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THE OBJECTIVE THEORY OF AGENCY: APPARENT AUTHORITY AND THE ESTOPPEL OF APPARENT OWNERSHIP

Michael Conant*

The purpose of this study is to reconsider the theoretical foundations of the liability of a principal to third parties in contract.¹ In order to reconcile the extended liability of the principal for unpermitted contracts of his agent beyond traditional apparent authority, the treatise writers have created new generalized concepts. In England Professor Powell has suggested the phrase "usual authority".² In the United States, Professor Seavey and the *Restatement of the Law of Agency* have adopted the label of "inherent agency powers".³ Professor Mearns goes even further and suggests the adoption of a scope of agency concept analogous to the tort rule of scope of employment to replace the present authority generalizations.⁴ The conclusion of this study is that new conceptual generalizations to advance the theoretical framework of the law of principal's liability in contract are not only unnecessary but misleading. The basis of this conclusion is that these new concepts with more general and indeterminate content than the older ones seem to be created to rationalize the imposition of contract liability with little or no recognition of the primary rule that both contract and estoppel to deny contract in agency are based on manifestations of consent by the principal. A valid operational or functional analysis of the principal's liability in contract in each case can be made by utilizing the traditional concepts of authority and estoppel. The structural elements of such a functional theory of agency contracts are suggested in the following review of leading English and American decisions.⁵

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1 "We have too little theory in the law rather than too much . . ." O. W. HOLMES, *The Path of the Law*, COLLECTED LEGAL PAPERS 198 (1920).

2 R. POWELL, *THE LAW OF AGENCY* 41-53 (2d ed. 1961).

3 W. SEAVEY, *HANDBOOK OF THE LAW OF AGENCY* 15-17, 105-109 (1964); 1 *RESTATEMENT (SECOND) OF AGENCY* §8A (1957).

4 Mearns, *Vicarious Liability For Agency Contracts*, 48 VA. L. REV. 50 (1962).

5 See F. COHEN, *THE LEGAL CONSCIENCE* 69-80 (1960).

OBJECTIVE THEORY OF AGENCY

The liability of a principal for contracts negotiated by his agent is the foremost legal issue of agency because the making of contracts is the primary purpose of most principal-agent relationships. Hence, it is not surprising that a theoretical framework to approach the principal's liability in contract is derived from the underlying theory of contract liability, the objective theory of contract—that liability is founded on the objective consent of the parties. A person is bound by his promissory expression in contract if that promise should create in the promisee the reasonable expectation that promisor will perform on the basis stated. Presuming the other contractual requisites; consideration, legal object, etc.; contractual liability is not determined by subjective intent but by concurrence of objective expressions if the expressions are such that a reasonable man should rely on them under the circumstances.⁶

The objective theory of agency, as an extension of the objective theory of contract, is based on expressions or actions which demonstrate the consent of the principal. Just as ordinary liability in contract is based on voluntary promises, a principal's liability in contract is based on his voluntary representations to third parties concerning the scope of his agent's authority. The representations may be made by the principal to third parties through the agent's permitted expressions or acts (actual authority), or directly to the third parties (apparent authority). These representations are analogous to the offeror's promise in contract. Just as the offeror's promise puts a legal power in the offeree to enter contract, so does the principal's representations to third parties put a conditional power in them to enter contract with the principal upon successful negotiations with his agent. This unitary character of actual and apparent authority as merely two types of the same general representative power vested in the agent was early recognized by Mr. Justice Depue in *Law v. Stokes*⁷ and clearly summarized by Mr.

⁶ Smith v. Hughes, L.R. 6 Q.B. 597, 607 (1871) (Blackburn, J.); Brauer v. Shaw, 168 Mass. 198, 46 N.E. 617 (1897); 1 S. WILLISTON CONTRACTS §22 (3rd ed. 1957); 1 A. CORBIN, CONTRACTS §§1, 9 (1963); P. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 4 (1961).

⁷ "A principal is bound by the acts of his agent within the authority he has actually given him, which includes not only the precise act which he expressly authorized him to do, but also whatever usually belongs to the doing of it, or is necessary to its performance. Beyond that, he is liable for the acts of the agent within the appearance of authority which the principal himself knowingly permits the agent to assume, or which he holds the agent out to the public as possessing... In whichever way the liability of the principal is established, it must flow from the act of the principal." *Law v. Stokes*, 32 N.J.L. 249, 251-52 (Sup. Ct. 1867).

Justice Holmes' articles.⁸ The principal's words or acts in either case demonstrate to the third party the principal's objective consent to be bound in contract by a given class of promises of the agent.

In creating actual authority, the representations of the principal to third party are first made to the agent. The principal informs his agent, expressly or impliedly, what scope of authority he is to have. The principal may also inform third parties. If he does not, his agent may do so, either expressly by correctly relating the principal's statements or impliedly by offering to contract within the scope of his actual authority. But, the duty of inquiry is on the third party. He must find out from the principal what general grant of actual authority is in the agent. If he fails to do so, he assumes the risk that the agent's representations about his authority may be incorrect.⁹ In such case, the principal will not be bound by the agreement which his agent has made. Hence, it is established law that the unauthorized representations of an agent or alleged agent to third parties concerning the existence or scope of his authority have no legal standing.¹⁰ *Bailey and Whites v. House*¹¹ is a typical example. A former servant of House, who had never had any agency authority, misrepresented to the third parties that House had sent him to order goods and take delivery of them. House paid two bills for such goods before discovering the fraud and later sued to recover the sums so paid by mistake. In granting recovery, the court held that the mere mistaken paying of bills was not a holding out of an ex-servant as an agent and that misrepresentations of an alleged

⁸ "A man is not bound by his servant's contracts unless they are made on his behalf and by his authority, and that he should be bound then is plain common-sense. It is true that in determining how far authority extends, the question is of ostensible authority and not of secret order. But this merely illustrates the general rule which governs a man's responsibility for his acts throughout law. If, under the circumstances known to him, the obvious consequence of the principal's own conduct in employing the agent is that the public understand him to have given the agent certain powers, he gives the agent those powers. And he gives them just as truly when he forbids their exercise as when he commands it. It seems always to have been recognized that an agent's ostensible powers were his real powers; . . ." Holmes, *Agency II*, 5 HARV. L. REV. 1 (1891).

⁹ *Torrence Nat. Bank v. Enesco Federal Credit Union*, 134 Cal. App.2d 316, 285 P.2d 737 (1955); *Paine v. Sheridan Trust and Savings Bank*, 342 Ill. 342, 174 N.E. 368 (1931); *Chapleo v. Brunswick Building Society*, 6 Q.B.D. 696, 705 (1881).

¹⁰ *Atchison, Topeka and Santa Fe Railway Co. v. Bouziden*, 307 F.2d 230, 233 (10th Cir. 1962); *Atex Manufacturing Co. v. "Lloyds of London"*, 139 F. Supp. 314, 318 (W.D. Ark. 1955); *Burton v. Furniss*, 27 L.J. Exch. (n.s.) 139 (1858); *Wright v. Glyn* [1902] 1 K.B. 745.

¹¹ 31 T.L.R. 583 (K.B. 1915).

agent can never create authority. The same rule applies when a principal has employed the agent but the agent mistakenly represents his scope of authority to be greater than that which the principal conferred on him.¹²

APPARENT AUTHORITY

Apparent or ostensible authority is even more easily seen to be based on the objective consent of the principal to third parties. It is that authority which, through not actually delegated to the agent, the principal intentionally or inadvertently causes third persons to believe the agent to possess.¹³ Apparent authority can exist only if an agent has been employed and delegated some actual authority.¹⁴ It is founded on appearances of authority created by the principal and is measured by the reasonable inferences of third parties from the principal's representations or conduct toward them. Even though the agent exceeds his actual authority, the principal is bound by his agent's contracts if they are within the appearance of authority created by the principal.¹⁵ In the most common cases, a principal states to third parties that his agent has a certain general grant of authority to buy or sell specific products or services without informing them of special limitations on this authority. The functioning of commerce requires that third parties, unless informed otherwise, may contract with the expectation that the agent has that authority which similar agents usually have in the principal's line of business. The courts will enforce this reasonable expectation. The legal reasoning is analogous to the case of the offeror's unilateral minor mistake in contract, where he is bound without his subjective con-

¹² *Gumpert v. Bon Ami Company*, 251 F.2d 735, 739 (2d Cir. 1958); *Brownell v. Tidewater Associated Oil Co.*, 121 F.2d 239, 244 (1st Cir. 1941); *Mussey v. Beecher*, 57 Mass. 511 (1849); *Attorney-General for Ceylon v. Silva* [1953] A.C. 461, 479; *Jacobs v. Morris* [1902] 1 Ch. 816, 820.

¹³ "Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons." 1 RESTATEMENT (SECOND) OF AGENCY §8 (1957). See *Rubenstein, Apparent Authority: An Examination of A Legal Problem*, 44 A.B.A.J. 849 (1958).

¹⁴ *Reifsnnyder v. Dougherty*, 301 Pa. 328, 335, 152 A. 98, 101 (1930). Where no agent has been employed, there can be no authority. Misrepresentations by a person who is not a principal to third parties that he has employed an agent and delegated authority can only result in agency liability by estoppel, but not agency. *Hoddeson v. Koos Bros.*, 47 N.J. Super. 224, 135 A.2d 702 (1957); *Barrett v. Deere, M. & M.* 200, 173 Eng. Rep. 1131 (1828).

¹⁵ *Beaufort v. Neeld*, 12 C. & F. 248, 8 Eng. Rep. 1399 (1845); *Smith v. McGuire*, 3 H. & N. 554, 561-62, 157 Eng. Rep. 589, 592-93 (1858).

sent. It is the principal's expressions to third parties creating the appearance of agent's authority which allows him to be bound in contract with them even though he has not consented to his agent.

The objective actions of the principal upon which apparent authority are based need not be express representations but can instead be a course of dealing between principal and third party. When a principal actually authorizes his agent to make purchases on credit and the principal pays the bills to a third party for a number of such purchases, his conduct creates an apparent authority in the agent to continue to buy on credit. If the agent makes subsequent unauthorized purchases of the same type and absconds with the goods, the principal is liable.¹⁶ A similar apparent authority is created when a principal impliedly ratifies a series of unauthorized contracts of his agent by performing them. The principal's acquiescence in the agent's contracts, without notice to third parties that there have been excesses of authority, impresses them with the appearance of a larger authority than was actually conferred.¹⁷ In another group of cases, apparent authority is created by a principal who has had no prior contact with third parties by authorizing his agent to represent the general scope of his authority to them but not to relate secret instructions, such as price restrictions, which would impede the agent's bargaining power.¹⁸ If the agent exceeds his secret limitations but makes contracts which are usually within the authority of similar agents, the principal is liable. A third party who does not confirm an agent's representations of authority with the principal of course assumes the risk that they may be incorrect or exaggerated; but if they are the same unqualified general statements which the principal himself would make, the third party is protected when he presumes the usual apparent authority.

It is clear for all cases of disclosed principals that the apparent authority of the agent, while conforming to the contract requirement of consent, still describes a very broad category of liability. By including all the usual activities of agents in the given line of business and all other usual business practices developed between particular principals and third parties, it explains a rational basis for liability founded on reasonable expectations in third parties which are induced by principals. Distinct additional classes such as "usual

¹⁶ *Todd v. Robinson*, 1 Ry. & M. 217, 171 Eng. Rep. 999 (1825); *Gilman v. Robinson*, 1 Ry. & M. 226, 171 Eng. Rep. 1003 (1825)

¹⁷ *Feely Lbr. Co. v. Bookstaver-Burns Lbr. Co.*, 181 Wash. 503, 43 P.2d 953 (1935); *Ramelson v. North West Hide & Fur Co.*, 15 D.L.R. 905 (Alta. 1914).

¹⁸ *Butler v. Maples*, 76 U.S. 766 (1869). See *De Tchihatchef v. The Salerni Coupling, Ltd.* [1932] 1 ch. 330.

authority" or "scope of agency" are not useful innovations if an objective theory of contract is to prevail. Their only purpose can be to create absolute liability in contract without consent of the principal.

CONTRACT BASIS OF APPARENT AUTHORITY

The objective theory of agency gives a decisive answer to the sixty-year old controversy concerning whether apparent authority is a true authority or creates a liability of the principal based on estoppel.¹⁹ If apparent authority is a class of authority, it is like actual authority, a power in the agent to make binding contract between the principal and the third party. Under this view, both parties are bound in contract and the principal does not have to prove ratification to hold the third party. Liability exists whether the contract is bilateral or unilateral and whether the third party has changed his position in reliance or the promises are still executory. On the other hand, if apparent authority is only an estoppel, there is no contract and only the principal can be held liable; liability must be based on the principal's misrepresentations of his agent's authority and change in position in reliance thereon by the third party. It is thus clear that contract and estoppel are inconsistent concepts so that they cannot be combined as a basis for apparent authority.²⁰

In most decided cases, it makes no difference whether the rationale of the court for apparent authority is a true authority or estoppel since all the elements of contract and of estoppel are present.²¹ But it is the unusual, tough case that can either set a reasoned, equitable precedent or else deny recovery on the basis of legal technicalities which are contrary to the usual reliances of the business community. For this reason, it is submitted that estoppel is both an unnecessary and an inappropriate basis for apparent authority.

¹⁹ See Cook, "Agency by Estoppel," 5 COLUM. L. REV. 36 (1905); Ewart, "Agency by Estoppel," 5 COLUM. L. REV. 354 (1905); Cook, "Agency by Estoppel: A Reply," 6 COLUM. L. REV. 34 (1906). Compare Montrose, *The Basis of the Power of An Agent in Cases of Actual and Apparent Authority*, 16 CAN. BAR REV. 757 (1938) with F. TIFFANY, *AGENCY* §16 (2d ed. 1924), and R. POWELL, *LAW OF AGENCY* 68-72 (2d ed. 1961).

²⁰ "A man cannot in one breath invoke both the truth and an estoppel; he must make his choice: . . ." *Heskell v. Continental Express, Ltd.* [1950] 1 All E.R. 1033, 1044 (Devlin, J). See *Canadian and Dominion Sugar Co., Ltd. v. Canadian National Steamships Ltd.* [1947] A.C. 46, 56 (P.C. 1946).

²¹ See *Raynell v. Lewis*, 15 M. & W. 517, 527-28 153 Eng. Rep. 954, 958-59 (1846).

Since estoppel is a rule of evidence, founded on principles of tort and closely tied to the concept of deceit, it is not itself a cause of action but a technique of equity to support an incomplete cause of action.²² The common law does not favor estoppels, and this is especially true if the same facts will support a substantive cause of action. A court which pursued a policy of limiting estoppels to their full technical requirements would in certain cases find that apparent authority was not proven. An unqualified statement by a principal to a third party that A is his general sales agent (without revealing secret limitations thereon) does not meet the technical estoppel criterion of a false representation. Judge Learned Hand pointed out that this absence of a misrepresentation or deceit in apparent authority is especially clear when a corporate principal has delegated broad general authority to an agent which the agent is permitted to represent to third parties and the circumstances make it unreasonable to expect third parties to seek out a higher corporate official who will verify the exact scope of the agent's authority.²³ Technical estoppel is also not proved in those cases where only executory bilateral promises have been exchanged, so that there is no change in position in reliance.²⁴ It is only because courts do not stand on these technicalities that some of them can say that apparent authority is a type of estoppel.

The contract basis of apparent authority, in contrast to estoppel, finds direct support in the objective theory of agency, which, as noted, is directly derived from the objective theory of contract. The principal's representations or conduct toward third parties create in the agent a *power to contract* in excess of his actual authority. This view of apparent authority requires proof neither of misrepresentation nor of change of position in reliance thereon, and conforms to the mutuality of obligation requisites of the law of consideration. It is supported by the majority of American courts and the Restatement²⁵ but only by a minority of courts in England.²⁶ However, the English view may be changing.

²² See *Low v. Bouverie* [1891] 3 Ch. 82, 105; *Lyle-Meller v. Lewis* [1956] 1 W.L.R. 29 (C.A.). Compare *Jackson, Estoppel as a Sword*, 81 LAW Q. REV. 84 and 223 (1965).

²³ *Kidd v. Thomas A. Edison, Inc.*, 239 F. 405 (S.D. N.Y. 1917).

²⁴ *Reo Motor Car Co. v. Barnes*, 9 S.W.2d 374 (Tex. Civ. App. 1928); 42 HARV. L. REV. 570. See *Seavey, Agency Powers*, 1 OKL. L. REV. 3, 6 (1948); W. SEAVEY, *STUDIES IN AGENCY* 181, 184 (1949).

²⁵ *Condé Nast Press, Inc. v. Cornhill Pub. Co.*, 255 Mass. 480, 152 N.E. 240 (1926); See 1 RESTATEMENT (SECOND) OF AGENCY §8 (1957), comment d at 32.

²⁶ See *Meyer & Co., Ltd. v. Sze Hai Tong Banking and Insurance Co., Ltd.* [1913] A.C. 847, 853 (P.C.). Compare *Rama Corporation Ltd. v. Proved Tin and General Investments Ltd.* [1952] 2 Q.B. 147, 149-50.

In *Eastern Distributors, Ltd. v. Goldring*,²⁷ Justice Devlin dealt with a unique fact situation in which the basis of apparent authority became crucial to the decision. *P* owned a Bedford van and wanted to buy a Chrysler car from *A*, an auto dealer. Since *P* was without ready money, he acquiesced to a plan of *A*, whereby *P* appointed *A* as agent to pretend to *T* hire-purchase (finance) company that *A* owned both vehicles and *P* wished to acquire them. *P* signed in blank hire-purchase proposals for both vehicles under which, if accepted, *T* would become owner and *P* the hirer. *A* completed the documents and sent them to *T*, who accepted the proposal for the van but rejected the one for the car. Since *P* had directed *A* that the two deals were tied together, *A* had no actual authority to convey the van alone to *T*. Thus *A* clearly exceeded his actual authority, but he falsely notified *P* that the two deals did not go through. *P* told *A* he considered the proposals cancelled. *P*, who had retained possession of the van throughout these negotiations, sold it to *X*. In this action, the court allowed *T* to recover the van from *X*.

Plaintiff *T* maintained successfully that he had acquired *title* to the van under a *contract* within the apparent authority of *A*, the agent, and that the apparent authority exception to *nemo dat quod non habet* was codified under the final "unless clause" of Section 21(1) of the English Sale of Goods Act.²⁸ Defendant *X* had argued that there was merely an estoppel on *P* and *A* to deny that which they had misrepresented in the documents, namely that *A* owned the van and therefore had an owner's power to sell it. *X* had pointed to the fact that estoppels can not affect the reality of a transaction or transfer titles, so that under this view the title to the van was still in *P* when he transferred it to *X*.²⁹ *X* had further argued that as a good faith purchaser for value from *P*, he was not bound by the estoppel against *P* and could assert his title.³⁰ In ruling against these arguments of *X*, the court upheld the contractual basis of

²⁷ [1957] 2 Q.B. 600.

²⁸ "Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell." Sale of Goods Act, 56 & 57 Vict., c. 71, § 21(1) (1893).

²⁹ See *Simm v. Anglo-American Telegraph Co.*, 5 Q.B.D. 188, 206 (C.A. 1879).

³⁰ As to whether persons without knowledge or notice of a misrepresentation can be bound by an estoppel, see *Central National Bank of Richmond v. Rich.*, 256 N.C. 324, 329, 123 S.E.2d 811, 815 (1962); *Richards v. Johnston*, 4 H. & N. 660, 157 Eng. Rep. 1000 (1859); G. BOWER, ESTOPPEL BY REPRESENTATION 152-164 (1923); J. EWART, ESTOPPEL 196-208 (1900).

apparent authority. It applied the rule to this situation of limited actual authority plus apparent ownership without possession, which it found to fall under the same class as apparent authority.³¹

UNDISCLOSED PRINCIPALS: ESTOPPEL OF APPARENT OWNERSHIP

The objective theory of agency provides the basis for a primary rule limiting the contract liability of undisclosed principals: the agent of an undisclosed principal has no apparent authority. This follows necessarily from the fact that all representative authority in an agent is derived from the objective consent of the principal to the third party, either actual consent through the agent's permitted acts or apparent consent directly to the third party. An undisclosed principal, being one whose agent poses as dealing for himself, creates no direct appearances to the third party. Thus he can never be charged with appearing to consent that his agent has a certain scope of authority. This elementary rule was explained by Mr. Justice Blackburn in *Armstrong v. Stokes*,³² and it was broadly applied by Judge Hastie in *Senor v. Bangor Mills*.³³

In spite of this clear barrier to apparent authority, there are some situations in which agents in possession of assets of their undisclosed principals exceed their actual authority and the courts still hold the principals liable to the third parties. Professor Seavey and the Restatement choose to explain this liability as independent of the conduct or consent of the principal and create a new classification to describe it, *inherent agency power*.³⁴ This radical view that creates a contract-type of liability without consent of the principal seems unnecessary to explain the decisions and is so vague it can cause more analytical problems than it can solve. Although there is no consent to representative authority in these cases and therefore

³¹ For a sharp distinction between apparent authority and apparent ownership based on possession of goods or documents of title, see the following section of this paper.

³² L.R. 7 Q.B. 598, 604 (1872). See *Underwood v. Bank of Liverpool and Martins* [1924] 1 K.B. 775, 792 (C.A.) (Scrutton, L.J.); *McLaughlin v. Gentles*, 51 D.L.R. 383, 394-95 (Ont. 1919); *Miles v. McIlwraith*, L.R. 8 App. Cas. 120 (P.C. 1883); W. BOWSTEAD, *AGENCY* 176 (12th ed. 1959); R. POWELL, *LAW OF AGENCY* 60, 176 (2d ed. 1961).

³³ 211 F.2d 685 (3rd Cir. 1954). See *Smith-Perry Electric Co. v. Transport Clearings*, 243 F.2d 819, 821 (5th Cir. 1957); *Commercial Credit Corp. v. Stan. Cross Buick, Inc.*, 343 Mass. 622, 626, 180 N.E.2d 88, 91 (1962); *So. Seattle Auto Auction, Inc. v. Ladd*, 230 Ore. 350, 362, 370 P.2d 630, 636 (1962); Annot., 95 A.L.R. 1319 (1935); 39 MINN. L. REV. 307 (1955).

³⁴ W. SEAVEY, *HANDBOOK OF THE LAW OF AGENCY* §§58, 59 (1964); *RESTATEMENT (SECOND) OF AGENCY* §§ 8A, 194-202 (1957).

no direct contract liability, there are all the elements of estoppel to deny contract. Since the agents have exceeded all authority to contract for their principals, the rationale for holding the principal must be his conduct creating an estoppel of apparent ownership in the agent.³⁵ The undisclosed principal directs, permits or enables his agent in dealing with third parties to pose as the owner of assets which in fact belong to the principal. If third parties extend credit or purchase goods in reliance on the apparent ownership of the agent, when the principal is ultimately responsible for causing such appearance, the principal is estopped to deny contractual liability.

A word of caution is necessary. The estoppel of apparent ownership in an agent can be asserted only against an undisclosed principal, one who has delegated some actual authority relating to purchase, sale, pledge or negotiation of contract. A mere bailor has no such liability.³⁶ No matter how convincing the appearance or representations of a bailee in possession that he is the owner of goods he may not sell his bailor's goods to a third party. The only exception would be when the bailor has put documentary or other clear proof of title in the bailee. The policy of the common law on bailments is that the property interests of the owner take precedence over any rules aimed at protecting innocent third parties.

APPARENT OWNERSHIP OF A BUSINESS

The leading case concerning apparent ownership of a business firm and its assets by the agent of an undisclosed principal is *Watteau v. Fenwick*.³⁷ Defendant, brewer, bought a beer-house from Humble, and remaining undisclosed to third parties, hired Humble as its general manager. The license remained in Humble's name and his name remained over the door. Defendant gave Humble actual authority to buy only ales and mineral water. In violation of this limit, Humble bought cigars and Bovril from plaintiff on credit. Mr. Justice Wills held defendant liable, stating that: "... once it is established that the defendant was the real principal, the ordinary doctrine of principal and agent applies—that the principal is liable

³⁵ For analysis of the distinctions between apparent authority and apparent ownership, see J. EWART, *ESTOPPEL*, c. XVII (1900); Mechem, *Ostensible Agency or Ownership*, 22 ILL. L. REV. 652 (1928); RESTATEMENT (SECOND) OF AGENCY §8 (1957).

³⁶ *Commercial Credit Corp. v. Stan Cross Buick, Inc.*, 343 Mass. 622, 626, 180 N.E.2d 88, 91 (1962); *Kastner v. Andrews*, 49 N.D. 1059, 194 N.W. 824 (1923); *Jerome v. Bentley & Co.*, [1952] 2 All E.R. 114. Note the special rule for fungible goods in the United States, UNIFORM COMMERCIAL CODE § 7-205.

³⁷ [1893] 1 Q.B. 346. See *Kinahan & Co., Ltd. v. Parry* [1910] 2 K.B. 389; *Edmunds v. Bushell*, L.R. 1 Q.B. 97 (1865).

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." It is submitted that this apparent authority rationale for the decision is wrong.³⁸ Since Humble posed as owner and neither he nor the defendant made any representation of agency authority, there is no basis for apparent authority. Defendant is liable to the extent of the value of the assets of the business because he directed Humble to pose as their owner and is consequently estopped to deny Humble's ownership of those assets. The action could have been brought solely against Humble or jointly against Humble and defendant principal and the latter would have been estopped to deny execution against the assets of the beer-house. This substitute cause of action against the undisclosed principal alone is based on plaintiff's right of execution against assets in Humble's possession on which plaintiff reasonably relied in extending credit. No aspects of agent's authority are involved.

The same misapplication of apparent authority is followed in the leading United States cases.³⁹ In *Hubbard v. Tenbrook*,⁴⁰ however, the court comes close to recognizing the distinguishing characteristics of estoppel of apparent ownership. 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 unfavorable 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.⁴¹

In the leading Canadian case, *McLaughlin v. Gentles*,⁴² the court clearly recognized that the agent of an undisclosed principal, who in this case was authorized to carry on a business, could have no apparent authority. But, failing to understand the estoppel of apparent ownership, the court reversed the judgment for the plaintiff and ordered the action dismissed.

³⁸ See similar critique in J. EWART, ESTOPPEL 246-48 (1900). Compare 7 HARV. L. REV. 49 (1893), with 9 LAW Q. REV. 111 (1893) and 37 SOL. J. 280 (1893).

³⁹ See *Herkert-Meisel Truck Co. v. Duncan*, 141 Kan. 564, 42 P.2d 587 (1935); *Brooks v. Shaw*, 197 Mass. 376, 84 N.E. 110 (1908); *Rogers v. Robinson*, 104 Mich. 329, 62 N.W. 402 (1895); *Hubbard v. Tenbrook*, 124 Pa. 291, 16 A. 817 (1889).

⁴⁰ 124 Pa. 291, 16 A. 817 (1889).

⁴¹ *Id.* at 296, 16 A. at 817.

⁴² 51 D.L.R. 383 (Ont. 1919). See *Becherer v. Asher*, 23 Ont. App. 202 (1896).

APPARENT OWNERSHIP OF SECURITIES-INDICIA OF TITLE

These cases concern securities whose owner is registered with the issuing company; they are not negotiable instruments.⁴³ If an owner of such securities causes or permits his agent to assume the indicia of title to the securities, the principal will be bound by the agent's sale or pledge as owner. The leading English case is *Rimmer v. Webster*.⁴⁴ Plaintiff transferred the title to mortgage bonds to a broker for purpose of sale, and the broker registered the transfer to himself with the issuer. He then used the bonds to borrow £1000 from the defendant and absconded. In denying the plaintiff recovery Mr. Justice Farwell said:

If the owner of property clothes a third person with the apparent ownership and right of disposition thereof, not merely by transferring it to him, but also by acknowledging that the transferee has paid him the consideration for it, he is estopped from asserting his title as against a person to whom such third party has disposed of the property, and who took it in good faith and for value.⁴⁵

The true owner, by representing the broker as owner through indicia of title is estopped to deny the power of the broker to put full title to the securities in a good faith purchaser. Thus, the estoppel of apparent ownership in an agent of an undisclosed principal, giving an owner's unlimited power of sale or pledge, probably gives the agent greater power than does the apparent authority of most agents of disclosed principals.

In *Fry v. Smellie*,⁴⁶ Justice Farwell reiterated this rule relating to agents with indicia of title, although the case concerned common stock registered to the principals plus a blank transfer of the shares signed by them. From the opinions of the other justices, it can be argued that the agent with only a blank transfer of shares registered to another does not have indicia of title but merely a broad apparent authority from a disclosed principal.⁴⁷ On either basis of decision, the third party from whom the agent borrowed less than had been stipulated by the principal was entitled to retain the shares until repayment of his loan.

⁴³ As to bonds which are negotiable instruments, see *London Joint Stock Bank v. Simmons* [1892] A.C. 201.

⁴⁴ [1902] 2 Ch. 163. See *Marshall v. Nat. Prov. Bank*, 61 L.J.Ch. 465 [1892]; *Bentinck v. London Joint Stock Bank* [1893] 2 Ch. 120.

⁴⁵ [1902] 2 Ch. 163, 173.

⁴⁶ [1912] 3 K.B. 282 (C.A.).

⁴⁷ See *Brocklesby v. Temperance Permanent Building Society* [1895] A.C. 173.

The leading American case of the estoppel of apparent ownership of securities is *McNeil v. Tenth National Bank*.⁴⁸ The owner of stock, in order to secure a loan from his brokers, endorsed the certificate in blank and gave a power of attorney to transfer the shares. The brokers, without authority, pledged the shares to defendant to secure a larger loan than made to defendants. In upholding defendant's security interest in the shares, Mr. Justice Rapallo ruled:

It must be conceded, that as a general rule, applicable to property other than negotiable securities, the vendor or pledgor can convey no greater right or title than he has. But this is a truism, predicable of a simple transfer from one party to another where no other element intervenes. It does not interfere with the well-established principle, that where the true owner holds out another, or allows him to appear, as the owner of, or having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or the power which, through negligence or mistaken confidence he caused or allowed to appear to be vested in the party making the conveyance.⁴⁹

As to the documents enabling the disposition by the broker, the court said:

There can be no occasion for the delivery of such documents, unless it is intended that they shall be used, either at the pleasure of the depository, or under contingencies to arise.⁵⁰

Hence, the requirement of estoppel of apparent ownership that there be some actual authority in the party making the disposition has been met.

APPARENT OWNERSHIP OF GOODS

By far the largest number of cases of estoppel of apparent ownership concern goods. Before the passage of the Factors' Acts, cases concerning agents in possession of goods were especially troublesome. In many trades, people who were factors were also merchants who bought and sold for themselves the same types of goods. Third parties, in contrast to their agent expectations about brokers, generally presumed merchants who dealt in their own names to be

⁴⁸ 46 N.Y. 325 (1871). See *Gamble v. Cornell Oil Co.*, 260 F.2d 860 (10th Cir. 1958); *Powers v. Pacific Diesel Engine Co.*, 206 Cal. 334, 274 P. 512 (1929); *Jerome v. Eastern Finance Corp.*, 317 Mass. 364, 58 N.E.2d 122 (1944); *People's Trust Co. v. Smith*, 215 N.Y. 488, 109 N.E. 561 (1915); *Annot.*, 73 A.L.R. 1405 (1931).

⁴⁹ 46 N.Y. 325, 329 (1871).

⁵⁰ *Id.* at 330.

the true owners. Nevertheless, the basic common-law rule on unauthorized dispositions by factors was *nemo dat quod non habet*. The mere possession by a factor of his principal's goods or documents of title did not enable him to make an effective sale or pledge to third parties.

The one exception to this general protection of principals was when the factor not only had possession of the goods and apparent ownership but also had some actual authority to deal with the goods. In such case, the courts protected the good faith purchaser from the factor. The classic case is *Pickering v. Busk*.⁵¹ The plaintiff employed a factor, Swallow, to purchase two parcels of hemp for him. With plaintiff's consent, the hemp, which was in the possession of a wharfinger, was transferred to Swallow's name. Swallow, without authority, sold the hemp to a third party who became bankrupt. Plaintiff sued the defendant, assignee of the bankrupt, in trover. Lord Ellenborough held for the defendant on the basis of the appearance of ownership in Swallow created by plaintiff. His opinion in denying a motion for new trial creates confusion because he talks of apparent authority. The appearance of ownership in a factor, however, is inconsistent with an appearance of agency authority.⁵² And the agent of an undisclosed principal, by definition, never appears to be an agent. It is clear that the appearance in Swallow was one of ownership, as is shown by Lord Ellenborough's final comment:

The sale was made by a person who had the indicia of property: the hemp could only have been transferred into his name for the purpose of sale; and the party who has so transferred it cannot now rescind the contract. If the plaintiff had intended to retain the dominion over the hemp, he should have placed it in the wharfinger's books in his own name.⁵³

*Dyer v. Pearson*⁵⁴ was a similar case, in which the plaintiff principals allowed their agent, Smith, to purchase and warehouse in his own name ten bags of wool. Without authority, Smith sold the wool, and plaintiffs sued the buyer in trover. Chief Justice Abbot instructed the jury solely on the issue of whether the third-party-buyer bought under circumstances which ought to have excited his suspicion and to have induced him to distrust the authority of the person selling. After a verdict for plaintiff, the Chief Justice granted a new trial and stated:

⁵¹ 15 East 38, 104 Eng. Rep. 758 (1812).

⁵² See *Whitehead v. Tuckett*, 15 East 400, 104 Eng. Rep. 896 (1812), another undisclosed principal case where apparent ownership and apparent authority are confused.

⁵³ *Pickering v. Busk*, 15 East 38, 44, 104 Eng. Rep. 758, 761 (1812).

⁵⁴ 3 B. & C. 38, 107 Eng. Rep. 648 (1824).

... I should have left it to the jury to say, whether the plaintiffs had by their own conduct enabled Smith to hold himself forth to the world as having not the possession only, but the property; for if the real owner of goods suffer another to have possession of his property, then perhaps a sale by such a person would bind the true owner.

This general rule was followed in the United States.⁵⁵ In *Calais Steamboat Co. v. Van Pelt's Administrator*,⁵⁶ for example an owner in California employed an agent in New York to contract for and supervise the building of a ship. The owner specifically directed the agent to himself pose as owner and thereby conceal the existence and identity of the true owner. After completion, the agent, without authority, sold the ship to an innocent third party. The court held that since the purchase was from an agent who was apparent owner, possessed of all the indicia of property, the third party purchaser could not be divested of the title to the ship.

The estoppel of apparent ownership in an agent in possession of goods, as a protection for innocent third parties against the title claims of principals, proved inadequate for nineteenth century commerce. As many factors began financing their principal's dealings, it became usual for them to hold the documents of title in their own names and, with the principals' consent, to repledge them to banks. Yet, in spite of the appearance of ownership in the factor, when the factor made an unauthorized pledge, the courts refused to protect the lenders. The factor's unauthorized pledge of goods resulted in a successful conversion action by the principal against the pledgee.⁵⁷ There were a number of other defects. The rule protected only purchasers from agents of undisclosed principals and left uncertain the rights of purchasers who knew they were buying from factors representing unnamed principals. Third parties did not find it commercially feasible to investigate the apparent authority of this latter group of known agents. Estoppel also did not protect the purchaser from an agent of a disclosed but distant principal who had given this usual factor possession of the particular goods or

⁵⁵ See *Preston v. Witherspoon*, 109 Ind. 457, 9 N.E. 585 (1886); *Jepson Mfg. Co. v. Shank*, 54 Okl. 667, 154 P. 516 (1916); *Richardson v. Bouthillier*, 193 Ore. 354, 238 P.2d 212 (1951); *Smith v. Clews*, 114 N.Y. 190, 21 N.E. 160 (1889). See citations in P. MECHEM, *OUTLINES OF AGENCY* §§ 116-122 (4th ed. 1952). On goods entrusted to an auctioneer, see *Zendman v. Harry Winston, Inc.*, 305 N.Y. 180, 111 N.E.2d 871 (1953); Annot., 36 A.L.R.2d 1355 (1953).

⁵⁶ 67 U.S. (2 Black) 372, 374 (1862).

⁵⁷ *M'Combie v. Davies*, 6 East 538, 102 Eng. Rep. 1393 (1805); *M'Combie v. Davies*, 7 East 5, 103 Eng. Rep. 3 (1805); *Warner v. Martin*, 52 U.S. (11 How.) 209 (1850). See historical comment in *Fuentes v. Montis*, L.R. 3 C.P. 268, 277-78 (1868).

documents solely as bailee. For example, a warehouseman who received goods as bailee solely for storage could not be presumed by innocent third parties to be the owner even though he was regularly also a merchant for the same class of goods.⁵⁸ And where goods were delivered to an agent who was also a merchant for similar goods, solely to display and receive offers, but not to sell, the owner was allowed to recover them from a good faith purchaser from the agent.⁵⁹ These inadequacies of the common-law protection for the reasonable reliances of third parties who dealt with English and American factors led to the passage of the factors' acts.

FACTORS' ACTS: ENGLAND

Factors' acts were passed in England beginning in 1823 and 1825 and in a number of American states in subsequent years.⁶⁰ These acts were designed to remove the uncertainties of estoppel of apparent ownership and to remedy the courts' failures to protect innocent pledgees of apparent owners at common-law. The early English acts, which were a model for the New York and some other American statutes, centered on the concept of agents entrusted with goods for sale. Judicial limitations on the meaning of "entrusted for sale" led to major amendments in 1842 and 1877 to expand the protection afforded third parties.⁶¹ Finally, in the Act of 1889, which is still the English law, "agent entrusted" was dropped in favor of the broader concept, "mercantile agent in possession."

The Factors' Act of 1889 begins in §1 (1) with the key definition of a mercantile agent:⁶²

1 (1) The expression "mercantile agent" shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.

For a person to be held a mercantile agent for particular goods, he must customarily as agent sell, consign for sale, buy or pledge goods of the same general class. This would seem to limit mercantile agents to general agents, regularly selling the same goods as agents. The courts, in protecting the reasonable expectations of good-faith buyers, have also included one category of special agents. If a merchant who buys and sells a given class of goods is appointed an

⁵⁸ *Wilkinson v. King*, 2 Camp. 335, 170 Eng. Rep. 1175 (1809). See *Cole v. North Western Bank*, L.R. 10 C.P. 354 (1875), holding this rule to continue under the Factors' Act of 1842, 5 & 6 Vict., C. 39.

⁵⁹ *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332 (1882); *Smith v. Clews*, 114 N.Y. 190, 21 N.E. 160 (1889); *Biggs v. Evans* [1894] 1 Q.B. 88.

⁶⁰ 4 Geo. 4 C. 83 (1823); 6 Geo. 4, C. 94 (1825).

⁶¹ 5 & 6 Vict., C. 39 (1842); 40 & 41 Vict., C. 39 (1877).

⁶² Factors' Act, 52 & 53 Vict., C. 45 § 1(1) (1889).

agent for a single transaction in goods of that class, he will be deemed a mercantile agent. In *Lowther v. Harris*,⁶³ a shopkeeper who dealt in art goods was appointed a special agent to sell a tapestry in a nearby house. He was held to be a mercantile agent though employed as agent for only one sale and though he was not a general agent but a merchant.

Section 2(1) contains the major protection for third parties who deal with factors in good faith:⁶⁴

2(1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has no authority to make the same.

The language, "with the consent of the owner, in possession of goods or documents of title to goods" for the first time gave protection to innocent third-party purchasers even if the factor was given the goods only to receive offers and without authority to sell. In *Turner v. Sampson*,⁶⁵ an owner gave a picture to an art dealer and asked him to report any offers he might receive for it, but he gave the dealer no authority to sell the picture. Nevertheless, the dealer sold the picture and disappeared with the proceeds. In the owner's action to recover the picture, the court gave judgment for the good-faith buyer. After reviewing the fact that the prior statute depended on the relation of the principal to agent in the phrase "entrusted for sale," the court held that the 1889 amendment was designed to include this case.⁶⁶

⁶³ [1927] 1 K.B. 393. See *Weiner v. Harris* [1910] 1 K.B. 285 (C.A.). Compare *Heyman v. Flewker*, 13 C.B.N.S. 519 (1863), illustrating a special agent under the former statute who would not meet the criteria for mercantile agent under the 1889 Act.

⁶⁴ Factors' Act 52 & 53 Vict., C. 45 §2(1) (1889).

⁶⁵ 27 T.L.R. 200 (K.B. 1911). For opposite rule under earlier statute see *Brown & Co. v. Bedford Pantechon Co., Ltd.*, 5 T.L.R. 449 (C.A. 1889).

⁶⁶ "That state of things was substantially altered by the Act of 1889. The question now depended to a considerable extent upon what the business carried on by the factor was, and to bring the case within the act it must be shown that the goods were entrusted to the factor in that business. Therefore, at the present time if a person carried on a business in which it was in the ordinary course for persons who carried on that business to have authority to sell, and if someone entrusted goods to such a person, he was bound by his acts." *Turner v. Sampson*, 27 T.L.R. 200, 202 (K.B. 1911).

Not only does Section 2(1) protect the buyer taking from a mercantile agent who was only to receive offers, it also in some circumstances protects the buyer from a mercantile agent who is merely a bailee for particular goods of the same class as he sells. In *Moody v. Pall Mall Deposit and Forwarding Co.*,⁶⁷ a French company sent certain pictures to their London sales agents, some for sale and others (*états* prints) solely for exhibition. The agents pledged all the pictures to defendant who took them in good faith. In upholding the security interest of the defendant, this court also contrasted the more limited law before 1889.⁶⁸ The generality of this decision may be debatable. A dictum of Lord Denning indicates that the factor's possession must relate to sale, getting offers or display with appearance of being for sale.⁶⁹ Furthermore, the courts have made a sharp distinction under Section 8 of the Factors' Act between sellers and bailees and have not protected good faith purchasers from sellers in possession of goods who have become bailees.⁷⁰

The consent to possession under the Factors' Act is consent in fact. Even if it is induced by fraud so that on the criminal side there is false pretenses, or even larceny by trick, the consent to possession is sufficient for the agent to pass a valid title to a good-faith buyer or pledgee.⁷¹ For the purposes of the Act the consent of the owner is presumed in the absence of evidence to the contrary.⁷² And where an agent has been given goods or documents with consent of the owner, who then cancels the agent's authority without notice to third parties, a subsequent sale or pledge by the agent is still effective.⁷³

⁶⁷ 33 T.L.R. 306 (K.B. 1917).

⁶⁸ "Under the old law clearly the Factors' Acts did not apply. The *états* prints were never sent for sale but for exhibition. . . . But the words "entrusted for sale" were replaced by the words "in the possession of the agent" in the new Act. The object was to make the Act apply to such goods—all goods which were in the custody of the agent, whether for sale or not." *Moody v. Pall Mall Deposit and Forwarding Co.*, 33 T.L.R. 306, 307 (K.B. 1917).

⁶⁹ *Pearson v. Rose & Young Ltd.* [1951] 1 K.B. 275, 288.

⁷⁰ See *Staffs Motor Guarantee, Ltd. v. British Wagon Co., Ltd.* [1934] 2 K.B. 305. *Contrast Union Transport Finance, Ltd. v. Ballardie* [1937] 1 K.B. 510.

⁷¹ *Pearson v. Rose & Young, Ltd.* [1951] 1 K.B. 275, 288 (C.A. 1950); *Folkes v. King* [1923] 1 K.B. 282, 291-3, 296-7 (1922).

⁷² Factors' Act, 52 & 53 Vict., C. 45 § 2(4) (1889).

⁷³ Factors' Act, 52 & 53 Vict., C. § 2(2) (1889). See *Moody v. Pall Mall Deposit and Forwarding Co.*, 33 T.L.R. 306 (K.B. 1917). §2(2) overruled the earlier decision of *Fuentes v. Montis*, L.R. 3 C.P. 268, L.R. 4 C.P. 93 (1868).

Possession is defined in Section 1(2) as follows:⁷⁴

1(2) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf.

This statutory requirement is illustrated in *Lowther v. Harris*.⁷⁵ An owner stored his tapestries and furniture in a house near the shop of Prior, whom he appointed agent for sale on the condition that every potential buyer and price had to be first approved by the owner. The agent, Prior, was allowed to live in the house and bring people there to view the goods. Yet the court held that the goods were still in possession of the owner until Prior was permitted to remove them for delivery.

The requirement that the factor must be "acting in the ordinary course of business of a mercantile agent" is explained in *Oppenheimer v. Attenborough & Son*.⁷⁶ In this case, diamond dealers gave possession of some diamonds to a diamond broker who fraudulently misrepresented that he would show them to two firms he thought might buy them. The broker pawned the diamonds. It was proved a custom of the trade that such agents were not usually given authority to pledge diamonds. Nevertheless, the court held that the pledgee obtained a valid security interest under the Factors' Act, since the factor executed the pledge in the ordinary way such transactions were executed.⁷⁷ In his opinion, Justice Buckley noted another fact, which has been effective in England since the 1825 Factors' Act.⁷⁸ that whether the third party believed the agent to be the owner of the goods or an agent is not material for the purposes of the Act. In extending the protection of third parties, the

⁷⁴ Factors' Act, 52 & 53 Vict., C. 45 § 1(2) (1889).

⁷⁵ [1927] 1 K.B. 393 (1926). For the same rule under the former statute, see *Brown v. Bedford Pantechnicon Co., Ltd.*, 5 T.L.R. 449 (C.A. 1889).

⁷⁶ [1908] 1 K.B. 221 (C.A. 1907).

⁷⁷ "In my opinion the words 'acting in the ordinary course of business of a mercantile agent' mean that the person must act in the transaction as a mercantile agent would act if he were carrying out a transaction which he was authorized by his master to carry out." [1908] 1 K.B. 221, 227 (Averstone L.J.).

"I think it means, 'acting in such a way as a mercantile agent acting in the ordinary course of business of a mercantile agent would act': that is to say, within business hours, at a proper place of business, and in other respects in the ordinary way in which a mercantile agent would act, so that there is nothing to lead the pledgee to suppose that anything wrong is being done, or to give him notice that the disposition is one which the mercantile agent had no authority to make." (1908) 1 K.B. 221, 230-31 (Buckley, L.J.).

⁷⁸ 6 Geo. 4, 94, §4 (1825).

Factors' Acts not only codified the estoppel of apparent ownership but also relieved third parties of the obligation of investigating the apparent authority of known mercantile agents in possession of goods. In a later similar case, it was held that the pledge of a necklace at 15 per cent interest, which was contested as not a commercial rate, would not take the transaction out of the ordinary course of business.⁷⁹

In *Lloyds & Scottish Finance Ltd. v. Williamson*,⁸⁰ Salmon, L.J. further explained the "ordinary course of business, when he ruled:⁸¹

In cases in which the true principal not only put an agent in possession of the goods and the indicia of title, but also expressly authorizes him to sell as principal, the question as to whether the factor sold in the ordinary course of business can, in my judgment, be relevant only so far as it throws light upon the bona fides of the buyer.

Other cases have described the limits of the scope of this clause. Where a diamond broker in possession of his principal's diamonds had a friend pledge them for him, the pledge was held not to be in the ordinary course of business.⁸² Where a piano dealer was appointed agent to sell a piano and instead sent it to an auctioneer for sale, obtaining an advance thereon, the disposition was held not to be in the ordinary course of business.⁸³ In *Pearson v. Rose & Young, Ltd.*,⁸⁴ the court held that a factor's sale of a car with its log book was not in the ordinary course of business because possession of the log book had been obtained by the agent without the consent of the owner. Since the agent's sale of the log book could not come under the Factors' Act, the sale of the car alone was held to be outside the ordinary course of business. Furthermore, under Section 2(1) of the Factors' Act, the third party is not protected if he acts in bad faith or has notice that the factor was without authority to make the disposition. And under Section 4, a factor may not effectively pledge his principal's interest in goods to pay the factor's antecedent debt.

FACTORS' ACTS: UNITED STATES

The American states which have passed factors' acts fall in two groups. New York in 1830 and a few other eastern states have passed statutes modeled in part on the English Factors' Act of 1825. The

⁷⁹ *Janesich v. Attenborough & Sons*, 102 L.T. 605 (K.B. 1910).

⁸⁰ [1965] 1 W.L.R. 404 (C.A. 1964).

⁸¹ *Id.* at 410.

⁸² *De Gorter v. Attenborough & Sons*, 21 T.L.R. 19 (K.B. 1904).

⁸³ *Waddington v. Neale*, 96 L.T. 786 (K.B. 1907).

⁸⁴ [1951] 1 K.B. 275 (C.A. 1950). See *Stadium Finance Ltd. v. Robbins* [1962] 2 Q.B. 664 (C.A.).

New York statute, which was repealed in 1965 under adoption in New York of the Uniform Commercial Code, applied only to merchandise entrusted to an agent to sell or as security for advances or to documents of title issued or endorsed to the agent.⁸⁵ Like the early English statutes, the protection afforded third parties depended on the agent having possession with consent of the owner for the purpose of sale or pledge. The law was not designed to protect the good faith purchaser from a mere bailee of merchandise, even though the bailee was ordinarily an agent who dealt in that same kind of goods.

The New York statute did not include Section 4 of the 1825 English Act, so that a third party who took the goods knowing that he was dealing with an agent was not given statutory protection.⁸⁶ In Massachusetts, Maryland and Rhode Island, one who took goods with knowledge that he was dealing with a factor (agent) was protected so long as he took in good faith and without knowledge of the factor's lack of authority.⁸⁷ Like in England, these statutes

⁸⁵ "Every factor or other agent, intrusted with the possession of any bill of lading, custom-house permit, or warehouseman's receipt for the delivery of any merchandise, and every such factor or agent not having the documentary evidence of title, who shall be intrusted with the possession of any merchandise for the purpose of sale, or as a security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person, for the sale or disposition of the whole or any part of such merchandise and any account receivable or other chose in action created by sale or other disposition of such merchandise, for any money advanced, or negotiable instrument or other obligation in writing given by such other person upon the faith thereof." N.Y. PERSONAL PROPERTY LAW § 43(1) (McKinney 1962) (repealed upon adoption of the UNIFORM COMMERCIAL CODE, 1964). See MAINE REV. STAT., ch. 181 (1954) (repealed by ch. 362 § 33 [1963] Laws of Maine); MARYLAND ANNOT. CODE, Art. 2 (1957); MASS. ANNOT. LAWS ch. 104 (1967); PAGE'S OHIO REV. CODE ANNOT., § 1311.54 (1954) (repealed by 129 v. S 5 (1962), PAGE'S OHIO REVISED CODE ANNOT. § 1302.44 (1962)); PENN. PURDON'S ANNOT. STAT., Title 6 §§ 201-202 (1963); R.I. GEN. LAWS § 34-32-15 (1956) (repealed by ch. 147 § 2 [1960] R.I. Acts and Resolves); TENN. CODE ANNOT. §§ 47-1101 to 47-1104 (1955) (repealed upon adoption of the UNIFORM COMMERCIAL CODE, ch. 81 [1963] Public Laws of Tenn.).

⁸⁶ *Dorrance v. Dean*, 106 N.Y. 203, 12 N.E. 433 (1887). But if the third party deals with an apparent owner, his interest is protected even if he took the goods from a subagent to whom the agent had no authority of delegation. *Kirsch v. Provident Loan Soc. of N.Y.*, 189 Misc. 898, 71 N.Y.S.2d 241 (1947).

⁸⁷ *Associate Discount Corp. v. C. E. Fay Co.*, 307 Mass. 577, 30 N.E.2d 876 (1940).

factor will give the pledgee no greater right than the factor had.⁸⁸ generally have a proviso that a pledge for an antecedent debt of the Unlike England, where the agent in New York or Massachusetts induced the owner to trust him with goods by fraud which amounted to larceny by trick, there was not consent to the agent's possession and third parties were not protected.⁸⁹ And in Massachusetts, if the agent has no general authority, but is a special agent entrusted with goods to sell to specified customers, the Factors' Act does not apply.⁹⁰

Possession under the American statutes, like the English one, requires the agent to have actual custody. So that a loan made to a factor five days before he received the goods which were to be pledged did not bring the pledge within the statute.⁹¹ And when an owner of an automobile entrusted it to a dealer only for showing and gave the dealer the registration certificate without endorsement, the dealer was held not to be an agent entrusted with possession.⁹² But if the general manager of a used car lot has full authority to take cars from the lot and sell to other dealers and to receive payment, he is entrusted with possession of the cars on the lot.⁹³ Furthermore, customs of a trade can be controlling. A dealer delivering precious stones to another dealer under a memorandum indicating that they were for inspection only could not prevent the second dealer from becoming an agent entrusted with possession. Parol evidence was admitted to show that, in spite of such memoranda, it was generally expected in the trade that dealers receiving such stones had the option of returning them or selling them as agents.⁹⁴

The California Factors' Act,⁹⁵ which has been adopted in Mon-

⁸⁸ N.Y. PERSONAL PROPERTY LAW, §43(2) (repealed upon adoption of UNIFORM COMMERCIAL CODE, 1964); MASS. ANNOT. LAWS, ch. 104 §5 (1967).

⁸⁹ *Soltau v. Gerdau*, 119 N.Y. 380, 23 N.E. 864 (1890); *Sweet & Co. v. Provident Loan Society*, 279 N.Y. 540, 18 N.E.2d 847 (1939); *H. A. Prentice Co. v. Page*, 164 Mass. 276, 41 N.E. 279 (1895).

⁹⁰ *Boston Supply Co. v. Rubin*, 214 Mass. 217, 101 N.E. 133 (1913).

⁹¹ *DeBeixedon v. Brown & Seccomb*, 188 N.Y.S. 451 (1921).

⁹² *Royle v. Worcester Buick Co.*, 243 Mass. 143, 137 N.E. 531 (1922) (applying New York Law).

⁹³ *Caulson's of Welleslye, Inc. v. Coombe & McBeath, Inc.*, 342 Mass. 298, 173 N.E.2d 81 (1961).

⁹⁴ *Nelkin v. Provident Loan Society*, 265 N.Y. 393, 193 N.E. 245 (1934).

⁹⁵ CALIF. CIVIL CODE §§2026 to 2030, 2367 to 2369 (West 1954) (enacted in 1872).

tana⁹⁶ and North Dakota,⁹⁷ differs markedly from that of the eastern states. The controlling section states:⁹⁸

A factor has ostensible authority to deal with the property of his principal as his own, in transactions with persons not having notice of the actual ownership.

The phrase "ostensible authority" is clearly misused in this statute. An earlier section of the code defines ostensible authority as such representative authority in an agent as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess.⁹⁹ As noted above, a factor can not both appear to be owner of goods and also not the owner because he has ostensible authority as agent to dispose of them for the owner.

The language of the California statute protects only "persons not having notice of the actual ownership." Unlike the English statute, it is not designed to give extended protection to those who know they are dealing with an agent.¹⁰⁰ Of the few recorded cases, the two most recent ones concern automobile dealers. A used car dealer was held to be a factor when another dealer delivered cars to him for sale, so that third-party purchasers and lenders to such purchasers were protected as against the original dealer in whom the titles were registered.¹⁰¹ And even where used cars, brought from another state and not registered in California, were delivered to a dealer only to display for sale in his usual sales lot but without actual authority to sell, a good faith purchaser for value from the dealer received the property interest in the car.¹⁰² This rule is clearly consistent with the New York and English views on sales by factors. But under the former special California statute for pledges by factors, jewelry delivered to another under a written contract solely to exhibit and not to sell would entitle the true owner to recover it from a pledgee of the apparent owner.¹⁰³ Unlike

⁹⁶ MONTANA REV. CODE §§2-401 to 2-407 (1947).

⁹⁷ NORTH DAKOTA CENTURY CODE §§3-06-01 to 3-06-06 (1959).

⁹⁸ CALIF. CIVIL CODE §2369 (West 1954), Compare §2991, which until 1965 controlled pledges by factors.

⁹⁹ *Id.* §2317.

¹⁰⁰ *De Raad v. Nash-De Camp Co.*, 23 P.2d 68 (Cal. App. 1933).

¹⁰¹ *Pacific Finance Corp. v. Foust*, 44 Cal.2d 853, 285 P.2d 632 (1955).

¹⁰² *Siegel v. Bayless*, 113 Cal. App.2d 661, 248 P.2d 968 (1952). For a similar rule even though the third party knew he was dealing with an agent, see *Carter v. Rowley*, 59 Cal. App. 486, 211 P. 267 (1922).

¹⁰³ *California Jewelry Co. v. Provident Loan Assn.*, 6 Cal. App.2d 506, 45 P.2d 271 (1935), applying CALIF. CIVIL CODE §2991 (West 1954), repealed upon enactment of the UNIFORM COMMERCIAL CODE, 1965. Under §2991, the factor had to have some actual authority to transfer the goods before the law would protect a pledgee. See *Floyd v. Riskin*, 25 Cal. App.2d 297, 77 P.2d 233 (1938).

the New York case,¹⁰⁴ the court would not permit oral evidence that it was the custom of the trade for such special agents with such restricted written authority nevertheless to sell the jewelry.

The Uniform Commercial Code, which has been adopted by a majority of the United States, contains a "factors' act" in that third parties who buy goods from an agent in possession who is also a merchant of the same class of goods receive comprehensive protection. The latter parts of Section 2-403 state the rule:¹⁰⁵

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary courses of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

Although the term "factor" is not used in this section nor elsewhere in the Uniform Commercial Code, it is reasonably clear that the term "merchant" in the above subsection (2) does include some factors.¹⁰⁶ Those agents who deal as merchants in the same kind of goods as those they are entrusted by a principal would come under the Code. The comment following Section 2-403 states that the purpose of this part was to gather from the law relating to buyers from dealers "a single principle protecting persons who buy in the ordinary course out of inventory. Consignors have no reason to complain, nor have lenders who hold a security interest in the inventory, since the very purpose of the goods in inventory is to be turned into cash by sale." The term, merchant, would seem to include all commodity factors dealing in the products they usually inventoried, even though it was known in the trade that they always dealt as agents and took no title in the merchandise. Thus the merchant could be a known agent. The section does not, however, cover a sale by a merchant who did not usually deal in the kind of goods with which he was entrusted in the particular case. Nor does this section protect any pledgees of factors. Many of these transactions were covered by the earlier factors' acts, and the repeal of some of these earlier acts by the states which adopted the Uniform Commercial Code can be questioned on these grounds.

¹⁰⁴ See note 91 and accompanying text.

¹⁰⁵ UNIFORM COMMERCIAL CODE §2-403.

¹⁰⁶ "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practice or goods involved in the transaction....*Id.* §2-104(1).

The extent to which this Section will protect buyers from factors to the detriment of the claims of true owners depends on the interpretation the courts will give to the statutory definition of the final phrase of subsection (2), "buyer in the ordinary course of business."¹⁰⁷ The language seems as broad as the English Act though it is structured differently. If construed as broadly as the English Act, a buyer will be in good faith even though he knows he is dealing with an agent and makes no inquiry of the principal concerning the scope of the agent's authority. The purpose of factors' acts is to dispense with this duty of inquiry which was the burden of the buyer from an agent under common law. A factor's act is designed to confirm the apparent ownership or apparent authority in the agent. Under this Code, the buyer would seem to be protected if he buys from a factor who is in the business of selling goods of that kind and he is without actual knowledge that the sale to him is in violation of the ownership rights or security interest of a third party.

A counter-argument, limiting the scope of Section 2-403, could be based on the fact that this is one of the sales sections of the Uniform Commercial Code and hence there was no legislative intent to enact a general factors' act. It may be designed only to relieve buyers from any duty to inquire if the goods in the merchant's inventory are being sold as agent for another or are subject to a security interest. But, when the buyer actually knows that particular goods are being sold by the merchant as agent, sales law no longer predominates, and it could be argued that the common law of agency would here require the third party to inquire of the principal about the scope of the agent's authority.

Subsection 3 affirms that this statute is much broader in one aspect than the earlier factors' acts. Under this code, the power of the factor is not limited to possession of the goods for purposes of sale or pledge. The factor may be a bailee of the goods and still transfer title to third parties so long as he is also a merchant who deals in goods of that kind.¹⁰⁸ Entrusting of goods to a merchant merely for display and without actual authority to sell would still give him the full power to make a valid sale to an innocent third party. And a merchant who is also a warehouseman of similar goods

¹⁰⁷ "Buyer in the ordinary of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. *Id.* §1-201(9).

¹⁰⁸ The California version seems to exclude a mere bailment with one who is a merchant from "entrusting" under CALIFORNIA COMMERCIAL CODE §2403(3).

could sell goods which have been left with him solely for storage and the purchaser would gain good title. Furthermore, the previous American rule¹⁰⁹ that goods obtained by a factor through larceny by trick prevents his effective sale to third parties is overruled by this statute. Hence, our new code conforms to the interpretation of the English court of "consent of the owner" under the Factors' Act of 1889.¹¹⁰

Two other sections of the Uniform Commercial Code must be noted. A buyer of fungible goods from a warehouseman who is also a merchant receives special protection under Section 7-205. This section is designed to protect buyers of grains, metals and other fungible goods and does not protect pledgees.¹¹¹ Section 7-502 of the U.S. Uniform Commercial Code continues the protection in earlier laws of a holder to whom a negotiable bill of lading or warehouse receipt has been duly negotiated.¹¹² An agent who is entrusted with the possession of goods with a power of sale who obtained a negotiable document of title in his own name would be able to negotiate the document to a good faith buyer or pledgee even though the agent exceeded his authority.

SUMMARY AND CONCLUSION

In a free-market economy, the voluntary assumption of risk and market uncertainty is a prime basis for holding a party legally liable to those who are affected by his activities. This is exemplified in the law of contract where the objective theory holds a party bound by his consensual promissory expressions if the promisee has acted reasonably in relying on them. The objective theory of agency is merely an extension of the basic concept. A principal's liability in contract to third parties is measured by his expressions to them concerning the scope of his agent's authority. Whether the principal's expressions are made through the agent in the form of actual authority or directly to the third party in the form of apparent authority, consent of the principal is the fundamental characteristic. Some courts and commentators have failed to perceive these basic relations because an agent who exceeds his actual authority is acting

¹⁰⁹ See note 89, *supra*.

¹¹⁰ *Folkes v. King* [1923] 1 K.B. 282 (C.A. 1922).

¹¹¹ "A buyer in the ordinary course of business of fungible goods sold and delivered by a warehouseman who is also in the business of buying and selling such goods takes free of any claim under a warehouse receipt even though it has been duly negotiated." UNIFORM COMMERCIAL CODE §7-205.

¹¹² UNIFORM COMMERCIAL CODE §7-502; see UNIFORM SALES ACT §33; UNIFORM WAREHOUSE RECEIPTS ACT §41; UNIFORM BILLS OF LADING ACT §32.

without the express consent of his principal to him. But the consent which is controlling in agency is the principal's consent to the third party, the apparent authority which is found in the principal's statements to or conduct toward third parties. The scope of apparent authority of a particular agent in any given trade can be extremely broad and even expand over time, since it is governed by the conduct of the principal and the usual authority of agents in that trade.

Some of the most difficult classic agency cases concern undisclosed principals, whose agents, by definition can have no apparent authority. A number of these cases create confusion by holding the principal liable for the agents unauthorized contracts and use the language of apparent authority. In essentially all of these cases the principal has directed the agent to pose as owner of assets which in fact belong to the principal. A more rigorous treatment of this type of case would hold the principal liable only on the basis of estoppel of apparent ownership. Such estoppel is similar to authority in the sense that it is based on consent and direction of the principal that the agent purport to own the assets. In reasonable reliance on this representation, third parties extend credit and enter contracts. Underlying the liability of the principal is the clear assumption of risk by him that his agent may exceed his actual authority in dealing with the assets as purported owner.

When the agent is in possession of goods or documents of title to goods of his principal, third parties are protected in dealing with him in some jurisdictions by factors' acts. For the undisclosed principal cases, these statutes go beyond a mere codification of the estoppel of apparent ownership, since under them even an executory contract is sufficient change in position of the third party to hold the principal liable. The English statute also codifies apparent authority of the agent in possession of goods or documents of title, since it applies even though the third party knows he is dealing with an agent. Factors' acts seem to incorporate the reasonable expectations of businessmen in an industrialized society. Section 2-403 of the Uniform Commercial Code is also a type of factors' act, but it is of limited scope. Since this act includes only those factors' who deal as merchants in goods of the same kind and does not protect pledgees of factors, it would seem appropriate to advocate the adoption of general factors' acts in all of the American states.