## THE LAW OF AGENCY

The appearance of a new edition of the best known English book on the law of agency[1] suggests some observations on some fundamental principles of that branch of the law.

*Bowstead on Agency* was first published in 1896, and the last edition revised by the author was the eighth edition, published in 1932. Owing to the author's death the book has now joined the great majority in the character of a standard book which has been revised by some one other than the author. The frequency with which new editions have been published shows that there is a demand for a book on agency, and perhaps even specifically for a book in the form of this one, that is, in the form of a series of articles, each article being followed by summary statements of the facts and decisions in a number of reported cases. With the use of a larger page the format of the new edition is much improved. In its 400 pages it contains notes of 157 more cases than were contained in the 547 pages of the eighth edition. Nearly 3500 cases were cited in the earlier edition.

The task of editing another man's book is not free from difficulty. One logical method of treatment is to leave the original author's text unaltered so far as possible, adding references to recent cases. To a certain extent this is what the present editor has done, and in the main the book remains essentially the same in character as Bowstead left it, and presumably it will continue to be found useful by practitioners who desire to find ready reference to reported cases. The editor has, however, made some changes which are inconsistent with the general scheme of merely bringing Bowstead up to date. He has made just enough changes in the arrangement of the articles to involve a departure from the article-numbering adopted by Bowstead from the second edition (1898) to the eighth edition (1932), and thus to render obscure all references made in judgments and elsewhere to articles in these earlier editions. The utility or appropriateness of some of these changes would seem to be open to question. New article 8 on Agency of Partners seems to be out of place, as the subject matter belongs to chapter XI on Relations between the Principal and Third Parties. Article 6 on Co-Principals relates

[1] A DIGEST OF THE LAW OF AGENCY. By WILLIAM BOWSTEAD. Ninth Edition by ARTHUR H. FORBES. London: Sweet & Maxwell. 1938. Pp. xciv, 400. ($9.00).

to the agent's duty to account and belongs to chapter VIII, where Bowstead had it in old article 46. More important than these and other debatable matters of arrangement is the change made by the editor in article 102 (old article 101) relating to the liability of the principal for the torts of his agent. Of this I will speak later.

Another logical method of treatment of an old book by a new editor is to revise the book freely, and it would seem to be clear that this method of treatment is what was required in the present case. In Bowstead's lifetime the book remained what it was in the beginning, a nineteenth century book, and the subject is one on which a great deal of significant and constructive work has been done in the twentieth century. The fact that the author never departed from the old-fashioned habit of omitting all reference to extra-judicial writing no doubt tended to keep him unaware of the urgent necessity of reconsidering and restating some of the fundamental principles of agency law. The present editor has piously followed the author in excluding from consideration anything outside the limits of the text of judgments of English courts, notwithstanding that in recent years some other English authors (as, for example, Stallybrass and Winfield) have notably enhanced the value of their books by referring to law review articles. It may not be out of place here to note that Lord Wright, referring to Sir Frederick Pollock, put this in the forefront of his tribute: "This at least is clear, that he has vindicated to this generation the vital importance of extra-judicial writing in law."[2]

In several of the law schools of Canada, Agency is the subject of a major course, as it is generally in the United States, whereas in English legal education the subject is usually treated as a mere appendix to the Law of Contract and Tort. This may help to explain why it is possible for an English author to write or revise a book on Agency without taking advantage of the researches which have been made on this side of the Atlantic. The *Restatement of the Law of Agency* of the American Law Institute is an incomparable source of information and illustration, and contains an exposition of the general principles of agency law which is indispensable to any investigator in this field of law. It must of course not be relied on as being an exact restatement of the existing law of any country, but it furnishes invaluable suggestions for the statement and development of legal theory in various situations which have not yet

[2] (1937), 53 L.Q.R. 151.

been adequately considered in English or Canadian courts. Among the American pre-Restatement contributions may be mentioned those of Mechem, Laski and Seavey, with especial emphasis on Laski, *The Basis of Vicarious Liability*,[3] and Seavey, *The Rationale of Agency*.[4] Mechem was the reporter of the American Law Institute for the Agency Restatement during its earlier stages, with Seavey as his chief adviser. After Mechem's death in 1928, Seavey was the reporter until the promulgation of the Restatement in 1933, and he is primarily responsible for the final form of the Restatement. In Canada, Cecil A. Wright has been indefatigable in his discussion of agency law,* and I venture to make a list, for convenience of reference, of his series of articles and comments, namely: *Implied Agency of the Wife for Necessaries;*[5] *Husband and Wife, Termination of Agency;*[6] *Restatement of Contract and Agency;*[7] *"Authority" to Commit Torts;*[8] *Knowledge of an Agent or Principal as Affecting Liability;*[9] *Insanity (of Third Party) and Knowledge of Agent Imputed to a Principal;*[10] *Liability for Torts of Servants or Agents, Who is a Servant, Right to Control;*[11] *Liability for Negligence of Nurses and Doctors;*[12] *Doctors' Liability for Negligence of Nurses;*[13] *Liability of Hospitals for Negligence of Nurses.*[14]

Bowstead in its present form is singularly devoid of discussion of general principles, notwithstanding the superficial appearance it presents of stating principles in "articles". It would be much improved if each article were followed by some text explaining or amplifying the principle supposed to be stated or exemplified. There is in fact no adequate discussion, even in illustrations or footnotes, of modern cases which in

[3] (1916), 26 Yale L.J. 105.
[4] (1920), 29 Yale L.J. 859.
* An editor has no escape from this sort of thing when it is stated with decanal authority.—EDITOR.
[5] (1930), 8 Can. Bar Rev. 722.
[6] (1937), 15 Can. Bar Rev. 196.
[7] (1935), 1 U. of Toronto L.J. 17.
[8] (1935), 13 Can. Bar Rev. 116; *cf.*, as to "ultra vires torts", (1931), 9 Can. Bar Rev. 594, at p. 596.
[9] (1935), 15 Can. Bar Rev. 716.
[10] (1938), 16 Can. Bar Rev. 727.
[11] (1937), 15 Can. Bar Rev. 285; *cf.* (1938), 16 Can. Bar Rev. 752, at p. 756. See also Laskin, *Liability of Master for Torts of Servant, Right to Control* (1938), 16 Can. Bar Rev. 809. The judgments which were criticized by Wright and Laskin respectively were subsequently reversed on appeal: see *T. G. Bright & Co.* v. *Kerr*, [1939] 1 D.L.R. 193, and *Tulley* v. *Genbey and Bank of Toronto*, [1939] 1 D.L.R. 559.
[12] (1936), 14 Can. Bar Rev. 699.
[13] (1937), 15 Can. Bar Rev. 205.
[14] (1938), 16 Can. Bar Rev. 566; *cf.* (1938), 16 Can. Bar Rev. 654. See the valuable article by Goodhart, *Hospitals and Trained Nurses* (1938), 54 L.Q.R. 553.

some instances really call for a substantial rewriting of some of the articles. Sometimes separate articles are in effect examples of a common principle, but are not co-ordinated by notes or even by juxtaposition.

It is submitted that there are some fundamental concepts which should be clearly stated in a book on agency, and, if the book is written in the form of articles followed by illustrative cases, these concepts should be clearly stated in the text of articles.

There should, in the first place, be definitions of principal and agent linked with a definition of the relation of principal and agent as a consensual, and not necessarily a contractual, relation. In Bowstead we have, if we read articles 2 and 9 together, something answering the suggested requirement, although it might have been preferable to link the two definitions more closely. Both Bowstead and the Agency Restatement are guilty of the solecisms "relation of agency" and "agency relationship", in the sense of the relation of principal and agent.[15] In comments *c* and *d* on § 1 of the Restatement there are good definitions of principal and agent as, respectively, the person who authorizes another person to act on his account and under his control, and the person who is so authorized.

There should, in the second place, be a definition of authority (sometimes unnecessarily called "actual" or "real" authority, though it must be admitted that occasionally the context makes an adjective appropriate so as to point the contrast between authority and apparent authority, that is, between authority and the mere appearance of authority), and authority should be distinguished from power. There is no definition of authority in Bowstead,[16] and no clear distinction is made between authority and power. The Restatement clearly distinguishes authority from power, and defines the latter, in § 6, as "an ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act", but nevertheless, in § 7, confuses the matter by defining authority in terms of power: "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." As Montrose has rightly pointed out,[17] this supposed

[15] *Cf.* BOWSTEAD, article 9, and RESTATEMENT, § 1.

[16] In Chapter VI, entitled Authority of Agency, authority is taken for granted, without definition.

[17] Montrose, *The Basis of the Power of an Agent in Cases of Actual and Apparent Authority* (1938), 16 Can. Bar Rev. 757, at p. 763.

definition of authority "sandwiches"[18] two different things, namely, a definition of authority, and a statement of the legal result of an agent's acting within his authority, and leaves us without any definition of authority for use in another context. If § 7 began "An agent has power to affect the legal relations," etc., it would be a good statement *pro tanto* of the agent's power. The definition of authority should then read somewhat as follows: "Authority is the privilege or right 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." As stated by Duff C.J.C. in *Norwich Union Fire Insurance Society* v. *Banque Canadienne Nationale,*[19] with special reference to the expression "actual authority" in the Bills of Exchange Act,[20] actual authority means the authority which the agent possesses as between him and his principal by virtue of the principal's actual assent, either expressed or established by evidence of a course of dealing. The assent of the principal manifested to the agent defines the scope of the authority, and any act done by the agent to which the principal has not expressly or impliedly assented is unauthorized, although in the particular circumstances it may be apparently authorized. Accordingly, as stated in § 39 of the Restatement, "unless otherwise agreed, authority to act as agent includes only authority to act for the benefit of the principal", so that an act of the agent done for his own purposes is unauthorized, although in the particular circumstances it may be apparently authorized.

There should, in the third place, be a statement that the power of an agent may be, and often is, wider than his authority. This is of course implicit in some of Bowstead's articles, but it is not clearly stated. On the other hand, the Restatement states, in § 140, that "The liability of the principal to a third person upon a transaction conducted by an agent, or the transfer of his interests by an agent, may be based upon the fact that (a) the agent was authorized, (b) the agent was apparently authorized, or (c) the agent had a power arising from the agency relationship, and not dependent upon authority

[18] *Cf.* the "portmanteau" words in "Jabberwocky" as explained by Humpty Dumpty in chapter vi of THROUGH THE LOOKING GLASS, AND WHAT ALICE SAW THERE.

[19] [1934] S.C.R. 596, at pp. 601 - 2; [1934] 4 D.L.R. 223, at pp. 227-228.

[20] Section 25 of the Bills of Exchange Act, 1882, re-enacted in Canada as s. 51 of the Canadian Bills of Exchange Act, R.S.C. 1927, c. 16. The section is quoted in Bowstead, article 89, without any hint as to difficulties of construction. For a conjecture as to the meaning of the section, see my BANKING AND BILLS OF EXCHANGE (5th ed. 1935) 636 - 637.

or apparent authority." Notwithstanding that the Restatement differentiates between cases of apparent authority and estoppel, the proposition quoted may be used to express a doctrine which is valid in English law, in the sense that in certain classes of cases the decisions in favour of the third parties cannot be supported upon grounds of either authority or apparent authority and must therefore be based on the existence, in some circumstances, of a power on the part of the agent who is neither authorized nor apparently authorized.[21] One well known category of cases in which an agent's power may exceed his authority or his apparent authority may be generally described as the factor cases, in which it has been held that an agent who has possession of his principal's goods with the principal's consent with authority to pledge or to dispose of them on certain terms has power to give a good title on any terms to a third party who takes for value and in good faith and without notice that the agent is acting in excess of his authority, and notwithstanding that the third party does not know the agent to be an agent at all, so that there is no question of apparent authority.[22] Somewhat analogous cases are those in which a person has been entrusted by the owner with the possession of title deeds[23] or share certificates[24] with some authority to pledge or dispose of them, and has power to give a good title to an innocent third party by an unauthorized disposition. In these cases the title of the third party cannot of course be based on the authority of the agent, because the particular disposition is unauthorized, nor can it be based on apparent authority if the third party does not know or think that his transferor is an agent at all.

While English courts must admit in the foregoing classes of cases that in some circumstances an agent who is neither

[21] Generally, see Wright, *Restatement of Contracts and Agency* (1935), 1 U. of Toronto L.J. 17, at pp. 40 *ff.* (A new approach to agency.) In my BANKING AND BILLS OF EXCHANGE (5th ed. 1935) I availed myself of Wright's researches in attempting to state (pp. 225 - 236) the result of the cases under the Factors Acts and other cases as to the power of a person who has no title to give a good title to an innocent third party, and (pp. 611 - 649) various matters of agency law arising in connection with forged and unauthorized signatures under the Bills of Exchange Act.

[22] *Oppenheimer* v. *Attenborough & Son*, [1908] 1 K.B. 221, at pp. 227 - 228, Lord Alverstone, and at p. 232, Kennedy L.J. Of course, if the person in possession with the consent of the owner is merely a bailee for safe custody, even if he also carries on the business of mercantile agent, the third party gets no protection, and it is immaterial whether he thinks the person in possession is the owner or is a mercantile agent. *Cole* v. *North Western Bank* (1875), L.R. 10 C.P. 354.

[23] *Brocklesby* v. *Temperance Building Society*, [1895] A.C. 173; cf. *Rimmer* v. *Webster*, [1902] 2 Ch. 163, at pp. 172 - 173.

[24] *Fry* v. *Smellie*, [1912] 3 K.B. 282.

authorized nor apparently authorized has power to dispose of a proprietary interest of his principal, they are more reluctant to admit that in some circumstances an agent who is neither authorized nor apparently authorized has power to bind his principal by contract. It would appear, however, that a general agent, who is not known to the third party to be an agent at all, has power to bind his principal by an unauthorized contract, if the making of the contract would have been within the scope of his apparent authority as regards a third party who knows he is dealing with an agent.[25] Again, it would appear that if a principal delivers to his agent a power of attorney in wide terms he is bound by a contract made with a third party who does not read the power of attorney and does not know of its terms or even of its existence, provided the contract would have been within the scope of the agent's apparent authority as regards a third party who had read the power of attorney or was aware of its terms.[26]

Again, a principal may become liable upon a bill of exchange signed by him if he delivers it in an incomplete condition to an agent with authority to complete it and issue or negotiate it on certain terms, and the agent fills in the document in some unauthorized way, and obtains money on it in fraud of the principal. The third party who takes it, even though he may not be holder in due course, gets a good title to the bill and the right to sue the principal if he takes for value in good faith without notice of the fraud.[27] If the incomplete bill had been delivered to a person as custodian merely, subject to further instructions, and not in the character of agent with some authority to complete and issue or negotiate it, the third party, even though he might be a holder in due

[25] *Edmunds* v. *Bushell and Jones* (1865), L.R. 1 Q.B. 97, as explained in *Watteau* v. *Fenwick*, [1893] 1 Q.B. 346; *cf.* the liability of a dormant partner: s. 5 of the Partnership Act, 1890 (R.S.O. 1937, c. 187, s. 6). *Sed vide McLaughlin* v. *Gentles* (1919), 46 O.L.R. 477.

[26] *Hambro* v. *Burnand et al.*, [1904] 2 K.B. 10; *cf. Hayes* v. *Standard Bank of Canada* (1928), 62 O.L.R. 186, [1928] 2 D.L.R. 898 (especially the judgment of Middleton J.A.). It would appear clear that the trial judge in *Hambro* v. *Burnand* was right in holding that the agent was neither authorized nor apparently authorized to make the contract in question (cf. s. 39 of the Restatement quoted *supra*), and that the judgment of the Court of Appeal in favour of the third party must be based upon a power conferred by the law upon the agent, analogous to the power of a general agent not known to the third party to be a general agent or an agent at all.

[27] *Lloyds Bank* v. *Cooke*, [1907] 1 K.B. 794. The case was said by the court to be governed by *Brocklesby* v. *Temperance Permanent Building Society, supra*, note 23, and this would seem to be the true ground of the principal's liability, although the court also spoke of "the common law doctrine of estoppel."

course, would acquire no right of action against the original signer.[28]

Chapter XI of Bowstead is entitled Relations between the Principal and Third Persons, and consists of five "Sections", as follows: Section 1, What Acts of Agents Bind their Principals (articles 82 to 89), Section 2, Rights and Liabilities of the Principal on Contracts made by Agent (articles 90 to 100), Section 3, Liability of the Principal for Wrongs of Agent (articles 101 to 108), Section 4, Admissions by and Notice to Agents (articles 109 and 110), Section 5, Right of Principal in Respect of Property Intrusted to Agent (articles 111 to 113), and Section 6, Bribery of Agent (article 114). This mode of subdividing the chapter has been taken without change from the previous editions. The only changes made in sections 1, 2, 4, 5 and 6 appear to be one improvement in the wording of article 87, and the less commendable transfer of former article 88 (Holding out another as agent) to new article 10 in chapter I, where it is now far removed from the analogous material with regard to apparent authority contained in chapter XI. Important changes have, however, been made in section 3, of which some at least will be mentioned later. An initial question presents itself to any reader of the chapter, namely, what is the relation of section 1 to sections 2 and 3. Section 1 begins with articles 82 and 83, which are not by their terms limited to the classes of cases dealt with in most of the other articles of section 1 (namely, the power of an agent to make an unauthorized, but valid, disposition of the principal's property), and most of the illustrations following articles 82 and 83 are contract cases. Article 89 is also applicable by its terms to contract, and it would appear that articles 82, 83 and 89 must be read along with the articles in section 2, so as to get a complete picture of the author's theories with regard to the principal's liability in contract. Must they also be read along with the articles in section 3 so as to get a complete picture with regard to the principal's liability for the agent's torts? Articles 82 and 83, which have been taken textually from the previous edition, contain combinations of expressions which seem to be inappropriate to either tort or contract. The

[28] *Smith* v. *Prosser*, [1907] 2 K.B. 735. The case would be analogous to *Cole* v. *North Western Bank*, *supra*, note 22. If the bill were originally delivered in a complete state a holder in due course would be protected without proof that the bill had been delivered by a principal to his agent with some authority to issue or negotiate it. For fuller discussion of the cases of both complete and incomplete bills, see my BANKING AND BILLS OF EXCHANGE (5th ed. 1935) 580 - 597.

principal, it is said, is bound either (a) if the agent's act was done "within the scope of his actual authority", or (b) if the agent's act was done "in the course of his employment" *and* "within the apparent scope of his authority". The course of employment is, of course, a familiar basis of liability of a master for the torts of his servant, and apparent authority upon which a third party relies to his detriment is a familiar basis of liability of a principal upon an unauthorized contract made on his behalf, but the combination of the two bases in a single proposition is somewhat mystifying. When we turn to section 3, specifically devoted to the liability of a principal for the torts of his agent, the confusion between authority and course of employment is worse confounded, for we are told in article 102 of the new edition that the principal is liable if the agent acts either "by authority of the principal" or "in the course of his employment", and in either case it is said that the agent acts "within the scope of his authority".

In the preface to the new edition the editor intimates that in some places he has "thought fit to lay hands upon the 'saws' themselves [that is, Bowstead's articles] and to alter their cut, in an endeavour to give fuller effect to modern decisions, particularly those relating to the liability of the principal for the torts of his agent". On this fundamental topic Bowstead, in article 101 (8th edition), wrote: "Where loss or injury is caused to any third person by any wrongful act or omission of an agent while acting or purporting to act on behalf of the principal, either in the ordinary course of his employment, or within the authority of the principal, the principal is liable jointly and severally with the agent." (I omit, as being irrelevant to the present discussion, the proviso relating to trade unions, which now appears as a separate article, number 106.) In the 8th edition there followed articles 102 (money, etc., misappropriated by agent) and 103 (money, etc., received by, or applied for benefit of principal), now articles 103 and 104 (9th edition), and then Bowstead in article 104 (8th edition) wrote: "No principal is liable for any wrongful act or omission of his agent while acting, without the principal's authority, outside the ordinary course of his employment, or while not acting nor purporting to act on the principal's behalf." Then followed article 105 (8th edition): "Subject to the provisions of articles 102 and 103, no principal is liable in excess of the value of the benefit (if any) acquired by him, for any fraud or other intentional or malicious wrong committed by his agent

without his authority, unless it was committed in the ordinary course of the agent's employment. But every principal, subject to the provisions of article 101, is civilly liable for every fraud or other intentional or malicious wrong committed by his agent in the ordinary course of his employment though he did not authorize it, or even if he had expressly forbidden it." (I omit the final sentence, relating to corporations, which now appears as a separate article, number 105, in the 9th edition.)

It is true that these articles in Bowstead's text may not give an adequate impression of the modern law of vicarious liability, but it is submitted that they are much better than article 102 of the 9th edition, which is as follows: "Where injury or loss is caused to a third person by the wrongful act or omission of an agent who is acting within the scope of his authority, the principal is liable jointly and severally with the agent. An agent acts within the scope of his authority when he acts by authority of his principal or otherwise in the course of his employment. Where the agent is acting in the course of his employment, the principal is liable although the agent, as between himself and the principal, has no authority to do the particular act and the act is done for the benefit of the agent and not of the principal."

It is submitted that the editor of the 9th edition has confused the subject of vicarious liability by the use of language which suggests, as the basis of liability of a principal for the torts of his agent, the idea that the agent must be acting within "the scope of his authority", when, usually, the question is whether the principal is liable for unauthorized torts. If a tort is authorized by the principal the tort is of course the tort of the principal as well as the tort of the agent, and there is no question of vicarious liability.[29]

*Lloyd* v. *Grace, Smith & Co.*[30] is cited in support of the last sentence of article 102 (9th edition), without any suggestion that the liability of the master for the fraud of his servant committed by the latter deliberately for his own benefit and not that of his master should be limited to a case in which the third party has been previously invited by the master to enter into relation with the servant, or, in other words, the defraud-

[29] *Cf.* note 8, *supra.* If ss. 5 and 10 of the Partnership Act, 1890 (R.S.O. 1937, c. 187, ss. 6 and 11), had been quoted in chapter XI, s. 5 in section 2, and s. 10 in section 3, instead of being quoted in chapter II, they would have served as a useful corrective and helped to avoid the indiscriminate use of "authority" and "course of employment" in contract cases and in tort cases alike.

[30] [1912] A.C. 351.

ing of the third party has been a sequel to the holding out of the servant by the master.[31] In some other cases the fact that the act of the servant has been done for the benefit or supposed benefit of the master may be essential in order to bring the act within the course of employment.[32]

Generally, as regards the liability of a principal for the torts of his agent, it is submitted that the text of article 102 in the 9th edition gives a slim and insufficient notion of the law, in the absence of any hint of any test or formula for distinguishing between cases in which the principal is liable, and those in which he is not liable, for the torts of his agent committed in the course of employment. One formula is that the principal is liable for the torts of the agent committed in the course of the employment if the agent was at the material time subject to the control or right to control of the principal as regards the manner of performance of the principal's mandate, or, in other words, if the agent was a servant or in a position sufficiently analogous to a servant to bring the case within the principles governing the liability of a master for the torts of his servant. According to this formula a principal is not liable for the torts of his agent if the agent is virtually in the position of an independent contractor. This is the formula adopted by the Agency Restatement and by Stallybrass.[33] Again we may say that the test is whether at the material time the agent was engaged in doing his principal's business or was engaged in doing his own business.[34] In this connection it may be noted that there is in Bowstead a very scant treatment of the question of the liability of hospitals and surgeons for the negligence of nurses,[35] a matter in which the element of control or right to control has been much discussed.

On the question whether a principal, in the absence of intentional concealment from his agent of material facts, is liable in respect of a statement known to the principal to be false but made without his knowledge or authority by an agent who believes it to be true, Bowstead in article 106 (8th edition) cautiously expressed a doubt. In the new edition article 106

[31] See SALMOND, TORTS (9th ed. 1936, by Stallybrass) 99; *cf.* Duff J. (now C.J.C.) in *National Union Fire Ins. Co.* v. *Martin*, [1924] S.C.R. 348, at p. 356; [1924] 3 D.L.R. 1012, at pp. 1018-1019; Wright, *Restatement of Contracts and Agency* (1935), 1 U. of Toronto L.J. 17, at pp. 50-51.

[32] *Limpus* v. *London General Omnibus Co.* (1862), 1 H. & C. 526.

[33] SALMOND, TORTS (9th ed. 1936) 88 *ff.*; *cf.* note 11, *supra.*

[34] Wright, note 11 *supra.*

[35] A question which has been discussed in an illuminating manner by Wright and Goodhart: see notes 12, 13 and 14, *supra.*

has been superseded by a paragraph, following the illustrations to article 102, in which it is categorically stated: "Where a principal or his agent makes a representation which is false to the knowledge of either of them, the principal is responsible to the same extent as if the person making the representation had knowledge of its falsity. In this respect the principal and agent are one, and it matters not which of them makes the representation and which had the guilty knowledge."[36]

Bowstead's treatment of the question how far a principal is affected by notice to or knowledge of his agent is confused, because no distinction is made between notice in the sense of notification and notice in the sense of knowledge.[37] In the law of bills and notes we are familiar with the use of "notice" in these two senses (notice of dishonour, taking without notice), it being clear from the context of the particular section of the Bills of Exchange Act in which of the two senses the word is used. In the law of agency, however, there is a tendency to confuse the two senses. Article 110 in the 9th edition of Bowstead reproduces without change article 109 as it appeared in earlier editions. The title is "When Notice to Agent Equivalent to Notice to Principal", and while the text of the article relates in terms to knowledge, illustrations 6 and 7, and possibly illustrations 17 and 18, relate to notification. As regards notification to an agent the principal is bound only if at the time of the notification the agent is authorized or apparently authorized to receive notice, and it would appear to be immaterial whether the agent intends or is likely to communicate the notice to his principal. On the other hand, if the question is whether the principal is affected by what the agent knows, the fact that the agent is engaged in the commission of a fraud on the principal and is therefore unlikely to communicate what he knows to the principal may be material, but the fact that the agent's knowledge is acquired in a previous transaction or outside of the course of his employment would appear to be immaterial, if the matter known is still present to his mind when the matter becomes relevant to the course of his employment.[38]

[36] Citing, as the most important decision, *Pearson* v. *Dublin Corporation*, [1907] A.C. 351. See, however, Devlin, *Fraudulent Misrepresentation: Division of Responsibility between Principal and Agent* (1937), 53 L.Q.R. 344; *cf.* Wright, note 9, *supra*.

[37] As to this fundamental distinction, see Seavey, *Notice Through Agent* (1916), 65 U. of Penn. L.R. 1; AGENCY RESTATEMENT, §§ 9 - 11, and chapter VIII; Wright, *Restatement of Contracts and Agency* (1935), 1 U. of Toronto L.J. 17, at p. 52; *cf.* note 9, *supra*.

[38] So that Bowstead's statement that "Knowledge acquired by an agent otherwise than in the course of his employment on the principal's behalf . . . . . is not imputed to the principal" cannot be accepted as an accurate statement of the law.

If an apology is needed for making the appearance of a new edition of Bowstead the occasion for somewhat extended critical observations, the justification would seem to lie precisely in the fact that Bowstead is widely used by the profession and frequently cited by the courts. The book, it is submitted, does not adequately reflect the current of modern theories on fundamental points of agency law, and as it is a part of my present duties to expound the modern law of agency to other students of the law, it has seemed proper for me to express by dissent from some of Bowstead's statements. My criticism, expressed I hope with becoming diffidence, is for the most part not directed to the work of the present editor except in so far as he has too piously left unchanged the text of his predecessor.

JOHN D. FALCONBRIDGE.

Osgoode Hall Law School.