

PERSONAL CHARACTER OF OBLIGATIONS.

would be in its absence the lawful freedom of action of the party bound by it, and the law will not enforce such limitations beyond what is required to carry on men's ordinary affairs: now, it cannot be said that for this purpose it is generally necessary† to give the parties to a contract the power of conferring rights on third persons.

Exceptions.—The exceptions real or apparent to this rule are now to be shortly considered.

1. The most obvious is Agency. A contract made by an agent within his authority, or even made without authority and subsequently ratified, is binding on the principal: and this at first sight looks like an exception to the rule confining the legal effect of contracts to the actual parties. But the exception is only apparent, for the true party is the principal, and the agent is only the instrument by which the intention of the principal is expressed.

There are several conceivable degrees of agency according to the relative importance to the agent's part in the transaction; but the same principle runs through all.

If I discuss with another party an offer made by him, and we come to no final agreement, but afterwards I send a messenger to signify my assent, the messenger has only to deliver that, and is not concerned to know the matter to which my assent relates; he is just as much a passive instrument as a letter would be.

Nor does it make any difference in the nature of his instrumentality if the terms of the message are so full and explicit that he understands what it is about, but still has no choice. Again, if I empower him to exercise a strictly limited discretion (as to propose giving a certain price and increase it up to a certain limit if necessary) it is impossible to treat this as a substantial distinction. Again, if we go yet a step farther and consider what happens when I employ the agent not merely to act, but to judge, and leave the choice of several courses to his discretion, it still appears that he is in the same situation

touching the ultimate contract as the mere messenger. For though it is in his discretion to determine against several possible alternatives that one which is to constitute the intention on my part to be declared in the final contract, yet the intention is mine when determined. I may tell him to buy these or those goods for me according to the best of his judgment, but it is I who am the real buyer of the goods he decides upon.

In short, it matters not for this purpose whether the agent is the bearer of only one certain resolve of the principal, or of several alternative resolves amongst which he is to choose.*

The case is somewhat less simple when the agent contracts nominally for himself, but really for an undisclosed principal. But here the rule of law still rests upon the ground, "that the act of the agent was the act of the principal, and the subscription of the agent the subscription of the principal."† The principal has effectually and truly contracted, and "the parties really contracting are the parties to sue in a court of justice, although the contract be in the name of another."‡ Accordingly, if any agent makes a contract in his own name, the principal may sue and be sued on it,§ except in the case of contracts under seal, when a technical doctrine, applicable to deeds only, prevents this.|| And the fact of the agent expressly signing his own name makes no difference in this respect.¶ The peculiarity is that the introduction of the principal as a party is possible only, not necessary. In fact, there are two alternative and mutually exclusive** obligations, the principal being a party in one, the agent in the other. "Whenever an express contract is made, an action is maintainable upon it either in the name of the person with whom it was actually made or in the name of the person with whom in point of law it is made,"†† and

* Savigny, *Obl.*, sec. 57 (2, 57-59); Cp. *ib.* sec. 51 (2, 19).

† Per Parke B., *Beecham v. Drake*, 9 M. & W., 96.

‡ *Id.* p. 91, per Lord Abinger C. B.

§ *Cothay v. Fennell*, 10 B. & C., 671.

|| *Beecham v. Drake*, 9 M. & W., 95.

¶ *Id.* 91.

** Leake on *Cont.*, 300, 304.

†† *Cothay v. Fennell*, 20 B. & C., 6.

† Savigny, *Obl.* 2, 76; D. 44, de O. et A. 11 45, 1, de v. o. 38, sec. 17. Inventæ sunt enim hujusmodi obligationes ad hoc, ut unusquisque sibi adquirat quod sua interest: ceterum ut alii detur nihil interest mea.