary first that the contract should be within the range of the business committed to the agent, the burden of proving which is on the third party setting up the contract. Secondly, when the contract is of such a character that only when there is a special authorization does it fall within the range of the agent's powers, then it must be shown that there was such authorization.[5] The mere assertion by the agent of the business relation, unless sustained by his establishment or other recognition as such by the principal, will not sustain an action against the principal on the agent's contract.[6] So, also, if certain conditions are essential to the agency, it is necessary to show that these conditions existed;[7] or at least that there was probable cause for a belief in their existence. Recognition by the principal is requisite in order to bind the principal on the agent's contract. But there is no particular form necessary in order that this recognition (that the salesman is dealing not for himself, but for the principal) should be duly expressed.

§ 803. The relation of the institor to the principal may include either that of the mandate, or of the *locatio conductio*, or that of the innominate contract. The last condition exists when the institor has a share in the profits, or a commission on the total receipts. So, also, in cases where the institor intervenes without authority, we can assume a *negotiorum gestio*.

§ 804. The salesman authorized to act as such, in a shop or store open to the public, is to be regarded by third parties as au-

[1] L. 13, pr. D. h. t.

[2] Colvin *v.* Dixon, 5 Macph. 603; cited Bell's Com. 7th ed. 514, note.

[3] Kaye *v.* Brett, 5 Exch. 274; Calais Co. *v.* Van Pelt, 2 Black U. S. 372.

[4] Kerns *v.* Piper, 4 Watts, 222.

[5] See L. 13, pr. D. 14. 3. See supra, § 48.

[6] See Thöl, Handelsrecht, § 74.

[7] See, as illustrating this, L. 7, pr. D. de exercit. act. See, also, Thöl, Handelsrecht, § 74.

thorized to make such sales and deliveries of goods as are usual in the particular business. Such a salesman may, by the Roman law, sell on credit, unless expressly forbidden by his principal's instructions;[1] and even if so restricted, such sale is good to a *bonâ fide* purchaser, if in accordance with the customs of the business.[2] The salesman may warrant the goods sold.[3] And if left to manage the store in his employer's absence, he may sue and defend claims for debts connected with the business.[4]

§ 805. *Selling agent liable as an institor.* — The original strictness of the Roman law was so far relaxed as to extend the institorial relation to selling agents, selling on the principal's account at his place of business, but during his permanent absence. By the modern Roman law, the selling agent of a manufacturer is regarded as subject to the rules already noticed as applying to institors in general.

§ 806. But a selling agent for a manufacturer cannot engage on his own account in the same line of business with his principal;[5] and by the codes of several states, all profits made by him in pursuing such independent business enure to the principal, while the losses fall to himself.[6] In case of the principal's death, the heirs, by the Roman law, are bound by the agent's acts either during the life of the principal,[7] or after the devolution of the estate on the heirs, they acquiescing,[8] or between the death and the devolution of the estate, the agent being ignorant of the death.[9] Whether, in case of his knowledge of the death, he bound the heirs in the interval, until the estate devolved on them, and they took cognizance of the relation, has been the subject of much controversy.[10] The selling agent has implied power to do any acts which usage may hold necessary to effect a sale.[11]

§ 807. *The institor as a travelling agent binds the principal.* — The relations of a commercial traveller to his principal are gov-

[1] See Upton *v.* Suffolk Mills, 11 Cush. 586.

[2] L. 5, § 15. D. de instit. 14. 3.

[3] L. 5, § 16. Ibid. See Palmer *v.* Cheney, 35 Iowa, 281. Supra, § 124, 187, 739.

[4] Davis *v.* Waterman, 10 Vt. 526.

[5] Bender, § 45; Brinckmann, § 13. This, however, is contested by Thöl, Handelsrecht, § 73.

[6] Codigo de Comercio, art. 180. See Preuss. L. R. § 523–5, and other references by Thöl, § 73.

[7] L. 15. D. h. t.

[8] L. 15, § 17. D. h. t. L. 11, pr. D. eod.

[9] L. 5, § 17. D. h. t.

[10] See Thöl's Handelsrecht, § 73. See supra, § 101.

[11] Upton *v.* Suffolk Bk. 11 Cush. 586. Supra, § 187.

erned by the rules already expressed; nor does the fact that the principal is a foreigner vary these relations.[1] In the latter case, however, the present German Code makes the following provisions: —

A commercial traveller authorized to sell goods in a foreign country is empowered to sell both for cash and for credit. Whether he is empowered to receive the price of goods sold by his predecessor or by his principal is to be determined by the circumstances of each particular case. Even though he be limited to sales under a particular amount, yet, by the Code, he binds his principal, as against an innocent third party, for sales beyond that amount. So also he is authorized to make a *bonâ fide* compromise with an insolvent debtor. But he is not authorized to release without consideration any of his principal's rights.[2]

§ 808. According to the Scotch practice, where a mercantile or manufacturing house employs a rider or traveller to receive debts, and take orders to be executed by the principal, a relation is instituted which is analogous to that of the Roman institor. "The authority of such a person may depend either on the instructions he receives, or on the custom of the trade, or on the extent to which the exercise of authority has been recognized. In general it appears that a riding or travelling agent has not only authority to receive payment for his principal of the moneys due to him, but to take orders by which the principal shall be bound as much as if he himself had accepted the contract." [3]

§ 809. But in the English practice such an agent has not, without special authority, the right to receive payment. Thus in

[1] Thöl, Handelsrecht (1875), I. § 67. See L. 34. D. de R. J.

[2] Thöl, *ut supra*. See supra, § 187–197.

[3] 1 Bell's Com. 515. To this point Mr. Bell cites Milne *v.* Harris, 1803, where the facts were as follows: An order was given by Milne to Callender, a rider of Harris, James & Co., which was executed. In his next round, another order was given by Milne to Callender, which he transmitted to his principals. But they refused to execute it, as Milne had not settled the former dealing correctly. Milne immediately wrote that cash should be paid down, but his order was not answered. Harris, James & Co., defended the action by Milne, on the ground that Milne's offer was not accepted by them. The court held the rider to have authority to receive orders, and to bind his principal to the execution of them. Some of the judges held that this general rule must admit the exception of a refusal for sufficient cause, and the irregularity of the former dealing they held sufficient; but this did not prevail.

a recent trial the evidence was that the plaintiffs supplied the defendant with goods ordered through M., the traveller of the plaintiffs, and the defendant, by way of payment, accepted a bill drawn by M. upon them, and made payable to his own order. M. absconded, having cashed the bill, and the value thereof did not reach the plaintiffs, who sued the defendant for the price of the goods. It was proved in support of the plea of payment that M. had, on a prior occasion, taken payment by a bill drawn in blank and accepted by the defendant which the plaintiffs had afterwards filled up and cashed, and also that the plaintiffs had written a letter to M., which was shown to the defendant, in which they intimated a wish to draw upon him for an amount due. It was however ruled that neither the previous dealing, nor the letter of the plaintiffs to M., was evidence of an authority to M. to draw a bill in his own favor, and a rule to enter a verdict for the defendant was therefore discharged.[1]

[1] Hogarth *v.* Wherley, 32 L. T. N. S. 800.

CHAPTER XVIII.

LIEN.

I. What Debts a Lien includes.
- Lien is a right of satisfying a debt out of a thing, § 813.
- Liens may be general or particular, § 814.
- By Roman law agent has lien for labor and outlay, § 815.
- So by our own law, § 816.
- Lien covers expenses on particular thing, § 817.
- But does not cover debts on independent transactions, § 818.
- Lien produced by operation of law, § 819.
- Lien creditor may by his own act estop himself from asserting lien, § 820.
- Lien not exclusive of other rights, § 821.

II. To what Goods a Lien attaches.
- The goods must at the time be within the power of the agents, § 822.
- No lien attaches to goods obtained without owner's consent, § 823.
- Agent waives lien by parting with goods, § 824.
- Lien revives when goods are restored, § 825.

III. Rights of Owner against Goods.
- Owner may dispose of goods subject to lien, § 826.

IV. Lien of Sub-agents.
- Sub-agent, who is mere servant, has no lien, § 827.
- Otherwise as to ancillary agent, § 828.
- So principal may clothe sub-agent with rights of primary agent, § 829.
- Substitute acting *bonâ fide* entitled to lien, § 830.

V. Liens of Particular Classes of Agents.
- Factors, § 766.
- Attorneys, § 623.
- Bankers, § 688.

I. WHAT DEBTS A LIEN INCLUDES.

§ 813. *Lien a right to satisfaction of a debt out of a thing.* — A lien is the right to satisfy a debt out of a particular thing.[1] So far as concerns agents, in respect to whom our inquiries in this relation are now limited, it is usually involved in the right to detain in possession the article to which the lien is attached.[2] In other relations, — *e. g.* that of a vendor to a vendee in respect to purchase money, — a lien is severable even from possession.

§ 814. *Lien may be general or particular.* — A lien is general when it covers the indebtedness of the principal to the agent on a balance on their running accounts, as in the case of factors.[3] Or

[1] 2 Kent, 12th ed. 634; Paley on Agency, 127.

[2] Paley on Agency, 27. Infra, § 824. Scarfe *v.* Morgan, 4 M. & W. 270. The attorney's *charging* lien, as we have already seen (supra, § 626), does not require possession to sustain it, and is governed by rules which are exceptional.

[3] Supra, § 623, 766. See Bock *v.*

it may be particular, when, as in the case of operatives, it is confined to work done on a particular article. In no case, however, does it cover charges not connected with the special agency.[1]

§ 815. *Agent by Roman law has a lien on a thing on which he has bestowed care or outlay.* — He who bestows labor on a thing, — whether his labor be viewed as that of an agent or as that of an ordinary mechanical employee, — has a right to detain the thing until he is paid for his labor and expenses incurred by virtue of his employment. By the Roman law this lien can be asserted by him in priority to non-lien creditors, in case of bankruptcy of the owner of the thing, or in case of the thing being taken into execution for debt. A preference, says Windscheid, a peculiarly authoritative expositor of the Pandects,[2] is given to the lien (Pfandrecht) which a person has on a thing on account of any outlay which he has made in procuring, maintaining, or keeping such thing; this lien being known as a *privilegium* resting on a *versio in rem.* It is to be observed, he adds, that this priority (Vorzugsrecht) is not limited to advances of money on the particular thing, but extends to every kind of outlay, and is applicable when a thing is sold on credit. It is indeed disputed whether there is a lien for repairs. But, argues Windscheid, it follows from the passages cited from the standards,[3] that

Gorissen, 2 De G., F. & J. 434; Plaice *v.* Allcock, 4 F. & F. 1074; Bowman *v.* Malcolm, 11 M. & W. 833.

[1] Supra, § 768. Adams *v.* Clark, 9 Cush. 215. See Wiltshire Iron Co. *v.* R. R. L. R. 6 Q. B. 101; L. R. 6 Q. B. 776. Where D. indorsed a bill to P. for "collection," and P. indorsed the bill in like form to A., who collected the bill; it was held in Maryland that A. was not entitled as against D. to retain the amount collected for the general balance of his account with P. Cecil Bk. *v.* Farmers' Bk. 22 Md. 148.

[2] Lehrbuch des Pandektenrechts, Dusseldorf, 1873, § 246.

[3] *Ulp.* 1. 5. 6. 7. qui potior. in pignore (20. 4.): Interdum posterior potior est priore, utputa, si in rem istam conservandam impensum est, quod sequens credidit, velut si navis fuit obligata, et ad armandam eam rem vel reficiendam ego credidero; (1. 6.) hujus enim pecunia salvam fecit totius pignoris causam, quod poterit quis admittere, et si in cibaria nautarum fuerit creditum, sine quibus navis salva pervenire non poterat. § 1. Item si quis in merces sibi obligatas credidderit, vel ut salvae fiant, vel ut naulum exsolvatur, potentior erit, licet posterior sit: nam et ipsum naulum potentius est. § 2. Tantundem dicetur, et si merces horreorum, vel areae, vel vecturae jumentorum debetur: nam et hic potentior erit. (1. 7.) Idemque est, si ex numis pupilli fuerit res comparata. Quare, si duorum pupillorum numis res fuerit comparata, ambo in pignus concurrent pro his portionibus, quae in pretium rei fuerint expensae.

such a lien exists; and this view is consistent with the principle of lien, that he who puts money into a thing should have preference when that thing is turned into money. At the same time when a thing ceases to exist by extinction (*e. g.* when the thing on which the lien rests is burned up), then the lien necessarily expires. Vangerow, for many years a profound jurist as well as most eloquent lecturer at Heidelberg, discourses to the same effect.[1] After speaking of liens for taxes, and for the wife's *dos*, he says: The remaining liens (Pfandprivilegien) may be grouped under the general title of *versio in re*.[2] If we examine the particular rulings on this point,[3] it is clear that these rulings do not constitute *leges singulares*, but that they were developed by the Roman jurists from the nature of the subject itself. From this it follows,

Quodsi res non in totum ex numis cujusdam comparata est, erit concursus utriusque creditoris, id est et antiquioris, et ejus, cujus numis comparata est.

4. *Dioclet.* et *Maxim.* 1. 7. C. qui potior in pign. (8. 18.): Licet iisdem pignoribus multis creditoribus diversis temporibus datis priores habeantur potiores, tamen eum, cujus pecunia praedium comparatum probatur, quod ei pignori esse specialiter obligatum statim convenit, omnibus anteferri juris auctoritate declaratur.

5. Nov. 97. c. 3: Novimus et antiquioribus creditoribus aliquas hypothecas praeponere juniores existentes ex privilegiis a legibus datis, quale est, quando aliquis propriis pecuniis procuraverit navem comparare aut fabricare aut reparare, aut domum forsan aedificare, aut etiam emi agrum aut aliquid horum [ἤ τι τῶν αλλον; *Homb.* aut aliud quid]. In his enim omnibus priores existunt posteriores creditores, quorum pecuniis emta aut renovata res est, iis, qui etiam multo antiquiores sunt. Quaesitum est igitur, si mulier praetendens privilegium super antiqua dote —— —— prioribus voluerit praeponi creditoribus, veniat autem alter creditor, posterior quidem, praetendems autem, pecuniis suis emtam aut reparatam navem, aut domum aut agrum, et convenire, eum in his rebus, quae ejus pecuniis emtae aut reparatae sunt, habere praedictum privilegium: utrum oporteat dotem etiam talibus praeponi; in aliis quidem praevalere creditoribus, quicunque non talia praetendunt, his autem cedere, quoniam ex eorum substantia res acquisita est. Plurimum igitur super his cogitantes; non invenimus mulierem juste existentem cedere aliqui tali privilegio: —— —— volumus igitur secundum hoc, ut si quis domum renovasset, aut etiam agrum emisset, non possit talia privilegia mulieribus oponere.

See Tatham *v.* Andree, 1 Moore P. C. N. S. 386, where it is said that, by the Roman law, possession on part of agent is not necessary.

[1] Vangerow, Lehrbuch der Pandekten, 7th Auf. § 386.

[2] See Schweppe, Jurist Mag. I. No. 4; Heise, Grundriss, 3te. Auf. § 61; Zimmern in seinen und Neustetel's römisch. Untersuch. I. 282; Seuffert, Erört. II. p. 118; Fritz, Erlaüt. II. p. 504; Sintenis, Handbuch, p. 624; Puchta, § 211.

[3] See passages in prior note.

that we cannot rest with the particular enumerated instances, but that we must penetrate to the general principle that lies back of them. This principle is, that when one person has made any outlay in order to procure, to repair, or to retain a thing for another, and when on account of this outlay he has either by contract *in continenti* or by statute a lien on such thing, then this lien is privileged. It makes no matter what is the quality of the thing, whether movable or immovable.

§ 816. *In our own law this applies to all cases in which care and expense have been bestowed.* — From the relations of the parties, an employee, putting his labor and money into a thing on his employer's account, has a right to detain such thing until he is paid.[1] The lien, indeed, has been said to be limited to the agent's own claim;[2] but the better opinion is that it covers whatever he pays for the work of others expended on the goods.[3] He cannot, however, include in the lien charges for keeping the goods, if the keeping be for his own protection.[4]

§ 817. *Lien covers expenses on particular thing.* — That this is the Roman law we have already abundantly seen. That such is the case with ourselves there can be no doubt. Thus the carrier has a lien for his advances to others for storage and incidental

[1] 2 Kent's Com. 631–6; Story on Bailments, § 440; Deeze, ex parte, 1 Atk. 228; Wilson *v.* Heather, 5 Taunt. 642; Winks *v.* Hassall, 9 B. & C. 372; Gladstone *v.* Birley, 2 Meriv. 404; Barry *v.* Longmore, 4 Perry & D. 344; Jackson *v.* Cummins, 8 M. & W. 342; Blake *v.* Nicholson, 3 M. & S. 167; Chase *v.* Wetmore, 5 M. & S. 180; Lovett *v.* Brown, 40 N. H. 511; Wilson *v.* Martin, 40 N. H. 88; Moore *v.* Hitchcock, 4 Wend. 292; Schmidt *v.* Blood, 9 Wend. 268; Morgan *v.* Congdon, 4 Comst. 551; Gregory *v.* Stryker, 2 Denio, 628; McIntyre *v.* Carver, 2 Watts & S. 392; United States Ex. Co. *v.* Haines, 67 Ill. 139; Nevan *v.* Roup, 8 Iowa, 211; Farrington *v.* Meek, 30 Miss. 578. See M'Rae *v.* Creditors, 16 La. An. 305. A man employed as foreman in a job printing office has no privilege on the property and materials in the establishment to secure a claim of wages. Lewis *v.* Patterson, 20 La. An. 294. An artificer who, in the exercise of his right of lien, detains a chattel upon which he has expended his labor and materials, has no claim against the owner for taking care of the chattel while so detained. Somes *v.* British Empire Shipping Co. 8 H. L. Cas. 338; 6 Jur. N. S. 761; 30 L. J. Q. B. 229; 8 W. R. 707. Judgment of exchequer chamber, and of queen's bench, El., Bl. & El. 353; 5 Jur. N. S. 675; 28 L. J. Q. B. 220, affirmed.

[2] Houghton *v.* Matthews, 3 B. & P. 485; Hollingsworth *v.* Dow, 19 Pick. 228.

[3] See cases cited supra, § 816.

[4] Somes *v.* Shipping Co. 8 H. L. Cas. 338; British Emp. Shipping Co. *v.* Somes, E., B. & E. 353.

services.[1] But the expenses must be expressly or constructively authorized by the principal.[2]

§ 818. *But it does not cover debts due the agent on other transactions.* — The case of factors has been independently considered, and rests upon the circumstance that the factor is an agent for a continuous service.[3] An agent who is employed, not for a continuous service, but to do something to a particular thing, cannot have a lien on such thing except for services connected with it.[4] Hence there can be no lien for a prior,[5] or a subsequent[6] independent debt; as *e. g.* for the keeping of the goods on which the lien is charged.[7]

§ 819. *Lien produced by operation of law.* — Liens, no doubt, can result from an express contract, but in mercantile relations they generally spring from operation of law.[8] The rules of equity, in this relation are the same as those of common law.[9]

§ 820. *Lien creditor may estop himself by his own act from asserting lien.* — An agent performing on behalf of his principal services to particular goods, may preclude himself, by his acts or words, from asserting a lien on such goods.[10] Thus, as will pres-

[1] Sodergreen *v.* Flight, 6 East, 612; Hollis *v.* Claridge, 4 Taunt. 807; Stevenson *v.* Blakelock, 1 M. & S. 543; Chase *v.* Wetmore, 5 M. & S. 186; Gledstanes *v.* Allen, 12 C. B. 202; Scarfe *v.* Morgan, 4 M. & W. 270; Hunt *v.* Haskell, 24 Me. 329; Briggs *v.* R. R. 6 Allen, 246; Hoover *v.* Epler, 52 Penn. St. 522; Sawyer *v.* Lorillard, 48 Alab. 332.

[2] Kay *v.* Johnston, 21 Beav. 536; Buxton *v.* Baughan, 6 C. & P. 674. An agent has an implied or equitable lien, enforcible within proper time, in equity, for advances, expenses, commissions, &c., made in the purchase of lands for his principal.

A farmer pasturing horses has no lien on the horses for his pay. Bissell *v.* Pearce, 28 N. Y. 252. A mere volunteer custodian has no lien for storage. Rivara *v.* Ghio, 3 E. D. Smith, 264; Alt *v.* Weidenberg, 6 Bosw. 176; Byers *v.* Danley, 27 Ark. 77.

[3] See supra, § 768.

[4] Cecil Bk. *v.* Farmers' Bk. 22 Md. 148; Castellain *v.* Thompson, 13 C. B. (N. S.) 105; Sweeny *v.* Easter, 1 Wallace, 116; Thacher *v.* Hannahs, 4 Rob. (N. Y.) 407.

[5] Jarvis *v.* Rogers, 15 Mass. 396; Adams *v.* Clark, 9 Cush. 215; Olive *v.* Smith, 5 Taunt. 56; Mountford *v.* Scott, Turn. & Rus. 280; Scott *v.* Jester, 8 English (Ark.), 437.

[6] Barry *v.* Longmore, 4 Per. & D. 344; Somes *v.* British Co. 8 H. L. Cas. 838; *S. C.* E., B. & E. 353.

[7] Ibid. The lien of attorneys, as has been already seen, covers independent transactions. Supra, § 624.

[8] Chambers *v.* Davidson, 1 L. R. P. C. 296; 4 Moore P. C. N. S. 158; Kirchner *v.* Venus, 12 Moore P. C. 158.

[9] Oxendham *v.* Esdaile, 2 Y. & J. 493; 5 D. & R. 49; 3 B. & C. 225; Jacobs *v.* Latour, 5 Bing. 130.

[10] See supra, § 688, 769, 771. See Paley's Agency, 140–2; Chandler *v.*

ently be seen, he may throw himself obviously and exclusively on the personal security of the owner of the goods, disclaiming recourse to the goods;[1] or he may take the goods in execution on his own suit;[2] or he may elect other securities, surrendering recourse to the goods.[3] Or he may, by accepting a trust inconsistent with the lien, indicate that he waives such lien,[4] or the same result may be worked by his claiming the same sum on another right or on a different ground.[5] But the existence of a special contract for remuneration does not oust the agent's right of protection by lien.[6] That an agent by parting voluntarily with the goods waives his lien will be presently more fully seen.[7]

§ 821. *Lien is not exclusive of other rights of agent.* — An agent, in addition to his lien, may have recourse to his personal claims against the principal, and may sue the latter on the bal-

Belden, 18 Johns. R. 157; Randel *v.* Brown, 2 How. 424; Manchester Bk. Co. ex parte, L. R. 18 Eq. 249; Maxfield *v.* Burton, 43 L. R. Eq. 15; Frith *v.* Forbes, 4 De G., F. & J. 409; Chambers *v.* Davidson, L. R. 1 P. C. 296; Weeks *v.* Good, 6 C. B. N. S. 367; Harrison *v.* Scott, 5 Moore P. C. 357; Pickett *v.* Bullock, 52 N. H. 354; Harkins *v.* Toulmin, 25 Mich. 81; Cavender *v.* Bultcel, L. R. 9 Ch. 79; Jacobs *v.* Latour, 5 C. & P. 560.

[1] Woollen Man. Co. *v.* Huntley, 8 N. H. 441. This is the case where he gives credit for a stipulated time. Fieldings *v.* Mills, 2 Bosw. 489; Trust *v.* Pirsson, 1 Hilt. 293; *S. C.* 3 Abb. Pr. 84.

[2] Jacobs *v.* Latour, 5 C. & P. 560. As to effect of such election, see Oakley *v.* Crenshaw, 4 Cow. 250; Hapgood *v.* Batchellor, 4 Metc. 576.

[3] Paley on Agency, 147–8; Hewison *v.* Guthrie, 3 Scott, 298; Leith's Est. in re. L. R. 1 P. C. 296; Cowell *v.* Simpson, 16 Ves. Jr. 275; Chambers *v.* Davidson, L. R. 1 P. C. 296; Sanderson *v.* Bell, 2 Cr. & M. 304; Vandersee *v.* Willis, 3 Bro. C. C. 21; Mason *v.* Morley, 34 Beav. 471; Gilman *v.* Brown, 1 Mason, 191; Randel *v.* Brown, 2 How. 406; Hickox *v.* Fay, 36 Barb. 9; Bailey *v.* Adams, 14 Wend. 201; Bower's appeal, 68 Penn. St. 126; McDevitt *v.* Hays, 70 Penn. St. 373; Downer *v.* Bank, Wright, 477; Foltz *v.* Peters, 16 Ind. 244; Jones *v.* Vantress, 23 Ind. 533; Kirkham *v.* Boston, 67 Ill. 599; Ducker *v.* Gray, 3 J. J. Marshall, 163; Gaines *v.* Casey, 10 Bush, 92.

[4] Paley's Agency, 140–2; Chase *v.* Westmore, 5 M. & S. 180; Walker *v.* Birch, 6 T. R. 258; Jarvis *v.* Rogers, 15 Mass. 389; Williams *v.* Littlefield, 12 Wend. 362.

[5] White *v.* Gainer, 9 Moore, 41; 2 Bing. 23; 1 C. & P. 324; Boardman *v.* Sill, 1 Camp. 410; Weeks *v.* Goode, 6 C. B. N. S. 367; Scarfe *v* Morgan, 4 M. & W. 270; Dirks *v.* Richards, 4 M. & G. 574. This has been held to be the case where the lien creditor makes a special agreement for a particular mode of payment. Trust *v.* Pirsson, 1 Hilt. 293; *S. C.* 3 Abb. Pr. 84.

[6] Hulton *v.* Brag, 7 Taunt. 25; Chase *v.* Wetmore, 5 M. & S. 180; Peyroux *v.* Howard, 7 Peters, 324.

[7] See infra, § 824.

ance due without impairing the security of the lien.[1] Thus an agent to purchase goods, who pays the purchase money, may, after demand, sue the principal before having recourse to the goods.[2] A factor, however, as we have elsewhere seen, must, if he accept goods for sale with the understanding that he is to be repaid for his advances from the goods, exhaust the goods before he can have recourse to his personal remedy against the consignor.[3] And the agent, as we have just noticed, may so exclusively elect one fund as to bar himself from the other.[4]

II. TO WHAT GOODS A LIEN ATTACHES.

§ 822. *The thing charged must be, at the time of the creation of the lien, within the power of the agent.* — Of course this proposition is to be understood as having no reference to statutory liens, such as those given to mechanics or material men. As to agents the law is positive. No man can charge a thing with his labor and expenses put on it unless it is within his power. It may not be actually in his hands. He may hold it by subordinates,[5] or, in case of a ship at sea transferred by bill of sale, he may hold it, without actual delivery, by the highest title that can be obtained.[6] He may hold it as a factor holds goods consigned to him when such goods are still in the carrier's hands.[7] But have it in some way under his power, at

[1] Curtis *v.* Barclay, 5 B. & Cr. 141; Frixione *v.* Tagliaferro, 10 E. F. Moore, 675; Consequa *v.* Fanning, 3 Johns. Ch. 600; Colley *v.* Merrill, 6 Greenl. 50; Burrill *v.* Phillips, 1 Gall. 360; Peisch *v.* Dickson, 1 Mason, 10; Beckwith *v.* Sibley, 11 Pick. 482; Upham *v.* Lafavour, 11 Metc. 174; Storking *v.* Page, 1 Conn. 519; Corlies *v.* Cummings, 6 Cow. 181. The lien creditor, however, abandons his lien by taking other securities. Supra, § 820.

[2] Hoy *v.* Reade, 1 Sweeny, N. Y. 626.

[3] Gihon *v.* Stanton, 9 N. Y. 476. See supra, § 766 *et seq.*

[4] Supra, § 820. Woollen Man. Co. *v.* Huntley, 8 N. H. 441. If an agent has advanced money, or incurred a liability upon the faith of the solvency of his principal, and the latter becomes insolvent while the proceeds and fruit of such advance or liability are in the possession of the agent, or within his reach, and before they have come to the actual possession of the principal, the agent has a lien upon the same for his protection and indemnity. Muller *v.* Pondir, 55 N. Y. 326.

[5] Clemson *v.* Davidson, 5 Binn. 392; Elliott *v.* Cox, 48 Ga. 39; M'Combie *v.* Davies, 7 East, 5; Mitchell *v.* Byrne, 6 Richards. 171. He may hold it by transfer of paper titles. Haile *v.* Smith, 1 B. & P. 563.

[6] See Robinson *v.* M'Donnell, 2 B. & Ald. 134; Mitchell *v.* Byrne, 6 Richards. 171; Rice *v.* Austin, 17 Mass. 197.

[7] Elliott *v.* Cox, 48 Ga. 39; Wade

the time of the alleged creation of the lien, he must, if he would assert such lien.[1]

§ 823. *No lien attaches to goods obtained without the owner's consent.* — On principle it may well be argued that he who bestows labor or money on a thing does so on the credit of the thing, and is entitled to be paid out of the thing. No question can be made that this is the law as to certain statutory (*e. g.* mechanics') liens, in which the lien attaches irrespective of the ownership; and the same distinction applies to the lien of innkeepers.[2] But outside of these cases we may hold that an agent has no lien on goods coming to him without the owner's consent; and that he cannot detain such goods, as against the owner, until his charges and expenses are paid.[3] Accidental possession gives no lien.[4] So as to involuntary deposits, such as lost goods, and waifs, there is no lien,[5] though it is otherwise as to lost goods for which the owner offers a reward; which reward is a lien on the goods in the finder's hands.[6]

§ 824. *Agent may waive his lien by parting with goods.* — When a person, having a lien upon goods, voluntarily surrenders them to the owner, he loses his lien.[7] He may, indeed, transfer the goods with an express agreement to keep alive the lien, for

v. Hamilton, 30 Ga. 450. Supra, § 769.

[1] Bryan *v.* Nix, 4 M. & W. 775; Legg *v.* Evans, 6 M. & W. 41; Shaw *v.* Neale, 4 Jur. N. S. 695; 27 L. J. Chan. 444; Heywood, ex parte, 2 Rose, 355; Robinson *v.* Larrabee, 63 Me. 116; Collins *v.* Buck, 63 Me. 450; Brown *v.* Wiggin, 16 N. H. 312; Rice *v.* Austin, 17 Mass. 197; Winter *v.* Coit, 3 Seld. 288; Milliken *v.* Shapleigh, 36 Mo. 596; Byers *v.* Danly, 27 Ark. 77; Allen *v.* Shortridge, 1 Duvall, 34. See Paley's Agency, 137. Supra, § 769. See Rogers *v.* Ins. Co. 6 Paige, 583.

[2] Yorke *v.* Greenaugh, 2 Ld. Ray. 866. See King *v.* Richards, 6 Whart. 418.

[3] Fitch *v.* Newberry, 1 Dougl. 1; Buxton *v.* Baughan, 6 C. & P. 674; Turner *v.* Letts, 20 Beav. 45; Van Buskirk *v.* Purinton, 2 Hall, 561; Robinson *v.* Baker, 5 Cush. 137; Clark *v.* R. R. 9 Gray, 231; Briggs *v.* R. R. 6 Allen, 247; Pearce *v.* Robert, 27 Mo. 179; Waugh *v.* Denham, 16 Irish L. R. 405; Jackson *v.* Clark, 1 Y. & Jerv. 216; Lempriere *v.* Pasley, 2 T. R. 485; Ogle *v.* Atkinson, 5 Taunt. 763.

[4] Jarvis *v.* Rogers, 15 Mass. 414; Muir *v.* Fleming, 1 D. & R. 29. See Paley on Agency, 128–31, 134, 139; 2 Kent's Com. 638–39.

[5] Preston *v.* Neale, 12 Gray, 222.

[6] Cummings *v.* Gann, 52 Penn. St. 484; Wentworth *v.* Day, 3 Metc. 352.

[7] Kinloch *v.* Craig, 3 Term R. 119; Daubigny *v.* Duval, 5 T. R. 604; Sweet *v.* Pym, 1 East, 4; Reeves *v.* Capper, 5 Bing. N. C. 136; Barry *v.* Longmore, 12 A. & E. 639; Donald *v.* Suckling, L. R. 1 Q. B. 587; Driscoll, in re, 1

the purpose of protecting such lien.[1] Of course this rule does not apply when the goods are taken in execution, or forced into a bankruptcy assignment;[2] or are otherwise taken from the lien creditor against his will or by fraud;[3] though should the execution be in collusion with the lien creditor or under his direction, he forfeits his lien,[4] and so if he omits when parting with the goods to give notice of the lien.[5] And a factor's lien, as is elsewhere seen, attaches to the proceeds of the goods after he has parted with their possession by sale.[6]

§ 825. *Lien, though lost when goods are parted with, revives if they are restored by owner to lien creditor.* — That is to say, if I return goods on which I have a lien to the owner, though my lien is thus waived, it is revived if the goods are restored by him to me.[7] But such revival of lien is subject to any incumbrances which intermediately, while the goods were in the owner's hands, attached to them.[8] And whether a special lien for work or outlay on a particular article can be thus revived, depends upon usage, and the intention of the parties.[9]

Ir. R. Eq. 285; Blackett *v.* Hayden, 3 Shepl. 347; Robinson *v.* Larrabee, 63 Me. 116; Collins *v.* Buck, 63 Me. 450; Eastman *v.* Avery, 23 Me. 250; Sears *v.* Wills, 4 Allen, 212; Homes *v.* Crane, 2 Pick. 607; Holly *v.* Huggeford, 15 Pick. 76; Jarvis *v.* Rogers, 15 Mass. 389; Sumner *v.* Hamlet, 12 Pick. 76; Way *v.* Davidson, 12 Gray, 466; Perkins *v.* Boardman, 14 Gray, 481; Ferguson *v.* Furnace Co. 9 Wend. 245; Look *v.* Comstock, 15 Wend. 244; Macfarland *v.* Wheeler, 26 Wend. 467; Grinnell *v.* Cook, 3 Hill, 485; Bigelow *v.* Heaton, 4 Den. 496; Walther *v.* Wetmore, 1 E. D. Smith, 7; Bowman *v.* Hilton, 11 Oh. 303; Sawyer *v.* Lorillard, 48 Ala. 332.

[1] Supra, § 772; Thompson *v.* Farmer, 1 M. & M. 48; Urquhart *v.* M'Iver, 4 Johns. 103; Nash *v.* Mosher, 19 Wend. 431; Clemson *v.* Davidson, 5 Binn. 392. But see Walther *v.* Wetmore, 1 E. D. Smith, 7.

[2] Hudson *v.* Granger, 5 B. & Ald. 27. See supra, § 815.

[3] Pierson *v.* Dunlop, Cowp. 571; Wallace *v.* Woodgate, R. & M. 193; 1 C. & P. 575; Bigelow *v.* Heaton, 6 Hill, 43; Ash *v.* Putnam, 1 Hill, 302; Kilby *v.* Wilson, Ry. & M. 178; Bristol *v.* Wilsmore, 1 B. & C. 514.

[4] Jacobs *v.* Latour, 5 Bing. 130; Legg *v.* Willard, 17 Pick. 140; Campbell *v.* Proctor, 6 Greenl. 12.

[5] Mexal *v.* Dearborn, 12 Gray, 336.

[6] See § 775.

[7] Supra, § 707; Paley's Agency, 145–6; Wallace *v.* Woodgate, R. & M. 193; Spring *v.* Ins. Co. 8 Wheat. 268; Johnson *v.* The M'Donough, 1 Gilpin, 101.

[8] Perkins *v.* Boardman, 14 Gray, 48. See supra, § 447, 707–755.

[9] See Bosanquet *v.* Dudman, 1 Stark. N. P. 1; Burn *v.* Brown, 2 Stark. N. P. 272; Johnson *v.* The M'Donough, 1 Gilpin, 101. If there be no agreement or usage to that effect there is no revival. Robinson *v.* Larrabee, 63 Me. 116; Collins *v.* Buck, 63 Me. 450. And an insurance broker's lien on the

III. RIGHTS OF OWNER AGAINST GOODS.

§ 826. *Owner may dispose of goods subject to lien.* — The owner of the goods may of course dispose of his title to them, but this is subject to the agent's lien. The transfer will convey a perfect title to the vendee only when the agent's lien is discharged.[1] But the owner cannot, by leaving enough in the agent's hands to satisfy the lien, dispose of any portion of the goods free from the lien, unless with the agent's consent.[2] This, however, is subject to modification by custom,[3] and factors, as we notice elsewhere, are bound to obey orders to sell whenever by so doing their lien will not be destroyed.[4]

IV. LIEN OF SUB-AGENTS.

§ 827. *Sub-agent, who is a mere servant of primary agent, has no lien against principal.* — We have noticed that the sub-agent, who is the servant of the primary agent, bears no personal relation to the principal, being himself absorbed in his immediate employer.[5] Such a sub-agent has recourse only to the primary agent for his compensation; and though the primary agent may acquire a lien on goods in his charge for the expense of the employment of such servant, yet the servant himself has no such lien.[6] Thus an attorney's clerk has no lien on the client's papers for his wages, though the attorney may charge as within his lien his expenses in the employment of his clerk.[7]

§ 828. *Otherwise as to an ancillary agent.* — Supposing, however, an ancillary agent, with liberty of action as to the mode of fulfilling his mandate, be appointed, under a general authority from the principal, then such ancillary agent is directly liable to the principal, and may directly sue the principal, and have a lien against the latter for services and outlay.[8] Thus if a general agent employ an attorney to act for the agency, the attorney

policies obtained by him, but with which he has parted, is not revived by a redelivery to him for collection, with notice of the interest therein of a third party. Sharp *v.* Whipple, 1 Bosw. 557.

[1] See supra, § 776–7; Drinkwater *v.* Goodwin, Cowp. 256.

[2] See supra, § 774–777.

[3] See Jolly *v.* Blanchard, 1 Wash. C. C. 252.

[4] Supra, § 758.

[5] See supra, § 348, 371.

[6] Supra, § 348; Paley's Agency, 147; Mann *v.* Shiffner, 2 East, 523; Westwood *v.* Bell, 4 Camp. 348.

[7] Supra, § 604, 623–6.

[8] Paley's Agency, 148–9; Snook *v.* Davidson, 2 Camp. 218; Foster *v.* Hoyt, 2 Johns. Cas. 327; Lincoln *v.* Battelle, 6 Wend. 475.

may sue the principal for his compensation, and have a lien for his fees on the principal's papers.[1]

§ 829. *So principal may clothe sub-agent with rights of primary agent.* — A principal may elect to ratify the acts of a subordinate agent, so as to become the immediate employer of such subordinate. If so, such agent has immediate recourse to the principal, with the usual rights of lien.[2]

§ 830. *Substitute who supposes himself to be primary agent entitled to latter's rights.* — We have elsewhere seen that if A., purporting to be rightful principal, and intrusted by the owner with the absolute control of goods, employ B., as an agent, which appointment B. accepts, innocently and non-negligently believing A. to be principal, B. has the same rights, unless there be a conflicting custom of trade, which he would have had if A. were the real principal.[3] The rule is otherwise when the secondary agent knows, or ought to know, that the person dealing with him is not owner.[4] And, generally, when one agent, without authority express or implied, employs a substitute, such substitute has no such privity with the original employer as sustains a lien.[5]

V. LIENS OF PARTICULAR CLASSES OF AGENTS.

§ 831. The liens of factors, of attorneys, of brokers, and of bankers, are considered in other sections.[6]

[1] See supra, § 615–623.

[2] See supra, § 348, 571, 827. See Westwood *v.* Bell, 4 Camp. 348; Schmaling *v.* Tomlinson, 6 Taunt. 147.

[3] See § 132, 490, 708, 739; Ferguson *v.* Carrington, 9 B. & Cr. 59; and see Fish *v.* Kimpton, 7 C. B. 687; Dresser *v.* Norwood, 17 C. B. N. S. 466; 32 L. J. C. P. 201; 34 L. J. C. P. 48; Turner *v.* Thomas, L. R. 6 C. P. 610; Lime Rock Bk. *v.* Plimpton, 17 Pick. 179; Miller *v.* Lea, 35 Md. 396.

[4] Supra, § 137; Maans *v.* Henderson, 1 East, 335.

[5] Solly *v.* Rathbone, 2 M. & S. 298; Jackson *v.* Clarke, 1 Y. & J. 216. See supra, § 823.

[6] As to factors, see § 766; attorneys, § 623; bankers, § 688.

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