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## Special Agency

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## SPECIAL AGENCY†

BY BASIL H. POLLITT\*

FROM Livermore to Powell, all writers on the subject of agency have used, or at least mentioned, the classification of agents into agents general and agents special.<sup>1</sup> The earlier of these writers laid great stress on the distinction.<sup>2</sup> Those that followed began to waver, and sometimes even to straddle the proposition.<sup>3</sup> The more recent writers have become outspoken and emphatic in denying the sense or desirability of the distinction.<sup>4</sup> This last viewpoint is reflected in the only articles that have appeared in legal periodicals discussing such classification.<sup>5</sup>

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† Grateful acknowledgment is made to Professors Warren A. Seavey and Calvert Magruder of the Harvard Law School for the privilege of their consultation and advice during the writing of this article. The opinions suggested and the conclusions arrived at, however, are solely the responsibility of the writer, and must not be taken as representing in any degree the thought of either Professor Seavey or Professor Magruder.

<sup>1</sup>There is a third class of agencies, supposedly, namely, universal agencies. For many years even the possibility of such agencies has been ignored by the courts and text-books. The writer makes bold to suggest that the universal type of agency is worthy of more serious study than has been given to it up to now. It cannot be studied, however, in the limits of this paper.

<sup>2</sup>Livermore, *Principal and Agent*; Paley, *Principal and Agent*, 4th ed. 1856, p. 189, et. seq.; Story, *Law of Agency*, 9th ed., sec. 17, 126. See also *Agency*, *Corpus Juris*, sec. 222, 223.

<sup>3</sup>Wharton, *Agency and Agents* (1876), a good discussion from the Roman law standpoint.

Evans, *Principal and Agent* (1888) pp. 2, 117, 176, helpful; Reinhard, *Law of Agency*; Clark and Skyles, *Law of Agency*, sec. 197, et. seq.; Mechem, *Outlines of the Law of Agency*, 3rd ed., sec. 26, 31; Bowstead, *Law of Agency*, 7th ed., pp. 3, 79.

<sup>4</sup>Huffcut, *Law of Agency*, pp. 19, 132; Tiffany, *Principal and Agent*, 2nd ed. by Powell, pp. 49-51, 78, 117. Professor Powell calls the distinction "meaningless and confusing."

<sup>5</sup>(1907) 5 Mich. L. Rev. 665 (case-note):

"It is easy to see how legal consequences depend on whether one acts under limited or unlimited authority, and if agents can be classified into such as act under restrictions and such as do not, then here is a sensible and important classification. But it is believed there is no such distinction that can clearly be made. Every agent is presumed by law to be limited, either by his principal's instructions or by the nature of his undertaking. Some are more limited, others less; some secretly, others openly. If the limitations are secret it needs no citation of authorities to establish that the third person who deals with the general agent is not bound by them. The same is true of the special agent. If the limitations are not secret, then in either case the third person is bound by them. . . ."

"The conclusion seems clear that general and special are merely rela-

It is believed, moreover, that the great majority of teachers of agency in our law schools are, and have been for some time, teaching the subject in a manner corresponding to the views of the third and last group of writers.

But if one inquires of practicing members of the bar what their ideas are on the subject, it is discovered that these gentlemen believe in the efficacy and enduring value of the distinction. Such a discrepancy between teachers and writers, on the one hand, and practitioners on the other, makes one wonder whether the law in the books may be one thing and law in action another.<sup>6</sup> But it is well to remember that the real law of the books is to be found in the reports of decisions and we should examine these most care-

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ative terms incapable of precise definition except as applied to the particular facts of each case. The scope of the authority of a general agent is, in general, broader than that of a special, *Mars v. Mars*, 27 S. C. 132, but it is entirely proper to refer to the same agent as either general or special, according as the emphasis is on the extent or the limitations of his powers. The terms are not precise, but used in this way they are often convenient. In any case the liability of the principal can not be settled by calling the agent a general agent or a special agent. If the act done by the agent, general or special, was within the real or apparent scope of his authority the principal will be bound. If it was not, the principal is not liable, regardless of whether the agent was general or special, or whether he acted under a general or a special authority. No objection can be taken to defining, as in the present case, what are the limits of the authority of a 'general agent' of a telegraph company, and then announcing that limitations beyond those to be implied from the nature of the employment are not binding on third persons unless they are informed of them. But it would be open to the objections above pointed out to say that limitations are not binding because the agency is a general one."

(1908) 67 Cent. L. J. 377, a brief, but thoughtful and thought-provoking article, the conclusion of which is as follows:

"In brief, it may safely be stated that the two classes of agents considered stand upon the same footing. Though they may differ in the amount of work entrusted to them, this difference is but accidental, and does not justify the application of different rules in settling questions of liability. In either case the liability of a principal is to be measured, not by the actual authority conferred, but by the ostensible authority that the agent has been held out to the world as possessing."

It is probable that Professor Theophilus Parsons gave real currency to this view. The language of his contracts treatise on the point has been frequently quoted by the courts of an earlier generation. See, for example, *Lorton v. Russell*, (1889) 27 Neb. 372, 378, 9, 43 N. W. 112:

"In support of this view may be cited the authority of the most acceptable American commentator (Parsons on Contracts, vol. I, chap. III., p. 44) as to the distinction between general and special agencies, in which he says: 'Of late years, courts seem more disposed to regard this distinction and the rules founded upon it, as altogether subordinate to that principle which may be called the foundation of the law of agency; namely, that a principal is responsible, either when he has given to an agent sufficient authority, or when he justifies a party dealing with his agent in believing that he has given to this agent this authority'."

<sup>6</sup>Compare, Pound, *Law in the Books and Law in Action*, (1910) 44 Am. L. Rev. 12.

fully before deciding which side of the controversy is in the right.<sup>7</sup>

The writer proposes to show in this article that there is a real and vital distinction between the two classes of agents, which distinction is deeply imbedded in the decisions of both English and American courts, and serves a very useful purpose today.

Since all agents, excepting only that *rara avis*, the universal agent, must be either general or special under our present system of classification, it is obvious that a complete study of general and special agency would embrace practically *all* cases involving agency. The present study is not so ambitious. It is to be limited to those cases abstracted under the heading of general and special agency in the American Digest System and the corresponding English Digests. This study is also limited, primarily, to cases involving the contractual liability of disclosed principals, i.e., no conscious effort will be made to work out a separate body of rules for partially disclosed and undisclosed principals, although occasionally such cases may be discussed incidentally.

In this study, no attempt will be made to separate what the courts hold from what they say are the reasons for reaching the result in question. On the contrary, it is submitted that the only sure clue to the judicial process is to take the courts at their face value and accept as the reasons for their decisions those which they have themselves announced. This, it is believed, is the only true realism possible. Otherwise we make out our judges to be liars. Thus it will not do blandly and naively to brush aside or ignore the reasons given by the court in reaching the result X, and ascribe X to some pet theory. If all the world were like "Alice in Wonderland," this might be all right; but we live in a practical age and law must be a practical science. Our jurists must not indulge in the *a-rationalism* they like to ascribe to the courts.

A recent case illustrates the theory of this study. In *Barrett Co. v. Globe Indemnity Co.*,<sup>8</sup> B, the agent of A (the Globe Indemnity Co.) executed a surety bond to C, a municipal corporation, for the faithful performance of a highway construction contract entered into by E (the contractor and principal on the bond) and C. Plaintiff was a materialman and one of the class in whose favor the bond ran. The power of attorney given by A to B limited

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<sup>7</sup>Compare, Pound, "an unhappy gulf between the law of academic teachers and the law of the courts." Pound, *Interpretations of Legal History* 52.

<sup>8</sup>(N. J. Sup. 1932) 159 Atl. 709.

B's authority for the writing of a bond such as this one to \$15,000. This bond was for \$21,881.31.

The court reasoned that the signature on the bond, "Globe Indemnity Company, by Arthur P. Ellis, Attorney in Fact," showed that B (or Ellis) was a special agent, that one dealing with a special agent, known to be such, is bound to inquire as to the extent of his authority, that a putting on inquiry is normally the equivalent of notice and that, therefore, the numerical limit was binding on the third party, C, and all persons suing in its right. Hence, judgment for the defendant.

It matters not that the court sadly confused apparent authority, and that its implication that an agent appointed by power of attorney is a special one is opposed to the better reasoning of the New York Court of Appeals in *Corklite Company, Inc. v. The Rell Realty Corporation*<sup>9</sup> (also involving a surety company agency). Nor will it do to explain the case by saying that everyone knows that the authority of a surety company agent is extremely limited, or to explain the case on the ground of non-payment of the premium. Whether the court be right or wrong in the reasons it gives, we cannot dissociate such reasons from the result it reaches, for without the *known* reasons, the result might have been different.

This article is a study of the law as it is, for before we can advance in any direction, we must know where we now are. To understand a problem frequently comes pretty near to solving it. But even though this article is not censorial in nature, there are certain fairly obvious advantages to stressing the distinction between general and special agencies:

(1) The gulf between the teachers and the judges may be narrowed, or even entirely bridged.

(2) Utility and meaning may be restored to the phrase "special agent," which is now a sort of orphan child, a name, and nothing more.

(3) The law of agency may be made more scientific by requiring a sharper and more precise use of the terms "general" and "special" agent, legal consequences having been shown to attach to such terms, and by getting away somewhat from the vague and incoherent manner in which the phrase "apparent authority" is now bandied around on every occasion.

Descriptive terms ordinarily only have value because some

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<sup>9</sup>(1928) 249 N. Y. 1, 162 N. E. 565.

legal distinction results from their use. In other words, legal categories are important only in so far as rights and liabilities are affected by them. Sometimes, however, we describe and classify as a mere matter of convenience, later gradually attaching legal consequences to the class. Which of these propositions is true with respect to general and special agency? Did the eighteenth century judges divide agents into general and special as a matter of convenience and then attach legal consequences to the classification, or did they so divide agents *because* the varying legal consequences required it?

It is submitted that the classification serves both the end of convenience and that of different legal consequences. The writer will therefore take up first, the situations in which courts have held a special agency to exist and, secondly, the legal consequences flowing from the fact of special agency.

So long as neither the special nor general agent exceeds his actual authority, the distinction, assuming one to exist, remains dormant<sup>10</sup> and of relatively little importance. Also, the distinction is of more importance between the principal and a third party than it is between the principal and his agent, *inter se*.<sup>11</sup>

It has been said that the terms "general or special agent" are very indefinite,<sup>12</sup> again, that the terms have only a vague content,<sup>13</sup> and again, that they are relative.<sup>14</sup> In a sense, the words "special" and "general," as applied to agents, are only tags.<sup>15</sup> Tags, however, are often very useful. They lend themselves to classification, and classification constitutes a large part of any science or art.

## I

### SITUATIONS IN WHICH THE COURTS HAVE DISTINGUISHED BETWEEN SPECIAL AND GENERAL AGENCIES AND HAVE HELD A SPECIAL AGENCY TO EXIST

The writer will not set out a perfect, ready-made definition of

<sup>10</sup>Morton v. Scull, (1861) 23 Ark. 289.

<sup>11</sup>Schaaf v. Stripling, (Tex. 1924); 265 S. W. 264; Kelly v. Estate of Strong, (1887) 68 Wis. 152, 31 N. W. 721.

<sup>12</sup>Great West Min. Co. v. Woodmas of Alston Min. Co. et al., (1888) 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204.

<sup>13</sup>Glogowski v. Erie and Niagara Farmers' Insurance Association, (1926) 216 App. Div. 654, 216 N. Y. S. 64.

<sup>14</sup>The Jeffersonville Association et al. v. Fisher, (1856) 1 Ind. 699.

<sup>15</sup>The Springfield Engine and Thresher Company v. Kennedy, (1893) 7 Ind. App. 502, 34 N. E. 856.

special agency. Instead of defining, let us divide the various ways in which a special agency may be created into a few groups. For purposes of reference and as a starting point, let us refer to Restatement, section 14.<sup>16</sup>

The courts are not so reluctant in defining special agency and a number of cases containing their definitions, usually coupled with one of general agency also, are collected in the footnote.<sup>17</sup>

#### (A) The Single Act

It is most frequently said that a special agent is a person employed to perform a single, specific act, or to act "*for a particular purpose,*" as the older cases put it. Numerous illustrations of this type of agency may be found in the books.<sup>18</sup> This notion of special

<sup>16</sup>"A special agent is one authorized to represent his principal in the contractual negotiating or bargaining involved in a particular act or in a single transaction only, or in a number of acts treated as distinct transactions."

<sup>17</sup>Gregg v. Wooliscroft Co., (1893) 52 Ill. App. 214; Davis v. Talbot, Receiver, (1893) 137 Ind. 235, 36 N. E. 1098; The Mayor and City Council of Baltimore v. H. R. and J. Reynolds, (1862) 20 Md. 1; Cooley v. Perrine, (1879) 41 N. J. L. 322, 32 Am. Rep. 210, affirmed in 42 N. J. L. 623, virtually on the opinion below; Ish v. Crane, (1862) 13 Oh. St. 574; House, Assignee v. Vinton National Bank, (1885) 43 Oh. St. 346, 1 N. E. 129, 54 Am. Rep. 813; Hooe and Harrison v. Oxley and Hancock, (1791) 1 Wash. (Va.) 19, 1 Am. Dec. 425; Butler v. Maples, (1869) 9 Wall. (U.S.) 766, 19 L. Ed. 822.

<sup>18</sup>Witcher v. Brewer, (1873) 49 Ala. 119 (authority to borrow a horse); Everett v. Clements and Thompson, (1849) 9 Ark. 478 (authority to stack plank); Mayor and Aldermen of Little Rock v. State Bank, (1847) 8 Ark. 227 (authority to execute a note); Bryan v. Berry, (1856) 6 Cal. 394 (authority to sign name of principal as surety on a note); Drover v. Evans, (1877) 59 Ind. 454 (authority to subscribe for a certain amount of stock); Robinson v. Bank of Winslow, (1908) 42 Ind. App. 350, 85 N. E. 793 (authority to receive money); Hackworth v. The Hastings Industrial Company, (1912) 146 Ky. 387, 142 S. W. 681 (authority to subscribe for stock); Carothers v. McChord, Neal and Co., (1891) 13 Ky. L. Rep. 238; De Hart v. Wilson, (1828) 6 T. B. Mon. (Ky.) 577 (authority to execute a bond); Harber v. Hutson, (1891) 13 Ky. L. Rep. 333 (authority to collect a note); Rhoda v. Annis, (1883) 75 Me. 17, 46 Am. Rep. 354 (authority to sell a farm); Snow v. Perry, (1830) 9 Pick. (Mass.) 539 (authority to pay off a promissory note); Brown v. Henry, (1899) 172 Mass. 559, 52 N. E. 1073 (authority to sell a quantity of wool); Brown v. Johnson, (1849) 20 Miss. 398, 51 Am. Dec. 118 (authority to buy land at an auction sale); Moore v. Skyles, (1905) 33 Mont. 135, 82 Pac. 799, 114 Am. St. Rep. 801, 3 L. R. A. (N.S.) 136 (authority to cash a money order); Norfolk National Bank v. Nenow, (1897) 50 Neb. 429, 69 N. W. 936 (authority to leave a note at a bank); Dowden v. Cryder, (1893) 55 N. J. L. 329, 26 Atl. 941 (authority to negotiate a draft); Milne v. Kleb, (1888) 44 N. J. Eq. 378, 14 Atl. 646 (authority to solicit a purchaser—many negotiations but only a single act); Gibson v. Colt, (1811) 7 Johns. (N.Y.) 390 (authority to sell a ship); Martin v. Farnsworth, (1872) 49 N. Y. 555 (authority to charter a tug boat); United States Bank v. Herron, (1914) 73 Or. 391, 144 Pac. 661, L. R. A. 1916C 125 (authority to execute a note); Donnom v. Adams, (1902) 30 Tex. Civ. App. 615, 71 S. W. 580

agencies is so strong and prevalent, in the United States at any rate, that it has completely dwarfed all other ideas on the point and has been made almost the sole, the exclusive test in the Restatement.<sup>19</sup> It is so well-known that it would be a work of supererogation to dwell on it at length here.

(B) A Single Transaction.

Closely allied to the idea of the agent appointed to perform a single act is that of the agent appointed to perform a single transaction. It is a little difficult to state with exactness what is meant by a single transaction, but it would appear to convey the idea of authority to perform more than one specific act, all of which acts are bound together in an integral unit and might be called a single deal.<sup>20</sup> And now, immediately we run into difficulty.

We learn from Comment (a) to section 13 of the Restatement,<sup>21</sup> defining general agency, that the chief test of general agency is that the general agent is able to negotiate many contracts, etc. under one authorization. But when we begin to study special agency arising from authority to carry out a single transaction, we soon discover that one transaction (so-called) may involve the making of many contracts.<sup>22</sup>

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(authority to sell a specific piece of land); *White v. Langdon*, (1858) 30 Vt. 599 (authority to trade a horse); *Woolsey v. Trimble*, (C. C. A. 6th Cir. 1927) 18 F. (2d) 908 (authority to invest money in specified mining stock).

<sup>19</sup>Compare section 14 thereof. *supra*. note 16.

<sup>20</sup>*New York Life Insurance Co. v. Smith*, (1929) 39 Ga. App. 160, 147 S. E. 126 (authority to foreclose securities); *Hardwick Brothers v. Kirwan and Tyler*, (1900) 91 Md. 285, 46 Atl. 987 (authority to sell goods to a certain individual); *Strauss v. Rabe*, (1925) 97 N. J. Eq. 208, 127 Atl. 188 (attorney employed to close a title); *Nestor v. Craig*, (1893) 69 Hun (N.Y.) 543, 23 N. Y. S. 948 (authority to sell specified quantities of barley); *Driver v. Galland*, (1910) 59 Wash. 201, 109 Pac. 593 (authority to build a house); Query: Is an agent in charge of an *enterprise* a *general* one, whereas an agent in charge of a *transaction* is a *special* one?; *Singer Mfg. Co. v. McLean*, (1894) 105 Ala. 316, 16 So. 912 (authority to check up business of salesman and make inventory).

<sup>21</sup>"The characteristic of the general agent is that he is authorized to represent his principal in a class of acts, or in a variety of acts, or in the doing of the same act repeatedly, but by virtue of one authorization."

<sup>22</sup>*Grant v. Burrows*, (1919) 139 Ark. 16, 212 S. W. 95 (authority to represent land owners in the construction of a levee and in the matter of a right of way; a number of separate, individual contracts involved).

*Wiseman v. Graham*, (1928) 178 Ark. 459, 10 S. W. (2d) 892 (A and B each sent their agents C and D to the same town to sell a carload of apples which each principal owned. The apples "flooded" the market and C and D entered into an agreement of joint adventure whereby the apples were put together, one agent to do the work of both and profits to be pooled equally. *Held*—that C and D were special agents. Obviously, many



This leads us to wonder whether it can safely be said that a special agent may not, occasionally at least, make a number of contracts under one authorization, and, in view of the decisions in the footnote, we are forced to conclude that the test of one or many

contracts were made by the agent. Query: What kind of an agent is a chain store grocery salesman?)

McIntosh Huntington Co. v. Rice, (1899) 13 Colo. App. 393, 58 Pac. 358 (Here the principal was in Cleveland and the third party in Denver. One Percy was in Colorado as the agent to sell the bicycles manufactured by the principal and to establish a sales agency. The company wrote Rice, the third party, a letter as follows: "As our Mr. Percy is still in Denver, we have referred this matter to him, and trust that he will be able to make some arrangements with you that will be satisfactory to all parties." Next Rice and Percy entered into an agreement reciting the sale of 75 bicycles to Rice, for which he gave his promissory notes and Percy, in his turn, repurchased machines and gave his promissory note to Rice, the idea appearing to be one of joint venture by which Rice's liability to the company was to be limited to the amount realized by Percy. *Held* (for the company, reversed), that the trial court was wrong in holding that Percy was a general or universal agent, the fact being that he was a *special agent*. "It was an agency to do a particular thing with reference to particular machines manufactured by this corporation.")

Thompson v. Stewart, (1819) 3 Conn. 171, 8 Am. Dec. 168. (Here S was appointed agent for the Gretna Christina and her cargo in Bermuda, the vessel having been libeled as a prize of war. S gave bonds, regained the vessel, sent it back to its owner, sold the cargo, and received therefor bills of exchange drawn on England by J. D. and W. B. The owner directed that the bills be placed subject to his order. S invested the bills of exchange in a cargo of flour which he shipped to a person at Barbadoes, then in good credit. This person died insolvent, however, and the flour was virtually lost. In buying the flour, S intended to promote the interest of his principal. *Held* (against S) that in disposing of the bills, he had not acted as a faithful agent, the owner having directed otherwise. S had transcended his authority, and his good motive could not clothe him with legal power. "An agent, constituted for a particular purpose, and under a power limited and circumscribed, cannot bind his principal by any act in which he exceeds his authority. It would involve this principle, that one person may bind another against his consent." . . . "It is no less extravagant to assert that an agent may enlarge his authority than that he can originate it.")

Kuecks v. New Home Sewing Machine Co., (1906) 123 Ill. App. 660. (Kuecks shipped furniture to one Crawford to be sold upon a commission of 15 per cent. Crawford also sold sewing machines, school supplies, and musical instruments. Crawford, holding himself out as the agent of Kuecks, ordered two sewing machines of the plaintiff. Wherefore this suit. *Held* (for Kuecks, reversed) that Crawford was at most a special agent of Kuecks.)

Sandford v. Handy, (1840) 23 Wend. (N.Y.) 260. (Here the agency was one for a "special purpose", i.e. the obtaining of subscriptions to a joint stock land company. *Many contracts, but all embraced in one transaction*. Query: Would such an agent be held to be a general one today? Compare: Gibson v. Snow Hardware Co., (1891) 94 Ala. 346, 10 So. 304. Here the son of the defendant was the architect of an opera house being built by his mother. He drew the plans and specifications, superintended the erection of the building, etc. *Held*, that there was evidence that the son was defendant's *general agent*.)

contracts under one authorization is not an infallible guide to determining the dividing line between general and special agency.<sup>23</sup>

(C) A Limitation of Authority.

1. *In general.* Quite frequently the principal says to the agent, in conferring upon him his appointment and charter of authority, "perform X, but do not attempt Y; do this but not that." These limitations may be distinct from the grant of authorized powers, or they may be incorporated into, and made a part of, the authority itself. Apart from the problem of the binding nature of such limitations upon a special agency created to perform a special act or single transaction, the very interesting question is presented as to whether a limitation of authority may, in and of itself, make an agency special which would, were it not for the limitation, be a general one.

There are a large number of cases wherein a limitation upon the authority granted was held to make the agency a special one.<sup>24</sup>

<sup>23</sup>Murray v. The Standard Pecan Company, (1923) 309 Ill. 226, 140 N. E. 834, 31 A. L. R. 604; Pursley v. Morrison, (1855) 7 Ind. 356, 63 Am. Dec. 424; Davis v. Talbot, Receiver, (1893) 137 Ind. 235, 36 N. E. 1098; Norton v. Nevills, (1899) 174 Mass. 243, 54 N. E. 537; Savage v. Rix, (1838) 9 N. H. 263. Beals v. Allen, (1820) 18 Johns. (N.Y.) 363, 9 Am. Dec. 221; Kelly v. The Tracy and Avery Co., (1904) 71 Oh. St. 220, 73 N. E. 455; Gordon and Walker v. Buchanan and Porterfield, (1833) 5 Yerg. (Tenn.) 71; Schaff v. Stripling, (Tex. 1924) 265 S. W. 264.

The above cases are worthy of study, in all of which a special agency was held to have been created although the agent had the power to make many contracts, under one authorization.

<sup>24</sup>Burks v. Hubbard, (1881) 69 Ala. 379 (authority to sell limited by requirement that payment be made to principal); Littleton and Lamar v. Loan, Mercantile and Stock Ass'n, (1895) 97 Ga. 172, 25 S. W. 826 (limitation on authority to buy); Americus Oil Co. v. Gurr, (1902) 114 Ga. 624, 40 S. E. 780 (limitation to buying with funds furnished agent by his principal); Chapman v. Americus Oil Co., (1903) 117 Ga. 881, 45 S. E. 268 (semble); Germain Company v. Bank of Camden County, (1913) 14 Ga. App. 88, 80 S. E. 302; Gregg v. Wooliscroft and Co., (1893) 52 Ill. App. 214 (limitation to purchasing "number two oats"); American Telephone and Telegraph Co. v. Jones, (1898) 78 Ill. App. 372; Young v. Harbor Point Club House Ass'n, (1901) 99 Ill. App. 290 (See also Harbor Point Club House Assn. v. Young, (1901) 99 Ill. App. 292); Sawin v. The Union Building and Savings Association of Des Moines, (1895) 95 Ia. 477, 64 N. W. 401; Bohart, Dillingham and Co. v. Oberne, Hosick and Co., (1887) 36 Kan. 284 (limited to purchases for cash); Murdock v. Mills, (1846) 11 Metc. (Mass.) 5 (authority to draw bills limited by requirement that they be accompanied by bills of lading); Philip Gruner Lumber Co. v. Algonquin Lumber Co., (1920) 123 Miss. 157, 85 So. 191 (authority to buy lumber limited by requirement of approval of principal); Fowler v. Cobb, (Mo. App. 1921) 232 S. W. 1084 (authority to buy a carload of "number three" corn). Compare: Hall v. Hopper, (1902) 64 Neb. 633, 90 N. W. 549 (authority to buy grain on "Baltimore Terms"). Held, that the agency was *general*. Query: Is there a distinction between a limi-

We are inclined to ask ourselves, how can this thing be? Is it really so? But if we laid down an absolute rule that a limitation incorporated into the authority made an agency special, a strong volume of protest would immediately well up from a respectable number of our courts.<sup>25</sup>

tation on the *quality* of the article purchased and a similar one with respect to the *terms* of sale? *Jacques v. Todd*, (1829) 3 Wend. (N.Y.) 83 (agent absolutely prohibited from buying on credit); *Andrews v. Kneeland*, (1826) 6 Cow. (N.Y.) 354, *Ogden*, arguing for the plaintiff; "a man is to be deemed a special agent only when a power is given, and he is restricted to exercise it in a particular way. But if a power be given as in this case, to sell generally, and there be no express prohibition against a warranty, the agency is to be deemed general. This is the import of the English cases cited. And this distinction is expressly sanctioned in *Hicks v. Hankin*, (1802) 4 Esp. 114. That case turned upon the distinction. 'The character of a special agent does not depend on the number of acts he has power to do.'" Compare: *The Farmers' and Mechanics' Bank of Kent County, Maryland v. The Butchers' and Drovers' Bank*, (1857) 16 N. Y. 125, 69 Am. Dec. 678 (Query: Is a subordinate employee always to be regarded as a special agent?); *Swindell v. Latham*, (1907) 145 N. C. 144, 58 S. E. 1010, 122 Am. St. Rep. 430 (agent to buy, restricted to cash purchases); *Pacific Biscuit Company v. Dugger*, (1901) 40 Or. 302, 67 Pac. 32, *contra*; *Devinney v. Reynolds*, (1841) 1 Watts & S. (Pa.) 328 (authority dependent upon a condition subsequent); *W. Hoskins and Co. v. Carroll*, (1835) 7 Yerg. (Tenn.) 505 (*semble*).

<sup>25</sup>In the following cases it was strongly denied that a limitation of authority standing alone could make an agency special. *Doan v. Duncan*, (1855) 17 Ill. 272; *Southern Pacific Co. v. Duncan*, (1894) 16 Kv. L. Rep. 119. *Walker v. Skipwith*, (1838) *Meigs* (Tenn.) 502, 33 Am. Dec. 161; "it is contended that the evidence shows Lyle, to whom the box was delivered, to have been a special, and not a general agent of the defendant, because he was not authorized to forward goods by the stage, unless they were put in charge of some passenger, and therefore the jury found a verdict contrary to the law.

"In order the better to apply the facts of this case to the principles of law, we will consider what is a general and what a special agency. 'By a general agency is understood, not merely a person substituted in place of another, for transacting all manner of business, since there are few instances in common use of an agency of that description, but a person whom a man puts in his place to transact all his business of a particular kind, as to buy and sell certain kinds of wares, to negotiate certain contracts, and the like.' *Paley*, Agency 162, 163. But a special agent is where one is employed about 'one specific act, or certain specific acts only;' *Id.* 164.

"It will be seen from this definition of a general agency, that if a stage contractor puts a man in his place to transact all his business of a particular kind, as to receive and forward passengers and baggage in the stage, and to receive payment therefor, at any particular stand or stage office, such person is the general agent of the contractor or owner of the stage. In such case, though the owner of the stage may limit the agent by a private order or direction, still he is bound for all his agent's acts, though not conformable to his direction, if within the scope of his employment, unless this limitation upon the power of the agent be known to the party dealing with him: *Paley*, Agency 163. It is not therefore a limitation, by private instructions to the agent, that constitutes a special agency."

Compare. *Pollitt*, Some Comments on the Restatement of Agency, (1929) 17 *Georgetown L. J.* 177, at 181:

"It will be noted that the definitions of general and special agents

2. *The "Numerical Limitation" cases.*—The most important and largest class of cases involving a limitation of authority are the so-called "*numerical limitation*" cases. They group themselves rather automatically into two classes:

(1) Those where the agency would be special under some other rule and a numerical limitation is superadded on thereto;<sup>26</sup>

given in the Restatement are based upon the extent of the transaction which the agent is appointed to perform, rather than the more difficult question of whether there is also a distinction between general and special agency with respect to the scope of authority possessed by the agent.

"Some cases hold that the distinction between the two kinds of agencies is the one the court stated in *Butler v. Maples*. Other cases hold that there is a distinction between the authority of a special and of a general agent which does not depend upon the number of transactions in which the agent is authorized to represent the principal, but upon the scope of his authority so to do in the given transaction."

<sup>26</sup>It is frequently difficult to determine whether an agency is special because of the fact that only one specific act is to be performed or because of the numerical limitation interwoven with the authority to perform a single act.

*Blackwell v. Ketcham*, (1876) 53 Ind. 184. Here A authorized B to put his (A's) name to a note for \$350. B signed A's name to a note for \$475. *Held* (for A) that B was a special agent and exceeded his authority. Query: Had the agent exhausted his powers here by the unauthorized act, or could he still give a note for \$350?

*Dugan v. Champion Coal and Tow Boat Co.*, (1899) 105 Ky. 821, 20 Ky. L. Rep. 1641, 49 S. W. 958. A by power of attorney authorized B to execute a surety bond for him in the sum of \$6,000. B executed a bond purporting to bind A in sum of \$8,667. *Held* (for A) that B was a special agent (single act) and had not *strictly pursued* his authority.

*Pedigo and Warder v. Day and Allen*, (1886) 8 Ky. L. Rep. 159. Here A, the owner of a horse, authorized B to sell it provided he could get \$100 for it. B sold the horse to C for \$85, throwing in bridle and saddle. *Held* (for A) that the numerical limitation was part and parcel of the special agency to do a single act. *Hatch v. Taylor*, *infra*, note 84, distinguished.

*Olyphant v. McNair*, (1864) 41 Barb. (N.Y.) 446. A authorized B to buy 500 shares of a certain mining stock on his account. *Held*, that B was a *special agent*. Why? Because the deal was a single unit or because of the express instruction? B bought 100 shares only. *Held* (for A), B could no more buy less than 500 than he could buy more. Query: Could he buy 50 shares from each of ten men?

*Cohen v. Mincoff*, (N.Y. App. term 1904) 96 N. Y. S. 411. (1) A said to C: "I give permission to my son, B, to buy goods for \$50 on 30 days time, on my name, bill to be sent to me." (2) C sold B goods amounting to \$27, billing A, who paid. (3) Later C again sold B goods, amounting to \$51.25. A refused to pay. *Held* (for A, reversed), that B was a *special agent* and his authority was a *limited one*. *Only one sale was authorized*. Query: Is the agency *special*, because (a) only one sale was authorized? (b) the authorization was limited? (c) there was a *numerical limit*? Is not the last a better reason for deciding in favor of A?

*Hoffman v. Marano*, (1918) 71 Pa. Super. Ct. 26. A authorized B to bid for him at an auction, setting a numerical limit of \$12,000. B bid up to \$14,100. *Held* (for A), that B, being a special agent (one specific act), must strictly pursue his authority. Third persons who dealt with him as such special agent did so at their peril when the agent passed the precise

(2) Those where the numerical limitation itself creates the special agency.<sup>27</sup>

Our problem is primarily the second one above, but we are also interested in ascertaining how far the limitation will be recognized and enforced under any and all circumstances.

Numerical limitations are concerned, for the most part, with price, setting a limit beyond which the agent may not go, either in selling or buying for his principal. There may also be numerical limitations of time, or quantity, or amount,—this last, particularly with respect to commercial paper.

Numerical limitations are not binding upon general agents for in that case they yield to other rules.<sup>28</sup> And, of course, following a universal principle, no third party can recover against the principal of his powers.

Bryant v. Bank of Commerce, (1897) 95 Wis. 476, 70 N. W. 480. These cases clearly illustrate the rule that exceeding a numerical limit is fatal to a special agency.

<sup>27</sup>Young v. Harbor Point Club House Association, (1901) 99 Ill. App. 290. (See also Harbor Point Club House Ass'n v. Young, (1901) 99 Ill. App. 292). Here the president of the association engaged a father as manager of a hotel and instructed him to retain help, reporting to the president the amount of salaries demanded by the chef, headwaiter and room clerk. Regarding the latter position, the president wrote: "We have always paid \$75 per month for this position and trust you can see your way to have your son accept at that price." The son claimed that the father employed him at \$100 a month. *Held* (for the hotel), that the letter above quoted amounted to a limitation upon the authority of the father as to price. His agency was therefore a special one.

Bell v. Offut, (1874) 10 Bush (Ky.) 632. Here A wrote B to buy for him (a) 2,000 good corn-fatted hogs, averaging 260 pounds or over, to be delivered in four batches on or before specified dates, at \$5 per hundred, weighing at Louisville. The court instructed the jury that the above letter made B a *special agent*, so that if B had already bought two thousand hogs before making the purchase on which the suit was brought, then such purchase did not bind A.

Mussey v. Beecher, (1849) 3 Cush. (Mass.) 511. (In this exceedingly well-known case the court assumed that a numerical limit made an agency special which would have otherwise been general by any test. Query: Is this a non sequitur?)

Scherer v. Post Office Building and Loan Association, (1918) 91 N. J. L. 666, 103 Atl. 202. Here the numerical limit to the agent's authority was the fundamental reason for the court holding the agency to be special.

Sloan v. Brown, (1910) 228 Pa. St. 495, 77 Atl. 821, 139 Am. St. Rep. 1019. Here A appointed B his "*special agent*" to sell stock at a fixed price, viz., 50 cents a share. B sold at 10 cents a share to C. *Held*, C could not recover. Hicks v. Hardin, (1802) 4 Esp. 114.

<sup>28</sup>Young v. Mueller Bros. Art and Manufacturing Company, (1905) 124 Ill. App. 94; Jasper County Farms Company v. Holden, (1923) 79 Ind. App. 214, 137 N. E. 618; Blackstone Theatre Corporation v. Goldwyn Distributing Corporation, (1925) 86 Ind. App. 277, 146 N. E. 217; Palmer and Sons v. Cheney, (1872) 35 Ia. 281; Fishbaugh v. Spunaugle, (1902) 118 Ia. 337, 92 N. W. 58; Shaw v. Indio Cattle Co., (C.C.A. 5th Cir. 1930) 40 F. (2d) 835.

principal where the agent has exceeded his numerical limit and such limitation was known to the third party.<sup>29</sup>

3. *Solicitors*.—Additional evidence that a limitation of authority imposed on the agent may make the agency special is offered by the fact that solicitors, the authority of whom, as a class, is notoriously very limited, are regarded in the great majority of cases as special agents. A solicitor is a representative of the principal authorized to obtain and procure offers or orders, which the principal himself normally reserves the right to accept or reject.<sup>30</sup> It might be said that anyone can obtain an offer for another, but the important fact about solicitors is that they are employed to do this very thing.

A solicitor has many of the characteristics of a general agent, viz., he participates in the making of many contracts under one authorization, he usually has a definite territory, and is ordinarily the sole representative of his principal in that territory, and he represents his principal in all the negotiations and bargainings of a particular class or nature. Despite all these characteristics of general agency, the overwhelming majority of decisions hold a solicitor to be a special agent. The only fundamental reason that may be assigned for this holding is that *the solicitor is an agent of limited authority*.

Solicitors fall, for the most part, into two groups, soliciting agents for insurance companies<sup>31</sup> and traveling salesmen<sup>32</sup> or "drummers," as they are popularly called.

<sup>29</sup>Ker v. Lefferty, (1859) 7 Grant Ch. (U.C.) 412; Chapleo and Wife v. The Brunswick Permanent Building Society, (1881) 6 Q. B. D. 696, impliedly. Compare the dictum in Smith v. McGuire, (1858) 3 H. & N. 554, to the effect that a special agent who sells below a numerical limitation binds his principal. Also the dictum in Kampman v. Nicewarner, (1900) 60 Neb. 208, 82 N. W. 623, that a purchase at a judicial sale in excess of numerical limit of price set by the principal would not be set aside for that reason.

<sup>30</sup>It seems to be clear that a representative of a principal need not have the power to close a deal in order to be an agent, for one who merely obtains offers is engaged in "the contractual negotiations, bargainings or transactions involved in business dealings with third persons." Compare Restatement, sec. 3.

<sup>31</sup>In the following cases soliciting agents for insurance companies were held either expressly or by necessary implication to be special agents.

Southern States Fire Insurance Co. v. Kronenberg, (1917) 199 Ala. 164, 74 So. 63; Mutual Life Ins. Co. v. Reynolds, (1906) 81 Ark. 202, 98 S. W. 963; Iverson v. Metropolitan Life Ins. Co., (1907) 151 Cal. 746, 91 Pac. 609, 13 L. R. A. (N.S.) 866; Cayford v. Metropolitan Life Ins. Co., (1907) 5 Cal. App. 715, 91 Pac. 266; Kerlin v. The National Accident Ass'n, (1893) 8 Ind. App. 628, 35 N. E. 39, 36 N. E. 156; Bartholomew v. Merchants' Insurance Co., (1868) 25 Ia. 507, 96 Am. Dec. 65; Thompson v. Equitable Life Assurance Society of the United States, (1930) 199 N. C.

A few cases hold solicitors to be general agents,<sup>33</sup> because of special facts and circumstances involved, or, usually because the solicitor had, in fact, the power to close a deal, i.e., make an absolute, binding contract.<sup>34</sup>

59, 154 S. E. 21; *New York Life Ins. Co. v. Horton*, (C. C. A. 5th Cir. 1925) 9 F. (2d) 320.

<sup>32</sup>In the following cases traveling salesmen or local representatives to procure orders were held to be special agents. *Savage v. Pelton*, (1891) 1 Colo. App. 148, 27 Pac. 948 (no authority to sell samples). *Sioux City Nursery and Seed Co. v. Magnes*, (1894) 5 Colo. App. 172, 38 Pac. 330 (no authority to trade or barter); *Butler v. Marsh*, (1919) 66 Colo. 45, 178 Pac. 569 (no authority to settle or adjust a sale . . . "no case holds that one dealing with a special agent e.g., salesman, may presume that whatever such agent assumes to do is within his authority. *To so hold would abolish special agency*"); *Harris Loan Company v. Elliott and Hatch Book Typewriter Company*, (1899) 110 Ga. 302, 34 S. E. 1003 (no authority to pledge his samples); *Inman and Company v. Crawford and Maxwell* (1902) 116 Ga. 63, 42 S. E. 473 (no authority to make agreement not contained in written offer); *J. T. Richardson and Son v. Studebaker Corporation of America*, (1922) 29 Ga. App. 249, 114 S. E. 648 (no authority to vary the contract made by his principal); *Elder and McKinney v. Stuart*, (1892) 85 Ia. 690, 52 N. W. 660 (no authority to do any act rendering the business unprofitable for the principal); *Russell and Co. v. Cox*, (1897) 18 Ky. L. Rep. 1087, 38 S. W. 1087 (no authority to accept anything other than money); *Bensberg v. Harris*, (1891) 46 Mo. App. 404 (no authority to make absolute sales); *Howell, Jewett and Co. v. Graff, Murray and Co.*, (1888) 25 Neb. 130, (semble); *Hayes v. Colby*, (1889) 65 N. H. 192, 18 Atl. 251 (no authority to make an exchange); *The Metropolitan Aluminium Manufacturing Co. v. Law*, (1908) 61 Misc. Rep. 905, 112 N. Y. S. 1059 (no authority to vary the printed credit provisions of the order); *Shull v. New Birdsall Co.*, (1901) 15 S. D. 8, 86 N. W. 654 (no authority to accept payment before delivery); compare the following cases wherein it is difficult to ascertain whether the agency of the solicitor was general or special: *American Sales Book Co. v. Whitaker*, (1911) 100 Ark. 360, 140 S. W. 132 (no authority to modify or cancel an executed order); *Beebe and Co. v. The Equitable Mutual Life and Endowment Association*, (1888) 76 Ia. 129, 40 N. W. 122 (no authority to buy office furniture); *Peaslee Gaulbert Company v. Rogers*, (1927) 220 Ky. 338, 295 S. W. 137 (no authority to make an unusual agreement such as a "sale or return" contract); *City Ice Co. v. York Mfg. Co.*, (C.C.A. 5th Cir. 1919) 259 Fed. 465 (soliciting agent expressly given additional authority empowering him to accept the order he had obtained.)

<sup>33</sup>*Smith v. Droubay*, (1899) 20 Utah 443, 58 Pac. 1112. A, a wholesale house in Omaha, had one B as its salesman in the state of Utah. B was a solicitor, apparently, whose orders were subject to the approval or rejection of A. B took an order from C and orally agreed that the goods would be delivered in 12 days. The order did not reach C until five days later and it was not until very much later that A learned of B's alleged oral promise. A sues C for price of goods and C counterclaims for delay in delivery. *Held* (for C on his counter claim), that B was a general agent. . . Dissenting opinion: B was a mere solicitor, a special agent. *The case is wrong.*

<sup>34</sup>*D. H. Baldwin and Co. v. Tucker*, (1901) 112 Kv. 282, 65 S. W. 841, 57 L. R. A. 451 (agent to sell pianos); *Baker v. Chicago Great Western Ry. Co.*, (1903) 91 Minn. 118, 97 N. W. 650 (railroad freight soliciting agent); *Kissell v. Pittsburg, Fort Wayne and Chicago Railway Co.*, (1916) 194 Mo. App. 346, 188 S. W. 1118 (railroad traveling fast freight solicitor. He "was not sent out to solicit a particular shipment, but he was sent to

4. *Limitations of authority implied in agencies created by power of attorney.*—A rather old and perhaps now somewhat outgrown idea of special agency is that an authority created by a power of attorney was necessarily special,<sup>35</sup> involving, as it did, a certain amount of restriction arising from the fact that only those matters enumerated in the power could be done by the agent, this result following from the well-known rule that the enumeration of specifics excludes generals. Other cases have shown that an agency created by power of attorney may be either special or general (and perhaps even universal) depending upon the scope and nature of the authority granted.<sup>36</sup>

A recrudescence of the idea that authority conferred by a power of attorney is necessarily special is to be found in the analogous rule, prevailing in only a few states, that an authority

obtain freight contracts from whomever he could. He was, therefore, a *general agent* as to that branch of the defendant's business"; *Porter v. Heath*, (1884) 2 Willson Civ. Cas. (Tex.) No. 124; *Keith v. Herschberg Optical Co.*, (1889) 48 Ark. 138.

<sup>35</sup>*Johnson v. Ala. Gas. Fuel and Mfg. Co.* (1889) 90 Ala. 505, 8 So. 101; *Davis v. Trachsley*, (1906) 3 Cal. App. 554, 86 Pac. 610 (a general agency under the Restatement definitions but held to be special); *Quay v. Presidio and Ferries R. R. Co.*, (1889) 82 Cal. 1, 22 Pac. 925. *Billings v. Morrow*, (1857) 7 Cal. 171, 68 Am. Dec. 235. A power of attorney gave the agent authority (1) "to superintend my real and personal estate, (2) to make contracts, (3) to settle outstanding debts, (4) and generally to do all things that concern my interest in any way. . . . Held that the power was limited and special, and gave no authority to sell real estate."

*Rossiter v. Rossiter*, (1832) 8 Wend. (N.Y.) 494, 24 Am. Dec. 62; *MacDonald v. O'Neil*, (1902) 21 Pa. Super Ct. 364 (two acts, each probably mutually exclusive of the other); *Morrill v. Cone*, (1859) 22 How. (U.S.) 75, 16 L. Ed. 253; *Owings v. Hull*, (1835) 9 Pet. (U.S.) 607, 9 L. Ed. 246 (a decision by Mr. Justice Storey).

<sup>36</sup>*Dearing v. Lightfoot*, (1849) 16 Ala. 28 (A written power to an agent in charge of a plantation to "act for him in all cases whatsoever and to do all which he might himself do", coupled with later verbal instructions to settle up or discharge all demands against the family before he (the agent) left and, acting under the power of attorney, to do all that might be necessary, did not authorize the agent to sell slaves); *Slaughter and Baker v. Fay*, (1899) 80 Ill. App. 105. Query: To what extent may a third party who is unaware of a power of attorney at the time he deals with the agent avail himself of this limitation in an action against the principal? Is not the power of attorney primarily intended for the protection of the principal?

*Young v. Mueller Bros. Art and Mfg. Co.*, (1905) 124 Ill. App. 94 (a Lloyds' insurance group case); *Wilcox v. Routh*, (1848) 17 Miss. 476; *The Mechanics' Bank v. Schaumburg and Mills*, (1866) 38 Mo. 228 (The "parol evidence rule" applies to powers of attorney generally); *Muth v. Goodard*, (1903) 28 Mont. 237, 72 Pac. 621, 98 Am. St. Rep. 553 (an "unrestricted general power"); *Matter of Milstein v. Mosher*, (1908) 126 App. Div. 515, 110 N. Y. S. 568 (A general agent appointed by power of attorney is restricted to objects germane to the power); *Bukva v. Matthews and Tuttle*, (1927) 149 Va. 500, 140 S. E. 674; *Auwarter v. Kroll*, (1914) 79 Wash. 179, 140 Pac. 326 (no duty on the third party to inquire further than the face of the power. He did not act at his peril).



created in writing is a special one.<sup>37</sup> It is rather difficult to understand the basis of a rule such as this, and it is suggested that it is due more to a local and temporary aberration from the norm of the judicial process than from any underlying reason of importance or stability.

5. *Other limitations of authority.*—The relatively early case of *Fenn v. Harrison*<sup>38</sup> appears to have given rise to the distinction which persisted for a time between special agents of limited authority and special agents of unlimited authority.<sup>39</sup>

The distinction, however, was an artificial one and now no longer crops up in the decisions. One may still be a special agent although all the details are left to him and he is clothed with great discretion.<sup>40</sup>

<sup>37</sup>*Norton v. Nevills*, (1899) 174 Mass. 243, 54 N. E. 537.

<sup>38</sup>(1790) 3 Durn. & E. 757. "Where the holder of a bill of exchange desired A to get it discounted, but positively refused to indorse it, and A delivered it to B for the same purpose, informing him to whom it belonged, and B, finding that he could not dispose of it without indorsing it, was prevailed upon to do so by A's telling him that he would indemnify him: but the indorsee took it upon the credit of the names on the bill without any knowledge of the real owner; although such original holder afterwards promised to pay the bill, yet such promise cannot support an action brought against him by the indorsee, it being nudum pactum; for as A was a special agent under a limited authority, he could not bind his principal by any act beyond the scope of such limited authority."

<sup>39</sup>*Scott v. McGrath*, (1849) 7 Barb (N.Y.) 53.

(1) A employed B as the agent of his stage-line at X which was interpreted by the court to mean that B was an agent; general, probably, to receive daily fare, look after passengers, etc.

(2) A specifically authorized B to sell Bucephalus or exchange him for another horse suitable for staging. B traded the horse for two ponies unfit for staging, giving \$22.50 "boot" besides.

(3) C, the third party, now claims that B warranted the trusty charger and sues A for breach of warranty. Held, that as to trafficking in horses B was a special agent (specific act). If B had sold the horse, he could have warranted it (his *special agency* being unlimited), but when he exchanged it as he did, he exceeded his authority, his agency to exchange being limited. It follows that the exchange itself was void. Hence the collateral contract of warranty must also fall. Compare: *Layet v. Gano*, (1848) 17 Oh. 466.

(1) A et al. granted a power of attorney to B to collect the amount secured upon a steamboat plying the Ohio and Mississippi, by a mortgage, A, etc. being mortgagees. The power authorized B to sue, settle or secure the claim and specifically authorized the employment of an attorney.

(2) B executed a promissory note in the name of A for professional services rendered by attorneys employed by him by virtue of the power.

(3) A resists payment of the note.

Held, (against A) that B was authorized to execute the note. Query: Was B a general or special agent? The court says that the power in question is limited to a particular transaction, but general as to the means of performance.

<sup>40</sup>*Manhattan Life Ins. Co. v. First National Bank of Denver*, (1905) 20 Colo. App. 529, 80 Pac. 467.

May a prohibition against dealing with one individual make an agency special? It is difficult to answer the above question, for there is no authority in point. The idea is suggested by the answer in a mid-western case.<sup>41</sup> True enough there is a limitation, but the class of individuals left for the agent to deal with is still so large that the limitation is virtually negligible. Perhaps there is an analogy to a condition in restraint of marriage.<sup>42</sup>

#### (D) Manual or Mechanical Agents

There is a class of agents, so-called, who may almost be regarded as servants. They do not act upon things, however, but deal in a limited way with persons, and, inasmuch as they are instrumentalities in bringing about a contract, they must be regarded as agents. Their agency is invariably special.<sup>43</sup> In this group should be placed messengers.<sup>44</sup>

## II

### LEGAL CONSEQUENCES FLOWING FROM SPECIAL AGENCY

The idea of *restriction* in some form or other is invariably involved in special agency, and appears to be its most fundamental canon. This restriction may take many forms. It may be applied to the number of acts the agent may do, to the number of persons he may deal with, to the amount he may receive or pay over, to the conditions under which he may act, to the manner of his performance, to the quality of the article to be bought, sold, or bartered, etc., ad infinitum. The application of the idea thus

<sup>41</sup>Howell, Jewett and Co. v. Graff, Murray and Co., (1888) 25 Neb. 130, 41 N. W. 142. Compare, Rogers v. Smith, (1919) 24 Ga. App. 458, 101 S. E. 193.

<sup>42</sup>Compare Graydon's Executors v. Graydon, (1872) 23 N. J. Eq. 229.

<sup>43</sup>Florence Auto Co. v. McBeth, (1924) 75 Colo. 355, 225 Pac. 816 (mechanic attempting to sell automobile to his uncle. No agency relationship involved apparently). Moore v. Tickle, (1831) 14 N. C. 244 (groom cutting price for the service of a stallion below that advertised by his employer, the owner). Gross v. State Industrial Commission, (1926) 117 Okla. 33, 245 Pac. 580 (telephone operator held to have no authority to select a surgeon for an injured employee). Trammell v. Turner, (Tex. 1904) 82 S. W. 325 (hired man tending to a large number of steers in a feed pen. A trace of general agency present).

<sup>44</sup>Schenck v. Griffith, (1905) 74 Ark. 557, 86 S. W. 850 (boy sent to get horse purchased by his father); Camp v. The Southern Banking Trust Company, (1895) 97 Ga. 582, 25 S. E. 362 (messenger sent to present a draft); Kingan and Company, Limited v. Silvers, (1895) 13 Ind. App. 80, 37 N. E. 413 (traveling salesman authorized to procure a note held to be a messenger only, i.e. a servant, on his homeward journey to his principal. The fallacy of this reasoning would appear to lie in the fact that an agent should not cease to be such the moment his dealing with the third party is over for the time being); Snow v. Perry, (1830) 9 Pick. (Mass.) 539 (debtor sends a boy to the holder of a note to make a payment thereon).

varies, but the fact of restriction, as appertaining to special agencies, remains. It is fundamental.<sup>45</sup> We cannot escape it. Bearing this fact always in mind, we find certain consequences.

(A) THIRD PARTIES DEAL WITH THE SPECIAL AGENT AT THEIR PERIL.

Is it more dangerous to deal with a special agent than with a general one? The rules laid down by the courts say most emphatically that such is the case.<sup>46</sup>

It is clear that anyone who deals with a special agent does so at his own risk<sup>47</sup> and cannot recover in a court of law if it later

<sup>45</sup>Compare statements and holdings in: *Southern States Fire Ins. Co. v. Kronenberg*, (1917) 199 Ala. 164, 74 So. 63, *Cooper v. Cooper*, (1921) 206 Ala. 519, 91 So. 82; *In re Senate Bill*, (1888) 12 Colo. 188, 192, 21 Pac. 48; *Dudley v. Perkins*, (1923) 235 N. Y. 448, 455, 139 N. E. 570; "Large incidental powers flow from a general agency, but a narrow limit of incidental authority attaches to a special agency."

<sup>46</sup>*Payne v. Potter*, (1859) 9 Ia. 549. "The rule of law is that no man is bound by the act of another, without or beyond his consent; and where an agent acts under a special or express authority, whether written or verbal, the party dealing with him is bound to know at his peril what the power of the agent is, and to understand its legal effect; and if the agent exceed the boundary of his legal power, the act, as concerns the principal, is void. *Delafield v. State of Illinois*, (1841) 26 Wend. (N.Y.) 192; *Story, Agency*, section 165. The power must be pursued with legal strictness, and the agent can neither go beyond nor beside it. The act must be legally identical with that authorized to be done, or the principal is not bound."

*Martin v. Farnsworth*, (1872) 49 N. Y. 555. "In the case of a special agency the principal is not bound by the acts of the agent beyond the limits of the authority conferred. The authority must be strictly pursued; and it is the duty of a party dealing with a special agent to ascertain and know the extent of his powers. If he omits to do so, it is at his peril, and he takes the risk of the authority. He is held chargeable with notice of the extent of the agent's authority as it exists in fact."

*Michael v. Eley*, (1891) 61 Hun (N.Y.) 180, 15 N. Y. S. 890. "They knew, therefore, that the authority of the agents was special, and that the writing which conferred it specified none of the terms of sale beyond the price per acre of the land, and, therefore, that if the agents had authority to agree upon any further terms of sale, such authority must have been conferred by special instructions received by them from the defendant, and they were bound to inquire whether such instructions corresponded with the terms of the contract which the agents assumed to make with them."

*White v. Langdon*, (1852) 30 Vt. 599. "It was a special and limited authority which he thus gave McLeran. McLeran was bound to pursue it strictly. It is sufficient, in this connection, to state the principle of the law, that whoever deals with one, having only a special and limited authority, is bound at his peril to know the extent of the authority. If the agent exceeds it, the principal is not bound, and the contract, as to him, is void."

*Biggs v. Insurance Company*, (1883) 88 N. C. 141. "When one deals with an agent, it behooves him to ascertain correctly the extent of his authority and power to contract. Under any other rule, every principal would be at the mercy of his agent, however carefully he might limit his authority." (The facts of the case restrict the language to special agency.)

<sup>47</sup>*Baldwin Fertilizer Company v. Thompson and McAlister*, (1898) 106 Ga. 480, 32 S. E. 591.

turns out that the agent with whom he dealt lacked the authority which the third party thought he possessed,<sup>48</sup> such third party not having inquired of the principal, but relied on the statement of the special agent.

And it is almost universally held that the third party is under a duty to inquire, not from the agent himself, but from the principal, as to the extent of the agent's authority and, if he does not so inquire, he is bound, nevertheless, by what he might have learned had he sought information in the proper manner.<sup>49</sup>

In the opinion of many courts and writers a third party deals with *any* agent at his peril, whether general or special. A number of cases are in the books so holding.<sup>50</sup> This idea is closely con-

<sup>48</sup>*Witcher v. Brewer*, (1873) 49 Ala. 119; *Quay v. Presidio and Ferries R. R. Co.*, (1889) 82 Cal. 1, 22 Pac. 925; *Davis v. Trachsley*, (1906) 3 Cal. App. 554, 86 Pac. 610; *Florence Auto Co. v. McBeth*, (1924) 75 Colo. 355, 225 Pac. 816; *Inman and Company v. Crawford and Maxwell*, (1902) 116 Ga. 63, 42 S. E. 473; *Peabody v. Hoard*, (1867) 46 Ill. 242; *Abrahams v. Weiller*, (1877) 87 Ill. 179; *Murray v. The Standard Pecan Company*, (1923) 309 Ill. 226, 140 N. E. 834, 31 A. L. R. 604; *Rich v. Johnson*, (1878) 61 Ind. 246; *Roberts v. Rumley*, (1882) 58 Ia. 301, 12 N. W. 323; *McIntosh and Cathro v. Penney*, (1920) 190 Ia. 194, 180 N. W. 177; *Dowden v. Cryder*, (1893) 55 N. J. L. 329, 26 Atl. 941; *Cooley v. Perrine*, (1879) 41 N. J. L. 322, 32 Am. Rep. 210; *Lockwood v. Embalmers' Supply Co.*, (1931) 233 App. Div. 189, 251 N. Y. S. 321 (field manager without power to close contracts of employment termed a special agent); *Sloan v. Brown*, (1910) 228 Pa. St. 495, 77 Atl. 821, 139 Am. St. Rep. 1019; *Stewart v. Woodward*, (1877) 50 Vt. 78, 28 Am. Rep. 488; compare: *Bryant v. Moore*, (1846) 26 Me. 84, 45 Am. Dec. 96 (a peculiar local rule now no longer existing); *Buchanan v. Caine*, (1914) 57 Ind. App. 274, 106 N. E. 885 (an erroneous limitation placed upon the rule).

<sup>49</sup>See cases, note 32, *supra*. Compare: *Dickinson County v. The Mississippi Valley Insurance Company*, (1875) 41 Ia. 286; *Reinforced Concrete Pipe Co. v. Boyes*, (1914) 180 Mich. 609, 147 N. W. 577; *Ordway Building and Loan Association v. Moeck*, (1930) 106 N. J. Eq. 425, 151 Atl. 126; *West End Hotel and Land Co. v. Crawford*, (1897) 120 N. C. 347, 27 S. E. 31.

<sup>50</sup>*American Southern Trust Co. v. McKee*, (1927) 173 Ark. 147, 293 S. W. 50. "It is a well established principle of law that one dealing with an agent without inquiring of the principal of his authority does so at his peril." *Blackmer v. The Summit Coal and Mining Co.*, (1900) 187 Ill. 32, 58 N. E. 289. "A person dealing with an agent does so at his peril, and when the agent's authority is in writing is bound to take notice of the terms thereof." *Metzger v. Huntington, Trustee*, (1894) 139 Ind. 501, 37 N. E. 1084, rehearing denied, 39 N. E. 235. *Contra*, *Gaar, Scott and Company v. Rose*, (1891) 3 Ind. App. 269, 29 N. E. 616; *Kerlin v. The National Accident Ass'n*, (1893) 8 Ind. App. 628, 35 N. E. 39, 36 N. E. 156 (holding that it is the duty of the principal to bring to the knowledge of the third party any limitations upon the power of the agent. The court was talking about insurance agents, but there is no difference between them and any other class of agents. The statement is erroneous with respect to special agents.) *Godshaw v. J. N. Struck and Bros.*, (1900) 109 Ky. 285, 58 S. W. 781, 51 L. R. A. 668; *The Thomas Gibson Company v. Carlisle*, (1895) 3 Oh. S. and C. P. 27, 1 Oh. N. P. 398; *Brager v. Levy and Markowitz*, (1914) 122 Md. 554, 90 Atl. 102

nected with the rule sometimes laid down that the burden of proof is on the third party who endeavors to charge the principal on a contract made by his agent.<sup>51</sup> Some risk is involved in dealing with a general agent, if the third party does not first inquire of the principal as to the extent of authority conferred, but it is an almost negligible risk, of relatively little importance in the complexity of modern human affairs.<sup>52</sup> It is submitted that this rule should *not* be applied to general agents.

If the principal sends his special agent out into the world clothed with a written charter of authority, the third party need inquire no further and is safe in his reliance on the charter shown to him for his inspection.<sup>53</sup>

Also, if the principal holds out the special agent to the third party as having unlimited authority or discretion in the premises, the third party may naturally take the principal at his word and need inquire no further.<sup>54</sup> In such case it may well be that the special agent is clothed with apparent authority.

Now and then, cases hold that the rule under discussion applies with particular severity where the authority of the agent is in writing.<sup>55</sup> This doctrine is meaningless unless the fact of the writ-

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(half-heartedly); *The President, Directors and Co. of the Mechanics' Bank v. The New York and New Haven Railroad Co.*, (1856) 13 N. Y. 599; "Whoever proposes to deal with a security of any kind appearing on its face to be given by one man for another, is bound to inquire whether it has been given by due authority, and if he omits that inquiry, he deals at his peril," *The Farmers' and Mechanics' Bank of Kent County, Maryland v. The Butchers' and Drovers' Bank*, (1857) 16 N. Y. 125, 69 Am. Dec. 678; *Interstate Securities Co. v. Third National Bank*, (1911) 231 Pa. St. 422, 80 Atl. 888.

<sup>51</sup>*Pole v. Leask*, (1863) 33 L. J. Ch. (N.S.) 155; *Gulick and Holmes v. Grover*, (1868) 33 N. J. L. 463, 97 Am. Dec. 728; *Gates Iron Works v. Denver Eng. Works Co.*, (1901) 17 Colo. App. 15, 67 Pac. 173; *Johnson v. Lennox*, (1913) 55 Colo. 125, 133 Pac. 744; *Jefferson v. Chase*, (1856) 1 Houston (Del.) 219.

<sup>52</sup>See the discussion, *infra*, this article.

<sup>53</sup>*Brown v. Frontum*, (1833) 6 La. 39; *Lister and Supplee v. Allen*, (1869) 31 Md. 543; *Auwarter v. Kroll*, (1914) 79 Wash. 179, 140 Pac. 326 (a case of general agency, however); *Bass Dry Goods Co. v. Granite City Mfg. Co.*, (1903) 119 Ga. 124, 145 S. E. 980; *Williams v. Mitchell*, (1821) 17 Mass. 98 (although one dealing with an agent is not bound to look behind the written authority, yet, if the paper proves to be a forgery, he can establish the facts to be as stated therein, although he relied solely on the paper, by evidence aliunde thereto); *Michael v. Eley*, (1891) 61 Hun (N.Y.) 180, 15 N. Y. S. 890 (if the written authority given to the agent does not cover the whole field of the contract to be entered into, essentially, then the third party must look beyond the written authority and make sure that the agent is complying with his oral instructions).

<sup>54</sup>*Sorrel v. Brewster*, (1850) 1 Mich. 373; *Kincaly v. Burd*, (1880) 9 Mo. App. 359.

<sup>55</sup>*Schaeffer v. Mutual Benefit Life Insurance Co.*, (1909) 38 Mont. 459, 100 Pac. 225; *The National Union Fire Insurance Co. v. The John*

ing be known to the third party,<sup>56</sup> for we have already seen that the rule applies to all special agencies in any event.

Where a third party is put on notice that the agent is acting for his own benefit or that of someone other than his principal, the rule invariably applies, irrespective of whether the agency be general or special.<sup>57</sup>

The very unusual nature of the contract entered into by a general agent may also invoke the application of the rule.<sup>58</sup>

In *Atwood v. Munnings*<sup>59</sup> an agent accepted a bill "per pro-curation." The court said:

"This was an action upon an acceptance importing to be by pro-curation, and, therefore, any person taking the bill would know that he had not the security of the acceptor's signature, but of the party professing to act in pursuance of an authority from him. A person taking such a bill ought to exercise due caution, for he must take it upon the credit of the party who assumes the authority to accept, and it would be only reasonable prudence to require the production of that authority. . . The word pro-curation gave due notice to the plaintiffs, and they were bound to ascertain, before they took the bill, that the acceptance was agreeable to the authority given. . . It is said that third persons are not bound to inquire into the making of a bill; but that is not so where the acceptance appears to be by pro-curation. The question then turns upon the authority given."

A similar doctrine was laid down in a Canadian decision.<sup>60</sup>

The rule of *Atwood v. Munnings* was considerably limited by *Smith v. McGuire*,<sup>61</sup> wherein it was held that the doctrine did not apply to general agents. We must take it to be settled law, there-

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*Spry Lumber Company*, (1908) 235 Ill. 98, 85 N. E. 256; *Winkel v. Atlas Lumber Company*, (1917) 36 N. D. 542, 162 N. W. 364; *Finch v. Causey*, (1907) 107 Va. 124, 57 S. E. 562; *The Virginian Railway Co. v. Stoke*, (1922) 134 Va. 186, 113 S. E. 704.

<sup>56</sup>If the limitation upon the authority of the agent be known to the third party with whom he deals, no problem is presented. Such notice is often conveyed by a recital of the authority in the contract or other instrument entered into. See the following cases:

*Chauche v. Pare*, (C. C. A. 9th Cir. 1896) 75 Fed. 283; *The National Union Fire Insurance Co. v. The John Spry Lumber Co.*, (1908) 235 Ill. 98, 85 N. E. 256; *Johnson v. Alabama Gas, Fuel and Mfg. Co.*, (1889) 90 Ala. 505, 8 So. 101; *Forman and Co. Proprietary, Ltd. v. The Ship Liddesdale*, [1900] A. C. 190, 69 L. J. P. C. 44, 82 L. T. 331.

<sup>57</sup>*Gerard v. McCormick*, (1891) 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234; *State National Bank of St. Joseph, Mo. v. Newton National Bank*, (C.C.A. 8th Cir. 1895) 66 Fed. 691; *Wickham, Assignee v. Morehouse*, (C.C.Pa. 1883) 16 Fed. 324. Analogously, *Chrystie v. Foster*, (C.C.A. 2nd Cir. 1894) 61 Fed. 551.

<sup>58</sup>*Edwards v. Heralds of Liberty*, (1919) 263 Pa. St. 548, 107 A. 324.

<sup>59</sup>(1827) 7 Barn. & Cress. 278.

<sup>60</sup>*Taylor v. Wallbridge*, (1879) 2 Can. S. C. 616, 677-680.

<sup>61</sup>(1858) 3 H. & N. 554.

fore, that the words, "*Per Proc.*," do not, in and of themselves, put a third party on his peril except where the agency is special or where the rule of *Atwood v. Munnings* has been codified, as under the Negotiable Instruments Law.<sup>62</sup>

The converse of the proposition now being explicated is that there is no duty on the part of the principal to caution or warn the third party that the authority of the special agent is limited.

This rule would seem to follow, necessarily, from the fact that the duty of inquiry is placed squarely on the third party. There are not many cases on the point.<sup>63</sup>

(B) The Special Agent Must Strictly Pursue His Authority.

Some quotations have already been set out tending to establish the proposition of the heading.<sup>64</sup>

The legal requirement is that *the special agent make the identical contract authorized by the principal, no more, no less.*<sup>65</sup> He

<sup>62</sup>"Signature by procuracy; effect.—A signature by procuracy operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority." (Section 21.)

<sup>63</sup>Compare: *Halladay v. Underwood*, (1900) 90 Ill. App. 130 (general agency); *Atlantic Trust Co. v. Subscribers to Automobile Insurance Exchange*, (1926) 150 Md. 470, 133 Atl. 319 (a principal is under no duty to strangers to keep a watch over his agent's transactions in order to prevent unauthorized endorsements, or misappropriations); *White v. Langdon*, (1858) 30 Vt. 599 ("The defendant claims that the plaintiff, by such omission to give notice and make claim, has thereby ratified the sale of McLeran. We think not. It would be reversing the rule of law. It is the duty of one trading with an agent who has only a limited and special authority, to make inquiry as to the extent of the agent's authority; if he omits inquiry, he does so at his peril. It is not the duty of the principal, upon hearing of the sale by the agent, to seek the purchaser and give him notice of his claim, and his omission to do so, and his mere silence, are not ordinarily to be construed as a ratification of the sale"); *White v. Langdon* was followed on this point in *Ferguson v. Phoenix Mutual Life Insurance Company*, (1911) 84 Vt. 350, 79 Atl. 997, 35 L. R. A. (N.S.) 844.

<sup>64</sup>See note 46. *supra*. Also *Savage v. Rix*, (1838) 9 N. H. 263 "The authority of a special agent, appointed to do a particular act, must be limited to the act set forth and designated in the instrument, or act by which he is appointed, and to such acts as are necessary to the performance of that act."

<sup>65</sup>*Mayor and Aldermen of Little Rock v. State Bank*, (1847) 8 Ark. 227 (authority to execute a note gives no authority to execute a bond); *Bryan v. Berry*, (1856) 6 Cal. 394 (authority to sign the name as surety on a note gives no authority to sign the name as joint and several maker); *Phoenix Insurance Co. v. Gray*, (1899) 107 Ga. 110, 32 S. E. 948; *Mouson v. Jacques*, (1892) 44 Ill. App. 306; *Gregg v. Wooliscroft and Co.*, (1893) 52 Ill. App. 214; *Bagot v. The State ex rel. Dennison*, (1870) 33 Ind. 262; *Thomas v. Atkinson*, (1871) 38 Ind. 248 (authority to buy for cash only prevents a purchase on credit); *Davis v. Talbot, Receiver*, (1893) 137 Ind. 235, 36 N. E. 1098; *Taylor v. White*, (1876) 44 Ia. 295; *Mitchell's and Davis' Administrators v. Sproul*, (1831) 5 J. J. Marsh. (Ky.) 264. Compare peculiar rule laid down in *Bryant v. Moore*, (1846) 26 Me. 84, 45 Am.

cannot vary one iota from the authority given him.<sup>66</sup> Substantial performance is not sufficient.<sup>67</sup>

It frequently happens that the loyal agent, out of excess of zeal and acting from the most laudable motives, will "use his own head" and will exercise what he regards as a sound discretion in carrying out the orders of his principal. If principals were all "good sports," they would probably "back up" their faithful servants in these well motivated acts, but principals are practical, hard-headed business men and when they find that the well-intentioned acts of their agents, amounting in effect to a deviation from the authority given, have gotten them into difficulty, they "renig" and we are faced with the problem of whether or not the agent's

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Dec. 96. But this state apparently returned to normalcy in *Johnson v. Wingate*, (1849) 29 Me. 404; *Stollenwerck v. Thacher*, (1874) 115 Mass. 224; *Trudo v. Anderson*, (1862) 10 Mich. 357, 81 Am. Dec. 795; compare, *Saginaw, Tuscola, and Huron R. R. Co. v. Chappell*, (1885) 56 Mich. 190, 22 N. W. 278 (pursuit rule may not apply to special agency where *the negligence of the principal has enabled the agent to perpetrate a fraud thereby*); *Norfolk National Bank v. Nenow*, (1897) 50 Neb. 429, 69 N. W. 936; *Driscoll v. Modern Brotherhood of America*, (1906) 77 Neb. 282, 109 N. W. 158; *Winkel v. Atlas Lumber Co.*, (1917) 36 N. D. 542, 162 N. W. 364 (written authority); *Olyphant v. McNair*, (1864) 41 Barb. (N. Y.) 446; *Nester v. Craig*, (1893) 69 Hun (N.Y.) 543, 23 N. Y. S. 948; *Matter of Bauer*, (1902) 68 App. Div. 212, 74 N. Y. S. 155; *Reis v. The Drug and Chemical Club*, (1907) 55 Misc. Rep. 276, 105 N. Y. S. 285 ("One man . . . cannot be charged because another holds a commission from him and falsely asserts that his acts are within it.") *Snow v. Wathen*, (1908) 127 App. Div. 948, 112 N. Y. S. 41 (The risk of the *special agent* not carrying out his employment at all, as, for example, the delivery of money, is, of course, upon his principal); *United States Bank v. Herron*, (1914) 73 Or. 391, 144 Pac. 661, L. R. A. 1916C 125 (the case appears to be wrong); *Reaney v. Culbertson*, (1853) 21 Pa. St. 507; *Baring v. Pierce*, (1843) 5 Watts & S. (Pa.) 548, 40 Am. Dec. 534; *Mercier v. Lachenmeyer*, (C.C. Pa. 1871) 1 Leg. Gaz. R. 279. Fed. Cas. No. 9455. *Cleveland v. Pearl and Co.*, (1890) 63 Vt. 127, 21 Atl. 261, 25 Am. St. Rep. 748 (the result reached appears to be unjust); *Cannon v. Long*, (1925) 135 Wash. 52, 236 Pac. 788; *Storr, Son and Co., Ltd. v. Royal Electric Co.*, (1900) 33 Nova Scotia 156. Compare, *Morrill v. Cone*, (1859) 22 How. (U.S.) 75, 10 L. Ed. 253 (Query: Is a *departure a legal gap* or merely an equitable breach, not good against bona fide purchasers?); *Haskins v. City of Orlando, Fla.*, (C.C.A. 5th Cir. 1931) 51 F. (2d) 901; *Jordan v. Norton*, (1838) 4 M. & W. 155.

<sup>66</sup>*Rhode v. Gallot*, (1915) 70 Fla. 536, 70 So. 471; *Larned v. Wentworth*, (1901) 114 Ga. 208, 39 S. E. 855; *Sieckmann v. Stanton*, (1928) 251 Ill. App. 442; *Interstate Securities Co. v. Third National Bank*, (1911) 231 Pa. St. 422, 80 Atl. 888 (at least four separate and distinct acts of deviation).

<sup>67</sup>Compare: *Rogers v. Smith*, (1919) 24 Ga. App. 458, 101 S. E. 193 (*A prohibition on an agent's buying from a named person is not binding on, and does not relieve the principal from liability even though the agency is special. The variation is not a material one.*) *De Hart v. Wilson*, (1828) 6 T. B. Mon. (Ry.) 577 (holding that the authority in question was a particular one and had to be "at least, substantially pursued"). *The mayor and City Council of Baltimore v. H. R. and J. Reynolds*, (1862) 20 Md. 1.



good motives will serve to keep the act within the path of "strict pursuit." The answer is, that it will not so serve.<sup>68</sup>

Just as a good motive will not avail against the doctrine of strict pursuit, so also the fact of greater benefit to the principal is immaterial.<sup>69</sup>

The rule applies with particular severity to real estate agents,<sup>70</sup> and to depositaries of escrows<sup>71</sup> who, it might be said in passing, are almost always special agents. It applies to the time<sup>72</sup> of per-

<sup>68</sup>Thompson v. Stewart, (1819) 3 Conn. 171, 8 Am. Dec. 168; Reitz v. Martin, (1859) 12 Ind. 306, 74 Am. Dec. 215 (a case of spurious agency); Bleecker v. Satsop Railroad Co., (1891) 3 Wash. 77, 27 Pac. 1073; Allen v. Ogden, (C.C. Pa. 1804) 1 Wash. C. C. 174, Fed. Cas. No. 233.

<sup>69</sup>Baxter v. Lamont, (1871) 60 Ill. 237; Wanless v. McCandless, (1873) 38 Ia. 20; Everman v. Herndon, (1894) 71 Miss. 823, 15 So. 135; Daniel v. Adams, (1764), Ambler 495; Blackmer v. The Summit Coal and Mining Co., (1900) 187 Ill. 32, 58 N. E. 289 (general agency). Compare Elder and McKinney v. Stuart, (1892) 85 Ia. 690, 52 N. W. 660 (There is probably a presumption that any act on the part of at least a *special* agent, rendering the business unprofitable for the principal, is beyond the scope of his authority). Cf. Simonds v. Clapp, (1844) 16 N. H. 222. (1) A had a prisoner in his custody who escaped. A offered a reward and employed B to offer it to such person as *should give information which might lead to the arrest of the prisoner*. (2) C sued for the reward and set out in his declaration that the offer ran to any one *who would arrest the prisoner*. (3) A pleaded the variance between the authority given B and the offer advertised by him. But held, (for C) that a greater benefit derived by the principal from the act of his special agent will not vitiate the agent's act.

<sup>70</sup>Yates and P. and A. R. R. Co. v. Yates, (1888) 24 Fla. 64, 3 So. 821; Everman v. Herndon, (1894) 71 Miss. 823, 15 So. 135; Monson v. Kill, (1893) 144 Ill. 248, 33 N. E. 43; Monson v. Jacques, (1892) 44 Ill. App. 306; Taylor v. White, (1876) 44 Ia. 295; Siebold v. Davis, (1885) 67 Ia. 560, 25 N. W. 778; Devinney v. Reynolds, (1841) 1 Watt & S. (Pa.) 328; Godfrey v. Schneck, (1900) 105 Wis. 568, 81 N. W. 656; Davis v. Gordon, (1891) 87 Va. 559, 13 S. E. 35.

<sup>71</sup>Chicago and Great Western Railroad Land Co. v. Peck, (1885) 112 Ill. 408, 447 ("It is said that Mr. Jewett was the agent of Gookins, and that the latter should be bound by the acts of the former as his agent. The depositary of an escrow is a special and not a general agent, and the person dealing with him is bound to know the extent of his powers. . . It is a settled doctrine that the delivery of an escrow by the depositary to the grantee named therein without a compliance with the condition is not a delivery with the assent of the grantor and conveys no title, and that the authority of the *depositary* of an escrow is limited strictly to conditions of the deposit, a compliance with which alone justifies the delivery."); Berry v. Anderson, (1864) 22 Ind. 36; United States v. Payette Lumber and Mfg. Co., (D.C. Idaho 1912) 198 Fed. 881 (holding that delivery by the depositary contrary to the instructions of his principal to his agent did not bind the principal, even in favor of subsequent purchasers without notice). Affirmed by C. C. A. sub. nom. Corban v. Conklin (C.C.A. 9th Cir. 1913) 208 Fed. 231 on this very ground.

<sup>72</sup>Longworth v. Conwell, (1831) 2 Blackf. (Ind.) 469; Lovett, Hart and Phipps Co. v. Sullivan, (1905) 189 Mass. 535, 75 N. E. 738; Tate and Hopkins v. Evans, (1842) 7 Mo. 419; Batty v. Carswell, (1806) 2 Johns. (N.Y.) 48; Green v. Priddy, (1923) 112 Tex. 567, 250 S. W. 656; Mann v. Dublin Cotton Oil Co., (1898) 92 Tex. 377, 48 S. W. 567; Compare, Bowles v. Rice, (1907) 107 Va. 51, 57 S. E. 575.

formance, the place of performance,<sup>73</sup> the quantity or amount<sup>74</sup> of performance and the capacity in which the agent acts.<sup>75</sup> The agent becomes answerable to his principal for any damage caused by the act of the former in exceeding his authority.<sup>76</sup>

The rule has been relaxed *ex necessitate*, so far as regards common carriers, and this whether they be principals or third parties.<sup>77</sup>

An early South Carolina case<sup>78</sup> applies the doctrine of "strict pursuit" to agency generally. (Query: was this the original idea on the matter?)

*May the Act of the Agent in Violation of the Requirement of "Strict Pursuit" be Held Good in Part and Bad Only as to the Excess of Authority?*

The foregoing question presents a problem of some nicety and difficulty. The classification suggested by the decisions is a division of the cases into those in which (1) the excess of authority is separable from the authorized act, and (2) those cases in which the excess cannot be so separated from the authorized act.

There are a number of decisions in which an agent with authority to execute a deed inserted in such deed unauthorized covenants of warranty. In this line of cases<sup>79</sup> it is held that the warranty is separable from the rest of the deed and that, therefore, only the warranty will be held invalid.

A good case illustrating an inseparable act is the well-known one of *Blackwell v. Ketcham*.<sup>80</sup> This case held that the whole note for four hundred and seventy-five dollars was invalid. Obviously, the note could not be held good up to the authorized amount of three hundred and fifty dollars, for the making of the note was

<sup>73</sup>*Parks v. The President and Managers of the S. and L. Turnpike Road Co.* (1930) 4 J. J. Marsh. (Ky.) 456; *Williams v. Kerrick*, (1903) 105 Minn. 254, 116 N. W. 1026.

<sup>74</sup>Compare, *The Virginian Railway Co. v. Stokes*, (1922) 134 Va. 180, 113 S. E. 704.

<sup>75</sup>*Moore v. Ensley*, (1895) 112 Ala. 228, 20 So. 744.

<sup>76</sup>*Vigers v. Kilshaw*, (1839) 13 La. 438; *Loeb v. Hellman*. (1879) 45 N. Y. Super. Ct. 336; *Thompson v. Stewart*. (1819) 3 Conn. 171, 8 Am. Dec. 168.

<sup>77</sup>*Magnus v. Platt*, (1909) 62 Misc. Rep. 499, 115 N. Y. S. 824; *Smith v. Robinson Bros. Lumber Company*, (1895) 88 Hun (N.Y.) 148, 34 N. Y. S. 518.

<sup>78</sup>*Welsh v. Parish*. (1833) 1 Hill (N.Y.) 155. Another abnormality is in a Wisconsin decision—*Saveland v. Green*. (1876) 40 Wis. 431.

<sup>79</sup>*Nixon v. Hyserott*, (1809) 5 Johns. (N.Y.) 58, perhaps contra. *Smith v. Tracy*, (1867) 36 N. Y. 79 (warranty on a sale of bank stock); *Gimell, Simicker, Storms and Co. v. Adams*, (1850) 11 Hump. (Tenn.) 283.

<sup>80</sup>(1876) 53 Ind. 184, stated supra, note 26.

a single, indivisible act. Most of the cases involving this situation hold the entire act to be invalid.<sup>81</sup>

In those cases wherein the excess is clearly separable, the court usually holds that only the excess is invalid.<sup>82</sup>

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<sup>81</sup>De Hart v. Wilson, (1828) 6 T. B. Monroe (Ky.) 577 (a case wherein the excess of authority was perhaps separable). Brown v. Johnson, (1849) 20 Miss. 398, 51 Am. Dec. 118; A directed B to purchase for him a tract of land at a chancery sale located in section 32. B bought a piece of land in section 31 giving one-third in cash and a bond for the balance. A, hearing of B's act, at once repudiated it and brought suit to cancel the bond and obtain the money back. *Held*, (for A) that B was a special agent (single act) and, having exceeded his authority, his act was void.

One justice dissented as to the return of the money, due to the good faith of the third party, the state in this case. But, as pointed out in the prevailing opinion, the one act of an agent could not be bad in part and good in part. "If the money is not to be refunded, then the contract is only void in part."

Dowden v. Cryder, (1893) 55 N. J. L. 329, 26 Atl. 941. "This position of the plaintiff is untenable. The transaction between him and Carmack's agent was a unit. By it the agent was to give the plaintiff title to the draft, in consideration partly of a personal benefit enuring to the agent." . . . "The rule which would preclude the principal from ratifying part of this transaction and repudiating the rest (Story Ag. 250), precludes the plaintiff from forcing upon him such partial adoption. Certainly if, after the arrangement was made between the plaintiff and Carmack's agent, the plaintiff and Carmack had met, and the latter had said, 'I will accept the money part of the consideration and give you a title pro tanto in the draft, but will not accept the diamonds,' the plaintiff would have had the right to decline upon the ground that he had assented to no such bargain. Carmack's rights rest upon a similar foundation."

<sup>82</sup>Hammond v. Michigan State Bank, (1843) Walker (Mich.) 214. Where an agent acting within the scope of his authority does a thing which, standing alone, and by itself, would be binding on his principal, and at the same time does something more which is unauthorized, and the two things are susceptible of separation, constituting different parts of the same contract, that which the agent was authorized to do is binding on the principal and that only which he was not authorized to do is void.

Roberts v. Rumley, (1882) 58 Ia. 301, 12 N. W. 323. Whatever a special agent does beyond his authority is void unless ratified, and that without affecting the validity of what was done within the scope of his powers.

Snow v. Perry, (1830) 9 Pick. (Mass.) 539. (1) The issue here was over an alleged payment of \$300 on a promissory note payable by the defendant, and another to Seth Snow, and by him endorsed to the plaintiff after maturity. (2) The defendant had sent a boy to Seth Snow with \$300 in bank notes of a bank which subsequently failed. The boy was told not to surrender the bills until payment was endorsed on the note or a separate receipt was given. (3) Seth Snow took the bills and gave the boy a receipt in which he agreed either to endorse the payment on the note or to return them when called for.

*Held*, the payment was good. The messenger was a *special agent* (one act, explicit directions). He had no authority to accept the receipt. The peril and pursuit rules applied. Query: Does acceptance have anything to do with the receipt? Is the latter not purely a unilateral act? Is this not binding the third party by the excessive act of the agent where the principal is let off?

Here the principal said, "Don't deliver the money unless you get an

It is to be noted that courts say that the excess of authority is void, but what they actually mean is that it is voidable, for it is clear that the principal may, if he desires, ratify the excess.

(C) UNDISCLOSED LIMITATIONS IMPOSED UPON THE SPECIAL AGENT ARE BINDING ON THIRD PARTIES DEALING WITH HIM.

If the third party deals with the special agent at his peril, and is bound to inquire of the principal as to the extent of his authority, or otherwise run the risk of a want of authority, and if the special agent must pursue his authority strictly and literally, then it inevitably follows that the limitation imposed upon the authority of the special agent by his principal is binding on the third party, *whether known or unknown to the latter*.<sup>83</sup>

But it is believed that the cases go further than this, and also hold that so-called secret instructions, as distinguished from limitations, imparted to the special agent, sometimes bind the third party. This brings us to a discussion of *Hatch v. Taylor*.<sup>84</sup>

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[absolute] receipt." The agent delivers the money in return for a conditional receipt. The court says the delivery of the money is good. The conditional receipt is bad. Is this not playing fast and loose, splitting an inseparable act, letting the principal benefit by the authorized part and rejecting the unauthorized part?

Mars v. Mars, (1887) 27 S. C. 132, 3 S. E. 60. (1) A and B were owners of a draft unendorsed by them. (2) A delivered the draft to B instructing him to deliver it to C, in part payment on a promissory note secured by a mortgage on A's property. (3) B endorsed the note and then transferred it to E in payment of goods, etc. bought by himself. *Held*, (for E) (1) that an authority to transfer the draft gave B authority to endorse it. (2) Once endorsed, it became fully negotiable and the holder in due course was protected.

Note: the case looks queer. The agency was special, viz. to perform a single act, transferring the draft to C. The fact that this involved a subsidiary act, that of endorsement, is immaterial. It would seem, therefore, that the endorsement made was never authorized at all. Query: Has not the court split up a single indivisible act into two parts that are not component? Compare, Gordon and Walker v. Buchanan and Porterfield, (1833) 5 Yerg. (Tenn.) 71.

"For if an agent has executed his commission but for a part, he obliges his principal so far; as if the commission were to purchase fifty shares of the stock of a bank, and the agent contracts with a person who is the owner of but thirty, for the purchase of that number, intending to obtain the other twenty from some other man, the principal will be bound by that contract, although the agent afterwards fail in his attempts to buy the other twenty. Liv. on Agency 99."

<sup>83</sup>The cases cited in the notes under the two preceding headings (notes 46 to 78, *supra*) amply sustain this proposition.

<sup>84</sup>(1840) 10 N. H. 538. In an article, entitled *Some Comments on the Restatement of Agency, Part III* (1930) 18 *Georgetown L. J.* 327, 337, the writer ventured the opinion that section 384 of the Restatement was inspired by *Hatch v. Taylor*. This statement was technically erroneous because the section deals with the liability of a disclosed or partially disclosed principal, whereas the principal was undisclosed in *Hatch v. Taylor*.

In that well known case, reported in four out of five national case books on agency, a distinction is made between limitations incorporated into and made a part of the authority itself, and private (or secret) instructions meant to serve solely as directions to the agent and not intended to be communicated to third persons.

A limitation leaves no discretion to the agent. It places a numerical or other quantitative limit. It says "Thus far shalt thou go and no further."

A private instruction is meant as a line of retreat, an avenue of escape, but it leaves discretion in the agent, as to the mode and manner of executing his agency.

It follows as a corollary to the peril rule, discussed above, that the principal should, in order to play fair, let the agent disclose all limitations of authority. (Query: what if the agent, nevertheless, deceives the third person as to his authority? Who should lose? The fraud may be for the benefit of the principal; again it might have been a "frolic.")

In *Hatch v. Taylor* there was a special agency to sell or exchange one or two horses only, the agent, perhaps, being told by the principal not to part the span.

If the directions not to part the span were an instruction, then two sales were authorized. If a limitation, then only one sale was authorized. The court left it to the jury to decide what was limitation and what was instruction. (Query: does not this let the jury speculate on the matter before it?)

For a decision so often referred to, it is believed that the effect of *Hatch v. Taylor* in shaping the law has been relatively slight.<sup>85</sup>

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The resemblance between *Hatch v. Taylor* and section 384 is quite striking, however, and it would seem that the one really led to the other. There appears to be no section of the Restatement dealing with *Hatch v. Taylor* under the part thereof taking up the liability of an undisclosed principal.

Three illustrations to section 384 are given in the Restatement. All three deal with the case of a special agent and involve price. Two objections to these illustrations arise at once: (a) the cases on special agency are to the contrary, (b) price is never an "incidental" term, but is the most vital part of the bargain. The first illustration is probably not correct, the second is certainly not correct, and the third, substituting "seller" for "purchaser" to make it sensible in language, depends entirely upon the objective theory of contracts. In this third illustration the agent merely followed his principal's instructions; he violated no limitation whatsoever. The limitation never really existed outside of the brain of the principal; it was a creature of his imagination.

<sup>85</sup>Compare: *Hurlburt v. Kneeland*, (1859) 32 Vt. 316. A authorized B to buy one-half of a lot of hay from C for the account of A. B purported to buy the whole lot from C for A. A paid for one-half and refused to pay for any more. *Held*, (for A) that the case was one of a total want of authority in B to bind A in excess of one-half of the hay, rather than the

Its holding would appear to be open to criticism in that it deprives the agent of authority to do something which the principal could undoubtedly do, if he were conducting the negotiations himself, i. e., "dicker."

Cases involving apparent authority contrary to the secret instruction are not in point, and analysis of the cases supposedly applying *Hatch v. Taylor* will reveal that most of them deal with apparent authority.<sup>86</sup> The rule of *Hatch v. Taylor* properly applies only where the special agent is vested with leeway, or discretion, as to the *manner* of acting. From such a grant of discretion, it follows that the principal must suffer in case the agent *abuses* the discretion thus confided in him. It *should not* apply where the limitation or secret instruction (call it whichever you will) is as to something definite, concrete and tangible.<sup>87</sup>

Moreover, the distinction between authority and instructions is a fine and shadowy one, difficult both to apply and understand.<sup>88</sup> This difficulty is increased by the fact that courts constantly use the two terms as synonymous and interchangeable.<sup>89</sup>

#### (D) APPARENT AUTHORITY IN SPECIAL AGENCIES.

Apparent authority, which arises from a holding out by the principal to the third party or to the public generally, has in it a certain element of continuity.<sup>90</sup> It is difficult, therefore, to conceive of apparent authority in special agencies, particularly if we take the single act definition of special agency as the correct one.

A special agency may be created by apparent authority<sup>91</sup> but

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case of a secret instruction.

"It is not a case where the authority extends to the whole, and special instructions are given by the principal to his agent in regard to the bargain, affecting one-half. In such case it is well settled that the principal is bound to the extent of the authority conferred notwithstanding the agent, even if he be a special agent, depart from his instructions."

<sup>86</sup>Compare, *Goad Motor Co. v. Grote*, (Tex. Civ. App. 1931) 43 S. W. (2d) 319,—a most remarkable and astonishing decision.

<sup>87</sup>Compare, the cases in note 26, *supra*.

<sup>88</sup>See, for example, the illustrations of the distinction set out in *Mechem, Agency*, 2d ed. secs. 731 to 735.

<sup>89</sup>Compare, *Bryant v. Moore*, (1846) 26 Me. 84:

"A special agent is one employed for a particular purpose only. He also may have a general authority to accomplish that purpose, or be limited to do it in a particular manner. If the limitation respecting the manner of doing it be public or known to the person, with whom he deals, the principal will not be bound, if the instructions are exceeded or violated. If such limitation be private, the agent may accomplish the object in violation of his instructions, and yet bind his principal by his acts."

<sup>90</sup>It is possible for a special agency to be continuous, as in the case of solicitors or collectors.

<sup>91</sup>*Wise v. Mohawk Rubber Co.*, (1919) 23 Ga. App. 255, 98 S. E. 100

that is far different from saying that a special agent may have apparent authority.<sup>92</sup> One special agency may certainly not be the basis of apparent authority,<sup>93</sup> and it is believed that practically the only occasion when a special agent really has apparent authority is where the principal holds him out as having unlimited discretion in the premises.<sup>94</sup>

If there be apparent authority to do several things or deal with a class considered as individuals, then the apparent authority should make the agency a general one.<sup>95</sup>

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followed in *Mullins v. DuVall*, (1920) 25 Ga. App. 690, 104 S. E. 513.

<sup>92</sup>Compare, perhaps contra, *Home Beneficial Ass'n v. Clark*, (1929), 152 Va. 715, 148 S. E. 811 followed in *Royal Indemnity Co. v. Hook*, (1931) 155 Va. 956, 157 S. E. 414.

<sup>93</sup>*Kuecks v. New Home Sewing Machine Co.*, (1906) 123 Ill. App. 660, (stated supra, note 22).

<sup>94</sup>Compare cases supra, note 54.

<sup>95</sup>Compare, *Germain Company v. Bank of Camden County*, (1913) 14 Ga. App. 88, 80 S. E. 302.