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THE CONCEPTUAL BASIS OF RELATIONSHIPS
CONSEQUENTIAL UPON AGENCY

"If there is a true gap between theory and practice,
either the theory is inadequate or the practice is
wrong": debile fundamentum fallit opus.

William Noy, Maxims.

L. A. RUTHERFORD

Thesis submitted for the award of the degree B.C.L.

Submitted

1976

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ABSTRACT

This thesis is divided into three areas. The first concerns the conceptual basis of the relationship created between a principal and a third party where the agent acts in accordance with his principal's express or implied instructions and also reveals his agency to the third party. The historical origins of the concept of agency are briefly considered, noting the movement away from formalism, through fiction, which is translated into fact, so that the acts of the agent are treated as those of his principal, enabling the creation of a simple contractual relationship between the principal and third party, through the agent.

The second part seeks to ascertain the conceptual nature of the relationship created by an agent who exceeds his principal's instructions in circumstances where the agents acts are, nevertheless, held to affect his disclosed principal's legal relations with a third party. This investigation is particularly concerned to review the traditional English approach, which confines a principal's liability to those situations in which the agent has the appearance of acting in accordance with his principal's instructions. This is demonstrated to be inadequate and the possibility of a more satisfactory theory is considered.

The third part reviews the conceptual basis of the doctrine of the undisclosed principal, under which the acts of an agent acting in accordance with his principal's instructions are held to bring his principal into a legal relationship with the third party, despite the third party being unaware of the principal's existence. Research reveals that this "anomalous" doctrine is based upon sound historical foundation and that misunderstanding of its origins has led to

distortion in its later application. Finally, the problem of the relationship between an undisclosed principal and third party, where the agent exceeds his principal's instructions, is considered, and the development reviewed in its conceptual and practical context.

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PREFACE AND OUTLINE

The law of agency seeks to regulate not only the internal relationship of an agent and his principal but also the agent's powers in the creation of external relations between the principal and third party. An agent affects the legal position of his principal by the making of contracts or the disposition of property, it is this power which is the essence of the agency relationship. This thesis examines the conceptual basis of the relationship which arises between principals and third parties through the medium of the agent.

It is submitted that a full examination of the basic underlying theories is essential to an understanding of what may be regarded as a neglected area. An appraisal of this topic is dictated by the diverse views of academic commentators and by the paucity of recent authority, rendering that essential element of commerce, certainty, almost lost.

The letters P, A and T are used to refer to principal, agent and third party throughout the thesis. U.P. refers to an undisclosed principal.

Outline

Part one of this thesis concerns the basis of the relationship created between a principal and a third party where an agent acts in accordance with his principal's express or implied instructions, having revealed his agency to the third party.

The historical origins of the concept of agency are briefly considered, being particularly evident in the development of the law of deeds. The movement away from formalism is noted and the fiction whereby formalism was avoided (*qui facit per alium facit per se*) is translated into fact. Finally, the simple contractual relationship between P and T is accepted and the stage is set for the more

sophisticated principles of agency discussed in parts two and three.

Part two concerns the liability of the disclosed principal for acts perpetrated by his agent in excess of the instructions given to him by his principal. It is sought to ascertain the conceptual nature of the relationship created between P and T where the agents unauthorised acts do give rise to liability on the part of P.

The first part of the inquiry is devoted to a sketch of the controversial nature of the problem, by reference to academic and judicial sources. Judicial support is indicated for the view that P's liability to T is based upon estoppel. This leads to a brief outline of the nature of estoppel, being basically a rule of evidence preventing a person from denying a state of affairs. The state of affairs, in this case, being that P is bound to T.

In contrast, the notion of apparent authority is outlined. Basically this theory indicates that P's liability is truly contractual, leading to mutual rights and liabilities existing between P and T. This leads to an illustration of the conflict between the notions of estoppel and apparent authority, the illustration being drawn by reference to judicial decision and hypothetical situation.

The conflict between the proponents of the competing theories is considered and this involves an attempt to reconcile the competing theories. Because the notion of detriment is essential to estoppel, the executory agreement is seen as a major problem for the estoppel assertor. It is sought to demonstrate that the requirement of detriment, when properly understood, does not, in fact, provide an obstacle to reconciliation of estoppel with the executory agreement. It is demonstrated that when detriment is fully understood and considered along with the notion of ratification (and relation-back) there may be no distinction in practice between the effects produced by the two distinct theories under discussion. However, this conclusion, being

based upon ratification, depends for its proof upon the certainty which may be found in the principles of ratification. (A detailed consideration of ratification is confined to Appendix I so as not to interfere with the general theme.) The conclusion, to be drawn from the detailed consideration of ratification, is that the rule is subject to such uncertainty that a combination of estoppel and ratification cannot provide a satisfactory basis for mutual rights and liabilities between P and T. A contractual relationship between the parties is the only conceptual legal relationship to adequately meet the needs of the case.

An attempt is made to introduce precision into traditional terminology, which has frequently given rise to needless confusion. Having considered loose terminology, the assertion that apparent authority creates a "true contract" between P and T is considered in more detail. By a "true contract", proponents of the notion of apparent authority, meant a consensual contract. However, the consensual contract is demonstrated to be merely a modern interpretation of contract flowing from one of various independent contractual bases. These are, the contract in the form of a deed; that based upon the "quid pro quo"; and that developing from assumpsit. These theories of contractual origin are considered as possible historical origins of the agency rules. In particular, the assumpsit theory is considered in some detail through the early cases.

Having established that the relationship between P and T is contractual in origin, the traditional contractual theory based upon what may be described as "manifested intention" or appearance of authority, is applied to a number of cases and found wanting.

The unsatisfactory nature of the "traditional" approach in its application to a number of difficult cases having been demonstrated, it is clear that the theory does not make for any certainty. This

leads to a consideration of new approaches which may reveal true agency rules capable of explaining all cases, leading to certainty of prediction. The principal "new approaches", collectively described under the term "Inherent Agency Power", cause the inquiry to move, finally, into an investigation of the extent to which the new theories are reflected in recent cases.

Part three concerns an investigation into the conceptual basis of the doctrine of the undisclosed principal. It begins with an explanation of the effect of the doctrine, which is followed by a note of the criticism which has been levelled at its theoretical basis. This covers both English and American academic opinion and English judicial pronouncements.

However, the utility of the doctrine is recognised and this is given expression alongside illustration of the failure to seriously seek out the true basis of the doctrine.

Various competing theoretical bases are examined and criticised, namely, "Trust Theory", principally expounded by Ames; "Receipt of Benefit", principally expounded by Huffcut; "Tort Theory", illustrated by Lewis; "Primitive Assignment", advanced by Goodhart and Hamson. This latter theory, although it is rejected as a satisfactory foundation, is acknowledged for the part which it plays in advancing understanding of the doctrine. The case of *Dyster v Randall*, used by Goodhart and Hamson, is reconsidered in the light of a new approach, leading to a detailed consideration of the case of *Said v Butt*. This case emphasises the relationship between U.P. and T, rather than the A - T relationship, as the foundation of the doctrine. This in turn leads to a consideration of the U.P. - T relationship, as being essentially a contractual relationship based upon a contract founded upon consideration, linked to the development of *assumpsit*.

The historical origins of the doctrine are now traced in the

light of the theory of contract developed from assumpsit. Having established, through the early cases, that a contract founded in assumpsit lies at the root of the doctrine, anomalies in the development of the doctrine are considered. It is sought to demonstrate how application of a consistent theory would resolve problems, leading to greater certainty.

Finally, somewhat tentatively, the problem of *Watteau v Fenwick* is considered as an aspect of the doctrine of the undisclosed principal. Although a theoretical foundation may be found for the *Watteau v Fenwick* rule, the case is recognised as exhibiting features leading to uncertainty. The "Objective Theory of Agency" is briefly considered as a basis from which to achieve certainty in this area, leading once more to "Inherent Agency Power" - true agency principles.

CHAPTER I

"It is obvious that the law of agency would be as thin as it would be uninteresting were A always confined to act solely as commanded by P."⁽¹⁾

This chapter is concerned with a consideration of the basis of the relationship between principal and third party where A acts in accordance with P's express or implied instructions and reveals the agency relationship to T.

In the early development of English law the parties to any transaction were required to perform those acts required for its creation, in person. Legal acts were performed through the medium of certain formal words which were simply meaningless if it was purported to utter them on behalf of another who was not a party to the act.⁽²⁾

The history relating to the development of deeds exemplifies this attitude. A was required to act, when it became accepted that he could act on behalf of a P, strictly as the alter ego of P when surrendering P's land or making a lease or a release or a feoffment of land to T.⁽³⁾

In Combes' Case it was said that the reason for this insistence was because "P appoints the attorney to be in his place, and to represent his person; and therefore the attorney cannot do it in his own

(1) Stoljar, Law of Agency, p.18 (hereafter cited as Stoljar).

(2) Pollock and Maitland, History of English Law, ii, 219, Holdsworth, History of English Law, viii, 222.

(3) Combes' Case (1613) 9 Co.Rep.75a; Anon. (1565) Moo. K.B.70; Bridgecourt v Ashley (1612) Moo. K.B.818; Cremer and Tookley's Case (1628) Godb. 385,389.

name, nor as his proper act, but in the name, and as the act of him who gives the authority."⁽⁴⁾ Holmes found the origins of this principle in the Roman law which, although it did not develop the sophisticated rules of agency found in English law, nevertheless developed a very similar doctrine in relation to the "family".⁽⁵⁾ "... so far as rights of property, possession or contract could be acquired through others not slaves, the law undoubtedly started from slavery and the patria potestas. And this lead to the fictitious identification of agent with principal."⁽⁶⁾ This "fiction" is of course expressed in the maxim "qui facit per alium facit per se".⁽⁷⁾

However, the subsequent development of agency followed the classic pattern whereby, although originally the fiction of identity was simply a convenient way of expressing rules arrived at for good policy reasons, soon the formula acquired an independent standing. Instead of holding that for sound policy reasons a master is responsible

- (4) 75b. Technically A was enabled to act as a complete substitute because of the old rule (dating back to Bracton) that A could use his principal's seal instead of his own. See Norton on Deeds (2nd ed. 1928) p.8 cited Stoljar, p.15.
- (5) Buckland, Roman Law from Augustus to Justinian, 2nd ed. p.102 et seq.
- (6) Holmes 4 Harv. L.R. 349. Montrose 16 Can.B.R. 757,778 also appeared to accept this proposition.
- (7) See Bracton, fol.171b. The familia embraces "those who are regulable in the light of serfs ... So, too, as well freemen as serfs and those over whom one has the power of command." Also West's Symboleography Lib. I., Sect. 3, "Of the Fact of Man" "The person is he which either agreeth or offendeth, and beside him none other. And both may be bound either mediately or immediately. Immediately, if he which is bound doe agree. Mediately, when if he, which by nature differeth from him, but not by law, whereby as by some bond is fained to be all one person, doth contract, or offend, of which sort in some cases be these which be in our power as a wife, bondsman, servant, a factor, an attorney, or procurator, exceeding their authority." cited Holmes 4 Harv. L.R.349.

for his servant, "the law treats the master as the Contractee and the formula becomes a reason in itself for making the master answerable and giving him rights."⁽⁸⁾ The sum total of this development was, of course, that the courts regarded A as being capable of bringing P and T into a contractual relationship.⁽⁹⁾

Most certainly there appears to be little inconsistency with any theory of contract where A has linked P with T, in that A may be regarded as a meeting point for the wills of the parties. It may be that this is only strictly true where A acts as a mere nuntius between P and T, but nevertheless there can be little objection on theoretical grounds, even when A exercises a discretionary will of his own.

However, whatever slight reservations may exist in placing the relationship between P and T within the generally accepted mould of contract based upon consensus, the remedies which were made available to enforce the relationship were most certainly the contractual remedies of the day, account and debt leading on to assumpsit. It was natural, therefore, that P and T should be regarded as being in a contractual relationship⁽¹⁰⁾ and this must be a very real reason for supposing that they were and are in such a relationship in law.⁽¹¹⁾

(8) Holmes 4 Harv. L.R.349; c.f. Abbott 9 Harv. L.R.591.

(9) Some writers deny that a "true" contract can exist between P and T. See Powell, Law of Agency, 2nd ed. p.148 (hereafter cited as Powell) "It was perhaps inevitable, therefore, that the courts should come to think that there really was a contract between P and T effected through the act of A."

(10) "To admit ... [a principal] has rights and duties under [a] contract ... and yet to deny that he is a party to it seems to be a totally unnecessary piece of mystery making." Williams 23 Can. B.R.380,409. c.f. Montrose 16 Can. B.R.790 "The principal is affected by an agreement between the agent and the third person, not because he can be said to be a party to that agreement but because his own conduct has made it just that he should be bound in accordance with the terms of the agreement."

(11) The historical basis of contract on a conceptual plane is discussed in detail later in the thesis.

The idea that a contract can exist without a "meeting of minds" may be somewhat unexpected but it is no more and no less illogical than any other concept of law.⁽¹²⁾ It is therefore no surprise to find that today most commentators are happy to baldly state that "If an agent makes a contract on behalf of a named principal, the only contracting parties are the principal and the third party..."⁽¹³⁾ Furthermore, there are very sound reasons, as previously explained, for holding that such statements represent an entirely accurate view of the law.

(12) See Montrose 16 Can. B.R.757; Lewis 9 Col.L.R.116; Thol, Handelsrecht, sect.70 cited Holmes 4 Harv.L.R.347 expresses a somewhat simplistic attitude when he indicates that it is "absurd to maintain that a contract in its exact shape which emanates exclusively from a particular person is not the contract of such person i.e. the agent but is the contract of another."

(13) Lowe, Commercial Law, 4th ed. p.39 is typical.

CHAPTER II

"Legal technique consists in creating particular concepts for the handling of the complex circumstances of life. Vague as the general idea of justice may be it is nevertheless the touchstone of the jurist, and the technical concepts of law are not governed merely by the ordering of social facts but are moulded under the influence of the idea of justice."⁽¹⁾

This chapter concerns the concepts underlying the liability of a disclosed principal for acts perpetrated by his agent in excess of his mandate, commonly described as falling within the Doctrine of Apparent Authority.

The nature of the problem outlined

It is remarkable that, in an area of such practical importance, theory and principles of the agency concept should remain so unsettled as to be stigmatized as the "second toughest problem in the study of law."⁽²⁾

The conceptual basis of the relationship created between P and T where A acts in such a way that he appears to be authorised (although he is not) to act on behalf of P, in establishing contractual relations on his behalf, probably first attracted serious academic interest in 1905.⁽³⁾ Although it is clearly established that a properly authorised agent, acting in accordance with his instructions, will create a

(1) Montrose, 16 Can.B.R. 757,778.

(2) Rubenstein 44 A.B.A.J.849, "Apparent authority: an examination of a legal problem". See also Conard 1 J. of Legal Ed.540, "Whats wrong with agency" and Mechem 2 J. of Legal Ed.203, "Whats wrong with agency : a comment."

(3) Cook 5 Col.L.R.36, "Agency by Estoppel".

contract between P and T,⁽⁴⁾ the question is posed as to whether the agent who acts in such a way as to have "apparent authority" or "ostensible authority", otherwise called "authority created by estoppel" or "implied", "imputed" or "constructive authority",⁽⁵⁾ similarly creates a contractual relationship between P and T. In 1961 Stoljar⁽⁶⁾ was able to write that "the question has given rise to a long controversy the dust of which has not yet settled." Indeed text book writers in general are still in the position of having to admit that the issue must be regarded as controversial.⁽⁷⁾

In Rama Corporation, Ltd. v Proved Tin General Investments, Ltd.,⁽⁸⁾ Slade J., said that "Ostensible or apparent authority which negatives the existence of actual authority is merely a form of estoppel."

Diplock L.J., in Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd.,⁽⁹⁾ further explained this approach saying, "an 'apparent' or 'ostensible' authority ... is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted on 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 contract. To the

(4) See Chapter I of this thesis.

(5) Terms variously used to describe the same legal situation.

(6) Stoljar, p.30.

(7) Fridman 3rd ed., p.68, (hereafter cited as Fridman) is typical of the recognition afforded to the problem.

(8) [1952] 2 Q.B. 147, 149.

(9) [1964] 1 All E.R. 630, 644.

relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation. The representation, when acted on by the contractor by entering into a contract with the agent, operates as an estoppel preventing the principal from asserting that he is not bound by the contract."

The nature of estoppel

Estoppel is primarily a rule of evidence preventing a person from denying a certain state of facts and "an estoppel does not in itself give a cause of action; it prevents a person from denying a state of facts."⁽¹⁰⁾ However, estoppel may be used to raise a defence to an action when the plaintiff is, estopped from setting up the facts upon which he wishes to rely.⁽¹¹⁾ In particular estoppel may, in cases of agency, the argument continues, make a principal liable to compensate a third party, who dealt with an agent, in the mistaken belief that the agent's actions were fully authorised. The action which T brings against P does not, however, arise from the estoppel. T's action is necessarily based upon contract and the key to the success of his claim will lie in P's inability to deny the state of facts (that A's actions were authorised) which he had led T to believe existed. The assertion, cited above, that P, in such situations, is "liable to perform any obligations imposed on him by such contract" might profitably be contrasted with a later passage in the same judgment in which

(10) Per Lord Esher M.R., in *Seton, Laing Co. v Lafone* (1887) 19 Q.B.D. 68, 70. See also *Low v Bouverie* [1891] 3 Ch.82,101, per Lindley L.J., "estoppel is not a cause of action - it is a rule of evidence which precludes a person from denying the truth of some statement previously made by himself."

(11) See Spencer Bower and Turner, "The Law Relating to Estoppel by Representation", 2nd ed. p.6 (hereafter cited as Spencer Bower).

Diplock L.J. dealt with the legal relationship created by an authorised act of A, acting on behalf of an undisclosed principal:⁽¹²⁾ "... if the agent does enter into a contract pursuant to the 'actual' authority it does create contractual rights and liabilities between the principal and the contractor." Clearly Diplock L.J. indicates a distinction to be drawn between P's contractual rights and liabilities created in the latter situation and his liability to perform obligations imposed in the former case.

The nature of apparent authority

In contrast to these authoritative statements, it has been asserted with equal assurance that apparent authority (or ostensible authority) is based upon contractual principles. Seavey indicated that there is no connection between apparent or ostensible authority and estoppel⁽¹³⁾ and we find his views echoed, not surprisingly, in the Second American Restatement on Agency,⁽¹⁴⁾ "Apparent authority is based upon the principle which has led to the objective theory of contracts, namely, that in contractual relations one should ordinarily be bound by what he says rather than by what he intends."

Thus, an agent with actual authority, at least where he acts on behalf of a fully disclosed principal, is deemed to create a contract between his principal and a third party, and, it may be argued, if P has led T to believe that A has actual authority, then again, in law, a contractual relationship arises between P and T. Powell,⁽¹⁵⁾ considered the doctrine of apparent authority to be an independent

(12) at p.644.

(13) 29 Yale L.J. 859, 873, 874.

(14) Para.8, comment d. Seavey was Reporter on Agency.

(15) Powell, p.70-72.

doctrine, bearing similarity to estoppel only in so far as the essential elements of the two doctrines were almost the same.⁽¹⁶⁾

The conflict between the notions of apparent authority and estoppel.

A simple illustration of the difficulties which may arise as a result of a failure to rationalise the conceptual basis of apparent authority, which will suffice to whet the appetite, is afforded by *Reo Motor Car Co. v Barnes*.⁽¹⁷⁾ In this case A, the plaintiff's salesman, contracted to sell a motor car to the defendant and agreed to take the defendant's old car in part exchange. A had previously completed a similar transaction with the defendant without objection from the plaintiff. In fact, A was authorised only to make cash sales. Before the defendant had given up his old car or made any payment, the plaintiff sued for return of the car which had been delivered to the defendant. It was held that although A had apparent authority, the plaintiff might repudiate the transaction so long as the defendant had not acted in reliance upon it. Such a decision would flow naturally from the notion that apparent authority is merely a form of estoppel which negatives actual authority.⁽¹⁸⁾ However, if the doctrine of apparent authority operates so as to objectively create, by manifestation of assent, a contract based upon consent between plaintiff and defendant, then it would immediately bind the parties in accordance with normal contractual principles. The fact that the agreement remained executory would be of no consequence.

(16) He further indicated that as estoppel does not create a relationship of P and A, its effect being limited to the relationship between P and T, to speak of "agency by estoppel" was "entirely misleading."

(17) (1928) 9 S.W. (2d) 374, Tex. Civil app. noted 42 Harv. L.R. 570.

(18) To raise estoppel, the "estoppel asserter" must show reliance upon "the facts" to his detriment.

Perhaps a further, slightly more complicated, hypothetical situation demonstrating the real technical problems thrown up by the conflicting theories, will finally serve to crystalize the need for research into the underlying theory.

Consider where A has frequently purchased goods, on credit, on behalf of P, from T. In accordance with A's apparent authority and usual practice A enters a further transaction at a time at which, unknown to A and T, P has already died insolvent. A's authority will, of course, be determined upon P's death.⁽¹⁹⁾ T will wish to sue A, if possible, as any action against P's estate would be unsatisfied. T may bring an action against A for "breach of warranty of authority" under the rule in *Collen v Wright*.⁽²⁰⁾ However, if A had apparent authority so as to bind P to T, by contract, any damages recovered against A would be nominal. T would still have available the right of action against P that he would have enjoyed, had A had actual authority. T's loss would be caused by P's insolvency, not by the breach of warranty of authority. In contrast, if the estoppel principle is applied, no contract would arise between P and T by operation of law and if T did not raise the issue of estoppel there would be no relationship between P and T. Therefore, T could simply plead A's breach of warranty of authority and recover substantial damages from A on the basis that he had been deprived of the benefit of a contract with a principal.

Examination of the foundation of authority

I now propose to examine the development of the conflicting theories. The central problem of agency is the theoretical foundation

(19) *Blades v Free* (1829) 9 B & C. 167.

(20) (1857) 8 E & B. 647.

of authority. Clearly A must have some authority if he is to act as agent for P, rather than act on his own account. However, if A's authority was limited to the precise terms of his mandate then he would be reduced to a mere "channel of communication". The problem arises as to the extent to which A is to be permitted to establish relationships or contracts, between P and T, where A acts beyond his express mandate. The principles at stake are those underlying the basic conflict between the protection of personal interests, that a man should not be deprived of his property unless he disposed of it himself, and the protection of the sanctity of reasonable expectations raised by commercial dealings.⁽²¹⁾

Clearly if T is about to contract with A, who claims to be acting within an authority granted by P, whereby T is to be brought into contractual relations with P, T is at some risk. If A is not truthful, then P will not be bound to T and T may lose his anticipated bargain. In order to avoid this risk T could, of course, insist upon consultation, with P, prior to any agreement. This cumbersome procedure would, however, be extremely inconvenient and furthermore, would render the law of agency superfluous. A second solution would be for T to stipulate that A should incur a personal responsibility to T. However, again this agreement would frustrate reasonable commercial expectations. In truth A and T would be the principal parties to all agreements, with P merely indirectly entering into the picture. The concept of apparent authority provides a third solution consonant with a

(21) "In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title." per Denning L.J., *Bishopsgate Motor Finance Corp. Ltd. v Transport Brakes Ltd.* [1949] 1KB.322, 336, 337.

sophisticated form of direct agency whereby a legal relationship may arise between P and T despite the absence of real authority in A.

Definition of apparent authority

First it is necessary to adopt some working definition⁽²²⁾ of apparent authority. When it is said that an act falls within an agent's apparent authority, all that is meant is that the act has the appearance of an authorised act. An act falling within the scope of an agent's apparent authority, is one which in truth was not authorised by a principal but, has the appearance of having been so authorised.

The origins of the academic dispute over the basal theory to apparent authority.

A protracted and animated academic struggle between J.S. Ewart and W.W. Cook historically marks the beginnings of a search for a basal theory to the area under consideration.⁽²³⁾

Ewart was convinced that the concept underlying apparent authority was estoppel. This was consistent with his general faith in this ubiquitous notion which he set forth at length in his treatise "Principles of Estoppel by Misrepresentation."⁽²⁴⁾ Cook was equally insistent that apparent authority had nothing to do with estoppel, but rather, was based upon "true contract".

The basic proposition of supporters of an estoppel theory was that where T makes a contract with A, who has apparent authority, then because A is unauthorised, the responsibility of P for the contract can only arise from estoppel. Consequently, unless T acted

(22) Uncertainty as to terms has bedevilled agency. See Powell, p.272 also 15 Harv. L.R. 324.

(23) 15 Harv. L.R. 324; 35 Am.L.Rev.707; 16 Harv. L.R. 186; 5 Col. L.R.36, 354; 6 Col. L.R. 34; 13 Green Bag 50.

(24) Callaghan & Co., Chicago 1900.

with knowledge of and in reliance upon a misrepresentation attributable to P, then T could not hold P liable.

In contrast, supporters of a contractual theory contended that this proposition did not go far enough. They asserted that persons who were not aware of facts which gave the appearance of an authorised act could only succeed if; (a) they could prove a fully authorised agency or (b) if there was no such actual agency, then if there was an appearance of it, that is, by estoppel. However, the argument progressed, since there is apparent authority, which would be proved by evidence of a previous course of business, the same evidence which would prove apparent authority would also establish estoppel. Thus in situation (a), P's liability could be accounted for on principles of actual agency. Whereas in situation (b), P's liability would rest upon apparent agency or estoppel. Argued in this way, estoppel would be superfluous to agency, for P's liability in both cases would be attributable to "normal agency rules", estoppel being merely an additional ground for liability in situation (b).⁽²⁵⁾

However, it must be noted that this latter argument totally ignores the highly pertinent question related to apparent authority - apparent to whom?

The nub of the problem

The point at issue between the opposed approaches is perhaps best illustrated by reference to a simple factual example:⁽²⁶⁾

(25) Cooke also made the curious point that an estoppel theory must be unsound because the doctrine of agency "was well recognised long before the courts began to use the language of estoppel." Perhaps he had not heard of Monsieur Jourdin "who talked prose although he did not know it." Molliere, *Le Bourgeois Gentilhomme*, cited in *Re Schebsman* [1944] Ch.83, 104.

(26) See 16 Harv. L.R. 186.

A buyer has authority from a firm to purchase for cash only; it is the ordinary business custom for such a buyer to purchase on credit, he buys for credit:-

(a) from T, a dealer who is aware of the custom,

(b) from T, a Patagonian, just arrived, who
knows nothing of the custom.

Those favouring a theory based upon estoppel would hold P liable in situation (a); those favouring a contractual theory would hold P liable in (a) and (b). In support of the estoppel theory one might cite Lord Cranworth's assertion, in *Pole v Leask*,⁽²⁷⁾ that in order to make P liable to T one "must show that the agency did exist and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it." In short, in the absence of a real authority (actual authority) there can, upon this view, be no liability in P in the absence of an estoppel.⁽²⁸⁾ Furthermore, the doctrine of estoppel applies strictly, with all vigour, there being no place for any notion of "holding out to the world at large."⁽²⁹⁾ It is a basic assumption, of those who rely

(27) (1863) 33 L.J. Ch. 155, 162.

(28) Clearly upon proof of liability in P in a case in which there is a lack of authority, actual or apparent, Ewart's approach is exposed as either fallacious or incomplete. See later discussion of *Hambro v Burnand* [1904] 2 K.B. 10; *Fry v Smellie* [1912] 3 K.B. 282; *Brocklesby v Temperance Building Society* [1895] A.C.175; *Thurber & Co. v Anderson* (1878) 88 ILL.167; *Kidd v Thomas A. Edison Inc.* (1917) 239 Fed.405 also *Edmunds v Bushell and Jones* (1865) L.R. 1 Q.B. 97.

(29) "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." per Lord Lindley in *Farquharson Bros. v King & Co.*, [1902] A.C. 325.

upon estoppel as forming the basis of P's liability, that P and T have not agreed so as to be mutually bound, where A has acted without P's actual authority.⁽³⁰⁾ In other words there has been no "meeting of the minds" so as to form a legally binding agreement or contract between them.

However, those supporting the contractual basis to P's liability rely upon the case of *Pickering v Busk*,⁽³¹⁾ in which Lord Ellenborough first introduced the expression "apparent authority", for there it was indicated that "an apparent authority is a real authority"⁽³²⁾ so far as T is concerned. Cook contended that it is a fundamental principle of the law of contract that a person is bound by his "manifested intention" and not by his "real intention". By this he meant that a person is bound by what he appears to be intending. This means that a man must be taken to have offered to enter a contract, if he appears to do so, irrespective of whether he actually intended to make an offer or not. Thus the term "manifested intention" merely denotes an objective finding of intention. This principle is, in essence, widely recognised throughout the law of contract and expressed quite simply by Lord Wright in *Norwich Union Fire Insurance Society, Ltd. v Price*⁽³³⁾ "Intention is to be ascertained from what the parties said or did". Perhaps Holmes was first to express this

(30) "A man cannot be bound by the act of another unless he has authorised it. Nevertheless, if he personally represents that he has authorised it, and on the faith of the representation some third party has changed his position, he ought to be estopped from denying the existence of the authority". Ewart, "Principles of Estoppel by Misrepresentation."

(31) (1812) 15 East 38.

(32) At p.39. See also *Hambro v Burnand* [1904] 2 K.B.10, 21, 22.

(33) [1934] A.C. 455, 463.

sentiment as a fundamental common law principle when he said "The Common Law of England is no more concerned to determine whether the promisor in fact intended that his utterance be taken as a binding assurance than it is interested to know whether the killers heart was black or the driver's mood reckless."⁽³⁴⁾ The widespread acceptance of this principle is easily demonstrated by reference to the numerous cases⁽³⁵⁾ expressly or impliedly relying upon it or indeed simply by reference to the notorious "postal rule"⁽³⁶⁾ or the well settled principles of mutual mistake.⁽³⁷⁾

Thus it is asserted that to accept that an offeror's liability upon a contract "created" under the "postal rule" (where there has been an uncommunicated revocation of offer prior to a posted acceptance) is based upon contract, is to accept that logically, P's liability for A's unauthorised acts, where A has apparent authority, is also based upon contract. Within the accepted framework of the common law it would be incongruous to explain the offeror's liability as being based upon estoppel, in that the offeror has represented, to the offeree, that his offer is still open and that the offeree has changed his position in reliance upon the representation and, therefore, the offeror is estopped from denying his liability that

(34) "The Common Law", O.W. Holmes, ed. Howe.
See 7 J.S.P.T.L. 227.

(35) See *Sullivan v Constable* (1932) 48 T.L.R.369;
Van Praagh v Everidge [1902] 2 Ch. 266; *Imperial Loan Co. v Stone* [1892] 1 Q.B. 599; *Northland Airlines Ltd. v Dennis Ferranti Meters Ltd. C.A.* The Times, October 23, 1970.

(36) *Henthorn v Fraser* [1892] 2 Ch.27; *Ramsgate Hotel Co. v Montefiore* (1866) L.R.I. Ex.109; *Byrne v Van Tienhoven* (1880) 5 C.P.D. 344.

(37) *Tamplin v James* (1880) 15 Ch. D.215; *Raffles v Wichelhaus* (1864) 2 H. & C. 906.

would have arisen, had a contract been formed.⁽³⁸⁾

The inherent assumptions of the estoppel assenter.⁽³⁹⁾

In view of the undoubted strength of authority⁽⁴⁰⁾ supporting the estoppel assenter, it is appropriate to examine the assumptions inherent in such a basal theory. The basic proposition is that P does not enter a contract with T, nor does A make a contract on his behalf, as A has no authority to do so. However, T has dealt with A in the belief, induced by P, that A had authority. In these circumstances T ought to be placed in the same position as if P had authorised A and this result is achieved through the doctrine of estoppel.

By definition, estoppel involves some change of position,⁽⁴¹⁾ in

(38) Ewart, 5 Col. L.R. 354, could not accept contractual liability founded upon an act which P did not do; no one having his authority did; but was done in contravention of his will. However, this confuses internal assent, within the agency relationship, with external criterion recognised by law. Consider where S inherits a guitar, a banjo and a mandolin. B says he would like to buy the guitar for £10. S agrees and invites B to call to collect the instrument next day. When B arrives S tenders the banjo, thinking it to be the guitar. B says, "Not that one. That is the guitar" - pointing to the mandolin. W, a layman, then instructs them as to which instrument is, in fact, the guitar. Can it be doubted that, on the authorities, a valid contract has been entered for the sale of the guitar? There has been no meeting of the minds in fact or reality, but there is no "latent ambiguity" as in *Raffles v Wichelhaus*. This interpretation must favour the Patagonian!

(39) Ewart's terminology, 13 Green Bag 50.

(40) See footnotes 8 and 9, p.8.

(41) "...an act or omission resulting from the representation" per Lord Tomlin, *Greenwood v Martin's Bank Ltd.* [1933] A.C. 51, 57; Second Restatement Chap.1, 8B (b) 3 "Change of position ... indicates payment of money, expenditure of labour, suffering a loss or subjection to legal liability."

reliance upon a representation, which prevents the representor from denying the truth of the fact asserted. Consider that, in consequence of P's representation, T does accept an unauthorised offer from A or makes one to A, which A, without authority accepts. The "contract" remains executory. Upon what basis can T claim to have changed his position?

As originally formulated the estoppel theory relied upon a change of position being proved by indirect means. Under the rule in *Collen v Wright*⁽⁴²⁾, where A's act is unauthorised, then T undoubtedly has an action, for breach of warranty of authority, against A. As T has an action against A, then this must result from the exchange of promises between T and A and, therefore, T's act in "speaking the words of acceptance" must amount to a change of position. This effort is the consideration for the undertaking between A and T and a change of position for the estoppel against P. This theory, of course, relies upon the assumption that T's right against A is contractual and that, therefore, T's actions must involve sufficient consideration for that relationship and, therefore, sufficient "change of position". Whilst it must be accepted that the action for breach of warranty of authority is usually considered contractual in origin, it must be noted that this is not universally accepted.⁽⁴³⁾

However, contract may exist without detriment or change of position. In every contract formed by the exchange of a promise in return for a promise, detriment is lacking in the sense that no detriment

(42) (1857) 8 E. and B. 647; see also p.15.

(43) See Stoljar, p.263; *Benton v Campbell* [1925] 2 K.B. 410, 415 per Salter J. "Every agent to a contract, when he makes the authorised contract between his principal and the other party, makes also a contract on his own account with the other party; he warrants his authority." See also, *Edwards v Porter* [1925] A.C.1, 21; 26 Col. L.R. 224; 35 Yale L.J. 625; 16 Harv. L.R. 311; 18 L.Q.R. 364; 48 W.Va.L.R.96.

exists without first acknowledgment of a binding contract.⁽⁴⁴⁾ Similarly in the case of breach of warranty of authority, detriment may be lacking but contract not.⁽⁴⁵⁾

Furthermore, there is, as previously indicated, judicial and academic support for the proposition that the obligation imposed by the doctrine of breach of warranty of authority is not contractual in origin. If so, reliance upon change of position or detriment as being revealed in *Collen v Wright* is misplaced. In *Edwards v Porter*, *McNeall v Hawes*⁽⁴⁶⁾, Bankes L.J. forcefully asserted his view. "Does the doctrine of implied warranty of authority ... require for its application the presence of the essentials to the making of an ordinary contract, or is it implied by law apart from those essentials wherever the agent professes to have the authority which in fact he has not got ... I do not myself think that the doctrine of *Collen v Wright* depends for its application upon the existence of those essentials." Similarly, Holdsworth⁽⁴⁷⁾, concluded that "the obligation is not contractual but quasi-contractual. That the obligation is

(44) Cheshire, Fifoot and Furmston, *Law of Contract*, 8th ed. p.95; Pollock, *Principles of Contract*, 13th ed. p.147-150.

(45) Montrose, 16 Can. B.R. 786, suggests that even in the case of an exchange of promises it may be possible to discover detriment in that, although the mere speaking of words of acceptance may not suffice (as Ewart asserted) the speaking of words constituting an undertaking imposes a moral obligation to keep one's word and this social recognition of obligation constitutes a detriment. The undertaking given by T to A, to be liable to P, would thus constitute detriment and as such the exchange of promises would include detriment. This reliance upon 18th century notions of "fair play" is, however, unconvincing. It is reminiscent of Lord Mansfield's attempt to eliminate the doctrine of consideration. See *Hawkes v Saunders* (1782), 1 Cowp.289. "The ties of conscience upon an upright mind are a sufficient consideration."

(46) [1923] 2 K.B. 538, 545.

(47) 40 L.Q.R. 3.

expressed in terms of contract is an historical accident, and should not be allowed to affect the result of its essentially non-contractual nature ... it falls rather under the head of non-contractual than contractual liability ... it is in effect an obligation which the law imposes on an agent who purports to act for another."

Is detriment essential to estoppel?

These considerations lead to questioning of the requirement of detriment or change of position, on the part of T, so as to support an estoppel. However, Lord Tomlin in the leading case of *Greenwood v Martin's Bank Ltd.*⁽⁴⁸⁾ indicated that "The essential factors giving rise to estoppel are ...

- (1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made.
- (2) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made.
- (3) Detriment to such person as a consequence of the act or omission."

This statement could not be more emphatic, yet, Montrose⁽⁴⁹⁾ has sought to avoid its strictures by pointing out that the modern doctrine of estoppel was first formulated in a case of apparent authority, *Pickard v Sears*.⁽⁵⁰⁾ Further, in the authoritative statement of the principles of estoppel given by Parke B. in *Freeman v Cooke*⁽¹⁾, apparent authority was used to illustrate the doctrine but no mention of a requirement of detriment was made. He concludes that "just as detriment may not be a universal requirement for contract, so too it may not be for estoppel."

(48) [1933] AC. 51, 57.

(49) 16 Can.B.R. 757, 786.

(50) (1837) 6 A. and E. 469.

(1) (1848) 2 Ex. 654.

This, it is submitted, can be regarded as no more than an interesting and ingenious attempt to side step a difficulty placed in the way of the estoppelasserter. The weight of authority certainly supports the view that detriment is an essential element of estoppel. Indeed Turner⁽²⁾ indicates that "innumerable estoppels have failed on this ground" (inability to show alteration of position to detriment).

The true meaning of detriment in relation to estoppel

In *Fung Kai Sun v Chan Fui Hing*⁽³⁾, Lord Reid indicated the true test to be satisfied in a case of estoppel was that of "material prejudice to the plaintiff." Thus the representee must prove that "the belief ultimately entertained materialized in conduct, and caused him to act upon the representation in a manner prejudicially affecting his temporal interests."

The vital question which requires an answer is therefore the meaning to be attached to "alteration of position to the prejudice of the representee." Turner⁽⁴⁾ contends that the cases indicate its meaning to be merely some change in the business affairs of the representee which causes some loss of money or money's worth susceptible to quantification and assessment.

What then of the situation where T, as in *Reo Motor Co. v Barnes*, enters into an executory contract to purchase from P, under circumstances in which A has only apparent authority? Montrose, as observed earlier, sought to avoid the problem of what he saw as the absence of change of position by his assertion that detriment is not essential

(2) Spencer Bower, p.96. See *Carr v London and North Western Rail Co.* (1875) L.R. 10 C.P. 307; *Horsfall v Halifax and Huddersfield Union Banking Co.* (1883) 52 L.J. Ch. 599; *George Whitechurch v Cavanagh* [1902] A.C. 117.

(3) [1951] A.C. 489, 506.

(4) Spencer Bower, p.78.

to the estoppel theory. However, it may be that such circumlocution is rendered unnecessary upon more searching analysis of the elusive element of detriment.⁽⁵⁾

Re-consideration of detriment

The leading statement of principle, as to the standard against which detriment is to be measured, is that of Dixon J. in *Grundt v The Great Boulder Pty. Gold Mines Ltd.*⁽⁶⁾ "The principle upon which estoppel in pais is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations ... One condition appears always to be indispensable. That other must have so acted or abstained from acting upon the footing of the state of affairs assumed that he would suffer a detriment if the opposite party were afterwards allowed to set up rights against him inconsistent with the assumption. In stating this essential condition, particularly where the estoppel flows from representation it is often said simply that the party asserting the estoppel must have been induced to act to his detriment. Although substantially such a statement is correct and leads to no misunderstanding, it does not bring out clearly the basal purpose of the doctrine. That purpose is to avoid or prevent a detriment to the party asserting the estoppel by

(5) Misunderstanding of the nature of "change of position and detriment" is evident in Wright's review of the American Restatement of Contracts and Agency 1 Unvy. of Toronto L.J. 17,41. He poses the rhetorical question : "In the formation of an executory contract, where is this change of position by the third person who, because of a representation by the principal, believes that the agent is authorised?" This issue has been a constant thorn in the flesh of supporters of the estoppel theory. See Stoljar, p.31.

(6) (1937) 59 C.L.R. 641, 674, cited with approval by Lord Denning in *Central Newbury Car Auctions Ltd. v Unity Finance Ltd.* [1957] 1 Q.B. 371, 379.

compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it."

Thus the test for ascertaining the existence of detriment lies in measuring the change of position, of T, if P were to be permitted to disavow the truth of his representation that A has authority. It is only when the representor, P, wishes to disavow the assumption which his representation created, that estoppel is called in aid. The question of detriment is only at this stage relevant, and, so far as T is concerned, the detriment is to be measured by comparing the change which would be effected as a result of an assertion of the true position, with that which flowed from the representation. In the *Reo Motor Co.* situation, clearly T has acted in reliance upon P's representation that A was authorised. Although the reviewer of the case⁽⁷⁾ considered that such an executory "contract" could only be enforced on the "objective theory" of apparent authority based on contract, it is submitted that a more sophisticated view of detriment reveals a situation in which enforcement under the doctrine of estoppel is possible. The detriment is simply that T would be deprived of his right to enforce his contract if P were permitted to disavow his representation.

However, if this view is not acceptable, there are other sound reasons for arguing that T does suffer a detriment. This approach involves a detailed consideration of the doctrine of ratification

(7) 42 Harv. L.R. 570.

Ratification and detriment

Where an entirely unauthorised contract is entered into by an assumed agent on behalf of a "principal", then it is a well established rule of law that the "principal" may, by ratification, make the contract effectively his own.⁽⁸⁾

If the estoppel theory is assumed to underlie "apparent authority", then, in order that P may sue upon the "contract" under which liability has been imposed upon him, he must ratify the agent's act. Quite clearly, once P has ratified the "contract" then the relationship between P and T is entirely regularized.⁽⁹⁾ The point of interest, to this inquiry, is to ascertain the position of T before P ratifies. If it can be shown that, at this stage, T has "altered his legal position", then T will have suffered an undoubted detriment and the conditions of estoppel will be satisfied.

The Rule in Bolton v Lambert

The leading case on the effect of an unauthorised acceptance, by an assumed agent, in the name of a person to whom an offer is made, is Bolton Partners v Lambert⁽¹⁰⁾, a decision of the Court of Appeal. The rule, said to follow from this decision, is that the acceptance by A prevents T, the offeror, from withdrawing. If this rule is absolute, then it would appear that T is greatly disadvantaged by A's acceptance, in the period before P's ratification. For T would appear to be in no-man's land, he has no contract with P but cannot withdraw his offer; while T is bound to P, P is not bound to T. If this is so,

(8) The recognition of the principle by the House of Lords in *Keighley Maxsted & Co. v Durant* [1901] A.C. 240.

(9) "Omnis ratihabitio retrotrahitur et mandato priori aequiparatur." Co. Litt. 207a; 4 Inst. 317.

(10) (1889) 41 Ch. D. 295.

then, the mere offer by T and its subsequent unauthorised acceptance by A, is sufficient to deprive T of a legal right (of withdrawal of offer) and thus satisfies the requirement of detriment as an essential ingredient in the doctrine of estoppel. Thus T will be subject to P's whim and suffers a detriment thereby and therefore can sue P on the estoppel; T may be sued by P if P does ratify.

At this stage, any distinction between the theories of contract, based on manifested intention, and estoppel, as the conceptual foundation for the legal principles surrounding apparent agency, is almost reduced to a mere academic quibble⁽¹¹⁾. However, as Story J. observed⁽¹²⁾ the maxim "omnis rati habitio retrotrahitur et mandato priori aequiparatur" is a "useful and convenient rule" but like other rules it requires to be received with qualifications.

Qualifications to the Rule in Bolton v Lambert

The qualifications to the Rule in Bolton v Lambert require such extensive and detailed consideration that a relation of their investigation is confined to an appendix⁽¹³⁾ so as not to cause deviation from the main issue under consideration. However, to clearly state the object of the detailed investigation is perhaps desirable.

1. If the rule in Bolton v Lambert is "good", without the fetter of exceptions, then its effect is, inter alia, to satisfy the requirement of detriment essential to T's cause in instances of an executory contract. If so, there may be little meaningful distinction to be drawn between the theories of estoppel and manifested contract as the basal theory to apparent authority.

(11) Cf. the hypothetical problem situation illustrated p.15.
Also, if P does ratify, A's right to indemnity will arise, aliter, if no ratification.

(12) 5 L.Q.R.440.

(13) Appendix I.

P can sue T under the Rule in Bolton v Lambert; P because of estoppel is unable to defend against T's action by pleading A's want of authority.

2. If the Rule in Bolton v Lambert is "bad",⁽¹⁴⁾ then clearly there is need to distinguish between the alternative basal theories at present under discussion. In this context "bad" must include the existence of exceptions and uncertainty.

Conclusions drawn from consideration of the issue of ratification contained in Appendix I.

The conclusion drawn from the detailed investigation undertaken is that the uncertainty which exists in relation to the application of the "Rule" is such as to suggest, in cumulative effect, that a basal theory which involves, as a necessary part of its adoption, inclusion of the Rule in Bolton v Lambert is far from satisfactory. The exceptions and assumed exceptions are of such nebulous form and effect that the whole principle of ratification must be regarded with circumspection. If, as has been shown to be the case, the area is uncertain, or indeed if it leads to practical difficulty such as uncertainty of proof, then the estoppel theory is best avoided.

Problems of definition reconsidered

As has been noted earlier, there has been little agreement upon definition of terms in the field of agency.⁽¹⁵⁾ This thesis has

(14) See Lord Lindley in Fleming v Bank of New Zealand [1900] A.C.577. "The decision ... presents difficulties, and their Lordships reserve their liberty to reconsider it if on some further occasion it should become necessary to say so." See also Second American Restatement para.88 "To constitute ratification, the affirmance of a transaction must occur before the other party has manifested his withdrawal from it either to the purported principal or to the agent, and before the offer or agreement has otherwise terminated or been discharged."

(15) See footnote 5, p.7; footnote 22, p.17.

proceeded upon a working definition of apparent authority and it is appropriate at this stage to consider a more precise definition.⁽¹⁶⁾

Adoption of Hohfeld's analysis of "jural relations"⁽¹⁷⁾ demonstrates, clearly, the imprecise language frequently used in describing the meaning of authority. Cook indicates that "If P says to T 'A is authorised to sell you my horse upon terms to be agreed between you and him', A thereby has authority to bind P." (irrespective of any secret limitation placed upon A by P). By this illustration he seeks to demonstrate that "an apparent authority is a real authority."⁽¹⁸⁾ However, to adopt Hohfeld's more precise terminology, what is demonstrated is that an expression of unrestricted authority confers a power upon A, co-extensive with the expressed authority or instruction. Thus the term "apparent authority" may be said to be a misnomer. Apparent authority need only be relied upon in the absence of authority or as it is commonly termed actual authority; apparent authority denotes an absence of authority. To adopt Seavey's approach⁽¹⁹⁾ "authority should be limited to its primitive meaning of a power which can be rightfully exercised", i.e. a power flowing from a right to carry out agreed instructions. The extent of the power, vested in A, beyond his agreed instructions is, under the manifested intention approach, to be ascertained from the extent to which his acts appear to be authorised. This raises a question, adverted to earlier, apparent to whom?⁽²⁰⁾

(16) See Montrose, 16 Can.B.R.757,763.

(17) Fundamental Legal Conceptions, incidently Hohfeld's writings were collected and published posthumously under the editorship of W.W. Cook in 1923.

(18) Pickering v Busk (1812) 15 East 38, 39 per Lord Ellenborough.

(19) 29 Yale L.J. 859.

(20) See p.18; Slade J. in Rama Corporation Ltd. v Proved Tin and General Investment Ltd. /1952/ 2 Q.B. 147 and Willmer L.J. in Ryan v Pilkington /1959/ 1 W.L.R. 403, 414.

The notion that "apparent authority" may exist at large is inherent in the oft stated requirement that there must, in order to raise an estoppel, be reliance upon the "apparent authority".⁽²¹⁾ However, it is clear that the old notion of a "holding out" to the world at large has no part to play so far as T's claim against P is concerned.⁽²²⁾ The courts do require that the representation by one party shall "induce" the alteration in the position of the other party.⁽²³⁾ Thus far, it is clear that Ewart's Patagonian merchant⁽²⁴⁾ would fail because of his inability to show that he personally was induced to rely upon A's authority.

The "true contract"

Having discussed Cook's rather loose terminology it is now possible to consider again his assertion that there is a "true contract"⁽²⁵⁾ created between P and T where A has a "power" under the principles of apparent authority. He went to some length to demonstrate that this contract is one created by consensual agreement, if not "in fact" then "in law".⁽²⁶⁾ However, Montrose pointed out that such a statement constitutes merely an incorrect statement of the legal rule itself and is

(21) See Powell, p.57 also Underwood v Bank of Liverpool [1924] 1 K.B. 775, 798.

(22) See Martin v Gray (1863) 14 C.B.N.S. 839 per Erle C.J. "Formerly it was considered sufficient if the party was held out to the world as a member of a firm. Now, however, it is necessary that there should be direct evidence that the holding out should come to the knowledge of the plaintiff." See also Edmundson v Thompson and Blakey (1861) 2 F. and F. 566, where there was a holding out to some, yet, the person seeking to sue P was not able to bring himself within the class. Also, Lord Lindley in Farquharson Bros. v King & Co. [1902] A.C.325. footnote 29, ante, p. 19.

(23) See Oliver v Bank of England [1902] 1 Ch.610; Kershaw v Smith (A.F.) and Co. Ltd. [1913] 2 K.B.455.

(24) See p.18.

(25) See p.17.

(26) 5 Col. L.R.36.

not an explanation of it.⁽²⁷⁾ Whilst it may be accepted that there is a contract in law and that agency exhibits rules "sui generis", it may be doubted whether the "true contract" can be, what Cook regarded it to be, based upon "simple contract" founded on agreement between parties. Cook's demonstration of his theory assumed that all contracts were based upon the same theory of consensual agreement (in the case of apparent authority, the agreement being based upon an objective finding).

Consider his example illustrating his belief : "A says to B, 'X is authorised to sell you my horse upon terms to be agreed upon between you and him.' Privately A instructs X not to sell for less than \$150. X offers the horse to B for \$100 and B accepts. We all agree that A is bound, but why? By estoppel? So says the new school. A has not contracted with B, for he has not assented : there has been no meeting of the minds. To be sure there has not in fact. I contend there has been in law. A's statement to B is nothing more or less than an offer to contract with him leaving the terms to be fixed by X." Ewart contended that A's statement to B was not an offer to B but merely a statement that A was willing to be bound by an offer which was to be made by X, consequently there could be no question of a contract between A and B. This criticism of Cook's theory is based upon what was also Cook's misconception - that for the case to be covered by contract it must fall within the simple consensual form of contract. In order to develop this line of inquiry it is necessary to take a brief excursion into the jurisprudential basis of contract.

The jurisprudence of the origins of contract

The basic concept, currently accepted as underlying contractual

(27) 16 Can.B.R.757, 783.

liability, is that an agreement, entered into by parties who intend to create rights and duties, should be legally enforced.⁽²⁸⁾ This is the concept which underlies the type of contract described by Cook as the "true contract". The theories of contract generally accepted in the nineteenth century were based upon "consensus".⁽²⁹⁾

Lewis put forward three independent bases, to what he regarded as rights in contract, arising from quite distinct forms of obligation.⁽³⁰⁾

The first situation, considered as a basis for an action in contract, is a unilateral declaration of willingness to be bound. This was the form of contract enforced by an action in covenant. Although there would appear to be no injustice in requiring that a promisor should be bound to keep his promise, having stated that he is willing to do so and, morally, there is no doubt an obligation to abide by one's promises, by our law a unilateral declaration of will, in itself, is insufficient to impose binding obligations. The archaic form of contract is the formal undertaking by deed. Here it is the form of the promise which provides the binding force. In an action upon a contract alleged to take the form of a unilateral undertaking, there must be proof of a formal act of execution.⁽³¹⁾

(28) See *Weeks v Tybald* (1605) cited 91 L.Q.R. 247, 263.

(29) Probably derived from Kant's concept of contract which involved the promisor in a delivery of his freedom, from obligation, to the promisee. This required the mutual will of the parties, resulting in the common basis of meeting of the minds in 19th century theory. See Pound on Kant, "Introduction to the Philosophy of Law" p.260. See also "Innovation in Nineteenth Century Contract Law", Simpson, 91 L.Q.R.247,267.

(30) 9. Col. L.R. 116,132. He relied heavily upon material published in 52 Am.Law Reg.764 and 53 Am.Law Reg.112, by Crawford D. Hening.

(31) The formal contract is further considered in Chapter III p.113 and p.117 with reference to the undisclosed principal.

A second ancient form of contract was the obligation enforced by the action of debt. In its origin this was the contract arising from a completed sale. The binding force here flowed from the notion of "quid pro quo". This was the promise to pay a definite sum upon receipt of something of value. Upon receipt there was created a binding promise, not simply because of the promise but because of the receipt of something of value; it was the receipt which raised the duty to pay, based upon principles of unjust enrichment.

The third notion underlying our law of contract was that developing through the action of assumpsit. The obligation arose in an action of assumpsit in the fact that the promisee could show that he had done something, which he would not otherwise have done, at the instigation of the promisor. It is here that the element of deceit, fundamental for procedural reasons in an action of assumpsit, is raised. The argument being, that had the promisor not so requested, the promisee would not have so acted; the failure on the promisor's part to carry out his part of the undertaking thereby constituting a fraud on the promisee. In more contemporary thinking, the action of assumpsit is seen as a vehicle for the proposition that reasonable expectations ought not to be defeated.⁽³²⁾

The "true contract" again

Following Cook's assertion that in cases of apparent authority there is a "true contract" between P and T⁽³³⁾ and the counter assertion that this cannot be so, as there is in fact no meeting of

(32) See Atiyah, Inaugural Lecture at Canberra University "Consideration in contracts : a fundamental restatement." also Paley W. "Moral and Political Philosophy cited 91 L.Q.R. 247, 267.

(33) See also Second American Restatement para.8. Comment, indicates that apparent authority "conforms to the principles of contract."

the minds, it is pertinent to consider which species of contract is most closely resembled in the area under discussion.⁽³⁴⁾

Quite clearly the unilateral will of P cannot be the basis of any contract in cases of apparent authority. The principle of unilateral will could only have application to formal contracts.⁽³⁵⁾

(34) Montrose, 16 Can.B.R. 757, 783, refined Ewart's criticism of Cook's application of the doctrine of "manifested intention" so as to exclude any theory of contract based upon the combined wills of P and T. This refinement again exposed loose terminology in the formulation of the theory. Cook found the combined wills to be expressed in the formation of a contract in the "manifestation of consent by the principal to the third person, and in the case of a bilateral transaction, a counter-manifestation which completes the transaction." Montrose, however, indicated that the requirement of "consent" to a simple contract consists in a consent to the specific terms of the contract. Thus there can be no "contract to make a contract"; such an agreement is ineffective until the terms of the future contract are agreed. Further, "in the case of apparent agency there is no original agreement between P and T. P's representation that A is authorised does not necessarily result in a contract between P and T, that P will be bound by the dealings between A and T ... there may be such a contract between P and T, but it does not arise from T's consent to the arrangement with A. That consent does not also operate as consent to such a contract with P. In any case such a contract is quite different from the contract whose terms are settled between A and T." This distinction drawn between "consent", as conceived of by Cook as consent given by P to be bound by the agreement between A and T, and consent, as required by the "general principles of contract", in the sense of a bilateral willingness to conform to specific terms, demonstrates the inadequacy of Cook's terminology and the failure to "prove" his theory in jurisprudential terms.

(35) Moreover there is the ancient rule that only the parties to a deed can sue or be sued upon it, even though they are agents and not principals. Combes' case (1613), 9 Co. Rep. 75a. See Chapter I. Further, far from the contract being an expression of P's will, his will is quite absent!

The receipt of the "quid pro quo" making it unjust that P should retain the "thing" without fulfilling the obligation annexed to the making over of the "thing", would appear a more fruitful basis for a contract between P and T. However, there are two pressing considerations which make the principle of doubtful value in this instance.

The first point is the basic principle of our law, that contractual obligations or quasi-contractual obligations, are not to be imposed upon persons except with their knowledge and consent.⁽³⁶⁾ Whilst it is recognised that the principle of unjust enrichment is preserved to cover the exceptional case, there would appear not to be a suitable case for its application where a more basic principle is available. The second difficulty is the problem raised by the executory contract. The notion of "quid pro quo" would not meet the needs of such situations and the problems of *Reo Motor Car Co. v Barnes* would again arise.

Of the Lewis trilogy there remains the theory, based upon assumption, which links with the theory of the objective nature of agreement. Cook⁽³⁷⁾ maintained that the effect of apparent authority was precisely the same as actual authority, "so far as the persons to whom I have held a given person out as possessing certain authority are concerned, the relationship of principal and agent does exist: he is authorised,

(36) See Bowen L.J. in *Falcke v Scottish Imperial Insurance Co.* (1886), 34 Ch.D. 234,240. "The general principle is, beyond all question, that work or labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will."

(37) 6 Col. L.R. 36 in his reply to Ewart 5 Col. L.R. 354.

has authority to act for me to that extent : he is in fact my agent,⁽³⁸⁾ with all that authority and I am bound if at all, because through my agent I have entered into those contracts which have been duly accepted." Thus Cook maintains that by a legal fiction P himself has made a promise which causes T to adopt a particular course of action in expectation of a promised reward, therefore, it is his contract. There is, however, very substantial authority of great antiquity that such a fiction is unnecessary.

In *Seignior and Wolmer's Case*⁽³⁹⁾ Dodderidge J. said "An assumpsit to the servant for the master, is good to the master: and an assumpsit by the appointment of the master of the servant, shall bind the master and is his assumpsit. If my Bailly of my manor buy cattel to stock my grounds, I shall be chargeable in an action of debt: and if my bailly sell corn or cattel, I shall have an action of debt for the money; for whatsoever comes within the compass of the servants service, I shall be chargeable with, and likewise shall have advantage of the same."

Thus where P has not actually authorised the contract it could be shown to be his contract by showing that the man who made it, A, was his servant. The person receiving the promise recovered because it was made in the masters business. In terms of assumpsit, the failure, on the part of P, to make the payment to T constituted a deceit. T would not otherwise have acted or undertaken an obligation. To hold P liable in deceit it was not necessary to show any direct contact between P and T: it was simply enough to show P "caused" the harm which T suffered. The fiction of identification of P and A, so that P may be found to have undertaken the obligation is unnecessary.

(38) Note that this explanation in terms of "fact" is again transparently unscientific, for the factual situation, as he defines it, involves the acceptance of legal rules which he is attempting to expound.

(39) (1623) Godbolt 360; 78 E.R.212.

"P is liable simply because he has set in motion the machinery and his act motivated or induced the plaintiff (T) to change his position for a stipulated reward."⁽⁴⁰⁾

Again, the issue of the executory contract must be considered. Does the *Reo Motor Car Co. v Barnes* situation, pose any problem for this approach? The nature of an executory contract is that it remains in the form of a "promise for a promise". However, in essence, the theory of assumpsit proceeds on the basis that T would not have promised but for P's promise or action, which led T to promise, in the expectation of a benefit which P has failed to provide. It is not P's promise upon which T recovers, but rather, he recovers upon the fact that P has caused T to do an act. This is so even though the act which T has been caused to do is merely to make a promise with the intention of being legally bound. The executory contract poses no conceptual problem for this theory.

(40) 9 Col. L.R.116, 134. This does of course raise to some extent the policy argument raised in *Hern v Nichols* (1701) 1 Salk.289, so often cited yet infrequently followed (see also *Wayland's case* (1706) 3 Salk. 234) that the employer should bear the loss as he was really the person who, because of trust in the servant, brought the loss about. "Wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such a third person to occasion the loss must sustain it." The mystic quality of the term "enabled" has bedevilled lawyers for centuries. See Lord Halsbury in *Farquharson Bros. & Co. v King & Co.* [1902] A.C. 325, 332. "In one sense every man who sells a pistol or a dagger enables an intending murderer to commit a crime; but is he, in selling a pistol or a dagger to some person who comes to buy in his shop, acting in breach of any duty? Does he owe any duty to all the world ... to prevent people taking advantage of his selling pistols or daggers in his business, because he does in one sense enable a person to commit a crime?" See *Jerome v Bentley* [1952] 2 All E.R. 114, 118 per Donovan J., "Enabled in this context means the doing of something by one of the innocent parties which in fact misled the other." also similar statement of principle in *Central Newbury Car Auctions, Ltd. v Unity Finance Ltd.* [1957] 1 Q.B. 371.

A note of dissent

Montrose⁽⁴¹⁾ considered the relationship between P and T to be contractual, but, did not accept it was based upon assumpsit, which I have indicated to have been found satisfactory.⁽⁴²⁾ He contended that the basis of P's liability was the agreement made between A and T. He found Cook's explanation to be unsatisfactory, based as it is upon loose language and circular reasoning. Ewart's theory of estoppel, he considered displayed some merit and he devised a more direct contractual theory based upon the indirect approach, underlying the estoppel theory. As has been demonstrated earlier, the theory of estoppel requires that two stages be accepted in placing liability at P's door for A's unauthorised acts. The first is that in cases of actual authority a power is vested in A whereby P may be bound to T. The second is, that in the apparent authority situation, it is demonstrably the case that P ought to be under the same liability as he would have been under, had actual authority existed.

Montrose adopts a somewhat similar practical approach, which does, however, present theoretical difficulties. He contends that the agreement between A and T is that P will be liable to T and T liable to P. Further, that this agreement will be enforced (that between A and T), so as to make P liable, simply because P has shown

(41) 16 Can.B.R. 757, 788.

(42) His refusal to accept the assumpsit theory was, apparently, based upon his reluctance to accept a different basal theory for actual authority to that adopted for apparent authority. He considered actual authority to produce a contract which could not, in cases of special agency, be justified upon grounds of enforcement of reasonable expectations. There was, he claimed, no ground for saying that in special agency (actual authority without any apparent authority) T should reasonably believe A's statement as to the extent of his authority. This, with respect, displays misunderstanding of the assumpsit theory, which merely required that P should "cause" T's change of position. T's belief, reasonable or not, is irrelevant to actual authority.

a willingness to be liable by virtue of a representation to T.⁽⁴³⁾ P has led T reasonably to expect that contractual obligations would arise. This, it is contended, is sufficient reason for enforcing the agreement between A and T.⁽⁴⁴⁾ The achievement of justice is seen as the justification. Montrose accepts that objections may be raised, that such a theory takes no account of the "factual element" in such a transaction. The theory of estoppel takes account of the factual situation, that T will usually deal with A because he believes A to be authorised. However, he contends that the failure to take this aspect of positive belief into consideration poses no serious difficulty for, in practice, either T does believe A is authorised or he will refuse to deal with P. The failure to take account of T's belief is therefore not a serious defect in the theory of agreement between A and T. The merit of the theory is, perhaps, the precision which it gives to the relationship between P and T. Certainly the executory contract poses no problem.

I consider, however, that it ought to be noted that Montrose's proposition requires a flexibility in the doctrine of privity which has yet to be discovered in the mainstream of the law of contract.⁽⁴⁵⁾

(43) In cases of actual authority there has been an agreement with T, not merely a representation, that P would be liable. But liability is based upon the same basis as in the text.

(44) This argument is in essence supported by the approach adopted in Atiyah's "Inaugural address" (footnote 32 p.36) where he argues that contracts are enforced because there are "good reasons" for enforcing agreements. Consideration in the technical sense is a red-herring, if there are valid "considerations" for supporting enforcement, in practical terms, then this is sufficient.

(45) See *Dunlop Pneumatic Tyre Co. Ltd. v Selfridge & Co. Ltd.* [1915] A.C. 847; *Midland Silicones Ltd. v Scruttons Ltd.* [1962] A.C.446. c.f. *New Zealand Shipping Co., The v Satterthwaite (A.M.) & Co.* [1974] 2 W.L.R. 865 taking into account maritime practice upon a matter of privity, also, *Fleming v Bank of New Zealand* [1900] A.C.577.

Application of Traditional Theory to the Cases

Having established that the obligations arising in cases of apparent authority are derived from a contractual base, it is necessary to consider the efficacy of the theory, in its application in the cases, so as to "prove" its worth.

Wright submitted that the English courts have admitted of only two bases of liability (apart from the doctrine of the undisclosed principal considered in Chapter III) of a principal.⁽⁴⁶⁾ These are, of course, contract and estoppel. Wright considered that the liability of P "followed naturally from contract doctrine" to the extent that "the principal has manifested his consent to a given contract to the agent - real authority - or has manifested his consent to a third person - apparent authority ..."⁽⁴⁷⁾ Accepting the frailty of his reasoning, one may adopt this general proposition of the limited sources of liability and reinforce it with a more general statement of the traditional English approach.

Fridman states, "...the principal will only be bound to the third party by acts which are within the agent's authority. Anything that the agent does in excess of that authority will not affect the principal unless the principal adopts what the agent has done in accordance with the doctrine of ratification."⁽⁴⁸⁾ Authority, he asserts, may only be created "by contract - actual authority, or by estoppel - apparent authority."⁽⁴⁹⁾

(46) An attempt was made by V.C. MacDonald to classify the English cases into categories solely based upon either "real" authority or "apparent authority". 1934 3 D.L.R. 305 "An agent's authority to bind his principal in contract."

(47) 1 Unv of Toronto L.J. 17, 42.

(48) Fridman, p.89.

(49) He does instance a third category of authority created by operation of law, but, by this, he merely means the special cases of "agency of necessity" and agency presumed in the case of a wife or mistress. The wife's agency of necessity has been abolished, Matrimonial Proceedings and Property act, 1970, section 41.

If a theory is to be generally acceptable then it must provide, at the very least, a plausible explanation of the difficult case, together with a readily understandable explanation of the mainstream cases. If it can be shown that there are situations in which P is liable in respect of a transaction, entered by A, who had no authority or apparent authority (where the elements of estoppel are not demonstrably present), that P, in short, is liable simply because it was his agent (or has been his agent), then any contractual theory, based on objectivity, may have to "give way" to some other principle.

The difficult case of Hambro v Burnand

A case requiring explanation in terms of any proposed all embracing theory of obligation imposed in the absence of actual authority is Hambro v Burnand.⁽⁵⁰⁾

Here, a group of underwriters at Lloyd's authorised A to underwrite the solvency of corporations. The group of underwriters, P, authorised A to underwrite insurance policies in the names of A and P. In the names of A and P, A underwrote a policy which guaranteed the bills of an insolvent company. T accepted a bill drawn by the insolvent company after having taken A's word that he was authorised to issue the guarantee; T did not request nor did he obtain sight of the written power of attorney, indeed it appeared he was not aware of its existence. When the bill became due, the insolvent company dishonoured it. T sued P and A upon the policy of guarantee and was successful in the Court of Appeal. I submit that the case poses considerable difficulty for any attempt to justify the decision in terms of actual or apparent authority. However, no one has suggested that the decision is "wrong", yet there is no general agreement upon the

(50) [1903] 2 K.B. 399; [1904] 2 K.B.10.

nature of A's authority. It is submitted that the case defies classification into any theory of "real" or "apparent" authority.

At first instance Bigham J. held that the underwriters were not liable on the policy, on the grounds that A had acted outside his authority in failing to underwrite in accordance with the objects for which he was employed. On appeal, however, this reasoning was interpreted as an impermissible inquiry into motive. Collins M.R., approached the argument in this way: "It has been contended for [P] that, although express authority was given in writing, as in the present case, authorising an agent to make such a contract as he here made, it is open to the principal to say that, nevertheless, if it appears on inquiry into motives which existed in the agent's mind, that he intended, in making the contract, to misuse for his own ends the opportunity given to him by his authority, and apply it to a purpose, which, if the principal had known of it, he would not have sanctioned, then because the agent was so influenced by improper motives, the principal is not liable upon the contract made by him. I should have said myself, apart from authority on the subject, that such a proposition could not hold water." He went on to say that, "where a written authority given to an agent covers the thing done by him on behalf of the principal, no inquiry is admissible about the motive upon which the agent acted."

Authority on the subject was, in fact, somewhat difficult to find but support was gained from the American case *Westfield Bank v Cornen*,⁽¹⁾ where Andrews J., stated, "...whenever the very act of an agent is authorized by the terms of the power, that is, whenever by comparing the very act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the

(1) (1867) 37 N.Y.320. See also *North River Bank v Aymar* (1842) 3 Hill (N.Y.) 262 cited in support.

constituent as to all persons dealing in good faith with the agent; such persons are not bound to inquire into the facts aliunde. The apparent authority is the real authority."

Did actual authority exist?

The general proposition under discussion is that in order that P should be bound there must have been either an actual authority or an apparent authority exercised by A. Can this proposition stand alongside Hambro's case? Did actual authority exist?

It is established beyond all doubt that if T is aware that A acts for his own purposes then he cannot hold P liable.⁽²⁾ In these circumstances A cannot be said to have actual authority. Thus, upon the English approach outlined above,⁽³⁾ unless P makes some representation or permits A to make a representation on his behalf, then A cannot be said to have "authority" when he acts for himself. However, Hambro's case would appear to indicate that, in circumstances where T is unaware of the improper motive, A does have a power to affect P with liability - despite the fact that T was unaware of any written power of attorney. Ought Reckitt's case to be regarded as an exception to the rule that inquiry into motive is inadmissible? If the general rule is that inquiry into motive is inadmissible, then Hambro's case exhibits a rule under which a fictitious "real" authority is created - there is no place here for a rule that liability exists upon apparent authority based on objectivity. Reckitt would be the exception which reveals the truth.

Powell⁽⁴⁾ has argued that the power in Hambro's case flowed from

(2) Reckitt v Barnett, Pembroke and Slater, Ltd. [1929] A.C. 176.
A strong case as there was no evidence of actual knowledge, on T's part, that A had an improper motive, he was fixed with constructive notice.

(3) P.44.

(4) Powell, p.79.

actual authority "The underwriter did in fact underwrite a policy in the names of himself and his principals. He therefore acted within his express authority." This it is submitted, is difficult to reconcile with Reckitt's case.⁽⁵⁾ Moreover, it is submitted that it was implicit in the written power of attorney that the agent, in Hambro's case, should only underwrite payments by corporations which he reasonably considered to be solvent. "Hence the agent was not authorized to do the very thing which he did."⁽⁶⁾

If we accept, as is indeed generally accepted, that A acted quite outside his actual authority, then on the principle underlying the present inquiry, the authority, which bound P, must have been apparent authority.

Support for the view that Hambro's case was indeed a case of apparent authority is to be found in the writings of Montrose.⁽⁷⁾ It flows from his general assertion that an appointment of A to a certain position necessarily carries with it an incidental authority to disclose the nature of the appointment. He contends that any other agreement must necessarily amount to an instruction not to disclose the agency. This being so, A's act amounts to a representation, on behalf of P, that he has authority to transact a certain class of business. Thus the very act of A amounts to a holding out by P giving A an apparent authority. He, therefore, regards Hambro's case as purely and simply an illustration of apparent authority.

Stoljar⁽⁸⁾ deals with Hambro's case in a rather pragmatic way

(5) See footnote 2 ante.

(6) Seavey, "Agency Powers", 1 Okla.L.R.3.

(7) 50 L.Q.R. 229,230; 16 Can.B.R.757; 17 Can.B.R.693,711.

(8) Stoljar, p.100,101.

which limits considerably any principle to be drawn from the decision. He does, however, consider that it displays the feature of apparent authority. Whilst accepting that A in fact had no authority to do that which he did do, the question is posed, "How could the third party ever know whether A was acting honestly?" Any scrutiny of the power of attorney would of course have yielded no hint of wrong doing; A would still appear to be acting within his authority. Mathew L.J.⁽⁹⁾ asked "could it in such a case be suggested that, after inspecting the documents, the plaintiffs would then be bound to inquire into the motives which actuated the agent in acting upon them? How could such an inquiry, practically be made?" Of course no inquiry could reasonably be expected to reveal the absence of authority. However, Stoljar recognises that no actual authority does exist, but, creates a form of "constructive apparent authority" on the assumption that even if a scrutiny of the power of attorney was undertaken it would not reveal the absence of authority. Consequently it is considered just that T's position ought not to be prejudiced by his failure to inspect any written authority. However, Stoljar deals with the case alongside instances of agents exceeding borrowing powers⁽¹⁰⁾ and is regarded merely as an illustration of the principle, accepted in those cases, that a distinction ought to be drawn between an agent's express power to borrow and the use he makes of the power. He concludes that Hambro's case constitutes "an excellent illustration of how the doctrine of apparent authority works with regard to written documents."

Two points may be made with respect to Stoljar's approach:

(9) At p.26.

(10) See *Withington v Herring* (1829) 5 Bing.442; *Perry v Hall* (1860) 2 De G.F. and J. 38.

1. If the case is to be regarded as an illustration of a narrow rule in relation to written documents, then perhaps excessive concern is unwarranted. However, Stoljar appears to be in singular isolation in this restrictive interpretation.
2. The whole tenor of the judgments in Hambro's case itself, was to the effect that the case was not an instance of the usual construction of apparent authority, which is, of course, based upon objective findings which were absent in the instant case. Indeed, Mathews L.J., as previously noted, based his judgment on the point that A had in his possession the indicia of authority, so that if A had requested inspection, "there would have been apparent authority."

Collins M.R., as previously indicated, was at pains to discover what may be called "constructive actual authority."

Romer L.J. was content to find that T ought, in justice, to be in the same position "as if they had asked to see the written authority and it had been produced to them."

The court did, in fact, expressly negative any holding out or appearance of authority created by the principal. However, in citing the judgment of Andrews J., in *Westfield Bank v Cornen*, that "The apparent authority is the real authority", where motive is inadmissible, clearly the court "struggled to find apparent authority where none existed."⁽¹¹⁾

The question remains, as posed earlier in relation to apparent authority, "apparent to whom?" "As it was not apparent to either the agent or the third person, it could only have been apparent to the court as a matter of law."⁽¹²⁾

(11) Seavey 1 Okla. L.R. 3,14.

(12) Wright, 1 Unvy. of Toronto L.J. 17, 43.

More difficult cases falling outside the traditional theory of apparent authority.

It would appear that what was apparent to the court, as a matter of law, was that had T made a proper inquiry, then the situation would have been such that A would have appeared to have authority, apparent authority. One might at this juncture pose the question, what of the Patagonian businessman?⁽¹³⁾ Had he made a local inquiry as to custom then the buyer would have been disclosed to have had apparent authority. Ought the Patagonian to be placed at a disadvantage, as compared with his knowledgeable counterpart? Does the Hambro principle make for uncertainty, where certainty existed? The early American case of *Thurber and Co. v Anderson*⁽¹⁴⁾ met this problem, which now discloses itself, in terms of the difficulty of reconciling a desired result with traditional theory.

In this case, a father appointed his son to be general manager of the father's grocery store. The son ordered goods (ale and cigars) from a seller who carried on business in another area. The goods were delivered but the father refused to pay for them, claiming that his son had no authority to make such a contract. The judgment makes it clear that the father had expressly instructed the son that he was not to make contracts in respect of the class of goods in question. There could be no question of actual authority. It was held that the father, P, was liable on the contract created by the son, A. The son, as a general manager would, under normal circumstances, have had authority to purchase the goods in question. Further, however, the business

(13) See p.19.

(14) (1878) 88 ILL.167. The case was either unknown or ignored by Ewart and his contemporaries.

community within which the son normally operated thought that the son had a greater authority than was actually intended by the father. The important point which the case makes was, that the father never held out his son as general manager to the seller, T, in question. T, carrying on business in another area, did not know of and, necessarily therefore, could not have relied upon, the son's expanded authority as general manager.⁽¹⁵⁾

A second American case serves to emphasise the difficulties encountered when attempts are made to explain cases within the rigid confines of either actual or apparent authority.

In *Kidd v Thomas A. Edison, Inc.*⁽¹⁶⁾ a general booking agent promised, on behalf of his company, that expenses incurred by an artiste during a tour, would be met by the company. The contract took the form commonly adopted by similar companies and was such as to fall within the customary authority of booking agents. Unfortunately the agent in question had only a limited authority which did not extend to such an undertaking as was given. The question for decision was whether the expenses incurred were recoverable from P. The artiste in question did not know what was in fact customarily within a booking agent's authority. Nevertheless Judge Learned Hand held that P was bound by A's undertaking to T. This must constitute a departure from any theory of apparent authority. T could not have relied upon any holding out by P but could only have relied upon A's unauthorised

(15) The Montrose approach, that A may hold himself out by virtue of his authority to disclose his agency, would not appear to explain this case, as T was unaware of A's capacity.

(16) (1917) 239 Fed. 405 (S.D.N.Y.)

assurance that he had authority.⁽¹⁷⁾

Brocklesby v Temperance Permanent Building Society

To return to authoritative but difficult English cases, I consider two more instances in which obligations were imposed upon P in circumstances in which explanation within the traditional theories of actual or apparent is difficult or impossible.

The facts of Brocklesby v Temperance Permanent Building Society⁽¹⁸⁾ are somewhat complex but a full reiteration is desirable.

P had loaned money upon a mortgage of land, thereby obtaining possession of the title deeds to the land. P himself borrowed money from the X Bank and, as security, deposited the title deeds with the X Bank. Subsequently P wished to borrow a larger sum from the Y bank

- (17) Application of the Montrose approach to this case would, again, fail to achieve any convincing argument as to the existence of apparent authority. Even if one accepts that A was authorised to disclose his agency, a general agency, the customary incidents of that agency were unknown to T.

Montrose does, however, take his thesis to extraordinary lengths. Taking illustration (3) of the First American Restatement, relating to disclosed agency, he asserts that it displays, contrary to the commentary, an instance of apparent authority. "Illustration (3): P employs A as the general manager of his foundry, instructing A to purchase his alloys only from a certain firm. A, finding the alloys to be unsatisfactory, and without consultation with P, purchases alloys from another firm, T, writing to T upon personal stationery, and signing the letter only 'A, agent of P.' P is bound upon this transaction."

Montrose contends that although T is unaware that A is general manager "A's signature means that he is P's agent for the purchase of alloys, and is equivalent to such a statement made to T, by P. The mere fact of an agent negotiating with a third person amounts to a representation by him, equivalent to one by the principal, that he has authority to transact that class of business." I submit that whatever the basis of P's liability, if it does exist, in this illustration, it certainly cannot be apparent authority as generally understood. A has not disclosed his capacity as general manager and his disclosure of agency, as a special agency, is incomplete and unauthorised in the absence of full disclosure. The words "A agent of P" are descriptive only. Indeed, Montrose himself, 50 L.Q.R.224,230, indicated "Hambro v Burnand cannot be applied where it is sought to rely on a representation by an agent that he has authority to do a particular act when he has no actual authority to do it."

- (18) [1895] A.C. 173.

on the same security. It was, of course, necessary that, in order to repossess the title deeds, pledged with the X Bank, he should first pay off the first loan. For this purpose he gave A, his son, a written authority addressed to the X Bank to hand over the title deeds to the son on payment to it of the loan and interest. He also gave the son a second authority, addressed to the X Bank, stating that the Y Bank had agreed to make a larger loan and noting the amount of it. A used only the first general authority to obtain possession of the deeds from the X Bank and then pledged them with the Z Bank (not as required, the Y Bank) to secure a loan in excess of the authorised sum, keeping the excess sum for himself. Later the Z Bank required repayment of the loan and A forged a transfer of the mortgage to himself. He also obtained a transfer of the equity of redemption, all of which gave him the appearance of being owner of the land. A then mortgaged the land to building societies which repaid the loan from the Z Bank. P then sought to redeem the mortgages by offering to pay off the amount which he had actually instructed A to borrow on his behalf. The point at issue was whether P was bound by A's dealings with the Z Bank. If so, he would have to repay the full amount which A had borrowed and the building societies repaid. If he was not bound then his only obligation would indeed be to repay the amount of the loan actually authorised. It was held in every court that P was liable to repay the full amount borrowed.

Before considering the basis upon which liability was imposed, it is necessary to note the particular nature of title deeds to land. Unlike negotiable instruments (which by their very nature constitute impersonal rights unattached to an exclusive owner) they clearly indicate a particular owner and specify that P, not A, is that owner. In the event of A attempting to dispose of the deeds, T will be put on inquiry as to the true owner. A, it would appear, cannot transfer

title deeds in the absence of a written authority from P.

In the instant case A did have a written authority to obtain possession of the deeds; he did have authority to borrow, but this authority was limited in amount.

Lord MacNaghton based P's liability upon the fact that, as he saw it, the Z Bank had, upon P's invitation, dealt in good faith with A, without notice of the limitation as to amount placed upon A's authority.⁽¹⁹⁾ This does, of course, ignore the fact that (a) P made no direct representation of any borrowing power vested in A and (b) any representation by A to the Z Bank must have been outside his authority, as the second written authority addressed to the X Bank indicated that the loan was to be obtained via the Y Bank.

Lord Herschell based P's liability upon the authorised delivery of the deeds to A, coupled with an authority to raise money on them.⁽²⁰⁾ He felt that loss should not fall "upon those who, finding him [A] in possession of the deeds with authority in fact to borrow, had no knowledge of the limitation of the amount which he was authorised to raise upon the security of the deeds." Again, liability is imposed in respect of only one authorised act, the obtaining of possession, and an unauthorised act of borrowing.

Powell considered that the indication is that this was a case of "apparent authority in which P delivered to A the means of getting the deeds, but did so by means of a document, i.e. the first written authority, which contained, in effect, a representation that A had unlimited authority to borrow on the security of the deeds."⁽²¹⁾

(19) At p.184.

(20) At p.180.

(21) Powell, p.84.

Fridman, consistently with his rigid classification of authority, considers the case to be decided on authority by estoppel. He interprets the case as authority for the proposition that "the delivery of title deeds to an agent either directly or indirectly, in circumstances in which the agent is made to appear, or would normally appear, to the outside world as the owner of such deeds, or entitled to deal with them, will give rise to an estoppel, despite whatever limitations exist in the agent's authority."⁽²²⁾

I submit that the Brocklesby case does not, on any objective test, support either Powell's or Fridman's rule. How can it be said that an authority to give up possession of deeds contains "in effect" an authority, unlimited in extent, to pledge? How can the mere delivery of deeds into the possession of A constitute circumstances in which A is made to appear as owner of the deeds, or entitled to deal with them, when the deeds on their face notify that the owner is P?

Fry v Smellie

Fridman himself goes on to classify the second English case, which necessarily must be discussed in this context, as an illustration of the "Brocklesby rule".

In Fry and Mason v Smellie and Taylor,⁽²³⁾ P owned shares in a limited company and wished to obtain a loan of not less than £250, using the shares as security. P gave A the documents of title to the shares (the share certificate and a signed transfer form with the name of the transferee left blank) and instructed him to borrow not less than £250 on the security. A borrowed £100 from T, depositing the documents with T. When A failed to repay the loan, T completed

(22) Fridman, p.112.

(23) [1912] 3 K.B.282.

the blank transfer and obtained the shares. The Court of Appeal held that T was entitled to the shares as against P. As noted earlier, Fridman, as an adherent of the principle of authority by estoppel as an explanation of the Brocklesby case and, of Fry's case as an illustration of the Brocklesby principle, consistently treats Fry's case as based upon a representation of authority, constituting apparent authority. Powell, however, refused, for powerful reasons to be discussed later, to regard the case as based upon apparent authority.

An examination of the judgments in Fry's case itself, reveals an illuminating passage in which the conceptual basis of P's liability is discussed. Vaughan Williams, L.J.⁽²⁴⁾ considered the liability in terms of estoppel which clearly indicated that the term was used in a general sense, meaning simply that P would be unable to assert his title, for reasons unconnected with the doctrine of estoppel by representation. "What really creates the estoppel, as it is called, is the relation of the transferor to the transferee - the relation of principal and agent ... It is really an instance of the application of the rule that when one of two innocent persons must suffer, the person who rendered it possible for the wrongdoer to do the wrong by reason of the trust he reposed in the wrongdoer should suffer rather than the person who suffers from the agent's having that opportunity ... It occurs to my mind that it is not strictly speaking estoppel by representation." The essential point to be extracted from this passage and which requires emphasis, is that it is accepted that in a case where there is no actual authority vested in an agent, where the

(24) At p.292.

essentials of apparent authority or authority created by way of estoppel by representation are absent, there is nevertheless recognised liability imposed upon P simply because of the relationship of principal and agent.

Powell argued that Fry's case could not be based upon apparent authority and he based his argument upon principles fundamental to our law, not simply upon the technicalities of "holding out". It is a well established principle that the mere delivery of property into the hands of another, is not sufficient to give rise to an estoppel should that other attempt, unlawfully, to dispose of the property.⁽²⁶⁾ If, therefore, Fry's case is to be regarded as a case of authority created by representation, giving rise to estoppel or apparent authority, then he argued, its effect is that wherever P, an owner, gives his agent, A, a blank transfer of shares, or similar document, by an unauthorised act A may divest P of his title, without the necessity of any further representation on the part of P. This consequence certainly does not follow when a motor vehicle, even accompanied by the "best evidence of title", the registration book, is given into the possession of an agent.⁽²⁷⁾

Fridman⁽²⁸⁾ has necessarily attempted to counter Powell's approach by asserting that it ignores the effect of placing a document "of this kind" into the hands of an agent, in circumstances in which

(25) Powell, p.82, 83.

(26) See *Biggs v Evans* [1894] 1 Q.B.88; *Central Newbury Car Auctions, Ltd. v Unity Finance Ltd., Mercury Motors (Third Parties)*, [1957] 1 Q.B.371; *Mercantile Credit Co. Ltd. v Hamblin* [1965] 2 Q.B.242.

(27) See cases cited in footnote 26 ante. There is of course an exception to the rule in the case of a negotiable instrument which by its very nature imposes a duty of care upon P. See section 20 of the Bills of Exchange Act, 1882.

(28) Fridman, p.113.

the agent can reasonably be taken to have complete authority to behave in the way he has done. He asks two rhetorical questions: (a) Is there not a representation contained in the document? (b) Is this not like the case where an owner has entrusted goods to another in circumstances in which third parties can reasonably infer that the possessor of the goods is entitled to deal with them? To each question I submit the answer ought to be no!

In support of his contention that the document contains a representation in itself he cites the view of Pickford J., in *Fuller v Glyn, Mills, Currie and Co.*,⁽²⁹⁾ (a case in which P did not actually sign a transfer himself because he was merely the purchaser of the shares. The transfer had, however, been signed by the owner, and P left the share certificate, together with the signed transfer in the hands of A, who unlawfully pledged the shares).

"I must therefore consider the principle on which this estoppel rests. In my view it does not rest on the mere manual act of signature. That act is not an essential element in the estoppel. Its importance, where it exists, is as one step towards placing in the power and disposition of another an instrument which carries with it, and which when produced to a third person will convey to that third person that such an authority exists ... In my view the plaintiff, though he did not actually sign the transfer himself, gave rise to just the same mischief as if he had affixed his signature himself."

However, is there, objectively, anything in a blank share transfer which in itself signifies that A has an authority to deal with the shares himself? In fact, the document clearly indicates that P owns the shares and cannot by any fiction be said to signify anything

(29) [1914] 2 K.B.168.

as to A's authority. Support for this latter interpretation which, I believe conclusively, disposes of the approach indicated by Pickford J. and adopted by Fridman, is to be found in the broad statement of principle per Lord Greene M.R. in *Wilson and Meeson v Pickering*.⁽³⁰⁾ "The application of the principle of estoppel to instruments handed to an agent in blank, in order that they may be filled in by him, has been much debated in the past. The view, which so far as my researches go, appears to me to have the weight of judicial opinion behind it is that, apart of course from some specific representation of authority or some holding out or some special character of the agent from which his authority would naturally be inferred, the rule that a person who signs an instrument in blank cannot be heard as against a person who has changed his position on the faith of it, to assert that the instrument as filled in is a forgery or that it was filled in in excess of the agent's authority, is confined to the case of negotiable instruments."

Now, whilst there is no doubt that one cannot say that estoppel is any longer restricted to negotiable instruments,⁽³¹⁾ nevertheless, it appears that something beyond mere signing of a document is normally required to raise the estoppel. In *Mercantile Credit Co. Ltd. v Hamblin*⁽³²⁾ it was held that a further requirement, proof of negligence in the traditional formulation of duty, breach and damage,

(30) [1946] K.B.422, 427.

(31) See *Branwhite v Worcester Works Finance Ltd.* [1969] 1 A.C.522 commenting adversely on *Campbell Discount Co. Ltd. v Gall* [1961] 1 Q.B.431 in which the principle was restricted to negotiable instruments. Also *United Dominions Trust Ltd. v Western* [1976] 2 W.L.R.64.

(32) [1965] 2 Q.B.242.

was essential to raise the estoppel.⁽³³⁾ Why then, if Fry's case is correctly decided, was the signing of the instrument sufficient?⁽³⁴⁾ As to Fridman's drawing a parallel between the mere signing of an instrument and the entrusting of goods in the possession of an agent in circumstances which lead a third party reasonably to infer an authority to deal with them has been vested in the agent, this does, perhaps, merely serve to emphasise the weakness in his argument, for, there appears to be a clear distinction between the two situations. In the case of goods, there are additional circumstances giving an appearance of authority. In the case of the instrument, the additional circumstances are absent.⁽³⁵⁾

Perhaps there has been a sufficient demonstration to warrant the claim that in many cases the courts and academics have struggled to find apparent authority and, although they have succeeded in convincing themselves that they have found it, a feeling of uneasiness must

(33) The document signed being a hire purchase proposal form.

(34) It could hardly be said to be an unambiguous statement of A's authority - see *Colonial Bank v Cady* (1890) 15 App. Cas. 267.

(35) Hence the emphasis upon the special character of the factor under the Factors Acts. See *Pearson v Rose and Young, Ltd.* [1951] 1 K.B.275; *Cole v North Western Bank* (1875) L.R.10C.P.354. Perhaps Fridman's argument may be considered to be based upon a misconception in that he equates the handing over of a blank transfer with the position, at common law, of P handing goods into the possession of a factor. As has been recognised in section 1 of the Factors act 1889, a factor is a general agent customarily empowered with authority to sell. Fry's case did not consider the question of a class of general agent. Further, under the Factors Act, which basically simply codified the common law, the factor must take possession of the goods for some purpose connected with his business as a factor. Emphasis on the mere handing over of a signed transfer obscures what must, properly, be taken into consideration - other surrounding circumstances and policy considerations - in an effort to draw Fry's case within a too restrictive theory.

remain. I consider it to be sufficiently well established by the English cases, considered above, that development of a satisfactory theory to cover the difficult cases has been stifled, rendering prediction difficult, if not impossible.

Uncertainty in current theory

Perhaps two simple references will serve to demonstrate the present uncertainty.

Atiyah⁽³⁶⁾ boldly states that "It seems ... that in addition to cases in which the agent acts within his 'usual' or 'ostensible' authority, there is an independent principle which, at least in some circumstances, enables an agent to pass a title beyond his actual authority."⁽³⁷⁾ However, he goes on to note that there is another view, that the authorities supporting this "independent principle" are anomalous and should not be extended. "On this view the third party will only be protected if the agent had apparent authority or usual authority beyond his actual authority."

This view is in fact voiced in Chitty⁽³⁸⁾, "There is a line of

(36) The Sale of Goods, 4th ed. p.187, 188.

(37) See [1965] J.B.L. 130, 136, where Atiyah, without citing direct authority claims, "If a person takes his car to a dealer and instructs him to sell it for £500 and the dealer sells it for £400 it would seem elementary that the third party gets a good title ... This is because the dealer is merely exceeding his authority and not doing an act which is right outside it." This formulation would appear to render negatory the statutory provision in section 2 (1) of the Factors Act 1889. c.f. Chitty on Contracts, 23rd ed. Vol.II, para.65 where it is stated that "In so far as [the rule] is good law, [it] should probably be confined to situations where an agent is entrusted with title deeds to property with authority to borrow on the security of such property, and borrows in excess of the sum authorised."

(38) Chitty on Contracts, 23rd ed. Vol.II, para.65.

cases indicating that where an agent has some authority and exceeds it, the principal may be bound by the acts of such agent, though there is neither actual nor apparent authority. Such cases are hard to reconcile with the normal principles of authority, for such a rule would be difficult to limit."⁽³⁹⁾

In view of the manifest difficulty in reconciling traditional doctrine with the approaches adopted, although not avowedly, in the series of cases investigated in the foregoing pages, I consider it essential to delve more deeply for an approach which will more genuinely meet the needs of the diverse situations.

Agency Power

The search for a more satisfactory theory leads to a consideration of a more adventurous approach to the concepts underlying the "difficult" cases. The development of the approach in question has been principally undertaken by Seavey. As Reporter on Agency in the American Restatement, he was able to give comprehensive expression to his theory of the "Inherent Agency Power".

(39) See also Fridman, p.97, where he asserts that a usual authority, being implied as part of actual authority, where it is restricted but notice is not given to third parties, may be relied upon by such third parties, as being an authority objectively ascertained - there is no need to rely upon apparent authority or ostensible authority which only results from conduct on the part of the principal which gives rise to an estoppel i.e. involving a subjective test of knowledge. This appears to be based upon *Edmunds v Bushell and Jones* (1865) L.R. I.Q.B.97, 99 per Cockburn C.J. "... for it 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." See consideration of the case Chapter III in relation to the problem of *Watteau v Fenwick* (1893) 1 Q.B.348, p.131 c.f. the position of a wife forbidden to pledge her husband's credit, the husband will not be liable, unless there is conduct giving rise to estoppel, *Debenham v Mellon* (1880) 6 App.Cas.24.

Terminology again

The American Restatement attempts to introduce some precision into the terminology surrounding agency, by the use of the terms "power" and "authority". However, the attempt has not been wholly successful and before a consideration of the Articles covering "Inherent Agency Power", it is worthwhile noting the apparent defects in the terminology adopted.

Authority⁽⁴⁰⁾ is defined in this way: "Authority is the Power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him."⁽⁴¹⁾

Although authority may properly be said to create power it would seem to be inaccurate to describe "authority" as "the power". However, quite clearly Seavey was aware of the dangers of the misuse of terminology and himself defined "power" as an ability, given by a legal rule, to create, change, or extinguish legal relations by doing an act.⁽⁴²⁾

(40) Para.7 American Restatement (unchanged in Second Restatement).

(41) Criticised in 16 Can.B.R.757 and also in 17 Can.B.R.248, "The Law of Agency", Falconbridge.

(42) Seavey, 29 Yale L.J. 859, 861. See also "The authority of an agent - definition", Corbin 34 Yale L.J.788, 794. "Authority differs from power : Authority is a fact; power is a legal relation. Authority is conduct of the principal, including either oral or written communication to the agent; power is neither conduct nor a document. Authority may create power, but not always [e.g. where P himself has no power to empower A, he may authorise ineffectively]; power may be created by authority, but may also be 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 the principal and third persons. Authority merely describes an historical event; power predicts possible events in the future."

Paragraph 140 of the Restatement outlines the general rules as to the liability of a principal to a third person.

"The liability of the principal to a third person upon a transaction conducted by an agent, or the transfer of his interests by an agent, may be based upon the fact that -

- (a) the agent was authorised;
- (b) the agent was apparently authorised; or
- (c) the agent had a power arising from the agency relation and not dependent upon authority or apparent authority."

Quite clearly it is incorrect, in view of the distinction drawn between power and authority,⁽⁴³⁾ to say that an agent's power can arise from the fact of the agent's "power arising from the agency relation." The relationship between P and A is a fact. That a power arises from this relationship is a result which is achieved by the application of a legal rule to a factual situation. Thus the Restatement groups together various factual situations in which an agent has, by law, a power to bind P to T by what is described as the "inherent agency power."

The power is defined in this way:⁽⁴⁴⁾ "Inherent agency power is a term used in the restatement of this subject to indicate the power of an agent which is derived not from authority, apparent authority or estoppel, but solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent." The comment to paragraph 140 gives evidence of the underlying reasons for the "inherent agency power." "... in transactions in which there is neither authority nor apparent authority, the

(43) See previous footnote, 42.

(44) Second Restatement, para. 8A.

principal may be subjected to liability because, in view of the relations of the parties or the subject matter involved, policy requires that the agent should have power to bind the principal."

It is now clear that policy and not concepts creates rules in this area.⁽⁴⁵⁾ To take the specific instances from paragraphs 140 and 8A, it may be said that liability may be imposed upon P under inherent agency power because:

Policy requires that,

- (1) A's acts should result in P's liability, or, more narrowly,
- (2) To effect the protection of persons harmed by A.

The need for expression of policy

It is, furthermore, clear that there is a real need for a cohesive statement of policy or perhaps a disclosure of underlying concept or concepts in this uncharted area.

The American experience has given rise to greater expression than has hitherto been the case in English law. Indeed, perhaps the most frank expression of recognition of the problem and indication as to its solution was made so long ago as 1917 by Judge Learned Hand in *Kidd v Thomas A. Edison, Inc.* He recognised the difficulty in explaining many of the cases decided upon apparent authority in terms of consent or manifested consent, consonant with the principle of objectivity underlying the concept. He said: "The responsibility of a master for his servant's act is not at bottom a matter of consent

(45) Concepts no doubt arise from policy but an established concept becomes policy in itself. In this situation it becomes difficult to distinguish policy and concept. Inherent agency power appears to be an area in which the policy element of existing concept is absent.

to the express act or of an estoppel to deny that consent, but it is a survival from the ideas of status ... While we have substituted for archaic status a test based upon consent, i.e. the general scope of business, within that sphere the master is held by principles quite independent of his actual consent and indeed in the face of his own instructions." He also, in explaining the cases ostensibly decided upon apparent authority, went on to meet the rationalisation based on apparent authority, later to be submitted by Montrose,⁽⁴⁶⁾ of those cases in which T relied solely upon information communicated by A. "Certainly it begs the question to assume that the principal has authorized the agent to communicate a part of his authority and not to disclose the rest... The considerations which have made the rule survive are apparent. If a man select another to act for him with some discretion, he has by that fact vouched to some extent for his reliability. While it may not be fair to impose upon him the results of a total departure from the general subject of his confidence, the detailed execution of his mandate stands on a different footing."

The Restatement, under the influence of Seavey, although it gives recognition, under its head of inherent agency power, to this basis of liability quite apart from any theory based upon consent, does not attempt any firm guidelines as to its application. Seavey appeared almost to despair of achieving any such breakthrough. He said,⁽⁴⁷⁾ "... the difficulty is in drawing a line ... the persons included within the generic term 'agent' operate under widely differing circumstances and the closeness of their relation to the principal varies from those authorized merely to conduct one transaction to those who are in complete control of a business. No blanket rule will

(46) See footnote 15, p.51

(47) "Agency Powers" 1 Okla. L.R.3,19.

or should cover all situations. The line of liability must be pricked out as cases arise."⁽⁴⁸⁾

Wright, who approved of the classification of "inherent agency powers" as an integral part of the Restatement, was also pessimistic of achieving certainty.⁽⁴⁹⁾ "... it is doubtful whether any group of rules can accurately prophesy exactly when the courts will shift the risk of loss from the third person to the principal. The value of the Restatement lies in showing us that we are deluding ourselves by an attempt to talk of 'authority' and 'estoppel'."

The measure of agreement

There appears to be general agreement, amongst those recognising the concept of inherent agency power, only upon the existence of two situations in which, in cases of disclosed agency, P will be held liable in the absence of an "authority" falling within the traditional English classification. The agreed situations may be outlined as:

- (1) Where the agent acts entirely for his own benefit.⁽⁵⁰⁾
- (2) Where A is entrusted by P with possession of documents of title, signed blank transfers of shares, perhaps certain chattels with some authority to deal.⁽¹⁾ Here it may be said that P has

(48) Surely a curious admission of failure in an area in which certainty has always been recognised as being of the utmost importance. See the recent judgment of Sachs L.J., in *Eaglehill Ltd. v Needham Builders Ltd.* [1972] 2 Q.B.8, in which he approved of the stress which has been laid upon certainty in the law merchant ever since the time of Lord Mansfield.

(49) 1 Unv. of Toronto L.J. 17, 44.

(50) E.g. *Hambro v Burnand*.

(1) E.g. *Brocklesby v Temperance Building Society*; *Fry v Smellie*.

enabled A to create a false appearance of authority (or ownership)⁽²⁾ when A acts in an unauthorised manner.

More uncertainty exists in relation to other classifications variously submitted: P may be liable for all acts usually incidental to transactions which a general agent is authorised to conduct even though forbidden by P.⁽³⁾

A second possibility is that P may be held liable where A acts outside his apparent authority but for the benefit of a disclosed principal, representing that he has authority.⁽⁴⁾

I make no attempt to produce an exhaustive list of situations.⁽⁵⁾ However, from its very nature, a list of instances reveals a fundamental defect in a mere classification under the head of "inherent agency power". Although "inherent agency power" may be an accurate description of the source of liability in P, it is, nevertheless,

- (2) See Ewart 18 L.Q.R. 159, 163. "The difference between giving to another an appearance of ownership or authority, and enabling that other to assume such appearance, is in the law of estoppel quite immaterial. The question must be looked at from the purchaser's side: Here is a man who appears to own these goods; the true owner did that which enabled the man to present such an appearance; therefore the true owner should lose."
- (3) See footnote 39, ante, p.62 ; See also *Whitehead v Tuckett* (1812), 15 East 400; *Smith v M'Guire* (1858). 3 H. and N. 554, instances in which a disclosed principal was held liable even though there is no indication in the reports that T relied upon any apparent authority objectively assessed, indeed, in the latter case it appears P's liability turned not upon what T could have discovered on inquiry of P, but rather upon what he could have discovered if he had inquired of others with whom A's reputation was established. A case which would, no doubt, bring great joy to the Patagonian merchant, p.19 .
- (4) See *Butler v Maples* (1870) 9 Wall 766; *Thurber v Anderson* (1878) 88 Ill.167.
- (5) Perhaps the Second American Restatement provides the most comprehensive list of possibilities for English law.

merely descriptive and goes no further. It is a classification ex post facto, to cover an apparently amorphous group of decisions in which liability has been imposed upon P "simply because of the relationship of principal and agent."⁽⁶⁾

If we accept that recognition of the head of "inherent agency power" is a step forward in legal knowledge,⁽⁷⁾ we must also acknowledge its dangers.

Powell commented that there was no objection to speaking in terms of an all-embracing principle⁽⁸⁾ to explain the liability of a principal upon his agent's unauthorised acts beyond the usual classifications provided:

- "1. the universal principle does not obscure such essential distinctions as are necessary if the parties are to be treated equitably in all cases;
2. both lawyers and those engaged in commerce have a reasonably clear perception of the rules by which they are to be guided in practice;
3. the principle, if it is a legal principle, will really fit every case."

A conceptual basis for the class falling within descriptive term "inherent agency power"

In order to meet the above reservations it is clearly essential

- (6) See judgment of Vaughan Williams L.J. in Fry v Smellie cited p.56.
- (7) For as Wright commented "So long as we continue to speak of liability of a principal as dependent on 'authority' or 'estoppel' the law will certainly furnish no guide to 'law in action'." 1 Toronto L.J. 17, 47.
- (8) It is doubtful whether "inherent agency power" is intended to be elevated into an all embracing principle, as noted above, it may more properly be considered as a purely descriptive term.

to attempt to seek out a basic principle or conceptual basis for liability falling within the descriptive classification of "inherent agency power". Two questions are posed:

(1) Why should P be liable?

(2) How should the desired result be achieved?

Seavey⁽⁹⁾ commenced his search for what was, in effect, an answer to the first question with the assertion that, assuming P to be liable on grounds other than those traditionally accepted, "there must be some reasons of public policy which require [liability] ... It must be in the protection of some conceived interest of business that, except in the case of a special agent,⁽¹⁰⁾ one is prevented from creating powers limited to the express authority given." He notes that the notion that interests may only be protected in certain ways defined by law is by no means limited to the law of agency or powers.⁽¹¹⁾

(9) "The Rationale of Agency", 29 Yale L.J. 859, 883.

(10) It ought to be noted that Seavey was a proponent of the classification of agents into "general" and "special" agents. This approach is followed in the Restatement, where special rules are outlined as applicable to one class or the other, see paras. 127, 128, 132, 161, 161A, 194. However, there is no agreement to be found amongst academic writers as to a definition or indeed as to the existence of the distinction. See Powell, p.30; Bowstead on Agency 13th ed. p.89; Halsbury, Laws of England 4th ed. para.711; Stoljar, p.43. Powell emphatically denied its existence, p.31, indicating that para.3, comment (a), of the Restatement to the effect that "the distinction between a general agent and a special agent is one of degree", could be regarded as nullifying any purported distinction.

(11) See the restriction imposed upon the creation of easements over land "... but it must not therefore be supposed that incidents of a novel kind can be devised and attached to property, at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and to the public weal that such latitude be given; ..." per Lord Brougham, *Keppell v Bailey* (1834) 2 My. and K. 517, 535. Similarly those instruments, recognised as negotiable, cannot be enlarged to include others, not so recognised, merely upon an expression of intention to create a negotiable instrument.

The courts have consistently sought to disallow extraordinary modes of dealing, they being considered injurious to an individual or perhaps a class of society. Whenever an agent exceeds his authority it is likely that either P or T will suffer in consequence. Seavey suggested that the reasons actuating the placing of this burden upon P could be grouped under three heads. The first two heads, it would appear, are merely more particular aspects of the third.

The first reason, is because trust was reposed, in A, by P. In answer to the possible objection that T also has reposed trust in A, it is suggested that a distinction is to be drawn between the adversarial relationship between A and T and the fiduciary relationship between P and A. An analogy is drawn between the trusting with a power in the case of agency and the trusting with title in the case of a trust, properly so called.⁽¹²⁾

The second, rather tentative, reason is "control". The submission being that "liability follows control and the principal has a power of control at all times". This assertion of a form of "strict" liability in respect of a "dangerous and novel" or "ultra hazardous" activity is certainly a stimulating thought.⁽¹³⁾ Is it fanciful to equate the creation of an unexpected and unusual power outside "usual business methods" with instances of strict liability?

The third reason is "business convenience."⁽¹⁴⁾ The assertion

(12) See "Liabilities in the administration of trusts", 28 Harv. L.R. 725, 733; "Contracts for the benefit of third persons", 15 Harv. L.R. 767, 775.

(13) See *Honeywell v Stein and Larkin* [1934] 1 K.B. 191, for an illustration of the principle as applied in the law of tort.

(14) Apparently approved by Wright 1 Toronto L.J. 17, 47, where he maintained that adherence to "authority" and "estoppel" meant that "we shall have to expect occasional decisions, completely out of harmony with business experience, simply because they purport to proceed on an a priori assumption which at no time ever explained all the cases."

is that: "Agency is essentially commercial; generally there is neither time or opportunity to examine the extent of the powers of the individual agent by tracing them to their source. They have to be classified at face value. The general agent must circulate more or less as does a negotiable instrument, without hindering conditions. Because of this, an agent sent out habitually with powers limited in certain abnormal ways would be in a position to cause injury to third persons. In sending out an agent, the principal knows, or should know, that his vouchers will not be carefully looked to. And he knows that the agent will not be apt to mention a lack of authority, for this might often interfere with sales. He knows of the human qualities which, at times, will lead even a faithful agent to overstep his authority in the desire to make sales. It is said that the third party need not deal with the agent. But if business is to continue, agents must be dealt with and protection given as experience rather than logic dictates."

In short, the reply to the question - why should P be liable for A's unauthorised acts? - is, because business convenience demands that he should be so liable in certain circumstances. The question "in which circumstances?" produces the circular answer, "those in which business convenience so dictates."

Powell⁽¹⁵⁾ conceded that it was a highly desirable state of affairs that the courts should have the highest regard for business convenience, provided it involved no violent disturbance of reasonable legal principles. Indeed he accepted that the English law of agency has "sometimes tended to be confined within the blinkers of legal principles which have limited its view." Nevertheless, whilst accepting "business convenience" as "a lamp to light our path when the

(15) Powell, p.95.

road is not clear, we must be careful not to let it shine so brightly in our eyes that we are dazzled and blinded by it." He expressed a confidence in the ability of our judicial process to adopt an approach which would meet the needs of the business community without the need to adopt such an "overriding legal principle".⁽¹⁶⁾ He further considered, that his interpretation of decided cases led to the conclusion that although commercial needs have been recognised, "business convenience" has not been accepted as an overriding principle determining P's liability for A's unauthorised acts. De facto recognition of the principle, in certain cases, was as much as he could accept in so far as the courts have not always disclosed the reasons for decisions⁽¹⁷⁾ or have rested their decisions upon a distorted application of recognised agency principles or of estoppel.

There is no doubt that the open recognition of "business convenience", as a general principle of liability, could have disadvantages. Too much discretion is left in the judge, too much hope is created in lawyer and litigant. Rigidity, Powell felt, could ultimately follow from judicial recognition of the principle. Precedents

(16) See the approach adopted in the area of restraint of trade in classifying agreements as contrary to public policy, also, in relation to those trusts which should fail as charitable trusts, the element of public benefit being absent. A minimum of legal principles are laid down as a framework, leaving the possibility of change to meet a developing society.

(17) He felt that some cases brought under the head of "inherent agency power" could be explicable on other grounds e.g. disputes between equally innocent owners and purchasers. The second Restatement does, however, recognise this possibility. Para.141 "A principal, although not subject to liability because of principles of agency, may be liable to a third person on account of a transaction with an agent, because of principles of estoppel, restitution or negotiability."

as to the nature of business convenience could fetter the development of a system suited to commercial practice.

The development of principles governing "usual authority", established by evidence of those actually practising in commerce, Powell saw as the solution to the issue. His endeavours were, therefore, devoted largely towards defining more clearly the rules governing "usual authority", which may be regarded as an aspect of apparent authority.⁽¹⁸⁾ His conclusion was that "Business Convenience is best served if the courts act upon evidence of what is usual in business."⁽¹⁹⁾

Thus far I have proffered answers to the question "why should P be liable for A's unauthorised acts?" but, the reply is in such broad terms that development is clearly essential if an answer to the question, "How should the desired result be achieved?" is to have precision.

Development of a theory to clothe inherent agency power

A principle of liability analagous to that adopted in the law of tort, whereby a master is made vicariously liable for the torts of his servant would appear, at very least, an interesting possibility.⁽²⁰⁾ Again within a context of "business convenience", the more specific justification for P's liability is based upon the ground that P is responsible for having created reasonable expectations in innocent third parties dealing with his agent. This of course begs the question: What is a reasonable expectation? Surely the concept of "holding out"

(18) C.f. Fridman, footnote 39, p.62.

(19) I shall return to this solution in considering *Burt v Claude Cousins and Co. Ltd.*, and another 1971 2 Q.B.426, p.85 post. The approach certainly recognises the plight of the Patagonian businessman!

(20) See 48 Va. L.R. 50, Mearns, "Vicarious Liability for Agency Contracts."

adequately covers reasonable expectation. Mearns, however, holds otherwise, illustrating his argument in the following way.

Consider the shop assistant who, being anxious to make a sale, offers a deduction, in respect of goods displayed at full price, upon their being discovered to be shop-soiled. The assistant has no authority to do this but the customer being unaware of this accepts the bargain and arranges to pay C.O.D. Later, the manager of the shop, observing the discrepancy in the price, corrects the bill before the goods are despatched. The customer upon receipt of the amended bill calls to see the manager and is told that as the assistant had no authority to vary the price, the goods must either be paid for or returned. The man in the street, it is suggested, would consider the reasonable expectation of the customer would entitle him to his bargain. Why? Because the shop assistant was part of the manager's business organisation. Although this may appear a sensible reply, a lawyer would, no doubt, indicate the answer to be erroneous. The assumption, claims Mearns, is that the average person observing a servant about his business, quite reasonably, assumes that the servant is carrying out his duty properly. The lawyer, steeped in legal theory, assumes it is "unreasonable" to expect such acts, which are actually unauthorised, to be enforced. He looks for some "objective manifestation" to displace the presumption that P is not bound. The underlying assumption is that if A acted outside his authority then he, primarily, is the person who must satisfy any expectations created. Mearns claims that, "This reflects a rather limited view of what is necessary to give adequate protection to those dealing in a commercial world, unless it is the Nineteenth Century World."

At once the germ of a practical answer to the question, "How should the desired result, of holding P liable for A's unauthorised acts, be achieved?" presents itself. The justifications for any

adoption of a theory of "vicarious contract liability" must be as wide if not wider than the justifications of "vicarious tort liability."⁽²¹⁾ But, as Mearns suggests, "... though there may be no consent to specific promises, consent to the relationship (of principal and agent) should be enough for anyone. In a real sense, the responsibility being placed upon the principal is a responsibility he himself assumed in sending a member of his enterprise to represent himself in the business world. The agent, you must realize, would not be out there "promising away" were it not for his obligation to serve the principal."

This argument bears a striking similarity to the unsophisticated formulation of the reasons for 'vicarious tort liability' submitted by Lord Pearce in *Imperial Chemical Industries Ltd. v Shatwell*⁽²²⁾ "The doctrine of vicarious liability has not grown from any very clear, logical or legal principle but from social convenience and rough justice. The master having (presumably for his own benefit) employed the servant, and being (presumably) better able to make good any damage which may occasionally result from the arrangement, is answerable to the world at large for all the torts committed by his servant within the scope of it."

In short, the argument for "vicarious contract liability" is that

(21) Baty, "Vicarious Liability", lists nine reasons, all of which, in his opinion are unsatisfactory. See also Street, *Foundations of Legal Liability*, II p.458. Also expressions of judicial opinion, *Duncan v Findlater* (1839) 6 Cl. and F. 894, 910 per Lord Brougham; *Hutchinson v York, Newcastle and Berwick Rly.* (1850) 5 Exch. 343, 350 per Alderson B.; *Jones v Staveley Iron and Chemical Co. Ltd.* [1955] 1 Q.B. 474, 480 per Denning L.J.; *Taff Vale Rly. v Amalgamated Society of Railway Servants* [1901] A.C. 426, 439 per Farwell J.; *Broom v Morgan* [1953] 1 Q.B. 597, 608 per Denning L.J. The "deep pocket" theory is perhaps the most widely accepted today, although its formulation has become extremely sophisticated. See *Limpus v L.G.O.C.* (1862) 1 H. and C. 526, 539 per Willes J.

(22) [1965] A.C. 656, 685.

the employer who creates, controls and benefits from the agency relationship should stand to lose rather than someone who deals in good faith with his agent. Our business community relies to a great extent upon "first appearances". This is necessarily so, for constant resort to checking that an agent was not deviating from his authority would undermine efficiency.

Four questions

Several important questions must be posed at this juncture:

- (1) Does this suggested "new approach" contribute to precision or certainty?
- (2) Does it detract from, and is it compatible with, established principles?
- (3) Is the approach reconcilable with an established conceptual basis of P's liability for A's unauthorised acts.
- (4) Has the inquiry deviated from the "is" to the "ought".

Precision or certainty

Clearly, being based upon analogy with the principle adopted in relation to master and servant tortious liability, no greater precision may be expected than in this latter case. Two questions are suggested as aids to establishing liability. First, "was the employee a general agent?"⁽²³⁾ Second, if so, "was the promise within the scope of the agency power?" This latter question recognises that P ought not to be liable in respect of substantial departures from duty. The scope of the agency power will be established by ascertainment of

(23) Mearns accepted the classification of "general agent". As this is always a "question of degree", some other test, such as "business agent", could be equally well adopted e.g. see the classifications in the Continental "Commercial Codes" whereby agents transacting certain types of business must be registered and hence classified.

various factual incidents of the relationship. Illustrations of these would be (1) Whether the promise is similar in nature to those specifically authorised by the principal; (2) Whether the promise is similar to those previously made with knowledge of the principal and underwritten by him though not specifically authorised; and (3) Whether the promise is of a kind usually within the specific authority of agents similarly employed.⁽²⁴⁾

Mearns' approach thus demotes a consideration of consent to a mere preliminary function adopted in establishing the existence of the agency relationship. The real basis of liability under this doctrine is to "pin responsibility on those who deal with others through the instrument of a general agent."⁽²⁵⁾

Compatibility with established principles

There would be, it would appear, no need to abandon the well established rules surrounding the accepted doctrines of apparent authority or authority created by estoppel. The objectively assessed liability provides a welcome degree of certainty. The value of the suggested approach appears to lie in the resolution of cases which do not readily fall within established principles. Where, unable to find classic examples of authority, the courts have sought to "dabble" in "implied", "ostensible", "constructive", "general apparent", or "customary authority".⁽²⁶⁾

Reconciliation with the established conceptual basis for P's liability

"Vicarious contract liability", as a technical term, would appear

(24) The Patagonian merchant would succeed upon this approach, see p.19.

(25) See footnote 23, ante, p.77.

(26) The terms used for what would appear to be the "cover up" situations, see footnote 5 p.11.

to denote that P's liability is vicarious, that is, he is responsible for a contract entered into by another, A.

Stoljar's,⁽²⁷⁾ theory of transmissible contracts or transmissible contract-interests provides an extremely convenient link with the theories of contract previously discussed.⁽²⁸⁾ He submits that in the three party agency relationship there is indeed created a contract between A and T. In addition, there is created another between P and T, "the peculiarity however being that the A-T contract in most cases (yet not always) disappears in favour of the designated contract between P and T." This, he claims, "explains and overcomes the hiatus in the law of agency between the formation of a contract as between one set of persons (A and T) and the transfer of its incidents to another set (P and T)."⁽²⁹⁾

However, in more verifiable form it may be that the link between Stoljar's theory and the notion of "vicarious contract liability", and the underlying source of P's liability, lies in the history and development of assumpsit.⁽³⁰⁾

The historical origins

An important point to be borne in mind, when considering early

(27) Stoljar, p.36.

(28) See p.34 et seq.

(29) See the discussion of a similar approach, suggested by Montrose, at p. 41. Note how Stoljar's theory neatly explains the nature of warranty of authority and also satisfies the requirement of the doctrine of ratification, that A's act must not constitute a mere nullity if it is to support P's ratification, *Brook v Hook* (1871) L.R.6 Ex. 89.

(30) See p.38 et seq.

mercantile transactions, is that they were executed immediately.⁽³¹⁾ The executory contract did not become commonly adopted until the turn of the nineteenth century.⁽³²⁾ Because of this the normal form of action was in debt, for the price of goods come to the use and benefit of P. Further, it was held at a very early time that even when a servant had bought goods under his own deed, if the goods had profited the master, then absence of authority in the servant would not assist the master.⁽³³⁾ However, it was not merely the receipt of goods which created liability in P, the master. The essential factor was that the servant should have acted apparently as P's agent.⁽³⁴⁾ The courts, in order to ascertain precisely how the goods came into P's possession, therefore, directed attention to A's conduct at the time of purchase. Thus in 1379 Bellewe⁽³⁵⁾ reported that even though T, the seller, was unable to show that A acted within his (actual) authority, P was liable, for "if one has a bailiff or a

(31) See Blackstones Commentaries 247 "and, therefore if the vendor says, the price of the beast is £4, and the vendee says he will give £4, the bargain is struck; and they neither of them are at liberty to be off, provided immediate possession be tendered by the other side. But if neither the money be paid, nor the goods delivered, nor tender made, nor any subsequent agreement be entered into, it is no contract; and the owner may dispose of the goods as he pleases."

(32) Witness the development of the implied warranties of "correspondence with description", (unnecessary for the most part in face to face contracts) "fitness" and "quality" which took place, not by chance, at the same time.

(33) Randolph v Abbot of Hailes (1313-14) Eyre of Kent, 6 and 7 Edw.2 (Selden Soc., Vol.27) 32, cited Fifoot, History and Sources of the Common Law.

(34) Otherwise there would have been the difficulty of proof where the master claimed he had received the goods by way of gift or from another quite outside his household.

(35) Anon. (1379) Bellewe, 58, 136, cited Fifoot, History and Sources of the Common Law.

servant, who is known to be one's servant, if you send him to the fair to purchase merchandise and other things, it is reasonable that he [P] should be charged with the payment, if the merchandise come to his use."

This development within the action of debt was followed from around the fourteenth century by a recognition that P's liability lay not simply in debt but in "contract". It appears that the acceptance of a contractual nexus between P and T grew alongside the related development which transformed the action for debt from a "real" action (the executed contract) giving it the form of a contractual undertaking.⁽³⁶⁾

This contractual liability, of great antiquity, would appear to resolve the difficulties involved in holding P liable even though he has not authorised A's act. The early cases showed it was no longer necessary to regard P as liable because of receipt of the goods, rather, liability flowed from his "enabling" A's action. P would therefore be liable for the acts of even a fraudulent agent.⁽³⁷⁾

Because the origins of P's contractual liability, enforced by assumpsit, were in debt, there ought not to have been difficulty in holding P liable where he came into possession of goods via A, despite the fact that A had not specifically acted on behalf of P at the time of the contract. However, the emphasis placed upon the appearance

(36) See Fifoot, *History and Sources of the Common Law*, p.227 et seq.

(37) (1469) Y.B. 8 Edw. 4, Mich. fol. 116, p.1.9. "if I command my servant to buy certain things, or if I make someone my factor or attorney to buy merchandise etc., and he buys the merchandise from another, in that case I shall be charged by this contract even though the goods never come to my hands and even though I have no knowledge of [A's precise acts], and the reason is because I have given him such a power [to effect the unauthorised act]." Cited Fifoot, *History and Sources of the Common Law*.

of A's act at the time of the contract, related earlier, overshadowed the old liability for goods coming to P's use, when the action for debt fell into desuetude. An action in assumpsit was considered inappropriate if A's acts were not such as to attribute his actions to P.⁽³⁸⁾ It was in this way that P's liability came to be classified as "truly contractual". Indeed, liability for goods coming to the use of P was subsequently based upon an implied ratification of A's unauthorised act. The implication of ratification was considered essential in order to preserve the contractual nature of P's liability, now regarded as of the essence.

The emphasis on the contractual nature of the P-T relationship eventually, when the consensual theory of contract became widely accepted, obscured the source of the relationship - it was not a consensually formed contract. The incidents of the relationship are contractual, but are not consensually formed. It is this oversight which gives rise to conceptual problems in ascertaining the proper basis of the P - T relationship.

I submit that a theory of "vicarious contract liability", which may be rationalised in terms of "a transmissible contract - interest", although not necessarily so, falls readily within the conceptual basis of P's liability, previously established as flowing from the origins of assumpsit. Assumpsit certainly exhibits tortious facets in its development and the notion that P is liable because he has enabled A to act to T's detriment is historically harmonious.

Has the inquiry deviated from the "is" to the "ought"?

The proof of any theory lies in its satisfactory application to decided cases. In this way the theory may be demonstrated to be a useful tool for prediction. I shall consider, in some detail, the

(38) *Alford v Eglishfield* (1564) 2 Dy. 230b.

recent Court of Appeal decision in *Burt v Claude Cousins and Co. Ltd.* and *Shaw*⁽³⁹⁾ which has been criticised as lacking in principle.⁽⁴⁰⁾

This investigation is merely illustrative and must be regarded as simply a compromise instead of a far reaching and exhaustive review of many diverse areas which I feel is desirable. Leave to appeal was granted in Burt's case but unfortunately no appeal was pursued. It is, therefore, particularly important to establish principles within the particular area concerned, especially in view of the doubts expressed in *Barrington v Lee*⁽⁴¹⁾, decided by a differently constituted Court of Appeal only eight months after Burt's case and indeed more doubts recently expressed in the case of *Sorrell v Finch*.⁽⁴²⁾

[Because of the detailed consideration which these cases require I have set out my full investigation in Appendix II so as not to cloud the basic issues of this thesis.]

The point at issue in Burt's case was who should bear the loss of a deposit, paid by a prospective purchaser to an estate agent, appointed by the prospective vendor, in the event of the estate agent acting so as to render it impossible for the purchaser to recover the sum from the agent. The issue has been reduced by the majority⁽⁴³⁾, in each of the three cases previously referred to, as to basically a question of whether the vendor is bound by a contract to repay the sum. Lord Denning M.R. has expressed what I believe to be a self induced straitjacket as the key to the dilemma in this way: "If an

(39) [1971] 2 Q.B. 426; [1971] 2 All E.R. 611.

(40) See the criticism in *Barrington v Lee* [1971] 3 All E.R. 1231.

(41) [1971] 3 All E.R. 1231.

(42) Unreported Court of Appeal decision, 12th June 1975.

(43) Lord Denning M.R. dissenting in each case from the reasoning of the majority.

agent makes a contract for a named principal (having actual or ostensible authority to do so), then that principal is bound by the contract"⁽⁴⁴⁾ otherwise the vendor (P) is not bound to repay. This position of course fails to give recognition to any notion of inherent agency power.

However, I submit that the elaborate arguments, related in Appendix II, directed towards the finding of an implied undertaking by P to repay, reveal a failure to appreciate the principles of agency which would adequately meet the needs of the situation. The attitudes expressed upon the policy issue are important. Megaw L.J., in Burt's case,⁽⁴⁵⁾ commenced his judgment with these words: "I have no doubt that in the absence of special circumstances justice requires that the prospective vendor rather than the prospective purchaser should bear the loss." Sachs L.J. was equally forthright⁽⁴⁶⁾ "It is the vendor who selects and appoints the estate agent" and citing *Hern v Nicholls*⁽⁴⁷⁾ "... it is more reason that he that employs and puts trust and confidence in the deceiver should be the loser than a stranger ..."

Nevertheless, the Court's attempt to find an implied term so as to achieve the desired end, as is demonstrated in Appendix II, totally failed to meet the requirements of the classic test for implication of such a term⁽⁴⁸⁾, which test was indeed simply ignored. Why was worse than doubtful reasoning adopted, rather than application of well recognised rules? I submit it was because the application

(44) In *Sorrell v Finch*.

(45) At p.624.

(46) At p.622.

(47) (1701) 1 Salk. 289.

(48) See *Luxor (Eastbourne) Ltd. v Cooper* [1941] A.C.108.

of the recognised rules as to the implication of a term would not enable achievement of the desired end, so clearly set out at the commencement of the majority judgments. However, I further submit that application of this demonstrably unsound approach⁽⁴⁹⁾ was dictated by a failure to recognise the notion of agency power as the basis of P's liability. Burt's case, together with *Barrington v Lee* and *Sorrell v Finch*, illustrates the application of the principle of agency power without affording it recognition.

Lord Denning M.R., in *Barrington's* case submitted that the reasoning of the majority in Burt's case, in finding an implied term so as to impose liability upon P, was reasoning only applicable to an action in tort and that no tort was revealed.⁽⁵⁰⁾ However, Stephenson L.J., in *Barrington's* case, without further comment said "I regret that I cannot, in agreement with Lord Denning M.R., hold that the reasoning ... was appropriate only to a claim in tort and not to a claim on an implied promise to pay."⁽¹⁾ This, I believe, recognises the tortious origins of the contractual remedy, based on *assumpsit*, which lies against P. The remedy is not based upon a consensual (express or implied) contract but upon a principle of "vicarious contract liability." There is no agreement as to the existence of ostensible authority on the part of A, the evidence as to the practice of estate agents being at best inconclusive. It is the fact of an agency relationship which gives rise to the "legal rule" which binds P to T. If it were not for the employment of A,

(49) See Lord Denning's criticism of the majority approach in *Barrington v Lee* at p. 1237, cited in Appendix II.

(50) See Appendix II, p. 8.

(1) At p.1247.

by P, then A would not be "out there promising away". As Lord Denning M.R. said in Barrington's case, "the claim to the return of the deposit lies in contract and nothing else", but the contract has its origins in assumpsit and not in consent. Although the conceptual basis of liability has perhaps not been fully understood, Burt's case is a classic illustration of its application.⁽²⁾

In short, the inquiry has fallen upon the "is" although the present development of the law does not appear to recognise the route whereby the "is" and "ought" converge.⁽³⁾

Conclusion

The findings of this chapter may be quite briefly stated. The notion of apparent authority gives precision, in instances of traditional application, enabling the minutiae of agreements to be

- (2) The confusion has been given further expression in *Sorrell v Finch* where Lord Denning M.R. (again dissenting) indicated that his understanding of Burt's and Barrington's cases was that each was based upon "ostensible authority". He found that any ostensible authority had been negatived in the instant case and that as there was no actual authority either, "... by no means can a third person ... be bound by the contract. He treats P as a third person in the absence of actual authority. However, if the majority found ostensible authority, in those cases referred to, then it was without requiring evidence as to the practice of estate agents.
- (3) See also *Mendelssohn v Normand Ltd.* [1970] 1 Q.B.177, where it was held that the "ostensible authority" of an agent could arise and override a written statement restricting the agent's authority. This was in spite of the well established cases in which it has been held constructive notice may limit authority. See *Jacobs v Morris* [1902] 1 Ch.816; *Reckitt v Barnett*, *Pembroke and Slater, Ltd.* [1929] A.C.176. c.f. *Overbrooke Estates Ltd. v Glencombe Properties, Ltd.* [1974] 3 all E.R.511 where notice was held to have limited the agents ostensible authority.

ascertained with certainty, upon an objective test. The basic underlying principle may quite properly be said to be that of contract, notions of estoppel being unnecessarily confusing and restrictive and historically inaccurate. However, in the grey area in which liability has been imposed outside the areas of traditional application, the theory of "vicarious contract liability", with a conceptual basis akin to that of apparent authority, may to some extent point the way to certainty in the "business transaction",⁽⁴⁾ where its development simply awaits overt recognition.

- (4) See the somewhat nebulous distinction drawn between "business transactions" in areas in which business confidence is to be guarded and "private transactions" in which the sanctity of individual property rights is paramount. Compare *Fry and Mason v Smellie and Taylor* [1912] 3 K.B. 282 with *Jerome v Bentley & Co.* [1952] 2 All E.R. 114. Note how Conant's notion of the "Objective Theory of Agency", 47 Nab. L.R.678, lends support to this distinction and also for, indirect support, development in relation to the law of tort in the United States: "Agency recovery in tort under the theory of Apparent Authority" 69 W.Va.L.R.186, R.B. Stone; "Apparent Authority - An extension of the deep pocket theory", 23 S. Carolina L.R. 826, Harris; "Liability of Principals for torts of Agents, Comparative study", 47 Nab.L.R.42, Conant. See also Second American Restatement, Comment to para.161A. "The reasons for the extensive powers of general agents as a part of a principal's business organisation do not apply to special agents."

CHAPTER III

"One of those not infrequent situations in our law where a legal problem of an important and recurring character remains unsolved for want of litigants."⁽¹⁾

This chapter considers the conceptual basis underlying the Doctrine of the Undisclosed Principal.

Introduction to the Doctrine of the Undisclosed Principal

The doctrine of the Undisclosed Principal springs from the situation in which an agent contracts in his own name, so that the third party is unaware that the person with whom he is dealing is an agent. So far as T is concerned A is really a principal, acting on his own behalf and in his own name. The problem which arises is as to the relationship which is created between the principal, who is undisclosed and unknown, and the third party. A may enter upon a transaction in this form even though he is faithfully observing P's instructions. There is further, however, a more complex problem, which may fairly be classified as falling within the sphere of an inquiry into the aforementioned doctrine, in which A acts so as to exceed his real authority. A consideration of this latter problem forms the later subject matter of this chapter.

In answer to the question of what relationship is created between P and T where T is unaware of P's existence, it may broadly be

(1) Montrose 17 Can.B.R. 693, 695.

stated that (in addition to the legal relationship arising between A and T), T can sue P and P can sue T upon discovery of their respective identities. This is the effect of the doctrine of the Undisclosed Principal.⁽²⁾ At first sight the doctrine appears to achieve a particularly curious result. It appears to enforce a contract between persons who cannot be parties to it, or perhaps, T would appear to find that instead of having simply contracted with A, he has contracted with an entirely different person, P.

Criticism of the doctrine

Criticism of the doctrine has been particularly severe. In order to express the academic and judicial assessment, a brief catalogue of opinion in an abbreviated form is instructive.

Sir Frederick Pollock maintained a particularly virulent opposition to the doctrine as may be witnessed by his writings in the Law Quarterly Review.⁽³⁾ The following quotation being a typical expression of his revulsion of the "anomalous doctrine".

"The plain truth ought never to be forgotten that the whole law as to the rights and liabilities of an undisclosed principal is inconsistent with the elementary doctrines of the law of contract. The right of one person to sue another on a contract not really made with the person suing is unknown to every legal system except that of England and America."⁽⁴⁾

Judicial opinion has been similarly forthright.

"At the same time, as a contract is constituted by the concurrence of two or more persons and by their agreement to the same terms,

(2) *Higgins v Senior* (1841) 8 M. and W. 834; *Browning v Provincial Insurance Co.* (1873) L.R.5 P.C.263; *Calder v Dobell* (1871) L.R.6 C.P.486; *Trueman v Loder* (1840) 11 A. and E.594; *Smethurst v Mitchell* (1859) 1 E. and E. 623; *Thomson v Davenport* (1829) 9 B. and C. 78.

(3) 3 L.Q.R. 358; 12 L.Q.R.204; 14 L.Q.R. 2.

(4) 3 L.Q.R. 358, 359.

there is an anomaly in holding one person bound to another of whom he knows nothing and with whom he did not, in fact, intend to contract."⁽⁵⁾

These expressions of reserve as to the propriety of the doctrine may perhaps be traced to the earlier misgivings of Lord Blackburn in *Armstrong v Stokes*⁽⁶⁾ where he said:-

"It might be said, perhaps truly, this is the consequence of that which might originally have been a mistake, in allowing the vendor [T] to have recourse at all against one [P] to whom he never gave credit, and that we ought not to establish an illogical exception in order to cure a fault in a rule."⁽⁷⁾

American academic writers have been no less critical.

"... the effect of holding him [P] liable is to give to the other party [T] the benefit of a liability which he did not contemplate at the time of the contract and for which he did not stipulate. In other words, the right to hold a principal liable in such circumstances amounts to a 'God-send' ... a rational theory for the principal's liability is not easy to discover."⁽⁸⁾

"Logically there is no direct relation between the undisclosed principal and the third person with whom the agent contracts."⁽⁹⁾

These opinions are of course based upon the underlying assumption, which Huffcut expressed succinctly in his *Treatise on Agency*, that A's act can only create a contract between himself and T. "A contract

(5) *Keighley Maxsted & Co. v Durant* [1901] A.C.240,261 per Lord Lindley. See also Lord Davey's judgment at p.256 and also that of A.L. Smith L.J., *Durant v Roberts and Keighley Maxted and Co.* [1900] 1 Q.B.629, 635.

(6) (1872) L.R. 7 Q.B. 598.

(7) At p.604.

(8) *Mechem* 23 Harv. L.R. 513.

(9) *Ames* 18 Yale L.J. 443, 445 and 453. See also *Comparative aspects of Undisclosed Agency*, 18 M.L.R.33.

creates strictly personal obligations between the contracting parties. In short permitting the undisclosed principal to sue or be sued may work out justice, but it is nevertheless an anomaly, and, like all anomalies, unfortunate."⁽¹⁰⁾

Recognition of the utility of the doctrine

However, the voices raised in criticism of the doctrine have typically directed their attention towards criticism of its theoretical basis and have not generally sought "to bury the undisclosed principal but to save and sustain him."⁽¹¹⁾ Indeed Earl Cairns L.C., in *Kendall v Hamilton*⁽¹²⁾ expressed his unqualified approval of the doctrine without reference to the conceptual difficulties raised by a doctrine apparently so alien to traditional legal theory.

"Now, I take it to be clear that, where an agent contracts in his own name for an undisclosed principal, the person he contracts with may sue the agent, or he may sue the principal ... It would clearly be contrary to every principle of justice that the creditor who had seen and known and dealt with and given credit to the agent, should be driven to sue the principal if he does not wish to sue him, and, on the other hand, it would be equally contrary to justice that the creditor on discovering the principal, who really has had the benefit of the loan, should be prevented suing him if he wishes to do so."

Failure to consider the basis of the doctrine

Furthermore, in a later passage in the same case, Lord Blackburn,⁽¹³⁾ in discussing the doctrines of Election and Merger, displays without

(10) Cited 9 Col.L.R.116,130 as the traditional approach to the doctrine.

(11) Stoljar, p.228.

(12) (1879) 4 App. Cas.504, 514.

(13) p.544.

hesitation an almost cavalier attitude to the theoretical basis of the undisclosed principal's liability.

"I do not think the defence [election] a meritorious one; but I think in the present case there is no great hardship. The Plaintiffs [T] had a right of recourse against Hamilton [U.P.] for which they never bargained, but they did nothing inequitable in taking advantage of that which the law gave them. They have destroyed that remedy by taking a judgment against persons [A] who turn out to be insolvent. I do not think Hamilton [U.P.] does anything inequitable in taking advantage of the defence which the law gives him. The Plaintiffs got a right by operation of law, without any merits of their own, by what, as far as regards them, was pure good luck. They have lost it by what was no fault of theirs, but was, as far as they were concerned, pure bad luck. If the Plaintiffs were willing to take advantage of their good luck against the Defendant, it seems no hardship that he should take advantage of their bad luck against them."

In short there may appear to be a true gap between theory and practice, if so, "either the theory is inadequate or the practice is wrong."⁽¹⁴⁾ The need for a detailed study of the conceptual basis of the doctrine under discussion is clearly indicated.⁽¹⁵⁾

(14) Noy, Maxims, 90 "debile fundamentum fallit opus".

(15) Montrose, 16 Can. B.R. 757, 777, justifies the search for a basic theory on the grounds that although a legal rule may be justified by reference to public policy or justice, this involves a fundamental investigation into the problems of the jurisprudence of a system of law. If one can refer to a particular solution as being consonant with an established legal rule (i.e. enforcement of contract) then any rule which is so supported is also consonant with justice in the enforcement of established principle.

Explanation of the reasons for the common law affording sanction to a "logically indefensible" doctrine.

Before a detailed consideration of the concepts underlying the doctrine is attempted it is pertinent to note, briefly, Lord Lindley's justification of its development alongside his acknowledgment of its theoretical problems.

"The explanation of the doctrine that an undisclosed principal can sue and be sued on a contract made in the name of another person with his authority is, that the contract is in truth, although not in form, that of the undisclosed principal himself. Both the principal and the authority exist when the contract is made; and the person who makes it for him is only the instrument by which the principal acts. In allowing him to sue and be sued upon it, effect is given, so far as he is concerned, to what is true in fact, although the truth may not be known to the other party.

At the same time, as a contract is constituted by the concurrence of two or more persons and by their agreement to the same terms, there is an anomaly in holding one person bound to another of whom he knows nothing and with whom he did not, in fact, intend to contract. But middlemen, through whom contracts are made, are common and useful in business, and in the great mass of contracts it is a matter of indifference to either party whether there is an undisclosed principal or not. If he exists it is, to say the least, extremely convenient that he should be able to sue and be sued as a principal, and he is only allowed to do so upon terms which exclude injustice."⁽¹⁶⁾

Clearly Lord Lindley acknowledges a sacrifice of principle in the interests of commercial convenience. The doctrine is seen as simply an expression of the feeling that justice is served where an

(16) Keighley Maxsted & Co. v Durant [1901] A.C. 240, 261.

undisclosed principal is fixed with the burdens and endowed with the benefits of a contract made at his instigation.

Competing Theories

The basic and fundamental objection to the doctrine is that it does not conform to basic principles of the law of contract. It is argued that there cannot exist a contractual bond between parties of whom one may not know of the existence of the other with whom he is alleged to contract. Huffcut expressed the principle quite simply "a fundamental notion of the common law is that a contract creates strictly personal obligations between the contracting parties."⁽¹⁷⁾

The Trust Theory

Ames made an early attempt to found the doctrine upon the concept of the trust.⁽¹⁸⁾ He argued that although the courts recognised the anomalous character of the doctrine, the feeling that it was just to recognise the undisclosed principal as having the benefits and burdens of contracts made on his behalf, overrode the conceptual difficulties. It was in fact merely because of a failure to ascertain a more rational means of achieving justice that the anomalous character of the doctrine developed.

Ames commenced his investigation of the doctrine with an examination of the "measure of justice" which might have been attained if actions, under the doctrine, by and against the undisclosed principal had not been allowed. This proposition envisages a similar situation,

(17) Huffcut, Agency, 2nd ed. ch.10 p.158.

(18) 18 Yale L.J. 443. See also 8 L.Q.R. 220 Trusteeship and Agency.

in the case of simple contracts, to that which now exists in the case of contracts under seal and negotiable instruments. Claims against T could only be brought by A; claims made by T could only be made against A and A alone.

The typical transaction may be analysed in the following manner. T sells goods on credit to A, who, without T's knowledge, is buying on behalf of an undisclosed principal, U.P. The argument is that the title to the goods sold must pass from T to A as this is the declared intention of the parties, A being the sole buyer in the sale. This excludes a concomitant sale of the same goods from T to U.P. However, although A and not U.P., acquires the legal title from T, A holds the title throughout the transaction for the benefit of U.P. To be more precise, A, in buying for U.P., is not acting as an agent or representative of his employer U.P. but as his trustee. By way of reinforcement from a more familiar scene, if the subject matter of the sale was land, no one would suggest that the title to the land would pass directly to U.P. Rather A, who acquires title, holds it, not for himself, but as trustee⁽¹⁹⁾ for U.P.⁽²⁰⁾

Conversely, if T undertakes to sell and convey a parcel of land to A and A is acting for the benefit of U.P., T having no knowledge of this, T is most certainly bound to A. This is the agreement between A and T. But T does not intend to assume an obligation to U.P., this would be an additional obligation. Indirectly U.P. may acquire the benefits of the contract, because A, having acquired T's obligation

(19) This suggestion of a "trust theory" was not novel, see *Mollett v Robinson* (1872) L.R. 7 C.P. 84, 119 per Kelly C.B; also apparent approval in *Armstrong v Stokes* (1872) L.R. 7 Q.B.598, 605 per Blackburn J.

(20) See 16 M.L.R. 303 where Muller-Freienfels makes clear "the doctrine of the undisclosed principal finds no place in the law of real property."

for the benefit of U.P., holds it, throughout the transaction, as a "trust - res". But again A acts not as a representative of U.P. but as U.P.'s trustee. Thus if Ames' theory based upon trust is accepted, then a doctrine which allows U.P. to be sued by T, is exposed as anomalous in another sense. It allows T to sue the cestui que trust (U.P.) upon contracts entered into by the trustee (A).

Attainment of justice under the trust theory

To return to the question of the measure of justice which it would be possible to attain if actions by and against the U.P. were barred.

Consider first claims in favour of A. A holds the legal title to the claim for the benefit of U.P. U.P., as cestui que trust, would realize indirectly through A, as his trustee, all that a direct action at present secures for U.P. T would have precisely the same defences against A as he has at present against U.P. suing in his own name. (21)

What, however, of imposing upon U.P. the obligations incurred by A in relation to T? Ames maintained that the principle of "equitable execution" would suffice to compel U.P. to make good the obligations of A. The relationship between U.P. and A impliedly, if not expressly, involves an undertaking by U.P. to indemnify A in respect of authorised undertakings entered on his behalf. (22) Thus if say A entered into a contract with T to purchase T's land for £10,000, although only A is liable to pay the sum due under the contract, U.P. is under a

(21) T's defences against A would of course be legal rather than equitable as they may appear to be under the theory allowing U.P. a direct action.

(22) See *Adams v Morgan & Co.* [1923] 2 K.B.234, aff'd [1924] 1 K.B.751, esp.752 where McCardie J. compared A's position to that of a trustee. Also Sir George Jessel M.R. in *Re Johnson*, *Shearman v Robinson* (1880) 15 L.R. Ch.D. 548. Also see Brandeis, *Liability of Trust Estates on contracts made for their benefit* 15 Am. L.R. 449.

duty to provide A with such funds. A's right to indemnity is a valuable asset and as such, Ames considered that by means of "equitable execution" T could secure to himself the benefit of A's right against U.P. The means whereby this satisfaction of T's claim could be attained was through an order of specific performance of U.P.'s obligation to indemnify, granted in favour of T. In the event of A's insolvency, such an order would be of no interest to A's general creditors, for the order could only be of benefit to T.⁽²³⁾

Ames accepted that the trust theory coupled to "equitable execution" had not been applied by the courts. Nevertheless, he maintained that had the possibility of achieving the end of allowing actions between P and T through this means been appreciated, then there would have been no need to have invoked the "anomalous" doctrine of the undisclosed principal. However, as Seavey has pungently commented,⁽²⁴⁾

(23) The principle has been applied in cases of trustees who have been supplied with supplies to benefit the trust estate. The trustee has a right to apply trust property in exoneration of liabilities properly incurred in administration of the trust estate. Should the trustee prove unwilling to enforce his right against the trust property then the creditor may through "equitable execution" compel him to do so. Ames, *Cases on Trusts* 2nd ed. 423 cited 18 Yale L.J. 443. Moreover, the trustee's right may be enforced against the general assets of the cestui que trust, *Hardoon v Belilios* [1901] A.C.118,123, unless the cestui can show good reason why it should not be so. See also *Clavering v Westley* (1735) 3 P.W.402, reversed in unreported appeal before Lord Talbot, referred to in *Walter v Northam Co.*, (1855) 5 D.M. and G. 629, 646. The case is not authority for the proposition that an equitable debt will be due from the cestui where a trustee has incurred such a debt, such principle was expressly denied by Lord Cranworth in *Walter's* case. However, it does demonstrate that an equitable right of exoneration may lie against the cestui where the trustee has incurred a debt in execution of his trust.

(24) 29 Yale L.J. 859, 878.

"If the rights of the third party are properly taken care of, as in fact they are, the only abnormality is the informality of allowing a direct action at law. The same is true in the case of suit against the principal; there should be no objection simply on the ground that a short cut has been taken. The only criticism of the doctrine that can have permanent value is that it produces unjust results."

However, it was precisely upon the point that unjust results were fostered by the accepted doctrine that Ames concluded his plea for reappraisal of traditional thinking. In three situations he argued the "anomalous" doctrine produced unjust results in that T profited at the expense of the undisclosed principal. He further argued that the principles of trust and equitable execution would alleviate these so called injustices. The three instances he discussed are as follows.

1. Where an undisclosed principal pays an agent in discharge of his duty to indemnify, then the agents right of indemnity or exoneration is ended. Consequently T can no longer maintain any right to equitable execution. It is, however, arguable that under the "anomalous" rule the U.P. will remain liable to T despite his payment to A, unless the conduct of T led P to suppose that T was already paid.⁽²⁵⁾
2. Where the misconduct of A is such, after having contracted with T, (say he misappropriates goods bought on credit for the U.P.) that he loses his right to indemnity. Again T could not maintain an action for equitable execution and yet under the anomalous rule P would remain liable to T.⁽²⁶⁾

(25) Considered in detail later, p.125 Heald v Kenworthy (1855) 10 Ex. 739; Irvine v Watson (1880) 5 Q.B.D.414; Armstrong v Stokes (1872) L.R.7 Q.B.598; Thomson v Davenport (1829) 9 B. and C. 78. See also Railton v Hodgson (1804) 4 Taunt. 576 and Higgins, 28 M.L.R.167 c.f. Mechem 23 Harv. L.R.513,590.

(26) See p.134.

3. Where no right of exoneration ever arose because of A's having contracted with T in such a manner as to exceed his instructions. Again T could not maintain an action for equitable execution.⁽²⁷⁾ However, it would appear under the rule in *Watteau v Fenwick*⁽²⁸⁾ that U.P. would be liable to T if A's act would have been within A's ostensible or apparent authority had the agency been disclosed.⁽²⁹⁾

However, it must be clear that there would certainly not be unanimous agreement that these situations do give rise to injustice, nor can it be said that the results which Ames attributes to the anomalous doctrine are necessarily accurate.⁽³⁰⁾

Appraisal of the trust theory

To return to the main thesis maintained by Ames, undoubtedly his explanation of the passing of rights to the undisclosed principal is attractive as a logical scheme designed to pass A's rights and liabilities to U.P. It nevertheless derives its logical appearance from an acceptance of the proposition that it is illogical to create

(27) See *Re Johnson* (1880) 15 L.R.Ch.548 "Where a trader has by his will directed his executor or trustee to carry on his trade and to employ a specific portion of the trust estate for the purpose, the rule is that though the executor or trustee is personally liable for debts incurred by him in carrying on the trade pursuant to the will, he has the right to resort for his indemnity to the specific assets so directed to be employed, but no further ... but the rule does not apply where the executor or trustee is in default in the specific trust estate devoted to the trade : in such a case the defaulting executor or trustee not being himself entitled to an indemnity except on terms of making good his default, the creditors are in no better position..."

(28) (1893) 1 Q.B.348.

(29) This third instance is of doubtful value in this context as it is probably a quite separate liability from that arising under the traditional doctrine under discussion. See full consideration of the problem of *Watteau v Fenwick* at p.130 et seq.

(30) See p.126 et seq.

a direct link between the U.P. and T.⁽³¹⁾ In short, if it is not illogical to say that A is not the sole party to the transaction entered into with T, then Ames' theory is exposed as being based upon a false premise.

Stoljar argues that Ames fell into error by adopting the commonly held misconception that "title" is to be considered as passing from one party to another as one would "throw a ball to another."⁽³²⁾ The better view is to regard "title" as merely denoting rights in respect of certain "things". In other words, title means the right to "take and keep". Thus where T transfers physical things to A, he also transfers "rights". These "rights" merely represent a conclusion of law and not a finding of fact. It is, therefore, perfectly "logical" to recognise the rights, as a conclusion of law, as vesting in U.P. even though T is unaware. This merely recognises a principle of law under which U.P. has the same rights as A.

Furthermore, it is clear that the trust theory, being based upon notions of property rights which can be pursued either by the equitable beneficiary or against him, has a manifest defect in that it provides no solution for cases in which benefits have either not passed or not been received - it provides no solution to the executory contract.⁽³³⁾ Moreover, as Seavey observed, although Ames

(31) See the previous exposition of Ames' interpretation of the problem at p.95.

(32) Stoljar, p.229.

(33) C.f. Higgins, "The Equity of the Undisclosed Principal" 28 M.L.R. 167, 170 footnote 20. See also the problems posed by the executory contract in the previous consideration of disclosed agency. Higgins based U.P.s liability upon U.P.s duty to indemnify A. If so, then of course as A's liability may arise in the case of the executory contract, then U.P.s liability would also arise. However, if A was not liable then U.P. is not liable and this notion is clearly defective in the light of *Danziger v Thompson* [1944] K.B.654 discussed p.109.

performed a considerable service in pointing out the analogy between the cestui que trust and an undisclosed principal, he failed to observe the distinguishing features.⁽³⁴⁾

The principal is a cestui in so far as he receives profits but he does not only receive profits in a passive manner, he controls the means of making the profits. The undisclosed principal is a master and it may be that this feature provides the key to many of the problems in this area.⁽³⁵⁾

Fridman⁽³⁶⁾ dismisses the trust theory in these words, "Though the fiduciary nature or aspect of the agency relationship is clearly established, there seems little point in trying to explain what is really a common law relationship in terms which have an equitable flavour. What similarity there is between the position of an agent and that of a trustee ought not to be carried too far." It is difficult to disagree with this conclusion for, as has been noted, the trust theory cannot meet all situations and the failure to take account of the dissimilar features of the cestui and the undisclosed principal renders it misleading. Moreover in a recent dictum Ungood-Thomas, J. categorically denied the existence of such a concept.⁽³⁷⁾

(34) 29 Yale L.J. 859.

(35) See the conclusions based upon Mearns approach to disclosed agency p.76. See also Street, Foundations of Legal Liability, for the influence of the master/servant concept upon agency.

(36) Fridman, p.188.

(37) Pople v Evans [1968] 2 All E.R.743, 749.

"... where there is a contract between an agent for a principal, whose identity is undisclosed, then, whether their relationship with the third party is considered as sounding in contract or in property rights, there is no trust relationship between any of the parties which can be recognised as between the third party on the one and the principal and agent, or either of them on the other hand."

Receipt of Benefit Theory

A further attempt to explain the underlying theory of the doctrine of the undisclosed principal, one which again exhibits an "equitable flavour" is the "Receipt of Benefit" theory proposed by Huffcut.⁽³⁸⁾

Huffcut, as has already been indicated,⁽³⁹⁾ regarded the belief that there was a contractual relationship between T and U.P. as "anomalous" and "unfortunate". Nevertheless, he sought to retain the incidents of such a relationship by suggesting a more satisfying basis for the mutual rights and obligations of T and U.P. He claimed that the liability of U.P. was "probably the outcome of a kind of common law equity,⁽⁴⁰⁾ powerfully aided and extended by the fiction of the identity of the principal and agent." Moreover, he claimed that "this doctrine is as old as the Year Books" as "the action against an undisclosed principal rests logically upon the ground that the principal's estate has had the benefit of the contract and ought to bear the burden."

If it should be assumed, for the moment, that a "Receipt of Benefit" theory was adopted by the courts then perhaps it might be useful to consider just one situation, similar to that previously

(38) Huffcut on Agency, 2nd ed. (1901).

(39) See footnote 10, p.91.

(40) Perhaps the term "common law equity" would meet with the approval of Professor Fridman, see footnote 36, ante.

adverted to,⁽⁴¹⁾ in order to ascertain what measure of certainty the theory might produce. Consider where T has executed his consideration in relation to a contract negotiated by A on behalf of U.P. It would appear that the theory could impose liability upon U.P., irrespective of the state of accounts between U.P. and A,⁽⁴²⁾ if it was accepted that consideration given to A was given to U.P. Yet again, if this solution was not adopted, the theory would equally serve to negate U.P.'s liability if the state of accounts between U.P. and A was such that U.P. had not, in fact, received any benefit. Similarly, this latter solution would lead to the conclusion that no recovery, by T, would be possible where the contract was entirely executory.

Again, if the first proposition was accepted, that U.P. should be held liable simply because he has received a benefit, then it would appear to be open to the same objection as that raised in relation to the "traditional" theory, that it is anomalous. A donee or beneficiary does not have to bear the burden of a contract simply because he receives the benefit of goods purchased. In the case of a donee it is quite clear that to impose such a liability would be unjust and to base the U.P.'s liability upon this ground alone, must be seen to be equally unsatisfactory.⁽⁴³⁾

Revision of the Receipt of Benefit Theory

However, a rather more sympathetic approach to Huffcut's theory reveals it in a more appealing form. There are two basic differences between the position of the undisclosed principal and that of the beneficiary or donee under a contract. The first is that, where A has acted in accordance with U.P.'s instructions, U.P. has been directly

(41) See situation one, referred to in footnote 25, p.98.

(42) C.f. Thomson v Davenport (1829) 9 B & C 78 footnote 25, ante.

(43) It would simply provide grounds for U.P.'s liability to be sued but not to sue.

responsible for the contract being formed. He has caused the contract to be made. The second is that when U.P. receives the benefit of the contract, prior to discharging his obligation to indemnify A, then he obtains a benefit at a time at which he is under an undoubted contractual obligation (to A) to bear its burden. It may, thus, not be thought anomalous to hold U.P. liable to T where he has caused "the contract" and benefited. Furthermore, it may be thought proper that where T has contracted with the agent of an undisclosed principal then he should be subrogated to the rights of the agent against the principal.

Having arrived at what appears to be an acceptable interpretation of the "Receipt of Benefit" theory, closely supported by the notion of subrogation, it is unfortunately only too clear that it suffers from the same defect as was revealed in relation to the "Trust Theory". Neither the notion of receipt of benefit or the notion of subrogation would bind U.P. if a contract was executory. It might, moreover, be added that the notions produce the same result, in instances where (a) U.P. has expressly forbidden A's act or (b) U.P. has settled his account with A, as was revealed to result from an application of the "Trust Theory", U.P. is not liable. These are areas producing acute problems in the cases.⁽⁴⁴⁾

The Tort Theory

A further theory which demands consideration is the "Tort Theory".⁽⁴⁵⁾ The theory is based upon the simple precept that U.P., by concealing

(44) Discussed in relation to the problems of *Armstrong v Stokes* (1872) L.R.7 Q.B.598 and *Watteau v Fenwick* (1893) 1 Q.B.348, see p. 125 et seq. and p.130 et seq.

(45) Development of this theory leads to the theory based upon *assumpsit*, developed by Lewis, 9 Col. L.R.116, considered post, p.113.

his identity, has wrongfully deceived T and that, in consequence, U.P. ought to be held liable to T. The difficulties which this theory involves are manifest. There must be reluctance to accept that concealment of U.P.'s existence is necessarily a wrong. However, even if this is accepted, an action in tort at T's insistence presents problems as to assessment of damages.⁽⁴⁶⁾ Basically tortious damage is assessed as merely the expense and trouble involved in T's negotiations. There could be no possibility of an order for specific performance being made against U.P. A, in this situation, would be unable to specifically perform, being totally without the means, and yet U.P., who has the means, would remain untouched. It would appear to be clear that a proper measure of damages in this situation is that appropriate to contract. T ought to be able to recover, against U.P., a sum sufficient to compensate him for the loss of the benefit which he would have received had there been no "breach of contract" by U.P.⁽⁴⁷⁾

Moreover, a theory based purely upon a "fault principle" fails to provide a remedy where U.P. has not directed A to conceal U.P.'s identity. No doubt if U.P. expressly instructed A to conceal U.P.'s involvement, then this may be regarded as deceit. However, it has never been a principle of the common law that merely to give another an appearance of wealth, so that a third party may be influenced to extend credit to or place reliance upon that other, should give rise

(46) See *Koufos v Czarnikow* [1969] 1 A.C. 350 as to the distinction between the rules for assessment of damages in contract and in tort. See also the special problems as to assessment in the tort of deceit in *Doyle v Olby (Ironmongers) Ltd.* [1969] 2 Q.B. 158.

(47) On the assumption, as always, that the doctrine of the undisclosed principal is to be maintained. See p.91.

to liability.⁽⁴⁸⁾

The need for contractual form as a basis for the doctrine of the undisclosed principal.

Thus far the difficulties revealed as inherent in the various theories advanced, are that they do not adequately provide for reciprocal claims between U.P. and T (the unrefined form of the "Receipt of Benefit Theory") or they are restricted to purely executed consideration (the "Trust Theory") or the relevant principles for assessment of damages appear inadequate (the "Tort Theory"). In short, in order to circumscribe the legal consequences, of the well accepted doctrine of the undisclosed principle, the theory must have a truly "contractual" basis. The concept of contract is the only legal form which adequately meets the case and it would appear that it must be presumed to form the basis of the established doctrine.

"A primitive and highly restricted form of assignment"

Goodhart and Hamson put forward such a theory, accepting the basis of the doctrine as contractual, the contract being entered into by A and T. The undisclosed principal's rights, they submitted, were based upon a "primitive and highly restricted form of assignment."⁽⁴⁹⁾ This theory involves two basic points: (a) that a contract does exist between A and T and (b) that there is no direct contract between U.P. and T.⁽⁵⁰⁾ This theory achieves the desired end of producing "contractual" features - reciprocal claims between U.P. and T

(48) See *Jerome v Bentley* [1952] 2 All.E.R.114; *Mercantile Credit Co. Ltd. v Hamblin* [1965] 2 Q.B.194. Early commentators clearly felt some reserve as to the acceptability of the common law rule, see Seavey, 29 Yale L.J. 876, n.49, also the general expression of sorrow at the common law rule 4 C.L.J. 320, 328.

(49) 4 C.L.J. 320, 352.

(50) A straightforward denial of the position as it was stated to be in *Said v Butt* [1920] 3 K.B.497, 500 per McCardie J. "Before the plaintiff (U.P.) can succeed he must establish that there was a binding and subsisting contract between the Palace Theatre (T) and himself."

embracing both executed and executory obligations - yet it claims a rational explanation which does not deny the basic principle that a contract is a personal bond between the contracting parties (A and T). The doctrine of the undisclosed principal, they claim, is no more anomalous than the doctrine of assignment. Undisclosed principals are only anomalous "in the sense that assignees with a power to sue are anomalous ... they are not anomalous in any other sense. Their presence does not contradict the fundamental principles of contract; it limits only the rule that no person but the contracting party may sue or be sued on the contract."⁽¹⁾

Primitive assignment and precedents

I will consider, briefly, the cases upon which the "primitive assignment" theory depends. The argument is, that to contend that the contract in which U.P. is involved is a contract between himself and T, is to contradict certain cases.⁽²⁾ It is contended that if X knows that Y will not (for any reason, capricious or otherwise) contract with him, he cannot "steal" Y's consent to a contract. There is no "reasonable expectation" that the "contract" will be binding. If, therefore, U.P. is aware that T would not contract with him but arranges to contract via A, if such a contract is enforceable by U.P. then the contract cannot be between U.P. and T but must be merely, for some other reason, enforceable by U.P.

In order to "prove" this reasoning, as disproving the U.P. and T contract, Goodhart and Hamson cite *Nash v Dix*⁽³⁾ and *Dyster v Randall*,⁽⁴⁾ which are claimed to be "express decisions on facts

(1) 4 C.L.J. 320, 346.

(2) "Well decided cases" according to Goodhart and Hamson, 4 C.L.J. 320, 347.

(3) (1898) 78 L.J. 445.

(4) [1926] Ch.932.

expressly raising the question whether there was an enforceable contract when the principal knew that the third party defendant would not contract with him, the principal."⁽⁵⁾ However, I contend that *Nash v Dix* does not present an arguable case in the present context as it was expressly found that A acted on his own account and therefore discount argument based upon this case.⁽⁶⁾

In *Dyster v Randall*, U.P. believed that T would not sell him certain land, he therefore engaged A to buy it for him without disclosing U.P. Later, A disclosed the agency relationship and T refused to complete. Nevertheless, U.P. was awarded specific performance of the sale against T. Goodhart and Hamson conclude from this that, therefore, the contract cannot have been between U.P. and T, for in such circumstances U.P. has attempted to "steal" T's consent. The contract which is enforced must be that between A and T. However, such a conclusion, based upon such tenuous foundations, must be suspect. The line of reasoning, adopted by the court, displayed an extremely robust approach to a practical situation in which the niceties implied by Goodhart and Hamson appear to have little application. T did indeed plead that he had been deceived, so that no contract existed at all. However, in rejecting this submission, the court noted first, that the personal qualifications of A formed no material part of the agreement; second, that if A had not acted for U.P., but had acted alone, there was no reason why he should not sell to U.P. There was little point in restricting U.P.'s rights in these

(5) 4 C.L.J. 320, 348.

(6) The case involved the Trustees of a congregational Chapel who would not sell to Roman Catholics. The Roman Catholics asked N to buy and re-sell to them for a profit of £100. The Trustees refused to complete and it was held that the agreement was good and enforceable but that N had acted on his own account and not as agent.

circumstances.⁽⁷⁾ The court also noted that as this was merely a simple agreement for the sale of land, A could have assigned the benefit to any person and the assignee would have been able to enforce specific performance. Perhaps it was this latter point which gave rise to the "primitive assignment" theory.

Denial of the Goodhart and Hamson approach

Perhaps a more telling case, which denies the Goodhart and Hamson approach, is *Danziger v Thompson*,⁽⁸⁾ decided twelve years after publication of their article. Here, an infant had rented a flat from T under a written agreement. The agreement was expressed as being between T and the infant (A), who was described as the "tenant". It was held that parol evidence was admissible to show that A entered the agreement as agent for her father (U.P.). Consequently, U.P. being the "real tenant", T recovered judgment against U.P. In order that T should succeed, it was clearly necessary to find a primary liability in U.P., not dependent upon any "quasi-assignment", for otherwise the action would have foundered upon the infant's contractual incapacity.

To cite one further instance illustrating that the doctrine of the undisclosed principal does not accord with the notion of assignment, regard may be had to the decision of the House of Lords in *Keighley, Maxsted and Co. v Durant*.⁽⁹⁾ In this case it was held that the principal, on whose behalf an agent purports to act, must be

(7) It was expressly noted that had the personal qualities of A been an essential ingredient of the agreement, then the case would have been decided differently. Discussed later, p. 111 et seq.

(8) [1944] K.B. 654.

(9) [1901] A.C. 240.

named or have been ascertainable by the third party when the unauthorised act was done, in order that the principal might ratify the act. If the basis of the doctrine of the undisclosed principal was analogous to assignment of a contract between A and T, then the disclosure of P would be quite immaterial. Indeed, there would have been nothing to prevent assignment of the rights of A on the actual facts of the case.⁽¹⁰⁾ Moreover, the difficulty which their Lordships experienced with what they perceived as common law principles, would be inexplicable if the doctrine had been simply a form of assignment.⁽¹¹⁾

Nevertheless, the notion of assignment does bear some similarity to the doctrine of the undisclosed principal. The main point of similarity, which it emphasises, is that the undisclosed principal (like the assignee of a chose in action in his relationship to the debtor), may be met by any defences or equities which T would have against A.⁽¹²⁾ However, dissimilar points which must be noted are:⁽¹³⁾

- (a) Assignment requires a voluntary act by the assignor, whereas agency involves a conferment of interests by operation of law. The agent has no choice, his very act of creating a contract contemporaneously involves the creation of rights and duties in U.P.
- (b) The assignee of contractual rights loses his right to sue upon assignment. The agent retains the right to sue T until U.P. intervenes and himself sues.

(10) See the judgment of Scruttons L.J. in the Court of Appeal [1900] 1 Q.B. 629.

(11) See per Lord James, "To establish that a man's thoughts unexpressed and unrecorded can form the basis of a contract so as to bind other persons and make them liable on a contract they never made with persons they never heard of seems a somewhat difficult task." at p.251.

(12) *Sims v Bond* (1833) 5 B. and Ad. 389; *Browning v Provincial Insurance Co. of Canada* (1873) L.R. 5 P.C.263.

(13) See also *Williams* 23 Can. B.R. 380, 408 distinguishing U.P. from an assignee.

(c) A party to an assignable contract is free to assign his rights under the contract. The rules as to the priority of assignees are well settled. An agent who enters an assignable contract on behalf of U.P. may also, it would appear, assign his rights. However, what is the order of priority of the assignees and U.P.? The principal is not an assignee and therefore the rules as to priority of assignees are not applicable.⁽¹⁴⁾

Reconsideration of Dyster v Randall⁽¹⁵⁾

Although Dyster v Randall may not adequately support the assignment theory, it may be that it indicates a proper approach to the doctrine under discussion. As previously considered, the court awarded specific performance of a contract at the instance of the undisclosed principal despite the fact that U.P. believed that had T known of his existence he would not have entered into a contract. However, it was accepted that the decision would have been different if the personal qualifications of A had been a material factor to T. This lays emphasis, I believe properly, upon the contract between U.P. and T.⁽¹⁶⁾ A leading case in which this approach was adopted is Said v Butt.⁽¹⁷⁾ Here U.P. (Said) knowing that T (Palace Theatre Ltd.) would not contract with him so as to sell him a ticket for a first night performance, engaged T (Pollock) to buy him such a ticket.

(14) See Powell, p.166 for a suggested approach.

(15) [1926] Ch.932.

(16) Emphasis upon a contract between A and T which, when U.P. seeks to enforce, T seeks to avoid because of mistake as to P's identity leads to the following logical progression. T cannot prove he was mistaken as to the identity of A unless A has actually impersonated another. If T argues that he only intended to contract with A, then, the reply must be that he has effectively done so.

(17) [1920] 3 K.B.497.

T, without disclosing U.P. in any way, contracted in the usual way for a ticket. Eventually, on the first night, U.P. was refused entry to the theatre. The question for decision was whether U.P., had a right, against T, to occupy the seat.⁽¹⁸⁾ McCardie J. held that U.P. was not able to establish a "binding and subsisting contract between the Palace Theatre and himself"⁽¹⁹⁾ and consequently had no right to a seat. This decision squarely places the essence of the doctrine upon the contract between U.P. and T. This directs attention to the personal factors⁽²⁰⁾ which could affect the U.P. and T relationship and so avoids the logical problems⁽²¹⁾ previously referred to and also

(18) Goodhart and Hamson submitted that the answer to the question ought (consistently with the assignment theory) to have been either (a) "No; this in the circumstances is a contract, similar to a contract to be a lodger in a private house or to be a member of a club, the benefit of which may be taken only by the contracting party, the benefit of which is unassignable. Said is not the contracting party. Said therefore has no right to sit in this seat on this night." Or alternatively (b) "No; in the circumstances, by his conduct, Pollock, in his contract between himself and the Palace Theatre made a representation that he, Pollock, and he, Pollock, alone, had any interest in this contract." 4 C.L.J.320, 349. However, it must surely be beyond the normal assumption of the parties that in booking a theatre seat one impliedly represents that no one else will occupy the seat. Nor, it would appear, can it be assumed that the benefit of a contract to sit in a theatre is of so personal a nature as to be unassignable. If either of Goodhart and Hamson's suggestions were to be the case, then it would be incumbent upon every person who buys a seat for another to disclose the agency. c.f. Powell, p.161.

(19) At p.500.

(20) It is the distinction between "personal factors" and "hindsight or caprice" which justifies the distinction between Said v Butt and Dyster v Randall.

(21) See footnote 16, p.111.

the impractical difficulties of the assignment theory.⁽²²⁾ Moreover, this approach is entirely consistent with the earlier case of *Smith v Wheatcroft*⁽²³⁾ in which X entered into negotiations with T, intending to buy T's land. Before an agreement was completed X became agent of U.P. It was held that the agreement, subsequently made, was enforceable, because T could not show that he had always had a specific objection to dealing with U.P. or that his motive for withdrawal was other than "hindsight or caprice".

By acceptance of the doctrine as expounded in *Said v Butt* one may achieve the desired end of directing attention to the problem area immediately, without hindering the process with the niceties of non-assignable contracts. However, acceptance of this exposition requires justification of the assertion that a contract can exist between P and T when T is unaware of P's existence.

Theory based upon contract

Historical perspective

In English law, two forms of contract are recognised; agreements by specialty and agreements by parol.⁽²⁴⁾ However, the doctrine of the undisclosed principal does not apply to contracts under seal.⁽²⁵⁾

(22) See footnote 18, p.112.

(23) (1878) 9 Ch.D.223.

(24) Per Skynner L.C.B. in *Rann and others Executors of Mary Hughes v Isabella Hughes, Administratrix of J. Hughes in Error*. (1778) 7 T.R.350.

(25) *Combes case* 9 Co.Rep.75a at 77a "When any has authority, as attorney to do any act, he ought to do it in his name who gives the authority; for he appoints the attorney to be in his place, and to represent his person; and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name, and as the act of him who gives the authority."

A consideration of the distinction between the two forms of contract is therefore likely to reveal aspects leading to understanding of the doctrine of the undisclosed principal.

"The affinity of the deed is with gift, not with bargain, and it is fair to say that the so called 'contract under seal' has little in common with agreement save in its name and its history..."⁽²⁶⁾ Thus in essence the feature distinguishing the simple contract from the deed is that factor which distinguishes contract from gift, in short, consideration. The contract theory to be discussed asserts that consideration is the connecting link between U.P. and T.⁽²⁷⁾ It is of course a natural corollary of this theory that the doctrine should not apply to deeds.⁽²⁸⁾

The leading case of *Dunlop Pneumatic Tyre Co. Ltd. v Selfridge & Co. Ltd.*⁽²⁹⁾ lends much support to the view that a contract formed by consideration supplied by U.P. forms the essence of the relationship between U.P. and T. The House of Lords fully considered the argument and indeed approached the case as being essentially concerned with an undisclosed principal. Two short passages, from the judgments of the Lord Chancellor and Lord Dunedin, are sufficient to display their Lordships' approach.

(26) Cheshire, Fifoot and Furmston, *Law of Contract*, 8th ed. p.18.

(27) 16 M.L.R.299, 306. Muller-Freienfels, "The Undisclosed Principal."

(28) Seavey accepted this as a proposition of law but questioned its utility, at least when both seal and consideration were present. 29 Yale L.J. 859, 880.

(29) [1915] A.C. 847; 84 L.J.(K.B.) 1680; 113 L.T.386; 31 T.L.R. 399.

"... a principal not named (in this case an undisclosed principal) in a contract may sue upon it, if the promisor really contracted as agent. But again, in order to entitle him so to sue he must have given consideration either personally or through the promisee, acting as his agent in giving it."⁽³⁰⁾

"I should have no difficulty in the circumstances of this case in holding it proved that the agreement was truly made by Dew as agent for Dunlop, or, in other words, that Dunlop was the undisclosed principal, and as such can sue on the agreement. Nonetheless, in order to enforce it he must show consideration ... moving from Dunlop to Selfridge."⁽³¹⁾

Thus the essence of U.P.'s being able to sue T is that U.P. has given consideration. Only the phenomenon of consent is absent from the traditional view of contract.⁽³²⁾ U.P. is the person who "pays the money" and receives the benefit, he actually shoulders the burden

(30) Per Lord Haldane L.C. at p.853.

(31) Per Lord Dunedin at p.855.

(32) If the right of U.P. to sue T was simply recognised in order to avoid circuitry of action (as was suggested by Diplock L.J. in *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd.* [1964] 1 All E.R. 630, 644), then surely U.P. could sue in such a situation as this. A could sue for breach of the agreement and U.P. could sue A if he failed to enforce the agreement. Yet their Lordships did not overlook the possibility of Dew enforcing the agreement. per Lord Parmoor "I abstain from discussing what remedy Messrs. A.J. Dew & Co. might have on their contract with the respondents ..." If the Trust theory was the true theory then again surely U.P. as beneficiary could enforce through his trustee, A, a contract made for his benefit. Ames, however, did recognise that the Trust theory could not be regarded as an "is" but simply an "ought".

of the agreement in the form of a detriment which forms the consideration moving to T.

In broad terms Muller-Freienfels has noted what he regards as the coherence of the doctrine of the undisclosed principal, founded upon the basis of consideration, with the historical development of contract.⁽³³⁾ The concept of the undisclosed principal, developing through the Law Merchant, is seen as naturally leading to the notion of bargain or consideration. Only the intentions of the parties could be a bar to a contract between U.P. and T.⁽³⁴⁾ Thus "it is no coincidence that the principle of consideration was finally settled at the end of the seventeenth century, and that there is no clear case of an undisclosed principal before the eighteenth century." He claims that English judges of the eighteenth century preferred to follow the doctrine of consideration, rather than the intentions of the parties, because of its objective and practical character.⁽³⁵⁾ Obviously if motive had been important, then establishing a U.P. and T contract would have been difficult. However, if motive is not important, its absence is not fatal. It is a failure on the part of more recent commentators⁽³⁶⁾ to appreciate the objective existence of contract, being themselves obsessed with the modern view⁽³⁷⁾ that a mental

(33) 16 M.L.R. 299, 308.

(34) This possibility is of course recognised in the exceptions to the doctrine which take into account, *inter alia*, personal factors.

(35) "Motive is not the same thing as consideration" per Patteson J. in *Thomas v Thomas* (1842) 2 Q.B.851.

(36) Pollock 3 L.Q.R.359, 12 L.Q.R.204, 14 L.Q.R.2; Seavey 29 Yale L.J. 859, 877.

(37) Although more recently even the mental element is being questioned. See P.S. Atiyah Inaugural Lecture delivered at the Australian National University Canberra, 29th July 1970 "Consideration in contracts - a fundamental restatement."

element is essential, which has led to castigation of the doctrine of the undisclosed principal as anomolous.

This broad outline of the historical development of the doctrine of the undisclosed principal does of course recall the more detailed consideration of the development of contract, from assumpsit, undertaken in the earlier chapter of this thesis devoted to disclosed but unauthorised acts. However, because of the close relationship between the argument mounted by Muller-Freienfels and that developed by Lewis,⁽³⁸⁾ it is necessary to pursue the development of assumpsit a little further, specifically in relation to the undisclosed principal.

Further consideration of the historical origins of the doctrine of the undisclosed principal.

Just as Muller-Freienfels finds the rule that an undisclosed principal cannot sue or be sued upon a deed entirely in keeping with a doctrine based upon early concepts of contractual form, so Lewis explains this aspect of the doctrine. Again the point is made that the binding force behind the archaic formal contract under seal is form itself. A man is bound by a formal contract under seal because he has promised, intending to be legally bound. Thus no matter how inadequate modern explanations may be for refusing to hold an undisclosed principal bound on a sealed instrument executed by his agent as principal, it is clear that so to hold the undisclosed principal bound would be to disregard the fundamental nature of the formal contract. The undisclosed principal has not formally promised to be bound, therefore, how can he be so bound?

With respect to the basic situation in which the undisclosed principal is sued by and able to sue T, again objections to these

(38) 9 Col. L.R.116.

actions are, when seen against historical development of contract, shown to be misfounded.

One of the most ancient contracts, enforced by an action in debt, was the contract arising from the completed sale. Here the binding force flows from a "quid pro quo". Receipt of something of value created an enforceable promise, not simply because of a promise, but, because of receipt of a benefit. Long before actions on assumpsit were raised, actions in debt were brought successfully by persons beneficially entitled to payment simply because they were instrumental in furnishing a benefit.⁽³⁹⁾

However, the action of assumpsit or other action for breach of contract can now be brought wherever in former times an action of debt for an obligation arising from a commercial transaction could have been brought. Any combination of circumstances which gives rise to a simple contract on which an action of debt could have been brought also brings into existence a simple contract based upon consideration. This being so it is difficult to see any theoretical objection to an action against the undisclosed principal on the contract developed through assumpsit. The defendant's liability on a contract in the action of assumpsit is based upon the plaintiff's ability to show that the defendant has caused the plaintiff to do something which he would not otherwise have done, and which the

(39) See "The limitations of the action of assumpsit as affecting the right of the beneficiary" 52 American Law Register 764 and 53 American Law Register 112. The subsequent actions of English courts in denying rights to a beneficiary are described as "revealing how far ideas fundamental to contract developed in assumpsit (embodying consideration) have tended to obliterate the fundamental conceptions lying at the foundation of the more ancient contractual liability expressed by the writs of account and debt."

defendant has stipulated he should do.⁽⁴⁰⁾ Thus, the liability of an undisclosed principal (or a disclosed principal) lies in his having caused a contract with T to be made. The basis of the action on assumpsit is simply that the defendant has so acted so as to cause the plaintiff to adopt a particular course of action in expectation of a promised benefit.

To allow the undisclosed principal and T reciprocal actions, therefore, may be seen as in perfect accord with the underlying concept of contract developed through assumpsit. There is no reason to deny an action simply because the motivating force, the undisclosed principal, is hidden.

The assumpsit theory thus reaches the conclusion that where T contracts with the agent of an undisclosed principal, the contract is with the undisclosed principal and not with the agent.⁽⁴¹⁾

(40) See p. 40 et seq. in chapter II on disclosed agency for the explanation of executory contracts.

(41) If it should be argued that the undoubted action which A is permitted against T is inconsistent with the right of action being vested in U.P., this may be countered, quite shortly, by reference to *Gardiner v Davis* (1825) 2 C. & P. 49. In this case A was permitted an action against T where A had carried on a business of cow-keeper on behalf of U.P. In answer to A's action, T adduced evidence that A was not owner of the business. Abbott C.J. countered by explaining that "... the person ostensibly carrying on the trade is, by law, entitled to recover for goods sold in the course of trade, unless the person so suffering him to carry on the trade interferes by asserting his or her right to the sum due ... Mrs. Evans (U.P.) has taken no step whatever to assert any right she may have to this money and therefore taking it that the plaintiff (A) was carrying on the trade in his own name with her privity and consent but was really a sort of agent to her, as she has not interfered to assert any claim to this money, he would still be entitled to recover in this action." In short, if A does not sue T then he sues on behalf of U.P., because of the privity between A and U.P. and sues upon U.P.'s contract. See also *Joseph v Knox* (1813) 3 Camp.320.

The agent, because he has asserted he is a principal is unable to deny that he is to be treated as a principal by T, nevertheless "the law with equal consistency and propriety allows the person who has contracted, believing the contract to be with the agent, to proceed on the contract as it actually is a contract with the real though undisclosed principal."⁽⁴²⁾

The technical basis of the contract theory would appear sound and examination of the early cases, in which the doctrine was developed, appears to extend the support for the theory. It is necessary to consider but few cases to reflect the general position.

Early cases supporting the contract or assumpsit theory.

The case of *Scrimshire v Alderton*,⁽⁴³⁾ frequently regarded as inaugurating the doctrine of the undisclosed principal,⁽⁴⁴⁾ itself contains a clear statement as to the legal relationship created between P and T when the parties are unaware of one another. Here, a farmer sold oats through a factor who undertook the risk of failure of the buyer. Because of this undertaking, the factor did not trouble to inform the farmer of the buyer. The factor failed and upon discovering who the buyer was, the farmer gave him notice not to pay the factor which, nevertheless, he did. The farmer brought an action. The Lord Chief Justice stated the rule of law to be applied, in this way: "a factors sale does by the general rule of law create a contract between the owner and the buyer."

(42) 9 Col. L.R.116, 132.

(43) (1743) 2 Stra. 1182; 93 E.R. 1114.

(44) See Holmes, *The History of Agency*, 3 *Select Essays in Anglo-American Legal History*, p.390. Also Goodhart and Hamson 4 C.L.J. 320. Stoljar challenges this assertion, holding that the doctrine was already implicit in previous decisions, p.207, see also *Garratt v Cullum*, (1709) Buller, N.P.42.

Cothay v Fennell⁽⁴⁵⁾ contains an equally positive statement of principle. "If an agent makes a contract in his own name the principal may sue and be sued upon it; for it is a general rule, that whenever an express contract is made, an action is maintainable upon it, either in the name of the person with whom it was actually made, or in the name of the person with whom, in point of law, it was made."

An important but neglected case re-visited

The rather neglected case of Drakeford v Piercy⁽⁴⁶⁾, it is submitted, is a most important decision depending upon the existence of a contract between an undisclosed principal and T. The Court of Queens Bench was a particularly strong court, Blackburn J., Shee J., and Lush J., sitting. The action, upon an account stated, was for goods sold and delivered by P to T. T, the defendant, pleaded that the goods were sold and delivered by one Daines (A) and that Daines sold as apparent principal and that the defendant bought from Daines as vendor on his own account without notice that he was only P's agent. Further, that the defendant, without notice that Daines was any other than the principal, paid the price to him before he knew that P was owner of the goods. It was held that the plea in defence was bad unless T alleged either that A was a factor, or that P had authorised A either to represent himself as a principal or to hold himself out as entitled to receive payment.⁽⁴⁷⁾

(45) (1830) 8 L.J. K.B. 302; 10 B. and C. 671; 109 E.R. 599.

(46) (1866) 7 B. & S. 515; 14 L.T.403.

(47) By the general law, an agent for sale does not normally have authority to receive payment. Linck, Moeller & Co. v Jameson (1885) 2 T.L.R. 206.

It is clear that if A has authority to act as a principal, T is entitled to treat him as a principal. Payment to A will discharge T.⁽⁴⁸⁾ However, it has been submitted by Powell⁽⁴⁹⁾ that the same rule ought to apply when A has no authority to act as principal. The basis of this submission is that because T is unaware of P, T's contract is solely with A; until A discovers P's existence there is no reason whatever why T should not obtain a discharge by paying A. However, the rule in *Drakeford v Piercy* is entirely consistent with the theory that T's contract is with U.P. and, however difficult, it is the duty of a debtor to seek out and pay his creditor.⁽⁵⁰⁾ The decision in *Drakeford's* case relies upon the contract theory and Powell's concern that it "would be absurd if a debtor in any contract had to withhold payment until he was quite certain that the other contracting party had no undisclosed principal behind him" is simply an emotive plea. The rule is sound, has subsequently been reflected in principle⁽¹⁾ and merely amounts to the proposition that T must bear the loss when A acts without authority in concealing his agency.

Consideration of anomalies in the development of undisclosed agency in the light of a constant underlying principle.

Certain problem areas in undisclosed agency have come to be regarded with a degree of stoicism. The problems of *Armstrong v*

(48) *Coates v Lewes* (1808) 1 Camp.444.

(49) Powell, p.172.

(50) *Heald v Kenworthy* (1855) 10 Ex. 739.

(1) See the principle reflected in *Jerome v Bentley & Co.* [1952] 2 All E.R.114; *Mercantile Credit Co. Ltd. v Hamblin* [1965] 2 Q.B. 242.

Stokes⁽²⁾, *Humble v Hunter*⁽³⁾, Election and Set-off are notorious. It is certainly a useful exercise to ascertain the degree of certainty which may be attained from an application of the contract theory to these areas.

The basis for the contract theory, underlying the doctrine of the undisclosed principal, lies in the ancient forms of action, basically assumpsit. However, despite the doctrine of precedent, the underlying justification for contractual liability has undergone considerable change. Pollock, Anson and Holland supported a theory of contract based upon the consensus of the parties.⁽⁴⁾ The doctrine of the undisclosed principal was developed prior to this change but under the influence of the "consensus" theory the doctrine appeared anomalous and this led to exceptions and problem areas which reflect the conflict between the underlying principles.⁽⁵⁾

(2) (1872) 7 Q.B. 598.

(3) (1848) 12 Q.B. 307.

(4) "The attitude of these writers seems to a large extent due to an attempt to force contract, in English law, into the straitjacket of the analysis which Continental writers, notably Savigny, have made of contract as it appears in the later Roman law and Continental codes based upon that law." Salmond and Williams, "On Contracts", 2nd ed. p.18.

(5) Blackburn J. in *Armstrong v Stokes* displays a distrust of the early development and indeed, it is submitted, a misunderstanding. "It is, we think, too firmly established to be questioned now, that, where a person employs another to make a contract of purchase for him, he, as principal, is liable to the seller, though the seller never heard of his existence, and entered into the contract solely on the credit of the person whom he believed to be the principal, though in fact he is not. It has often been doubted whether it was originally right to so hold; but doubts of this kind now come too late: for we think if it is established law that, if on the failure of the person, with whom alone the vendor believed himself to be contracting, the vendor discovers that in reality there is an undisclosed principal behind, he is entitled to take advantage of this unexpected god-send..."

The problem of Humble v Hunter

One of the first examples of the influence of the new approach to contract causing conflict with established principles of undisclosed agency is the decision in *Humble v Hunter*. The facts of the case were simply that A signed a charter-party in his own name describing himself as "owner" of the chartered ship. When the freight remained unpaid, A's principal, U.P., sued T. Lord Denman, C.J., said that A, by describing himself as "owner", contracted as principal and that therefore U.P. could not sue. This reasoning of course totally denies any doctrine of undisclosed agency for, of course, every agent of an undisclosed principal contracts as a principal. Subsequent rationalization of the decision has produced the rule that there can be no undisclosed agency where the agent contracts as the only contracting party. That is, warrants that he, and he alone, is principal. However, in *Formby v Formby*⁽⁶⁾ the rule was said to be based upon a rule of evidence whereby no evidence was to be admitted if it would contradict a written document.⁽⁷⁾

It would appear, however, that the rule in *Humble v Hunter* is simply an example of a situation in which, far from recognising the original conception whereby U.P. and T acquired mutual rights and liabilities, an exception has been introduced because of a feeling that it is in some way "wrong" that a non-consensual contract can be created.⁽⁸⁾

(6) (1910) 102 L.T.116.

(7) This rule is denied by many, 23 Harv. L.R. 513, Mechem. See also *Higgins v Senior* (1841) 8 M. & W. 834; *Basma v Weeks* [1950] A.C.441 c.f. Second American Restatement para. 189.

(8) See the recognition of the problems created by the decisions in *Humble v Hunter* and *Formby v Formby* in the judgment of Lord Shaw in *Drughorn (Fred) Ltd. v Rederiaktiebolaget Trans-Atlantic* [1919] A.C.203, "... the time may arise when the principles of these two cases may have to be reviewed in this House." See also 8 Unvy. of W. Australia L.Rev. 534 "Undisclosed principal: is *Humble v Hunter* still good law."

The problem of Armstrong v Stokes

Another nineteenth century decision to spark off a controversy, which has scarcely lessened to this day⁽⁹⁾, is the case of Armstrong v Stokes. Here P employed A to purchase goods from time to time. Sometimes A acted on his own account but at other times he acted as an agent. T had had dealings with A but had never inquired whether A acted as an agent or on his own account. P had always paid A and had never had any contact with A's sources of supply. In the instant case, P instructed A to acquire certain goods. A acquired the goods from T. P paid A for the goods at a time at which T was totally unaware of P's existence. A did not pass the money on to T. T, on discovering P's existence, sued P for the price of the goods. It was held that T could not succeed. Blackburn J., having indicated that he regarded T's right to sue P to be a "god-send",⁽¹⁰⁾ sought an exception to the rule that T could sue P.

He found the exception in the instance where an undisclosed principal pays his agent at a time when T is unaware of P's existence. In this situation he considered it would produce intolerable hardship⁽¹¹⁾ if the undisclosed principal should be called upon to pay T when he had already, bona fide, and without moral blame paid A, at a time when T

(9) Discussion is normally centred around the quartet of Armstrong v Stokes; Thompson v Davenport (1829) 9 B. & C. 78; Heald v Kenworthy (1855) 10 Exch. 739; Irvine v Watson (1880) 5 Q.B.D.414. Academic considerations spanning this century are to be found in 9 Col. L.R.116; 23 Harv. L.R. 513; 4 C.L.J. 320; 18 Miss. L.J. 436; 28 M.L.R.167. See also Second American Restatement para.208 expressing the uncertainty.

(10) See footnote 5, p.123.

(11) Following Thomson v Davenport.

was still giving credit to T alone, knowing of no one else. He did, however, quite frankly admit that the exception was of a somewhat unsatisfactory nature. "It might be said, perhaps truly, this is the consequence of that which might originally have been a mistake, in allowing the vendor to have resort at all against one to whom he never gave credit, and that we ought not to establish an illogical exception to cure a fault in a rule."⁽¹²⁾

However, it would appear that this decision was dictated, not by the basic doctrine of the undisclosed principal, but rather, by the view that basically T's only right is against A. Blackburn J. merely paid lip service to the established doctrine and, in effect, followed a line that T only had a right against U.P., based upon A's right of indemnity from U.P., which should become available to T upon U.P.'s disclosure. If A had no right of indemnity then T's position was prejudiced. Thus T obtains satisfaction from U.P. because U.P. is liable to A to pay, or to provide funds with which A may pay T. The implication of this decision is, therefore, that T has no original right against U.P., for otherwise he would not be deprived of his right to sue U.P. by the act of U.P., in paying A.

Higgins⁽¹³⁾ has attempted to explain the decision in *Armstrong v Stokes* in much this way, indicating that T's right against U.P. is equitable in nature. But, he considers that a proper understanding of the equitable rules reveals that U.P.'s act in paying A ought not

(12) *Armstrong v Stokes* was severely criticised in *Irvine v Watson*, although the latter was simply a case of an unnamed principal.

(13) 28 M.L.R.167. "The Equity of the Undisclosed Principal." Although he believes the facts of *Armstrong v Stokes* are such that agency principles were inapplicable and that the decision on the facts was correct.

to prejudice T. The important factor in equity is not T's knowledge of U.P. but rather P's knowledge of his duty to pay T. Therefore, the rule in *Armstrong v Stokes*, he finds erroneous. However, Higgins accepted Goodhart and Hamson's theory of "primitive assignment" as the basis of the doctrine. Again, this reveals that the reasoning he adopts in relation to *Armstrong v Stokes* is based upon a basic assumption that the doctrine of the undisclosed principal is founded upon a primary liability between A and T and not between U.P. and T.

It is submitted that a proper understanding of the doctrine reveals *Armstrong v Stokes* to be incorrect. The reasoning is simple and the decision plain if the correct basis is adopted. T ought not to be prejudiced by U.P.'s payment to A, simply because it was U.P.'s duty to seek out and pay his creditor.⁽¹⁴⁾ Emphasis upon the relationship between U.P. and T leads naturally to a simple resolution of a difficult problem. This is the solution which is widely sought after, but which has led to such obscure devices in its attainment.⁽¹⁵⁾

The problem of Set-off

The notion of set-off is another situation which has given rise to difficulty. Can T, dealing with A, set off a debt, due from A to T, against a debt due from T to an undisclosed principal? The basic rule is simple enough. Where A has been authorised to appear as a principal then T can set off debts, owed by A, incurred before T knew of P.⁽¹⁶⁾ However, the difficulty has arisen where P has required A to contract expressly on behalf of P (so that T cannot set off A's debt)

(14) *Haldane v Johnson* (1853) 8 Exch.689.

(15) Brett J. in *Irvine v Watson* commented "if the case of *Armstrong v Stokes* arises again, we reserve to ourselves sitting here the right of reconsidering it."

(16) *George v Clagett* (1797) 7 Term Rep. 359; 2 Esp. 557.

but A, in fact, contracts in his own name (thus bringing in the possibility of U.P. being faced with a set-off claim by T).

The leading case in *Cooke v Eshelby*,⁽¹⁷⁾ here A, in his own name but really on behalf of an undisclosed principal, sold cotton to T. T was aware that A was in the habit of dealing both for principals and on his own account. In answer to interrogatories, T admitted that he had no belief as to whether A was an agent or not. It was held, by the House of Lords, that T could not set off against P, a debt due from A.⁽¹⁸⁾

However, Powell⁽¹⁹⁾ has argued that the decision ought merely to be regarded as authority for a rule that if T has no belief in the existence of P, then P ought to be given the benefit of the doubt. Otherwise, T ought merely to have to prove T contracted with A, believing him to be a principal or not knowing him to be an agent and it is immaterial whether A had authority or misrepresented his authority to act as principal.

This argument again displays the difficulty which arises when the basis of the doctrine is lost to sight. If the contract theory is applied, then, just as in *Drakeford v Piercy*, attention is centred upon the relationship between U.P. and T. The result is that, consistently with other areas of development of similar fact situations, U.P. is not to be prejudiced by A's unauthorised acts unless he has

(17) (1887) 12 App. Cas. 271.

(18) The Second American Restatement para. 306(2) also adopts this rule, denying T a right of set-off in these circumstances.

(19) Powell, p.177.

"enabled"⁽²⁰⁾ A to appear as an actual contracting party.

The problem of Election

Finally, in this brief survey of difficult areas which, it is submitted, have been either created or not been resolved because of a lack of attention to a basal theory to the doctrine of the undisclosed principal, consider the rule of election or merger. The rule is that T must elect either to sue A or to sue U.P., he cannot sue both. The rule has been described as "unbending and indiscriminate"⁽²¹⁾ and as "resting on rather barren logic."⁽²²⁾

Under this rule, if T should sue A to judgment then even if the judgment should remain unsatisfied, T cannot, on discovering U.P., sue U.P.⁽²³⁾ The justification of the rule under which T is held to have elected to hold A alone responsible, at a time when U.P.'s existence remains unknown to him, has been through the doctrine of merger. "When one has merged a contract in a judgment, one can have only one judgment, and having merged the contract in the judgment, one cannot use the contract to get a second judgment."⁽²⁴⁾ In short, the rule

(20) See Lord Watson's judgment in *Cooke v Eshelby* esp.p.278 "... it is not enough to show that the agent sold in his own name. It must be shown that he sold the goods as his own ... and it must also be shown that the agent was enabled to appear as the real contracting party by the conduct or by the authority, express or implied, of the principal." C.f. the notion of "vicarious contract liability".

(21) *Kendall v Hamilton* (1879) 4 App.Cas.504,530 per Lord Penzance.

(22) *Ore Steamship Corporation v Hassel* (1943) 137 F. 2d. 326 cited *Stoljar*. p.216.

(23) *Priestley v Fernie* (1865) 3 H. and C. 977.

(24) *Debenhams Ltd. v Perkins* (1925) 133 L.T. 252, 254, 255. Severely criticised as a purely technical reason by Glanville Williams, *Joint Obligations* p.94.

cannot be justified. The rule is clearly based upon some valuation of interests which fail to recognise the doctrine of the undisclosed principal. The valuation of interests is, in fact, revealed as simply the old argument that T did not bargain for U.P.s liability and what the law gives it can take away. As has been demonstrated, this approach is not sound and, of course, if one has confidence in the basic theory then one must expect that departure from it will lead to problems.

The Watteau v Fenwick⁽²⁶⁾ situation

The celebrated case of Watteau v Fenwick raised a very controversial⁽²⁷⁾ and difficult problem, one which is only very tentatively considered within a section dealing with the doctrine of the undisclosed principal. The problem which the case raises is, the extent to which an undisclosed principal is liable for contracts entered into, without authorisation, by his agent.

Briefly, the facts of the case were that P, a brewer, purchased a beerhouse from one Humble (A), whom he permitted to continue to operate the beerhouse as P's manager. A's name remained over the door, the licence having been taken out in his name.⁽²⁸⁾ It was agreed between A and P that A should have no authority to buy any goods for the business except bottled ales and mineral; all other goods were

(26) [1893] 1 Q.B.346.

(27) Discussed 23 Harv. L.R. 513, 599, 601, Mechem; 29 Yale L.J. 859, Seavey; 4 Camb. L.J. 320, 366; 17 Can.B.R. 693, Montrose; 17 Can. B.R.248, 254, Falconbridge; 28 M.L.R.167, 172, Higgins; 1 Okl. L.R. 3, Seavey; [1961] C.L.J. 239, Hornby; 39 Minn. L.R. 307, Aaron; 47 Nab. L.R.768, Conant; [1967] J.B.L.122, Hill; Notes 9 L.Q.R.111; 8 Harv. L.R.49; 10 Col. L.R. 763.

(28) Under the Beerhouse Act, 1840 (3 & 4 Vict. C.61), section 1, a licence could only be issued to a person resident upon the premises.

to be supplied by P himself. A, ignoring the restriction, purchased cigars and other goods which were suitable for such an establishment and which a normal manager would be authorised to buy. Clearly A had no actual authority from P to purchase the goods, nor had he any apparent authority to purchase on P's behalf because, P being undisclosed, there was no appearance of agency at all. However, it was held that U.P. (as he was) was liable to T. The principle upon which U.P. was held liable Wills J. expressed as being: "the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority." (29)

This principle Wills J. supported by reference to the law of partnership. (30) However, it is now widely accepted that this argument was erroneous because section 5 of the Partnership Act, 1890 is in direct conflict with the proposition. (31)

The second ground upon which Wills J. based his principle was the decision in *Edmunds v Bushell and Jones* (32). Here P was a hat manufacturer owning two businesses. One business was outside London. The

(29) P. 348, 349.

(30) "In the case of a dormant partner, it is clear that no limitation of authority as between the dormant and active partner will avail the dormant partner as to things within the ordinary authority of a partner. The law of partnership is, on such a question, nothing but a branch of the general law of principal and agent, and it appears to me to be undisputed and conclusive on the point now under discussion." p.348.

(31) Powell, p.77 "... the liability of a dormant partner is not the same as that of an ordinary undisclosed principal, and the choice of the example of a dormant partner by Wills J., in *Watteau v Fenwick* was, perhaps unfortunate."

(32) (1865) L.R.1 Q.B.97.

London business was managed by A under his own name. A was authorised to draw cheques but was forbidden to draw or accept bills of exchange. Nevertheless, A, for business purposes, accepted four bills and the question arose as to whether P was liable on the bills. The decision that P was liable has itself given rise to considerable debate. Montrose⁽³³⁾ considered the case to be one of apparent authority, on the basis that the first indorsee of the bills was aware of P's existence and A's agency. On this basis he considered "Edmunds v Bushell and Jones, therefore, is no authority for making a principal liable in the absence of actual or apparent authority."

In direct contrast, Hornby,⁽³⁴⁾ has asserted that the decision is "no authority on the situation where an agent purports to act as an agent" because the situation was, in fact, one in which the principal remained wholly undisclosed.⁽³⁵⁾

Thus depending upon which approach is adopted either on the authority of the Montrose approach (a) Edmunds v Bushell and Jones is no authority for the decision in Watteau v Fenwick where P was certainly undisclosed or, following Hornby's approach, (b) Edmunds v Bushell and Jones is no authority for the principle propounded by Wills J., in so far as it refers to the "usual authority of an agent," for the facts of the case did not disclose agency.⁽³⁶⁾

The need for Watteau v Fenwick

Nevertheless, the decision in Watteau v Fenwick has been described as being "as necessary as it was simple."⁽³⁷⁾ Perhaps the

(33) 17 Can. B.R.693, 699.

(34) [1961] C.L.J. 239, 244.

(35) Hornby cites Cockburn C.J. at p.99. "Bushell was therefore the agent of the defendant Jones, and Jones was the principal, but he held out Bushell as the principal and owner of the business."

(36) Or, to express the argument differently, Edmunds v Bushell and Jones is either, authority for the Watteau v Fenwick principle but not for the decision, which did not fall within the principle which related to disclosed agency, or, it is authority for the decision on undisclosed agency, but not for the principle which was propounded as authority for the decision.

(37) Stoljar, p.58.

earlier American decision in *Hubbard v Tenbrook* best expresses the basic principle of justice reflected in the decision. In *Hubbard v Tenbrook*⁽³⁸⁾ A had been appointed to conduct a business, but was forbidden to buy on credit. Mr. Justice Mitchell stated: "A man conducting an apparently prosperous and profitable business obtains credit thereby, and his creditors have a right to suppose that his profits go into his assets for their protection in case of a pinch or an unfavourable turn in the business. To allow an undisclosed principal to absorb the profits, and then, when the pinch comes, to escape responsibility on the ground of orders to his agent not to buy on credit, would be plain fraud on the public."

This passage indicates an approach, to the resolution of the problem under discussion, which has been further developed by Conant in his "Objective Theory of Agency"⁽³⁹⁾ His basic explanation, of the real principle behind *Watteau v Fenwick*,⁽⁴⁰⁾ is that as A posed as owner and neither he nor U.P. made any representation of agency authority, the only basis for U.P.'s liability is estoppel based upon apparent ownership of the business. U.P. is liable to the extent of the value of the assets of the business because he directed A to appear as owner and is, therefore, estopped from denying A's ownership of those assets or T's execution against those assets.

Two points spring immediately from this explanation. The first, is that it raises the notoriously difficult conceptual problems of a liability based upon estoppel. The second, is that it raises an

(38) Cited 47 Nab.L.R. 678,688. (1889) 124 Pa.291, 16A. 817.

(39) 47 Nab.L.R.678.

(40) He too submits that the "apparent authority rationale for the decision is wrong."

entirely new liability of, almost, unlimited potential.⁽⁴¹⁾ If A is given the appearance of an owner then it would appear that any act which he carries out ought to be sufficient to impose liability upon U.P. An agent may thus do what would not be usual in an owner, the principle appears to be quite free from any restraining concept of "usual authority", such as that indicated in *Watteau v Fenwick* itself. Indeed, the limitation indicated in the latter case and in *Kinahan and Co. Ltd. v Parry*, that the agent's act should have been for U.P.s benefit would seem to be both unreasonable and inconsistent under the "Objective Theory".

However, there does appear to be some measure of agreement, amongst proponents of a liability based upon estoppel, that U.P.s liability should be limited to the assets of the business.⁽⁴²⁾ Moreover, as Fridman⁽⁴³⁾ has pointed out, the refusal of the House of

(41) Certainly the dishonest agent who benefits himself alone would appear to impose liability upon U.P. under this theory. Of course it may be argued that if the mischief is to protect innocent third parties, then this is a desirable end. Nevertheless, most theories have sought to avoid taking U.P.s liability so far. See Higgins, 28 M.L.R. 167, 173. indicating U.P.s liability to depend upon U.P. having benefited from A's actions. Also Ames 18 Yale L.J. 443. c.f. *Kinahan & Co. Ltd. v Parry* [1910] 2 K.B. 389 which followed *Watteau v Fenwick* but was reversed by the Court of Appeal, on the ground that there was no evidence that the goods supplied to A had been for the use of the U.P. and not for A personally.

(42) See Hornby [1961] C.L.J. 239, 246; Conant 47 Nab. L.R. 678, 688; 22 ILL. L. Rev. 652 "Ostensible Agency or ownership."

(43) Fridman, p.193.

Lords to accept that an undisclosed principal could ratify an unauthorised act on the part of his agent⁽⁴⁴⁾ indicates that, for policy reasons, the courts are prepared to place a limitation upon the scope of an undisclosed principal's liability for his agent's acts. The extent to which any principle displayed in *Watteau v Fenwick* may be of general application is uncertain.

Recognition of a class

Whatever, the bounds of the decision in *Watteau v Fenwick*, it appears to be indisputable that there are certain classes of case, decided in favour of third parties, which cannot be supported upon grounds of either authority or apparent authority (nor under the doctrine of the undisclosed principal, if it differs from authority) and which must, it appears, be based upon the existence of some "inherent agency power."⁽⁴⁵⁾ These basically relate to circumstances in which an agent, who is neither authorised nor apparently authorised, is able to dispose of a proprietary interest of his principal. Perhaps *Watteau v Fenwick* is simply unusual in that it is an exception to the usual reluctance of the courts to permit an agent, without authority or apparent authority, to bind his principal by contract. For it is submitted that it is only acceptance of the creation of a contractual relationship between U.P. and T which is in keeping with the needs of

(44) *Keighley, Maxted v Durant* [1901] A.C.240. Higgins' distinction between special and general agencies in this context would appear ingenious but unconvincing 28 M.L.R. 167, 174.

(45) Such decisions led to the passing of the Factors Acts, see 47 Nab. L.R. 679, 693, and decisions considered in the section dealing with disclosed agency.

the situation.⁽⁴⁶⁾ This again leads to the notion of an "inherent agency power"⁽⁴⁷⁾ and its contractual approach, which, although it would appear not to have the antiquity, giving respectability, present in the development of assumpsit at the root of the doctrine of the undisclosed principal, would meet the needs of the situation. In short, recognition of true agency principles in this area is likely to lead to recognition of the need for firmly based policy decisions, the need for which was argued in the previous section upon disclosed agency. This, it would appear, may lead to the dispersal of doubts, so frequently expressed in this area, the following passage being typical: "... it remains a question of no little theoretical interest whether the courts will finally decide there should be a limit on the liability of an undisclosed principal, and where that limit should be imposed."⁽⁴⁸⁾

Conclusion

The much criticised doctrine of the undisclosed principal has, I believe, been shown to be not only a desirable concept, indeed one much envied in non-common law jurisprudence,⁽⁴⁹⁾ but further to be a development falling clearly within the historical notion of contract. The apparent anomaly in recognising a contractual relationship between

(46) What if the cigars supplied to the beerhouse in *Watteau v Fenwick* had been defective? Surely U.P. ought to have had an action for breach of contract? See *Higgins* 28 M.L.R. 167, 175.

(47) See 29 Yale L.J. 859, 881.

(48) *Fridman*, P.194. See also *Hornby* [1961] C.L.J. 239, 246.

(49) See 18 M.L.R. 33 "Comparative Aspects of Undisclosed Agency."

U.P. and T has been shown to arise from a failure to recognise the historical origins and development of the theory underlying the law of contract. The current view of the contract as a consensual agreement ought not to overshadow the part which earlier theories of contract have played in the development of other branches of our law. It is satisfying to ascertain that survival of the doctrine of the undisclosed principal is in no way threatened by unsound foundations. Recognition of the basal theory of the doctrine ought to provide a platform from which may be launched crusades into areas of unsound development within the doctrine, which have been referred to in this thesis.

The problem of *Watteau v Fenwick* is considered in the overall conclusion to the thesis as an aspect of "inherent agency power" and the problems associated with inherent agency powers have been discussed in the section relating to disclosed agency.⁽⁵⁰⁾

(50) See the Second American Restatement paras. 161A and 194, 195 linking the areas of disclosed and undisclosed agency with inherent agency powers.

FINAL CONCLUSION

The broad conclusions of this thesis may be briefly stated in three parts. The first relates to the findings as to the conceptual basis of the relationship between P and T where:-

- (a) A acts in accordance with P's instructions, whether P is disclosed or undisclosed, or,
- (b) A acts outside the scope of P's instructions but appears, to T, to act within their limits.

It would appear that in these situations the relationship between P and T is contractual in origin and that the relevant principles have been developed upon a sound contractual theory. This finding requires acceptance of the historical fact that the law of contract, as we now know it, is derived from diverse sources. Nevertheless, enforcement of the several principles of agency related, in relation to the situations under discussion, can be justified as consonant with justice in that they are enforced in accordance with the inherent notion of justice in treating like cases alike. Each situation involves a common principle, the fundamental principle of our law, which requires that undertakings based upon contract should be enforced. The theory of the law of contract, as a consensual undertaking, ought not to be used as a basis for criticism of an entirely sound development, the origins of which have become obscured by subsequent belief. The rules of agency must be recognised as being sui generis, justifying agency as a branch of law.

The second finding relates to those nebulous areas in which:-

- (a) a relationship is recognised between U.P. and T and where A has exceeded P's instructions in what may be described as the *Watteau v Fenwick* situation, or,
- (b) a relationship is recognised between P and T where P is disclosed

but A does not have any appearance of acting in accordance with P's instructions and does in fact exceed those instructions. This may be described as the *Smellie v Fry* or *Hambro v Burnand* type situation.

Although it is possible once more to trace the relationship in each case to contractual origins, such a theoretical basis gives no guidance as to the development of principles. This is truly an area in which pure agency rules have been developed or in which "Inherent Agency Powers" arise. The relevant principles of law arise simply because of the relationship of principal and agent. Nevertheless the conceptual device of agency, in this area, ought to be recognised as being contractual and may be justified historically through the action of *assumpsit*.

The third and final concluding part concerns points one and two in perspective. Where a given situation falls within part one, the developed law exhibits a satisfactory degree of certainty and may be supported as being entirely consonant with principle. However, where a situation falls within part two, although a theoretical foundation to a contractual relationship, based upon historical origins, meeting the conceptual needs of the situation, may be found, the basal theory provides no guidance as to principle for prediction or future development. What, for instance, of the predicament of the Patagonian merchant? If the case falls within the nebulous principles surrounding inherent agency power then he would be successful against P, if not, then he would be left disadvantaged because of the notion of apparent authority. Quite clearly it is of the utmost importance that a thorough going review of policy and principle should be undertaken in this area. Seavey and the American Restatement have perhaps pointed the way for the future in undertaking a catalogue of situations from which it may be possible to develop a consistent body of doctrine.

Mearns too has suggested a possible policy foundation to any development for the future, through the notion of "vicarious contract liability". However, it is unfortunate to relate that English progress in this area appears to be in a particularly sorry state. The notion of inherent agency power has not been expressly accepted in any court and this must render development even more uncertain. The recent events in the Court of Appeal (*Burt v Claude Cousins*; *Barrington v Lee*; *Sorrell v Finch*) adequately demonstrate the practical difficulties arising from a lack of basic theory - these cases alone must point to the urgent need for a new start. Unfortunately in each case leave was given for an appeal to the House of Lords but, as yet, no appeal has been pursued.

Where the undisclosed principal situation arises, that which has been described as the *Watteau v Fenwick* situation, the uncertainty which exists is perhaps most significantly an indictment of the common law system under which a problem may be allowed to fester for want of litigants. Nevertheless, the uncertainty remains and is a source of concern, calling for resolution. It is indeed unfortunate that Agency, being developed in the Law Merchant, should, at this time, exhibit failure in the overriding requirement of certainty so revered by Lord Mansfield.

APPENDIX IQualifications to the Rule in Bolton v Lambert

The qualifications, or alleged qualifications, to the Rule in Bolton v Lambert⁽¹⁾ have, like the case itself, given rise to considerable debate.⁽²⁾ Further it is uncertainty as to the existence and extent of exceptions which, in part, necessitates a search for a sound basal theory to the "apparent authority" situation. Any basal theory which, like the estoppel theory, relies upon the doctrine of ratification must itself stand or fall by the efficacy or otherwise of the doctrine.

The alleged exceptions to the Rule in Bolton v Lambert may, it has been suggested,⁽³⁾ be accounted for and, either dismissed as spurious or accepted as genuine, in accordance with the general principle that the "Rule" must not cause "extra hardship to T." What then, is the hardship which the doctrine of ratification imposes upon T? In general terms the hardship may be simply stated as consisting in holding T to a bargain which he entered into with A, which he believed to be with P, by permitting P to ratify A's act. Thus the economic obligations which the ratification imposes upon T are, indeed, precisely

(1) (1889) 41 Ch.D. 295.

(2) See Wambaugh, "A problem as to ratification", 9 Harv. L.R.60; Mecham, "A question of ratification", 24 Am. L.R.580; Sondley, "An effect of ratification", 25 Am.L.R.74; 19 South Carolina L.R.788; 42 Temple L.R.I; 6 Australian Law 95; 2 Mich. L.R.25; Tamaki, "The Rule in Bolton v Lambert", 19 Can. B.R.733; Seavey, 29 Yale L.J. 859, 891; Hunter, "What is the effect of ratification of an agent's unauthorised contract?" 5 Louisiana L.R. 308.

(3) Stoljar, p.193.

those obligations which he believed he had incurred in his initial negotiation with A. Clearly the reason for T's desire to withdraw must be simply that the bargain is now considered to be less attractive. The mere fact that one party to a bargain is disappointed has never been a sufficient reason for setting aside the transaction! Thus any true exception to the "Rule" must be one which reveals a "hardship" which exceeds being bound to the legal consequences flowing from the obligation between A and T.

It may be objected that as no offer was made by T to A, then no contract could be created between them. This, however, reveals a failure to appreciate the nature of ratification. Unless the exchange of offer and acceptance between A and T creates some contractual relationship then there would be nothing for P to ratify; truly *Bolton v Lambert* would reveal a violation of basic principles of offer and acceptance. However, there can be no doubt that the exchange between A and T does create a contractual relationship, the relationship recognised in *Collen v Wright*⁽⁴⁾ as warranty of authority.⁽⁵⁾ The principles of offer and acceptance do exhibit characteristics peculiar to agency⁽⁶⁾ in that an offer and acceptance exchanged between A and T creates a contract between P and T, and *Bolton v Lambert* is no exception to this principle. It is apposite at this stage to consider a situation, widely classified as an exception to the Rule in *Bolton v Lambert*, which may not, in fact, be an exception. This is the situation where T is aware that the purported agent is not authorised.⁽⁷⁾

(4) (1857) 8 E. and B. 647.

(5) See footnote 29, p.79.

(6) When viewed from the current theory of consensual contract.

(7) See 21 Unvy. of Chicago L.R. 248, Seavey; 5 L.Q.R. 440, 441; Stoljar, p.194.

Exception One

Perhaps the most frequently cited case to adopt this approach is that of *Watson v Davies*⁽⁸⁾ in which *Bolton v Lambert* was distinguished. The facts of *Watson's* case were that the defendant, T, offered to sell land to the board of management of a charity. At a full meeting of the board, an inspection of the land was agreed upon and the plaintiff together with twelve other members of the board, A, was instructed to carry it out. It was found, as a fact, that this inspection party accepted the defendant's offer "subject to ratification" by the full board. Before the full board of management could ratify the acceptance, in fact early on the day appointed for the ratification meeting, the defendant telegraphed a revocation of his offer. The board went ahead with the ratification and the plaintiff, on behalf of himself and the other members of the board, sued for specific performance. Maugham J.⁽⁹⁾ stated that "In a case where the agent for one party to a negotiation informs the other party that he cannot enter into a contract binding his principal except subject to his approval, there is in truth no contract or contractual relation until the approval has been obtained. The agent has incurred no responsibility. In *Bolton v Lambert* the decision of the Court was, I think, founded on the view that there was a contractual relation of some kind which could be turned into a contract with the company by ratification, whilst in the absence of ratification there was a right of action against the agent for breach of warranty of authority. It was admitted that there could be no ratification of a legal nullity. An acceptance by

(8) [1931] 1 Ch.455; followed in the recent case of *Warehousing and Forwarding Co. of East Africa, Ltd. v Jafferli, Ltd.* [1964] A.C.1.

(9) At p.468.

an agent subject in express terms to ratification by his principal is legally a nullity until ratification, and is no more binding on the other party than an unaccepted offer which can, of course, be withdrawn before acceptance."

This analysis of the legal principles behind the "Rule in Bolton v Lambert" clearly demonstrates that the "Rule" could have no application to the factual situation disclosed in Watson v Davies. The case fell to the ground upon a failure to satisfy the requirement of the law of contract that there must be established an offer and unqualified acceptance, no matter what form this may take. Here there was no consensually expressed intention to be bound. Indeed, Maugham J. went on to state expressly that, "Bolton v Lambert does not apply. Reference to that case will show that the contract was one entered into by a Mr. Scratchley on behalf of a company called Bolton Partners, Ltd. He had told the defendant that he would refer the defendant's written offer to his directors, and he had subsequently written to the defendant stating, erroneously, that the directors had accepted the latter's written offer. On the face of the documents there was, therefore a complete contract, and it was held by the Court of Appeal that the defect arising from the circumstance that Mr. Scratchley had not obtained a proper authority to bind the company could be cured by a ratification, and this even though the defendant, the other party to the bargain, had purported to withdraw his offer."

Quite clearly Watson v Davies⁽¹⁰⁾ ought not to be regarded as providing any exception to the Rule in Bolton v Lambert.

(10) Alternatively, it could not be said to give rise to a situation of "holding out", as authority is negatived.

Exception Two

The second situation, in which an exception to the "Rule" is said to arise, is where third party rights have vested or where the "Rule" would operate to prejudice rights vested in third parties.⁽¹¹⁾

Cotton L.J., in *Bolton v Lambert*,⁽¹²⁾ expressly stated that "an estate once vested cannot be divested ... by an application of the doctrine of ratification."

Probably the most frequently cited authority for this proposition, is the case of *Bird v Brown*.⁽¹³⁾ Here P had forwarded goods to T. His agent, A, on hearing of T's insolvency, gave an unauthorised notice of stoppage in transitu. The transit ended and the goods came into the possession of T's trustee in bankruptcy. P purported to ratify A's act two days after the notice had been given but after the trustee came into possession. The decision was that the ratification came too late to divest the trustee in bankruptcy of his vested right to retain the goods. This principle would certainly appear to constitute an exception to the Rule under discussion.

However, there is some evidence to suggest that the *Bird v Brown* principle is in fact unlikely to be applied today. In *Hutchings v Nunes*⁽¹⁴⁾ the person who stopped transit, before delivery to the insolvent T, was merely a merchant in Jamaica who had close business relations with P, the seller, in Baltimore. The Jamaican merchant heard of T's insolvency, wrote informing P but acted before P replied authorising the stoppage. The Judicial Committee of the Privy Council was prepared to uphold the ratification, upon evidence that P was "not at all

(11) Powell, p.144; Fridman, p.54.

(12) At p.307.

(13) (1850) 4 Exch.786.

(14) (1863) 1 Moore N.S. 243.

surprised"⁽¹⁵⁾ when he heard that A was to intervene on his behalf and a general authority so to do was implied. It is submitted that it must be a particularly rare case in which such a general authority will be found to be absent.

A further point of interest, in *Hutchings v Nunes*, is that although the head note refers to ratification of A's act, P's letter of authorisation had been posted before A's stoppage; A could therefore have been regarded as authorised, as at the time of stoppage. Stoljar has described this latter ratio decidendi as being unsatisfactory, for it would still allow an exception to *Bolton v Lambert* when, say, a letter of authorisation was posted after a time limit, which may be extremely short.⁽¹⁶⁾ It is a simple step to allow ratification where it is certain that P will subsequently approve of the act. This second "exception" is, therefore, likely to be of minimal effect. However, it does introduce the third point for discussion, the "time-limit".

Exception Three

Dibbins v Dibbins⁽¹⁷⁾ is frequently classified along with the second exception, relating to vested rights. However, a more satisfactory explanation is that it turned on the issue of a time-limit. Articles of partnership provided that on the death of either partner, the survivor should have the option of purchasing the deceased's share by giving written notice of intention to do so within three months from the date of death. The surviving partner, P, was unable to give notice, as he was of unsound mind during the three month period. His

(15) At p.255, 256.

(16) Stoljar, p.196.

(17) [1896] 2 Ch. 348.

solicitor, A, did give notice on his behalf within the time-limit but, owing to the insanity, his act was unauthorised. Subsequently an order was made under the Lunacy Acts authorising a notice to be given on P's behalf and a second notice was given after expiry of the three month period. Chitty J. treated the case as that of an attempted ratification of an unauthorised notice. He held that as the option to purchase had not been exercised within the time limit, there was no notice capable of being ratified after the expiration of the three months. More precisely, he ruled that an unauthorised agent's exercise of an option to purchase is not susceptible to ratification, by P, outside the time limit fixed for the option. This qualification upon the "Rule", it would appear, is quite sound.

In *Reynolds v Atherton*⁽¹⁸⁾ Younger L.J., accepted the principle with these words, "... whether or not the doctrine of ratification (in *Bolton v Lambert*) will in the House of Lords survive the criticism of Lord Justice Fry upon it in his book on Specific Performance, the doctrine of that case has not yet extended to any ratification after the date limited for acceptance."

That such an exception may exist is no doubt a blow to supporters of the estoppel theory, for it places some limitation upon P's opportunity to sue under an arrangement which binds him to T upon T's insistence. However, if the limitation is restricted to those situations in which an express time limit is imposed then, perhaps, it may be received with equanimity. Is the qualification confined to the express time limit?

North J., in *Portuguese Consolidated Copper Mines, Ltd., Re, ex parte Bosanquet, ex parte Badman*,⁽¹⁹⁾ expressed surprise that no

(18) (1921), 125 L.T.R. 690, 698.

(19) (1890) 45 Ch.D.22.

mention of a requirement of ratification within a reasonable time was made in Bolton v Lambert itself. Indeed a detailed consideration of the judgments, delivered in the Court of Appeal, would seem to leave no room for manoeuvre. They appear to indicate that, subject to ratification, there was a complete and binding contract from the moment of acceptance by the agent, in accordance with the long settled doctrine of relation back. Further, this would follow in the natural course of events and T is unable to withdraw, therefore logically, a requirement as to ratification within a reasonable time has no place in the "Rule". For as Cotton L.J. said:⁽²⁰⁾

"When and as soon as authority was given to Scratchley to bind the company the authority was thrown back to the time when the act was done by Scratchley, and prevented the defendant from withdrawing his, because it was then no longer an offer, but a binding contract."
and Lindley L.J.:⁽²¹⁾

"I can find no authority in the books to warrant the contention that an offer made and in fact accepted by a principal through an agency or otherwise, can be withdrawn."
and Lopes L.J.:

"Ratification gives ... the same effect to the contract made by Scratchley as it would have had if Scratchley had been clothed with a precedent authority to make it."

Despite these three clear statements of principle, Chitty J., in Dibbins v Dibbins, (discussed earlier) decided seven years after Bolton v Lambert, distinguished the earlier case on the grounds that there had been no question of a time limit within which ratification was to

(20) At p.308.

(21) At p.309.

be made. Clearly on this reasoning, had the offer been open for a specific time, then no ratification would have been possible after that time. Further, however, in *Metropolitan Asylum Board v Kingham*,⁽²³⁾ Fry J.⁽²⁴⁾ held that "if the ratification is to bind, it must be made within a reasonable time after acceptance by an unauthorised person." Now, there was nothing in the facts of Kingham's case to lead to such a wide statement of principle. The case could have been disposed of upon the more easily discernable principle adopted in *Dibbins v Dibbins*.

Exception Four

Kingham's case concerned a contract to supply eggs. On the 18th of September, 1888 the defendants submitted a tender to supply the plaintiff Board with eggs at a specific price, from the 30th of September, 1888 to the 30th of March, 1889. Acceptance of this offer was approved by a meeting of the Asylum Board on the 22nd. of September but the corporation seal was not affixed to the acceptance. The same day the plaintiff's clerk informed the defendants of the acceptance. On the 24th of September the defendants withdrew the offer on the grounds that they had submitted an incorrect price in error. On the 6th of October the corporation seal was formally affixed to the acceptance. Fry J., in his judgment, distinguished *Bolton v Lambert* on the wide principle that in that case ratification had been made within a reasonable time. But further, he held that no ratification would be possible in any case beyond the time at which performance of the contract was to commence, for beyond this would always be an unreasonable time. Had the matter remained as left by Fry J., then the "Rule" could

(23) (1890) 6 T.L.R.217.

(24) He expressed strong views on the whole doctrine of *Bolton v Lambert* in his book on *Specific Performance*.

have been applied with precision, following the principle that the time for ratification ended upon the date for performance of a contract;⁽²⁵⁾ again the exception could have been accepted by the estoppel theorists as providing no great problem.

However, the issue of reasonableness, as to the time of ratification, arose again in *ex parte Bosanquet*.⁽²⁶⁾ The Court of Appeal introduced the qualification upon *Bolton v Lambert* that the ratification must come within a reasonable time, having regard to all the circumstances. This decision reversed the first instance decision of North J., who, despite protest at what he considered to be an unsatisfactory principle, had been unable to distinguish *Bolton v Lambert*. Cotton and Lindley L.J.J., accepted the qualification upon *Bolton v Lambert*, without citing authority, no doubt on the simple grounds that it was considered equitable that P should have no more than a reasonable time within which to ratify A's unauthorised act.

Bowen L.J., clearly troubled by the lack of logic in the qualification, attempted to rationalize the decision. Fry J., in his book, *Specific Performance*⁽²⁷⁾, had said, "It is apprehended, therefore, that the real meaning of the learned judges [in *Bolton v Lambert*] was that the contract would be avoided if it were not shown within a reasonable time that Scratchley's act had been ratified. So that the contract was contingent upon a subsequent expression of will of one of

(25) For as Fry J. (p.217) explained, it is only at this point of time that "hardship" may ensue for T, "The defendants [T] could not know then whether they were to supply the eggs or not."

(26) See footnote 19. ante.

(27) Third ed. p.735.

the contracting parties, 'and existed as a contract before that will was exercised or expressed." Thus when pressed with argument that A's unauthorised act created a contract subject to a subsequent avoidance (or ratification) making a qualification as to time superfluous, Bowen L.J. indicated that he considered: "... ratification is not an election not to avoid the contract - because original contract, from my point of view there was none, they not having been authorised agents to make it - but an election to confirm the act which professed originally to be done by the authority of the company, although it was not; and as it is an election it must take place within a reasonable time, and the standard of reasonableness depends upon the circumstances of each case."

Although the question of reasonableness is necessarily left at large, it might be wondered at the equity of permitting withdrawal of an apparently completed contract which is not, as in the case of offer, merely intended to remain open for a reasonable time.⁽²⁸⁾ Indeed, on the facts of *ex parte Bosanquet*, the parties having contrived to act as though bound after knowledge of the want of authority, it was found that ratification was made within a reasonable time.

Although the qualification of "reasonable time" has been widely accepted,⁽²⁹⁾ it would appear, from *ex parte Bosanquet* itself, that the qualification ought to be treated with some care. The case arose in respect of an irregularity in allotment of shares in a company and the subsequent ratification of the allotment. However, in addition to any question of reasonableness as to the time of ratification both

(28) See note 12 Col.L.R.455.

(29) See the bold statement in *Fridman*, p.57.

Cotton and Bowen L.J.J. laid stress that an important element for consideration in relation to reasonableness was, whether there had been any alteration in the "state of the company" so as to render any ratification "inequitable".⁽³⁰⁾

Perhaps the most acceptable approach, which would relieve the qualification of its potentially catastrophic impact upon the usefulness of the estoppel theory of apparent authority, is to regard a repudiation, by T, on grounds of A's lack of authority, as merely a very important factor in determining the issue of reasonableness as to the time of ratification. Certainly the question of reasonableness of the time for ratification does not appear to have given rise to intervention in the application of Bolton v Lambert in reported cases.⁽³¹⁾ Channel J. in *Re Tiedemann and Ledermann Freres*⁽³²⁾, whilst accepting that ratification must be made within a reasonable time held that a ratification was an effective adoption of a sale contracted two months previously, involving a commodity upon a fluctuating market. On the 27th of April A had sold, in P's name, a quantity of wheat to T. A contracted in this way, using P's name, because T had refused to deal with A personally following previous unsatisfactory transactions. A had, in fact, the fraudulent intention of selling on his own behalf. Early in June the market price of wheat fell and T who by now suspected,

(30) Per Bowen L.J. at p.36, "We have not the materials from which we can safely come to the conclusion that there has been such an alteration in the prospects of the company as rendered it unfair that that which had been assumed to be, in the first instance, good between the parties should be made good by a subsequent adoption or election ..."

(31) Fridman, p.57, is only able to cite one case, involving an easily implied specific date, as authority for the proposition that ratification, in general, must be within a reasonable time - the case of *Metropolitan Asylums Board v Kingham*.

(32) [1899] 2 Q.B.66.

correctly, that A was secretly acting for his own benefit, refused to carry out the contract. A thereupon called upon P to ratify the contract and P did so. Channel J. applied *Bolton v Lambert* and held T's repudiation, although before ratification, to be ineffective.⁽³³⁾

Thus it may be that this extension of the third exception to the "Rule" may be of little application and need not unduly restrict the application of the estoppel principle to apparent authority.

Exception Five

What may be regarded as the fifth possible exception⁽³⁴⁾, to the Rule under discussion, said to flow from the case of *Walter v James*⁽³⁵⁾, is that ratification may not operate retrospectively if it would prejudice T.⁽³⁶⁾

The facts of *Walter's* case were that P, having requested that A should pay off a debt which P owed to T, countermanded the authorisation before A actually made over the payment. A, however, considered that T should be paid and he subsequently paid the amount that P owed. Following this, A and T, realizing that as A's act was unauthorised and that P would, therefore, be under no duty to reimburse A, agreed upon the return of the money by T to A. T then sued P for the money still owed to him. The ingenious P at once purported to ratify A's unauthorised act (paying T) and pleaded the earlier payment in satisfaction of the debt. Quite clearly this plea could not be allowed to succeed. It was held that A and T could cancel the payment before P ratified, and therefore the ratification could not deprive T of his right to sue for the debt.

(33) The case involves difficult questions of voidable contracts and their ratification, not discussed here.

(34) It has been argued that *Walter v James* and *Bolton v Lambert* are irreconcilable. 5 L.Q.R. 440, 441.

(35) (1871) L.R. 6 Ex. 124.

(36) Interpreted as such in *Powell*, p.141.

Martin B.⁽³⁷⁾ indicated the rule to be "When a payment is not made by way of gift for the benefit of the debtor, but by an agent who had not the debtor's authority to pay, it is competent for the creditor and the person paying to rescind the transaction at any time before the debtor had affirmed the payment, and repay the money, and thereupon the payment is at an end, and the debtor is again responsible." This formulation would appear to restrict the rule to the payment of debts. However, Bolton v Lambert itself was the first reported case to interpret Walter's case as authority for the more general proposition that A and T may mutually agree, under a general cancellation power, that their acts should be negatived. Indeed it was in these terms that Cotton L.J. distinguished Walter's case.⁽³⁸⁾ "... there was an agreement between the assumed agent of the defendant and the plaintiff to cancel what had been done before any ratification by the defendant."

In a note in the Law Quarterly Review⁽³⁹⁾ it was argued that Bolton v Lambert involved precisely the same point of law as did Walter v James except, that in the latter case payment was involved whereas in the former acceptance was at issue. Therefore, on principle, assuming Bolton v Lambert to be correct, as the ratification relates back to the time of A's act, any subsequent cancellation of the payment as between A and T must be ineffective, as was the attempted withdrawal, before ratification, in Bolton v Lambert. Stoljar,⁽⁴⁰⁾ however, argues that there is in fact no inconsistency if one considers when

(37) At p.128.

(38) At p.307.

(39) 5 L.Q.R. 440, 441.

(40) Stoljar, p.194.

the rule of relation back does apply. In *Bolton v Lambert*, he asserts, it applied because the question was whether T was bound to P. In *Walter v James* the question was simply whether T had been paid or not.⁽⁴¹⁾

Tamaki,⁽⁴²⁾ however, suggests a more satisfying explanation of *Walter's* case, consonant with the doctrine of relation back. He quite simply notes that the bi-lateral cancellation effected in *Walter's* case, when considered along with the fiction of "agency identification" is more readily acceptable, on principle, than the unilateral action undertaken by T in *Bolton v Lambert*. Under the fiction of "agency identification", P and A are regarded as one; cancellation by A therefore may be regarded as cancellation by P. Further, even if it be argued that P must ratify all of A's acts, it may be that if P ratified A's acts, as in *Walter v James*, then this would include the cancellation.

The uncertainty which surrounds this exception suggests that a wider sample of academic thought may be of assistance.

Fridman⁽⁴³⁾ does not classify *Walter's* case as an exception in its own right, simply regarding the case as falling within the category of cases in which ratification was attempted too late, that is, outside a time limit.⁽⁴⁴⁾

Powell⁽⁴⁵⁾ extracts the wider ratio, that *Bolton v Lambert* does

(41) A neat approach but not aesthetically pleasing, for the answer to the latter question would depend upon the movement in time at which the question is posed and, taking into account the doctrine of relation back the answer could be, yes! and T would be deemed to be satisfied.

(42) 19 Can. B.R.739.

(43) Fridman, p.54.

(44) He cites *Dibbins v Dibbins*, post, relegating *Walter's* case to a footnote.

(45) Powell, p.141.

not apply if it would result in hardship, but he does not attempt a detailed analysis, simply regarding the facts of Walter's case as a clear illustration of the wider principle.

Seavey⁽⁴⁶⁾ stoutly asserts that English cases⁽⁴⁷⁾ adopting Bolton v Lambert "are wrong" and that the fiction of relation back adopted merits the "harshest language used by the critics" for it amounts to mere "worship of a transcendental shrine" of doctrine.⁽⁴⁸⁾

Certainly Walter v James may properly be regarded as an exception to the doctrine of relation back, but equally, the decision handed down by the case may be regarded as one directed by the exigent circumstances.

Exception Six

To consider one final possible exception to the "Rule in Bolton v Lambert", one with potentially devastating consequences for the estoppel theory, it is necessary to consider a case decided sixteen years previously. Halsbury⁽⁴⁹⁾ cites the case of Mayor, Aldermen, Citizens of Kidderminster v Hardwick⁽⁵⁰⁾, as authority for the proposition that ratification of a contract does not give P a right of

(46) The Rationale of Agency, 29 Yale L.J. 859, 891.

(47) Recently approved in principle in Lawson v Hosemaster Machine Co. Ltd. [1966] 2 All E.R. 944, esp. Danckwerts L.J. at 951.

(48) A less withering and more dispassionate consideration of the doctrine and its alternatives is undertaken by Wambaugh 9 Harv.L.R.60. He considers the merit of Bolton v Lambert to be that it emphasises that once A has accepted T's offer, then T's offer will not expire by lapse - that A's act is not a mere nullity. He considers thereafter the rule has been taken too far and that before ratification T ought to be able to withdraw. Note the Second American Restatement para.88(a), there is no ratification possible after withdrawal.

(49) Halsbury, 4th ed. Vol.1 para.762.

(50) (1873) 9 L.R. Ex.13.

action in respect of breaches of contract occurring prior to ratification.

The facts of the Kidderminster case concerned an irregular acceptance of a tender for the purchase of a toll. Subsequently the offeror failed to satisfy the terms of his tender and only then was an attempt made to regularize the acceptance by the passing of a resolution by Kidderminster Corporation. It would appear that authority for Halsbury's rule is derived from the alternative grounds for their decision given by two of the three judges sitting in the appellate court. It was held that the contract was not binding because of irregular acceptance and that an offeror could withdraw at any time before ratification.

This case was followed in *Mayor, Alderman, Citizens of Oxford v Crow*⁽¹⁾ which was decided four years after *Bolton v Lambert*. Here the defendant, the leasee of a building belonging to the plaintiff corporation, offered to surrender his lease and erect a new building on the site in question, provided, the corporation, in return, granted him a new lease for seventy five years. The offer was made to and accepted by a Public Improvements committee which had not been appointed, as was required, under the Corporation Seal. Romer J. held that the purported contract was invalid, in the absence of authority under seal. He considered that the Kidderminster case led inexorably to the rule that a contract which must be made under seal must be ratified, where necessary, by an instrument under seal and that until this was done the offeror may revoke.

I submit that this latter rule may be accepted as flowing from the cases or alternatively that policy considerations in relation to local

(1) [1893] 3 Ch. 535.

authorities differ from those of general application. However, if the rule in *Bolton v Lambert* is to have any credibility or substratum of principle, the *Kidderminster* decision cannot stand for the wider principle outlined in *Halsbury*. The matter appears to have received too little attention. *Fridman*⁽²⁾ baldly states the principle enunciated in *Halsbury*, without comment upon the clear contradiction with the doctrine of *Bolton v Lambert*. *Powell*⁽³⁾ relegates the case to a footnote referring to modifications of *Bolton v Lambert*.

Stoljar⁽⁴⁾ alone grasps the nettle and indicates that the *Kidderminster* decision is simply not consistent with *Bolton v Lambert*, of which he is a staunch supporter. The "modification" would produce the absurdity of T being technically incapable of revoking his offer, whilst having, at the same time, the advantage of having revoked or withdrawn his offer. It is, therefore, apparent that this final exception is fraught with difficulty. The exception is of such uncertain scope, if it exists at all, that speculation upon its technicalities is muted if not silent.

Conclusion

This general uncertainty pervades the whole issue of the doctrine of relation back as applied to Agency. Indeed, even the precise time at which a ratification takes effect is uncertain. On principle it is assumed that ratification must be effective from the time P manifests his approval of A's unauthorised act - it is unnecessary that

(2) *Fridman*, p.56.

(3) *Powell*, p.144.

(4) *Stoljar*, p.192.

T should, at this time or ever be acquainted with the fact of P's ratification⁽⁵⁾. However, if this is so then it raises extremely difficult questions of proof over the whole field of ratification. The conclusion must be that the doctrine of ratification is an unsound foundation upon which to build any greater theory.

(5) See Warehousing and Forwarding Co. of East Africa, Ltd. v Jafferli and Sons Ltd. [1964] A.C.1. where it was held ratification was effective when communicated where Bolton v Lambert did not apply. i.e. where A's acceptance was subject to P's approval. See Fridman, p.58 for speculation as to the effective time of ratification.

APPENDIX IIBurt v Claude Cousins and Co. Ltd., and Another⁽¹⁾

The facts of Burt's case were that the first defendants were acting as estate agents for the sale of the second defendant's hotel and the plaintiff was a prospective purchaser. The hotel had been on the market for a short time when the first defendant called in for a drink and casually mentioned his profession and that he would be pleased to introduce prospective purchasers. The second defendant, equally casually, agreed that he might proceed to do so. Nothing was said as to commission or terms. Negotiations were embarked upon between the plaintiff, introduced by the first defendant, and the second defendant. The negotiations, conducted through solicitors, proved fruitless, mainly it appeared, because of the plaintiff's failure to sell his own property, so enabling him to complete the contract. During the course of negotiations the plaintiff, having agreed "subject to contract" to purchase, upon request from the estate agent, forwarded a deposit of £2,075. The estate agent took the deposit, but did not inform the prospective vendor of this event. When the plaintiff finally withdrew, he demanded return of his deposit, only to learn that the estate agent had gone into liquidation. To recover the money, he sued the estate agent, who did not enter an appearance, and the prospective vendor.

Lord Denning M.R. summarised the issue in this way: "The case raises once more the question of which of two innocent persons is to suffer for the default of a third? This is always a difficult question. But in this case it depends on the capacity in which the

(1) [1971] 2 Q.B.426; [1971] 2 All E.R.611.

estate agents received the deposit. Did they receive it as 'agents for the vendor' ...?"⁽²⁾

Previous to the decision in Burt's case there are only half a dozen or so reported cases in which the capacity of estate agents holding prospective purchaser's deposits has been at issue.⁽³⁾ Further, as Sachs L.J. was anxious to note, in Burt's case, "this is the first such case ... in which it is necessary to consider what is the position as between purchaser and vendor [words his Lordship adopted to cover prospective purchaser and prospective vendor] ... when nothing was expressly said as between the purchaser and the estate agent about the terms on which the deposit was to be held. In all the previous cases ... much has turned on some special fact emerging in the course of the evidence." Thus Burt's case is the first where "there is nothing [in the facts] that makes [it] turn on any fact or matter."

The leading authority upon the nature of the legal relationship between a vendor and an estate agent is *Luxor (Eastbourne) Ltd. v Cooper*.⁽⁴⁾ Although the case was concerned with commission earned by estate agents, the observations upon the nature of the estate agent's employment are, undoubtedly, of general application.

Viscount Simon L.C.⁽⁵⁾ outlined the limits upon the implication of terms into such contracts of "employment", in the absence of express

(2) At p.614.

(3) *Mynn v Joliffe* (1839) 1 Moody and Rob 327; *Rayner v Pascall and Cann* (1948) 152 Est. Gaz. 270; *Brodard v Pilkington* (29th April 1953) [1971] 2 W.L.R.941. [1971] 2 All E.R. 630; *Ryan v Pilkington* [1959] 1 W.L.R. 403. [1959] 1 All E.R. 689; *R. v Pilkington* (1958) 42 Cr. App. 233. [1971] 2 W.L.R. 942. [1971] 2 All E.R. 631; *Goding v Frazer* [1967] 1 W.L.R. 286. [1966] 3 All E.R.234.

(4) [1941] A.C.108.

(5) At p.120.

agreement. "... in contracts made with commission agents there is no justification for introducing an implied term unless it is necessary to do so for the purpose of giving to the contract the business effect which both parties to it intend it should have."⁽⁶⁾

It is noteworthy that none of the judgments in Burt's case makes reference to this statement of principle, yet essentially all three judges decided the matter by a consideration of the nature of the "implied agreement" between vendor and purchaser.

In Burt's case Sachs and Megaw L.J.J., giving the majority decision, considered themselves bound by the Court of Appeal decision in *Ryan v Pilkington*.⁽⁷⁾ Lord Denning M.R. distinguished the case on its facts. Ryan's case involved an estate agent who took a deposit, signing a receipt "as agent" for the vendors, before absconding with the money. Hodson, Morris and Wilmer L.J.J. held that "the finding of fact that Pilkington (the estate agent) had purported to receive this sum of money as agent is unassailable..." further, "... [he] must have been acting within the scope of his ostensible authority."⁽⁸⁾ The prospective vendor was, in consequence, held liable to the prospective purchaser, for the former was entitled and was constructively

(6) This statement of principle is itself unexceptional, see 8 Halsbury's Laws of England 3rd ed. p.122, 123, "Such implication must in all cases be founded upon the presumed intention of the parties and upon reason, and in order to give the transaction that efficacy that both parties must have intended it to have"; however, "if the contract is effective without the suggested term and is capable of being fulfilled as it stands, generally speaking, an implication will not be made."

(7) See footnote 3, ante.

(8) At p.414.

in possession of the deposit upon its receipt by his agent.⁽⁹⁾ Hodson and Wilmer L.J.J. both spoke in terms of the agent having acted within his "ostensible" or "apparent" authority, whereas, Morris L.J., spoke of his acting within his "implied" authority. This diverse and imprecise terminology Megaw L.J., in Burt's case, interpreted as essentially referring to what "today, when there has been further definition of the terms ... [would] be described as implied authority."⁽¹⁰⁾ He did, however, remark that even if the case were to be understood as illustrating "ostensible" authority he would still have extracted the same principle leading him to follow its strictures in Burt's case.⁽¹¹⁾

It may be that the term "implied authority", in this context, is itself not sufficiently precise, in that it does not express the distinction, essential to this problem, between "usual" authority, implied by law generally with respect to particular agencies and "implied" authority which is implied in a specific instance as incidental to the execution of an express authority, to be ascertained by reference to the evidence disclosed by the special circumstances of the case.⁽¹²⁾ Megaw L.J., in Burt's case, by equating the finding of "implied" authority with "ostensible" authority, to be applied generally with reference to estate agents, clearly interpreted Ryan's

(9) Unfortunately the Court did not have before it the report of Pilkington's prosecution, 42 Cr.App.233, for fraudulent conversion of the deposit. He was convicted on an indictment for alleged fraudulent conversion of the purchaser's money and not that of the vendor.

(10) See the illuminating judgment in Freeman and Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd. [1964] 2 Q.B.480,502-504, per Diplock L.J. and Hely-Hutchinson v Brayhead Ltd. [1968] 1 Q.B.549,583, per Lord Denning M.R.

(11) At p.626.

(12) In Ryan's case Wilmer L.J., at p.413, set out the circumstances which led to his finding that "ostensible" authority existed. Lord Denning M.R. in Barrington v Lee [1971] 3 All E.R.1231 considered there to be special circumstances whereby an actual authority to receive a deposit "as agent for the vendor" was to be implied in Ryan's case.

case as illustrative of "implied usual authority".

Any implication of a term whereby an estate agent is enabled to enter an undertaking binding upon his principal must, however, take account of the well established rule that generally "an estate agent has no implied authority to make a contract so as to bind the vendor;⁽¹³⁾ nor to give any warranty;⁽¹⁴⁾ nor to receive part payment of the purchase money on behalf of the vendor.⁽¹⁵⁾ This difficulty, combined with the fact that at the "deposit stage" there is no binding contract at all and, therefore, the prospective vendor is not entitled to the payment of any sum of money from the prospective purchaser led Sachs L.J., in Burt's case, to the formulation of an extremely tortuous implied term which he explained in this way:⁽¹⁶⁾

"He (the estate agent) is authorised, or perhaps it would be better to say instructed, to hold that deposit in his own possession unless and until the event occurs upon which he is authorised to dispose of it. In the event of the purchaser demanding its return before any contract is concluded (i.e. during the 'pre-contract' period) he has to return the deposit to him. In the event of a contract being concluded, it is to be disposed of in accordance with the terms of that contract, be they express or implied. The instruction to hold the deposit in his, the estate agent's, possession is one which during the pre-contract period precludes him, in the absence of the consent of both depositor and the vendor, from handing it over to the vendor

(13) See *Hamer v Sharp* (1874) L.R. 19 Eq.108; *Wragg v Lovett* [1948] 2 All E.R. 968.

(14) See *Hill v Harris* [1965] 2 Q.B.601.

(15) *Mynn v Joliffe* (1834) 1 Mood and R. 326.

(16) At p.620.

or any person the latter may nominate, but, of course, entitles him to place it in his, the estate agent's, account at a bank of repute. The above terms correspond with the practice of estate agents as set out in the evidence in the instant case and also in other cases which have been before the courts. Indeed, it has by now become, to my mind, a matter of judicial knowledge that it is the practice of estate agents to receive deposits on the above mentioned standard terms."⁽¹⁷⁾

Megaw L.J. was satisfied that implied authority to take a deposit, as an incidental instruction, was established merely because the prospective vendor was "not surprised" that the estate agent took a deposit.⁽¹⁸⁾

However, following the finding of an implied term, the majority took a further step in holding that this necessarily meant, as an incident of the term, that liability for loss of the deposit lay with the prospective vendor. The question which must be posed is: Is this aspect of the term necessary in order to give the contract the business effect which both parties intended it should have?⁽¹⁹⁾ It has been suggested that, "To take a deposit may indeed be an act necessary for, or ordinarily incidental to, the effective execution of the agent's express authority,⁽²⁰⁾ but to imply a term that he holds the money as agent for the vendor is a non sequitur."⁽²¹⁾

(17) Lord Denning M.R. found upon the evidence adduced in Burt's case itself that, on the contrary, there was no such established business practice. The evidence of practice, he found, established that estate agent's took deposits and held them as "stakeholders". Megaw L.J., at p.625, dismissed evidence of a business practice, short of a custom, as irrelevant where one party was not engaged in a particular trade.

(18) One may wonder at the implication of a term in circumstances in which there is no agreement (i) upon its existence and (ii) as to the test to be employed in its establishment.

(19) See Viscount Simon L.C. in *Luxor (Eastbourne) Ltd. v Cooper*, cited earlier p.2.

(20) See Bowstead on Agency, 13th ed. p.28 and 72.

(21) 121 N.L.J. 1066, 1067, L.J. Kovatts.

Nevertheless, the majority in Burt's case found no difficulty in making this important step. Sachs L.J. indicated this to be because the implied instruction put it "into the power of the estate agent to demand and receive deposits. If as is normally to be expected, he is honest and keeps the deposit money in some separate account as he ought to - all is well. If he is dishonest - he can demand a deposit from more than one purchaser, he can use the deposit to pay the expenses of his failing business, he can use it 'to rob Peter to pay Paul' (as amongst depositors) or he can misappropriate it in some other manner not unfamiliar in another Division of this court. Prima facie, at least, defaults are due to dishonesty ... However one defines his position, the plain fact is, that at all pre-contract stages he is the vendor's commission agent and could not otherwise have got hold of the deposit." In conclusion he expressly stated that the celebrated statement of Holt C.J. in *Hern v Nichols*⁽²²⁾ "... for seeing that someone must be a loser by this deceit, it is more reasonable that he that employs and puts a trust and confidence in the deceiver should be the loser, than a stranger...", should be applied, "even if, which I very much doubt, that application slightly extends its hitherto sphere of operation."

Lord Denning M.R. in *Barrington v Lee*⁽²³⁾, following his dissenting judgment in Burt's case, returned to his criticism of the reasoning adopted by the majority in the latter case. He said, "In coming to their conclusion in Burt's case, the majority used reasoning which is appropriate to a claim in tort. They said that the vendor had employed the estate agent and had put him in a position to ask for a deposit. The vendor should, therefore, be answerable for his defaults. The risk should fall on him and not on the purchaser. That is the very language which is used to justify the liability of a principal for the frauds or other wrongs of his agent. Indeed Sachs L.J. quoted the

(22) (1701) 1 Salk. 289.

(23) At p.1237.

well known cases on tort on the subject."⁽²⁴⁾

Edmund Davies L.J., in Barrington's case,⁽²⁵⁾ although he felt bound by the precedent of Burt's case, also criticised the reasoning. He said "... it is too simplistic to say that, because it was the would be vendor who appointed the estate agent in a position to receive a deposit, he should be held liable to recompense the purchaser if loss results."⁽²⁶⁾

Lord Denning M.R. summarised what may be regarded as the view of the opponents of the solution proposed in Burt's case by asking the question⁽²⁷⁾ : "What is the cause of action against the vendor? ... I cannot think that the purchaser can sue the vendor for money had and received, seeing that the vendor has never received the money, nor been entitled to receive it. If the purchaser cannot sue the vendor in money had and received, how can he sue him? Not in contract, because the vendor never promised to pay if the agent defaulted. Not in trust because the vendor never had any control over the money. Not in tort, because there was no tort."

I submit, with respect, that the several arguments related in this summary reveal an incomplete appreciation of the application of principles of agency and their conceptual foundation. Sachs and Megaw L.J.J. seek to impose liability on the prospective vendor by means of a term,

(24) *Hern v Nichols and Lloyd v Grace, Smith & Co.* [1912] A.C.716.

(25) At p.1239.

(26) He indicated that a possible approach to resolution of the problem of adjustment of loss between vendor and purchaser "should depend very largely (and possibly conclusively) upon what rights could have been asserted by each of them in respect of the money in the agent's hands at all material times."

(27) At p.1237, 1238.

implied into the contract between the estate agent and prospective vendor, that the agent may bind the principal to underwrite loss. Here there is revealed a search for a consensual agreement, satisfied through the medium of the implied term. There is great difficulty in implying such a term, as the classic test, that it should be essential to the business effect the parties desired, would appear to be achieved by a term in which risk was placed upon the agent or prospective purchaser. In short, the classic test as to conditions to be satisfied for the implication of a term would appear not to be satisfied.

Lord Denning M.R. looks for a cause of action whereby the prospective purchaser may seek recovery. "... there is clearly an implied promise by someone to repay it [the deposit] if the negotiations break down."⁽²⁸⁾ He finds no consensual undertaking on P's part and therefore no contractual term. This leads him inexorably to the denial of liability on P's part.⁽²⁹⁾ Recognition of agency powers would not necessarily lead to this conclusion.

Thus the notion of inherent agency power would provide a platform upon which to build a coherent system of agency rules, without the straitjacket accepted by Lord Denning and without the obvious deviation from well settled principles, as was evident in the majority decision in Burt's case.

(28) Barrington's case, p.1238.

(29) See Sorrell v Finch and passage cited p.84.

May 13th, 1976

Sorrell v Finch (The Times, May 12, 1976)

Subsequent to preparation of this thesis an appeal to the House of Lords has, in *Sorrell v Finch*, reversed the decision of the Court of Appeal (Unreported, see Appendix II).

However, the grounds upon which their Lordships reversed the previous decision were not unanimous and the case, I believe, still exhibits want of fundamental agency principles. Indeed, Lord Edmund-Davies, who sat in the Court of Appeal in *Barrington v Lee*, adopted a different approach from that which he previously outlined as his favoured argument in the latter case (see footnote 26, p. 8 Appendix II). In the instant case, he held that the claim for return of deposit could not succeed, "in the absence of express or implied authority", on A's part, to receive the deposit on behalf of the prospective vendor. (C.f. the difficulty in implication of such a term in *Burt's* case). Lord Russell, however, adopted the argument previously advanced by Lord Edmund-Davies.

Perhaps it is significant that their Lordships felt it to be a "hard case", in that the prospective vendor was obliged by the Court of Appeal decision to shoulder the whole loss in respect of five deposits. This might be contrasted with the forthright statement of the preferred liability, of the prospective vendor, in *Burt's* case (see p. 84).

Although the issue with respect to estate agents deposits is resolved, principles of agency are still at large.