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SPECIAL AGENCY.

THOUGH the principles of law applicable to cases of general agency are well settled, and are laid down with great perspicuity by Story, Parsons and other text writers, the distinctions between general and special agencies, and the different rules governing the liabilities of principals, seem to be still involved in much uncertainty and confusion. How a special agent is to be distinguished from a general agent, becomes frequently a question of much importance and great nicety, and there is often no certain criterion. Moreover it is easier to lay down a rule, than to determine its application in a particular instance, and there may be great subtlety and refinement in discussing the principles, without reaching a solution satisfactory to a candid mind in the case at bar.

A special agent is defined generally by Story, as "a person appointed to act concerning some particular object;" by Parsons, as "one authorized to do one or two special things;" by Chitty, as "one appointed only for a particular purpose, and invested with limited powers;" by Kent, as "one constituted for a particular purpose and under a limited power;" though all these writers recognise these definitions as incomplete, and admit that the question whether the agent falls within them by no means always determines the rule of liability of the principal to third parties.

A most reasonable and proper rule, founded upon the soundest reason and clearest justice, is stated by Chitty in his excellent work on Contracts, though it seems to have been overlooked by most of the elementary writers. "If the agent being himself engaged

in a particular trade or business, be employed by the principal to do certain acts for him in that trade or business, he will in each case be held to be, with reference to his employment, a *general* agent, and the public having no means of knowing what are in any particular case within the general scope of the agent's powers—the wishes and directions of the principal,—the latter will be liable even though his orders be violated. In such a case the principal having for his own convenience induced the public to consider that his agent was possessed of general powers, is bound by the exercise, on the agent's part, of the authority which he thus allowed him to assume:" p. 284. This principle, so wise and salutary as to commend itself at once to every clear-thinking mind, is supplemented on p. 289 by the further rule: "Factors and brokers are both, it would appear, general agents, and hence it follows that—except in cases where it is known to be usual to limit their authority, although the actual limit be not known—all contracts made by them in the ordinary course of their employment, without notice by third parties of their private instructions, and without fraud or collusion, are binding on their principals."

These rules as thus laid down contain all the restrictions necessary to the safe conduct of business, and the protection of principals so far as they should be protected as against innocent third parties; for in cases of agency the universally recognised principle is to be applied that he who, even without intentional fraud, has enabled any person to do an act which must be injurious to himself, or to another innocent party, shall himself suffer the injury, rather than the innocent party who has placed confidence in him. The principal who has appointed the agent, has clothed him with the *indicia* of agency and authority, and has thus in the furtherance of his own business, given him the power and position to do injury, should be the one to suffer for any abuses or misapplication of that power or authority. And the reason and justice of this is precisely the same in cases of general and of special agency. The principal of course should not be bound by any act of the special agent beyond what it was reasonable and proper or usual for the agent to do in the course of his agency.

If the owner sends another with a horse for sale, it is well established that he has the implied power to warrant his soundness; that is reasonable and proper. He may also sell him for a fair price. But if the agent were to offer a valuable horse for twenty-

five dollars, the purchaser should be at once put upon inquiry as to his agency, and whether he had the right to sell him at such a sacrifice; or if he warrants him to trot in 2.30, the principal would not be bound, unless he had given proper authority for such a warranty, as that would be an extraordinary warranty, and the purchaser should be at once put upon inquiry.

In both cases of general and special agency, the authority of the agent, whether conferred in writing or by parol, includes all the necessary and usual means of executing it with effect: Story on Agency, § 58; 1 Parsons on Contracts 57; Paley on Agency 189; 2 Kent 618; 1 Chitty on Contracts, note to page 286.

If then the agent be prohibited by his principal from using certain of these means, which would ordinarily be necessary and usual, what will be the effect upon third parties dealing with the agent in ignorance of this prohibition? In the case of a general agent the principal would certainly be bound, and in the case of a special agent, although this precise point is by no means settled in the books, it would seem that he should also be bound; otherwise innocent third parties would only know the existence of the limitation after the injury had been done. When too late they would discover that the liability of the professedly contracting party was but a myth and a hallucination. Suppose for example, that a merchant should intrust a note to a broker for negotiation, with the direction "not to go to a National Bank with it," but the broker should sell it to a National Bank, who hold it till maturity. If the merchant has received the proceeds, he would of course be liable on that ground, but if the broker had converted them, could the merchant successfully defend against the note in the hands of the bank on the ground of his prohibition? It would certainly seem that in reason and justice, and by analogy, he could not, whether the broker be considered as a general or a special agent; otherwise there can be no safety in dealing with an agent.

In *Anderson* v. *Coonley*, 21 Wendell 280, it is distinctly stated, "The authority of the agent being limited to a particular business does not make it *special*; it may be *general* in regard to that, as if the range of it was unlimited."

Nor can the distinction between a general and special agency be established by inquiring whether this was the first time that the agent had acted as such, for an agency is established either by the authority actually conferred upon the agent, or by the manner in which he is held out to the world as possessing authority, and

either of these may be the same in a first as in a subsequent employment or act. If a man appoints another to do all his business in a particular line, he becomes forthwith general agent within that line, and his first act in that capacity binds his principal precisely as though he had acted during a term of years.

In *Barber* v. *Brittan & Hall*, 26 Vermont 112, which was a case of first employment, BENNETT, J., in delivering the opinion of the court, states the case and the law briefly and clearly: "The defendants sent their own agent for the plaintiff (a physician), and clothed him with authority to employ plaintiff to visit the boy, and though the agent was told to inform the plaintiff that the defendants would pay him for the first visit, yet this the agent for some cause neglected to do, and employed the plaintiff generally to attend the boy so long as he might need medical aid. The law is well settled that if an injury is to result to one man from the omissions or neglect of an agent of another, the principal must be held liable. In this cause the defendants, through the neglect of their agent, caused the services to be rendered upon their credit, and the case is within the above principle." And Judge Story tells us in § 131 of his work on Agency, it makes no difference in the case of a factor who from the nature of his business possesses a general authority to sell, whether he has been ordinarily employed by the principal to sell or whether it is the first and only instance of his being so employed by the principal; for still being a known factor, he is held out by the principal as possessing in effect all the ordinary general authority of a factor in relation to the particular sale. And again, § 133, "So far as the agent, whether he is a general or special agent, is in any case held out to the public at large, or to third persons dealing with him, as competent to contract for and to bind the principal, the latter will be bound by the acts of the agent, notwithstanding he may have deviated from his secret instructions and orders; for otherwise, such secret instructions and orders would operate as a fraud upon the unsuspecting confidence and conduct of the other party." And these rules thus stated by Mr. Justice Story, are approved by the Supreme Court of Massachusetts in *Soldell* v. *Baker*, 1 Metcalf 202, 203.

And even in case of an agent constituted for a special purpose, the rule is laid down by Kent, 2 Com. 621, that though the person dealing with him does so at his peril, when the agent passes the precise limits of his power, yet if he pursues the power as exhibited to the public, his principal is bound, even if private in-

structions had still further limited the special power. In the case of *Hatch* v. *Taylor*, 10 New Hampshire 538, PARKER, C. J., in delivering the opinion of the court, elaborately discusses the doctrine of special agency, and lays down the distinctions between authority and instructions, more satisfactorily and clearly than we have elsewhere found them. He says: "It is contended, however, that the distinction between authority and instructions does not apply in cases of special agents," &c. "But it is, we think, apparent enough that all which may be said to a special agent, about the mode in which his agency is to be executed, even if said at the time that the authority is conferred, or the agency constituted, cannot be regarded as part of the authority itself, or as a qualification or limitation upon it. There may be at times upon the constitution of a special agency, and there often is, not only an authority given to the agent, in virtue of which he is to do the act proposed, but also certain communications addressed to the private ear of the agent, although they relate to the manner in which the authority is to be executed, and are intended as a guide to direct its execution. These communications may, to a certain extent, be intended to limit the action of the agent; that is, the principal intends and expects that they shall be regarded and adhered to in the execution of the agency; and should the agent depart from them, he would violate the instructions given him by the principal, at the time when he was constituted agent, and executed the act he was intended to perform in a case in which the principal did not expect that it should be done. And yet in such case he may have acted entirely within the scope of the authority given him and the principal be bound by his acts. This could not be so if those communications were limitations upon the authority of the agent. It is only because they are not to be regarded as part of the authority given, or a limitation upon that authority, that the act of the agent is valid, although done in violation of them; and the matter depends upon the character of the communications thus made by the principal and disregarded by the agent."

Another principle is sometimes applicable even in cases of special agency, that a recognition by the principal of the agency in the particular instances is evidence of the authority; as where a person subscribes policies in another's name, and upon a loss happening the latter pays the amount. This would be evidence of a general authority to subscribe policies: 2 Starkie on Evidence 43.

This would seem to operate in the nature of an estoppel, and the principal cannot be permitted to be at the same time recognising and denying the agency.

In a case recently tried at *nisi prius*, where a real estate agent had been employed to negotiate a loan, but the principal claimed that there was a specific limitation to his authority, it was strenuously contended on his behalf, that the burden of proof was upon the plaintiff to establish the agency, in all its terms; and that unless he could show by a preponderance of testimony that there was no such limitation as claimed by the defendant, he must fail in his case. This however cannot be the law: *first*, because under the well established rules of evidence, whenever certain facts are peculiarly within the knowledge of one party, upon him lies the burden of proof as to these facts: Taylor's Law of Evidence, § 347, p. 384; 1 Phillips on Evidence 821. *Secondly*, because such limitation is matter of defence and avoidance, set up by the defendant, the plaintiff having in the first instance made out a *primâ facie* case. In constituting an agency, the principal and agent are ordinarily the only persons cognisant of the facts, and of any special terms, conditions or limitations of that agency, while persons dealing with such agent have usually no means whatever of knowing anything of the particulars of the constitution of the agency. If then the burden of proof is upon the plaintiff, he must necessarily in every case where the principal and agent, either honestly or dishonestly, differ in their testimony as to the special conditions or limitations of the agency, fail in an action against either the principal or agent, and however meritorious his cause of action may be, remain thus utterly and absolutely without remedy. With such a burden upon him he could of course never recover from either principal or agent. Such a result is not in accordance with nor contemplated by the law of agency. The innocent party must have his remedy, while the principal and agent must settle between themselves. The plaintiff must of course establish the agency by a clear preponderance of proof; but having once done that, and the agent having been, so far as the person dealing with him could know, competent to act and bind the principal, the burden is and ought to be upon the defendant to establish any condition or limitation. It will not do to say that where the agent has the *indicia* of full authority, though in fact it has been limited, a person dealing with the agent

has the presumption of authority in the agent, but that such presumption is repelled as soon as the principal testifies that the authority was never actually conferred, even though there be counterbalancing testimony to establish the authority. Though unquestionably the plaintiff has the burden in establishing the agency, the condition or limitation is matter of defence, and as to that the defendant setting it up has the affirmative of the issue and in this particular must bear the *onus probandi.*

If the evidence as to the condition or limitation is evenly balanced, that defence must fail. Of what possible value is a presumption, if one cannot act upon it, and if it confers no sort of protection upon one who in good faith has acted upon it? No doctrine of agency could be more fruitful of deception and imposition than this.

In cases clearly of special agency, the rule is certainly established by the regular current of authorities, that the principal is only bound by the acts of the agent within the limits and scope of the authority conferred upon him; but the distinctions between limitations to his *authority* and private directions or instructions as to the *manner* of executing that authority, are vague and shadowy, and unsatisfactory in the extreme. Limitations enter into and become of the essence of the authority; whereas directions or instructions are merely guides to the agent, and cannot affect third parties acting in good faith and in ignorance of them.

In cases of general agency the universal tendency of the courts, both in England and in this country, has been to protect innocent third parties in preference to the principal, while in cases of special agency, they determine the liability by the terms of the authority, but in deciding the question whether the agency in a given case is general or special, some have looked at the transaction between the principal and agent, when the agency was in fact originally constituted, while others have, with what seems to me to be the better reason, considered rather the relations to those dealing with the agent and with whom the agent was expected to deal, and have inquired whether the agent was held out to the world as possessing general authority, and whether third parties dealing in good faith with him were justified in believing that he was a general agent, or possessed of general powers in the particular business. The reason of the rules established for the protection of persons dealing in good faith with an agent, apply with equal force to cases of

general and special agency, provided only that in the latter case they had good reason to believe that the agent was in fact possessed of the powers which he claimed the right to exercise; and the principal, who has clothed even a special agent with every appearance of lawful authority, and allowed the world to believe that a certain authority existed, must have some liability in the matter. Special agency cannot be all advantage to the principal and no liability. There is no such an anomaly in this branch of jurisprudence. Such a rule of law, or such an application of existing rules, would be in the highest degree unjust. It would be simply preying upon innocent men, and a special agent would be nothing more nor less than a man sent out, with a roving commission, to perpetrate continuous frauds upon the community.

It is also now well established, that a special agent, even acting without authority, may in certain cases bind his principal. This is true in case of a bank teller who certifies checks when the drawer has in fact no funds on deposit. This principle has been twice decided by the New York Court of Appeals, and each time elaborately argued and discussed. In the first case, *Farmers' & Mechanics' Bank of Kent Co.* v. *Butchers' and Drovers' Bank*, 14 New York 627, the court say that although the plaintiff was chargeable with knowledge that the power of the teller to certify checks was confined to such as should be drawn by parties having money on deposit, the teller having been appointed by the bank to create evidence on their behalf of that fact, and authorized to hold out to parties inquiring for the existence of such funds, the bank should be held liable. In the same case as reported in 16 New York, Judge SAMUEL L. SELDEN, in delivering the opinion of the court, and treating the case as one of an agency specially restricted, said, p. 133, that the principle assumed by the defence, that principals are bound only by the authorized acts of their agents, except where the agent has been apparently clothed with an authority beyond that actually conferred, is too broad to be sustained; that principals have repeatedly been held responsible for the false representations of their agents, not on the ground that the agents had any authority, either real or apparent, to make such representations, but for reasons entirely different; citing with approval Lord HOLT's remark in *Hern* v. *Nichols*, 1 Salkeld 289: "Seeing somebody must be a loser by this deceit, it is more reasonable that he who employs and puts a confidence in