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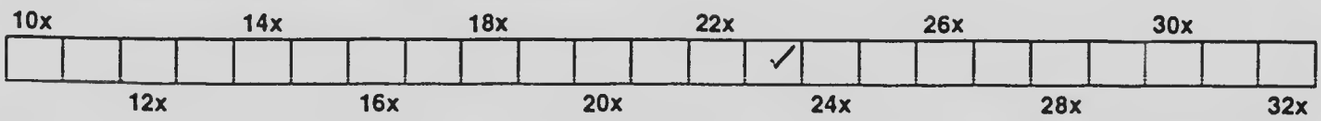

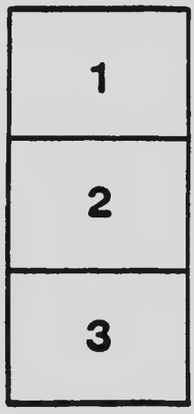

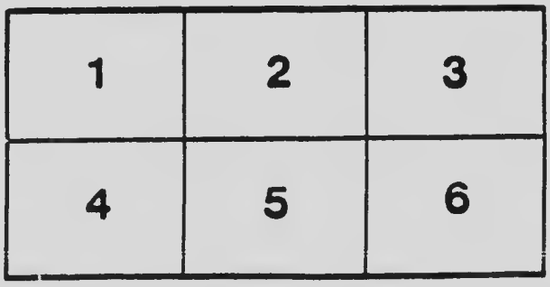

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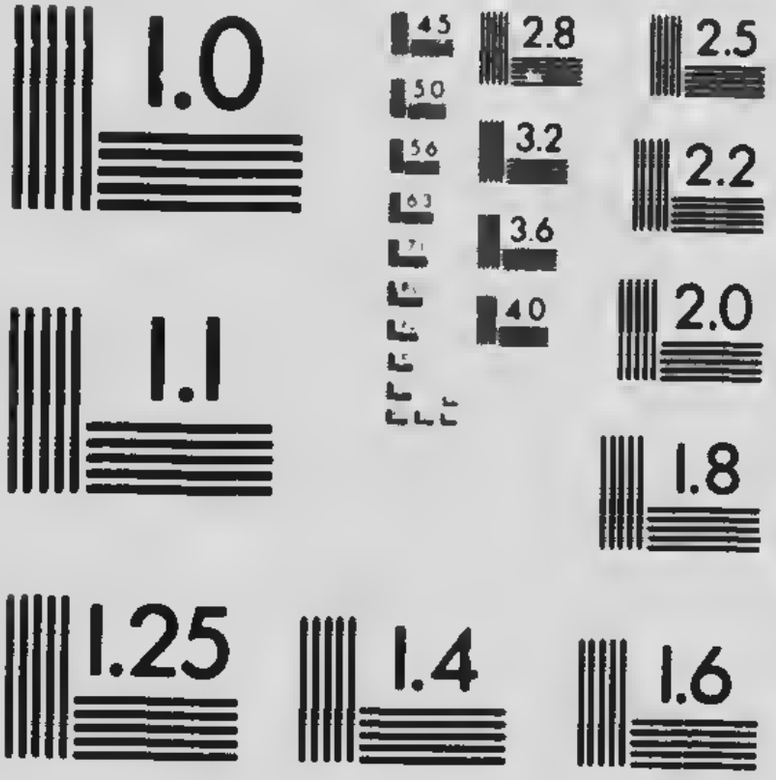

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NOTES

ON

The Law of Agency

INCLUDING

Principal and Agent

AND

Master and Servant

By STUART JENKS, K. C.

HALIFAX, NOVA SCOTIA, 1917.

TABLE OF CASES.

AGENCY AND REPRESENTATION.

Introduction. In the discussion of the subject of Agency we have to do with the conditions under which an act or default of one person is given effect so as to produce legal consequences in respect to another. If one person becomes the representative of another for the purpose of bringing the principal into contractual relation with a third person he is called an Agent. If he is employed to perform service subject to the direction and control of the principal he is a Servant. The term Agency is used to cover the whole field of representation. Historically agents are merely a particular class of servants.

See Blackstone Cons., Bk. 1, p. 427.

Two considerations sufficiently account for the modern differentiation of the law of master and servant (employer and employee) and the law of Principal and Agent.

(1) The great importance attained by agency as a branch of contracts. This is of course due to commercial development.

(2) The fact that the law of master and servant had its origin in status and was associated with the law of domestic relations. The law of master and servant has in modern times lost nearly all traces of its origin and rights formerly determined by considerations of status are now determined upon the basis of contract or consent. The change was of course a gradual one.

See Maines Anc. Law, pp. 164-165.

Modern Idea. Agency according to the modern conception is a relation arising out of agreement. It does not necessarily originate in an enforceable contract tho it involves in every case the consent of the principal actual or implied as a matter of fact.

Identity. Some have found the basis of the law of agency in the identification of the persons of the principal and agent. The use of this fiction is however unneccessary. The phase

used by Lord Holt gives the correct point of view "What is done by the deputy, is done by the principal and is the act of the principal."

See Articles by Judge Holmes, 4 H. L. R. 34, 5 H. L. R. 1.

Articles by Prof. Wiquire, 7 H. L. R. 315 and 383, 9 H. L. R.

1 Blackstone Com. 429.

Compare Blackstone's statement with the language of Willis J. in

Limpus v. Gen. Oninibus Co. 1 H. & C. at p. 539.

and note how the "implied command" idea has been supplanted by the "scope and course of employment" test. This change in phraseology marked the change of the presumption of fact into a rule of positive law. "Implied authority" and the like phrases were not applicable (except as pure fictions) to cases where the master is held liable for the consequences of acts which he not only did not authorize but which he expressly forbad. In such cases the master was held liable on the principle that the act was done in furtherance of the masters' business.

See Wambaugh's Cases, Ch. 2, Sec. 1, pp. 79-95.

Scope of the Subject. The act which a representative is authorized to do may be either (1) to represent the will of his principal to third persons with a view of establishing new legal relations between such persons and the principal by creating primary obligations with the rights correlative thereto, or (2) to perform for the principal (master) mechanical duties not intended to create new legal relations between the principal and third persons.

When the representative is employed for the first purpose he is called an agent: when employed for the second purpose he is called a servant or employee.

Preliminary Distinctions.

(1) Distinguish the relation of agency from the legal relations created,

(a) by a trust.
(b) by a partnership.
(c) by a sale.
(d) by a bailment.

See Exparte White (1870) L. R. 6, Ch. 397.
40 L. J., Bk. 73.
Exparte Bright (1879) 10 Ch., D. 566.
48 L. J., Bk. 81.
Turner v. Sampson (1911) 27 T. L. R. 200.
Biggs v. Evans (1894) 1 Q. B. 88.
W. Cas. 355.
Factors Act R. S. 1900, Ch. 146.
Callow v. Kelson, 10 W. R. 193.
125 R. R. 944.
Farquharson v. King (1902)A. C. 325.
71 L. J., K. B. 498.

(2) Distinguish an agent or servant from an independent contractor.

See Quarman v. Burnett 6 M. & W. 499.
55 R. R. 717.
W. Case 125.
Singer Mfg. Co. v. Rahn 132 U. S. 518.
W. Cas. 240.
Con. Plate Glass Co. v. Caston 29 S. C. C. 624.
Maple Leaf Co. v. Fulton 48 N. S. R. 46.

(3) Distinguish from transfer of service.

See Donovan v. Lang (1893), 1 Q. B. 629.

Definitions.

An "Agent" is a person who has authority express or implied to act on behalf of another person (the principal) and to bind that other person by his acts or defaults. (Jenks' Digest Sec. 121).

A "Servant" is a representative vested with authority to perform operative acts for his master not intended to create new legal obligations.

The same representative may be both an agent and servant. It is the nature of the Act performed that constitutes the real difference between the two classes of representatives

See A. & E. Eney, Law and Practice, Vo. 2, p. 793.
Kingan & Co. v. Silvers 13 Ind. App. 80 (1895).

Del Credere Agent.

See Hornby v. Lacy 6 M. & S. 166.
18 R. R. 345.
W. Cas. 675.

Mercantile Agent.

See Factor's Act R. S., 1900, C. 146, Sec. 2.
Oppenheimer v. Attenborough (1908) 1 K. B. 221.
Weiner v. Harris (1910) 1 K. B. 285.

Classification.

(1) General. (2) Special.

See Smith v. McGuire (1858) 3 H. & N. 554.
117 R. R. 853.
W. Cas. 324.
Brady v. Todd 9 C. B. N. S. 592.
W. Cas. 328.
Holland Jurisp 9th Ed., p. 260.
Jenks' Dig., Sec. 128-130 and 140.

The principal by authorizing the agent to do a particular act or class of acts vests him ostensibly with authority to do what is ordinarily incidental to the execution of the power conferred. This rule applies to both general and special agents. This distinction is not a fundamental one. It marks a difference in degree not in kind.

Division of Subject.

The subject of Agency may be divided logically into two great parts:

1. The law of principal and agent.

2. The law of master and servant.

Each of these parts is divided into four parts:

I. The formation of the relation. Incidental to this is the subject of the termination of the relation.

II. The mutual rights and obligations of the constitutent and representative to each other.

III. The mutual rights and obligations of the constituent and third persons growing out of the exercise of the authority by the representative.

IV. The mutual rights and obligations of the representative and third persons arising from the acts of the representative.

I.

FORMATION OF THE RELATION OF PRINCIPAL AND AGENT.

The inquiry as to whether the relation of principal and agent exists may arise in (a) a controversy between the alleged principal and agent, or (b) between the principal and some third person with whom the agent has dealt, or (c) between the agent and such third person. Different considerations apply to these cases. If we are considering the question as to whether the relationship or principal and agent exists, in a controversy between the alleged principal and the agent, we have simply a question of contract. An agreement of agency to be binding between the principal and agent must have all the essential elements of any enforceable contract; namely, agreement, consideration, competent parties, legality of object and in some cases a particular form. These elements call for no special

discussion as they do not differ from the like elements in any other contract.

If the question as to the existence of the relation of agency arises between the principal and a third person, we must have an agreement (express or implied) between the principal and agent, that is, there must be an express or implied consent to the formation of the relation. Such agreement may, however, amount to a contract, or it may fall short of a contract. If it amounts to a contract it is binding as between the principal and agent, and when acted upon may create legal rights and obligations between third persons and the principal. If it fall short of a contract, it will not bind the principal and agent as a contractual obligation but is good as an appointment of an agent, and if acted upon by the agent so appointed may create legal rights and obligations between the principal and third persons, and may render the agent liable to the principal for misfeasance.

We can say then that the relation of agency must rest on agreement (a broader term than contract). The assent of the principal to such agreement may be, of course, express or it may be implied. It is implied whenever a third person occupies such a position that according to ordinary reasonable usuage he would be understood to have the principal's authority to act on his behalf.

1. FORMATION BY CONTRACT.

Most of the elements of a contract of agency are common to all contracts. Some special points in this connection may however be usefully noted.

Competency of Parties.

Generally speaking parties competent to make any contract are competent to make a contract of agency. As between the principal and agent this rule is well enough since this aspect of the relationship is as we have seen governed by the law of contract; but as between the principal and third persons it calls for modification. On the one hand we have to inquire whether an incompetent person, as a lunatic or an infant, can

make a contract through a competent agent; on the other hand whether a competent person can make a contract through an incompetent agent.

A. Capacity to Act as Principal.

Rule. Capacity to contract or do any other act by means of an agent is coextensive with the capacity of the principal himself to make the contract or do the act that the agent is authorized to do.

Infants. An infant is bound by a contract made by his agent with his authority in cases where he would be bound if he made the contract personally.

Insane Principals. "The contractual acts of a person of unsound mind are valid unless it can be proved by the person seeking to avoid them that the other party to the transaction was aware of the unsoundness of mind. In the latter case they are voidable at the option of the person of unsound mind or his representatives." (Jenks' Dig. Sec. 64).

There is no "status" of lunacy for the purposes of legal capacity.

Applying these principles to the contract of agency the result is as follows:—As between the principal and agent the contract would be voidable if when it was formed the agent knew that the principal was insane: as between the principal and third parties the same result would follow, knowledge of the insanity would make the contract voidable. In the absence of knowledge it would be binding.

See Drew v. Nunn (1879) 4 Q. B. D. 661 C. A.
Yonge v. Toynbee (1910) 1 K. B. 215, W. Cas. 967.
Auson Contracts 12th Ed. 391-392.

Married Women. A married woman could make no binding contract at common law but otherwise now under the Married Woman's Acts, to the extent that she may contract in her own person, she may contract through an agent.

Corporations.

A corporation has the powers expressly conferred upon it by its charter as well as all powers incidental to the powers so conferred. The power to appoint agents is on the same basis as any other power of a corporation. It must be contained in the charter expressly or by implication. The appointment of an agent by a corporation in excess of its powers would be a void act.

Partnership. In a partnership each member is usually a principal and also an agent in the management of the partnership affairs. As agent each partner has the authority necessary for carrying on the business of the partnership. Among other powers he has the power to appoint agents to carry out the purposes for which the partnership exists. But if the appointment be to do an act which the partner could not himself do without special authority from his co-partners the appointment will not bind the firm.

Unincorporated Clubs, etc. Unincorporated clubs and other voluntary organizations are not competent principals because not legal entities. Their members may be held as joint principals if they have acted jointly in the appointment of an agent. Mere membership in a club does not make them principals as to contracts made by officers of the club.

See Flemyng v. Hector (1836) 2 M. & W. 172: 46 R. R. 553.

Exceptions to the Rule as to Capacity.

(1) Where the capacity to do the act arises by virtue of special custom which requires the act to be done in person.

See Combs Case 9 Co. R. 75a (1613); W. Cas. 33.

(2) Where the transaction is one required by statute to be done personally; e. g. the acknowledgement of a deed by a married woman.

See Hyde & Johnson (1836) 2 Bing. N. C. 776.
42 R. R. 737: W. Cas. 37.
Re Whitley (1886) 32 C. D. 337: W. Cas. 39.

(3) Where the capacity to do the act arises by reason of the holding of some public office, or by virtue of some duty of a personal nature requiring skill or discretion in its exercise.

The rule established in Hyde & Johnson was abrogated by the Mer. Law Am. Act 1856 19 & 20 Vict. C. 97, Sec. 13 and see R. S. 1900 C. 167 Sec. 5, Stat. of Limitations.

B. Capacity to Act as Agent.

Rule. Any person, notwithstanding any legal incapacity, may act as an agent: but his own rights and liabilities in respect both of his principal and third persons will be subject to his capacity.

Limitations. (a) No party to a contract is competent to sign the memorandum required by the Statute of Frauds as agent of another party to such contract.

See Wright v. Dannah (1809) 2 Camp. 203.
11 R. R. 693.
W. Cas. 10.
Fairbrother v. Simmons 3 B. & Ald. 333.
24 R. R. 399.
W. Cas. 11.

Disqualification. (b) As between the agent and principal the agent may be disqualified by the fact that he has an interest in the subject matter of the agency adverse to that of the principal. As between the principal and a third person the agent may be disqualified by the fact that the agent is secretly acting for both the parties to the contract to the knowledge of the third person. This would amount to collusion between the agent and third party to defraud the principal.

See Mayor of Salford v. Lever (1891) 1 Q. B. 168
60 L. J. Q. B. 39 C. A.

The agent of one party to a contract is however not disqualified from acting as agent for another party thereto where he can do so consistently with his duty to his principal.

Thus brokers and auctioneers frequently act for both the buyer and seller of goods.

See Bird v. Boulter (1833) 4 B. & 443; W. Cas. 12.
38 R. R. 285.

Co-Agents. Where a number of persons are given authority as agents of the principal, whether the agency is joint or several is a matter of construction to be gathered from the terms of the authority and the circumstances.

See Brown v. Andrew (1849) 18 L. J. Q. B. 153.
83 R. R. 842.

If the agency is a joint agency all the co-agents must (in the absence of a contrary provision) concur in the execution of the representative acts in order that the principal may be bound. This rule is however subject to the limitation that where the authority is of a public nature and the co-agents all meet (or a majority meet after due notice to all) for the purpose of executing it the majority may decide for all.

See Grindley v. Barker (1798) 1 B. & P. 229; 4 R. R. 787.
Commonwealth v. Canal Coms. 9 Watts (Pa.) 466.

If the authority is joint and several it is exercisable by all or each of the co-agents.

An authority conferred on more than one person is *prima facie* a joint authority.

Appointment of Agents.

An agent (even though appointed to execute an instrument required by the Stat. of Frauds to be in writing) may be appointed by oral communication, by writing or by instrument under seal.

Sale of Goods Act, 1916, Ch. 1, Sec. 6.

R. S. Ch. 141, Sec. 7.

Emerson v. Heelis, 2 Taunt 38: 11 R. R. S. 20: W. Cas. 53.
Johnson v. Dodge, 17 Ill. 433: W. Cas. 56.
Page v. Methfessel, 71 Hun 442: W. Cas. 47.

Limitations.

(1) Where by statute the appointment is required to be writing.

e. g. R. S. 1900, Ch. 141, Sec. 2, 3 4, & 7.

(2) It was a common law rule (subject to some exceptions) that contracts by corporations must be under the corporate seal. This limitation is completely abolished in N. S. by statute. R. S. 1900, Ch. 130.

The rule has also with regard to trading companies been abolished in England.

(3) Where the contract between the principal and third party is required to be under seal the authority of the agent to execute the instrument must itself be under seal. A contract for the sale of lands need not be under seal, though by reason of the statute of frauds it must be in writing, but a conveyance of lands must be under seal and the agents authority to execute such conveyance must also be under seal. So also authority to execute any specialty, as a bond, must be given by a sealed instrument.

Hibblewhite b. McMorine, 6 M. & W. 200: W. Cas. 58.
Berkley v. Hardy (1826) 5 B. & C. 355; 2 E. R. C. 273.
29 R. R. 261.

This rule does not apply to a case where the specialty is executed by the agent in the presence of the principal and the authority to execute the deed is given then and there.

See Cardner v. Garner 5 Cush. 483 W. Cas. 61.

This rule has been relaxed in the United States in the case of partnerships. Many jurisdictions there have held that one partner may be authorized by parol to execute specialties in the partnership name.

But see Harrison v. Jackson (1797) 7 T. R. 207.
4 R. R. 422.
Ball v. Dunsterville (1791) 4 T. R. 313.
2 R. R. 394.

Gratitous Agency.

The question of gratuitous agency resolves itself into two parts (1) as to the liability of a principal to third persons where the principal acts through a gratuitous agent (2) as to the liability of the agent to the principal or to third persons where the agent serves with compensation.

The first phase of the question affords little difficulty. One who acts through another is liable to third persons in the same way as if he has acted without the intervention of an agent, and so far as the third person is concerned it is wholly immaterial whether the agent acts for the principal for compensation or gratuitously. The sole inquiry is, had the agent authority to act for the principal? If so, the principal is bound by the agent's acts within the scope of his authority.

By reason of the doctrine of consideration in contract, a gratuitous promise by an agent otherwise than by specialty to act for the principal is unenforceable. If the agent enters upon the performance of the act he may then be liable for negligence in the performance of it because one who voluntarily meddles with the property rights of another is bound to act as an ordinarily prudent man would act under like circumstances.

See 2 L. Q. R. 33.

2. Formation by Ratification.

The relation of principal and agent may be formed by ratification.

The assent of the principal to the act of the agent may be given either before the act is performed or after its performance. When given before the performance of the act the assent is in the nature of an appointment of the agent for the performance

of the act When given after the is performed it is in the nature of a ratification of the act d has the same effect as a prior appointment.

Statement of the Doctrine. Subject to certain exceptions hereafter mentioned where one person assuming to act as the agent of another does an unauthorized act on behalf of that other the person on whose behalf the act was done may ratify the act and thereby give it the same legal effect as if the doing of it had been in fact authorized.

See Grant v. Beard 5 N. H. 129: W. Cas. 1021.

Elements of Ratification.

(1) The act must be performed on behalf of an existing principal.

Two elements must concur before the basis of ratification can be said to be laid:

(a) The principal must be an existing person capable of being ascertained.

If an agent professes to make a contract on behalf of a corporation to be formed but not yet in existence the contract is incapable of being ratified after the corporation has come into existence.

See Kelner v. Baxter L. R. 2 C. P. 174.
36 L. J. C. P. 94.
W. Cas. 1016.
Re Northumberland Ave. Hotel Co. (1886) 33 C. D. 16.
2 E. R. C. 351.

The company may of course make a new contract on the same terms or it may incur liability by receiving benefits under the contract or on the doctrine of part performance, but it cannot ratify.

(b) The contract must have been at the time professedly made on behalf of such existing principal. In ot. er words

where the act is done in the name of the actor without disclosing any other person there can be no ratification even though the actor had in mind a principal whom he expected to ratify.

The leading case is:

Keighley Maxtead & Co. v. Durant (1901) A. C. 240 H. L.
70 L. K. B. 662.
1 B. R. C. 351.

See also Durant v. Roberts (1900) 1 Q. B. 629.
Moore v. Roper (1904) 35 S. C. C. 533.

Under the rule that the principal must be disclosed as a condition precedent to ratification, it has been held that it is enough that some person who may be ascertained and identified is referred to.

See Hagedoon v. Oliverson 2 M. & S. 485: W. Cas. 1037.
15 R. R. 317.
Foster v. Bates 12 M. & W. 226: W. Cas. 1000.
66 R. R. 3111.
Watson v. Swan (1862) 31 L. J. C. P. 210: 2 E. R. C 346
11 C. B. N. S. 756: 132 R. R 746
Fraser v. Sweet 13 Man. L. R. 254 (1900).
Willon v. Tunman (1843) 6 M. & G. 236: W. Cas. 997
64 R. R. 770.

(2) It is a second element of ratification that the principal on whose behalf the act was performed shall subsequently assent to the contract. Ratification like prior authority by agreement rests on assent. The assent of the agent is already given by his assuming to act in the transaction. The assent of the third party is already given by his entering into the contract. The assent of the principal is therefore all that is required to make the contract binding on him and on the third person. Practically the same considerations govern the the doctrine of assent in ratification as govern the assent in acceptance of an offer. Except in cases where a particular form is necessary by statute the ratification may be express or it may be implied by conduct. All that the law requires is such a manifestation of the intention of the principal to adopt

the act of the agent as would lead the ordinarily prudent man to conclude that the principal had assented.

In order that the assent required to effect ratification may be established it is necessary that the third person shall have full knowledge of all the material circumstances under which the act was done.

See Lewis v. Read 13 M. & W. 834: 67 R. R. 828.
W. Cas. 1001.
Freeman v. Rosher (1849) 13 Q. B. 780.
78 R. R. 514.

Of course the facts relied on as effecting a ratification may show that the principal intends to take the risk in respect to the circumstances in which the contract was made and in such case it is not necessary to show knowledge. As was said by Patterson J. in Freeman v. Rosher, "the intention to adopt the act at all events is the same as adopting with knowledge."

See also Hasler v. Lemoyne (1858) 5 C. B. N. S. 530.
116 R. R. 753.
Fitzmaurace v. Bayley (1856) 6 El. & Bl. 868.
106 R. R. 827.
26 L. J. Q. B. 114.
Coombs v. Scott 12 Allen (Mass) 493.
Hyatt v. Clarke 118 N. Y. 563.

Ratification by conduct may of course assume an endless variety of forms. The most common form is the acceptance by the principal of benefits under the contract. Mere silence may in certain circumstances be sufficient. Rarely if ever would mere silence amount to ratification of an act done by a person who had no authority to act at all, but in the case of an agent exceeding his authority the circumstances may impose a duty to speak

See Fothergill v. Phillips L. R. 6, Ch. A. at page 777.
Waithman v. Wakefield 1 Camp. 120
10 R. R. 654.
Smith v. Hull Glass Co. 11 C. B. 897.
87 R. R. 804.

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Assent must be Unconditional. The ratification must extend to the whole act. One cannot of course take the benefit of a contract without also assuming its burdens. Accordingly the ratification of part of a transaction operates as a ratification of the whole.

See Cornwall v. Wilson (1750) 1 Ves. 510.
Dempsey v. Chambers 154 Mass 330: W. Cas. 1030.
Bradford v. Myers 32 T. L. R. 113.
Hillberry v. Hatton (1864) 2 H. & C. 822.
133 R. R. 811.
33 L. J. Ex. 190.
Powell v. Smith (1872) 14 Eq. 85.
41 L. J. Ch. 734.

Recapitulation-Assent.

The assent necessary to effect a ratification must be a real assent free from fraud, mistake or ignorance of material facts. It must be unconditional, but may be express or implied from circumstances. If the principal has been induced to ratify the contract by the fraud of the third party he can of course avoid the ratification.

Form of Ratification.

(3) In some cases it is an element of an effective ratification that the assent of the principal be expressed in a particular form.

It is not necessary that the ratification of a written contract should be in writing even though the contract is one which by reason of the Statute of Frauds is unenforceable unless evidenced by writing.

See Maclean v. Dunn (1828) 4 Bing 722: W. Cas. 993.
29 R. R. 714.

Specialty. Authority to execute a contract which is required to be under seal must be conferred by an instrument

under seal, hence the unauthorized execution of such a contract can be ratified only by an instrument of equal formality.

See Oxford v. Crowe (1893) 3 Ch. 535.

(4) It is essential to ratification that the act be one which the principal could have authorized but every act (not void) whether lawful or unlawful which is in its nature capable of being done by an agent is capable of ratification.

Ashbury v. Riche (1875) L. R. H. L. 653.
2 E. R. 7 C. 304.
Ancona v. Marks 7 H. & N. 686: W. Cas. 1014.

Forgery.

If A. forges the name of B. to an instrument can B ratify the forgery?

See Brook v. Hook (1871) L. R. 6 Ex. 89.
W. Cas. 1034.
Scott v. Bank of N. B. 23 S. C. C. 283.
Greenfield v. Crafts 4 Allen (Mass.) 447, W. Case. 1026
McKenzie v. British Linen Co. (1881) 6 A. C. 82.

Limitations to the general rule that the principal may ratify any act which he could have authorized.

A Limitation to the general rule is found in the case of notices on behalf of an alleged principal where the notice is one of an existing intent and must be authoritively given within a specified time. Such notice cannot be given by one without authority or by an agent in excess of authority and be subject to ratification after the xpiration of the time, so as to avail the principal. The reason is that the party notified has a right to know the intent of the principal within the time during which notice may be given.

The act of ratification must take place at a time and under circumstances when the ratifying party might have lawfully done the act which he assumes to ratify.

See Right v. Cuthell 5 East 491: W. Cas. 1034.
7 R. R. 752.
Bird v. Brown (1850) 4 Ex. 786.
80 R. R. 775.
W. Cas. 1040.
Dibbins v. Dibbins (1896) 2 Ch. 348.
65 L. J. Ch. 734.

A payment cannot be ratified after the money paid has been returned to the person who paid it.

Walter v. James (1871) L. R. 6 Ex. 124: W. Cas. 1049.
40 L. J. Ex. 104.
W. Cas. 1049

Does notice of the withdrawal of an offer made to and accepted by an agent without authority prevent the principal from subsequently ratifying the acceptance?

See Boulton Partners v. Lambert (1888) 41 C. D. 295.
58 L. J. Ch. 425.
W. Cas. 1053.

Note that the third person and the unauthorized agent may by mutual assent release the third person from liability at any time before ratification. (Walter v. James Supra).

In the United States the doctrine generally prevails that the third person may recede from the contract at any time before ratification on the ground that prior to ratification there is no mutality, and if one party is free to be bound or not bound the other must also be free.

See Flemming v. Bank of N. Z. (1900) A. C. at p. 587.
Williams v. North China Co. (1876) 1 C. P. D. 757.
W. Cas. 1040 (note)
Grover v. Mathews (1910) 2 K. B. 401: 79 L. J. K. B. 1025.

(5) It is another element of an effective ratification that the principal be competent. The same considerations apply in respect to the competency of the principal to ratify an act as to authorize it.

Recapitulation of Elements.

(1) Act must be professedly performed on behalf of an existing principal.

(2) Subsequent genuine assent of such principal.

(3) In some cases ratification must be in a particular form.

(4) The act ratified must be a valid act which the principal was capable of authorizing.

(5) The principal must be competent.

Legal Effects of Ratification.

Ratification bears many analogies to acceptance of an offer. "Probably the legal analysis of the position is: that the agent offers to act as such, and assuming his offer accepted, proceeds to act as agent. The intended principal may decline or omit to accept the offer, but, if he accepts it his acceptance relates back to the date of the offer." (Jenks' Dig. Bk. I, Sec. 125).

Rule. After ratification the principal and the agent and third party are in the same position as if the contract or act had been authorized at the time it was made or done.

See Wilson v. Tunman (1843) 6 M. & G. 236: W. Cas.997
64 R. R. 770.
Bird v. Brown (1850) 4 Ex. 786: W. Cas. 1040.
80 R. R. 775.

e. g. A. on B's behalf but without his authority distrains goods belong to C. and B. ratifies the distress. If B. had a right to distrain A. is discharged from liability, the ratification having a retroactive effect and rendering the distress lawful *ab initio*. If B. had no right to distrain A. and B. are jointly liable as trespassers.

See Whitehead v. Taylor (1839) 10 A. & E. 210.
50 R. R. 385.
Hull v. Pickersgill (1819) 1 Brod. & B. 282.
21 R. R. 598.

Limitations of Rule.

(1) **Intervening Rights.**

(a) While as between the parties ratification relates back to the time of the original transaction, it cannot by so doing cut off the intervening rights of strangers to the transaction. Purchasers of the subject matter of the contract, attaching creditors and others who acquire intervening proprietary rights are protected from the effects of a subsequent ratification.

e. g. See Bird v. Brown (above cited) W. Cas. 1040.
Donelly v. Popham 1807 1 Taunt 1
9 R. R. 687.

(b) Where except in the case of the ratification of a contract an act is of such a nature that, if it had been duly authorized, it would have imposed a duty on any third person the ratification of such an act does not operate to impose such duty retrospectively.

e. g. A. being indebted to B. tenders the amount of the debt subsequently C. demands the debt in B's name and on his behalf but without authority B. cannot ratify the demand so as to defeat A's plea of tender.

Cole. v. Bell (1808 1 Camp. 478.
10 R. R. 731 (n).

A. has possession of goods belonging to B. C. demands the goods on B's behalf but without his authority. B. cannot ratify the demand so as to entitle him to maintain an action (founded on the demand) against A. for the conversion of the goods.

Solomon v. Daws (1794) 1 Esp. 83.

(2) **Previous Breach.** There is a further limitation on the rule as to the effect of ratification in that the ratification of a contract does not give the principal a right of action in respect of any breach committed before the time of ratification.

Kidderminster v. Hardwick (1873) L. R. 8 Ex. 13.
43 L. J. Ex. 9.

3. Quasi-Contractual Relations giving rise to agency.

Aside from contracts which rest upon the agreement of the parties there is a more or less clearly defined class of legal relations in which the obligations are enforced by contractual remedies, although in fact no contract by agreement existed between the parties. These relations are usually now called quasi-contractual relations. Such are the contracts of an infant to pay for necessaries, of a man to return money paid him under a mistake of fact, of a corporation to return the benefits received under a contract ultra vires. These obligations are imposed by law on grounds of public policy and juctice.

The same principle of quasi contractual obligation is applied for the purpose of creating an agency where otherwise there would be none. Such agency generally arises from the necessity of the situation.

(1) Agency of a Wife.

The agency of a wife to pledge the credit of her husband may rest on any one of three grounds.

(1) There may be actual authority. In such case we have of course only the normal agency created by agreement.

(2) There may be ostensible authority arising out of the marriage relation by reason of,

(A) Cohabitation.

Rule. A wife living with her husband is prima facie the agent of her husband in respect of the management of the household, and may pledge her husband's credit for necessaries suitable to his position and the manner in which the household is maintained: The presumption from mere cohabitation may be rebutted by proof that her husband has either supplied her (a) with sufficient necessaries or money to purchase the same or (b) expressly forbidden her to pledge his credit.

See. Phillipson v. Hayter (1870) L. R. 6 C P. at p. 41.
Morrell v. Westmoreland (1903) 1 K. B. 64.
72 L. J. K. B. 66.
Debenham v. Mellon (1880) 6 A. C. 24 H. L.
50 L. J. Q. B. 155.
Jolly v. Rees (1864) 15 C. B. N. S. 628.
32 L. J. C. P. 177.

Where the purchases go beyond such as the manager of the household might reasonably make in the circumstances there is no presumption of authority from the mere fact of the marriage relation. Marriage does not as does partnership create the relation of agent and principal. Authority must be sought in acts and conduct on the part of the husband calculated to induce third parties to believe that the wife has the added authority. That is to say ostensible autority rests upon the same considerations here as in any other case except that the fact that the wife manages the household raises a presumption of authority to make the usual and ordinary purchases necessary in such management. Where husband and wife live apart there is no such presumption.

B. Cohabitation and Household Management.

Rule. Where a wife who is living with her husband has the management of the household she is the husband's agent in all household matters and may pledge his credit for such things as are necessary in the ordinary course of such management and are usually bought on credit and every act done by the wife within the scope of her estensible authority as manager of his household binds her husband unless she has in fact no authority to do the particular act, and the person dealing with her has at the time of the transaction notice of such want of authority.

See Emmett v. Norton (1838) 8 C. P. 506: 56 R. R. 848.
Ruddock v. Marsh (1857) 1 H. & N. 601: 108 R. R. 743

But compare Morel v. Westmoreland (1904) 1. A. C. 11. (cited supra) and Jenks' Dig. Bk. 1 Sec. 132.

A housekeeper or servant presiding over a man's household has the same ostensible authority while so presiding to pledge his credit as a wife. (Jenks' Dig. Sec. 134).

See Ryan v. Sams (1848) 12 Q. B. 460.
76 R. R. 31.
Reneaux v. Teakle (1853) 8 Ex. 680; 91 R. R. 703.

The question whether the articles for which the credit is pledged are necessaries is a question of fact for the jury, and the burden of proof lies on the person supplying them.

See Jewsbury v. Newbold (1857) 26 L. J. Ex. 247; 112 R. R. 927.

Husband and Wife living apart.

Rule. A wife living apart from her husband with his consent has authority to pledge her husband's credit for necessaries supplied for the use of herself and their children living with her; unless she is provided by him with an adequate maintenance or an income which she has agreed to accept as adequate, or has adequate separate means.

See Negus v. Foster, 46 L. T. 675 C. A.
Johnston v. Sumner (1858) 3 H. & N. 261; 117 R. R. 769
Eastland v. Burchell (1878) 3 Q. B. D. 432.
47 L. J. Q. B. 500.

Mainiwering v. Leslie (1826) 2 C. & P. 507; 31 R. R. 691.

Wife's Agency of Necessity.

Rule. Where a wife has been deserted by her husband or has been turned away by him without adequate cause, or has left him in consequence of such misconduct on his part as justifies her in leaving him, and is living apart from him, she has authority to pledge his credit,

(a) for necessaries suitable for her station in life;

(b) for costs reasonably incurred in taking legal proceedings against him;

(c) for the maintenance and education of their children living with her.

In the circumstances above stated there is a liability created by law.

See Wilson v. Ford (1868) L. R. 3 Ex. 63.
37 L. J. Ex. 60.
Houliston v. Smith (1825) 3 Bing. 127: 28 R. R. 609.
Bazeley v. Forder (1868) L. R. 3 Q. B. 559.
37 L. J. Q. B. 237.

As to what misconduct justifies a wife in leaving her husband.

See Houliston v. Smith (supra).
Tempany v. Hakerville (1858) 1 F. & F. 438.
115 R. R. 936.
Brown v. Ackroyd (1856) 5 El. & Bl. 819.
103 R. R. 762.

Effect of Misconduct of Wife.

See Govier v. Hancock (1796) 6 T. R. 603. 3 R. R. 271.
Cooper v. Lloyd (1859) 6 C. B. N. S. 519.
120 R. R. 253.
Atkings v. Pearce 109 R. R. 876.
(1857) 2 C. P. N. S. 763.
Wilson v. Glossop 20 Q. B. D. 354.
57 L. J. Q. B. 161 C. A.
Norton & Fazan (1789) 1 B. & P. 226.
4 R. R. 785.

(2) **Children.** A child even though living with his parents has no authority to pledge his parents' credit even for necessaries.

It is of course true that the relationship of the parties will establish authority on slighter evidence than in cases

where the relationship does not exist; but some evidence of authority must be given, enough to establish a case for the jury.

See Mortimore v. Wright (1840) 6 M. & W. 482.
55 R. R. 704.

(Some American courts enforce a liability founded on the obligation to support).

(3) Shipmaster.

A shipmaster has authority in case of necessity to purchase supplies for his vessel and pledge the credit of the owner. So also in case of supreme necessity the shipmaster has authority to sell the cargo or even the vessel.

See Vol. 2 E. Ruling Cases, 535, Et seq.

The doctrine of agency by necessity has been extended in some cases to relations unknown to the common law. An instance is found in that of the employment of medical attendance in railway accidents.

Terra Haute Ry. v. McMurray 98 Ind. 358.
Lewisville Ry. v. Smith, 121 Ind. 353.
Langan v. G. W. Railway Co. (1873) 30 L. T. 173.
G. N. Railway Co. v. Sroaffield, L. R. 9 Ex. 132.
Gwillian v. Twist (1895) 1 Q. B. 84 C. A. W. Cas. 95.

(4) Estoppel.

Where a person by his conduct represents that another person is his agent he will not be permitted to deny the existence of the agency with respect to any third person acting on the faith of such holding out.

This rule is an application of the doctrine of estoppel *in pais*.

See Page v. Methfessel 71 Hun. (N. Y.) 442: W. Cas. 47.
Pale v. Leask (1862) 22 L. J. Ch. 155.

Some writers have given great emphasis to the doctrine of estoppel in its application to the law of agency. It has been said that the ground on which the principal is held liable for the acts of an agent within the scope of his apparent or

ostensible authority but beyond the limits of his real authority is estoppel. Other writers think the doctrine of estoppel too narrow and furnishing in any case a roundabout approach to an end which can be reached more directly by appealing at once to the axiom of agency.

For a discussion of the matter see the following:

Estoppel Theory.

Ewart on Estoppel, C. 26.
Estoppel & Agency 16 H. L. R. 186.

Contra.

15 H. L. R. 324.
Missapplication of Estoppel, Kenneson
5 Columbia L. R. 261.
Also see Green Bag Vol. 13 p. 50.

4. The Termination of the relation of Agency.

(1) The relation of principal and agent may come to an end under the terms of the agreement under which it was constituted. Butler v. Knight (1867) L. R. 2 Ex. 109.

(2) The relation may be determined (a) by the principals revocation of the Agent's authority, of (b) by the Agent's renunciation of his authority.

See Warlow v. Harrison (1859) 1 El. and El. 309.
117 R. R. 219.
Campanari v. Woodburn (1854) 15 C. B. 400.
100 R. R. 406.
Brookshire v. Brookshire 8 Ired, L. 74: W. Cas. 953.

Notice of Revocation. In order to protect himself the principal should communicate the revocation not only to the agent but to persons who on the strength of the previous authority are likely to deal with the agent.

See Anon v. Harris 12 Mod. 346: W. Cas. 953.
Truman v. Loder (1840) 11 A. & E. 589.
52 R. R. 451: W. Cas. 578 (n).
Aste v. Montague (1858) 1. F. & F. 264.
115 R. R. 903.

Effect of Revocation. While the principal has the power to revoke at any time with or without good cause, the revocation may give use to a claim for damages for breach of contract.

Effect of Renunciation. The renunciation becomes operative at between the principal and agent when knowledge of it actually reaches the principal. The principal as in the case of his own revocation should notify third persons in order to protect himself against subsequent dealings with the agent. The renunciation may give use to a claim for damages against the agent.

(3) The relation may be determined by operation of law. Discharge of contracts by operation of law is a topic of the general law of contract. Contracts of personal service may be terminated.

(a) By a change in the law which renders the contract impossible or illegal.

(b) By destruction of the subject matter of the agency.

(c) By changed conditions not contemplated by the Agency.

See Rhodes v. Forwood (1876) 1 A. C. 256.
Turner v. Goldsmith (1891) 1 Q. B. 544.

(d) By the death of either party.

Baxter v. Burfield 2 Str. 1266: W. Cas. 957.
Blades v. Free (1829) 9 B. & C. 167. 32 R. R. 620.
Foster v. Bates (1843) 10 M. & W. 226.
67 R. R. 311: W. Cas. 1000.
Whitehead v. Lord (1852) 7 Ex. 691. 86 R. R. 797.
Salton v. New Beeton Co. (1900) 1 Ch. 43.
Harper v. Little 2 Me. 14: W. Cas. 958.
Griggs v. Swift 82 Ga. 392: W. Cas. 960.

(e) By the insanity of either party.

See Drew v. Num (1879) 4 Q. B. D. 611.
W. Cas. 967.
Yonge v. Toynbee (1910) 1 K B. 215.

(f) By the bankruptcy of the principal.

See Pearson v. Graham (1837) 6 A. & E. 899.
45 R. R. 644.

The bankruptcy of the agent does not necessarily determine the agency. Whether or not it has this effect depends uponthe nature of the agency.

See Phelps v. Lyle (1840) 10 A. & E. 163.
50 R. R. 353.

(g) By war

See Insurance Co. v. Davis 95 U. S. 425.
W. Cas. 961.

(4) Irrevocable Agencies.

To the general rule that an authority vested in an agent by the principal may be revoked by the act of the principal, or by operation of law there are some exceptions. These exceptions constitute the class of irrevocable agencies.

The reason for holding certain powers vested in an agent irrevocable is that a revocation would cause to the agent a loss or damage other than and different from a mere loss of employment or profit. Thus if the agent is employed to do an act which involves him in personal liability to a third person, and he has incurred such liability, the authority cannot be revoked, because its revocation would subject the agent to an action by the third person.

See Walsh & Whitcomb (1797) 2 Esp. 565: W. Cas. 973.
Gaussen v. Morton (1830) 10 B. & C. 731.
34 R. R. 558.
Raleigh v. Atkinson (1840) 6 M. & W. 670.
55 R. R. 764.
Smart & Saunders (1848) 5 C. B. 895; 75 R. R. 849.
Toplin v. Florence (1851) 10 C. B. 744: 84 R. R. 773.

Crawfoot v. Gurney (1832) 9 Bing. 372.
35 R. R. 557.
Hamilton v. Spottiswoode (1849) 4 Ex. 200.
80 R. R. 519.

Yates v. Hoppe (1850) 9 C. B. 541; 82 R. R. 429.
Read v. Anderson (1884) 13 Q. B. D. 779.
53 L. J. Q. B. 532 C. A.
W. Cas. 765.

What is the effect of death of principal where the authority is "irrevocable?"

See Watson v. King (1815)4 Camp. 272
16 R. R. 790.
Spooner v. Sandilands (1842)1 Y. & Coll. C. C. 390.
57 R. R. 397.
Hunt v. Rousmanier's Adm 8 Wheat, 174.
W. Cas. 974.

II.

The Effect of the Relation Between Principal and Agent.

The obligations of each party are fixed either by the terms of the contract expressly made or annexed by law or custom or by terms reasonably inferred from the circumstances.

1. Obligations of Principal to Agent.

(1) **The duty to compensate the agent.** The compensation may be fixed by express agreement or (in the absence of express agreement) by business custom or the circumstances of the employment.

See Reeve v. Reeve (1858) 1 F. & F. 280: 115 R. R. 911.
Foord v. Morley (1859) 1 F. & F. 496: 115 R. R. 949.

Unauthorized Service. If the service was unauthorized but subsequently ratified, the agent may recover remuneration to the same extent as if the service had be originally authorized. Apply this doctrine carefully. In the first place the adoption of the act must be a *real ratification* and not merely an attempt by the principal to avoid further loss. Secondly what might establish ratification between the principal and a third party will not necessarily establish it between the principal and the agent. Thirdly distinguish between ratification and a subsequent promise to pay for gratuitous services.

Conditional Compensation.

See Cutter v. Powell (1795) 6 T. T. 320.
3 R. R. 185.
2 Sm. L. C. 1.
Burchell v. Gowrie Collieries (1910) A. C. 614.

Illegal services. Where the services of the agent have been knowingly rendered in an unlawful undertaking or where the agent is not legally qualified he can recover no compensation.

Agent's misconduct or negligence.

See Salamans v. Pender (1865) 3 H. & C. 639.
140 R. R. 651.
Hill v. Featherstonhaugh (1831) 7 Bing. 569.
33 R. R. 576.
Andrews v. Ramsay (1903) 2 K. B. 635.
72 L. J. K. B. 865.
Hippisley v. Knee Bros. (1905) 1 K. B. 1.
74 L. J. K. B. 68.

Revocation by act of principal or operation of law.

(a) See Pricket v. Badger (1856) 1 C. B. N. S. 296.
107 R. R. 668.
Simpson v. Lamb (1856) 17 C. B. 603 104 R. R 806
Cutter v. Gillette 163 Mass. 95.
Cadigan v. Crabtree, 179 Mass 474.

(b) See People v. Globe N. S. Co. 91 N. Y. 174.

Renunciation. Where the agent carefully abandons the the agency he cannot recover for services already performed, unless the contract is divisible.

See Davis v. Maxwell (1847) 12 Met. (Mass) 286.
Anson on contract p.

(2) The duty to indemnify and reimburse.

See D'Arcy v. Lyle (1813) 3 Binn (Pa) 441. W. Cas. 747.
cf. Halbroom v. International Horse Agency (1903)
1 K. B. 27.
Adamson v. Jarvis (1827) 4 Bing 66.
29 R. R. 503; W. Cas. 754.

Duncan v. Hill (1873) L. R. 8 Ex. 242.
42 L. J. Ex. 179: W. Cas. 760.
Read v. Anderson (1884) 13 Q. B. D. 779.
W. Cas. 765.
Bayliffe v. Butterworth (1847) 1 Ex. 425.
74 R. R. 702.

Remedies of Agent. In addition to an action at law and other remedies open to all creditors the agent may have a special remedy in the nature of a lien on the subject matter of the agency. The lien is a possessory one and like other common law liens is lost when the agent parts with the property which is subject thereto. See Bowstead on Agency Art. 71-75 inclusive. pp. 233-264 of the 5th Edition.

2. Obligations of Agent to Principal.

Gratuitous Agents.

See Wilkinson v. Coverdale 1 Esp. 75: 33 R. R. 256.
W. Cas. 882.
Thorn v. Deas 4 Johns 84: W. Cas. 883.
Baxter & Co. v. Jones 6 Ont. L. R. 360.
Whitehead v. Greetham 2 Bing 464.
W. Cas. 885.
Wilson v. Brett 11 N. H. W. 113: W. Cas. 890.
Article by Prof. Beal 5 H. L. R. 222.

Agents bound by Contract. Classification of duties:

(1) To obey instructions.

See Fray v. Voules (1859) 1 El. and El. 839.
117 R. R. 483.
Wiltshire v. Sims 1 Camp. 258.
10 R. R. 673.
Whitney v. Merchants Co. 104 Mass. 152.

(2) To exercise prudence.

See Keys v. Tindall (1861) 1 B. & S. 296.
124 R. R. 564.
Lee v. Walker (1872) L. R. 7 C. P. 121.

(3) To act with the strictest good faith.

See Tenant v. Elliott 1 B. & P. 3: 4 R. R. 755.
W. Cas. 904.

Thompson v. Havelock 1 Camp. 527: 10 R. R. 744.
W. Cas. 907.
Robinson v. Mollett (1875) 7 H. L. 802.
W. Cas. 908.
44 L. J. C. P. 362 (H. L.)
Bell v. McConnell 37 Ohio St. 396: W. Cas. 913.
Merryweather v. Moore (1892) 2 Ch. 518.
W. Cas. 924.

(4) To account to the Principal.

See Dodswell v. Jacobs (1887) 34 C. D. 278.
56 L. J. Ch. 233.
Parker v. McKenna L. R. 10 Ch. 96.
44 S. J. Ch. 425.

(5) To act personally. *Delegatus non potest delegare.*

Rule. The agent must act in person unless he has express or implied authority to act by deputy.

See Palliser v. Ord W. Cas. 928.
Catlin v. Bell W. Cas. 929.
Wainbaugh's Cases pp. 933-4 (note).

Implied authority. Authority may be implied from the conduct of the parties, the nature of the authority conferred or from the usage of trade or business.

See Exparte Sutton 2 Cox 84: W. Cas. 935.
Dorchester Bk. v. N. E. Bank 1 Cush 177.
W. Cas. 942.
De Bussch v. Alt. 8 C. D. (1877) 286.
W. Cas. 934.
Giwiliam v. Twist (1895) 2 Q. B. 84.
W. Cas. 951.

Rule of Liability. Unless the circumstances are such as to create privity between the principal and sub-agent "the agent is answerable both to his principal and to third parties for the acts and defaults of any persons whom he appoints, whether authorized to do so or not, to act for him in the business of the agency and a principal incurs no liability for the acts and defaults of any person so appointed." (See Jenks' Dig. Sec. 518).

III.

The Legal Effect of the Relation as Between the Principal and Third Parties.

1. Contracts of Agent on Behalf of a Disclosed Principal. The normal case of agency.

Rule. The principal is liable upon all contracts made by his agent within the scope of his actual authority and upon all contracts made by his agent within the scope of his apparent authority, unless the third person had notice that the agent was exceeding his authority, but the principal is not liable upon contracts made by an agent beyond the scope of his actual or his apparent authority.

See Hambro v. Burnand (1904) 2 K. B. 10.
73 L. J. K. B. 669.

Apparent Authority. In order to establish the apparent or ostensible authority of the agent in a particular case it is necessary to show (1) That the principal held out the agent under circumstances from which a reasonably prudent man would be justified in inferring such authority and (2) that the third party had no knowledge of any limitation of the apparent authority of such agent.

Elements of Authority. Several elements combine to make up what is termed the scope of the agent's authority.

(1) The powers actually conferred.

(2) The powers reasonably incidental to those actually conferred.

(3) The powers annexed by custom or usage to those conferred.

(4) The powers which the principal has by his conduct led third persons to reasonably believe the agent possesses.

See Hazard v. Treadwell, W. Cas. 253.
L. Loyd's Bank v. Cooke (1907) 1 K. B. 794.
76 L. J. K. B. 666 C. A.

Smith v. Prosser (1907) 2 K. B. 735.
77 L. J. K. B. 71 C. A.
Fenn v. Harrison 3 T. R. 757: 4 T. R. 177.
W. Cas. 253-259.
Gardner v. Bailie 6 T. R. 591: W. Cas. 260.
3 R. R. 531, 538.
Howard v. Baillie 2 H. Bl. 618: W. Cas. 261.
3 R. R. 531.
Wiltshire v. Sims 1 Camp. 258 (1808).
10 R. R. 673: W. Cas. 268.
Hogg v. Snaith (1808) 1 Taunton 347.
9 R. R. 788: W. Cas. 269.
Pickering v. Busk (1812) 5 East 38.
13 R. R. 364: W. Cas. 272.
Whitehead v. Tucket (1812) 15 East 400.
13 R. R. 509: W. Cas 277.
2 E. R. C. 358.
Guerreiro v. Peile (1820) 3 B. & Ald. 616: W. Cas. 282.
Hawtayne v. Bourne (1841) 7 M & W. 595.
58 R. R. 806: W. Cas. 301.
Upton v. Suffolk Mills (1853) 11 Cush 586.
W. Cas. 316.
Smith v. McGuire 3 H. & N. 554: 117 R. R. 853.
W. Cas. 324.
Brady v. Todd (1861) 9 C. B., N. S. 592: W. Cas. 328.
Edmunds v. Bushell, L. R. 1 Q. B. 97: W. Cas. 331.
Baines v. Ewing (1866) 4 H. & C. 511: W. Cas. 334.
L. R. 1 Ex. 320: 35 L. J. Ex. 194.
Chapleo v. Brunswick Society (1881) 6 Q. B. D. 696.
50 L. J. Q. B. 372: 2 E. R. C. 366.

Signature by procuration.

See Attwood v. Munnings (1827) 7 B. & C. 278.
31 R. R. 194: W. Cas. 286.
Bryant v. Quebec Bank (1893) A. C. 170 & 179.
Russell on Bills, p. 169, et seq.
Bills of exch. act, sec. 51.

Disposition of Property by Agents.

Rule. Where an agent is intrusted with money, goods or other property belonging to his principal no disposition of the

property made by the agent without the principal's authority is binding on the principal.

See Fowler v. Hollins L. R. 7 H. L. 757.
2 E. R. C. 410.
Farquharson v. King (1902) A. C. 325.

Exceptions.

(1) Where the principal by his conduct represents the agent as entitled to dispose of the property (Estoppel).

See Sale of Goods Act, Sec. 27.

(2) Where a sale is made in market, overt (in England).

(3) Where the agent transfers negotiable instruments in his possession to a person who receives the same in good faith.

(4) Where agent entrusted with the documents of title to property exceeds his authority in dealing with the property.

See Brocklesby v. Temperance Soc. (1895) A. C. 173:
64 L. J. Ch. 433.

Apparent Ownership.

See Callow v. Kelson 125 R. R. 944 (Supra p. 3).

(5) Dispositions under the Factors Acts.

See R. S. 1900 Ch. 146.

Effect of Act stated:—

Where a mercantile agent is with the consent of the principal in the possession of goods or of the documents of title to goods belonging to the principal, the principal is bound by any sale, pledge or other disposition of the goods made by the agent for valuable consideration while acting in the ordinary course of business of a mercantile agent as regards any person taking under the disposition, provided that such person acts in good faith and has no notice at the time of the disposition that the agent has no authority to make it.

2. Contracts of Agent for Undisclosed Principal.

Doctrine Stated. When a person, who apparently acts as a principal, is discovered to have been really acting as agent the true principal may (subject to certain limitations) be made liable by persons with whom the agent has dealt. So also an undisclosed principal may declare himself and assume any contract entered into on his behalf. (Jenks' Digest, Sec. 144 and 146).

Hence a contract made between A and B, each believing the other to be acting in his own behalf, may be shown to be a contract between X and Y, two undisclosed principals.

Privity of Contract. Consider the doctrine of undisclosed principal in connection with the doctrine of privity in contract.

It is said, "A person has a right to select and determine with whom he will contract, and cannot have another person thurst upon him without his consent." (Boston Ice Co. v. Potter 123 Mass 28).

Rights of Undisclosed Principal Against Third Party.

See Scrimshire v. Alderton (1742) W. Cas. 627.
Cothay v. Fennell (1830) 10 B. & C. 671.
W. Cas. 628.
Humble v. Hunter (1848) 12 Q. B. 310: W. Cas. 629.
Schmaltz v. Avery (1851) 16 Q. B. 655: W. Cas. 631.
Huntington v. Knox, 7 Cush 371: W. Cas. 634.

Limitations.

(1) The right of the undisclosed principal to sue the third party is subject to the state of accounts between the agent and third party at the time the right is asserted.

See Rabone v. Williams (1785) 7 T. R. 360 (n)
4 R. R. 463: 2 E. R. C. 391: W. Cas. 673.
George v. Clagett 7 T. R. 359: 4 R. R. 462: W. Cas. 674.
Hornby v. Lacey (1817) 6 M. & S. 166: 18 R. R. 345.
W. Cas. 675.

Barrie v. Imp. Bk. (1873) L. R. 9 C. P. 38: W. Cas. 678.
Roosvelt v. Doherty 129 Mass. 301.
W. Cas. 681.
Cook v. Eshelby (1887) 12 A. C. 271.
2 E. R. C. 398: W. Cas. 687.
See also 3 L. Q. R. 358.

(2) Where in a written instrument agent has represented himself to be the real principal. (a rule of evidence).

(3) Where a sealed instrument names the agent alone as the obligee.

See Berkley v. Hardy (1826) 5 B. & C. 355: 29 R. R. 261.

(4) Negotiable Instruments. The rule of the Law merchant confines the rights and liabilities upon negotiable instruments to the parties named or described therein.

Liability of Undisclosed Principal to Third Party.

See Thomson v. Davenport (1829) 9 B. & C. 86: 2 Sm. L. C
32 R. R. 578: W. Cas. 637.
Calder v. Dobell (1871) L. R. 6 C. P. 486.
2 E. R. C. 456: W. Cas. 564.
Kayton v. Barnett 116 N. Y. 625: W. Cas. 652.
Watteau v. Fenwick (1893) 1 Q. B. 346.
W. Cas. 654.
See also Article in L. Q. R. Vol. 9 p. 111.

Theory of Liability.

It appears first that an undisclosed principal is liable upon a contract made by his agent because the agent's act is the act of the principal or the agent's name has been adopted by the principal for the purposes of the contract, and second, that having established (by fiction) the privity, the law goes on to apply the usual doctrines of agency in order to determine the agent's authority.

Limitations to right of third party to hold liable the undisclosed principal.

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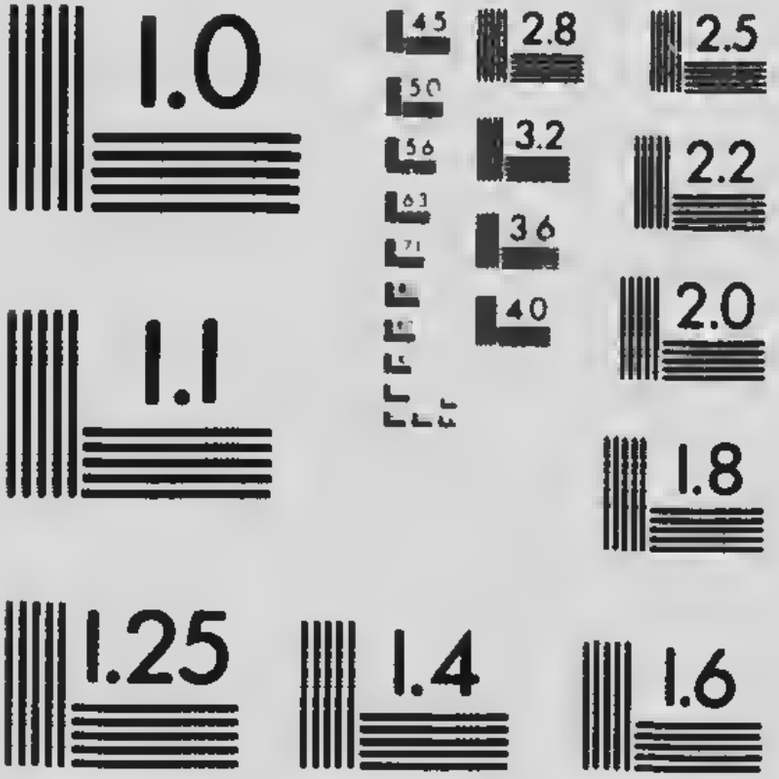

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(1) "If the st[illegible] of accounts between the principal and the agent has been altered owing to the conduct of the creditor, the latter cannot to the prejudice of the principal hold him liable." (Jenk's Dig., Sec. 144).

See Heald v. Kenworthy (1855) 10 Ex. 739.
102 R. R. 800: W. Cas. 692.
Armstrong v. Stokes (1872) L. R. 7 Q. B. 598.
2 E. R. C. 471: W. Cas. 704.
Curtis v. Williamson (1874) L. R. 10 Q. B. 57.
W. Cas. 713.
Irvine v. Watson (1880) 5 Q. B. D. 414.
W. Cas. 715.

Note. Armstrong v. Stokes has not been overruled, tho said by Bowstead to be of doubtful authority. See remarks of Brett L. J. in Irvine v. Watson. The decision will be confined to the circumstances of the particular case, and is not founded on any general principle. Its effect should therefore be stated as a limitation on the general r.le of liability of the undisclosed principal. The statement by Bowstead is as follows, Art. 97.

"Where an agent buys goods in his own name from a person who believes him to be buying on his account, and whilst he continues to give exclusive credit to the agent believing him to be the principal and not knowing of any other person in the transaction, the principal in good faith pays the agent for the goods, the principal is discharged from liability to the seller."

(2) Where the third party recovers judgment against the agent he cannot (probably) afterwards sue the principal even tho the judgment remains unsatisfied."

See Priestly v. Fernie (1865) 3 H. & C. 977.
W. Cas. 698.
Kendall v. Hamilton (1879) 4 A. C. 504.
W. Cas. 702 (n)

(3) "A third party who, after discovering the existence of the principal, unequivocally manifests his intention to give exclusive credit to the agent, cannot afterwards sue the principal."

(4) Where the contract between the agent and third party is under seal (the seal not being superfluous) the undisclosed principal is not liable.

See Berkley v. Hardy (1826) 5 B. & C. 355.
29 R. R. 261.

(5) The doctrine of the liability of undisclosed principal is inapplicable to negotiable instrument contracts.

3. Principal's Liability for Torts of Agent.

Contract is the chief subject matter of the law of Principal and Agent, but the agent may have authority, real or apparent, to make representations to third persons which when acted upon involve the principal in tort liability. Practically the same rule of liability is applied in the case of an agent as in the case of a servant.

See Udell v. Atherton (1861) 7 H. & N. 172.
W. Cas. 374.
Barwick v. English J. S. Bank (1867) L. R. 2 Ex. 259.
W. Cas. 412.
British Mutual v. Charnwood 18 Q. B. D. 714.
W. Cas. 425.
Poulton v. L. & S. W Ry L. R. 2 Q. B. 534; W. Cas. 191.
Cornfoot v. Fowke (1840) 6 M. & W. 358.
55 R. R. 331; W. Cas. 358.
Lloyd v. Grace Smith (1912) A. C. 716.
See also Pollock on Torts 10th Ed. pp. 318-321.

4. Principal's Liability for Crimes of Agents.

Except where otherwise provided by statute a principal is not criminally liable for any act of an agent not authorized or participated in by the principal.

The criminal liability of the principal is not governed by the same rules as his civil liability. The presumption of authority which arises from the relation of the parties is counterbalanced in the criminal law by the presumption of innocence. From this presumption the conclusion is natural that a criminal act committed by the agent should be presumed to be committed contrary to and not in obedience to the directions of the principal. Something more than the mere fact that the agent was acting within the scope of his employment must therefore be shown.

See Rex v. Almon (1770) 5 Burr 2686. W. Cas. 429.
Rex v. Medley (1834) 6 C. & P. 292. W. Cas. 432.
Com. v. Nichols (1845) 10 Met. 259. W. Cas. 435.
Com. v. Briant (1886) 142 Mass. 463; W. Cas. 445.
Carini v. R. C. Bishop of Springfield, 219 Mass. 117.

IV.

THE LEGAL EFFECT OF THE RELATION

AS

BETWEEN THE AGENT AND THIRD PARTIES.

1. Contract relations between agent and third parties—

(1) **Liability of Agent to third party.**

Principal Alone Bound. Where an agent acts within the real or apparent scope of his authority for a disclosed principal.

See Owre & Gooch 2 Esp. 567: W. Cas. 525.
Williamson Barton (1862) 7 H. & N. 899.

Whether a written contract is made in the name of the principal or of the agent is a question of construction for the Court. Whether a verbal contract is made on behalf of a principal is a question for the jury.

See Gad & Houghton (1876) 1 Ex. D. 357.
W. Cas. 358.
Jones v. Littledale (1827) 6 Ad. & E. 486: W. Cas. 552.

Agent Alone Bound.

Exclusive credit given to agent.

See Patterson v. Gandsequi 15 East 62: 13 R. R. 368:
W. Cas. 527.
Addison v. Gandsequi 4 Taunt 574: 13 R. R. 689:
W. Cas. 529.
Kirkpatrick v. Stainer 22 Wend 244: W. Cas. 531.
Die Elbinger v. Claye L. R. 8 Q. B. 313: W. Cas. 542.
Bray v. Kettell 1 Allen 80: W. Cas. 559.
Harper v. Kelled (1915) 84 L. J. K. B. 1696.

Unauthorised Contract. Warranty of authority.

See Collen v. Wright (1857) 3 El & B. 647.
W. Cas. 506.
Kroeger v. Pitcairn 101 Pa. 311: W. Cas. 509.

Note. The action ex contractu founded on an implied warranty of authority may be maintained even tho the agent has acted in good faith under the mistaken belief that he had the authority which he represented himself to have. The action is founded on a fiction invented by the Courts to provide a remedy for the case where a third party has suffered injury through an agent innocently exceeding his authority in circumstances not amounting to deceit. The fiction serves a useful purpose but it should not be allowed to disguise the fact that such action furnishes a plain exception to the rule that no action lies for an innocent misrepretentation. If the agent wilfully misrepresents his authority he is liable to an action ex delicto for deceit. See Pollock on Torts 10th Ed. pages 295-296. 564-565.

See Ballow v. Talbot 16 Mass. 461: W. Cas. 494.
Pothill v. Walter 3 B. & Ad. 114: W. Cas. 496.
Smout v. Ilbery 10 M. & W. 1: W. Cas. 499.
Jenkins v. Hutchinson 13 Q. B. 744: W. Cas. 503.
Lewis v. Nicholson (1852) 18 Q. B. 503: W. Cas. 504.
Fairbanks v. Humphreys (1886) 18 Q. B. D. 54:
W. Cas. 517.
Meek v. Wendt 21 Q. B. D. 126: W. Cas. 521.
Lilly v. Smales (1892) 1 Q. B. 456: W. Cas. 524.

Sealed Instruments. Where an agent makes a contract under seal in his own name (the seal not being merely superfluous) the agent alone is liable thereon. The instrument in order to bind the principal must purport to be his deed.

Negotiable Instruments. The rule that only the parties named or described in a bill or note can sue or be sued has been previously mentioned, and is here referred to only for completeness.

Principal and Agent both Bound.

Undisclosed Principal. The agent and principal are both liable and the third party may elect which he will hold.

See Simon v. Motivos (1776) W. Cas. 658.
Rhodes v. Blackiston 106 Mass. 334: W. Cas. 736.

Written contract Parol evidence rule.

See Higgins v. Senior 8 M. & W. 834: W. Cas. 554.
Bateman v. Phillips 15 East 272: W. Cas. 548.
Pike v. Ongley 18 Q. B. D. 708: W. Cas. 662.

Public Agents. See Macbeath v. Haldi nand (1786) 1 T. R. 172: 1 R. R. 177.
See Auty v. Hutchinson (1848) 6 C. B. 266.
77 R. R. 324.
Dunn v. Macdonald (1897) 1 Q. B. 401.

(2) **Liability of Third Party to Agent.**

See Gibson v. Winter 5 B. & Ad. 96: W. Cas. 739.
Isberg v. Bowden (1853) 8 Ex. 852: W. Cas. 734.

2. Agent's liability to third party for Torts.

See W. Cas. p. 469.
Bell v. Josselyn 3 Gray 309: W. Cas. 478.
Bennett v. Bayes 5 H. & N. 391: W. Cas. 179.
Osborne v. Morgan 13 Mass. 102: W. Cas. 484.

MASTER AND SERVANT.

Scope of Subject. We have seen that a servant is a representative vested with authority to perform operative acts for his master.

The chief subject matter of the law of master and servant is tort. A servant in performing operative acts for his master may wilfully or inadvertently cause injury to the person or property of a third person, and such third person may be a stranger to the service or may be a fellow servant. The main problem of the law of master and servant is to determine the nature and extent of the master's liability for such torts.

In discussing the matters characteristic of the law of master and servant, we shall, without going over the ground already covered under the head of agency, consider the following matters:—

I. Who is a servant? That is when does the relation of master and servant exist in fact so that the master is liable for any acts or omissions of the servant?

II. For what acts or omissions of a servant resulting in injury to a third person is the master liable?

III. For what acts or omissions of a servant resulting in injury to a fellow servant is the master of the two servants liable?

IV. To what extent is a servant liable for his own torts resulting in injury to strangers or to fellow servants?

V. For what torts affecting the relation of master and servant is a third person liable either to the master or to the servant?

VI. We shall next consider important modern statutes which have changed the common law in respect to the relation of master and servant.

Independent Contractor.

When a person desires a particular act done he may either hire a workman to do it, retaining control of the servant and directing his work, or he may let the job by contract simply stipulating that it shall be done in accordance with certain specifications, but retaining no control over the contractor or over his methods of work. In the first case the workman is a servant in the second case he is an independent contractor.

Rule. Subject to certain exceptions one who lets a contract for work and retains no control over the work or the methods of doing it is not liable for the negligence or other wrong of the contractor.

See Pollock on Torts 10th Ed. p. 84 et. seq.
Sadler v. Henlock (1855) 4 E. & B. 570; W. Cas. 152.

Exceptions.

(1) If the employer contracts for a nuisance or other unlawful act, he remains liable to any person injured in consequence of the performance of the contract.

See Ellis & Sheffield Gas Co. (1853) 2. E. & B. 767.
W. Cas. 148: 95 R. R. 792.

(2) If the employer is under an obligation of positive law to do a particular thing, or to observe particular safeguards, he cannot relieve himself of this liability by putting the work into the hands of an independent contractor.

See Terry v. Ashton (1876) 1 Q. B. D. 314.
Pollock on Torts 10th Ed. pp. 542-3.

(3) If the work to be executed is extra hazardous, and such that in the natural course of things injurious consequences are likely to ensue, unless suitable means are adopted to prevent such consequences, the employer is liable unless he uses due care in the adoption of such means.

See Black v. Christ Church Co. (1894) A. C. 48.

(4) If the owner of property contracts for work to be done upon it, he is as to licenses bound to keep the premises in a safe condition, and cannot excuse himself on the ground that the work is under the exclusive control of a contractor. The rule extends to the protection of the users of a highway against defective overhanging structures.

See Bush v. Steinman (1799) 1 B. & P. 404: W. Cas. 98.
Reedie v. L. & N. W. Ry. Co. (1849) 4 Ex. 244.
80 R. R. 541: W. Cas. 134

Note that the case of Bush v. Steinman carried this early doctrine to the extreme point of holding that where work is done on an owner's premises he ought to reserve control over the methods, and if he does not, is liable for all results. This case has been unfavorably commented on.

See Pollock on Torts, 10th Ed. p. 85.
Hillyard v. Richardson 3 Gray (Mass.) 349.

(5) If the employer reserves the right to interfere with the method of work and to direct and control, the employer is substantially the master and remains liable under the usual doctrines applicable to master and servant.

So also where the employer having reserved no right to interfere does in fact interfere and the injury complained of is the natural result of such interference the employer is liable.

See Linneham v. Rollins 137 Mass. 123.
McLaughlin v. Pryor (1842) 4 Man. & Gr. 48·
61 R. R. 455.
Pollock on Torts 10th Ed. 85-86.

Resumption of Control After the work of the contractor is completed and the owner resumes control of his property, he is of course liable for its safe condition. It is sometimes a nice question whether or not the owner has resumed control, but this is essentially a question of fact and not a question of law.

Transfer of Service.

See Rourke v. White Moss Co. (1877) 2 C. P. D. 205.
46 L. J. C. P. 283: W. Cas.229.

Hiring Horses and Driver.

See Laugher v. Pointer (1826) 5 B. & C. 547.
29 R. R. 319: W. Cas. 105.
Quarman v. Burnett (1840) 6 M. & W. 499.
55 R. R. 717: W. Cas. 125
Jones v. Scullard (1898)2 Q. B. 565: 67 L. J. Q. B. 895.

Hiring Machine and Operator.

See Donovan v. Laing (1893) 1 Q. B. 629: 63 L. J. Q. B. 25.
Murray v. Currie (1870) L. R. 6 C. P. 24: W. Cas. 206.

Compulsory Employment.

See Martin v. Temperly (1843) 4 Q. B. 298: W. Cas. 129.
Smith v. Steele L. R. 10 Q. B. 125: W. Cas. 808.

Sub-servants, etc.

See Gwilliam v. Twist (supra): W. Cas. 951.
Booth v. Mister (1853) 7 C. & P. 66: W. Cas 936.
Beard v. London G. O. Co. (1900) 2 Q. B. 530.
68 L. J. Q. B. 895 C. A.

Public Officers.

See Pollock on Torts 10th Ed. p. 89.
23 L. Q. Rev. 12.

Liability of Occupant.

See Halptzok v. G. N. Ry. 55 Min. 446: W. Cas. 947.
Althorp v. Wolfe 22 N. Y. 355.
Pollock on Torts 10th Ed. 451-452.

II.

LIABILITY OF MASTER TO THIRD PERSONS FOR TORTS OF SERVANTS.

Conditions of Liability.

(1) The wrongdoer must have been in fact the servant of the person sought to be charged with liability.

(2) The servant must have been at the time the tort was committeed about his master's business.

(3) The servant must have been acting in the course of his employment.

Master's Business.

Obviously one may be in the general service of another, and yet at times attend to business or pleasure for himself. Acts done during the time when the servant is at liberty cannot render the master liable.

Whether the servant is really about his master's business is a question of fact.

See Pollock on Torts, 10th Ed. pp. 91-95.
Mitchell v. Crassweller (1853) 13 C. B. 273.
93 R. R. 517: W. Cas. 144.
Storey v. Ashton (1869) L. R. 40 Q. B. 476: W. Cas 204
Aldrich v. Ry. Co. (1868) 100 Mass. 31: W. Cas. 202.
Whatman v. Pearson (1868) L. J. 3 C. P. 422:
W. Cas. 196.
Joel v. Morrison (1834) 6 C. & P. 501: W. Cas. 117.
Sleath v. Wilson (1839) 9 C. & P. 607: W. Cas. 122.
Patten v. Rea (1857) 2 C. B. N. S. 606: W. Cas. 157.

Course of Employment.

See Burns v. Poulson (1873) L. R. 8 C. P. 563:
W. Cas. 214.

Whether or not the act was done in the course of employment is essentially a question of fact and its decision may rest upon one or more of several considerations.

(a) The particular act may be expressly authorized by the master, in which case there would be no doubt that it is one of the objects to be accomplished by the employment. The cases of an express command to do an unlawful act shade imperceptibly into the

cases where the command is to conduct a certain business for the master, and the question is whether the particular wrongful act is within the course of employment.

See Wigmore 7 H. L. Rev. p. 399 et. seq.
Rounds v. Deleware Ry. 64 N. Y. 129: W. Cas. 219.
Carswell v. Cross 120 Mass 545: W. Cas. 226.

(b) The act of the servant may be ratified by the master, in which case it stands upon the same footing as all acts previously authorized.

See Dempsey v. Chambers 154 Mass. 330: W. Cas. 1050.

The doctrine of ratification has been discussed under the head of agency.

(c) Acts impliedly authorized.

In addition to the acts expressly commanded or authorized there are others which may fairly be implied as necessary or usually incidental to those actually authorized.

Wilful Torts.

In the case of wilful and malicious torts it is easier to establish that the servant has departed from the course of his employment for ends of his own than in the case of merely negligent torts.

See McManus v. Crickett (1800) 1 East. 106: W. Cas. 102.
Wright v. Wilcox (1838) 19 Wend. 343 (N. Y.):
W. Cas. 118.

In the case of wilful as well as negligent torts the test is, was the servant acting for his master and within the course of his employment?

See Pollock on Torts, 10th Ed. pp. 95-102.
Barwick v. Bank L. R. 2 Ex. 259: W. C. 412.
Phila. Ry. v. Derby 14 How. (U. S.) 468: W. Cas. 139.

How v. New March 12 Allen 49 (Mass.): W. Cas. 134.
Limpus v. L. G. Omnibus Co. (1862) 1 H. & C. 526:
W. Cas. 170.
Seymour v. Greenwood 7 H. & N. 355: W. Cas. 166.
Evans v. Davidson 53 Md. 245: W. Cas. 231.
Weed v. Panama Ry. Co. (1858) 17 N. Y. 362:
W. Cas. 162.
Craker v. Ry. Co. 36 Wis. 657: W. Cas. 165 Note.

III.

LIABILITY OF MASTER FOR INJURIES TO SERVANT.

The Fellow Servant Rule.

> "A servant when he engages to serve a master undertakes as between himself and his master to run all the ordinary risks of service, including the risk of negligence on the part of a fellow servant when he is acting in the discharge of his duty as servant of him who is the common master of both." (Erle, C. J. in Tunney v. Midland Ry. Co. (1866) L. R. 1 C. P. at 296).

In order that the rule should apply, it is necessary: (1) that the servant injured and the servant at fault should have a common master, and (2) That the servant at fault and the servant injured should be engaged in a common employment.

The doctrine of common employment does not prevail in Quebec.

See the following cases:

Priestly v. Fowler (1837) 3 M. & W. 1.
49 R. R. 495: W. Cas. 773.

Priestly and Fowler is the first case suggesting the doctrine of common employment.

Murray v. S. C. Ry. Co. (1841) 1 McMullen L. 385.
W. Cas. 777.

This is the earliest actual decision.

Farwell v. B. & W. Rd. Corp. (1842) 4 Met. 49:
W. Cas. 786.

This case is "the fountain head of all the latter decisions and has been judicially recognized in England as the most complete exposition of what constitutes common employment." (Pollock).

See also Gillshannon v. Stoney Brook Rd. Corp. 10 Cush. 228: W. Cas. 794.
Morgan v. Vale of Neath Ry. Co. (1865) L. R. 1 Q. B. 149.
35 L. J. Q. B. 23: W. Cas. 798
Lovell v. Howell (1876) 1 C. P. D. 161: W. Cas. 810.
Gannon v. Housatonic Rd. Co. 112 Mass. 234:
W. Cas. 803.

The Petrel L. R. (1893) P. 320.
Tuney v. Midland Ry. (1866) L. R. 1 C. P. 291.
Swainson v. N. E. Ry. Co. (1878) 3 Ex. D. 341.
37 L. J. Ex. 372: W. Cas. 813.
Pollock on Torts 10th Ed. 104-111.

Liability of Master for His Own Torts.

See Ashworth v. Stanwix (1861) 3 E. & E. 701.
122 R. R. 906: W. Cas. 795.
Tarrant v. Webb (1856) 18 C. B. 797: W. Cas. 834.
Grant v. Acadia Coal Co. 32 S. C. C. 427.
Skipp v. Eastern Counties Ry. Co. (1853) 9 Exch. 223.
W. Cas. 831.
Clark v. Holmes (1862) 7 H. & N. 937: W. Cas. 836.
Wilson v. Merry L. R. 1 H. L. Sc. 326: W. Cas. 842.
Ford v. Fitchburg Rd. Co. 110 Mass. 240: W. Cas. 850.
Flike v. B. & A. Rd. Co. 53 N. Y. 549: W. Cas. 853.
Corcoran v. Holbrook 59 N. Y. 517: W. Cas. 857.
Johnson v. Boston Tow Boat Co. 135 Mass. 209:
W. Cas. 862.

Volenti Non Fit Injuria.

See Smith v. Baker (1891) A. C. 325: 60 L. J. Q. B. 683.
Pollock on Torts 10th Ed. p. 166 et. seq.

In a wide sense the maxim covers three distinct classes of cases.

(a) Those in which the Plaintiff has expressly or impliedly agreed to run the risk.

(b) Those in which because of the Plaintiff knowing the danger the Defendant has done no wrong in causing it. See Coughlin v. Gillison (1899) 1 Q. B. 145.

(c) Those in which because the Plaintiff knows of the danger his act in voluntarily exposing himself to it is an act of contributory negligence, and so deprives him of an action.

The extended discussion of the doctrine of assumption of risk belongs to the general subject of Torts.

IV.

SERVANTS LIABILITY FOR TORTS.

A servant who commits a tort is as a rule liable to the person injured, and his liability is not affected by the existence of the contract of service or by the fact that the circumstances may make the master also liable.

Limitation.

> "Where the act committed by the servant is merely an act of nonfeasance, which, without proof of a contract to do that which has been left undone, would not give rise to a cause of action and the only contract in existence relating to the nonfeasance is between the master and the person injured by the servant's nonfeasance, the servant, not being a party to the contract, is not liable for the consequences of his nonfeasance to the person injured, but only to his own master, to whom it was his duty to perform the obligations imposed by the contract of service. In this case the injured person must look to the master for any compensation to which he may be entitled by reason of the nonfeasance."

See (Hals Cyc. Vol. 20 p. 278).
Lane v. Cotton (1701) 12 Mod. 472: W. Cas. 469.
Stone v. Cartwright (1795) 6 T. R. 411: W. Cas. 470.
Denny v. Manhattan Co. (1846) 2 Denio. 115;
W. Cas. 473.
Bell v. Joseslyn 3 Gray (Mass.) 309: W. Cas. 478.
Bennett v. Byes (1860) 5 H. & N. 391: W. Cas. 479.
Osborne v. Morgan 130 Mass. 102: W. Cas. 484.

V.

LIABILITY OF THIRD PERSON FOR TORTS AFFECTING THE RELATION.

This subject belongs more properly to the general law of Torts than to the law of master and servant. For the sake of completeness we shall, however, notice the general principles applicable.

(1) **Liability to master.** It is a violation of legal right to interfere without justification with binding contractual relations (whether of service or otherwise), consequently an action for damages and an injunction lies at the suit of a master against any person who without justification induces the servant to commit a breach of the contract of service.

See Quinn v. Leatham (1901) A. C. 495: 1 B. R. C. 197.
Allen v. Flood (1898) A. C. 1: 67 L. J. Q. B. 119.

No case has yet decided what is a legal justification for inducing a breach of contract. It has been suggested (Glamorgan Coal Co. v. S. W. Miners Federation, etc., (1903) 2 K. B. at p. 377) that duty arising from natural or fiduciary relation might be a justification.

Several cases have decided what is not justification; e. g.,
Glamorgan Coal Co. v. S. W. Miners (1905) A. C. 239
Gibland v. Nat. Laborers Union (1903) 2 K. B. 600.
Smithies v. Nat. Assn. of Plasters (1909) 1 K. B. 310.

Seduction of Servant.

See Pollock on Torts 10th Ed. pp. 239-244.

Personal Injuries to Servant.

See Martinez v. Gerber 3 M. & G. 88: 6 R. R. 466.

Since the death of the servant puts an end to the contract of service, the master cannot recover if the effect of the tort is to kill the servant instantaneously, though it is otherwise if the servant dies after an interval of time.

See Osborne v. Gillett (1873) L. R. 8 Ex. 88.
Monoghan v. Horn (1882) 7 S. C. R. 458.
Clark v. London G. O. Co. (1906) 2 K. B. 648.
Pollock on Torts, 10th Ed. pp. 64-70.

(2) **Liability to Servant.**

A servant is entitled to maintain an action against any person who interferes with the contract of service by inducing the master to break it. The principles are the same as those regulating the rights of a master in the corresponding case.

See Read v. Friendly Society (1902) 2 K. B. 732.
71 L. J. K. B. 994.

VI.

STATUTORY MODIFICATIONS OF THE COMMON LAW RULES.

(1) **The Employers' Liability Act.**—C. 179, R. S. 1900—copied from the English Act, 43 & 44 Vict. C. 42.

This act applies to employers and workmen as defined by the act. The act does not abolish but greatly modifies the doctrine of common employment. Its general effect is that whereas before the act a "workman" injured in the course of his employment could only recover when he could prove that his employer had either neglected a statutory duty imposed upon him, or was personally responsible for the negligence which led to the injury, he may now recover where the "employer" has delegated his duties or powers of superintendence to other persons and such persons have negligently performed the duties or powers delegated to them. (See Sec. 3.)

Where the act applies, no special privilege is given the workman or his representatives. They have "the same right of compensation and remedies against the employer as if the workman had not been a workman, &c." (Sec. 3.)

The defences of volenti non fit injuria and of contributory negligence are open to an employer under the act.

See Weblin v. Ballard (1886) 17 Q. B. D. 122.
Thomas v. Quartermain (1887) 18 Q. B. D., 685.
Yarmouth v. France (1887) 19 Q. B. D. 647.
Smith v. Baker (1891) A. C. 325.

Defect in machinery, &c. Sec. 4.

Before the act the employer got rid entirely of his obligation if he entrusted the duty of superintendence to a competent person.

See Tarrent v. Webb 18 C. B. 797: W. Cas. 834.
Clark v. Holmes 7 H. & N. 937: W. Cas. 836.
Wilson v. Merry L. R. 1 H. L. Sc. 326: W. Cas. 842.

> "The Key to the Employers Liability Act is to be found in the fact that almost every clause is intended to reverse a previous judicial decision." (Jenks' Dig. p. 449).

For a discussion of the general effect of the Employers Liability Act and for annotations thereof.

See Pollock on Torts, 10th Ed. pp. 111-114 and appendix B. p. 595.

When a servant is killed instead of being merely injured, the right of his relatives and representatives is based both upon the Employers' Liability Act and upon the Fatal Injuries Act. At common law there was a double defence for the master in such case;

1. The rule that the death of a person is not a cause of action (now excluded by the Fatal Injuries Act Ch. 178 R. S. 1900) and

2. The rule of common employment (now excluded by the Employers' Liability Act, Ch. 179 R. S. 1900). The claim in such a case must conform to the requirements of both these acts.

(2) **Workman's Compensation Acts.**

(a) Individual Liability acts.
Acts of N. S., 1910, chap. 3. English Acts 1897 and 1906.

(b) Mutual Insurance Acts.

Acts N. S., 1915, Chap. 1.

Act Ontario, 1914, Chap.