

SPECIAL AGENCY.

nizant of the facts, and of any special terms, conditions or limitations of that agency, while persons dealing with such agent have usually no means whatever of knowing anything of the particulars of the constitution of the agency. If, then, the burden of proof is upon the plaintiff, he must necessarily in every case where the principal and agent, either honestly or dishonestly, differ in their testimony as to the special conditions or limitations of the agency, fail in an action against either the principal or the agent, and however meritorious his cause of action may be, remain thus utterly and absolutely without remedy. With such a burden upon him he could of course never recover from either principal or agent. Such a result is not in accordance with nor contemplated by the law of agency. The innocent party must have his remedy, while the principal and agent must settle between themselves. The plaintiff must of course establish the agency by a clear preponderance of proof; but having once done that, and the agent having been, so far as the person dealing with him could know, competent to act and bind the principal, the burden is and ought to be upon the defendant to establish any condition or limitation. It will not do to say that where the agent has the *indicia* of full authority, though in fact it has been limited, a person dealing with the agent has the presumption of authority in the agent, but that such presumption is repelled as soon as the principal testifies that the authority was never actually conferred, even though there be counterbalancing testimony to establish the authority. Though unquestionably the plaintiff has the burden in establishing the agency, the condition or limitation is matter of defence, and as to that the defendant setting it up has the affirmative of the issue, and in this particular must bear the *onus probandi*.

If the evidence as to the condition or limitation is evenly balanced, that defence must fail. Of what possible value is a presumption, if one cannot act upon it, and if it confers no sort of protection upon one who in good faith has acted upon it? No doctrine of agency could be more fruitful of deception and imposition than this.

In cases clearly of special agency, the rule is certainly established by the regu-

lar current of authorities, that the principal is only bound by the acts of the agent within the limits and scope of the authority conferred upon him; but the distinctions between limitations to his *authority* and private directions or instructions as to the *manner* of executing that authority, are vague and shadowy, and unsatisfactory in the extreme. Limitations enter into and become of the essence of the authority; whereas directions or instructions are merely guides to the agent, and cannot affect third parties acting in good faith and in ignorance of them.

In cases of general agency the universal tendency of the courts, both in England and in this country, has been to protect innocent third parties in preference to the principal, while in cases of special agency, they determine the liability by the terms of the authority, but in deciding the question whether the agency in a given case is general or special, some have looked at the transaction between the principal and agent, when the agency was in fact originally constituted, while others have, with what seems to me to be the better reason, considered rather the relations to those dealing with the agent and with whom the agent was expected to deal, and have inquired whether the agent was held out to the world as possessing general authority, and whether third parties dealing in good faith with him were justified in believing that he was a general agent, or possessed of general powers in the particular business. The reason of the rules established for the protection of persons dealing in good faith with an agent, apply with equal force to cases of general and special agency, provided only that in the latter case they had good reason to believe that the agent was in fact possessed of the powers which he claimed the right to exercise; and the principal, who has clothed even a special agent with every appearance of lawful authority, and allowed the world to believe that a certain authority existed, must have some liability in the matter. Special agency cannot be all advantage to the principal and no liability. There is no such an anomaly in this branch of jurisprudence. Such a rule of law, or such an application of existing rules, would be in the highest degree unjust. It would be simply preying upon