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THE BASIS OF THE POWER OF AN AGENT IN CASES OF ACTUAL AND APPARENT AUTHORITY

The polemics of legal literature were enriched by the pyrotechnically illuminating controversy which took place some thirty years ago between Cook and Ewart dealing with the question whether estoppel is a proper explanation of the doctrine of apparent authority. Ewart in his book on Estoppel had dealt with apparent authority as an illustration of the doctrine of estoppel. Cook denied that apparent authority was based on estoppel and Ewart replied.[1] Cook's thesis is that the liability of a principal for acts within the apparent authority of his agent is a "true contractual liability". Though there can be little doubt that some of the arguments with which Cook supported his proposition are fallacious the proposition itself has been generally accepted. It was supported by Seavey in his well-known article *The Rationale of Agency*,[2] and it reappears in the American Law Institute's *Restatement of Agency*.[3] Wright has also recently approved this thesis.[4] It is proposed in this article to consider afresh the basis of actual and apparent authority, and in so doing to survey the past controversy. Some of the differences between the protagonists are purely verbal, and it is necessary in the first place to consider the terminology of the subject.

[1] Cook, *Agency by Estoppel* (1905), 5 Col. L.R. 36; Ewart, *Agency by Estoppel* (1905), 5 Col. L.R. 354; Cook, *Agency by Estoppel: a Reply* (1906), 6 Col. L.R. 34. Another article by Cook on the same subject is *Estoppel as Applied to Agency* (1903), 16 Harv. L.R. 324. Other articles by Ewart are: *Estoppel: Principal and Agent* (1902), 16 Harv. L.R. 186: *Estoppel by Assisted Misrepresentation* (1905), 5 Col. L.R. 456; *ibid.*, 35 Am. L.R. 707.

[2] (1920), 29 Yale L.J. 859.

[3] "Apparent authority conforms to the principles of contract."—Art. 8 Comment C. "Apparent authority . . . . is to be distinguished from estoppel."—Art. 159 Comment e. It should be remembered that Seavey was the reporter and largely responsible for the Restatement.

[4] *Restatement of Contract and Agency* (1935), 1 Univ. of Tor. L.J. 17 at p. 41.

The Definition of Agent

In legal terminology it is important that concepts relating to factual situations should be clearly distinguished from concepts which relate to legal rules referring to or embodying such factual situations. Unless this is done it will be difficult to explain or justify a rule of law; for the terminology will itself introduce the rule, and the attempted explanation or justification will involve a circular argument or an *ipse dixit* of the law. For example the term "negligence" is sometimes used as embodying a legal rule making certain conduct actionable and connotes therefore that there has been a breach of a legal duty, that the conduct has been the legal cause of damage, and that the conduct has not been that of a reasonable man. On other occasions the term "negligence" is used as referring only to careless conduct. The result has been that many are confused as to the basis of the "Rule in *Davies* v. *Mann*". The rule has nothing to do with the doctrine of "contributory negligence": it is an illustration of the doctrine of causation. Where A and B are both careless and the consequence of their antecedent want of care is damage, then if B had the last chance of avoiding the damage and did not avail himself of it A's carelessness is not the legal cause of the damage. It follows that A has not been guilty of negligence in the sense in which that term is used in the phrase "contributory negligence". In contributory negligence the acts of both parties cause the damage. Once it is seen that the problem in *Davies* v. *Mann* is one of causation it is possible to realise that the temporal order of the acts of carelessness is not always conclusive of the question of causation. A's action may be a cause of the damage or even the cause notwithstanding subsequent carelessness on the part of B.[5]

In the law of agency it is equally important not to confuse factual situation and legal rule. In his article on *The Rationale of Agency*, Seavey defined agency as "a consensual relation in which one (the agent) holds in trust for and subject to the control of another (the principal) a power to affect certain legal relations of that other". This was indeed a confusion of factual situation and legal rule, without any precise delimitation of either. The Restatement to some extent separates factual situation from legal rule. Its definition of agency, and consequently of principal and agent, deals entirely with a factual situation, and may be accepted.[6] The legal rules applying to the factual situation are

[5] Hence the decision in *Loach's Case*, [1916] A.C. 719, and the *dicta* in *Swadling* v. *Cooper*, [1931] A.C. 1.

[6] Art, 1, subsections 1, 2 and 3:—

then set out in Arts. 12-14. For example, Art. 12 says: "An agent or apparent agent holds a power to alter the legal relations between the principal and third persons and between the principal and himself." However, in discussing the power of the agent the separation of factual situation from legal rule rather breaks down. I deal with this in dealing with the definition of "authority".

It is important to note that the term "agent" is only properly applicable to a person in connection with the relationship in which he stands to the principal, and that that relationship is limited to the acts to be done on the principal's behalf. The word "agent", therefore, properly connotes the character in which a person acts. It is, however, sometimes applied to a person irrespective of the character in which he acts, merely because in respect to other acts he stands in the relationship of agency to the principal. If P agrees with A that A should do acts *a*—*g*, he thereby constitutes A his agent for the purpose of doing those acts. It is true that A is P's agent, but if A does any act *h*—*l*, he does not do it as agent of P. It can be said that in doing the act he was not an agent of P. Yet it can also be said the act was the act of P's agent. In this last sentence "agent" does not refer to the character in which the acts were due. This equivocation incidental to the word "agent" must not be allowed to lead to error. The courts distinguish between "agent" as descriptive of a person and descriptive of a function. The difference between signing a document "John Smith, agent", and "John Smith as agent", is well-known.[7]

The phrase "as agent" is also equivocal. It may mean that the act was in fact done in the character of agent in the sense that it fell within an actual agency relationship: or it may mean that the actor was purporting to act as if there were an agency relationship. Though A does an act he had not agreed with P to do he may yet represent to T that there is an agency relationship between him and P covering that act. In such a case it can be said that A was acting as agent.

In the definition of "apparent authority" in the *Restatement of Agency*[8] it is not clear in what sense the phrase "as agent" is

(1) "Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.
(2) "The one for whom action is to be taken is the principal.
(3) "The one who is to act is the agent."

[7] See *Fleet* v. *Murton* (1871), L.R. 7 Q.B. 126; *Universal Steam Navigation Co.* v. *James McKelvie & Co.*, [1923] A.C. 492.

[8] Art. 8 "Apparent authority is the power of an apparent agent to

used. Is it necessary for the apparent agent to purport to be an agent? Consider this case. L says to M, "X is authorized to sell you my horse Bess upon terms to be agreed upon between you and him". There never has been any agreement between L and X. L and X in fact are negotiating about the sale of the horse from L to X and X has possession of the horse. X offers to sell Bess to M for £100, and M accepts. Is this a case of apparent authority within the article even though X has not purported to act as L's agent? It may be that the Restatement contemplates an appearance of agency coming from the actions of the apparent principal alone: so that X will appear to M as an apparent agent in the transaction. The concluding words of the article may have to be read: "that such apparent agent shall act as his apparent agent". X's action may be considered as one consistent with his being an apparent agent and therefore done "as apparent agent" and so within the article.

Most writers would consider the case as one of apparent authority if X purported to act as L's agent; but Cook would say that L's statement to M constituted X not merely an apparent agent of L, but an agent of L. His definition of agency appears to be that the relationship exists wherever one person has a power to affect the relations of another with third persons. This is similar to the one laready cited of Seavey's: but it eliminates all question of agreement and control! It destroys the distinction between actual and apparent authority by concentrating on the fact that in both cases the agent has a power to affect the principal's relations with third persons. Cook says: "Our law recognizes that while as between principal and agent the relation of agency may in a given case not exist, it may and often does exist as between third parties." The words "principal and agent" require some qualifying epithet for otherwise the statement involves a repetition: if the parties are principal and agent the relation of agency must exist: and if it does not exist *inter se* it must exist as regards third persons.

It may seem to be flogging a dead horse to deal further with Cook's view of agency, but his obvious fallacy does appear in more subtle forms. Ewart dealt with Cook's view by a *reductio ad absurdum*. Suppose in the above case L had not said to M, "X is authorised to sell my horse", but "You may buy my horse upon terms to be agreed between you and X". In this new case

affect the legal relations of an apparent principal with respect to a third person by acts done in accordance with such principal's manifestations of consent to such third person that such agent shall act as his agent."

Cook, to be consistent, would have to regard X as agent of L. Yet X would be merely an arbiter or referee: the case would have nothing to do with agency.

The Definition of Power

The term power has been given a precise meaning by Hohfeld. It is a legal relation, one which exists by virtue of a legal rule. The power of an agent is not strictly conferred by the principal but by the law: the principal and agent do the acts which bring the rule into operation, as a result of which the agent acquires a power. If A agrees with P to do certain acts *a—l* for and on behalf of P and also agrees that he shall be subject to the control of P as to the doing of those acts, then the factual situation which thus arises is important enough to be given a special name and it is said the relationship of agency exists between P and A. It is clear law that A has power to affect P's relations with third persons and himself by doing those acts *a—l*. It is, however, conceivable that the law might have been otherwise. It is a question of law, not of agreement between P and A, how far A has power to affect P's relations by doing acts other than *a—l*. As such it is a question not merely of logic but of social policy.

The Definition of Authority

A most important factual matter in the problem of agency is the content of the agreement between the principal and agent as to the acts the agent is to do on behalf of the principal. P and A agree that A shall do acts *a—l*. It is expedient to have some name for the sum total of such agreed acts. The term "authority" has been used for that purpose: and I see no objection to its use and I will use "authority" in this article as meaning the sum total of the acts it has been agreed between principal and agent that the agent shall do on behalf of the principal. When it is said that P confers authority on A this means that P and A have agreed that certain acts should be done by A on behalf of P. That A has acted within his authority means that he has done one or more of such acts. That A exercises his authority similarly means that he has done one or more of the acts agreed upon. That he has authority means that it has been agreed he should do certain acts. The verb "authorize" is used with the same significance. To authorize A means to agree with A that he should do certain acts.

What the legal consequences of a grant of authority are is a matter quite distinct from the agreement between P and A. The terminology here adopted does not confuse question of fact with legal rule. It enables the legal rules, moreover, to be stated quite simply. Thus if P confers authority on A (factual situation) then A will have a power to affect P's relations by an exercise of his authority (legal consequence).

The authority of an agent, since it is governed by the agreement between him and the principal, can obviously be limited in any way. It is independent of what third persons reasonably or unreasonably believe it to be. That certain instructions are secret does not in any way prevent them from operating in limitation of the authority. There is, however, another meaning of the phrase "limiting the authority of the agent" which has to be considered. The agency agreement provides for control by the principal of the acts the agent is to do. The authority originally conferred can, therefore, be limited by subsequent instructions from P. P and A agree that A shall do acts *a*—*l*. P subsequently informs A that he is not to do acts *h*—*l*. A's authority is limited to the acts *a*—*g*. It is immaterial whether A agrees *ad hoc* to the subsequent limitation. There has been a prior agreement in entering into the agency relationship that P shall control his acts. So the fact that P can by an unilateral act delimit the authority does not prevent the relationship from being consensual.

The extent of the authority, being dependent on the agreement, is governed by the ordinary rules for the interpretation of agreements. P may have thought that the authority he was conferring was confined to acts *a*—*g*: A may have thought the authority he was accepting referred to acts *h*—*l*: P may have acted so that a reasonable man in A's position would have thought he was conferring authority to do acts *m*—*v*: A may have acted so that a reasonable man in P's position would have thought he was accepting authority to do acts *s*—*z*. There is no special agency rule applicable: the ordinary contract rules apply.[9] I may repeat that what a third person, however reasonable, believes cannot affect the authority. P and A use a code according to which their language denotes authority to do acts *a*—*g*. To a third person, unaware of the code, it denotes *h*—*l*. A has

[9] The rule in *Ireland* v. *Livingstone* (stated in Art. 44 of the Restatement) is not, it is submitted, a special agency rule. It applies wherever it is agreed that one party shall state a contractual term without an ad hoc agreement to that term by the other party. S sells goods to B and it is agreed that the goods are to be delivered in instalments according to the directions of B. B's directions are governed by the rule.

authority to do acts *a*—*g*. He may have a power to bind P by doing acts *h*—*l*, but his authority is to do acts *a*—*g*.

Unfortunately the term "authority" has been used as meaning the power which an agent has arising from the fact of agency. Used in this wide sense the distinction between actual and apparent authority disappears. Thus Cook writes, "If P says to T 'A is authorized to sell you my horse upon terms to be agreed upon between you and him', A thereby has authority to bind P." Ewart replies "We do not agree that he (the agent) had authority for the fact is otherwise". The difference here is really verbal: the protagonists are using "authority" in different senses; Cook in the sense of power, Ewart in the sense of agreement between P and A. The ineptness of Cook's terminology will be noticed if for the words "A is authorized" there be substituted what should be synonymous "A has authority". Cook would then use "authority" in two different meanings in the same sentence. As it is his verb has a different significance from his noun.

Seavey stated that "authority should be limited to its primitive meaning of a power which can be rightfully exercised", *i.e.*, a power to do the acts agreed upon. Cook's definition was, nevertheless, adopted in the tentative draft, but Seavey's modification prevails in the Restatement.[10] The defects due to the use of authority in the sense of power are these :—

(a) Art. 7 sandwiches two propositions (*i*) a definition of the term "authority", (*ii*) the statement of the legal rule that an agent has a certain power. The comment on the article reads as if by some mystical process legal rules could be deduced from an inherent meaning of the term "authority". It is often difficult in reading the Restatement to know whether a statement is a definition for the purpose of subsequent exposition, a proposition of logic, or a legal rule.

(b) The Restatement is left without a simple term to denote the content of the agreement between principal and agent, to which it often has to refer. It sometimes uses the phrase "manifestations of consent". More frequently it uses the word "authorization"; which perhaps etymologically should refer to the act of conferring authority. But often it uses the word "authority" not as meaning the power resulting from the legal rule dealing with the agency relationship but in the meaning adopted in this article of the content of the agreement between

[10] Art. 7: "Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him."

principal and agent.[11] The Restatement therefore uses the same word in different senses. The verb "to authorize", moreover, is nearly always used in the sense of actual agreement.

(c) Since "authority" as used in the Restatement is limited to the power conferred in respect of authority the same legal rule may be stated whichever meaning is given to the word "authority". The Restatement, however, rather disregards the fact that "authority" in the sense of power is created by law, *e.g.*, Art. 26 says "authority . . . . . may be created by written or spoken words".

Definition of Implied Authority[12]

The distinction between express and implied authority is not fundamental, but depends merely on whether the authority is delimited by words or by conduct. The distinction is sometimes difficult to draw. If P tells A that he is to act as manager this is really a compendious way of stating that he is to do all the acts a manager would ordinarily do. Those acts might well be termed his express authority. However, it is often said that if an agent is placed in a certain position he has implied authority to do all the acts a person in that position ordinarily does.[13] The law does not confer such implied authority. The proposition expresses a judgment of fact.

Definition of Apparent Authority [14]

It has been rightly said that apparent authority "denotes no authority at all".[15] Apparent authority is really equivalent to the phrase "appearance of authority". There may be an appearance of authority whether in fact or no there is authority. There is only one kind of authority; but since the phrase "apparent authority" has come into existence it is not unusual to use in opposition thereto the phrase "actual authority". The adjective "actual", however, adds no qualification to the noun

[11] The title of Chapter 2 is "Creation of Relationship". The page headings are "Creation of Authority". Chapter 3 is called "Creation and Interpretation of Authority and Apparent Authority". Topic 1 is entitled "Methods of manifesting consent". Art. 28 speaks of "sealed authority". Topic 2 is entitled "Interpretation of Authority etc.". The Articles generally speak of "authorization", and in the comments "authority" appears to be interchangeable sometimes with "authorization". Art. 45 reads "If authority is stated to be conditional upon the existence of specific facts . . . ."

[12] The Restatement uses the term "incidental".

[13] Art. 35 of the Restatement says : "Unless otherwise agreed, authority to conduct a transaction includes authority to do acts which are incidental to it, usually accompany it, or are reasonably necessary to accomplish it."

[14] Sometimes termed "ostensible authority."

[15] SMITH AND WATT, MERCANTILE LAW, 8th ed., 1924, p. 177, note S.

"authority" : all authority is "actual". When it is said that an agent's act was within the scope of his apparent authority all that is meant is that the act appeared to be authorized. An act which falls within the scope of the apparent authority but without the actual authority is one which is not authorized but appears to be so.

The notion of apparent authority raises two questions : apparent from what? and apparent to whom? The necessity of asking the second question has been sometimes overlooked and there has grown up in the English cases a use of the term "apparent authority" in an objective sense, in which "apparent authority" is conceived to exist independently of its subjective perception by somebody. The notion of perception is not regarded as inherent in the phrase "apparent authority" but as additional so that there may or may not be a "reliance on an apparent authority".[16] This judicial phraseology is possibly linked up with an occasional use in ordinary language of the word appearance. An appearance involves two factors, the matters to be perceived and their perception. Sometimes, however, appearance is used to denote only the matters to be perceived and the connotation of their perception by somebody does not receive attention. Thus an actor may be said to appear on the stage though he is only rehearsing and nobody sees him. Nevertheless the potentiality of being perceived is always connoted by the word appearance. It is perhaps worth while examining closely the judicial phraseology. P places A in a position in which an agent would ordinarily have authority to do acts *a—l*. It follows that a third person, aware of A's position and of the authority ordinarily possessed by a person in that position, and unaware of the actual agreement between P and A, might reasonably consider that A had apparent authority to do acts *a — l*. This potentiality certainly always exists in the circumstances. The phraseology we are considering stresses this; it says that A always has apparent authority to do acts *a—l*. It may be that to a particular person, T, there was no appearance of authority to do acts *a—l*; he may not have known A was an agent, or he may not have known that the ordinary agent in the position of A had that authority, or he may have known that P had restricted A's authority to acts *a—d*. Nevertheless even so far as T is concerned it is said A had an apparent authority to do acts *a—l*.[17]

[16] See e.g., the language of the judges in *Underwood* v. *Bank of Liverpool*, [1924] 1 K.B. 775.

[17] Let us apply this to a hypothetical case, put forward in the Agency Restatement in another connection. P appoints A his general wheat selling

Another possible explanation of the judicial phraseology is that it is a survival of the old notion of "holding out to the world".[18] However it is now clear law that an agent will not have a power to bind the principal merely by doing an act within this kind of "apparent authority" : there must have been a reliance by the third party on such apparent authority.

There is no necessity to apply the phrase "apparent authority" to the concept of the authority which an agent occupying the position in question would ordinarily have. Another name exists for that concept and is always used in the law of tort, to wit "the course of employment": it should be used also in the law of contract : the judicial usage whereby apparent authority is used in a peculiar objective sense should be discarded.

The above discussion answers the question "apparent to whom"? Apparent authority only exists—there is only an appearance of authority—when it is apparent to the person with whom the agent deals. We have now to deal with the question "apparent from what"? It is clear that T is concerned with the acts not only of P but also of A : nevertheless neither Cook nor Seavey consider the effect of A's actions : they assume that he will purport to act as agent and thus contribute to the appearance of authority. But suppose he does not. L says to M, "X is authorized to sell Blackacre to you". There has been no agreement between L and X. X offers Blackacre to M for £1,000 but states he has no authority to do so, or that he is the owner himself, or that he will be the owner at the date of conveyance. M accepts. It is possible to argue that L is bound : but it is difficult to see how there is an appearance of authority to T.[19]

The usual case of apparent authority occurs where P puts A in a certain position giving him an authority less extensive

agent for Philadelphia, instructing A not to give the usual market warranties with wheat sold. A deals with T a stranger to the Philadelphian market who is unaware that a warranty is customary, and moreover A tells him a warranty is not customary. The English user of "apparent authority" would result in it being said that A had apparent authority to give the usual warranty.

[18] In *Martin* v. *Gray*, 14 C.B.N.S. 839, Erle C.J. said: "Formerly it was considered sufficient if the party was held out to the world as a member of the firm. Now, however, it is necessary that there should be direct evidence that the holding out should come to the knowledge of the plaintiff." In *Dickinson* v. *Volpy*, 10 B. & C. 125, Parke J. said at p. 140: "If it could be proved that defendant had held himself out not 'to the world', for that is a loose expression, but to the plaintiff himself".

[19] The question whether such a case falls within the definition of apparent authority in the Agency Restatement is discussed above. I am of the opinion that the case is not one of apparent authority and that L is not bound.

than the course of employment. T is aware of the position and the course of employment and A purports to be authorized to do some act within the scope of employment but beyond his authority. By putting A in that position P represents that A's authority is co-extensive with the course of employment.[20] Since T is aware of P's act there is a representation to T by P. But can there be an appearance of authority based on A's conduct alone? P appoints A his manager but with restricted authority. T knows nothing of P or A. A approaches T, informs him that he is the manager of P's business and a contract is concluded within the course of A's employment but not within his authority. It is submitted A has apparent authority. T would have acquired knowledge of the appointment of A as manager and of the course of employment of such a position from many sources; A's intimate connection with the matters does not pollute the information he supplies. The appearance of authority is derived in such a case from the acts of both A and P.

In the above case P's appointment was considered to be of a public nature. Let us consider a case in which that is not so. P privately appoints A to sell goods. T, a stranger to A and P, has no means of ascertaining whether A has been so appointed, save by asking P. He concludes a contract with A without any enquiry of P but relying on A's assertion of authority. The contract was in the course of A's employment but unauthorized. In this case one cannot, merely by forming a judgment of a factual situation, say there was an appearance of authority. For such appearance must be derived from the acts of A and P. But the case can be brought within apparent authority by the assistance of a legal rule. A is authorized to disclose the fact of his appointment. A legal rule makes the disclosure by A equivalent to a disclosure by P.[21]

I have already referred to the definition of apparent authority in the *Restatement of Agency*, and pointed out an ambiguity in its concluding words. The *Restatement* defines authority as a

[20] In *Daun* v. *Simmons* (1879), 41 L.T. 783 the report suggests that Bramwell L.J. doubted whether there was any representation at all. He is reported as having said *arguendo*: "The only way in which there was a representation was by putting in Clarke as manager. How is that a representation?" If putting a person in the position of manager is not a representation at least that he is manager, the position of manager is a very curious and precarious one. The report is probably incorrect.

[21] It follows that the legal rules as to apparent authority could not be made applicable in the following case. A agrees to sell goods for P but not to disclose the existence of the agency. He contracts with T within the scope of employment but beyond his authority. In breach of his agreement he discloses the existence of the agency.

power : nevertheless apparent authority is not an apparent power but a real power : there can be no such thing as apparent power. Again, according to the *Restatement* definition, where P authorizes A to act *a—l*, and P represents to T that A has authority to do acts *a—l*, A has *two* powers. Surely it is better, using authority in its factual sense, to say that whether there is actual or apparent authority or both A has *a* power.

The Definition of Contract

The concept of contract is usually considered as being that of an agreement directed to the creation of rights and duties between the parties; this may be called the jurisprudential concept. In English law, however, there are various kinds of contracts: the technical term "contract" is not the equivalent of the jurisprudential concept. In using the term "contract" in connection with English law it must be borne in mind that it has a technical meaning in addition to the jurisprudential one.

The technical terminology of English law applies "contract" to the contract of record, the specialty contract, the simple contract, and also to the relation between principal and third person brought about by the agent. This technical terminology is based on the history of the procedure of English law. The action of assumpsit was available for various relations, it was the form of action which had to be invoked by the principal or third person. Since the Common Law Procedure Act personal actions are divided into actions of contract or tort. The action of contract applies to different relationships including that of principal and agent. A contract is said to exist whenever there is a relationship in respect of which an action of contract lies. It is important, therefore, to realize that when it is said that a contract is made by the agent between the principal and the third person no more may be meant than that the relationship between them is one in respect of which an action of contract lies. It does not follow from the terminology that the relationship is one which is governed by the same principles as govern that existing where there is a contract formed by agreement between the parties themselves. The single terminology does suggest that there may be a unifying principle applicable to the various relationships which are those of contract, but the terminology alone does not prove there is such a single principle. In fact it is submitted that the terminology is misleading.

The Basis of Contractual Liability

Owing to the various kinds of contracts in English law the phrase "contractual liability" can only refer to a single concept if the various kinds of contracts are based on a single principle. As already stated a proposition that the various kinds of contracts are based on a single principle is not self-evident; it requires proof. Nevertheless we find Cook speaking of contractual liability as if it were a single concept. The explanation, no doubt, is that he has in mind what I have called the jurisprudential concept of concept.

The jurisprudential concept is probably derived from the Kantian theory of contract which was generally adopted in the 19th century. As Pound has pointed out,[22] Kant based contract on a conveyance of property, the promisor delivering his freewill to the promisee. Kant stressed however that this could only take place by the combined wills of both,[23] and his notion of a common will as the basis of a contract is to be found in most theories propounded during the last century. It is submitted that where a contract is made through an agent the theory of a common will is inapplicable: the principal and third person even "under abstraction of . . . . empirical conditions" have not common wills except in the case of the *nuntius*.[24]

Lewis considers that the principles governing liability under the forms of action of covenant, debt, and assumpsit were distinct, and he therefore puts forward three basis of contractual liability.[25] He does not accept the notion of a common will as applying to any action of contract.

The first principle he submits is that of the unilateral will, the willingness of the promisor to be bound by what he has promised: he cannot complain of injustice if he is required to do that which he has said he is willing to do. One can also subject the unilateral will to liability on the ground of the moral obligation to keep one's word. It must be pointed out, however, that English law never subjects a unilateral declaration of will to liability. In the action of covenant there must be a formal act —the sealing or signing. The unilateral will is not, of course, an adequate explanation of the liability arising from a simple contract. There must be an agreement for consideration to

[22] INTRODUCTION TO THE PHILOSOPHY OF LAW, p. 260.

[23] "It is neither by the *particular* Will of the Promisor nor that of the Acceptor that the property of the former passes over to the latter. This is effected only by the *combined* or united Wills of both."—PHILOSOPHY OF LAW, tr. HASTIE, p. 102.

[24] This is discussed more fully later.

[25] *Undisclosed Principal*, 9 Col. L.R. 116 at p. 132.

which the promisor is a party. If M and N together agree that L should do a certain act, a statement by L that he is willing to do the act would not involve him in liability even though made before the agreement between M and N, unless either M or N was an agent for L.

Lewis considers that the doctrine of unjust enrichment underlies the action of debt. The receipt of the *quid pro quo* makes it unjust to retain the thing or money without doing the act promised. This principle is not of universal application; it cannot be easily applied to an executory contract.

Pound's postulate that reasonable expectations must not be defeated is considered to be the basis of assumpsit. This links up with the theory of the objective nature of agreement. Lewis says the plaintiff recovers because "he would not have promised had the defendant not so acted as to cause him to promise, in the expectation of a benefit which the defendant has failed to give him".

We thus have four principles which may be considered in relation to contract, and so it is pertinent when the *Agency Restatement* comment says that apparent authority "conforms to the principles of contract" to ask to which of these four the commentary refers. We shall discuss these principles in connection with both actual and apparent authority.

Actual Authority. (1) *The undisclosed principal.*

It is submitted that the case of the undisclosed principal is governed by considerations peculiar to itself. The relations of the principal are not directly affected by the agent treating with the third person. The agent alone acquires immediate rights and immediate liabilities as regards the third person. Under the contract of the principal with the agent the principal is entitled to the benefits which the agent obtains from his contract with the third person. The principal could indeed compel the agent to bring an action against the third person. He could thus obtain the name of the agent for the purpose of an action. The law shortens the proceedings by enabling the principal to sue the third person in his own name; this is in accordance with the principle of preventing circuity of action. That the action by the principal is one to enforce the agent's rights is shown by the fact that the principal is bound by the state of accounts between the agent and the third person. As regards the action by the third person against the principal it cannot be said that the third person has a contractual right to

the agent's rights against the principal. The position nevertheless is that the third person has a right against the agent and the agent has a right to an indemnity from the principal in respect of the liability corresponding to the third person's right. Is it not a form of the doctrine of subrogation which enables the third person to sue the principal?[26]

(2) *The nuntius.*

I think the case of the *nuntius* must be distinguished from other cases of agency. The *nuntius* is in fact and not metaphorically a channel of communication between the principal and the third person. He carries to a third person, specified by the principal, either (a) an offer, the terms of which have already been formulated by the principal, or (b) the acceptance of an offer, of which the principal is already aware. In such a case the offer or acceptance is in fact made by the principal himself and not by the *nuntius* for the principal. The principal is in direct agreement with the third person. The *nuntius* is not only "legally the mechanical contrivance by means of which the minds of the principal amd the third person meet", he is so in fact.[27] The principal acts *per se* in accepting or offering, it is only the communication which is *per alium.* The case is exactly the same as a contract by correspondence, there is no room for the application of the maxim *qui facit per alium facit per se.*

The situation in the case of the *nuntius* calls for little comment. No agency principle is in fact involved. It is true that the *nuntius* does fall within the definition of an agent given in the *Restatement,* but it would not be unreasonable to restrict the definition to the case where an agent exercises a discretion. It is conceivable that a legal system might require the parties to conduct their negotiations in the presence of each other. A transaction concluded by telephone might be legally unenforceable, *a fortiori* a human messenger might not be allowed, but

[26] Seavey expresses the point of view in the text thus: "Ames objects that logically the undisclosed principal is a cestui que trust and that a cestui que trust cannot sue or be sued at law. Admitting that he is a cestui he may as such realize through proceedings in equity upon the claim held by his trustee (agent) against the third party, as Ames pointed out. If the rights of the third party are properly taken care of, as in fact they are, the only abnormality is the informality of allowing a direct action at law. The same is true in the case of suit against the principal; there should be no objection simply on the ground that a short cut has been taken."

[27] The quotation is from a note on *Kinahan* v. *Parry,* [1910] 2 K.B. 389 in 19 Col. L.R. at p. 764. It is represented as being the basis of the operation of agency generally, the case of a *nuntius* not being discussed. The note is in effect only a lengthy paraphrase of the maxim *qui facit per alium facit per se.*

even Roman Law which had no general doctrine of agency allowed contracts to be concluded through a *nuntius*.[28]

(3) *Qui facit per alium facit per se*

Where the agent has a discretion either as to the person with whom he is to deal or as to the terms he may offer or accept or as to both he is not a contrivance for conveying the state of mind of the principal to the third person. By exercising his discretion the agent produces a state of mind which does not psychologically correspond to any state of mind of the principal. It follows that the offer is made by the agent and not by the principal; there is no agreement between the principal and the third person. The result of the agent's dealings may be that the principal is legally bound to the third person, but we are in the realm of fiction if we say that this is so because the offer or acceptance is made by the principal. The maxim *qui facit per alium facit per se* read without any qualification is obviously a fiction. Seavey treats it as such, but while Cook speaks of the fiction of the identity of principal and agent he considered that the maxim is not necessarily fictitious, for, he says that "in 1304 the maxim meant just what it said". If so the maxim can only be regarded as a tribute to medieval witchcraft. One must read the maxim as meaning that the legal consequence of a person acting *per alium* is the same as if he had acted *per se*. Whether such a proposition is true or false depends obviously upon legal rules and not upon the facts of nature.

A rule of law regulates human conduct by prescribing certain consequences for stated factual situations. It sometimes happens that the same or similar legal consequences may be prescribed for two different factual situations. Sometimes such a happening is described by saying that "in law" the two factual situations are the same or similar. The qualification "in law" may not be expressly stated: this happens in the maxim *qui facit per alium facit per se*. It appears by use of the epithet "legal" in Holmes' statement of the maxim which is "the

[28] The following case perhaps merits some consideration. T makes an offer to P and dispenses with the necessity of any communication of acceptance to him. P writes to A telling him to accept P's offer. Before A communicates with T, P cancels his instructions. Is there a completed contract? It can be argued that P's letter to A being more than a mere mental assent is a sufficient acceptance. It is submitted that P's letter can mean either (a) I have accepted T's offer, please inform him of that fact, or (b) I intend to accept T's offer as from the time of your communication to him. In case (a) there is clearly a contract. Case (b) raises the question whether it is possible to qualify an acceptance by making it operate as from a future event or date. But in either case, it is submitted, it is correct to say that the acceptance is in fact made by P.

characteristic feature which justifies agency as a title of the law is the absorption *pro hoc vice* of the agent's legal individuality in that of the principal."[29]

The equation of two different factual situations, though it be a defiance of reality, will not produce legal error if it be true that the same legal consequences follow from the two situations. Though some people's sense of accuracy may be offended by saying that recklessness is the same as intention no error will result in law if in fact the law always attaches the same consequences to them. But because in some circumstances the law does attach the same consequences to recklessness as to intention it does not logically follow that it should not differentiate between them in other circumstances. The device of equating two factual concepts should be used cautiously.[30] Psychologically human beings, including lawyers, having treated diverse things similarly on some occasions may tend to treat them again in the same way despite altered circumstances. This tendency is strengthened, or it is perhaps more correct to say evidenced, by language which equates the diverse things. The law however should, and very often does, pay regard to the points of difference and does not always attach the same consequences. The phraseology may hamper the law in doing this or may make exposition of the law difficult when it is done.

The maxim *qui facit per alium facit per se* merely states the legal rule that if A agrees with T, relations between P and T result just as if P had personally agreed with T. It does not explain or justify the rule. The maxim itself perhaps requires a little explanation. What is meant by *'per'*? If P pushes A so that A falls on T, has P pushed T *per* A? Has P pushed T *per* A where P and A agree that A should push T and A does so? Where P sends an offer through a *nuntius*, A, is the offer made *per* A? Or is it only where A exercises a discretion that the offer is made *per* A and not *per* T?

Cook insists that the offer or acceptance is made by the principal. True, he regards the identity of principal and agent as a fiction and he admits that the offer or acceptance actually emanates from the mind of the agent. Nevertheless he says

[29] THE COMMON LAW, p. 232.

[30] The maxim "every person is presumed to intend the natural consequence of his acts" is based on the same device. It represents a person's relation to the natural consequences of his acts as being the same as his relation to intended consequences. All the maxim means is that a person will sometimes be treated in relation to the natural consequences as if he had intended them. It is not surprising that Holmes (COMMON LAW, p. 147) says the maxim is "very inaccurate".

that the doctrine of the objective nature of the agreement justifies him in considering that the legal view is that the offer or acceptance is that of the principal.[31] He says "in law the manifestation" (by the agent) "is of the intention of the principal". By this he may mean that the legal consequence of the act of the agent is that the principal is bound in law as if had himself manifested the intention. If this is his meaning this is merely a statement of the doctrine of agency and not an explanation of it. If he means that the courts consider that the offer by the agent is in fact a manifestation of the principal's intention he is wrong. It is strange that he does not support his statement by any quotation from a judgment. It is merely playing with words to say that the act of the agent manifests the principal's intention. It is true that the principal intends the agent to make an offer, and that when the agent does so he acts in accordance with the principal's intention. But the actual offer was never conceived by the principal, he never has a specific intention as to that; the agent's state of mind is not a psychological development of the principal's mind. The offer is not even a manifestation of the principal's intention that the agent should make an offer. The law rejects the view that the mere fact that the agent purports to be authorized is evidence that he was authorized.

It is true that according to the objective theory what matters is not the principal's actual intention but his conduct. This is sometimes loosely stated by saying that what matters is not his real intention but his manifested intention, *i.e.*, the intention which his conduct reasonably manifests him as having. But the conduct of the principal consists in agreeing with the agent, and his intention is fully manifested by the grant of authority to the agent. The conduct of the agent is not that of the principal; it manifests his state of mind alone.[32] The

[31] "It is fundamental in the law of contract that a person is bound not by his real but by his manifested intention. One may manifest his intention not only by his own words or acts but also through the words or acts of another called in law an agent. In the latter case the complete expression of the intention is left to the agent: he is often given a discretion to fix the terms of the offer but when he does fix them, in law the manifestation is of the intention of the principal. . . . Let us never forget that our law of agency does not say that the agent makes a contract and that by some process of transfer the rights and duties thus executed are transferred to the principal: but that on the other hand it does regard the contract as made by the principal through the agent, the agent being treated only as a medium of transaction. It is the mind of the principal which meets the mind of the third party, just as much where the medium of conversation is an agent, or where for example it is a letter." (From the article in 6 Col. L.R. 34.)

[32] It looks to me as if Cook's statements involve an obvious fallacy. His argument appears to be : (i) According to the objective theory the actual state of the party's mind is immaterial in deciding whether he has entered

specific offer made by the agent is a product of his mind alone. It cannot be regarded as in any way a product of the principals' mind; the grant of discretion to the agent shows that the principal had no specific offer in *his* mind.

Seavey's demonstration of the view that the law does not regard the agreement between agent and third person as being an agreement between principal and third person is based on the doctrine of *Collen* v. *Wright*.[33] His argument is that if the law regarded the agreement as made by the principal himself there would be no room for saying that the agent warranted he had authority.

> In exchange for the undertaking of T to enter into a contract with P, A guarantees that he has a power to make P a party. If the agent is regarded merely as a channel of communication, or if the promise of the agent is the promise of the principal, no such agreement would exist and the agent could be held only upon a representation that the principal consents to the existence of the contract. . . . The doctrine of *Collen* v. *Wright* . . . . recognizes the real facts of the situation and disregards the fiction of the identity of principal and agent.

It should be pointed out that consistently with his argument Cook regards the doctrine of *Collen* v. *Wright* as anomalous.

The accuracy of the proposition that the contract is always made by the agent can perhaps be demonstrated more clearly by considering the following case which is very nearly one where the contract is made by the principal. T makes an offer to P and dispenses with the necessity for communication to him of acceptance of the offer. P writes to A authorizing him to accept if he thinks fit. A accepts. Even in such a case it cannot be said that the acceptance was by P : the contract was made by A not P. P's intention is that A should accept if A thinks fit. A, by accepting, does not effect telepathically an alteration in P's state of mind so that it becomes an inten-

into a contract. (ii) In a contract through an agent the actual state of the principal's mind is not necessarily the same as that of the agent's mind which conceived the contract. (iii) As a conclusion from the two above premises we have the proposition that, according to the objective theory, in a contract through an agent, though the principal's mind did not conceive the contract, he may be a party to it.

But of course no conclusion can be validly drawn from two negative premises. The argument neglects the positive factor of the objective theory that there must be conduct by the one party leading the other to believe that the former is entering into a contract. When the agent makes a contract there is, as stated in the text no conduct by the principal leading the third person to believe that the principal is entering into that specific contract.

A similar argument is put forward by Seavey in dealing with apparent authority. See *infra*.

[33] (1857), 7 E. & B. 301; and in the Exchequer Chamber, 8 E. & B. 647.

tion to accept. A's conduct in accepting does not manifest P's intention in the sense of making externally perceptible P's state of mind. It is in accordance with the content of P's intention but there is a different meaning from that which even Cook gives to manifestation of intention. Cook's definition of manifested intention is "an intention which one man led another to believe irrespective of whether he had such intention or not". It is of course no part of the doctrine of agency that T in dealing with A should consider that P had the specific intention of accepting. In law, to use Cook's phrase, it is quite immaterial what T thought about P's intention. In fact it is likely T will only think that the offer was authorized by P. Why should he think A is a mere messenger?

The case just considered was an extreme one; let us now consider one on the other side of the boundary. P makes an offer to T to sell at a price to be fixed by A. A price is fixed by A and T accepts. The contract in such a case is without doubt made by P; but as Ewart has pointed out this is not a case of agency at all : T could have accepted before A fixed the price. Where the agency relationship is involved and P authorizes A to make the offer to T at a price to be fixed by A then T, even if he knows of this, cannot accept before A makes an offer to him.

The discussion of the maxim has, it is submitted, made it quite clear that it cannot be said that the contractual principle of agreement between the parties is the basis of the doctrine of actual authority. Whether agreement be subjective or objective there is no agreement between the principal and the third person: the agreement is between the agent and the third perosn.

(4) *The unilateral will*

Seavey agrees that in the case of actual authority "the contract comes into existence through the independent will of the agent" but he adds "the contract does come into existence in accordance with the expressed will of the principal and there is no departure from the theory of contracts". This is surely tantamount to saying that the unilateral will is the basis of contract. Yet Lewis considers that it applies only to formal contracts. Even there the form is as important as the intention of the promisor. Moreover the doctrine of unilateral will is inconsistent with the following well-established principle of agency. If T knowing of the agency relation between A and P gives exclusive credit to A, *i.e.*, deals with A as if A were the

principal, he cannot make P liable. P's willingness to be liable is of course unaffected by T's conduct; it cannot be said that in all cases P is only willing to be liable if A contracts as agent.

When it is said that "the contract does come into existence in accordance with the expressed will of the principal" all that is being said is that the contract was authorized by the principal. We have to explain why the fact that the principal authorizes the agent to enter into agreement with a third person should involve the principal in relations with the other party to the agreement.

(5) *Reasonable expectations must not be defeated*

Both the principal and the third person doubtless expect that the one will be liable to the other. In the case of the principal it is probably correct that his expectation is always reasonable, because it is based on the knowledge that T will undertake to be liable to him. But T's expectations cannot confidently be said to be always reasonable. If A is a special agent and T relies solely on A's statement that he has authority to do a particular act, is it reasonable for T to expect P to be liable?

(6) *Suggested basis of liability*

The basis of a legal rule can always be expressed by reference to some such term as justice or public policy. Such terms are, however, properly used to indicate either a metaphysical concept transcending all rules of law or a teleological concept generalizing the ends of all rules of law. The jurist dealing with a particular rule must point to the particular vestment by means of which the metaphysical concept makes its material manifestation in that rule or to the particular end of that rule; he must then go further and show that the particular vestment does indeed clothe a manifestation of justice or that the particular end is one of justice. To perform the latter part of his task he may have to consider the fundamental problems of jurisprudence. However, he may escape that task by using the argument of analogy. He may refer to some matter in connection with the rule which is accepted as a justification of some other rule. Thus the doctrine of actual authority would be justified if it were based on the principle underlying the enforcement of simple contracts. The principle underlying simple contracts is accepted as being in accordance with justice, and so any doctrine

referring to that principle will also be accepted as being in accordance with justice.

Sometimes a rule of law is justified by showing its practical necessity for maintaining given social conditions. A doctrine of agency is clearly required to meet the needs of commercial life to-day : commerce involves transactions wtih persons geographically remote and the extensive capital involved demands organization of many people in commercial units. Business would be impossible unless agents could bind principals to third persons and vice versa. Yet practical necessity cannot be accepted as a juristic basis. Legal technique consists in creating particular concepts for the handling of the complex circumstances of life. Vague as the general idea of justice may be it is nevertheless the touchstone of the jurist, and the technical concepts of law are not governed merely by the ordering of social facts but are moulded also under the influence of the idea of justice. The theme of the play is the idea of justice. The technical concepts are the characters in the play. To many, however, the appearance is that of a modern play in which there is no theme—only a discussion of the characters.

The problem of finding a basis of liability consists in determining the particular concepts into which agency may be fitted. The concepts of English law are affected by the Roman law background of juristic science and its own terminology. Both combine in suggesting an agreement between principal and third person as the basis of actual authority. We have already seen that according to the terminology of English law the relation between principal and third person is said to be that of contract; this suggests the dominant kind of contract in modern days, *viz.*, that arising from agreement. But it is misleading insofar as it suggests an agreement between principal and third person. The existence of slavery in Rome made it unnecessary for Roman law to develop rules whereby, in all cases, one freeman should be bound by the acts of another free man. Mediaeval Roman law accepted the concepts of the classical law and applied them to the new conditions. It treated a person making a contract through an agent in much the same way as the classical law treated the person making a contract through a slave. The doctrine of agency was regarded only as an extension of the Roman law of contract and its underlying principle was that the contract was made by the principal.

We have rejected the notion of agreement between principal and third person as being the basis of the doctrine of agency.

It is submitted, nevertheless, that the basis is that of agreement, but not between the principal and the third person; it is that of agreement between the agent and the third person. Combined with this we have the well-known concept of a power; the principal has granted the agent a power to affect his relations with third persons. The agreement between the agent and the third person provides that the principal shall acquire rights against and be subject to obligations to the third person and vice versa. English law enforces this agreement and the principal and the third person do acquire those rights and are subject to those obligations.

Why has this simple basis of an agreement between A and P combined with a power given by P to A not been recognized? The answer appears to be that it has been thought to be a fundamental rule of English law that X can neither acquire rights nor be subject to liabilities by reason of an agreement between Y and Z. A doctrine of the personality of contracts may have been a universal doctrine of Roman law, certainly the modern law of contracts appears to have been formulated in the belief that it was. But when the doctrine was formulated as part of English law it was really inconsistent with cases of agency with which English law had dealt from its earliest times. The fiction of the identity of principal and agent was possibly an attempt to resolve the inconsistency. Justice may require that a third person may not be subject to liabilities nor acquire rights as a result of agreement between others—*res inter alios alteri non nocet.* But the doctrine of personality is not a necessary concept of universal application: it certainly does not apply in the case of agency. A third person may acquire rights under an agreement between others, for example, a cestui que trust and the principal may be bound by the acts of his agent.

T's liability depends on the ordinary principle of agreement. He has agreed to be bound with the agent's principal. P is bound because he has granted A a power to enter into an agreement specifying that P shall be bound. The concept of a power is not confined to cases where the donee has authority to enter into a contract; under a power of appointment the donee makes a grant of the donor's property. Underlying the concept of power is doubtless the principle of the unilateral will, so that it can be said that P is bound because he was willing to be bound. But this principle has to be combined with that of the agreement made by A under which the obligations of P are defined.

The Nature of the Agreement between the Agent and the Third Person

I have called the transaction between A and T an agreement. It is tempting to say that it is a contract whereby A promises that P will be liable to T and T promises to be liable to P. If that were so, since the law will only make P liable if P has authorized A, A will be liable to T should it turn out that he (A) had in fact no authority. The doctrine of *Collen* v. *Wright* would thus follow from the essential nature of the transaction between A and T. There are two matters to be considered in connection with this theory of a contract which may not however prove to be flaws in the theory. The first arises from the case of an executed contract. A supplies P's goods to T. What is the consideration for T's promise to pay for the goods? The consideration of the goods moves from the principal not the agent. This is the converse case to *Dunlop Pneumatic Tire Co.* v. *Selfridge*,[34] and the decision in that case makes it difficult to argue that the consideration moving from the principal will support a promise to the agent. On principle there is no reason why it should not—for it cannot be said that the doctrine of consideration moving from the promisee is a necessary concept of justice. It might further be argued that consideration consists in a promise by the agent, not indeed that the principal will be liable in any respect, but that the goods are the goods of the principal, which is another way of saying the warranty of authority. There would thus be mutual promises of the agent and the third person.

The other matter to be considered is also concerned with the "warranty of authority". Suppose that unknown to A the principal is an infant. It is clear law that the principal will not be liable to the third person. Is the agent liable? According to the contract theory under which the agent promises that the principal will be liable the agent of course does become liable.[35] The *American Restatement* suggests that there is no liability.[36] English case law based on *Collen* v. *Wright* is not decisive : but it would be consistent with the authorities that the agent should be liable.

The real objection to the contract theory, however, is that it is factually incorrect. The legal consequences of such a theory may coincide with established rules and may supply that *elegantia juris* which on the formal side is so desirable. It may also supply

[34] [1915] A.C. 847.

[35] Strictly the contractual liability, it is submitted, only arises when the agent refuses to compensate the third person.

[36] See Art. 332 and comment (a).

a solution for problems hitherto undecided. But it is submitted it is not in accord with an accurate judgment of the facts. The agent does not promise the third person that the principal will be liable, nor does the third person promise the agent that he (T) will be liable to the principal. Neither the agent himself nor the third person considers the agent as participating in the content of the liabilities to which the principal and the third person are subject.

The factual nature of the transaction, it is submitted, is that there is an agreement that P will be liable to T and T to P. There is a difficulty in calling the agreement a contract in the sense of a contract being an aggregate of promises. With regard to the actual subject matter of the liability neither the agent nor the principal undertakes anything. Can a statement by the agent that the principal will do certain things be said to be a promise of the principal? It is certainly not a promise *by* the principal. The transaction is really *sui generis*. A consensual relation not amounting to a contract is, however, not peculiar to the transaction of the agent and the third person. It may indeed exist in the setting up of the agency relation between the principal and the agent, *e.g.*, where the principal is an infant.[37]

In addition to the agreement between the agent and the third person dealing with the subject matter of the relation between principal and third person there is a collateral contract between the agent and the third person. This contract consists in a promise by the agent to compensate the third person if the agent was not authorized. The general consensus of opinion is that this "warranty of authority" is not a legal fiction, but depends on a judgment of fact that the agent does by his conduct warrant that he has authority from the principal. Since it is based on the agent's conduct, the warranty may be excluded by the circumstances of the transaction. It is a question of fact whether the warranty covers the case of incapacity of the principal unknown to the agent.[38]

Apparent Authority

A contract between principal and third person

The ordinary statement of the doctrine of apparent authority is that though A exceeds his authority in dealing with T there will nevertheless be a contract between P and T if T

[37] *Agency Restatement*, Art. 20 comment (b).
[38] *Yonge* v. *Toynbee*, [1910] 1 K.B. 215 suggests that it does.

reasonably believed that A had authority.[39] A consequence of the doctrine is that even if A had no authority P is liable. This is sometimes put in the form that the actual agreement between P and A does not affect T. According to this reasoning it is clear that the latter proposition is not the basis of the doctrine of apparent authority but a deduction from it: if the doctrine did not exist the actual agreement between P and A would concern T. Yet we find Cook in explaining the doctrine saying "The third party cares not and need not trouble himself about the state of affairs as between agent and principal, that is no concern of his". In fact the doctrine of apparent authority assumes that the third person has concerned himself about the agreement between principal and agent, for an essential part of the rule is that the third person reasonably believes the agent was authorized.

We have seen that when it is said that there is a "contract" between P and T the statement does not necessarily mean that the relationship between them is that of other species of contract. Both Cook and Seavey however consider that there is a "true contract", by which they mean a simple contract based on agreement between the parties. They both justify their attitude by reference to the objective nature of agreement.

Seavey says "The situation is not different from that where P makes an offer personally to T. P's actual consent is unnecessary. The offer is made by the speaking of the words or the doing of an act with communication through authorized channels. With P's mental processes we are not concerned." This reasoning transcends ordinary logic which does not allow a conclusion to be drawn in positive terms from a negative proposition. A similar argument to Seavey's would show that a "true contract" results between P and T because T is not concerned with the colour of P's eyes, neither when dealing with A nor when dealing personally with P.

Perhaps I may be forgiven still further repetition in stating Cook's application of the doctrine of manifested intention to the case of apparent authority. Cook writes :

> A says to B, "X is authorized to sell you my horse upon terms to be agreed upon between you and him." Privately A instructs X not to sell for less than $150. X offers the horse to B for $100 and B accepts. We all agree that A is bound, but why? By estoppel? So says the new school. A has not contracted with B, for he has not

[39] The Agency Restatement is careful to say that the principal is liable on "contracts made by the agent".

> assented: there has been no meeting of the minds. To be sure there has not in fact. I contend there has been in law. A's statement to B is nothing more or less than an offer to contract with him leaving the terms to be fixed by X.

Ewart deals trenchantly with this statement pointing out that A's statement to B is certainly not an offer to B, it is a statement that A is willing to be bound by an offer to be made by X. To say that there is "a meeting of the minds in law" is merely an incorrect statement of the legal rule itself — it is not an explanation of it.

The *Agency Restatement*, though it avoids saying there is a contract between P and T, says "apparent authority conforms to the principles of contracts; there is a manifestation of consent by the principal to the third person, and in the case of a bilateral transaction, a counter-manifestation which completes the transaction". But the "principles of contracts", as I understand them, require in the case of a simple contract that there shall be a consent to the specific terms of the contract. If L and M "contract to make a contract" they are not bound by the future "contract" until its terms have been agreed. In the case of apparent agency moreover there is no original agreement at all between P and T. P's representation that A is authorized does not necessarily result in a contract between P and T that P will be bound by the dealings between A and T. Of course there may be such a contract between P and T, but it does not arise from T's consent to the arrangement with A. That consent does not also operate as consent to such a contract with P. In any case such a contract is quite different from the contract whose terms are settled between A and T. The fallacy of the *Restatement* comment is the equivocacy of "consent". As used there it means merely a unilateral willingness to be bound by the contract between A and T. In the "principles of contracts" it means a bilateral willingness to be bound by specific formulated terms.

Equivalence of cases of apparent and actual authority

Cook, in his reply to Ewart, put forward the argument that apparent authority is in fact equivalent to actual authority. He said: "Agency is a question of fact, but we must not forget that the external relationship may exist as a fact, even though the internal one does not. So far as the persons to whom I have held a given person out as possessing certain authority

are concerned the relationship of principal and agent does exist: he is authorized, has authority to act for me to that extent: he is in fact my agent, with that authority and I am bound if at all, because through my agent I have entered into those contracts which have been duly accepted." Though he speaks of "fact" his definition of the terms "agency" and "authority" involve legal rules. They, in fact, embody the rules he is attempting to explain: and his argument is mere tautology.

Seavey says "if P represents to T that A has authority to contract the legal result is exactly the same as if A had authority". Even if this is true it does not follow that the factual situations in apparent and actual authority are identical: they are *ex hypothesi* different. Nor does the proposition imply that the legal causes are the same. But is the proposition true? Is the legal result *always* the same? Suppose, to consider one point only, A enters into a contract for which he has apparent authority but no actual authority; will he not be liable under the doctrine of *Collen* v. *Wright*? Should not A be liable for a wrongful assertion of authority even though no damage result to T because P does become liable? Damage is not required to sustain an action of contract.[40]

The theory of estoppel.

Ewart's thesis is that the principal does not make the contract, neither does the agent "make the contract for him . . . . for he had no authority to do so. . . . One of the requisites of a contract is missing, namely the authority of the agent to make it". The principal is, however, he maintains, estopped from traversing an allegation by the third person that the agent had authority, because the third person contracted with the agent on the faith of a representation by the principal that the agent had authority.

This argument assumes that the case of actual authority is familiar and explains apparent authority by reference to it. Its factual aspect is that the third person deals with the agent because he believes the agent had authority and that that belief was induced by the principal. The legal rule it introduced is that in these circumstances the law should deal with the principal as if the principal had authorized the agent. It maintains that this legal rule is an exemplification of the doctrine of estoppel. It is the last proposition which is generally controverted. It is said that the rule is not an application of the

[40] This point is further discussed below.

doctrine of estoppel for the doctrine of estoppel requires that there must be some detriment sustained by the person misled, *i.e.*, in the case of apparent authority, by the third person.

"Has the third person changed his legal position[41] in any way?" asks Cook. In the formation of an executory contract where is this change of position? asks Wright. The *Agency Restatement*[42] says: "Apparent authority which creates contractual relations between principal and third person, is to be distinguished from estoppel which operates to permit suit by the third person if he has changed his position." Of course it cannot be said that T's liability to P is for the change of position which makes the doctrine of estoppel applicable. The hypothesis is that the liability to P comes into existence because of the application of the doctrine of estoppel: there must be a change of position *before* there is liability. Ewart accepts the view that there must be detriment sustained by the third person, but he says it does exist. Suppose the contract is in writing and T "does nothing except sign something". T because of the representation of P does change his position: he makes an offer to A or accepts one made by A. That is a change of position precedent to the existence of the contract. Cook, however, denies that the mere act of offering or accepting is a detriment. "Surely he does not mean the labour of speaking the words or signing the memorandum (if he did so) is the change in position," says Cook. This, however, is precisely what Ewart does mean: and he claims that the law recognizes such labour as a change of position, not only by estopping P but also by giving T a right of action against A for wrongful assertion of authority. That right of action depends on a contract between A and T for which there must be consideration. The only consideration moving from T to A is the labour of T in making an offer to contract with P or in accepting such an offer. Consideration consists in a detriment, hence such labour must be a detriment.

This appears a rather strained view of detriment. Moreover, is consideration in the sense of a detriment sustained by a promisee always necessary to a contract? Is not the case of a promise for a promise one where no such consideration is necessary? If so the argument from the doctrine of breach of warranty of authority does not help. Again, if the labour of

[41] It is not clear what Cook means by "legal position". Does he mean that the estoppel-assertor must have changed his legal relations either with the person making the representation or with others? The doctrine of estoppel has no such requirement. Or does he mean a change of position which the law recognizes? What changes of position are not recognized?

[42] Sec. 159, Comment.

offering or accepting is a detriment then will it not exist in every agreement, so that consideration is not an additional requirement of English law? X says to Y "I offer to give you £100 if you will accept". Y says "I accept". Is Y's labour of speaking these words consideration?

A possible answer to this last argument is this. The speaking or writing of words which constitute an undertaking[43] is a very different thing from speaking or writing words which do not constitute an undertaking. The strain on the vocal cords or on the muscles of the hand may be the same in both cases. But that does not constitute the detriment. There is a moral obligation to keep one's word which applies in one case and not in the other—and there is a social recognition of this obligation apart from law. It is this which the law regards as the detriment and which is present in the speaking or writing of an undertaking. Such a detriment exists in the case of apparent authority by the undertaking by T to A to be liable to P. It exists in every executory contract so that there is no need to say that the case of a promise for a promise is one where the doctrine of consideration in the sense of detriment does not apply.

This argument is of course far from convincing; it is akin to the doctrine of moral obligation which Lord Denman in *Eastwood* v. *Kenyon*[44] said, "would annihilate the necessity for any consideration at all", though of course it does not involve any past consideration as did the doctrine discussed in *Eastwood* v. *Kenyon*.

The case of a promise for a promise is one where no detriment is required. The true answer to the objection against estoppel as the basis of apparent authority because no detriment exists is to say that the existence of detriment is not universally necessary in the doctrine of estoppel. It is true that it is stated as a requisite in Lord Tomlin's recent statement of the doctrine of estoppel;[45] but it will not be found in the statement of Parke B. in *Freeman* v. *Cooke*.[46] The modern doctrine of estoppel was first formulated in a case of apparent authority,[47] and in *Freeman* v. *Cooke* apparent authority is given as an example of the doctrine.

Cook calls the view that the doctrine of estoppel explains apparent authority a "new theory". It must have a youthful vitality

[43] I use undertaking here to mean the factual promising to do something without assuming that the promise is enforcable in law.
[44] (1840), 11 A. & E. 438 at p. 450.
[45] *Greenwood* v. *Martin's Bank*, [1933] A.C. at p. 57.
[46] (1848), 2 Ex. 654.
[47] *Pickard* v. *Sears* (1837), 6 A. & E. 469.

if in 1905, when Cook wrote, it was still novel, after having been stated, as we have seen, in 1837. Cook said also, "the courts are beginning to base the doctrine in question upon principles of estoppel", but surely for some seventy years the doctrine of estoppel was the accepted explanation of apparent authority in the courts. Cook's chronology can perhaps be understood when it is realized that he traces the doctrine of apparent authority back to the Year Books.[48] This historical perspective makes him consider the 19th century as unimportant. The earlier cases were certainly decided before the modern doctrine of estoppel was formulated. But an examination of them reveals no express statement of any theory on which they were decided. The mere fact that the doctrine of estoppel was formulated later does not mean that they cannot be regarded as examples of it. In fact the doctrine of estoppel, as we have seen, was formulated with express reference to the case of apparent authority, and with no reference to a requirement of detriment. Just as detriment may not be a universal requirement for contract so too it may not be for estoppel.

The controversy on this point is largely terminological. Some writers would confine the term "estoppel" to cases where there is a detriment. Others would apply it to all cases where the law refuses to allow one man to prove that in fact there does not exist the situation which he led another to believe did exist.[49]

Even according to the narrower terminology the doctrine of estoppel only requires that there be some detrimental action in consequence of P's representation. It does not require that there should be some action in consequence of T's agreement with A. In *Reo Motor Car Co.* v. *Barnes*,[50] A, the plaintiff's salesman, sold and delivered a motor car to the defendant and agreed to take the defendant's old car in part exchange. A had previously completed a similar transaction with the defendants without objection from the plaintiff. In fact A was authorized to make only cash sales. Before the defendant had given up his old car or made any payment the plaintiff sued for return of the motor car. It was clear that A had apparent authority; but the court considered that the principal might repudiate the

[48] Cook cites Y.B. Lib. Ass. pl. 5 fol. 133 (1353); *Seignior and Wolmer's Case* (1623), Godb. 360; *Anon.* (1691), 1 Shower 95; *Anon.* v. *Harrison* (1698), 12 Mod. 346; *Nickson* v. *Barham* (1712), 10 Mod. 109.

[49] Thus in *Smith* v. *Hughes*, L.R. 6 Q.B. 597, Blackburn J. deals with the doctrine of manifested intention in creating a contract as an application of the doctrine of estoppel.

[50] 9 S.W. (2d.) 374, noted in (1929), 42 Harv. L.R. at p. 570.

transaction so long as the third party had not acted in reliance on it. This is clearly a misapplication of the theory of estoppel. The third party had acted in reliance on P's representation that A was authorized.

The *Agency Restatement* says "estoppel . . . . . does not operate to permit the apparent principal to maintain an action". Wright asks "If we say the principal is estopped how can the principal ever sue on the resulting 'contract'? We have yet to find a case where conduct creating an estoppel gives rights to the person estopped." It is submitted that there is little difficulty in answering the question. If P sues T no question of apparent authority arises: P has ratified A's acts. If T sues P, P can counter-claim without being deemed to have ratified A's acts. The estoppel theory says that P cannot set up the defence that A was unauthorized but it goes no further. T, in suing, alleges P is liable on the contract made through the agent: he does not have to plead estoppel; he does not sue on the estoppel; estoppel only operates *in limine* to prevent P saying the agent was unauthorized. But T cannot blow hot and cold; he cannot set up the contract made through an agent for the purpose of enforcing his rights thereunder without conceding to P rights which P would have under such a contract.

The agreement between agent and third person as the basis of liability.

In order to show that the agent has a power to affect the principal's relations the theory of estoppel takes two bites at the cherry. It assumes a power exists in the case of actual authority and then shows that the parties should be treated as if actual authority existed. Can a more direct basis not be found? Is not the representation by P to T in itself sufficient to give A a power without calling in aid the position where there is actual authority? The factual situation is that A and T agree with each other that P will be liable to T and T to P. Can it not be said that this agreement will be enforced so as to make P liable because P has shown a willingness to be liable, not as in actual authority by his agreement with A but by his representation to T? Moreover P has led T reasonably to expect that he (P) will be liable. There appears to be good reason for enforcing the agreement between A and T.

How far, nevertheless, does this view of the position take account of what must usually be a factual element in the transaction, namely that the third person deals with A because

he believes that A was authorized? One can only conjecture about the probable state of T's mind: but it appears likely that if P's representation is that A is authorized T will think he is authorized. Of course if T does not in fact usually concern himself as to whether A is authorized, but is content to agree that P will be liable without caring whether A was authorized to make such a contract, the theory of agreement between A and T is realistic enough. In law it matters not if T has or has not concerned himself — but in fact it is likely that he has and that he only agrees with A because he only believes A to have authority. The theory of estoppel does take account of that likelihood. Is the omission of T's belief a serious defect in the theory of agreement between A and T?

Apparent authority and the doctrine of Collen v. *Wright.*

An agreement between A and T is an inadequate treatment of all the facts; but it must be realized that there also exists a contract between A and T under which A promises that he has been authorized by P. This contract does take into account the fact that T contracts with A believing that A had authority. The existence of this contract, as we have seen, depends on a judgment of fact based on A's conduct. Since A's conduct is the same whether apparent authority exists or not it would appear that the doctrine of *Collen* v. *Wright* applies to both cases.[51]

The consequences of the contract are not however the same whether apparent authority exists or not. If no apparent authority exists P is not liable to T and T may incur substantial damage. When apparent authority exists P becomes liable to T and T suffers no actual damage from the fact that A was not authorized.. It is a purely theoretical question to consider whether T can recover nominal damages from A.

In so far as T's action is based on the tortious character of assumpsit it is submitted he must fail for want of damage. In so far as his action is contractual the problem raises the question whether the subject matter of a promise is necessarily an act or forbearance. If Holmes' view be correct that the subject matter of a promise is not necessarily an act or forbearance,[52]

[51] This assumes that T does not disclose to A that P has represented to T that A had authority. If, however, T does disclose this fact and A deals with T as Agent for P then, it is submitted, *actual* authority exists. The agreement between P and A is based on an offer to A conveyed by T and accepted by A by dealing with T.

[52] COMMON LAW, pp. 289-290. The contrary view is taken in the *Restatement.*

then T can recover nominal damages from A, for A commits a breach of promise by reason of the fact that he had no authority. If, however, Holmes' view is incorrect then A's promise is only one to compensate T for the damage T suffers. Since T suffers no damage it follows that he cannot sue A. A always takes on himself when purporting to act as agent, when in fact he has no authority, the risk of P not ratifying his action. Where P has already represented to T that A has authority A's risk is already nullified and there is no need for ratification.

Conclusion.

The conduct of a person in acting as agent has a dual significance. On the one hand it amounts to a representation that rights and liabilities are not to be acquired by the person himself, but by another, his principal; and on the other hand it is an offer of a promise that the person acting as agent has authority so to act. For example, where a person enters into an agreement as agent for the sale of goods then (1) there is an agreement that the principal will be liable to the third person to deliver certain goods and that the third person will be liable to the principal for the payment of the price. (2) The agent promises that he has authority from the principal to enter into the agreement.

Apart from the warranty of authority an agent, in so far as he acts as agent, incurs no liabilities and acquires no rights, for the agreement is that the liabilities shall be those of the principal to the third person and the rights those of the principal against the third person. The simile of the conduit pipe is however misleading. The principal is not active in leading his legal bonds into confluence with those of the third person through the medium of the agent as a passive conduit. The agent is the active force, in combination of course with the third person. The principal, by agreeing with the agent or making a representation to the third person, endows the agent with power and the exercise of power by the agent generates a force which brings the principal into contact with the third person.

The principal is affected by an agreement between the agent and the third person, not because he can be said to be a party to that agreement but because his own conduct has made it just that he should be bound in accordance with the terms of the agreement. In the case of actual authority he has agreed with the agent so to be bound; in the case of apparent

authority he has shown the third person an intention so to be bound and he has led the third person reasonably to believe that he will be so bound.

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