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## RATIFICATION IN NORTH CAROLINA\*

M. S. BRECKENRIDGE†

The American Law Institute defines ratification as, ". . . the affirmation by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him."<sup>1</sup> This painstaking definition is probably more accurate than those sprinkled through texts and cases<sup>2</sup> even though its concluding clause seems foreign to the idea of defining, being, as it is, a statement of what ratification does when it exists.<sup>3</sup> In the physical world, of course, a description may be aided by just such additions. An elephant is a large, wrinkled, grey animal which has a trunk and the posterior appearance of wearing broken suspenders. *And* which eats peanuts. The eating of peanuts may in a pinch help to identify the animal. What ratification does, however, *i.e.*, the effects of ratification, can not be similarly observed and used to determine if ratification exists since those effects are what will ensue from a determination from other factors that there is ratification.<sup>4</sup> Criticism of a definition, however, because it has a dangling,

\* This article is not on ratification in agency with special reference to the North Carolina cases, but is a discussion and criticism of the North Carolina cases alone. From the standpoint of any broad scholarship, there is, of course, no such thing as the North Carolina law of ratification in the sense that there are special conditions here justifying an independent body of North Carolina law. And yet there is some practical advantage in familiarity with the local decisions.

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<sup>1</sup> RESTATEMENT, AGENCY (1933) §82 (hereafter cited as *Restatement*).

<sup>2</sup> 1 MECHEM, LAW OF AGENCY (2d ed. 1914) §347; TIFFANY, AGENCY (2d ed. 1924) 128. *Nelson v. Atlanta Home Ins. Co.*, 120 N. C. 302, 306, 27 S. E. 38, 39 (1897), ". . . subsequent affirmation or adoption of the act of another, or of the voidable contract of the party himself." *Cf.* terse statement in *Starkweather & Shepley v. Gravely*, 187 N. C. 526, 527, 122 S. E. 297, 298 (1924), apparently originating in *Steffens v. Nelson*, 94 Minn. 365, 102 N. W. 871 (1905), and frequently repeated in North Carolina. "The substance of ratification is confirmation after conduct."

<sup>3</sup> This incorporates into the definition the gist of the maxim, "*omnis ratihabitio*" etc., variously quoted. *Moore v. Rogers*, 51 N. C. 297, 299 (1859); *Rowland v. Barnes*, 81 N. C. 234, 239 (1879); *Greenleaf v. Norfolk So. R. R.*, 91 N. C. 33, 37 (1884). See comment on the two common forms of the maxim in TIFFANY, AGENCY (2d ed. 1924) 129 n. 1. Similar doctrine stated in English in *Gallup & Co., Inc. v. Rozier*, 172 N. C. 283, 289, 90 S. E. 209, 212 (1916).

<sup>4</sup> By comparison, the RESTATEMENT OF CONTRACTS (1932) §52, in defining acceptance of an offer—seemingly ratification's closest kin—, appends no corresponding clause concerning effects. "Acceptance of an offer is an expression of assent to the terms thereof made by the offeree in a manner requested or authorized by the offeror." It may be that the definition in the *Agency Restatement* most nearly corresponding to that of "acceptance" in the *Contracts Restatement*, however, is §83, on "Affirmance", which likewise omits any recital about effects. It may be also that for practical reasons the appendage is desirable in defining ratification, so that it may be distinguished from other possible consequences of affirmation, *e.g.*, "adoption". (Hence, my concession "possibly useful" in the text above.) Com-

unrelated-looking, but possibly useful, appendage is not a very worthwhile use of printed space, and it may be that the chief value of mentioning definitions here at all, when the state supreme court has gotten along a century and a half practically without using any, is to note how trifling a start they provide at best to an understanding of the subject. Ratification is, in other words, only so far illuminated by definition—even careful definition—as to be shown to be some kind of approval, of some kind of prior unauthorized acts, when given by some kinds of persons in some manner and within some period of time. All the indicated uncertainties must be dealt with later on, after which, and only after which, will one know much about what the term really means. That fact provides the task for this discussion.

#### WHAT ACTS CAN BE RATIFIED?

Such judicial comment on this problem as may be found in North Carolina deals with it rather simply. Void transactions can not be ratified, nor can those by which the "principal" could not have obligated himself had he handled them personally,—if indeed that is not the same thing. In this classification falls the case of *Johnson v. Royster*<sup>5</sup> wherein property was listed for taxes for a prior year by an agent who had no authority so to do, and Justice Ruffin held that listing could not lawfully be made at all or by anyone for past years, and accordingly refused to recognize the possibility of ratification as fixing tax liability on the principal. The same position can be taken on *ultra vires* contracts of corporations where the transaction in question is considered *ultra vires* in the sense of being illegal and invalid as, *e.g.*, a contract to join in creating a monopoly.<sup>6</sup> But if ratification in such a case would be in-

parison of the mechanics of reaching the ultimate obligation in Contracts and Agency discloses this peculiarity in the restatements. Acceptance of an offer produces the contract. Affirmance of a proper unauthorized act "results in ratification" (§83, comment *a*). Ratification is "the affirmance of a prior act", etc., and results in liabilities (see §100). In both Contracts and Agency the simple fact is that assent manifested in certain ways produces legal obligations. The two step process by which this is described in Agency seems to obscure rather than clarify the issue. A contract made by an agent "subject to ratification", such as that in *Storey v. Stokes*, 178 N. C. 409, 100 S. E. 689 (1919), may be in fact a case of offer only and present no problem of ratification.

<sup>5</sup> 88 N. C. 194 (1883). Formal invalidity of the agent's act will likewise prevent ratification. *Woodcock v. Merrimon*, 122 N. C. 731, 30 S. E. 321 (1898).

<sup>6</sup> See Clark, C. J., dissenting, in *Hill v. Atlantic & N. C. R. R.*, 143 N. C. 539, 601, 55 S. E. 854, 876 (1906). This was the rigid view of many early cases as to all *ultra vires* "corporate action". And an occasional unguarded statement to like effect may still be found. *Respass v. Rex Spinning Co.*, 191 N. C. 809, 133 S. E. 391 (1926) *semble*. The majority in the *Hill* case adopted, even as to this contract with its large questions of policy, the now prevailing view that most *ultra vires* contracts are binding and enforceable. STEVENS, CORPORATIONS (1936) 254, 276. Corporate contracts made by or to an interested director or officer being voidable only, are under a rule similar to that governing infant's contracts, *infra*, p. 311, and can be effectively ratified. *Green River Mfg. Co. v. Bell*, 193 N. C. 367, 137 S. E. 132 (1927); *Highland Cotton Mills v. Ragan Knitting Co.*, 194 N. C. 80, 88, 138,

effectual to validate the transaction and make it binding on the parties, it might still have the effect of creating tort or criminal liability on the law-breaking corporation since torts and crimes are capable of ratification to impose liability.<sup>7</sup> The bare statement that void contracts can not be ratified is thus seen to be oversimplified and misleading, though often correct enough as applied to the facts in hand.

When it comes to the contracts of married women and others under legal disability, the same doctrine has been applied. If the act done on her behalf by a person having no authority from her is one he could not have validly done with her authority, or which she could not have validly done herself, or if it is one which could only have been validly done in a form not followed, affirmance by her falls short of ratification.<sup>8</sup> All this seems fairly obvious. Ratification has at most been thought equal to prior authorization, and what she could not effectively authorize she could not ratify.

The above has been written of attempted ratification by a woman

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S. E. 428, 431 (1927); *Morris v. The Y. & B. Corp.*, 198 N. C. 705, 153 S. E. 327 (1930), also on ground of authority and estoppel. Contracts to employ unlicensed persons in certain employments might be illegal and void beyond ratification. *Respass v. Rex Spinning Co.*, *supra*, where foreign accountants were held not to have violated the statute in making one audit, and ratification was accordingly effective. Cf. as to other contracts contrary to public policy. *Waggoner v. Western Carolina Publishing Co.*, 190 N. C. 829, 130 S. E. 609 (1925). And, to the effect that corporate mortgages executed both on insufficient authorization and inadequate form may not be ratified, at least as against creditors, examine *Duke v. Markham*, 105 N. C. 131, 10 S. E. 1017 (1890). Cf. *Chatham v. Mecklenburg Realty Co.*, 174 N. C. 671, 94 S. E. 447 (1917); *Spence v. Wilmington Cotton Mills*, 115 N. C. 210, 20 S. E. 372 (1894); *Jenkins v. Gastonia Cotton Mfg. Co.*, 115 N. C. 535, 20 S. E. 724 (1894) (no ratification of formally invalid contract after repeal of the statute which imposed the formal requirement). Cf. also *Taylor v. Albemarle Steam Nav. Co.*, 105 N. C. 484, 10 S. E. 897 (1890); *Phillips v. Interstate Land Co.*, 176 N. C. 514, 97 S. E. 417 (1918).

<sup>7</sup> That torts may be ratified was recognized in *Moore v. Rogers*, 51 N. C. 297 (1859); *Daniel v. Atlantic Coast Line R. R.*, 136 N. C. 517, 48 S. E. 816 (1904); *Haynor Mfg. Co. v. Davis*, 147 N. C. 267, 61 S. E. 54 (1908) (false representations as to goods sold); *Starnes v. Raleigh, Char. & So. Ry.*, 170 N. C. 222, 87 S. E. 43 (1915) (same as to use of land purchased); *Riley v. Stone*, 174 N. C. 588, 94 S. E. 434 (1917) (slander); *Smith v. Somers*, 213 N. C. 209, 195 S. E. 382 (1938). As to ratification of crimes, *State v. Privett*, 49 N. C. 100 (1856). As to forgery, see *McNeely* case, cited *infra* note 41. As to liability for trespass later assented to by the one for whose benefit the trespass was committed, *Horton v. Hensley*, 73 N. C. 163 (1840).

<sup>8</sup> *Thompson v. Taylor*, 110 N. C. 70, 14 S. E. 513 (1892), where the contract to build a house on the married woman defendant's land was made by the husband and his agency was denied. No point was made of ratification in the opinion, but, by affirming the judgment below, the court approved the trial judge's ruling which excluded evidence calculated to show ratification by accepting benefits, *i.e.*, living in the house. Evidently ratification was considered impossible though the court (*id.* at 73, 14 S. E. at 514) speaks of the work being done without her authority, which, taken alone, would suggest that authority or ratification, if either were shown, would have been significant. *Weathers & Crowder v. Borders*, 121 N. C. 387, 28 S. E. 524 (1897), though somewhat similar, is probably not an agency case; and the statement, "She can not ratify a void contract", probably refers to the invalidity of an oral agreement made by her directly and jointly with her husband, rather than one by him as agent for her.

who at the time was still under the same disability which would have rendered an original authority fruitless. But the case may be presented in a more complicated form. Suppose the woman to have been married and incapacitated when the transaction was originally entered into in her name by the so-called agent, but that now, as a widow and *feme sole*, she manifests her approval. So far as new obligations are concerned, she is a free trader and a present appointment of an agent for like purposes would bind her. Can she effectively bind herself by ratification of the old unauthorized transaction? The answer is a technical one and is, "No".<sup>9</sup> Ratification relates back, so it is said,<sup>10</sup> and the obligation is then viewed as arising at the time of the agent's act.<sup>11</sup>

Whether this is the best rule or not, it is well established and covers in principle the case of purported agencies for other entirely disabled persons, as, *e.g.*, those adjudicated insane, of which no instances have been found in this state.

On the same grounds and *a fortiori* it is generally held that a corporation can not ratify the acts of promoters done on its behalf before its incorporation.<sup>12</sup> Acts for a then non-existent principal are at least as shallowly rooted as are those for one disabled. One local case might at first sight be regarded as in conflict with the rule here stated. In *McNair v. Southern States Finance Company*<sup>13</sup> plaintiff charged the defendant with responsibility for false representations made by its alleged agent in the sale of its stock. One of the representations was that the company was "then being organized". Had that been true the judicial observations about ratification<sup>14</sup> would be open to criticism, but the jury found that the representations, including this one, were false, and the act being thus done for a then existent principal could, of course, be ratified.

The situation as to transactions on behalf of an infant bears a close relationship to those just considered, but due to the modified character of an infant's disability in contract law, *i.e.*, that the infant's engagements are not void but voidable, a corresponding rule is recognized as to ratification. Accordingly, approval given after majority reached will apparently dispose of both the lack of authority and the voidability due to lack of full contractual power, *i.e.*, it will effect ratification in both

<sup>9</sup> Stated as one ground of decision in *Rawlings v. Neal*, 126 N. C. 271, 275, 35 S. E. 597, 598 (1900). "There can be no ratification of a void transaction." RESTATEMENT, AGENCY (1933) §84, illus. 7.

<sup>10</sup> *Respass v. Rex Spinning Co.*, 191 N. C. 809, 133 S. E. 391 (1926).

<sup>11</sup> See analysis in *McArthur v. Times Printing Co.*, 48 Minn. 319, 51 N. W. 216 (1892).

<sup>12</sup> Though there might be liability on different grounds,—quasi-contract, novation, adoption, etc. STEVENS, CORPORATIONS (1936) 187.

<sup>13</sup> 191 N. C. 710, 133 S. E. 85 (1926).

<sup>14</sup> *Id.* at 719, 133 S. E. at 90.

respects.<sup>15</sup> The effect given to approval voiced before majority is to be mentioned in the next topic, "Who Can Ratify?"

A special state of affairs exists with regard to insurance contracts. Where taken out by one without authority they may, like other contracts, be ratified by the principal prior to loss. But attempts to ratify and get the benefit of insurance after loss apparently impress some courts as a form of depravity not to be encouraged. Superficially it seems kin to the well-known stage antic of telephoning for coverage while the fire rages. There is something startling about the golden opportunity offered for gain through ratification after known loss, but against this it should not be forgotten that the third party is always in the exposed position by his own failure to ascertain the agent's authority, and that he is exposed in all cases of ratification to some loss since a purported principal will normally ratify only where he considers the transaction to his advantage. An unauthorized agreement to exchange properties may find the alleged principal little interested till he discovers a change in the market operating in his favor. We would have a more nearly parallel case to that of ratifying unauthorized insurance, however, if we assumed that an uninsured or inadequately insured building on the principal's lot had burned just before he learned of the agreement.<sup>16</sup> After a thorough examination of cases and the actual business practices in respect of insurance underwriting, a widely known author has concluded that ratification should be permitted even after known loss.<sup>17</sup> Our own law, after a period of uncertainty, seems to have swung around in the direction of this view.

The first case raised the question in interesting backhand fashion, and was one especially calculated to throw the sympathy of the court into the scales against the right and power to ratify.<sup>18</sup> Plaintiff had fire insurance issued by defendant company which by express provision should be void if plaintiff had or got other insurance, valid or invalid. He did get another policy, one in a Canadian company (whether before

<sup>15</sup> This doctrine seems to have approval in *Flowe v. Hartwick*, 167 N. C. 448, 83 S. E. 841 (1914), although there was insufficient evidence of manifested affirmance and there were other defects which are to be considered later herein. Refer also to *Smith v. Gray*, 116 N. C. 311, 21 S. E. 200 (1895), and *Norwood v. Lassiter*, 132 N. C. 52, 43 S. E. 509 (1903); neither of them are squarely in point, one being an irregular sale of infant's lands by commissioners and the other a similar sale by a mortgage trustee. Sales by such persons in an unauthorized or illegal manner, however, bear much resemblance to acts of an unauthorized agent or intermeddler, and the same principle seems to have been thought relevant and to have been applied where the infants took the proceeds after becoming of age.

<sup>16</sup> See the rule of the *Restatement* in the next footnote.

<sup>17</sup> *Robinson, Ratification After Loss in Fire Insurance* (1933) 18 CORN. L. Q. 161. The *Restatement*, §89, is *contra*, not as a narrow rule of fire or other insurance law, but as a proposition of general application where material changes in condition have occurred so as to make it inequitable to hold an unwilling third person. This is slightly different from the tentative language commented on by Robinson.

<sup>18</sup> *Nelson v. Atlanta Home Ins. Co.*, 120 N. C. 302, 27 S. E. 38 (1897).

or after the one in suit was issued does not clearly appear), in the sense that he received and for a time held in possession a policy issued without any authority from him. He went further than that. After the fire, he filed a proof of loss on it accompanied by an admission that he had not authorized its procurement. Failing, of course, to receive favorable action on that half-hearted and self-defeating claim, he fell back on what he considered his lawful insurance, only to be met by the invalidity clause already mentioned. If he were found to have ratified the Canadian policy his case would be lost. At trial the court seems to have made no point of ratification specifically, but to have submitted the issue of second policy or no second policy, elaborated by language (about plaintiff's accepting another policy) probably amounting to an issue on ratification in effect if liberally construed. As might be expected, the jury answered this favorably to the plaintiff. But on appeal the supreme court seems to have made the question of defendant's conduct looking toward ratification entirely immaterial. ". . . it will scarcely be contended that the assured can, after the property insured has been destroyed, accept a policy issued without his knowledge or procurement, and which, at the time of issue, he never intended to accept."<sup>19</sup> Whether this statement is the law of the case or only dictum might be questioned. The sentence immediately following is this: "In the absence of any prayer for fuller instructions, we think the charge sufficient." This might put the decision on the ground that the jury found against ratification on sufficient evidence and on instructions illuminating enough to pass unless challenged at trial. There can be no doubt, however, that the court, without investigation of authorities, held a somewhat emphatic opinion that there could be no ratification.

Between that case and the one relied upon for the statement above, that the rule in North Carolina is now otherwise, there were cases not squarely presenting the issue but which involved issues closely enough kin to it so that their results might be thought significant. They are summarized in the margin.<sup>20</sup>

<sup>19</sup> *Id.* at 306, 27 S. E. at 39.

<sup>20</sup> *Starkweather & Shepley v. Gravely*, 187 N. C. 526, 122 S. E. 297 (1924). Suit by broker to recover payments made by him on marine insurance he had taken out for defendant without authority. Shipment had arrived without loss. Jury finding: no ratification. On appeal, *held*, the cases on ratification after loss in order to hold the insurer are in conflict (citing *Nelson* case along with two federal cases), but that is not the question here. Plaintiff can not complain of the trial since he could only recover if there had been attempted ratification, and the jury had found none. Perhaps this does not do justice to the plaintiff's contention which seemed to call for an issue as to whether defendant had affirmed the contract even though it would not be effective as ratification. But the case is at least consistent with the view of no ratification after loss.

*Federal Land Bank of Columbia v. Atlas Assurance Co.*, 188 N. C. 747, 125 S. E. 631 (1924). Insurance taken out by mortgagor without the knowledge of mortgagee, but in its favor "as interest may appear". Argued *inter alia* that

Finally, there came *Belk's Department Store v. George Washington Fire Insurance Company*,<sup>21</sup> where an agent having written several concurrent policies on a large stock of merchandise for plaintiff, later substituted a policy of the defendant for one in a company which had become insolvent. Notice of the substitution was mailed to plaintiff before, but received after, a destructive fire. The jury found that the parties entered into this insurance contract (which they might have found either upon authority or upon ratification), and on appeal a judgment on the verdict was affirmed. The court, without reference to the seemingly contrary *Nelson* case, above, quoted with approval text statements that ratification could be effective after loss, and apparently rested its decision chiefly on that doctrine. The *Jernigan* case<sup>22</sup> was distinguished on its facts, but seemingly was approved on its law. It would have been more satisfactory to have had an obituary notice for the *Nelson* case incorporated in this opinion, but probably that is not necessary despite the two dissents registered without opinion.

#### WHO CAN RATIFY?

It is obvious that ratification must be either by "the principal"<sup>23</sup> or by someone authorized to affirm on his behalf. This necessarily includes ratification by an agent,<sup>24</sup> and, in the case of corporations, formal action to that end is ordinarily by agent rather than by the whole body of the stockholders who constitute the corporation.<sup>25</sup> It is possible that in

mortgagee can not ratify after loss. *Held*, case is one of third party beneficiary not agency, and authority on ratification (*Nelson* case) not in point.

*Jernigan v. National Union Fire Ins. Co.*, 202 N. C. 677, 163 S. E. 762 (1932). Named defendant had gotten local agent to cancel policy of plaintiff without notice. Agent then wrote new coverage in another company. New policy sent to mortgagee. Fire followed and plaintiff, having declared that she looked to original insurer, sued both companies. *Held*, no authority for cancelling old policy and while authorities (citations are to cases from other jurisdictions) recognize power to ratify substitution there was no ratification here. This case is the first to take that position, and while the statement is not made concerning affirmance after loss, the case was of that sort.

<sup>21</sup> 208 N. C. 267, 180 S. E. 63 (1935).

<sup>22</sup> See note 20, *supra*. On the substitution cases elsewhere see comment of Robinson, *loc. cit. supra* note 17.

<sup>23</sup> "The principal" must be taken throughout to mean the intended or purported principal whether the one acting was in fact his agent (for other but not these purposes) or was no agent at all. See *Restatement*, §87. Similarly as to "the agent".

<sup>24</sup> The headnote in *Moye v. Cogdell*, 69 N. C. 93 (1873), repeated in *Bank of Glade Spring v. McEwen*, 160 N. C. 414, 421, 76 S. E. 222, 225 (1912), but without any application to the facts, erroneously states that ratification must be by the principal and not by his agent, but the opinion only stated that the agent had no authority (*id.* at 96), though he was said to be a general agent (*id.* at 94).

<sup>25</sup> *Respass v. Rex Spinning Co.*, 191 N. C. 809, 133 S. E. 391 (1926), is a case of stockholder ratification where the contention was made that the action failed because of lack of directors' action—a contention possibly sustainable if the transaction in question had been part of the day-to-day business of the corporation as to which directors are sometimes held supreme. *BALLENTINE, CORPORATIONS* (1927) §99. *Cf. Hill v. Atlantic & N. C. R. R.*, 143 N. C. 539, 55 S. E. 854 (1906), where



some cases the affirmance might effectively be given by the very person who theretofore acted without authority, but that would be exceptional.<sup>26</sup> Perhaps if one not an agent for any purpose, but expecting approval of his action, was soon after given complete charge of the kind of business already conducted, it would be proper for a jury to find his authority sufficient even if the principal did not know of the events of the past.

The North Carolina case nearest to presenting a possibility of ratification by the subsequent conduct of the very one who first wrongfully acted seems to be one in which the agent employed to run a business borrowed without authority and applied the funds so obtained to the needs of the business.<sup>27</sup> But the court correctly held this benefit insufficient to charge the uninformed principal. If he had been unjustly enriched there was a remedy not based upon a non-existent affirmation.

Instances of ratification by public and corporate officers are numerous and for the most part of a routine character.<sup>28</sup> In all cases the rule seems to be, as of course it should be, that the officer or agent affirming must have been one who could authorize a like transaction.

When it comes to ratification by the person himself the matter of disability, already considered in connection with what acts can be ratified, is again important. The accepted rule is that the "principal" must at the time he affirms be able to authorize such a transaction.<sup>29</sup> It would follow that a married woman under common law disabilities would be incapable of ratifying those contracts which she could not validly appoint an agent to execute. If she had been single at the date the purported agent acted for her, but was married when she sought to ratify, the problem would be presented free of the question of original invalidity; but the local cases have not been so dissociated,<sup>30</sup> and the most that can be said is that there is no reason to doubt our acceptance of the rule. Putting the two rules together then, the "principal" must have been competent both at the time of the transaction and at the time of the approval or affirmation. And, as to an infant, it must be taken that

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directors are said to have "ratified" a railroad lease already approved by the stockholders who had also authorized the directors and officers to act. This is probably not an agency ratification.

<sup>26</sup> See RESTATEMENT, AGENCY (1933) §93, comment c.

<sup>27</sup> *Swindell v. Latham*, 145 N. C. 144, 58 S. E. 1010 (1907).

<sup>28</sup> Public officers: *Green v. Commissioners of Cherokee County*, 67 N. C. 117 (1872). Corporate officers: *Directors, Citizens Lumber Co. v. Elias*, 199 N. C. 103, 154 S. E. 54 (1930)—passively; (but not where they are under the control of the officer whose transaction on the corporation's account is in question, *Green River Mfg. Co. v. Bell*, 193 N. C. 367, 137 S. E. 132 (1927)); *President, Brimmer v. Brimmer & Co.*, 174 N. C. 435, 440, 93 S. E. 984, 986 (1917); *Turner v. C. C. Disher Chevrolet Co.*, 209 N. C. 587, 183 S. E. 742 (1936); *General Freight Agent, Porter v. Raleigh & Gaston R. R.*, 132 N. C. 71, 43 S. E. 547 (1903). This list is not exhaustive.

<sup>29</sup> HUFFCUTT, THE LAW OF AGENCY (2d ed. 1901) §39.

<sup>30</sup> See note 8, *supra*.

he can ratify in that inconclusive fashion which his peculiar style of disability makes possible, *i.e.*, so as to settle the question of agent's authority but not to deprive him of his established right and power to disaffirm.<sup>31</sup>

A special rule has been recognized as applicable to personal representatives of decedents and certain other court officers which sustains ratification by them of actions done on their official behalf before their appointment. Something akin to the retroactive feature of ratification itself is applied to justify ratification in these cases, *i.e.*, that the official appointment dates back.<sup>32</sup> A case of this kind is *Citizens Bank v. Grove*,<sup>33</sup> where the agent whose authority had terminated on the death of Grove, Senior, made a note on February 6 and the executors were appointed February 7. No point is made of the order of these events in the opinion, wherein the case is treated as the standard rather than an extraordinary situation as concerns ratification.

The definition of Ratification quoted in the opening sentence of this article must once more be scrutinized—this time in connection with the vexed question of whether an undisclosed principal can ratify.<sup>34</sup> The definition speaks of affirming an act "which was done or professedly done on his account".<sup>35</sup> The first of these alternatives might be thought to include the case of a wholly undisclosed "principal", *i.e.*, one whose existence was not disclosed; but a later section and its comment<sup>36</sup> indicate that the intended rule goes only so far as to recognize ratification by one whose existence was disclosed though not his identity, *i.e.*, where the volunteer actor really purported to be agent, not one acting on his own account.

Language in local cases, taken alone, might indicate a narrower rule than that of the *Restatement*. In a case where it was sought to hold a widow on a contract made by her husband before his death, and claimed to have been ratified by her, the court observed, "there can be no ratification where the act is done by a person not professedly acting as the

<sup>31</sup> The parenthetical aside in *Flowe v. Hartwick*, 167 N. C. 448, 453, 83 S. E. 841, 844 (1914), "(Homer Flowe was under 20 at the time and could not assent)" must be taken with reservation.

<sup>32</sup> TIFFANY, AGENCY (2d ed. 1924) 138; RESTATEMENT, AGENCY (1933) §84, comment *c*. Analytically this too should be placed in the topic, "What Acts Can Be Ratified?", but the more natural assignment seems to be here.

<sup>33</sup> 202 N. C. 143, 162 S. E. 204 (1932).

<sup>34</sup> As a matter of accurate analysis this problem is more correctly a part of the topic, "What Acts Can Be Ratified?" than of this one, but it is likely to be thought of as a question of who can ratify, and that is taken as a controlling reason here for the choice of classification made.

<sup>35</sup> RESTATEMENT, AGENCY (1933) §82. Cf. *Robertson v. Plymouth Lumber Co.*, 165 N. C. 4, 80 S. E. 894 (1914).

<sup>36</sup> *Id.* §85, comment *a*, illus. 1. Because of special rules concerning sealed instruments an unidentified principal could not ratify. Indeed, the sealed instrument rule goes much further. See *Codell v. Allen*, 99 N. C. 542, 544, 6 S. E. 399, 401 (1888).

agent of the person sought to be charged as principal".<sup>37</sup> This might mean that for ratification to be legally possible the very person now sought to be charged must have been named as principal, or at least identified, when the transaction took place. The facts of the case, however, did not require a rule so specific, for the testimony showed that the husband had purported to act for himself and not as agent for his wife or anyone.<sup>38</sup> It would have been sufficient then to have announced a rule consistent with that of the *Restatement* by saying that when a person does not profess to act as agent at all no one can ratify. In a later case which relies upon this one as its first citation the rule is stated somewhat differently. "It is well understood that in order to a valid ratification, when an unauthorized contract has been made for alleged principal, the agent must have contracted or professed to contract for a principal and the latter must signify his assent or his intent to ratify, either by words or by conduct."<sup>39</sup> It would be fair to treat the indefinite phrase "a principal" as meaning even an unidentified person. The case like the previous one contained no evidence that the person signing the memorandum purported to be an agent, although here she may have had an unrevealed intention to represent the other defendants. Accordingly, we have decided nothing contrary to the prevailing view now adopted by the *Restatement*. But, unless these cases are in the future to be treated as decided on the other grounds which were present in both,<sup>40</sup> we have definitely committed ourselves against the minority view long ago championed by Professor Goddard—that ratification will be recognized in a case where the person negotiating a deal had a secret intent to act as agent.<sup>41</sup>

<sup>37</sup> *Rawlings v. Neal*, 126 N. C. 271, 275, 35 S. E. 597, 599 (1900); cf. misleading statement in *Fay v. Doyle*, 95 F. (2d) 110, 111 (App. D. C. 1938).

<sup>38</sup> *Rawlings v. Neal*, 126 N. C. 271, 274, 35 S. E. 597, 598 (1900). The case furthermore, and chiefly, was put on the ground that a married woman's contract of the sort claimed was void and not capable of ratification.

<sup>39</sup> *Flowe v. Hartwick*, 167 N. C. 448, 453, 83 S. E. 841, 844 (1914) (opinion of Hoke, J.).

<sup>40</sup> See note 38, *supra*, as to the *Rawlings* case. In the *Flowe* case it was held that the defendant did not ratify. See, however, note 41, *infra*.

<sup>41</sup> Goddard, *Ratification by an Undisclosed Principal* (1903) 2 MICH. L. REV. 25. In *Patton v. Brittain*, 32 N. C. 8 (1848), the signed memorandum disclosed no agency and yet ratification was found, but it seems likely that the agency and even the identity of the principal were known. In *Thompson v. Taylor*, 110 N. C. 70, 14 S. E. 513 (1892), defendant denied that her husband contracted in her name, but no point was made of this because her status was sufficient defense. In *Parks v. Security Life & Trust Co.*, 195 N. C. 453, 142 S. E. 473 (1928), it was disputed whether one S was acting for himself or for the trust company, and nothing is recorded as to the disclosure either of the trust company as principal or of the existence of some principal. That fact would probably be brought out on retrial before the instruction on ratification ordered by the supreme court would be given. *Colonial Oil Co. v. Jenkins*, 212 N. C. 140, 193 S. E. 33 (1937), was discussed as a question of ratification, but was finally put on the ground of estoppel. *McNeely v. Walters*, 211 N. C. 112, 189 S. E. 114 (1937), on the allegations might be a case of forgery, in which event the signer does not purport to act as agent for another

## MANNER OF RATIFICATION

The simplest and most obvious form of ratification would be by direct statement to that effect by the one having power to ratify. Relatively few of such cases are found—perhaps because their certainty avoids litigation—, but in curious contrast to the paucity of instances where the term is thus correctly used stands the flood of forms in which the term is heaped inappropriately onto a pile of other terms granting authority in advance,—“hereby ratifying and confirming all that my said agent may (in the future) do in the premises”. Whether this is supposed to work some sort of equitable estoppel later on, like an after acquired property clause in a mortgage, or is just an illustration of the frequently displayed legal affection for quantity rather than quality in statement and the corresponding aversion ever to pruning a shoot or sucker alive or dead from the legal jungle, may only be guessed.<sup>42</sup> But, it may be noted that if a declaration of ratification in sweeping terms like these were made after the event it might operate as to some unknown and unsuspected transactions in the face of a rule later to be considered, which usually requires knowledge of all material facts by the party affirming or approving.

Where an express declaration of ratification is made, it may nevertheless fail because not done with the proper formalities. The well-nigh universal doctrine is that ratification must meet the same formal requirements as those necessary for original authorization.<sup>43</sup> In the case of sealed instruments the common law requisite of sealed authority to the agent would carry with it a corresponding requisite of sealed ratification to the purported agent if in each case the deed were to be held the deed of the principal. In North Carolina the court has consistently insisted on the necessity of sealed authority for the execution of sealed instruments, and even for the completion of deeds executed in partly blank form by the principal himself.<sup>44</sup> A correspondingly strict attitude would be expected in respect of ratification.<sup>45</sup> Some uncertainty, how-

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but purports to be that other. There is a great diversity of opinion on ratification in such cases. HUFFCUTT, *THE LAW OF AGENCY* (2d ed. 1901) 58; note (1930) 8 *TENN. L. REV.* 278. The case was also put on the ground of estoppel which is a valid ground, forgery or no forgery.

<sup>42</sup> See on such tendencies in another quarter discussed ironically, Drinker, *Concerning Modern Corporate Mortgages* (1926) 74 *U. OF PA. L. REV.* 360.

<sup>43</sup> HUFFCUTT, *THE LAW OF AGENCY* (2d ed. 1901) 55; TIFFANY, *AGENCY* (2d ed. 1924) 148; *RESTATEMENT, AGENCY* (1933) §93.

<sup>44</sup> *Merchants Bank & Trust Co. v. Wimbish*, 192 N. C. 552, 135 S. E. 452 (1926), and citations, although as there indicated the ineffective deed may have effectiveness in other fashions. And cases explainable on the ground of estoppel may have modified the rule as to court bonds. *Rollins v. Ebbs*, 138 N. C. 140, 50 S. E. 577 (1905).

<sup>45</sup> The attitude of the court in *Davenport v. Sleight*, 19 N. C. 381, 384 (1837), seems to bear this out: “Nothing that he could say in the absence of it [the bond], could amount to the adoption of it as his deed. . . .” But the discussion is not very

ever, is created by two decisions concerning sealed promissory notes. In the first of these<sup>46</sup> a sealed note dated in April and due in November was completed by one of two joint makers who had no sealed authority from the other, the defendant Bailey; and was transferred to the payee for value, apparently at about the time of its date. The evidence for ratification was that in the following September a representative of the payee exhibited the note to Bailey who "said he signed the note and it was all right". Of the effect of this interview the court has this to say: "It [the note] was then complete. The payee's name was in it then, and this acknowledgment made it his bond then, if it had not been so before." How far the result here depended on the fact that the defendant saw the note when he spoke<sup>47</sup> can only be surmised; but, regardless of that question, the decision goes far toward creating parol ratification of sealed documents since there seems to be nothing in the case upon which an estoppel could be asserted to arrive at the same result, *i.e.*, plaintiff is not shown to have acted in any way in reliance on this statement.

The other case<sup>48</sup> is substantially the same, the chief difference being in the absence of any evidence that the note was shown to the defendant at the times when she acknowledged it to be her obligation orally and by making payments. The importance of that fact in the previous case, therefore, dwindles considerably. What is left seems to be, in effect, ratification by oral statement and by making payments and having them noted on the paper. This seems to be exactly what was said in *McKee v. Hicks*<sup>49</sup> to be insufficient, yet the court here in a brief and seemingly

directly to the point of ratification (the headnote speaks of ratification, but the opinion does not), and the court seems to have been thinking of redelivery. Compare *McKee v. Hicks*, 13 N. C. 379 (1830); *Blend v. O'Hagan*, 64 N. C. 471 (1870). Similarly, in *Kime v. Brooks*, 31 N. C. 218 (1848), where the only thing which could have been thought to show ratification was that "no objection was afterwards made by her father to what she had done". In *Isenhour v. Isenhour*, 64 N. C. 640 (1870), the court held that testimony should have been admitted to show that a note previously signed and sealed had been completed by one without sealed authority. Not much light is shed on the problem by the remark of Justice Walker on the state of the evidence in *Rollins v. Ebbs*, 137 N. C. 355, 359, 49 S. E. 341, 342 (1904), "There is nothing admitted, or found by the jury, which shows that the defendants have, in any way known to the law of this State, assented to or ratified the insertion of the penalty in the bond." Persons on either side of the question would probably try to make something out of the words, "any way known to the law of this State". (Case overruled later on ground of estoppel.)

<sup>46</sup> *Wester v. Bailey*, 118 N. C. 193, 24 S. E. 9 (1896).

<sup>47</sup> The quoted language from *Davenport v. Sleight*, in note 45, *supra*, would give room for arguing that some sort of ratification could take place if the signer saw the completed note when he approved. If this was before the note was even delivered or at the time of delivery (see the contention of plaintiff in *Isenhour v. Isenhour*, 64 N. C. 640 (1870), cited *supra* note 45) it would be sufficient to constitute adoption, and no ratification would be needed to sustain it from the moment of its issue.

<sup>48</sup> *Moose v. Crowell*, 147 N. C. 551, 61 S. E. 524 (1908).

<sup>49</sup> 13 N. C. 379 (1830), "And further, that if the paper was not the deed of the Defendant at the delivery of it to the Plaintiff, the Defendant, by speaking of it

hasty opinion treats these facts as distinguishing the instant case from both the *McKee* case and one other.<sup>50</sup> The truth is that this was not only a hasty opinion but a hard case. The probabilities are that the note was either written in the maker's presence or delivered by her or both, and that the plaintiff would have lost his case if the strict rule had been enforced because he neglected to prove what at first sight seemed unnecessary for suit on a promissory note.<sup>51</sup>

A possible appraisal of these cases is that although they do not say so they are dealing with the instruments, executed under seal but without sealed authority, as if they were unsealed instruments, the seal being ignored because put there without authority and not having been ratified. This approach to the question which, as shortly to be seen, has been followed extensively in case of real estate transactions, would seem to justify a holding in both cases that the notes were valid and enforceable unsealed obligations and the actual result is accordingly not startling.

But however explainable, excusable, or justifiable they are, here stand two cases, neither one of them containing the word ratification<sup>52</sup> but establishing what to all intents and purposes is a rule that ratification of sealed obligations, at least of some sealed obligations, can be made by parol acknowledgment. It may be that the technical rules of sealed instruments have outlived their utility and should be discarded,<sup>53</sup> or that, at least as to negotiable instruments, some sweeping up should be done,<sup>54</sup> but the housecleaning should be done either by the legislature or by the court in such a way as to indicate what is gone and what remains.<sup>55</sup> These decisions give little clue to future developments.

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as his bond, or paying a part of the sum intended to be secured thereby, did not give it validity. . . ." *Id.* at 380. This was the language of the trial judge, but it had the express approval of the supreme bench.

<sup>50</sup> *Kime v. Brooks*, 31 N. C. 218 (1848), cited *supra* note 45, where only passive acknowledgment was present.

<sup>51</sup> Now that sealed promissory notes are negotiable instruments and not non-negotiable specialties, the lawyer naturally thinks of going to trial on them with the preparation appropriate to a negotiable instruments case. *Examine Tyson v. Joyner*, 139 N. C. 69, 51 S. E. 803 (1905); and *NEGOTIABLE INSTRUMENTS LAW* §§6(4), 16 (last sentence), 19, 24.

<sup>52</sup> And not indexed in the North Carolina Digest under Agency (Ratification), Bills and Notes (Ratification), or Bonds (Ratification), but, as to one case, under Alteration of Instruments (Ratification or Waiver).

<sup>53</sup> As per Breese, J., on the need for sealed authority to execute a bond in a day when a scrawl will do for a seal, ". . . believing that the purpose of justice are not all subserved by an adherence to such antiquated rules and unmeaning technicalities, I dissent. . . ." *Maus v. Worthing*, 4 Ill. 26, 27 (1841) (A. Lincoln for appellee).

<sup>54</sup> Already the other rule of these cases on the matter of seals, *i.e.*, the conclusive presumption of consideration, has been cast aside. *Cf. Cowen v. Williams*, 197 N. C. 432, 149 S. E. 396 (1929), and *Patterson v. Fuller*, 203 N. C. 788, 167 S. E. 74 (1933).

<sup>55</sup> In some states a well-defined exception has been established as to corporate authorization to its agents in recognition of long established custom and as a concession to good sense. A vote of the directors will suffice as a substitute for

In another line of cases we have struck at the harshness of the sealed instrument rule by indirection, but in a fairly well defined manner; the one just mentioned as a possible way out for the note cases just criticised. We have held that documents under seal which were executed or completed by one without sealed authority and which, therefore, are invalid as deeds, can be given effect as enforceable contracts to do the thing intended, and that a document thus reduced in rank will still serve to satisfy the statute of frauds requirements for a writing.<sup>56</sup> In states whose statutes either expressly or by judicial interpretation require the agent to have written authority to make these instruments, a problem parallel to that regarding sealed authority immediately arises on this lower legal level. But our statutes contain no such requirement, and, accordingly, the common law rule that parol authority is sufficient for the execution of unsealed writings is recognized. It should follow that parol ratification will validate unauthorized written obligations, even those bearing an unauthorized seal.

When once the question of formal sufficiency is out of the way the question becomes one of essential sufficiency, *i.e.*, whether the particular conduct of the "principal" which is proved is sufficient to make out affirmation by him of the prior unauthorized transaction.

Express statements of approval usually give little trouble,<sup>57</sup> although there is likely to be a dispute, and so a jury question, as to what was said. Often, however, the statements are equivocal and present also a jury question as to whether or not they signify approval or confirmation.<sup>58</sup>

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a sealed power. *Savings Bank of New Haven v. Davis & Center*, 8 Conn. 191 (1830); *RESTATEMENT, AGENCY* (1933) §28(2) b. Our liberality in *Bailey v. Hassell*, 184 N. C. 450, 115 S. E. 166 (1922), on the matter of what symbol may do for the corporate seal may forecast a like rule here. The local corporate practice seems to be to authorize by vote. *Green River Mfg. Co. v. Bell*, 193 N. C. 367, 137 S. E. 132 (1927).

<sup>56</sup> *Blacknall v. Parish*, 59 N. C. 70 (1860). There is considerable hocus-pocus about the signature in the cases of incomplete instruments completed by the agent. The statutory requirement of a signing by the party to be charged, or his agent, is met by saying that the signature actually written by the principal becomes, when the document is later handed over by the agent, legally the signing of his name by the agent.

<sup>57</sup> In *Hodges v. Holderby*, 49 N. C. 500 (1857), the statement by principal to agent was, "It is all right", and the question was whether this operated to ratify a collateral act. In *Rowland v. Barnes*, 81 N. C. 234 (1879), the statement, "Very well, go ahead and collect", was deemed to be ratification so as to discharge the agent notwithstanding other assertions of different import. A similar result was reached where the statement by letter was that "it is satisfactory to me", *Osborne v. Durham*, 157 N. C. 263, 269, 72 S. E. 849, 851 (1911). A stockholders' vote on a motion might be an equally clear approval. Cf. *Hill v. Atlantic & N. C. R. R.*, 143 N. C. 539, 554, 55 S. E. 854, 859 (1906), where the motion was to upset the lease and was defeated.

<sup>58</sup> *Darden v. Baker*, 193 N. C. 386, 388, 137 S. E. 146, 147 (1927), wherein the owner of notes admitted saying of some unauthorized collections made on her behalf that the agent "had collected this money for me but did not turn it over to

That silence may be sufficient to constitute ratification when the circumstances are such that the well-known reasonably prudent man would speak seems recognized as an abstract proposition,<sup>59</sup> but in the North Carolina cases silence seems invariably to have gone along with some conduct tending to show acquiescence.<sup>60</sup>

Instances of other conduct having value as proof of acquiescence, approval, or affirmance are common in our reports, and, except for those which involved taking the benefits, to be separately considered, most of them are noted here in the margin.<sup>61</sup>

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me". So, in *Acme Mfg. Co. v. McPhail*, 181 N. C. 205, 210, 106 S. E. 672, 674 (1921), a non-committal letter which might be considered also somewhat evasive was allowed to go in with other evidence on the question. *Porter v. Raleigh & Gaston R. R.*, 132 N. C. 71, 74, 43 S. E. 547, 548 (1903) (letter from general freight agent containing some conditional features); *Trollinger v. Fleer*, 157 N. C. 81, 84, 72 S. E. 795, 796 (1911).

<sup>59</sup> RESTATEMENT, AGENCY (1933) §94. Rule recognized in *Earp v. Richardson*, 81 N. C. 5, 7 (1879), but inoperative because of principal's ignorance of facts.

<sup>60</sup> See *Watson, Trustee v. Proximity Mfg. Co.*, 147 N. C. 469, 477, 61 S. E. 273, 276 (1908), where the transaction "was never questioned by the Mills Company", and also funds were drawn against a credit set up for the company. *Trollinger v. Fleer*, 157 N. C. 81, 72 S. E. 795 (1911), cited *supra* note 58, would be a good case of this sort if the jury disbelieved the testimony as to defendant's remark about hiring a sick man. See special rule *re* appearance of unauthorized attorney where defendant, in ignorance of material fact, fails to attend court. *University of N. C. v. Lassiter*, 83 N. C. 38 (1880). *Cf.* also as to attorney, *Rogers v. McKenzie*, 81 N. C. 164 (1879).

<sup>61</sup> Making payments on the disputed indebtedness: *Green v. Commissioners*, 67 N. C. 117 (1872); *Johnston County Sav. Bank v. Scroggin Drug Co.*, 152 N. C. 142, 67 S. E. 253 (1910). In *Frank Bros. & Co. v. Lefkowitz*, 184 N. C. 273, 114 S. E. 293 (1922), defendant principal had repudiated the unauthorized purchase from plaintiff but after agent's selling part of goods to another dealer and returning remainder to plaintiff, principal took the money and gave agent a check to be sent in payment of the part sold. The principal might be found to be merely providing the agent with a check to remit, as a bank would sell him a draft. Jury question. Miscellaneous cases:

*State v. Privett*, 49 N. C. 100 (1856), failure to discharge the wrong-doing clerk, along with keeping proceeds of the unlawful sale.

*Moore v. Rogers*, 51 N. C. 297 (1859). In settlement with agent, allowing him credit for funds which agent had, without authority, given principal's son to aid him in fleeing from state and from his creditors does not make principal liable for removing or assisting to remove debtor. Tort approved must have been done for principal's benefit.

*White Sewing Machine Co. v. Hill*, 136 N. C. 128, 48 S. E. 575 (1904), sending copy of plaintiff's business license to defendant retailer does not ratify unauthorized promise of agent for exclusive territory to the retailer. Apparently plaintiff had no knowledge of the exclusive territory agreement and this ignorance would be sufficient to make ratification then ineffective.

*Flowe v. Hartwick*, 167 N. C. 448, 453, 83 S. E. 841, 844 (1914), signing of deed pursuant to unauthorized contract not treated as ratification, despite intent to ratify, because of change of mind and destruction of deed. But, that affirmance need not be communicated to either the "agent" or third party, see *Restatement*, §95. And that it can not be revoked, see later herein. Of course, the signing may have been regarded as tentative. Case also goes on ground of undisclosed principal.

*Acme Mfg. Co. v. McPhail*, 181 N. C. 205, 106 S. E. 672 (1921), paying freight on shipment to defendant in accord with unauthorized oral agreement of plaintiff's agent when written purchase contract required defendant to pay it. Action now to recover the payment as an advance made for defendant.

*Morris Plan Industrial Bank v. Howell*, 200 N. C. 637, 158 S. E. 203 (1931),



One case deserving special notice is *Gibbs v. Plymouth Motor Corporation*.<sup>62</sup> The facts appear to be as follows. Plaintiff bought a new Plymouth automobile for \$825 from his local dealer, the salesman guaranteeing "satisfaction". Very soon it developed an alarming "shimmy". Complaints to the dealer resulted in the car being examined by a "factory man"—evidently an employee of the manufacturer—and work being done on it at the dealer's garage and another local shop—whether at the dealer's or manufacturer's expense is not stated. The difficulty was never cured, and after two years plaintiff traded the vehicle to a Ford dealer for \$100. The contract between the Plymouth Corporation and the local dealer disclaimed any principal and agent relation between them, and denied any right of the dealer to create any obligations on the manufacturer. It contained the "standard warranty" with its numerous hedges and exits. So far as appears this manufacturer-dealer contract was not shown to plaintiff, and it may be taken to have no bearing on his rights against either defendant except so far as it established that the dealer was not the manufacturer's agent. The action seems to have been for breach of the dealer's express warranty that the car would give satisfaction, which probably would mean at least that the car was not defective and was fit to drive. Looking at the matter in a non-technical way and forgetting the plaintiff's two-year delay, it would seem that there ought to be some relief for a buyer against the manufacturer of a car which was clearly unfit for use, whether the theory were to be breach of implied warranty or something more nearly related to tort. Furthermore, rules recently gaining a foothold in American law<sup>63</sup> seem likely in their ultimate form to cover cases like this, although their adoption may open the door to many false claims against distant manufacturers who are at a disadvantage before local juries.<sup>64</sup>

But plaintiff's case was not made out on the ground of some beneficent all-pervading doctrine such as this. It seems to have been on

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ceasing to collect installments of interest when agent started to do so. Mixed with estoppel, as many cases are. Also evidence of authority. *Cf. Colonial Oil Co. v. Jenkins*, 212 N. C. 140, 193 S. E. 33 (1937).

In *Lawson v. Bank of Bladenboro*, 203 N. C. 368, 166 S. E. 177 (1932), bank collecting draft for payee unauthorizedly allowed drawee to deduct from amount of draft accompanying shipment of cotton an amount it claimed drawer owed to it. Payee accepted the short credit to this account and tried to recover the shortage from the drawer. *Held*, ratification so as to relieve agent collecting bank.

*Maxwell v. Proctor & Gamble Distributing Co.*, 204 N. C. 309, 168 S. E. 403 (1933), performing contract for a time.

*McNeely v. Walters*, 211 N. C. 112, 189 S. E. 114 (1937), getting indulgence on note, probably estoppel case, as stated, because of reliance.

<sup>62</sup> 203 N. C. 351, 166 S. E. 74 (1932).

<sup>63</sup> Leidy, *Another New Tort?* (1940) 38 MICH. L. REV. 964.

<sup>64</sup> The jury here found that the local dealer made and breached no warranty, but that the manufacturer did both—which would be proper, of course, if the warranty was made in the name of the principal and then ratified, but is rather significant under the facts here.

the theory that the dealer was an agent and his express warranties were either authorized or ratified. Advance authority being out of the way because no agency was shown, the possibility of ratification became plaintiff's last hope. In support of that he argued that the sending of a "factory man" to locate the difficulty and have repair work done "constituted a ratification".<sup>65</sup> The court refused to accept this argument, but its reasons do not aid much in classifying the case as an authority on ratification. One might suppose that under the law as here determined, the sending of a representative to adjust or repair defects in goods sold did not constitute conduct from which ratification could be found.<sup>66</sup> In a proper case, however, this might be very persuasive evidence. Nor is the difficulty here that there was no agency. Ratification operates where there is no agency as well as where there is an unauthorized excess of action by an agent. But here there is no evidence that the dealer or his salesman purported to act as agent for the Plymouth Corporation and, of course, no evidence that the Corporation so understood when it sent the representative to New Bern. On that ground the case is sustainable.

The insurance cases which have already been found to present some novelty seem likewise to have rules of their own on the matter of what conduct will constitute affirmation. If mere expressions of approbation are sufficient to produce ratification of an act, it would seem that such conduct as keeping an insurance policy which had been taken out without the recipient's authority, or, *a fortiori*, filing a claim on it in case of loss, ought to manifest approval and bring about ratification.<sup>67</sup> Probably that would be the holding if legal enforcement of that policy were now sought. The only question then would be that already considered herein, whether any such thing as ratification of an insurance contract is legally possible after loss. Yet, in a case where a prior policy is sought to be enforced and it would be invalidated by the existence of the second policy and the existence of the second policy depends on a

<sup>65</sup> The "factory man" would probably not be a representative with wide enough authority to ratify dealer's representations, but the agreement reached back of that. A division office to which complaints were properly directed might be found to have such authority, and the knowledge of the "factory man" that such representations had been made could be imputed to the company. Purchasers can not be expected to see that a directors' meeting acts on their complaints however the companies try to tie the hands of their officers or agent.

<sup>66</sup> A quotation adopted by the court from *Farquhar Co. v. Hardy Hardware Co.*, 174 N. C. 369, 93 S. E. 922 (1917), furthers this impression. But the cases are only superficially similar, for the cited case involved only the manufacturer and the dealer. The dealer was bound by a specific contract, and the decision turned chiefly on violation of the parol evidence rule, a thing not here involved.

<sup>67</sup> The text statements are usually broad enough to include such conduct. HUFFCUTT, *THE LAW OF AGENCY* (2d ed. 1901) §34(2); TIFANY, *AGENCY* (2d ed. 1924) 146; RESTATEMENT, *AGENCY* (1933) §93. But cases of making claims on, as distinguished from expressing approval of or suing on, unauthorized contracts are hard to find.

finding of ratification, retention of this policy and filing of a claim on it were found to be insufficient evidence of ratification; and the finding was upheld by the supreme court.<sup>68</sup> This holding seems to be a clear departure from the standard rules to meet a particular situation. The insured is likely in all such cases to feel that he should first grab at all prospects and let go the least desirable ones when he can take stock of the situation. In insurance cases the court saves him from the dog, bone, and pool of water consequences which would ensue. In other situations, where he will not lose all by ratification, they clinch his decision on far less evidence. Suppose, though, that suit had been brought on the second policy and then discontinued. The bringing of suit is "one of the most unequivocal methods of showing ratification of an agent's act".<sup>69</sup> If we recognize the possibility of ratification after loss, as it now seems we do,<sup>70</sup> there would seem to be no way to avoid a finding of ratification of the second policy and simultaneous invalidation of the first one. The ratifying insured would have had full knowledge of the material facts though he might be ignorant of the legal effects of his action. Indeed, in North Carolina, he could not be otherwise.

#### BRINGING SUIT

As just observed, bringing suit on an unauthorized contract is very emphatic evidence of affirmation. That course of action is in the class with taking the benefits, next to be discussed—it is trying to get the benefits.<sup>71</sup> But it is the rule that other suits and defenses not on the contract may equally be in recognition of the validity of the originally unauthorized transaction.

The *Restatement* limits the rule to suits in which either the third party or the purported agent is an adverse party.<sup>72</sup> Perhaps the rule should be of wider application, for to bring trover against someone to whom the agent had wrongfully delivered goods which he had theretofore unauthorizedly bought in the plaintiff's name from a third party would seem to be in recognition and confirmation of the unauthorized purchase as much as a suit against the agent would be.<sup>73</sup> The cases

<sup>68</sup> *Nelson v. Atlanta Home Ins. Co.*, 120 N. C. 302, 27 S. E. 38 (1897); see note (1939) 121 A. L. R. 1428.

<sup>69</sup> 1 MECHEM, LAW OF AGENCY (2d ed. 1914) §446.

<sup>70</sup> *Belk's Dep't Store v. George Washington Fire Ins. Co.*, 208 N. C. 267, 180 S. E. 63 (1935), already discussed.

<sup>71</sup> 1 MECHEM, LAW OF AGENCY (2d ed. 1914) §446.

<sup>72</sup> RESTATEMENT, AGENCY (1933) §97.

<sup>73</sup> The rule in *Mechem*, therefore, while more vague, sufficiently gives the underlying idea and is more adaptable. The supposed case of suit against a converter could, of course, be brought under the general conduct section (§93) of the *Restatement* although this section seems to make the conduct only evidence of affirmation while suit within §97 seems to constitute affirmation. *Quaere*, should the instruction in one case be binding, and in the other discretionary?

are ordinarily clear enough. The problem sometimes, however, is whether the lawsuit in question is of a kind to fall within the spirit or letter of the rule in any of its forms of statement. One North Carolina case, decided as if within the rule, presents rather unusual facts.<sup>74</sup> Plaintiff in Georgia sold cotton to one Branch. Branch resold to Bladenboro Mills in North Carolina to whom he was indebted. The cotton was shipped direct, from plaintiff to the mills. If the mills had remitted to their seller, Branch, it is evident that they could have properly deducted his debt to them. That is what they did in effect, but the deal was handled by means of a bill of lading with draft attached and so involved other parties and complications. The draft was drawn by Branch, payable not to his own order but to the order of plaintiff—perhaps to assure plaintiff getting his money from Branch before he surrendered his cotton, perhaps just to prevent the mills from taking out Branch's debt before paying. Apparently plaintiff sent the draft through his Georgia bank to the Bladenboro Bank (defendant) for collection,<sup>75</sup> and defendant unauthorizedly<sup>76</sup> allowed the mills to deduct the Branch debt, thus surrendering the draft and bill of lading for less than was drawn. Defendant then remitted the short sum to plaintiff's bank with a statement of what had been done. Plaintiff, being advised, permitted the remittance to be credited to his account and "attempted to collect" the amount short from Branch. Failing in this, plaintiff sues the collecting bank for its default in taking less than it was charged with collecting for him. The court below found the facts and held the defendant not liable, apparently on the ground that by accepting and keeping the short credit while he tried his luck collecting from Branch the plaintiff had ratified the short collection. That is a sufficient reason, although one having nothing to do with ratification by bringing suit. It was on appeal that this idea seems first to have come into the case. Assuming that the bank would have been liable to plaintiff for failure to collect in full,<sup>77</sup> the court affirmed the judgment below not only on the ground that plaintiff ratified by keeping the money collected by his agent but that the bringing of the present suit "was an unequivocal ratification".

<sup>74</sup> *Lawson v. Bank of Bladenboro*, 203 N. C. 368, 166 S. E. 177 (1932).

<sup>75</sup> Which, under the "Massachusetts rule" recognized here and under the stipulation on most deposit slips, makes the collecting bank agent not of the forwarding bank but of the depositor.

<sup>76</sup> Unauthorizedly because the bank was hired to collect the whole amount. If the principal was not entitled to that much (as he would not be if he had parted with his title to the cotton and was merely collecting what Branch had coming from the mills), that would protect the bank in a later suit by the principal for its breach of duty, *i.e.*, there would be a breach of duty by *A* but no damages to *P*. If plaintiff had retained the cotton for security, and all parties were on notice of that fact, he would have a right to damages from the bank for surrendering the draft and bill for less than the face amount drawn.

<sup>77</sup> On this question, however, see note 76, *supra*.

The case seems to be correctly decided on the first ground, but not on the second. This suit did not recognize and affirm the binding character of the agent's act, which was accepting too little,<sup>78</sup> but rather sought to enforce the agent's original authority and duty, which was to obtain the right amount. Before this suit was brought the plaintiff had affirmed the unsatisfactory work of its agent by taking and keeping the benefit of that work.<sup>79</sup>

#### ACCEPTANCE OF BENEFITS

By far the most numerous group of cases on ratification in North Carolina is that in which the case just discussed is found properly to fall, *i.e.*, that group wherein acceptance or retention of the benefits with knowledge of the material facts is the basis of the ratification. Aside from the very obvious or merely cumulative ones summarized or cited in the footnotes<sup>80</sup> there are some of special significance. The very first

<sup>78</sup> Nor, in the language of the *Restatement* (§97) was it a suit "to enforce promises which were part of the unauthorized transaction or to secure interests which were the fruit of such transaction and to which he would be entitled only if the act had been authorized".

<sup>79</sup> That was the basis of the decision in *Southwest Nat. Bank v. Justice*, 157 N. C. 373, 72 S. E. 1016 (1911), relied on here, the facts of which were somewhat similar but simpler, *i.e.*, collection and return of less than the face amount with notice that it was tendered as full payment. Plaintiffs keeping this payment ratified the agent's act in receiving it, and could not succeed in suit against the debtor for the balance. They should have returned the unsatisfactory remittance as a condition to suing on the original claim.

<sup>80</sup> Receiving and keeping goods with knowledge that they were bought by *A* unauthorizedly on *P*'s credit. *Patton v. Brittain*, 32 N. C. 8 (1848); *Brittain v. Westhall*, 135 N. C. 492, 47 S. E. 616 (1904). Corporation's receipt and use of goods bought by stockholder and shown by invoice to have been charged to it binds it for purchase price. Ratification and estoppel. *L. & E. Miller v. Land & Lumber Co. of N. C.*, 66 N. C. 504 (1872). Likewise, when purchase was by president of family corporation and corporate note given. *Phillips v. Interstate Land Co.*, 176 N. C. 514, 97 S. E. 417 (1918). Receipt by president at head office of maps, reports, etc. from one hired by a local agent as civil engineer implies ratification of the contract of employment. *Lewis v. Albemarle & Raleigh R. R.*, 95 N. C. 179, 187 (1886). Accepting deed to strip of land for right of way obtained by mere volunteer and using the land binds grantee to terms of purchase. *Johnson v. East Carolina Land & Ry. Co.*, 116 N. C. 927, 21 S. E. 28 (1895). Using machinery obtained pursuant to contract made through common officer of two corporations. *Highland Cotton Mills v. Ragan Knitting Co.*, 194 N. C. 80, 138 S. E. 428 (1927). Use of goods, *Payne-Farris Co. v. Kuester*, 212 N. C. 545, 193 S. E. 707 (1937). Keeping money from *A*'s unlawful sale of spirits to a slave, jury apparently believing *P* had knowledge. Question is as to burden on that issue. *State v. Privett*, 49 N. C. 100 (1856). Receipt of cartage charge for *T*'s goods, hauled to market by *A* in *P*'s wagon without authority, ratifies carriage contract, but does not make *P* liable for proceeds of the goods sold for *T* by *A*. *Hodges v. Holderby*, 49 N. C. 500 (1857). Receipt and payment for part of logs bought by alleged unauthorized agent operates to ratify whole contract. *Williams v. Crosby Lumber Co.*, 118 N. C. 928, 24 S. E. 800 (1896) (though dissent finds nothing in record about payment. *Id.* at 939, 24 S. E. at 803). Receipt of money from sale, but disclaiming intent thereby to ratify under erroneous advice that it would not constitute ratification. *Norwood v. Lassiter*, 132 N. C. 52, 43 S. E. 509 (1903). See *RESTATEMENT, AGENCY* (1933) §98 (last sentence). Agent got plaintiff to pay for a large number of subscriptions to newspaper holding a contest on assurances she would thereby get first prize. Public policy argument dismissed. *Waggoner v. Western Carolina*

case on the subject in this state is one of these.<sup>81</sup> Here one Pritchard borrowed the mare of the defendant and on the suggestion of one Saunders who knew the defendant wanted to trade, but without any semblance of authority, exchanged the mare with a warranty of soundness for a horse of the plaintiff. Pritchard then took the newly acquired horse to the defendant and told him of the trade but not of the warranty. In this state of information the defendant approved the deal and took the horse. Being later sued for breach of the unknown and unauthorized warranty, he was held liable. The court was of the opinion that if authority to sell had been given in advance, the defendant might have limited it and expressly excluded any liability for warranty, but that if he had "been silent . . . and trusted that to Pritchard's discretion" he should have been bound. This amounts to implied authority to warrant soundness when that is not expressly forbidden.<sup>82</sup> Reasoning from that premise, the court then concludes that the defendant who takes the fruits of the deal obtained by the giving of a warranty is liable on it. To have avoided liability "he should have enquired" before he accepted the fruits. This last remark seems to suggest that one may be bound by an affirmation made in ignorance of material facts if only he could have learned them by due diligence, which is not the way the rule is usually stated.<sup>83</sup> On this more will be said later.

But if the position of the court on that point be thought questionable there is another way the case might be explained. Suppose the defendant had received the horse in ignorance but the next day had been fully informed. His informed retention of the horse would operate to ratify where his ignorant receipt did not. We have so held, even when information reaches the principal as late as in the trial of a lawsuit based on the transaction.<sup>84</sup>

There are situations, however, where the knowledge comes too late. If the principal has so far used the things received as to make it unfair to require that he return them, failure so to do after knowledge will not bind him on the unauthorized transaction. This is merely one part of a broader doctrine making ratification inoperative after a significant

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Publishing Co., 190 N. C. 829, 130 S. E. 609 (1925). *Sugg v. North Carolina Agric. Credit Corp.*, 196 N. C. 97, 144 S. E. 554 (1928), drawing against deposit as ratification of bank's endorsement of plaintiff's paper and credit to his account. *Citizens Bank v. Grove*, 202 N. C. 143, 162 S. E. 204 (1932); *Jones v. Bank of Chapel Hill*, 214 N. C. 794, 1 S. E. (2d) 135 (1939); *National Surety Co. of N. Y. v. Jackson County Bank*, 20 F. (2d) 644 (C. C. A. 4th, 1927).

<sup>81</sup> *Lane v. Dudley*, 6 N. C. 119 (1812).

<sup>82</sup> See, however, 1 *MECHEM, LAW OF AGENCY* (2d ed. 1914) §886.

<sup>83</sup> 1 *MECHEM, LAW OF AGENCY* (2d ed. 1914) §403. *Cf.*, however, *RESTATEMENT, AGENCY* (1933) §91, comment *e*.

<sup>84</sup> *Southwest Nat. Bank v. Justice*, 157 N. C. 373, 375, 72 S. E. 1016 (1911), "but he knows it now and insists on retaining the money".

change in the principal's position. The *Restatement* gives as one illustration the case of *P's* workmen installing in *P's* house some window frames purchased by *A* without authority and delivered on the job.<sup>85</sup> Our own cases contain perhaps a more valuable illustration. In *Parker v. Brown*<sup>86</sup> a contractor who had agreed to remodel defendant's house at a certain price, materials included, nevertheless bought lumber from plaintiffs in defendant's name and used it in the work. The court spent most of its time on the matter of implied or apparent authority and disposed of the argument about ratification rather summarily. The court said, ". . . the single fact that the *lumber* was used in repairing the house for defendant would not be any evidence of a ratification of such representations as Spencer may have made to plaintiffs." The principal here, as the evidence shows, had settled with the contractor.<sup>87</sup>

Another type of case in which receipt of the benefits of the agent's act does not operate as ratification is that in which the principal is entitled in his own right and independently of the agent's act to the very thing received, usually money.<sup>88</sup> It was on that ground, among others, that *Wynn v. Grant*<sup>89</sup> was decided. It appeared there that plaintiff owned two notes secured by a deed of trust on a house and lot in Asheville. The maker of the notes sold the house and the buyers paid to the trustee the full sum owed to plaintiff under the deed of trust and the amount due the sellers for their equity. The trustee entered a release in the register and sent to plaintiff the principal and interest on one of the notes due a month later and the interest only on the other one which still had a year to run. As to the latter he inquired if the plaintiff would discount it, and was advised in the negative. The trustee

<sup>85</sup> RESTATEMENT, AGENCY (1933) §99, illus. 5.

<sup>86</sup> 131 N. C. 264, 265, 42 S. E. 605, 606 (1902).

<sup>87</sup> See also remark about principal's being "prejudiced", in *Brittain v. Westhall*, 135 N. C. 492, 496, 47 S. E. 616, 617 (1904). The instruction approved in the same case on second appeal—137 N. C. 30, 33, 49 S. E. 54, 55 (1904)—seems to overlook the possibility of ratification by retention after notice of a purchase on his credit.

<sup>88</sup> The rule is variously stated, 1 MECHEM, LAW OF AGENCY (2d ed. 1914) §437; TIFFANY, AGENCY (2d ed. 1924) §96; RESTATEMENT, AGENCY (1933) §98 and comment *c*. And the exact extent of its application is not very clearly indicated. *Wilkins-Ricks Co. v. Welch*, 179 N. C. 266, 102 S. E. 316 (1920), might be thought to be such a case, and, if so, then wrongly decided. Here the mortgagor (not an agent but, in selling mortgaged property and trying to pass mortgagee's interest, standing in a somewhat analogous position) sold mortgaged mules for money and other mules. The mortgagee took the cash as a payment, but refused to take the mules as substitute security, and did nothing to recover the others from the buyers. Held, ratification and no enforceable lien on original animals. It might be argued that plaintiffs got only what they were entitled to, *i.e.*, a payment on their loan, but their knowledge of mortgagor's promise to get the mules released, and subsequent conduct created equities on which to base an estoppel even if ratification were doubtful.

<sup>89</sup> 166 N. C. 39, 53, 81 S. E. 949, 955 (1914). Also, *Bank of Franklin v. Trotter*, 207 N. C. 442, 177 S. E. 325 (1934). Cf. *Arbogast v. Corporation Comm.*, 200 N. C. 793, 158 S. E. 559 (1931) (where bank had a right to foreclose).

soon died insolvent, and in plaintiff's action to recover, the principal now having fallen due on the second note, he is met by the contention *inter alia* that he ratified the act of the trustee in receiving the prepayment of the whole debt by accepting the payment of the first note. On this the court held that there was no ratification because the plaintiff had no knowledge of the material facts when he received the remittance, and that before he did acquire such knowledge two things had happened: first, the agent had become insolvent, and second, the note whose payment he had received had matured and he was then entitled to that money anyway.

The first of these factors is within the rule already discussed concerning change of principal's situation, and would probably be sufficient ground for the decision. The second factor is the one now under discussion. If, to use a tax term, the transaction is regarded as "unitary", because it was one single payment to the agent, it is clear that the principal did not know the facts when he received only part of the money. And the court seems right in saying that after maturity of the first note he was legally entitled to the money without depending on the agent's act. Whether the rule envisioned a case like this may be doubted, but its language seems to fit and perhaps its equitable purpose is accomplished. If, on the other hand, the transaction is regarded as two payments made at the same time, the plaintiff took the first with full knowledge about it, *i.e.*, that it had been prepaid to an unauthorized agent. He would thus have ratified prepayment of note number one.<sup>90</sup> But he neither knew about note number two nor received any benefits other than the payment of interest and so would not have ratified the second principal collection either then or later when he learned about it.<sup>91</sup>

Other cases in which, for some reason or other, the receipt of benefits was found or held not to bring about ratification are noted in the margin.<sup>92</sup>

<sup>90</sup> And probably would have given ground for arguing estoppel as to the second payment if it had been separately paid to the agent later on.

<sup>91</sup> Refer also to *Hooper v. Merchants Bank & Trust Co.*, 190 N. C. 423, 130 S. E. 49 (1925), where plaintiff, having been sued on a note he owed the bank, left his brother to pay and take it up, and the brother without authority paid an attorney's fee which plaintiff now sues to recover. The defense argument is that plaintiff after knowledge had ratified (presumably by recognizing the remaining features of the settlement and perhaps by not offering to return the note and reinstate the case). In a way this looks like the converse of *Southwest Nat. Bank v. Justice*, 157 N. C. 373, 72 S. E. 1016 (1911), cited *supra* note 79, but the court held the transaction severable so that assent to the other payments would not evidence affirmation of this.

<sup>92</sup> Where agent sold principal's library for depreciated bonds, if principal received and kept the bonds that would amount to ratification, but principal is entitled to an instruction that if he could not return the bonds or make known his repudiation because of disrupted communications, he had not ratified. *Born v.*



Throughout the cases on ratification by taking benefits runs the statement in one form or another that the burdens must be taken with the benefits, a narrower manner of putting the also common thought that the whole contract must be affirmed if any of it is. No effort will be made to examine or even list all of the cases in which this doctrine finds expression, but some are given merely to provide reference.<sup>93</sup> The limitations on the application of the rule have already been discussed.

Throughout the cases there is also the constant recognition and reiteration of the elemental proposition, already often alluded to herein in connection with specific cases, that there must be knowledge of the material facts for ratification to arise from assent.<sup>94</sup> Only a few of the fringe cases will be specially examined. As has already been noted, it is knowledge and not notice or opportunity for knowledge which is meant by the rule,<sup>95</sup> though occasionally the word "notice" is used in the cases<sup>96</sup> and occasionally a decision seems to depart from the accepted rule and deal with the problem actually on the basis of notice or what reasonable diligence would have discovered.<sup>97</sup> Attention has already been given to *Lane v. Dudley*,<sup>98</sup> wherein the court held the defendant liable on a warranty made by one who sold his mare without authority. The case can be explained on the ground that although the defendant did not know of the warranty when he received the horse brought him

Smith, 67 N. C. 245 (1872) (seems as if efforts should have been continued till successful).

Receipt and use of money loaned on corporate mortgage improperly signed and not authorized by directors or stockholders, *held*, not a sufficient ratification, at least so as to make its registry good against creditors. *Duke v. Markham*, 105 N. C. 131, 10 S. E. 1017 (1890).

Receipt of payments made as consideration for unauthorized release of land from mortgage cannot operate to ratify a purported release which was not formally sufficient to be either a release or a memorandum of a contract to release. *Woodcock v. Merrimon*, 122 N. C. 731, 30 S. E. 321 (1898) (*cf. dissent and arguments on estoppel*).

<sup>93</sup> *Rudasill v. Falls*, 92 N. C. 222 (1885) (even when there were two documents); *Christian v. Yarborough*, 124 N. C. 72, 32 S. E. 383 (1899); *Corbett v. Clute*, 137 N. C. 546, 50 S. E. 216 (1905) (taking whole here means taking nothing since the burden invalidates the mortgage); *Alex Sprunt & Sons v. May*, 156 N. C. 388, 72 S. E. 821 (1911); *Journal Publishing Co. v. Barber*, 165 N. C. 478, 81 S. E. 694 (1914); *Morris v. Basnight*, 179 N. C. 298, 102 S. E. 389 (1920); *Maxwell v. Proctor & Gamble Distributing Co.*, 204 N. C. 309, 168 S. E. 403 (1933).

<sup>94</sup> I MECHEM, LAW OF AGENCY (2d ed. 1914) §393; RESTATEMENT, AGENCY (1933) §91. *Earp v. Richardson*, 81 N. C. 5 (1879); *Johnson v. Royster*, 88 N. C. 194 (1883) (perhaps dictum); *Sherrill & Co. v. Weisiger Clothing Co.*, 114 N. C. 438, 19 S. E. 365 (1894); *Wise & Bro. v. Texas Co.*, 166 N. C. 610, 82 S. E. 974 (1914).

<sup>95</sup> I MECHEM, LAW OF AGENCY (2d ed. 1914) §403; RESTATEMENT, AGENCY (1933) §91, comment *c*.

<sup>96</sup> See the instruction asked and approved in *Brittain v. Westall*, 137 N. C. 30, 33, 49 S. E. 54, 55 (1904), and the remarks of the court in connection.

<sup>97</sup> See *University of N. C. v. Lassiter*, 83 N. C. 38, 42 (1880),—apparently there is a special rule as to attorney and client.

<sup>98</sup> 6 N. C. 119 (1812).

in exchange he had since learned of it and retained the horse. But that reason was not given, and the opinion may mean that if prior authority to do one thing would have included implied authority to do another, then affirmance in ignorance of the latter having been done is binding. Thus if authority to sell and deliver implied authority to collect, an affirmance with knowledge only of the sale would be binding as to collections. It would be otherwise of course as to an act not implied, *e.g.*, authority to sell and deliver coal would not include authority to deliver negligently and break a window; therefore, ignorance of the negligent act would preclude ratification. This is not an impossible rule, though I find no authority for it. The rule that affirmance binds when there is or ought to be knowledge goes further, of course, since reasonable diligence might in some cases turn up the acts beyond those implied as well as those within.

In the latter category are the observations of Justice Walker in *Hall v. Giessell*,<sup>99</sup> where an employer was held liable for goods purchased by its employees under an alleged unauthorized arrangement by its superintendent. The charges had been paid for a number of months so there would be ample basis for an estoppel, but on trial Judge Bryson had given instructions on ratification; and the opinion above has this to say on knowledge by the defendant: "If the defendants were at all watchful of their interests and diligent in the prosecution and management of their business, they would have ascertained why McGee was making these monthly payments, . . ."<sup>100</sup> Taken alone, this sounds like a "constructive knowledge" doctrine, but what follows shows that the judge was speaking of evidence from which a jury might find actual knowledge, which is quite a different thing.<sup>101</sup> And in *Morris v. Basnight*,<sup>102</sup> where Justice Hoke speaks of the defendant's accepting and holding the benefits of the agent's trade but omits any reference to knowledge, the finding below that certain conveyances were made in bad faith clearly takes care of that element since there could have been no bad faith without knowledge or suspicion of plaintiff's claim.<sup>103</sup>

But, in *Fisher v. Roper Lumber Company*,<sup>104</sup> where an injured employee claimed that he had been hired for life at a "living wage" by defendant's foreman and the question was one of ratification, Justice

<sup>99</sup> 179 N. C. 657, 103 S. E. 392 (1920).

<sup>100</sup> *Id.* at 659, 103 S. E. at 393.

<sup>101</sup> 1 MECHEM, LAW OF AGENCY (2d ed. 1914) §406.

<sup>102</sup> 179 N. C. 298, 102 S. E. 389 (1920).

<sup>103</sup> Which raises the question whether suspicion would take the place of knowledge. I find no local counterpart of the "Can't-shut-his-eyes" doctrine stated in *Mechem* (§404) and *Tiffany* (pp. 143-144, notes 60, 61) nor of the "willing-to-affirm-regardless" rule stated in all the texts, though some of the North Carolina cases might have been put on that ground.

<sup>104</sup> 183 N. C. 485, 111 S. E. 857 (1922).

Hoke said, "they knew, or should have known, the condition of his return and the agreement concerning his employment, assuredly they had every opportunity to know, and there were facts sufficient to excite inquiry as to the terms of his further employment."<sup>105</sup> These assertions go far toward committing us to the doctrine that occasion to know will take the place of knowledge in ratification; but even here the court was passing on a jury verdict and had in mind only that the facts alluded to were sufficient to sustain the finding on which the judgment was based. Until the distinction is argued to the court it is by no means clear that we are outside the beaten path.

Closely akin to charging the principal with what he should know is the device of raising implications of knowledge from particular facts. An instance of this is the remark of Justice Merrimon in a case involving the validity of a contract employing plaintiff as an engineer in the planning and construction of a railway line in eastern North Carolina.<sup>106</sup> Speaking of the receipt by the president and directors of survey maps and charts from him and the payment of checks issued to him by the local vice-president, the learned judge said: "Such acts would imply notice of such employment and its nature, and a ratification of it."<sup>107</sup> That takes in a good deal of territory. Ordinarily no presumption of knowledge of the material facts should arise from mere receipt of benefits.<sup>108</sup> Little would be left of the knowledge rule after that trick. But *some* facts would be learned from the receipt of papers obviously prepared by an engineer. And here the coming through of regular checks would be some evidence of a fixed salary arrangement as distinguished from a piecework hiring such as could be assumed from the mere receipt of drawings. A jury would be warranted on this showing in finding actual knowledge of the material facts, and that was what was done. If anything is left to criticise it is the word "imply".

The real weed in the garden seems to have come up in the famous *Buchu Tonic* case,<sup>109</sup> wherein the defendant tried to recover on the promise of plaintiff's salesman that plaintiff would pay any license tax levied on the buyer on his sales of the tonic. On the theory that the knowledge of the agent is the knowledge of the principal, Chief Justice

<sup>105</sup> *Id.* at 490, 111 S. E. at 859.

<sup>106</sup> *Lewis v. Albemarle & Raleigh R. R.*, 95 N. C. 179 (1886).

<sup>107</sup> *Id.* at 187.

<sup>108</sup> Shipment of goods as per contract does not show knowledge. *Wise & Bro. v. Texas Co.*, 166 N. C. 610, 622, 82 S. E. 974, 978 (1914). Knowledge by a corporation will be presumed from slight circumstances when it has had the benefit of the contract. Quoted along with many other doctrines in *Morris v. The Y. & B. Corp.*, 198 N. C. 705, 716, 153 S. E. 327, 333 (1930).

<sup>109</sup> *Haynor Mfg. Co. v. Davis*, 147 N. C. 267, 61 S. E. 54 (1908). The case does not speak of ratification, but seems obviously to involve it notwithstanding the very large authority to warrant which the learned chief justice recognized at the outset. On that, compare 1 МЕСНЕМ, LAW OF AGENCY (2d ed. 1914) §889.

Clark held the manufacturer responsible on the "warranty". But the knowledge of the wrongdoing agent is not the knowledge of the principal<sup>110</sup>—if it were there would be no sense in the rule requiring knowledge—and, so far as the case turns on ratification of express warranty as distinguished from liability for false representations, it seems unsupportable.

One more special angle of the problem needs comment. It is generally held that the knowledge with which we are here concerned is knowledge of material facts and not of legal consequences.<sup>111</sup> It is sometimes said that unless the principal knows that he is not bound on his agent's contract he is still ignorant of a material fact. In a North Carolina case<sup>112</sup> an agent ordered not to sell thereafter at a certain price dated back an order wrongfully so as to give the buyer the old price. The principal did not know that fact and so supposed himself bound. The court stated the rule in the broad form given above, but the case obviously does not require us to go that far, for here the principal's lack of information was purely on the fact of the dating back. Ignorance of whether he is bound as a matter of law, as, *e.g.*, whether the agent will be found to have had apparent authority, is quite a different proposition.

#### EFFECTS OF RATIFICATION

These have been indicated in part as other problems were being considered. The underlying doctrine is that with which this paper opened because it was annexed to the definition of the subject, *i.e.*, that ratification operates as prior authority. In general that answers most questions, and the cases become fairly obvious applications of its language. Thus in contract cases, when effective, it binds *P* and *T* to each other<sup>113</sup> on the contract as made by *A*, binds *P* to *A* for commissions,<sup>114</sup> and relieves *A* of responsibility to *P* and to *T*.<sup>115</sup>

<sup>110</sup> HUFFCUTT, *THE LAW OF AGENCY* (2d ed. 1901) 51; 1 MECHEM, *LAW OF AGENCY* (2d ed. 1914) §407; RESTATEMENT, *AGENCY* (1933) §91, comment *c*. Mechem doubtfully, and Huffcutt apparently approvingly, recognize some holdings that the agent is presumed to tell because it is his duty to do so. But is that a likely thing when the agent is acting beyond his authority?

<sup>111</sup> 1 MECHEM, *LAW OF AGENCY* (2d ed. 1914) §395; *cf.* RESTATEMENT, *AGENCY* (1933) §91, comment *d*.

<sup>112</sup> *Wise & Bro. v. Texas Co.*, 166 N. C. 610, 619, 82 S. E. 974, 977 (1914).

<sup>113</sup> *P v. T: Belk's Dep't Store v. George Washington Fire Ins. Co.*, 208 N. C. 267, 180 S. E. 63 (1935). *T v. P: Lane v. Dudley*, 6 N. C. 119 (1812); also most of the latter cases. (The letters here, *P*, *A*, and *T*, refer to principal, agent, and third party respectively.)

<sup>114</sup> *Western Carolina Realty Co. v. Rumbough*, 172 N. C. 741, 90 S. E. 931 (1916); rule recognized in *Starkweather & Shepley v. Gravely*, 187 N. C. 526, 122 S. E. 297 (1924), though ratification not found.

<sup>115</sup> *Osborne v. Durham*, 157 N. C. 263, 72 S. E. 849 (1911). Defendants sold plaintiff's stock at his request, but could not get cash and so took paper of which he was advised. He assented. When paper became uncollectible because of insolvency of makers, plaintiff sued the agents. *Held*, relieved.

Ratification is said not to be revocable,<sup>116</sup> and the local cases bear that out.<sup>117</sup>

As to the more troublesome problems, our cases seem to present examples of but two, both of which have been partly considered already. The first is the matter of intervening equities. There is a considerable body of law on this problem elsewhere, but the case here most directly presenting the problem involved a corporate mortgage faultily executed as to form and improperly authorized, but nevertheless registered.<sup>118</sup> Because of the formal defect, the attempted ratification was probably ineffective anyway, but the court added that ratification could not operate so as to validate the original registry as against creditors. The usual rule blocks ratification only as against intervening equities. Nothing was said as to what class of creditors was meant in North Carolina, and presumably the decision would protect only those creditors who could upset an unregistered mortgage.

The other problem is that of collateral matters and independent rights not affected by ratification. In the section above on Manner of Ratification two cases of severable transactions were examined. But perhaps the best case in the local reports on a collateral transaction is *Hodges v. Holderby*.<sup>119</sup> There, a clerk in a store, being directed by his principal, the defendant, to buy a load of iron and take it in the principal's wagon from Watauga County to Rockingham County and return with goods for the store, found it impossible to get the iron and so, without authority, agreed to take plaintiff's bacon along and sell it. This he did and on return reported to defendant, his principal, who approved. Plaintiff later paid defendant the charge for cartage and for the clerk's time in making the sale,<sup>120</sup> but, on failing to get his bacon

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In *Rowland v. Barnes*, 81 N. C. 234 (1879), defendant without authority sold plaintiff's gin to T. Plaintiff ratified. Agent was relieved.

*Lawson v. Bank of Bladenboro*, 203 N. C. 368, 166 S. E. 177 (1932). Defendant having a draft to collect for plaintiff, accepted less than amount due. Plaintiff ratified. Bank was relieved. Cf. *Leigh v. Western Union Tel. Co.*, 190 N. C. 700, 130 S. E. 728 (1925).

<sup>116</sup> 1 MECHEM, LAW OF AGENCY (2d ed. 1914) §489.

<sup>117</sup> *Rowland v. Barnes*, 81 N. C. 234 (1879), where after professing assent to A's sale to T, he later made remarks indicating an intent to hold A. Ineffective. See *Norwood v. Lassiter*, 132 N. C. 52, 56, 43 S. E. 509, 510 (1903). The reverse of that process, ratification after repudiation, seems to be recognized in *Frank Bros. & Co. v. Lefkowitz*, 184 N. C. 273, 114 S. E. 293 (1922), where, after rejecting a purchase on his account, the principal did acts which the jury may find constituted ratification so as to bind him. This is in accord with the rule as stated in *Mechem* (§489). In another case where acts relied on for ratification were not communicated, ratification was held not to be complete. The acts were treated as evidence only of an unexecuted "intent to ratify". This may in effect have amounted to revocation, but that view was not stated. The case went off on another point. *Flowe v. Hartwick*, 167 N. C. 448, 83 S. E. 841 (1914).

<sup>118</sup> *Duke v. Markham*, 105 N. C. 131, 10 S. E. 1017 (1890).

<sup>119</sup> 49 N. C. 500 (1857).

<sup>120</sup> The statement of facts recites that "the price for hauling the bacon, was

money from the clerk, sued the principal. The case depended entirely on ratification as there was no evidence of prior authority or even apparent authority, and there was no question but what defendant had assented to the clerk's act. But the assent was held not to charge the defendant with the sum collected by the clerk; neither did the receipt of payment for the clerk's services, "because he was entitled to it whether McGuire had collected the money or not". This statement of the court has a verbal resemblance to the rule about the principal's independent rights;<sup>121</sup> it can not be classed with the cases under that rule since the principal's rights in such cases exist independent of the unauthorized transaction, which here they certainly did not. The real reason here, as the court elsewhere recognized in its opinion, was that the clerk was the plaintiff's agent in making the sale and the defendant only received payment for allowing the plaintiff to have the use of the clerk's time.

#### GENERAL OBSERVATIONS

This examination of the North Carolina cases on ratification discloses no need for any radical changes in theory or approach to meet the changing times. In general, the idea that one can become by assent a party to engagements or transactions made by a person professing to act as agent seems to produce reasonably satisfactory results. There are, of course, cases which permit a jury verdict to carry the obligations of ratification pretty far. The case in which a company was saddled with the obligation to employ an injured worker for life at a "living wage" for himself and his probably increasing family is one.<sup>122</sup> As already noted, the affirmance there was found chiefly in the fact of paying the worker his old wage for a period after the agent had made the unauthorized promise. The effect of a series of cases like that one on Mrs. Sanger's work might be worth considering as a part of the social background of the law. But the angle of the law of ratification in agency which is shown to warrant further study and criticism with the likelihood of really profitable disclosures and the opportunity for suggestions of value is the matter of trial practice and procedure. In many of the cases discussed herein no issue was submitted on ratification. Of course, a mere question whether defendant "principal" did or did not enter into a transaction with the plaintiff would be sufficient as an issue if the jury had the benefit of specific and lucid instructions on how the

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paid by the plaintiff to the defendant". The opinion, however, speaks of payment being made "for the use of the wagon, and the time and labor of his clerk, in selling the bacon". If defendant charged plaintiff only for the cartage, the case would be even clearer.

<sup>121</sup> See text accompanying notes 88-91, *supra*.

<sup>122</sup> Fisher v. Roper Lumber Co., 183 N. C. 485, 111 S. E. 857 (1922), cited *supra* note 104; cf. Stevens v. Cecil, 209 N. C. 738, 184 S. E. 531 (1936).

contract might have become binding on the "principal" with a particular reference to the rules of ratification. Considering the conglomerate treatment of implied and apparent authority and ratification found in the opinions of the supreme court, it may be expected that the treatment of the matter at trial may sometimes not be such as to force actual and informed consideration of the question by the jury. It is believed that the greatest opportunity for improvement in the field under discussion lies in that phase of the matter which is only touched upon here.