

THE CONCEPT OF AUTHORITY AND ITS IMPLICATIONS IN AGENCY RELATIONSHIP

A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT

FOR THE REQUIREMENTS OF LLB DEGREE,

UNIVERSITY OF NAIROBI

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NAIROBI MAY 1988

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DEDICATION

This paper is dedicated to my parents Mr and Mrs Samson Mwithimbu and to my brothers and sisters for their care and love.

ACKNOWLEDGMENTS

I would like to express my deep appreciation and gratitude to all those who assisted in the completion of this paper. I am grateful to my supervisor and teacher, L. Njagi (Lecturer - department of commercial Law) for his incisive, constructive and scholarly criticisms, suggestions and his valuable and devoted assistance which benefited me immensely in the organisation and re-shaping of this paper.

Many thanks also go to my friend David N. Rukunga for his sincere encouragement, corrections and moral support. To my friends Mary Chemueno and Catherine Rubia for their moral support.

I would also like to thank Hellen M. Ikamati for reducing my work to its present form.

May God bless you all.

ABBREVIATION OF LAW REPORTS

- | | | | |
|-----|----------------|---|------------------------------|
| 1. | A.C. | - | Appeal cases |
| 2. | All E. R. | - | All England Law Reports |
| 3. | A and E | - | Adolphus and Ellis |
| 4. | Beav | - | Beaven |
| 5. | CH. | - | Chancery |
| 6. | CH.D. | - | Chancery Division |
| 7. | C. B. | - | Common Pleas |
| 8. | C and P | - | Craig and Phellips |
| 9. | C.B.N.S. | - | Common Bench New Series |
| 10. | C.L.Y | - | Current Law Year |
| 11. | D.L.R | - | Dominion Law Reports |
| 12. | Dow and Ry | - | Dowling and Rayland |
| 13. | E.A.C.A. | - | East African Court of Appeal |
| 14. | Ex | - | Exchequer Reports |
| 15. | H and C | - | Huristone and Coltman |
| 16. | K. B. | - | Kings Bench |
| 17. | K.L.R. | - | Kenyan Law Reports |
| 18. | M and W | - | Meason and Welsby |
| 19. | N, S. W. L. R. | - | New South Wales Law Reports |
| 20. | Q.B. | - | Queens Bench |
| 21. | Q.B.D. | - | Queens Bench Division |
| 22. | T. R. | - | Taxation Reports |
| 23. | T. L. R. | - | Times Law Reports |
| 24. | Ves. | - | Vesey |

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JOURNALS (Abbreviations)

1. M L R - Modern Law Review
2. J L E - Journal of legal Education
3. Y L J - Yale law Journal

INTRODUCTION

"THE NOTION OF THE AGENT'S AUTHORITY BY CONSENT BETWEEN HIM AND THE PRINCIPAL IS AN ARTIFICIAL NOTION OF THE LAW WHICH OFFERS NO GUIDANCE AS TO THE TRUE LEGAL NATURE OF THE AGENCY RELATIONSHIP"

The reason as to why the concept of authority as understood in the agency relationship requires consideration can only be understood by an explanation of what follows when one person is used by another to perform certain tasks on behalf of that other. This employment of someone called the agent, creates problems of many kinds, in respect of rights and duties of various interested parties resulting from the introduction of a 3rd person between one who wishes to perform some undertaking and the one in respect of whom the undertaking is performed. Instead of having two persons directly connected in law with each other by the unilateral act of one, or the mutual acts of both, the employment of an agent affects the legal position of the one on whose behalf the agent acts and also of the one with whom he deals. Clearly, this employment of the agent who can subject the parties into legal consequences cannot be explained on the terms that at the initial stage of the creation of the agent's authority, the parties had consented that the agent will represent the principal to the 3rd party and subject him to certain known and clear legal consequences. It cannot be so determined because it is the law that looks at the Factual arrangement between the parties and determines whether the agent has authority, and the law can at times go outside that factual arrangement and declares that there is or there is no authority. In other sense there are situations when the agent's authority accrues where the parties have not consented to that authority, yet in different situations it exists and arises. There are even cases where authority exists against the wishes of one or both of the parties. Infact, the conduct which creates that kind of authority - for example, apparent authority and implied authority - may arise without the cognizance or even the approval of the principal and even without the agent's intention to possess that kind of authority. It is in this light that an attempt to look at the rationale behind the existence of different types of authority without the consent of the parties shall be made.

An attempt will also be made to show how actual authority is superficial in the sense that it is only express authority, which is an element of authority created by contract, which can strictly be said to be by the acts of the parties. On the other hand, it will be shown that usual, implied, apparent, and authority created by law, are types of authority which are imposed upon the relationship of principal and agent for particular reasons. Therefore, it is impossible to say that the parties have a free hand in setting out their terms in the kind of authority the agent is to be clothed with. The concept of the agent's authority does not explain, in itself, the true state of affairs.

The other question to be posed is whether the concept of authority is in itself enough to explain the legal consequences of a principal's employment of an agent. The employment of an agent results in the change of the principal's legal position by subjecting him into rights and liabilities with a 3rd party whom the agent deals with. It will be shown that the change in the principal's and 3rd party's position, which is a legal consequence, cannot be adequately explained in terms of the agent's authority to act for the principal, but can only be explained by the element of power which the agent is said to possess, and which enables him to affect the principal's position, the 3rd party's position and at times his own position. The question to be posed here is as to whether it is the agent's authority or his power which is the central feature of the agency relationship. In conclusion, it will be seen that it is the agent's power which is the central feature in an agency relationship.

The notion of authority can only be used to explain the effects of the agency relationship for it helps in showing what an agent can or cannot do but, it is an artificial element used by law to encampass the notion of the agent's power which can explain the true legal nature of the agency relationship.

In the modern commercial world, there is a need for employment of others to perform certain tasks for efficient and speedy distribution of goods and services to the consumers. Besides, there is a need for specialised activity for it would be difficult for the principal to avail himself in all situations calling for his attention in the terms of trade, hence the need to employ agents. An attempt will be made to show whether the 3rd party is in a position to know what kind of authority the agent has and the power contained therein, and thereby enabling him to declare his rights and liabilities. Thus enabling him to know whom he can sue as between the principal and the agent, in order to enforce his rights.

It is understood that there is no one unique type of authority for agent's authority emerge from different circumstances. The creation of agency relationship will be the subject of chapter one. The different types of the agent's authority depend on how the agency relationship was created. It is therefore necessary, for proper understanding of the concept of authority, that the creation of agency relationship should be understood. The definition of agency relationship will also be the focus of chapter one. An agency relationship is created expressly by way of contract between the principal and the agent, by ratification, by estoppel, and by the operation of the law. All of these methods will be considered in chapter one.

The second chapter will deal with the aspect of authority which is actual or real authority. This is the kind of authority equated to agency created by contract and under the doctrine of ratification. The chapter will touch on various divisions of actual authority. The chapter will also draw a distinction between power and authority and show how the agent's authority is not enough to explain the legal consequences that flow from employment of an agent by a principal.

Presumed authority which the agent is said to possess despite the lack of principal's consent and which is equated to agency created by operation of the law, will also be the subject of chapter three.

The chapter will also touch on apparent authority which is equated to agency created by the doctrine of estoppel. Here the principal, by his conduct allows the agent to appear to the outside world to have authority which he does not possess. The doctrine of estoppel is invoked and the agent is clothed with apparent authority. The chapter will show how apparent authority is different from implied and usual authority. The chapter will further focus on the rationale behind the existence of these types of authority without the consent of the parties.

The last chapter will be conclusion of the various chapters and an indication will be made as to whether the state of the law is satisfactory and if there is room for further changes.

CHAPTER ONE

CREATION OF AGENCY RELATIONSHIP

Agency is an important aspect of commerce and its importance has been highlighted by a bourgeois scholar - ~~Lowell~~ who says:-

"Any study of modern commercial law must start with agency because it lies at the very core of the subject and because without it, modern commerce would not exist "1

In agency, just like in any other branch of the law, no conclusive or exhaustive definition can be given but a working definition can only be attempted. Agency is the relationship that exist between two parties when one, called the agent is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by making of contract or the disposition of property. Certain salient features can be derived from the above definition. One of them is that agency law has no relevance to social and other non-legal obligations. It is to be noted that although situations exist in which one person represents another, it is only when such representation or action on another's behalf affects the latter's legal position, that is his right against and liabilities towards other people, that the law of agency applies. The other feature which can be derived from the definition is that a lot of emphasis is placed upon the manner in which the law regards the relationship that has been created. It is the effect in law of the way the parties have conducted themselves, and not the conduct of the parties or the language used by the parties, that must be looked at in order to determine whether the agency relationship has come into existence.

Other definitions of agency relationship have been given by various writers.

Lowell defines agency as a: "relationship which arises whenever one person (agent) acts on behalf of another person (principal) and the person so acting has the power to affect the principal's legal position with regard to 3rd party "2

Legally, therefore, an agent brings his principal into a relationship with a 3rd party and can thus make contract and dispose off goods on his behalf. A definition of agency relationship has also been offered by editors of Bowstead who state that agency is :

*Raymond & Rowland's
⇒ consent defn*

"The relationship that exists between persons of who expressly or impliedly consents that the other should represent him or act on his behalf and the other who similarly consents to represented the former or so to act" 3

The American Restatement of the law, in its definition of agency, also stresses the question of consent between the principal and the agent as a fundamental aspect of any relationship. It states that agency is:

"The relationship which results from the manifestation of consent by one person to another that the other will act on his behalf and subject to his control and consent by the other so to act" 4

This element of consent as an important aspect of agency relationship was also stressed in the case of Garnac Grain Company V. H.M.R. Faure and Fairclough Ltd ⁵ where lord Pearson said that:

"The relationship of principal and the agent can only be established by the consent of the principal and agent". However his lordship went on to say that they would be held to have consented "If they have agreed to what in law amounts to such a relationship even if they have professed to disclaim it".

The above definition, seem to indicate that agency relationship revolves around the idea that the principal and agent have agreed either in contract or otherwise, that the principal will be represented by the agent. However it is the law which determines what is or what is not agency. The law takes into consideration the factual arrangements between the parties but to a certain extent goes outside the arrangement to determine whether there is an agency relationship. It is therefore a matter of legal construction. It is to be noted that these definitions excludes from the scope of agency relationship cases in which agency relationship arises against the will of the parties. In such situations, the agency relationship, at least so far as certain of its effects are concerned, as no contractual or consensual basis.

The conduct which gives rise to particular effects may have occurred without the approval of the principal and without the agent intending to act for the benefit of such a principal.

Agency relationship may be created by contract between the parties, by the doctrine of estoppel, by ratification, and by the operation of the law. Each of these methods by which agency relationship comes into existence will now be considered.

A. AGENCY CREATED BY CONTRACT

To understand the nature of this kind of agency relationship, it is necessary to define what a contract is for the rules governing contract law are applicable to agency relationship. G.H Treitel⁶ in his book defines a contract as follows:

"A contract is an agreement giving rise to legally enforceable obligations binding the parties to it. The factor which distinguishes contractual obligations from other legal obligations is that they are based on the agreement of the contracting parties"

This definition is qualified by the fact that the law at times looks at appearance rather than the fact of agreement, Hence in the case of Smith V. HUNGES⁷ Blackburn J. said:

"If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms"

Dealing with agency law, it can be said that the relationship between the principal and his agent is normally a consensual one and that no one can be a principal's agent without the principal's consent. Agency created by contract is clearly a manifestation of the parties' consent as the core of agency relationship.

Thus in the case of White V. Lucas⁸ a firm of estate agents were anxious to act on behalf of the owner of certain property whom they ~~know~~^{know} that he wanted to sell the property. The owner told the estate agents not to put the property on their books. The court held that the estate agents could not claim remuneration since the property owner had never agreed to their acting on his behalf.

Some requirements must be met before an agency relationship can be created. Just as in other contracts, the parties must consent freely to the creation of the relationship between them. This means that there is to be no misrepresentation, duress, mistake or fraud. These matters, as understood in contract law, require some consideration.

1. MISREPRESENTATION For an agency relationship to be acted on, there must be no ^{mis}representation. A principal or an agent can claim relief on the ground that he was induced to enter into an agency relationship by a misleading statement. In the case of Headly Byrne & Co. V. Heller⁹ it was held that damages could be recovered at common law in certain cases of negligent misrepresentation.
- ii DURESS duress means actual or threatened physical violence to, or unlawful constraint of, the person of a contracting party. At common law a contract could be avoided if it was made under duress.
- iii FRAUD At common law a principal who suffers loss as a result of a fraudulent statement can recover damages in an action for deceit. In Derry V. Peek¹⁰ The House of Lords decided that a statement is only fraudulent if it is made: with knowledge of its falsity, or without belief in its truth, or recklessly.
- iv. MISTAKE The rules applicable in contract law as regards the effect of mistake on a contract, are also applicable in creation of an agency relationship. In the case of Bell V. Lever Bros Ltd,¹¹

the court observed that mistake negatives consent where it prevents the parties from reaching agreement but the agreement has no legal effect because it is based on fundamental mistake. The effect of mistake is to make a contract void.

As regards validity, the law may refuse to recognise a contract on the ground of illegality. The purposes of the contract of agency must be lawful. Examples of illegality are found where for instance, a contract involves the commission of a legally forbidden act or is contrary to public policy.

Dealing with the capacity of the principal and agent, the general rule is that both the principal and the agent must have contractual capacity. This is governed by rules of contract law. The capacity to act as principal is co-extensive with the capacity of the principal to undertake the contract which the agent is authorised to carry out. It follows therefore, that infants, incompetent persons, and corporations have no capacity or have only a limited capacity to appoint an agent. The appointment of an agent must not be ultra vires the corporation. An infant can only have the capacity to appoint an agent in contracts which he can validly make. As regards infants Lord Denning in Shephard V. Cartwright¹² said:

"The appointment by an infant of an agent - - - has always been held void.....The reason for this rule is because an infant has not sufficient discretion to choose an agent to act for him.....the law rather than have an argument upon the point declares him to be incapable of choosing an agent at all"

This argument, however, must be qualified by the fact that an infant can appoint an agent to contract to his advantage, for example, in a contract for his necessities and also in cases where the agent would be bound if he acted personally. In the case of Doyle V. White City Stadium,¹³ it was held that an infant can appoint an agent to eject a trespasser.

As far as insane persons are concerned, the rule is that contracts entered into by insane persons are voidable unless they were made during lucid moments and that it can be shown that the insane person was at the time of contracting capable of consenting and knowing what he was doing. An infant may be an agent provided that he has sufficient understanding of the contract and can do the act required. The rationale for this is that an agent acts as a link between the principal and the 3rd party.

There is no formality, in general, which needs to be observed in the appointment of an agent, an oral appointment will suffice. The contract between the parties may be express, either in writing or oral or may be implied contract. The case of Jacobs V. Morris¹⁴ is illustrative of agency created by express contract.

The plaintiff was a sole owner of business in Melbourne, Australia, He gave Jacobs a limited power of attorney. This power did not allow Jacobs to borrow any money from any institution. He however obtained money from Morris and Co. on the pretext that he wanted to purchase tobacco which was the business he carried on. Morris and Co. did not peruse the power of attorney which was offered to them. In exchange for the money Jacobs gave the company's bill of exchange as security. When the plaintiff found out this transaction, he sued the company for he did not want to meet the obligation of transactions. It was held that on the proper construction to the power of attorney, no power to borrow money was given to Jacobs and therefore no money could be recovered by the company.

The court may, just as it does with other contracts, imply an agency relationship without the parties having expressed any terms as to its creation.

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The court looks at the conduct of the parties, the existing circumstances, and customs, and from these it implies a contract. The courts can be said to create an agency contract by judicial implication. The principal's assent is derived from circumstances which indicate that he has given authority to another to act for him while that of the agent is implied from his having acted on behalf of the principal. The Kenyan case of Essak V. High Commissioner for Transport 15 is illustrative of the agency relationship implied from existing circumstances. Here the port manager of Mombasa claimed from the plaintiff a sum of 2,210 shillings for unpaid wharfage charges and a penalty for late collection of goods. The plaintiff paid the sum without accepting responsibility. He sued for the recovery of the amount. The plaintiff had employed two persons as clearing and forwarding agents, and it was they who had been late in forwarding the ~~sum~~^{same} under the Harbours Regulation Ordinance. The plaintiff claimed that the two people acting for him were not his agents but were independent contractors. Evidence was adduced as to customs and practices that such people are infact agents. It was held that the two persons were his agents. The principal (plaintiff) was held liable as the agents worked on his behalf and he remunerated them. The effect of this implied agency contract is to put the parties as if they had expressly created the contract.

B.

AGENCY CREATED BY ESTOPPEL

Estoppel means that a person who has allowed another to believe that a certain state of affairs exists, with the result that there is reliance upon such belief, cannot afterwards be heard to say that the true state of affairs was different, if to do so would involve the other person in suffering some kind of detriment. Its application to agency law means that a person who by words or conduct has allowed another to appear to the outside world to be his agent cannot afterwards repudiate this apparent agency if to do so would cause injury to 3rd parties.

By invoking the doctrine of estoppel, an agency relationship is created. It therefore means that a person can become a principal even in the absence of prior agreement, or ratification, by putting another in a position where, according to the outside world and in the light of what is usual and reasonable to infer, that other acts as his agent. The principal is said to "hold out" the person who he represents to the outside world as having authority to act on his behalf.

There are two situations in which estoppel arises. In the first instance, there may be no existence of any relationship between the principal and the agent and by invocation of the doctrine of estoppel, the agency relationship is created. The second case is where the relationship of principal and agent exists but the authority of the agent may be limited and by the doctrine of estoppel, the relationship is extended to bind the principal. It is to be noticed that in the first instance, the agency relationship is created by the law, and in the second instance, it is the extension of the agency relationship which is concern of the law rather than its creation. In such instances there is no element of consent between the parties that the agent will bind the principal to the outside world by subjecting him to rights and liabilities. This, therefore, shows the element of consent is not the core of the an agency relationship. The doctrine of estoppel can be justified on the theory that the principal has to be liable either by his consent or his having equipped the agent with authority, and the doctrine is looked at as the basis to rest the principal's liability. The other justification can be derived from the case of Lickbarrow V. Masons ¹⁶ where Ashurt J. said that whenever one person must suffer by the acts of a 3rd party, the loss must be sustained by him who has enabled the 3rd party to occasion the loss.

As regards the requirements for estoppel, these were set out in the case of Rama Corporation Ltd V. Proved Tin & General Investment Ltd ¹⁷ by Glade and these are that there has to be a representation, a reliance on that representation, and an alteration of the parties position resulting from representation and reliance. It is necessary therefore to consider each of the above requirements.

(1) REPRESENTATION The representation can be statement or some conduct on the part of the principal which amounts to a representation that the agent has authority to act on the principal's behalf in the manner he is acting. The statement must be clear and unequivocal.

The agent must appear to be acting in a way in which a person in his position would normally act so that it would appear to the world that the agent has the necessary authority to act. In Farguherson Brother V. King & Co ¹⁸ a clerk pretended to have authority to dispose of timber which he did and kept the proceeds. He was not normally employed for such a purpose. It was held that the purchasers of the timber ought to have realised he had no authority to sell and the purchaser could not keep the timber as against the clerk's employers.

(ii) RELIANCE ON A REPRESENTATION. This means that the statement must be made to a person who relies on it or to the public at large in circumstances which it would be expected the general public would be likely to transact business with the agent. In the above case Lord Lindley said: ~~that~~ the holding out must be to the particular individual who says he relied on it or under such circumstances of publicity as to justify the inference that he knew of it and acted upon it ¹⁹. The representation must also be made intentionally or possibly negligently. A deliberate representation by the person of another will bring the application of the doctrine of estoppel.

(iii) AN ALTERATION OF THE PARTIES POSITION RESULTING FROM SUCH A RELIANCE.

As with all instances of estoppel, there must be the suffering of detriment as a result of the change in position because of the faith in the representation. The representation must be the proximate cause of leading the party into that mistake. The case of Sumner V. Solomon ²⁰ is illustrative of the doctrine of estoppel. The defendant employed a manager to run a jewellery shop and regularly paid for jewellery ordered by the manager from the plaintiff for resale in the shop. The manager left the defendant's employment, ordered further jewellery and absconded with it. The defendant was held liable to pay for this jewellery since he had by his past conduct caused the plaintiff to believe that the manager had authority to act.

It is to be noted that the purpose of invoking estoppel doctrine is to protect 3rd parties who have altered their position or (economic) position in reliance on the representation which is made by the principal that the person is acting as his agent.

C

AGENCY CREATED BY RATIFICATION

The relationship of principal and agent can be created by ratification which occurs where the "agent" acts on behalf of a principal without prior authorisation by the principal. The agent, in fact, has no authority to do what he does at the time he does it. Subsequently, however, the principal, on whose behalf, though without whose authority, the agent has acted, accepts the agent's act, and adopts it, just as if there had been a prior authorisation by the principal to do exactly what the agent has done. Ratification by the principal does not merely give validity to the agent's unauthorised act as from the date of ratification. It is retrospective so as to take effect from the time of the agent's act. Hence the agent is treated as having been authorised from the outset to act as he did. The words of Tindal C. J in the case of Wilson V. Tunman²¹ are illustrative of the operation of the doctrine of ratification. His Lordship said:

"That an act done for another by a person, not assuming to act for himself but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and well established principle of law. In that case the principal is bound by the act, whether it be founded on tort or a contract, to the same effect as by, and with all consequences which follow him from the same act done by his previous authority.

The implication here is that the act which may be ratified can be lawful or unlawful which primarily indicates that the doctrine can apply to torts. By ratification a principal may turn what was previously a wrongful act into a legitimate one. Thus in the case of Hiberry V. Hutton,²² the plaintiff ship was unlawfully purchased by the defendant agent, the defendant purported to approve and ratify the agent's act but did not know that the sale to the agent was unlawful. It was held that the defendant was liable for conversion of the ship.

Ratification may be implied if the principal by his conduct unequivocally affirms the agent's acts even though he seems to repudiate them. Hence in the case of Cornwell V. Wilson,²³ a principal purported to repudiate his agent's unauthorised purchase of the hay but then sold the hay. It was held that he had ratified. Ratification will generally not be implied from conduct unless the principal has the knowledge of the agent's unauthorised act. Thus in the case of Lewis V. Read,²⁴ it was held that the defendant had not ratified an irregular distress levied by his bailiff since he had not known of the irregularity.

As regards the requirements for a valid ratification, there are certain conditions which must be satisfied before an unauthorised act can be effectively ratified. These requirements were set out in the case of Firth V. Stains²⁵ where Wright J. gave 3 conditions. First, the agent whose act is sought to be ratified must have purported to act for the principal. Secondly at the time the act was done, the agent must have had a competent principal and thirdly, at the time of ratification the principal himself must be legally capable of doing the act in question.

A look at these requirements brings out clearly four features of ratification which are of importance: the agents intentions , the legal quality of the act done by the agent, the principal's position and the time when ratification takes place. These elements require some consideration.

(i) The principal's position The principal must have been in existence when the act was done for an act cannot be ratified by a principal who will come into existence at a future date. Ratification can be affected by a person who is in existence either actually or in contemplation of the law.

Thus in the case of Kelner V. Baxter²⁶ (It was stated that "not only must the principal be in existence at the time the act was done, he must also be ascertained at that time".)

The implication is that the principal can be a living person or juristic person for example limited companies. It is not necessary to name the principal but the description must be such that he can be ascertained at the time the agent performs the act and the description must be such that it can offer a reasonable ascertainment of the person to be bound as principal. The aim here is to make 3rd parties to know with whom they are contracting.

Hence in the case of Watson V. Swann²⁷ an agent was instructed to effect a general policy of insurance on goods for a principal. He was unable to do so and he therefore declared the goods on the back of the general policy of insurance effected for himself. The goods were subsequently lost and the principal sued on the policy. It was held that he could not recover since the policy was not expressed to be made on his behalf at the time it was taken out. Therefore he could not ratify. It follows therefore that the only person who can ratify an agent's act is the person on whose behalf the act was performed. (D)

The agent must purport to act for an identified person. The consequence of this rule is that if the agent purports to act on his own behalf, the principal cannot ratify. Thus in the case of Keighley Maxted & Co. V.

Durant, ²⁸ an agent bought corn at a price higher than that he had been instructed. He intended to buy for his principal but he did not disclose the fact to the seller. The principal purported to ratify the purchase but later refused delivery. It was held that ratification was ineffective and that the principal was not liable. *for himself but later decided to pass to principal*

The principal must have capacity to do the act in the way the agent has acted for example infants, insane persons and other people lacking contractual capacity cannot ratify acts purported to be done by the agent. These lack contractual capacity to appoint agents.

(ii) Agent's Intention At the time of contracting the agent must contract for a definite identified principal otherwise there can be no ratification by another person as far as contractual obligations are concerned. It is of importance that the identity of the person with whom the contract is purported to have been made should be known to the 3rd party. The question as to whether the principal can validly ratify the agent's act is determined by reference to the way the transaction appears to the 3rd party. This depends on what the agent has shown either by statement or conduct, his intention to be. This means ratification does not depend on the way his conduct and statement were reasonably understood by the 3rd party to be. Thus in the case of Tiedemann and Ledermann Freres ²⁹ An agent acted for X as principal, though intending the sale to be for his own benefit and to his own account. The 3rd party later wanted to avoid the contract when he found out the truth, on the ground of the false pretence about the party with whom he was contracting. X purported to ratify the sale.

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It was held that he could do so and thus deprive the 3rd party of his right to turn avoidable contract into a nullity.

(iii) Time for ratification. The principal must ratify in time. A contract cannot be ratified after the time fixed for its performance has passed.

If no such a time is fixed, it must be ratified within a reasonable time. What is reasonable is a question of fact and depends on the circumstances and facts of each case. Thus in the case of Bulton Partners

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V. Lambert³⁰ Colton C. J said that an estate once vested cannot be divested by the application of the doctrine of ratification. Ratification by its very nature must take place after the act has been performed by the agent. Hence in the case of Midland Bank V. Reckitt³¹ lord Atkin said;

"Ratification in advance seems to contradict the essential attributes of ratification as generally understood".

(iv) The legal quality of the act. As long as the principal is aware of the state of facts the general rule is that any acts can be ratified whether the act is lawful or unlawful in the sense that it gives rise to tortious or criminal liability. However a distinction is to be drawn between acts which have legal validity although these can give rise to criminal or tortious liability and acts which have no legal effects at all for example an ultra vires contract. The former can be ratified while the latter cannot be ratified. Ratification may be proved by express acts. Any act which clearly shows the intention of the principal is sufficient. It was held in Soames V. Spencer³² that parol ratification was good even though the agent's contract with the 3rd party had been in writing. As far as implied acts are concerned, for ratification to be proved, the principal must do some positive unequivocal act which indicates that ratification has taken place.

Silence does not amount to ratification.

② It is to be understood that a principal cannot adopt the favourable parts of a transaction and disaffirm the rest. The principal must accept or reject the transaction in total although where an agent has affected various transactions, the principal may ratify all or some.

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② As concerns the effects of ratification, ratification provides the same results as if the agent had acted under antecedent authority. The principal and the agent are treated as if they had acted for each other from the beginning. Thus in the case of Risbourg V. Bruckner,³² the agent's contract with a third party was later ratified by the principal. Therefore it was only the 3rd party who could be sued by the principal for breach of that contract and not the agent, since, once the relationship of principal and agent was created by ratification, the agent, as in the case of previously created agency, ceased to be a party to the contract between the principal and the 3rd party.

③ The other effect of ratification is that it only operates in respect of past acts on the part of the agent and it does not authorise the agent to perform further acts in the future nor does ratification require that the agency relationship be terminated. Further in the event of litigation between the agent and the 3rd party regarding a breach of warranty, the agent is released from liability once ratification has occurred. Ratification may operate to turn what was an unlawful act on the part of the agent, for which he was liable to a 3rd party, into a lawful act for which in consequence there will be no liability. The other effect of ratification is that the principal and 3rd party are put in direct relationship with each other.

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D. AGENCY CREATED BY OPERATION OF LAW

This type of agency can only be justified on the grounds of public policy for its existence is neither the consent of the principal nor the consent of the agent, nor is it by conduct of the principal. It is also not by operation of the doctrine of estoppel. Agency created by operation of the law includes (i) Agency of necessity (2) Agency by cohabitation and the agency of a mistress. It is necessary to consider each of these types of agency.

AGENCY OF NECESSITY

The term agency of necessity has been applied in various cases but probably it was first applied with regard to ship masters but thereafter any person who could take or pledge the credit of another in circumstances of emergency, courts referred to that person as agent of necessity. I will deal with the circumstances in which this agency arises.

(a) SHIP MASTERS It was recognised by the beginning of 19th century that ship masters had authority and a duty in an emergency to take steps for the safety of the ship, its crew, and cargo, for the successful prosecution of the adventure. This was basically because he would find himself in a distance where he could not communicate with the master. The shipmaster's right to take such steps cannot be said to be a special power but rather an extension of his usual authority. Thus in Grand V. Norway³⁴ Jervis C.

J stated the above point as follows:

"The master is a general agent to perform acts related to the usual employment of his ship and his authority as such agent, to perform all such things as are necessary to the line of business in which he is employed, cannot be limited by any private orders not known to the party in any way dealing with him"

It is to be noticed that the authority of an agent is limited to the meaning to be attributed to the word "necessity". Lindley C.J. In Phelps v. Hill ³⁵ said that :

"By necessity is meant - - - - reasonably necessary and in considering what is reasonably necessary, every material circumstance must be taken into account for example danger, distance, accommodation, expense time and so forth".

The agency of ship masters must meet one condition. It must be impossible for the master to be able to communicate with the owners of the ship and ask for instructions.

(b) DESERTED WIFE. The agent of necessity is also used in connection with the wife's right to buy necessaries to support herself and her family. The wife becomes an agent of necessity where the husband mistreats her by leaving the matrimonial home or constructively where the husband by his conduct forces the wife to leave him. The justification for this type of the wife's power can be found at common law where she could not own property. Those who supplied her with goods could only sue the husband. Her necessities should fit to the style in which they are accustomed to living in the joint establishment ³⁶. Her husband credit may be pledged for her maintenance, the maintenance of children under her custody, or to initiate proceedings against her husband. If while deserted she commits adultery unless the husband condones it, it will have the effect of terminating the agency of necessity. *A very good principle of law!*

It will suffice to say that at common law, agents of railway owners could bind their principals if they got medical attendance for passengers injured in a railway accident. Carriers of goods by land are treated in the same way as shipmaster in respect of cargo they are carrying where goods have been sold without authority of the owners where it is apprehended that the goods might otherwise perish.

2 AGENCY BY COHABITATION Marriage plays an important role in agency

for the relationship of principal and agent can be presumed between a husband and a wife. This is applicable as long as they are living together for the purposes of necessities. The wife is said to have authority to pledge his credit for necessities. In the case of Philipson V. Hayter,³⁷ it was observed that:

" What the law does infer is that the wife has authority to contract for things that are really necessary and suitable to the style in which the husband chooses to live, In so far as the articles fall fairly within the domestic department which is ordinarily confined to the management of the wife."

In this type of agency, there is no implied or express consent between the parties but the law states that in the absence of any conduct which would make it impossible to construe the relationship as existing between husband and wife, the wife is said to have presumed authority to purchase necessities. There are requirements for the operation of this agency. The husband and the wife must be cohabiting. They have to be living together from which it can be inferred that the wife is acting on behalf of her husband. The other requirement is that the cohabitation must be in the same establishment. The parties must be living together as a husband and a wife in circumstances which show they are a family. In the case Debenham V. Mellon³⁸ a husband and a wife were managers and manageress of a hotel where they cohabited. The wife had an allowance for clothes but the husband forbade her pledge his credit for them. The wife bought clothes from plaintiff in her own name. She incurred a debt with the plaintiff who demanded payment of it from the husband. It was held that husband was not liable. This case shows that this agency is a rebuttable presumption which can be defeated if it can be shown that she had contracted on her own behalf, or if there is notification to the effect that the husband had forbidden, her to pledge his credit.

The goods must also be necessaries.

There are certain factors which can deprive the wife of this authority. In the case of Phillipson V. Hayter ³⁹, it was held that if a wife orders goods or services which are not necessaries and suitable to the style in which she and the husband customary live, the husband will not be liable to pay. Secondly, if the husband has given the wife sufficient allowance then this will operate as an implied prohibition to pledge his ~~credit~~ ^{Credit}. Furthermore, ~~if~~ there is evidence which can rebut the presumed agency, the husband will not be bound. He will also not be liable where the tradesman exclusively elects to deal with the wife as principal.

The local case of Nanyuki General Trading Stores V. Mrs Peterson, ⁴⁰ is illustrative of the creation of an agency relationship by way of cohabitation. In that it was held that apart from the occasional bottle of whisky, brandy or gin, the wife's orders were for such things as fell within the domestic department ordinarily confined to a wife's management and that therefore the husband was liable to pay for such necessaries.

3 THE AGENCY OF A MISTRESS As long as a man and a woman are cohabiting together in circumstances in which the outside world is made to infer that they are husband and wife, it makes no difference to the question of agency. The man will be in the same position as a husband and will be liable as such. Separation does deprive a mistress of her authority so long as the tradesman has notice of the separation. Hence in the case of Ryan V. Sams ⁴¹ the plaintiff knew that X was the defendant's mistress, but at the time he did some work for X, he had no knowledge that they had separated. It was held that there was evidence on which the jury could find that the defendant presumed authority to X still.

subsided and she was his agent:

It will suffice to mention that a child is not an agent of necessity to pledge his father's credit. In law V. Wilkins ⁴² it was held that to render a parent liable for the price of necessaries, there must be some evidence of assent, though it would appear that slight evidence would not be enough.

In conclusion it may be observed that as far as creation of agency relationship by contract is considered, it is mainly the rules of contract Law that are applicable. Agency relationship, as shown, may also be created by the doctrine of estoppel. Where a person who by words or conduct, has allowed another to appear to the outside world to be his agent, he cannot afterwards repudiate this apparent agency if to do so will cause injury to 3rd parties. By involving the doctrine of estoppel the agency relationship is created. The chapter has also shown how agency relationship is created by ratification. In this case the agency relationship does not exist when the agent acts, but the principal on whose behalf the agent acts adopts the act just as if there had been authorisation to do exactly what the agent has done. We have also seen that agency relationship can be created by operation of law as a matter of public policy for this type of agency does not depend on the consent of the principal nor his conduct.

It was necessary to consider the various ways in which the agency relationship is created for the concept of authority, its extent, and the agent's power, differs depending on the kind of agency involved.

FOOTNOTE FOR CHAPTER ONE

1. Robert Lowe - Commercial Law . Page 1
2. Robert Lowe - Commercial Law page 1
3. Bowstead on Agency 13th Edition 1968 Article 1
4. American Restatement of the law 1958
5. [1967] 2 All E. R 353 at page 58
6. G. H Treitel The Law of contract, 4th edition published by Stevens & Co, London 1974 at page 1
7. (1871) L.R. 6 Q.B 597 at page 607
8. (1887) 3 T L R 516
9. [1964] A.C 465
10. (1889) 14 A.C 337
11. (1932) A.C 161
12. [1953] 1 K. B 110
13. (1846) 9 Q. B 623
14. (1902) 1 ch 816
15. (1941) 20 K.L.R
16. (1787) 2 TR 73
17. [1952] 1 All E.R 557
18. (1902) A.C 325
19. I bid at page 341
20. (1857) 7 E&B 879
21. (1843) 6 Man&G 236 at page 242
22. (1864) 2 H&C 822
23. (1750) 1 Ves 509
24. (1845) 13 M & W 834

25. (1897) 2 Q.B 70 at page 75
26. (1866) LR 2 CP 174 at page 184
27. (1862) 11 C.B NS 756
28. (1901) A.C 240
29. (1899) 2 Q.B 66
30. (1889) 4 chd 295 at page 307
31. (1932) All E.R 90
32. (1822) 1 Dow & R.Y, K.B 32
33. (1858) 3 C.B.N.S 812
34. (1851) 10 C.B 665
35. (1891) 1 Q.B 605 at page 610
36. The deserted wif's right to pledge her husband credit for necessaries-
[1953] 16 M.LR 221 at page 2-3 by Treitel
37. (1870) LR 6 C.P 38 at page 42
38. (1880) A.C 24
39. (1870) L.R 6 CP 38
40. [1948] 15 E.A.C.A 28
41. (1848) 12 QB 460
42. (1837) 6 A and E 718

CHAPTER TWO

ACTUAL OR REAL AUTHORITY

Chapter one focused on the various ways by which the agency relationship is created and as indicated therein, the agency relationship arises from different circumstances. Likewise, the agent's authority differs depending on the way in which the agency relationship was created.

The concept of authority will be dealt with by way of the following contention:

" that the notion of authority by consent of the parties is an artificial notion of the law which offers no guidance to the true legal nature of agency relationship"

The agent's authority has been said to be the very core of the agency relationship, and that this authority flows from the principal. If the concept of authority is the very core of the agency relationship, then it would follow that the principal will only be bound by acts which are within the agent's authority, and anything that the agent does in excess of that authority, without the principal's consent, will not be binding on the principal unless he adopts the act by ratification. *fallacy of Argumentum!*

This is not always the case, and it can only be said that the agent's authority by consent of the parties is only manifested in the agent's actual authority which is the thrust of this chapter.

It is necessary, before commencing a discussion of the agent's actual authority, to have a look at the terms " authority" and "power".

These two concepts are sometimes confused for one another.

Authority is concerned with the factual relation between the agent and his principal. It is what the parties have agreed between themselves that the agent shall do on behalf of the principal. The term "authority" is sometimes used to denote both facts and legal relations.

Author Corbin ¹ argues that it is undesirable to have this double usage and to limit the use of the term to the facts alone.

Facts whether operative or in operative may be;

- Conduct of a person (acts or forbearance).
- Other events (physical change excluding human conduct.)
- and other events (neither conduct nor physical change.)

*I'd be damned
to see you!*

The concept of authority as articulated by Corbin is as follows:

" Authority in law of agency denotes an oral or written communication from the principal to the agent, expressing an actual intention that the agent shall act on the principal's behalf in one or more transactions with 3rd persons or causing the agent reasonably to believe that such was the principal's intention"²

"power," on the other hand, is concerned with the extent to which the agent is capable of altering his principal's legal relationship with 3rd parties. Generally, the extent of this power will be governed by the authority conferred to the agent. According to Corbin ³ "power" is an individual's personal capacity of the donee to do something.

Professor Honfeld Cautions against calling a power a capacity. It is true that some holder of power may have something approximating capacity although the power of the agent is not capacity. A power is personal to the holder, it may not be an obligation to exercise it. It is treated by law, in some instances because of and in accordance with the will of that whose property or legal relationship are affected by its exercise, and in other instances irrespective of his will. Professor

Corbin ⁵ observes that:

..... /

"Authority differs from power; authority is a fact, power is a legal relation including either oral or written communication to the agent. Power is neither conduct nor document. Authority may create power but not always; power is created by other operative facts. Authority denotes merely the factual relationship between principal and agent, power expresses the concept of possible future changes in the legal relations of principal with 3rd parties. Authority merely discusses an historical event power predicts possible events in the future".

On the distinction between power and authority Bowstead ⁶ has the following to offer":

"Yet it may be said that authority and power are different. This is so in the sense that authority like possession ; is thought of as a fact from which legal consequences should arise, in the paradigm case, the reason why it seems reasonable for the agent to have the power is that the principal has conferred something on him from which it stems, called authority. Thus cases where the agent has power but cannot be regarded as having been given authority by the principal seem exceptional, and it is said that there is only apparent authority --- authority like possession carries the image of paradigm case justifying a legal result, power is neutral and simply states the results regardless of the reason for it"

ACTUAL AUTHORITY

Actual authority may be equated to agency created by ^{contract} conduct and under the doctrine of ratification. It is the type of authority which as a matter of fact, has been given to the agent by the principal under the agreement or contract which has been made between them. In Freeman and Lockyer V. Buck Hurst Park Properties ⁷ Diplock LT commented on this type of authority as follows:

"Actual authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts including any proper implications from the express words used, the usages of trade or course of business between the parties"⁸

Actual
Express authority is divided into three categories. That is express authority, implied authority and usual or customary authority. Each of these categories of actual authority will be dealt with.

a. EXPRESS AUTHORITY

Express authority is a legal relationship between the principal and the agent created by a consensual agreement to which they alone are parties. The whole of its contents can be discovered in actual words used by the principal whether oral or written. This authority is specifically created and limited to the purpose to which it was given. Thus anything done by the agent in excess of the authority will not bind the principal. The extent of the agent's authority depends on the true construction of the words of appointment. If the words of appointment are vague or ambiguous the principal may be bound if the agent, in good faith interprets them in a sense not intended by the principal. Hence in the case of Weigall V. Ruciman⁹ the principal instructed the agent to fix a steamer intending the agent to let a steamer. It was held that the principal was liable when the agent instead hired a steamer.

The agent's express authority may be contained in a deed which is normally referred to as a power of attorney. This particular authority will be construed strictly in accordance with the following rules:

1. It is limited to the purposes for which it was given; anything done by the agent in excess of authority, therefore, will not bind the principal.
2. If in the power of attorney there are general words that have been used, then these words are limited by other special words describing the specific duties the agent is authorised to do.

The case of Jacobs V. Morris¹⁰ is illustrative of the above. In this case a power of attorney gave the agent power to purchase goods in connection with a certain business and to make, draw, sign, accept, or endorse for and on behalf of the principal bills of exchange or promissory notes if they should be necessary for the purchase of goods or in conduct of business. The agent purporting to act in pursuance of the power, borrowed money and gave bills of exchange drawn on the principal in respect of the loan. It was held that the agent had exceeded the authority given to him in the power of attorney and therefore the principal was not liable on the bills.

3. If the operative part of the deed is ambiguous, then the recitals will govern the construction of the power of attorney. The case of Danby V. Courts¹¹ illustrates the above point. In this case the operative part of the power of attorney did not mention any term which the power was to continue. However the recitals stated that the purpose of the deed was that the principal should have an agent while he was abroad. It was held that the agent's authority was limited to the period of the principal's absence from the country. The agent's authority conferred by the power of a deed is that which is within the four corners of the instrument either in express terms or by necessary implication. The case of Rewalace Ex parte Warrace¹² illustrate what is meant by necessary implication. The power of attorney authorised the agent to commence and carry on or to defend, at law or in equity all action, suits or other proceedings which concerned the principal's personal estate. It was held that this authorised the agent to sign, on the principal's behalf, a bankruptcy petition against one of the principal debtors.

The agent's authority may also be contained in a document. Here the approach is that the agent's authority is determined by looking at the purpose of the agency, for example, the surrounding circumstances, and the usual course

of business in which the agent is concerned. In the case of Ashford Shire Council V. Dependable Motors,¹³ the court observed that:

"The extent of an agent authority, if in doubt must be determined by inference from the whole circumstances"¹⁴

In that case it was held that a shire engineer, not expressly authorised to do so, was acting within the scope of his authority in describing to seller's of a tractor so as to show that he was relying on the seller's skill and judgement in making his report to his principal.

If there is any ambiguity about the wording of the agent's authority, the agent will have acted within his authority so long as he acts in good faith and in accordance with reasonable construction of his authority. In the case of Ireland V. Livingston¹⁵ the principal asked his agent to get him 500 tons of sugar at a certain price. The agent was told that 50 tons more or less was of no importance as long as the price was right. The agent bought 400 tons at that price which was the total amount he could obtain. It was held that the principal was bound to accept this amount because what the agent had done, in the circumstances could reasonably be interpreted as within the terms of his authority.

Actual
b. IMPLIED AUTHORITY

Authority is implied when it is incidental to and necessary for the effective exercise of the agent's express authority, and every agent has implied authority to do everything necessary for the carrying out of his express authority. The inference of implied authority is necessitated by the fact that what is expressed when the agency relationship is created does not cover the acts performed by the agent.

It is also possible that the only way of construing the document which contains the agent's power is by making necessary implications, moreover there could be no statement of the document which clarifies the exact authority of the agent and this can only be known by inferring a certain implied authority. Lord Denning said in the ^{case} of Hutchinson v. Bray Head,¹⁶ that authority is implied from the circumstances of the case and from the conduct of the parties such as when a board of directors appoints one of their members to be a managing director, they thereby impliedly authorise him to do all such things as fall within the usual scope of that office. The implication here is that for implied authority to arise there must be express authority from which some terms can be implied and in order to discover what acts fall within the scope of implied authority, regard must be made to the circumstances which attend the agent's authority. The contract of the agency must be interpreted in the light of what is necessary to imply into it in order to make it effective. Thus if there is evidence available to the other party with whom the agent contracts, the principal has not so consented, then the implication cannot be made and there would be no implied authority.

There are some agents who are said to have implied authority some of who include auctioners, brokers, shipmaster and factors. Auctioners have implied authority to sign a contract on behalf of both the vendor and the purchaser unless there is a mistake on the part of either the vendor or purchaser. An auctioneer does not have authority to receive payment, except in cash and he cannot give credit. He cannot also warrant for the goods he sells nor can he sell at less than the reserved price. If the auction is subjected to reserve price, if he does sell he will be liable for breaches of implied authority. Ship masters also have authority to do all such things as are necessary for proper prosecution of the voyage. In connection with brokers, a broker may act in accordance with the usages of and rules of the market in which he normally deals but the rules must be reasonable. Factors may sell goods entrusted to them in their own names unless a factor has been expressly prohibited from selling in his name. If a factor sells in his own name he may receive payment. He may also in the way he thinks best include selling on reasonable credit terms. If he has been instructed to sell goods he may not pledge them or batter them.

C. USUAL OR CUSTOMARY AUTHORITY

This is the kind of authority which the agent possesses as regards his business trade or profession, place in which the particular agent is employed, for the purpose of carrying out his authority or anything necessary or incidental to. It is the authority which persons dealing with the agent, and have knowledge of the trade, would expect him to have. A principal who employs an agent to act for him in a particular market authorises the agent to act in accordance with the customs of the market.

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The theoretical justification for the agent's usual authority can be found in the case of Watteau V. Fenwick ¹⁷ where Willies J said by way of obiter dicta, that:

"The principal is liable for all the agent's acts which are within the authority usually confided to an agent of that character. This is so despite limitations as between the principal and the agent upon that authority " 18

This means that the principal will be liable even if he has prohibited or restricted the agent from acting in the way he has done unless he had notice of the limitation. There is a well established principle that if a person employs another as an agent in a character which involves a particular authority, he cannot, by secret reservation, deprive him of that authority.

Usual authority appears to be similar to the doctrine of holding out an agent as having apparent authority. These two types of authority are different in the sense that the apparent authority comes as a representation to the outside world that someone is an agent where the relationship has not been expressly created or has not been intended to cover the transaction whereas usual authority is an aspect of express authority. Apparent authority is subjective in the sense that it is determined by the conduct of the principal as reasonably understood by the particular 3rd party while the agent's usual authority is objective for it rests on what is usual in a particular trade, business or profession.

Case law would best explain how the agent's usual authority works. In Edmunds V. Bushell, ¹⁹ the principal employed an agent to manage a business in which the drawing and accepting of bill of exchange was incidental and usual.

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But the principal stipulated that the agent should not draw or accept bills of exchange. The agent disregarded his instructions, accepted a bill of exchange and it was held that the principal was liable to X, ~~the~~ the endorsee of the bill who took without knowledge of the principal's restriction on the agent's authority. From this case it can be inferred that once a man is put into a position of a manager of a business which normally carries with it the power to transact certain kinds of legal acts, then such manager has authority to do whatever is normal or usual. Where the principal is disclosed (where the principal's name has been disclosed or revealed to the 3rd party by the agent), the agent will have usual authority to do what is normal in such business unless those whom he deals with know that such usual authority has been excluded by something expressly said by the true principal.

The knowledge of such an exclusion of what would be normal or usual may be expressly given to a 3rd party by the principal or implicit from what the principal does, or the surrounding circumstances. In the case of Dann v. Simmins²⁰, the principal, whose name appeared on the Licence employed the agent as a manager of a "tried" house and authorised him to buy spirits only from X. The agent bought from Y. It was held that the principal was not liable to Y because Y, as a person involved in this trade, should have known that it was usual for a manager to be authorised to buy goods only ^{from} specified persons and he knew that he was not a person from whom the agent would normally have been authorised to buy. In this case the agency was disclosed. The 3rd party should have been aware that there might be restrictions. The above case can be contrasted with the case of Watteau V. Fenwick²¹. The principals, who were a firm of brewers, employed an agent as a manager of a beer house. The principal forbade the agent from buying ~~articles~~ for the business although doing so was within the usual course of such manager's conduct of affairs.

The principals wanted to supply the articles themselves. The agent ordered articles of the forbidden kind from X who later disclosed the existence of the principals. It was held that the principal was liable to X for the price of the articles.-

The above cases indicate that where a person is employed in a position which usually carries with it the authority to transact certain kinds of legal business, such a person will still be endowed by law with this authority despite any undisclosed limitation which may have been made by the principal.

It is submitted that where the principal^{is} undisclosed (This is where the principal's existence is not known by the 3rd party so that the latter does not know the person he deals with is somebody's agent), usual authority may not be of relevance in determining the position of the parties. Dealing with customary authority, it can be said that a principal who employs an agent to act for him in a particular market authorises the agent to act in accordance with the customs and usages of such a market, place of business etc.

Thus in the case of Bayliffe V. Butter Worth ²² Parke B. put the rule in these words:

"if there is a particular place, an established usage in a manner of dealing and making of contracts, a person who is employed to deal with or to make a contract there, has an implied authority to act in the usual way." ²³

The custom must be known to the principal or notorious such that he cannot be heard to say that he has no knowledge of it. The custom should also not conflict with or affect the inherent nature of agency relationship for such a custom is not reasonable. Although a custom controls the mode of performance of a contract, it cannot change its intrinsic character. Thus in the case of Robinson V. Mollet ²⁴ a principal authorised his agent to buy tallow for him. The agent in accordance with the custom in this trade bought in his name in large quantities than the principal needed.

The principal refused to accept the goods, the agent sold the tallow and sued the principal for price difference. It was held that the principal was not bound by this custom of the trade of which he had no knowledge of because the effects was to make the agent a principal Vis-a-vis 3rd parties which was inconsistent with the character of the broker.

The custom must be reasonable and lawful, if while lawful it is unreasonable, the principal will not be bound unless he consents.

However, a custom, although valid and normally applicable, will not affect agency relationship created by contract where the contract of agency expressly excludes such a custom. In Ben ham Reeves V. Christensen²⁵ the plaintiffs who were estate agents, asserted that they could involve a custom to the effect, ^{agent} that they could ^{erect} elect signs on property with which they were dealing on behalf of their principal. ^{By the agent} The plaintiff did not want such signs erected and when they were, he refused to pay ten per cent of the agents bill. It was held that he was not bound to pay that amount ~~has~~ as he had informed the agents that he did not want the sign erected with the result that the contract between the parties contained a term to such effect, thereby making the custom inoperative. Despite the customary factor which binds the principal, the agent still has to obtain the initial authority from the principal. Lack of authority would mean that the principal would not be bound. The observation to be made is that the agent who pleads the existence of usages and customs must prove the very existence of his authority. In other words, the agent must have obtained authority to act in such a position from the principal, lack of which will preclude the principal from liability.

This chapter has dealt with the agent's actual authority, first by attempting a distinction between authority and power. The distinction which was adopted as a working tool was that of Auther Corbin²⁶ which showed that authority, is a fact which includes the principal's conduct or written communications. Authority, it was further seen, denotes merely the factual relationship between the principal and the agent. This being the case, it can be seen that the concept of authority is an artificial notion of the law for it does not explain how the principal who employs another (agent) to perform certain tasks on his behalf, can be put into direct relationship with a 3rd party who was not a party to the initial relationship between principal and agent. It was observed that authority merely shows an historical event but does not focus on future changes of showing how the principal is subjected to rights and liabilities with the 3rd party. The agent's authority is not therefore enough to explain the legal effects of agency relationship.

It was noticed from the same author (Corbin) that, power is a legal relation, it is neither a conduct nor document and that it can be created by authority, although not always. It was seen that power expresses the possible future changes in the legal relationship of principal with 3rd persons. Power, therefore, produces possible events in the future. From the above distinction, it can be seen that the legal effect of putting the principal and 3rd party in a direct relationship can only be adequately explained by the element of power which the agent is said to possess. It enables him to affect the principal's position, the 3rd party's and at times his own position. It is therefore not the agent's authority which is the central feature of agency relationship but it is his power for it is what explains the legal consequences between the parties. The notion authority only helps us in knowing what the agent can and cannot do but it is superficial in the sense that it is used

by law to encampass the notion of the agent's power which explains the true legal relationship between the principal and the 3rd party.

As far as actual authority is concerned, the power can be said to flow directly from the agent's authority. The agency relationship is therefore a power - liability relationship.

It was noted that actual authority is a legal relationship created by a consensual agreement between the parties and it is construed by looking at the ordinary words used, trade, and the course of business . This authority being a consensual one, it can be said that, it is created by the consent of the parties and its purposes can be ascertained by looking at the documents conferring it. Actual authority is divided into express authority, implied authority, and usual or customary authority.

A look at these different types of the agent's authority, shows that in the strict sense, its only the agent's express authority, which can be in the form of the power of attorney or contained in a document, which can be said to be by consent of the parties. In case of express authority, it is limited to the purposes to which it was conferred. As far as express authority is concerned, it is limited to the purposes to which it was given and it is within the four corners of the instrument. The principal will only be bound by those acts that he has authorised the agent to do. It is therefore possible to ascertain to what extent and to what limitation the principal will be bound by the acts of the agent by being subjected to rights and liabilities with a 3rd party. The 3rd party is also assumed to know the kind of authority that the agent possess for he can ascertain it from the document or the deed that confers the authority. In such

a situation he can know who to sue as between the principal and the agent so as to enforce his rights.

It was also noted that every agent has implied authority to do everything incidental to and necessary in order ^{to} carry out his express authority .

It is to be observed that the construction of the agent's authority is beyond what the parties by their acts had agreed to be the extent of the authority. The contract of agency is therefore construed by what can be inferred from the existing circumstances. However, for implied authority to arise there must be express authority conferred to the agent. Usual or customary authority was also considered as an element of actual authority. This is the kind of authority which the agent possesses as regards his business, trade or profession, usages and customs, for the purpose of carrying out his authority or anything necessary or incidental to. Usual or customary authority is based upon the idea of settled and well understood trade, business or professional usages evidence of which has to be produced should a dispute arise. The agent who pleads those usages, customs and professional practice has to prove the very existence of his authority. Implied authority is different from usual authority as it is based on business efficacy.

It is submitted that whether the agent's authority is implied, usual or customary, it can be said to be founded on business efficacy for it would be difficult to include each and every term of the agent's authority in a document. Therefore for speedy distribution of goods and services to the consumers, who are the wage earners and salaried personnel and who are the majority, the agent's authority has to be inferred from the known professional usages, the nature of the trade business and customs of the place.

The assumption here is that the 3rd party who contracted with the agent is aware of the customs, the nature of the trade, and profession, which is not necessarily the case. The law can clearly be seen to safeguard the interests of the producers. The extension of the agent's express authority should therefore be seen to be justified by the need for more production, need for wider markets and services and distribution of goods and services.

If the producers are to achieve the above, the agent's authority is not to be limited by what is contained in a document or a deed but such authority is extended in scope to what is incidental to the exercise of express authority. The aim of the law is to increase the productive forces which are owned and controlled by the better social class.

The essence of the agency relationship is important, for commerce would ground to a halt if the agent, before contracting with a 3rd party was to be limited by what is expressly conferred to him in a document. It should be noted that the fundamental aspect of capitalist commercial law is that once goods are produced they must reach the ultimate consumer and such goods are produced for their exchange value. This enables the industrialist appropriate, capitalise and accommodate the surplus value.²⁷ This fundamental aspect therefore would not be achieved if the agent only operated under the express authority, for goods and services sold in the market would be limited. Therefore, the need for wider markets and continuous capitalist expansion, make the producer of goods as of necessity employ agents to make contracts on his behalf and such agents, through their power are able to affect the principal position by putting him into direct relationship with the 3rd party.

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However, the agents implied authority, usual or customary, cannot exist independently but are set in motion by the very acts of the principal and the agent and for this reason these types of authority can be said to arise from the consent of the parties.

5

FOOTNOTES FOR CHAPTER 2

1. Auther L. Corbin - legal Analysis and Terminology
(1919)29 YLJ
2. Corbin (1886) 17 Q.B.D 526
3. Ibid
4. Professor Honfield - Some Fundamental legal conception (1913) 23 YLJ page
16
5. A.C Corbin - The legal authority of an agent - definition
6. Bowstead on Agency - Article Four, on power and authority 13th
Edition.
7. [1964] All E.R 630
8. Ibid at page 644
9. (1916) 85 C.J K.B 1187
10. (1902) 1 Ch 816
11. (1885) 29 Ch D 500
12. (1884) 14 Q. B. D. 22
13. [1961] 1 All E.R. 96
14. Ibid at page 101
15. (1872) L.R 5 H.L 395
16. [1967] 3 All E.R 98
17. (1893) 1 Q B 346
18. Ibid at page 348
19. (1865) L.R. 1 Q.B 97
20. (1879) 1 Q. B 346
21. (1893) 1 Q. B 346
22. (1847) 1 EX. 425
23. Ibid at 428

24. (1875) L. R. 7HL 802

25. [1979] C Ly. 31

26. Ibid

27. Ernest mandel - The marxist Economic theory

✓ *3 correct*

CHAPTER THREE

APPARENT AND PRESUMED AUTHORITY

1. APPARENT AUTHORITY

One of the ways in which agency relationship is created, as was shown in chapter one, is by the doctrine of estoppel. Estoppel means that a person who has allowed another to believe that a certain state of affairs exists, with the result that there is reliance upon such belief, cannot afterwards be heard to say that the true state of affairs was different, if to do so will involve the other party in suffering some kind of detriment. Applied to agency, this means that a person who by words or conduct has allowed another to appear to the outside world to be his agent, cannot afterwards repudiate this apparent agency if to do so would cause injury to 3rd parties. He is treated as if he had authorised the agent to act as he had done.

Where the doctrine of estoppel operates to create an agency relationship, the agent is said to have apparent or ostensible authority. Even in the absence of prior agreement as to authority, or subsequent ratification of the unauthorised acts, a person can become a principal by placing another in a situation in which, according to the ordinary usage of mankind, that other is understood to represent and act for the person who ~~is~~ ^{so} has placed ^{him} ~~him~~ ^{so}. Everything depends on the way the situation appears to the outside world, what is usual and reasonable to infer and the reliance which is placed by 3rd parties upon apparent authority of the person with whom they are dealing. The principal is said to "hold out" as his agent the person represented as having authority to act on his behalf.

Apparent authority may be observed in two kinds of cases. The agent may have no actual authority at all, there may be no relationship of principal and agent and by virtue of the doctrine of estoppel such apparent authority is created. The other way in which apparent authority is created is where there is a relationship of principal and agent but the authority may be limited by the agreement between the parties. If the agent exceeds his authority and as long as the 3rd party is not aware, the doctrine of estoppel is invoked and the agent's authority is extended to bind the principal.

The principal is liable for unauthorised act within the apparent authority of the agent where;

- (a) the principal has made a representation
- (b) that this man has authority to act as his agent
- (c) the representation is by words or conduct
- (d) to a 3rd party
- (e) Calculated to deceive the 3rd party
- (f) and in fact relied upon by the 3rd party
- g) so to his detriment

Apparent authority in the strict sense does not exist but the law looks at the factual arrangement between the parties to determine whether there is authority, the law goes outside the factual position and declares the agent to have authority and by the exercise of apparent (authority,) → (authority) the agent affects the legal position of the person whose conduct made him to appear to have that authority, for example the principal.

The case of Livingston V. Fuhrman² is adequate authority for the proposition that the agent's apparent authority is the product of the principal's conduct, his representation that the agent is authorized to act on his behalf. In this case Mrs. Fuhrman was interested in buying a diamond ring and was given the name and card of a man named Lassover. The address and telephone number listed on that card turned to be those of Livingston and Company. She called Lassover at the indicated address, went to the store and eventually bought a ring from him. She later bought a wrist watch by the same procedure. When the watch got spoilt, she took it to Livingston for repairs. He sent it to the factory but later informed her that the watch was in such a condition that it could not be repaired. She sued Livingston and company for breach of warranty testifying that she had thought Lassover was working for Livingston. Livingston on the other hand testified that Lassover was an independent jeweller. He had permitted Lassover to use the telephone, address and store premises but he had no connection with Lassover's sales. It was observed by judge Hood that:

"Livingston had clothed Lassover with at least apparent authority to act as his agent. Apparent authority may result from a manifestation of consent made to a 3rd party inferred from words or conduct which although ordinarily not indicating such consent, cause the 3rd person because of facts known to both parties, reasonably to believe that such consent exists either where the apparent principal intended to cause such belief or where he ought to have anticipated such belief would be caused³"

He concluded that Mrs. Fuhrman went to the appellants retail store and was shown jewelry by a salesman. She could reasonably assume that the salesman was the agent of the owner of the store and not acting as an independent jeweller and the appellant was bound to anticipate that the situation permitted by him might reasonably lead to such a conclusion. The case of Cr orgden and Co. V. Reliance Fire Sprinkler⁴ is also to the

effect that apparent authority is a product of the principal's conduct. Here a 3rd party was not liable to the principal when the agent had made a fraudulent misrepresentation in the course of negotiating the contract even though the agent acted without express instructions. In this respect, the principal was bound by what he had done as he had entrusted the negotiations to the agent.

The agent's apparent authority is different from actual authority for it does not result from consent of the principal and the agent. There has been confusion where apparent authority has been referred to as usual authority because that is what a 3rd party would expect an agent to have in the ordinary course of events. The case of Hely-Hutchinson V. Bray Head⁵ is an example of a situation where apparent authority has been referred to as implied and usual authority. A statement which can lead to such a confusion is to be found in the judgement of lord Denning MR. where he said:

"Thus when the board of directors appoint one of their number to a position of a managing director, they invest him not only with implied authority but also ostensible authority to do all such things as fall within the usual scope of the office"⁶.

It is to be noticed that actual authority and apparent authority do not exist exclusive of each other but these two types of authority are different. Apparent authority is different from implied authority in the sense that the latter is the authority which the agent possesses over and above his express authority granted by the principal. The agent possesses implied authority as a result of the construction of his contract of agency in the right of trade, business efficacy, place and profession in which the agent

is employed. Apparent authority on the other hand comes about as a result of the operation of the doctrine of estoppel and the agent is said to possess the authority in the view of what a reasonable 3rd party would understand the conduct or statements of principal and the agent to be. In order to prove the existence of implied authority it must be shown that the act performed by the agent was necessarily incidental to the proper performance of his agency or that some trade, profession or other practice justified his acting in such a manner but to prove apparent authority it must be shown that the principal's conduct was such as to mislead the 3rd party and to induce him to rely upon ~~the~~ the existence of the agency to his detriment. Implied authority is therefore based on prior consent between the principal and the agent whereas apparent authority is based on principal's conduct or representation which creates obligations on the principal as a result of the 3rd party's reliance on the representation made by the principal. In the case of Freeman and Lockyer V. Buckhurst Park Properties Ltd ⁷ Diplock C. J explained that apparent or ostensible authority was;

" A legal relationship between the principal and the contractor intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the apparent authority so as to render the principal liable to perform any obligations imposed on him by such a contract" ⁸

Once a person has been appointed as an agent, he is invested with authority to do whatever is usual in the trade, business or profession in which he is employed. There are some cases where the agent has not been appointed as such by the principal but he is believed to be an agent on the basis of the principal's representation. The agent's authority in such cases may depend on what is reasonable for the 3rd party to believe it to be in the light of what authority such a person would possess if he had been appointed, the 3rd party believes he is dealing with an agent of a certain class, the authority he believes may be the kind of authority which is usual for an agent of the class to possess. In such cases the usual authority is coincident with apparent authority. Apparent authority differs from usual authority in the sense that the principal has represented, but not authorised, the agent to act as his agent. Apparent authority is also based on representation either by words or conduct to the outside world, by the principal, that the agent has authority while usual authority is based on prior consent between the principal and the agent.

However there is a feature which is common to both apparent and usual authority. If a 3rd party is aware of the fact that the agent has neither implied nor apparent authority, or ought to have been on his guard against the lack of such authority he will not rely on either doctrine to make principal liable. It is important for the 3rd party to differentiate the status of the employee who is acting or purporting to act. If he is in a position to negotiate contracts for the employer, it is reasonable for the 3rd party to assume that the employee has apparent authority. If he occupies a minor position like a clerk, it would be unreasonable to conclude that the agent has apparent authority, 3rd parties ought to know employees of that kind lack the necessary authority to transact the kind of business involved.

One situation where the 3rd party may have notice of want or limitation of authority attributed to the agent is where the transaction is of such a usual nature that any reasonable person in the position of a 3rd party would be put on his inquiry.

In cases where the 3rd party may have notice of want of authority, estoppel will not be possible. Thus in the case of Jensen V. South Trail Mobile Ltd⁹. The 3rd party entered into a contract to purchase a mobile home. The contract provided that all sales had to have a final approval of an officer of the principal's company. This was known by the 3rd party, but the agent stated that he had received such approval for the purchase in question. It was held that the agent could not confer authority upon himself and the knowledge on limitation on the agent's authority affected the 3rd party's claim that the principal was estopped from denying that the agent acted with authority. Thus once a 3rd party knows or ought to know that the agent has limited authority in respect of certain transactions, he cannot rely on any alleged representation and the agent cannot affect the principal's contractual position. The fact that the agent was acting in his own interests, may be used to show that the 3rd party knew or ought to have known that the agent had no authority to act as he did and therefore it may make the doctrine of estoppel inoperative as well as showing that the representation by the principal, if any, was not the proximate cause of the 3rd party's reliance and detriment.

The above cases could be looked at as instances where the agent by virtue of his position had some actual authority upon the strength of which 3rd parties relied only to discover that the agent had abused his authority for his own benefit.

A case which could be viewed in this context is that of

Fam bro V. Burnand ¹⁰ In this case the principal, a group of underwriters at Lloyds authorised the agent, another underwriter to underwrite insurance policies in the name of the principal and agent. The agent was a director of a company X, and in the names of himself and the principal, the agent underwrote a policy of guaranteeing the bills of X. One such bill drawn upon X was accepted by the 3rd party who knew nothing of the exact nature of the authority given to the agent. When the bill was not met, the 3rd party sued the agent and his principal upon such policy of guarantee. It was held that since the underwriting of such policies was within the ordinary course of business of Lloyds underwriters, the agent had acted within his usual or implied authority and the 3rd party could not be expected to know in guaranteeing this particular company's bill the agent was also acting in his own interests as a director. Therefore the principal was liable to the 3rd party.

EXTENT OF APPARENT AUTHORITY

The predominant idea here is that if the principal has clothed the agent with all the indicia of the authority to act, thereby misleading 3rd parties and the agent there upon deals with the goods of the principal as though he were in fact authorised to do so, the agent will bind the principal by what he does. The extent of apparent authority depends on the representation which has been expressly made or impliedly can be made from the position in which the principal has placed the agent. Many of the cases where the doctrine of apparent authority is invoked is in cases involving dealings by the agent with property belonging to the principal.

One of the important ways in which an agent may appear to have authority to act on behalf of his principal is where he is in possession of the principal's property and he deals with such property in an authorised way.

An owner of goods will be regarded to have clothed another person with indicia of authority to act on his behalf where there is delivery and express authority to the agent to dispose off the property and where there is delivery plus representation by the principal to the 3rd party that the agent has authority. In these two types of cases, there is limited express authority in the first instance into which the law grafts an apparent authority whereas in the second case, there never was any express authority at all.

In all cases the problem is to determine the inference which a reasonable man could have drawn from the conduct of the owner in relation to his property and in determining this, one has to bear in mind the notice to the 3rd party of the agent's want of authority in which case he will not be protected. If there are any secret limitations on the authority, these will be irrelevant and the 3rd party will nevertheless be protected. One will also have to consider the inference which a reasonable man would draw from his knowledge of the position of the agent and the kind of authority normally entrusted to such an agent.

A few cases will illustrate the above points. In the case of Farguherson Bros V. King,¹¹ the agent in question, a clerk to a timber merchant was not the one who normally would have authority to sell goods for his principal, even though in fact, he he had certain authority to make the sales

as well as authority to sign delivery orders. It was held that the 3rd party was not entitled to rely on the fact that the agent apparently had authority to dispose of his principal's goods and the principal was able to recover the goods from the 3rd party.

The case of Brocklesby V. Temperance Building Society ¹² is also illustrative. An agent, the son of the property owner, was given the authority to borrow money for his father from X bank. For this purpose he was given documents which enabled him to obtain the title deeds to the property from another bank with which they were deposited as security for a loan, the son having obtained the deeds deposited them with the Y bank as security for a larger loan which the father wanted and kept the excess for himself. Later he forged certain documents which made him appear owner of the land in question and sold the land to building societies which paid off the Y bank. When the father sued the building societies, it was held that he could recover the land but that he was bound by what the son had done to the extent that he had to pay the building societies the amount of the loan obtained from Y bank which the building societies had paid.

It would appear from the above case that delivery of title deeds to an agent either directly or indirectly in circumstances in which the agent is made to appear to the outside world as the owner of such deeds, will give rise to estoppel. In cases of apparent authority the test is what a reasonable man in the position of the 3rd party would believe, as a result of the principal's conduct or language, was the position and authority of the agent when he transacted.

For the sake of completeness, it is necessary to consider the workings of apparent authority on the doctrine of undisclosed principal.

APPLICABILITY OF APPARENT AUTHORITY ON THE DOCTRINE OF UNDISCLOSED PRINCIPAL

As it was shown in chapter two, an undisclosed principal is one whose existence the 3rd party is unaware of so that the 3rd party does not know the person with whom he is dealing is anybody's agent. The notion of apparent authority and its workings on the doctrine of undisclosed principal is difficult to rationalise and harmonise, it is difficult if not impossible to reconcile all the cases in particular the case of Watteau V. Ferwick ¹³ especially if that case is approached from the stand point of apparent authority for example on the basis that it was concerned with holding out of the agent by a undisclosed principal and consequent estoppel of the principal.

A question may be asked to the effect that what precisely is undisclosed principal representing to the outside world when he holds out the agent as being and having the power of a principal? Logically it would seem that there is no limit to the extent of such an agent's authority. Professor Conant ¹⁴ takes the view that in such instances the principal is liable because he has made the agent appear to be an owner which would seem to be a straight forward example of estoppel by virtue of the undisclosed principal's conduct. However can it be said that there are any limitations on such apparent owner? and if so, what are the limitations? The most logical and reasonable conclusion to be drawn is that there are no limitations on the powers of such an apparent owner.

The effect of such a conclusion would be to render the undisclosed principal open to unlimited liability. Hence the refused by an Ontario court in Maclaughlin V. Gentles ¹⁵ to hold undisclosed principal liable without limit. In this case the plaintiff sought to recover from the defedents who were members of a company formed to explore and test mining properties, the price of the goods supplied on the order of one of the defendants, C, and on his credit. At the time the goods were supplied, the plaintiff did not know that C was a member of the company or was acting for others. He thought therefore that C was the principal. When the plaintiff sued, he did so on the basis that C was the agent of the other members, his undisclosed principals. They had not held C out as an agent, they had not heard of the plaintiff and the funds provided by the defendants for exploring and testing had been exhausted and C's authority to act for the defendants revoked before the plaintiff supplied any goods.

In the circumstances of the above case it was held that other than C himself, the defendants were not liable to the plaintiff. It would be difficult to justify such a limitation except on the basis of policy namely that it would be unwise to permit an undisclosed principal to be bound by anything done by his agent at least as long as it was connected with the business entrusted to the agent. Professor Conant wrote;

" a undisclosed principal, being one whose agent poses as dealing for, himself creates no direct appearance to the 3rd party. Thus he can never be charged with appearing to consent that his agent has certain scope of authority" ¹⁶

The notion of apparent authority , where the principal is said to hold out the person he represents as having authority to act on his behalf, can be justified on the theory that principal could not

be fully liable in a contract without his authority or consent. The courts looked for some basis on which to rest the principal's liability where he had not authorised the agent's act. The second basis of the existence of apparent authority can be got from the rule in Lickbarrow V. Mason¹⁷ to the effect that whenever one of the two innocent persons must suffer by the acts of a 3rd party, the loss must be sustained by him who enabled the 3rd party to occasion the loss. This was applied in the East African case of Vallabhdas Shivji Kapadia V. Thaker sey Laximidas¹⁸, where in connection with apparent authority, Newbold states as follows:

"I consider that the true common law principal is that where the true owner of goods, in breach of his duty to a 3rd party, arms his agent, or knowingly permits his agent to arm himself with some indicia of title to the goods and allows the agent to deal ~~with~~ the goods as if they were his own, then the true owner is precluded ~~as~~ against the 3rd party (and any subsequent dealer) who deals bonafide with the goods and without the knowledge of the rights of the true owner from denying the authority of the agent to deal with the goods in the manner in which they were dealt with"¹⁹

The notion of apparent authority is also designed to protect 3rd parties who may have acted on reasonable inference that a relationship of principal and agent existed between the parties concerned.

2 PRESUMED AUTHORITY

This type of authority may be equated to an agency relationship created by operation of the law. This authority does not depend upon any express ⁽¹⁾ consent from the principal that the agent should act for the principal. It also does not depend upon any implied consent. Neither does it result ⁽²⁾ from a representation on the part of the principal giving rise to estoppel. ⁽³⁾ It is therefore a peculiar kind of authority which is presumed by the law.

In other words, the law presumes that the principal would have agreed to what the agent has done had he been free to give instructions to the agent. It is necessary to consider situations in which this type of authority arises.

1.1. AGENCY OF NECESSITY

Authority of an agent of necessity is limited to the term "necessity" and this cannot be determined before hand. As was shown in chapter one, the meaning to be attributed to the word "necessity" was articulated by Lindley C. J in Philps V. Hill ²⁰ where his lordship said:

"By necessity is meant reasonably necessary. Every material circumstance must be taken into account for example danger, distance, accommodation, expense, time and so forth ²¹.

In instances of an agency of necessity, an agent is allowed, because of some unforeseen emergency, to do acts which would be outside his authority if the emergency had not occurred. This type of authority is only applicable where the person who does the act is agent or servant of the party for whose benefit the acts are done. In case of emergency the agent has authority to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case under similar circumstances.

(a) SHIPMASTER

The master of a ship or common carrier of goods may and in some cases be compelled, by circumstances to take active measures for the safety of the cargo. In this case he acts as agent for the owner of the cargo or the ship. In such instances, necessity is limited to the safety of the cargo and the ship and also to the impossibility of communicating with the owners of either

the ship or the cargo . The master of the ship must be sure he cannot save the ship before he sells or pledges any cargo. If it is practicable he must take any other alternative measure or communicate with the owner of the ship or cargo. The case of Prager V. Blatspiel ²² is illustrative of the above. During the 1914 to 1918 war, an agent in london bought skins for his principal who was in Rumania . As a result of German occupation of Rumania, the agent was unable to send the skins to his principal or to communicate with him. He therefore sold the skin. It was held that the agent had not established a necessity for sale , the skins could have been saved by putting them in cold storage at a reasonable cost.

The above case is important because of the judgement of MC Ardic J. where he set out the conditions which must be fulfilled before an agent is entitled to exercise an authority of necessity. It must be impossible to communicate with his principal. The question to be answered on this point in each case is whether the agent can obtain his principal's express instructions in time to enable him to cope with the emergency. Secondly the agent's action must be necessary in the circumstances. Generally there can be no agency of necessity unless there is real emergency such as may arise out of the possession of perishable goods or of livestock to be fed.

B. MARRIED WOMAN AS AGENT OF NECESSITY

In this case the wife is presumed to have authority as long as she is wrongfully treated by her husband. If a man wrongfully deserts his wife and leaves her destitute, she is his agent of necessity and can pledge his credit for necessaries. The husband cannot restrict or determine her authority or its scope because that authority is neither created by the

husband nor is it implied from the employment of the wife in any trade, profession, or business nor is it apparent from the representation of the husband. This is an authority presumed by the law in order to protect the wife and her children.

It is pertinent to note that there is no "necessity" and therefore no justification for the wife to pledge the husband credit for necessaries unless she is without any alternative means of support. She has no authority to pledge his credit if she has means of her own, neither may she do so if her own conduct and not that of her husband has led to her being a deserted wife. The deserted wife authority has limitation in that the husband credit can only be pledged for necessaries. Necessaries in this regard are things that are really necessary and suitable to the style in which the husband chooses to live, in so far as the services fall fairly within the domestic department which is ordinarily confined to the management of the wife.

It is the style and standard of the husband that is relevant. An action cannot be maintained against the husband if the goods are in such an extravagant nature as to be entirely unsuitable to the husband's normal standard of living.

2.2 AGENCY OF A WIFE OR MISTRESS

The authority of a wife or a mistress is presumed from the fact of cohabitation. However this presumption of authority can be rebutted by evidence that the man has forbidden the woman to pledge his credit even if this is not known to the tradesman. Therefore the scope of the

presumed authority is limited to the purchase of necessaries. The case of Phillipson V. Hayter²³ set out this limitation which is to the effect that if a wife orders goods or services which are not necessaries and suitable to the style which she and her husband customarily live, the husband will not be liable. The wife's presumed authority cannot also be invoked unless the wife and the husband are living together from which it can be inferred that the wife is acting on behalf of her husband. The cohabitation must be in the same establishment in circumstances which show they are a family. This was set out in the case of Debenham V Mellion²⁴.

The foregoing discussion has shown that apparent authority which arises by the operation of the doctrine of estoppel cannot be said to arise as a result of the wishes or consent of the principal and agent. The agent's apparent authority may arise even without the cognizance or approval of the person treated as principal and without the agent's intention to possess that kind of authority. Apparent authority in the strict sense does not exist but as a matter of law the factual arrangement between the parties is looked at to determine whether there is authority. The law even goes outside the factual position to declare the agent as having authority despite the fact that there is no consent between the parties. Apparent authority arises as a result of the conduct of the principal where he is said to have allowed the agent to appear to the outside world as having authority to act for him and by the exercise of the apparent authority the agent affects the legal position of the person whose conduct made him appear to have authority.

The case of Enco Plastica Internal Ltd. V. Freeburne²⁵ illustrative of the fact that apparent authority does not exist at all but arises as a matter of Law. By the articles of association of the appellants Company the business of the Company was to be managed by the directors. At its first meeting, the Company appointed the respondent as its secretary but did not specify the terms of his employment.

In the same meeting the chairman of the board of directors was also appointed who under the articles of association had no specific authority in relation to the business of the company and who was given no authority by the resolution to settle terms of the respondent contract of employment. The chairman was left by the board of directors to perform day to day management of the company and was allowed to perform the functions of the managing director. The chairman signed a letter offering the respondent on every generous terms which he accepted. Later the appellents company terminated the respodent employment on a few days notice. It was held that the board had held out the chairman as a managing director for he managed the affairs of the company with full knowledge of the board of directors.

It can therefore be concluded that the concept of authority by consent of the parties is an artificial notion of the law in the sense that it arise in instance where its impossible to say that the agent has been invested with such authority by the principal. The agent's power to affect the legal position of the principal does not come from express authority in case of apparent authority but it created by law authority. As regards presumed, it was shown that the existence of this authority cannot be based on express consent of the principal nor from representation on his part.

This type of authority is a creature of the law which shows further that the notion of authority is artificial in the sense that it does not go far enough to show how and why an agent should be created by law, and is clothed with power to affect the position of a principal who has not invested the agent with any authority at all.

A question may be asked as to why the law should go outside the factual arrangement between the principal and the agent to create presumed and apparent authority between parties who have no intentions of acting as principal and agent. This question may be answered on the basis of business efficacy. In the modern commercial world there is need for the employment of others to perform certain tasks for efficient and speedy distribution of goods and services. However, there is need for specialised activity for it would be difficult for the principal to avail himself in all situations calling for his attention in terms of trade hence the need to have agents. For wider markets, more production and distribution of goods, the law goes outside the factual arrangement between the parties, the law creates an agent who under the umbrella of apparent or presumed authority acts as a middleman between the producers of goods and services and the consumers.

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The capitalistic mode of production requires that goods produced must reach the consumer, the goods are also produced for their exchange value and the production aims at profit maximization. To enable the industrialists to reach wider markets and to continually expand the production so as to be in a position to appropriate and accumulate the surplus value, it becomes of necessity, to have agents who can affect the producers contracts with 3rd parties even where they have not been authorised to act. In cases of presumed authority the wife who is treated as an agent is able to affect the legal position of her husband who is liable as a principal if she pledges his credit for necessaries. The husband and the wife in this case are in class of consumers and by the operation of the law the industrialist is able to reach them for their purchase of his goods and services.

It is also to be noticed that capitalism mode of production, and international trade would come to a standstill if the agent, while making contracts for his principal who in most cases is a producer was to be limited by the authority conferred to him by the principal. it becomes therefore necessary to create agents, even against the parties' intentions, who are equiped with power to affect the principals' positions with third parties and by this the agents are in a position to facilitate the distribution of goods and services.

FOOTNOTES FOR CHAPTER 3

1. Powell, T. The Law of Agency 2nd edition page 57
2. [1944] 37 A.2.d 747
3. Ibid at page 749
4. [1973] N S W L R 7
5. [1967] 3 All C. R. 98
6. Ibid at page 102
7. [1964] All E.R. 630
8. Ibid at page 644
9. [1972] 28 D L R 233/
10. (1904) 2 K. B. 10
11. (1902) A. C 325
12. (1895) A. C 173
13. (1893) I Q.B 346
14. Professor Conant. The objective theory of Agency
15. (1920) D L R 383
16. "The objective Theory of Agency"
[1968] 47 Nebraska L R at page 686
17. (1787) 2 T. R. 73
18. [1964] E. A. 378
19. Ibid at page 383
20. (1891) I Q B 605
21. Ibid at page 21
22. (1924) I. K. B 566
23. Ibid
24. (1880) A. C. 24
25. [1971] E. A. 432
26. Earnest Mandel - The Marxist Economic Theory

CONCLUSION

The preceding chapters have focussed on agency law and the aim all along was to:

(1) Show how agency relationship is created and the rules there to for it is by understanding how agency relationship is created that the concept of authority can easily be appreciated.

(2) Show how the concept of authority by consent of the parties is an artificial notion of the law.

In so far as the creation of agency relationship is concerned, chapter one focussed on how it may be created by contract (express or implied), by the doctrine of estoppel, by ratification and by operation of the law. Under the creation of agency viz contract it was shown that it is mainly the rules of the law of contract that are applied. The following excerpts from the judgement of lord pearson¹ as used in Pole V. Leask² summarise the contents of agency created by contract. His lordship said of agency that ;

"The common division of the modes by which agency may be constituted is threefold, it is either by writing or it is by parol or it is by mere employment."³

Further, it was explained how an agency relationship may be created viz estoppel. Although there is no true consent between one person and another to stand in the relationship of principal and agent viz-a-viz each other or the outside world, the law treats their relationship as one of principal and agent giving effect to their conduct as if it amounted to the expression of consent that they should be principal and agent. This type of agency may be regarded as a type of agency arising by operation of law but this merited a different treatment in that for it to arise, special requirement quite distinct from other instances of agency by operation of the law is necessary.

Under estoppel, the law is concerned with the protection of 3rd parties who may have acted on the reasonable inference that a relationship of principal and agent existed between the parties concerned. In the same chapter, an examination of how an agency relationship arises by a way of ratification and by operation of the law was also considered. Under ratification, it was shown that what an agent does on behalf of the principal is done at a time when the relationship of principal and agent is not ⁱⁿ existence. The relationship of principal and agent is created when the principal, on whose behalf, though without his authority, the agent has acted, accepts the agent's acts and adopts it just as if there had been prior authorisation by the principal to do exactly what the agent had done.

Hence ratification is equivalent to antecedent authority. The principal and agent are treated as if they had acted for each other from the beginning. In the cases of litigation, the agent is released from liabilities once ratification has occurred. Ratification only operates in respect of past acts.

Under agency created by the law, there is no consent from the principal to justify the agent's acts but for reasons of policy, the law treats one person as agent of another. The existence of agency by operation of the law is neither justified by the consent of the principal nor his conduct but it is a creature of the law.

Chapter two focussed on the distinction between authority and power. The distinction between these two concepts was articulated by professor Corbin ³. In the same chapter various aspects of actual authority were discussed. Actual authority, it was shown, is authority conferred by the principal to the agent under the agreement between them and it is divided into express authority, implied authority and usual or customary authority.

Express authority is a legal relationship between the principal and agent created by a consensual agreement between the parties and is limited to the purpose to which it was given. Implied authority is the kind of authority which is incidental to and necessary for the effective exercise of express authority. Usual and customary authority was shown to be the authority which the agent possesses ~~has~~ regards his business, trade, profession or place in which a particular agent is employed for the purpose of carrying out his authority or anything necessary or incidental to.

It was further shown in the same chapter that authority is an artificial notion of the law for it merely denotes the factual relationship between the principal and the agent and it does not explain how the agent affects the legal position of the principal. Authority merely shows an historical event but it does not focus on future changes of showing the legal effects of the principal's employment of an agent who makes contracts on his behalf. It was shown that it is only the agent's power that can explain the possible future changes between the principal and the 3rd party. The agent's power enables him to affect the principal's position by subjecting him to rights and liabilities with a 3rd party. It is therefore not the agent's authority which is the central feature of agency relationship but it is his power.

The notion of authority is artificial for it is used by the Law to encampass the notion of the agents power which can explain adequately the legal relationship between the parties.

Express authority, it was further discussed, is the only authority which can strictly be said to be by consent or acts of the parties for it is created by a contract between the principal and the agent while the existence of implied, usual or coustomary authority was only justified on business efficacy. The need for speedy distribution of goods and services to consumers, wider markets and more production, dictates that the agent's authority is not to be limited by what is contained in the four corners of

a document or a deed but such authority is extended to what is incidental to and necessary for the exercise of express authority. The concept of authority is artificial in the sense that it does not go far enough in explaining the justification for the existence of these types of agent authority without the consent of the parties.

Chapter three focused on apparent and presumed authority. It was explained that where the doctrine of estoppel operates to create agency relationship, the agent is said to have apparent authority. A person who by words or conduct has allowed another to appear to the outside world to be his agent, cannot afterwards repudiate this apparent authority if to do so would cause injury to 3rd parties; the principal is treated as if he had authorised the agent to act in the way he has done and by the exercise of apparent authority the agent affects the legal relationship of the person whose conduct has made him to appear to have authority. Apparent authority does not result from the consent on the part of the principal whether express or implied. It is the authority which therefore apparently exists having regard to the conduct of the parties. It can be asserted that this authority does not exist at all but it is created by law.

As regards presumed authority, it was seen that this type of authority which the Law presumes that the principal would have assented to the agent's possessing it, if he had the opportunity to give his instructions, does not arise from the consent of the parties nor from the conduct of the principal. The fact that apparent and presumed authority are purely a legal concept greatly erodes away the question of the freedom of the parties in deciding what kind of authority an agent should have.

When the law creates these different types of authority, the law is in effect imposing terms which are contrary to the parties intentions.

The justifications given for the existence of apparent authority is that it is aimed at protecting 3rd parties who may have acted on reasonable inference that a relationship of principal and agent existed between the parties concerned. The existence of apparent and presumed authority can be Justified on the need to meet the expanding commercial needs. Due to the man's limited nature which makes it impossible for him to be in many places at the same time, especially in present commercial world with wide national and international market, it is necessary that capital owners in their capitalistic expansion must employ agents. The formation of the laws of agency therefore ensures that this expansion is done effectively by the agent.

The importance of agency is well expressed by professor Mechem ⁵ when he says; "Most of the world's work is done, and most of its deals made by persons who are not acting on their own behalf but working for or representing another -----as voltaire said of God, if agency did not exist, it would be necessary to invent it"

Under the contract law, there developed the principal of privity of contract. Hence 3rd parties could not sue or be used unless there was privity of contract. This was however modified to cope with the economic realities and there developed an exception to the general rule. This encompasses all those contracts made by agents on their principal's behalf for the relationship of the principal and agent does not only involve the internal relations between the agent and the principal but it is also regulates the agent's acts in the creation of contractual relations between the principal and 3rd parties.

Indeed, the idea of authority is important for it encompasses the agent's power to make contracts on his principal's behalf and his ability to affect his legal relations with 3rd parties. Authority therefore becomes a fact creating the legal relations of power. Where the agent's authority does not exist the law is prepared to create it as in the instances of apparent and presumed authority.

Agency law would not meet commercial needs if the agents always confined their acts to what is expressly conferred to them by their principals. Thus the law following a creative course has made the principal liable to a 3rd party and to a greater extent to benefit from him (3rd party) where the agent acts outside his express authority. Hence the law, through the Umbrella of apparent and presumed authority has evolved the necessary legal rules to support expanding economic and contractual activities. An agent in his representative capacity plays a very important role in a agency law which aims at meeting commercial needs. The agent makes contracts on his principal's behalf, carries on the marketing of his principal's goods, his role is to strengthen and increase the principal's markets, find new customers and forward useful information on market trends to the principal. The producer's aim is to maximise profits and expand his production. To achieve this the agent is not to be limited in his activities to what the principal has expressly authorised the agent to do. The chief objects of the rules of apparent and presumed authority is to provide the legal machinery for buying and selling on a large scale where the true contracting parties cannot meet face to face.

From the foregoing discussion, it can strictly be said that authority by consent of the parties' exists only in cases of express authority while the existence of implied, usual, apparent and presumed authority can be justified on commercial needs.

This shows why authority by consent of the parties does not exist, but it is artificial for authority in itself does not go far enough to give the reasons for the existence and the necessity of these latter types of authority.

The present state of affairs is not satisfactory to some extent. As the foregoing discussion has revealed, the concept of authority is artificial for it does not explain the legal consequences of the agent's actions. Thus, it does not explain explicitly the rationale behind agency law, "Power" is the central feature through which the agent brings the principal and the 3rd party into a direct legal relationship. From this point of view, therefore, the law as regards the concept of authority is unsatisfactory for it does not go far enough. It superficially describes the purposes of agency relationship in that it is a relationship by which one person permits (or in law is regarded as permitting) another person to act for him. Apparently this does not explain why this permission is vital to the agency relationship.

The concept of authority, whether actual or created by law, should be clearly set out so as to reflect the power factor. This will show the agency relationship as that of power - Liability relationship. Once it is realised that the essence of agency is this power to affect the principal's legal relations with the outside world, the law of agency can easily be understood. In this sense, the agent would be invested with the principal's own power so that when the agent acts, it would appear as if it was the principal himself acting and the missing link between the principal and the 3rd party would be established. In this case the results would be as if the principal had acted himself.

In normal business practice, the 3rd party rarely inquires as to whether the agent is acting for somebody else or whether such an agent has authority to act. Since the existence of implied, usual, customary and apparent authority are for the benefits of the principal, as shown in the proceeding chapters, once the concept of authority is understood as power-liability relationship, the law can protect a 3rd party where he settles with an agent by making payments to him. The position is that payments to the agent by either the principal or 3rd party does not discharge the liability owed by the principal to the 3rd party or vice-versa. Once the concept of authority is understood as right - liability factor, for as explained above it encompass the power factor, the law can protect a third party where he conducts himself so as to make the principal believe that the agent has discharged his (principal) liability to a 3rd party. The present law is that the 3rd party is not protected. The case of Mac clure V. Schemeil⁶ is illustrative. The agent, in this case, bought goods apparently on his own account, On terms that the cash was to be paid. The seller did not press for payment and the agent had not paid at the time the principal gave him the money for the goods. It was held that this payment to the agent discharged the principal's liability. In such a case, the concept of the agent's authority was not understood as a power factor in that the agent is expected to be invested with the principal's own power and when he acts, it is the principal himself acting, and where he has not discharged the debt, the principal has not. The principal should be liable in such circumstances and if necessary he can enforce his rights against the agent. Where the 3rd party settles with an agent who is not authorised to receive payments and the agent absconds with the money, the 3rd party will not have discharged his liability to the principal.

In the same light, in such cases, the concept of authority is separated from that of power. Since the agent is invested with the principal's own power when 3rd party settles a debt with him he should be seen as having settled with the principal himself and the principal should seek his own remedies from the agent.

However the authority - power factors should have some limits and this can be achieved by limiting the agent's authority as it carries with it the power factor. In such instances if the agent abuses his power or misuses it beyond the limits of its use as created by the parties or operation of the law, the principal should enforce his rights against the agent.

The law as regards the wife's or mistress presumed authority is not satisfactory in that it is unfair to the husband for the law to impose authority on the wife without the consent of the husband. For instance, it is unfair for the law to create a principal out of a husband by allowing the wife to pledge her husband's credit for necessaries. There is no "necessity" and therefore no justification for the wife to pledge her husband's credit. The man and woman are married or are cohabiting and in such circumstances the wife or the mistress can easily get the husband's consent for they are together and they can probably communicate easily. Therefore the law should not presume the wife's or mistress' authority, otherwise the husband is likely to be subjected to legal liabilities which are beyond his reach. Nevertheless the deserted wife's presumed authority is reasonable in that the woman might not have no resources of her own to support herself and the children or might not have the legal knowledge or money to institute legal proceedings against the husband. In this instances it is good law.

The present state of the law is not also satisfactory in that when the law implies terms on the nature of the authority to be possessed by the agent, the affected parties, that is the principal, agent and 3rd party, are left at the mercy of the law and they cannot determine their position before hand. They cannot determine what is incidental to or for the effective exercise of the agent's authority nor can they tell what is usual to the business, trade or profession. These can only be determined by the court, should a dispute arise between the parties. A principal's conduct which the 3rd party might think was misleading to him might be interpreted differently by the court. Hence an agent might find himself in an anticipated position of being liable to a principal if he had not acted with care and skill or being in a position to account to a principal for the secret profits when he had infact thought that he was not acting for the principal. The law might even not imply such an authority hence an agent who expects to be idemnified from Losses and liabilities incurred in the perfomance of the undertaking might find himself in a position where be undergoes those losses himself.

However sometimes when law creates such authority between the parties, it might do so with the aim of protecting an agent who might have acted believing that he is acting for a principal or the law might do so to protect a 3rd party. However, since it is not clear when the law will create such authority, the parties should be left alone to determine their own terms and the law should only intervene when it is necessary. Otherwise the same law cannot be protecting and at the same time creating legal hardships on the parties.

FOOTNOTES FOR THE CONCLUSION

1. Garnac Grain co. Inc V.V. H.M. Faure and Fair and Fair Clough Ltd. [1967] All E.R. 353
2. Ibid at page 358
3. (1860) 28 Beav at 574
4. Auther L. Corbin - opp. cited
5. Philip Mechem - What is with Agency?" a comment. (1949) 2 JLE at page 203
6. (1871)20 W. R 168

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11. Professor Honfeld - some Fundamental Legal Conceptions (1913) 23YLJ 16
12. Phillip Mechem - What is wrong with Agency? a comment. (1949) 2 JLE
13. Montrose Professor - The principal - agent - 3rd party relationship can B. R. Vol. 16