jury may consider the demeanor of the witness, it would seem to be a variety of real evidence and to be the proper subject of comment by the judge. If the judge added to the evidence it was by his statement that certain behavior was nearly always an indication of lying. The significance of nervous behavior is a matter of experience as to which the jury should have been left free to form their own judgment. The positive and unqualified statement by the judge apparently foreclosed the matter.[14]

Since the witness's demeanor upon the stand is to be observed and taken into consideration by the jury it is a part of the evidence, and so it is within the province of the trial judge to comment upon this particular evidence as well as any other type of evidence and subject only to the same limitations. For these reasons it seems the Supreme Court stated the rule too broadly and the trial judge's comment did not *add* to the evidence, though it may have exceeded the bounds of fair comment in being highly prejudicial.

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ANALYSIS OF "APPARENT AUTHORITY" IN PRINCIPAL AND AGENT

In the recent case of *Berryhill v. Ellett*[1] plaintiff bought a policy from the defendant insurance company through Ellett, the district agent. The policy stated that the district agent should collect only the first premium, the other premiums being payable only at the home office or to an "authorized" agent upon delivery of a receipt signed in a specified way. Despite the fact the general agent had refused upon plaintiff's request to allow a discount on premiums paid in advance, plaintiff nevertheless began paying his premiums in advance to Ellett. The latter allowed plaintiff discounts on the 1927, 1930, and 1931 premiums, which were not paid directly to the specified agents of the company as required by the wording of the policy. The general agent and the home office had no knowledge of these transactions. When Ellett was unable to perform his agreement with plaintiff by paying the premiums to the company as they fell due, the plaintiff brought an action against the company, the general agent, and Ellett, alleging "that the insurance company . . . . by their acts, conduct, and

generals or particulars, their directness or evasiveness, are soon detected . . . . The appearance and manner, the voice, the gestures, the readiness and promptness of the answers, the evasions, the reluctance, the silence, the contumacious silence, the contradictions, the explanations, the intelligence or the want of intelligence of the witness, the passions which move or control—fear, love, hate, envy, or revenge—are all open to observation, noted, and weighed by the jury." Chief Justice Appleton, Evidence (1860), 220.

"There is, however, a secondary advantage to be obtained by the personal appearance of the witness; the judge and the jury are enabled to obtain the elusive incommunicable evidence of a witness' deportment while testifying, and a certain subjective moral effect is produced upon the witness." 3 Wigmore, Evidence (2nd ed. 1923), § 1395, 96.

[14] Allis v. Leonard, 58 N.Y. 288 (1874).

[1] 64 F. (2d) 253 (1933).

acquiescence had held Ellett out as authorized to receive such premiums before due and allow a discount therefor, and had thereby clothed him with apparent authority to collect such premiums." The circuit court of appeals, affirming the district court, denied any relief against the insurance company and the general agent, on the ground that Ellett had neither authority nor apparent authority to accept payment of premiums before they were due nor to allow a discount for such payment.

The court, in arriving at its decision, makes an attempt to define and standardize the meaning of two legal terms which have caused much confusion in the law of agency, namely: "authority" and "apparent authority." In so doing, it makes use of the Restatement of the Law of Agency (Tentative Draft No. 1), going so far as to accept the definition of "authority" and "apparent authority" adopted by the Restatement. It should be pointed out that the language of that early draft is not the same in these respects as the language used in the restatement "as adopted and promulgated" by the Institute on May 4, 1933.

"Apparent authority" has been given many different meanings, sometimes contradictory, and by the same court.[2] The court in the principal case falls into the same error.

Thus it states:

> Apparent authority may result from a manifestation of consent made to a third person or to third persons, by inference from words or conduct which, ordinarily indicate such consent. . . . . This is sometimes referred to as implied authority.

In the next paragraph the court states:

> Apparent authority may result from a manifestation of consent made to a third person or to third persons and inferred from words or conduct which, although ordinarily not indicating such consent, cause the third person because of facts known to both parties reasonably to believe that such consent exists, either where the apparent principal intended to cause such belief on the part of the third person, or where he ought to have anticipated that such belief would be caused. . . . . This is sometimes referred to as agency by estoppel.

Hence, "apparent authority" is capable of definition both as implied authority and authority by estoppel. But the court fails to point out that the definitions given, although common, are obviously contradictory in terms. Implied authority, it is submitted, is actual authority which, not being expressed, must be inferred from the conduct of the principal.[3] Then the court itself points

[2] When a court holds a principal liable because his agent had "apparent authority" to deal with the third person, the court may mean authority by estoppel, implied authority, "secret instructions," the principle involved in such cases as North River Bank v. Aymar, 3 Hill 262 (N.Y. 1842), the objective theory of contracts, or a combination of some of these notions. General Motors Truck Co. v. Texas Supply Co. 64 F. (2d) 527 (1933); Three States Lumber Co. v. Moore, 132 Ark. 371, 201 S.W. 508 (1918); Gilmore Portland Cement Corp. v. Leinard, 9 S.W. (2d) 862 (Mo. 1928); Castonguay v. Acme Knitting Co., 83 N.H. 1, 136 Atl. 702 (1927); N.Y. City Car Advertising Co. v. Greenberger, 142 N.Y.S. 226 (1913); National Surety Co. v. Miozrany, 53 Okla. 332, 156 Pac. 651 (1916); Bentley v. Daggett, 51 Wis. 224, 8 N.W. 155 (1881); Mechem, Agency (2nd ed. 1914), § 720.

[3] Moore v. Switzer, 78 Colo. 63, 239 Pac. 874 (1925); Ky.-Penn. Oil Corp. v. Clark, 57 S.W. (2d) 65 (Ky. 1933); Nertney v. National Fire Ins. Co., 199 Ia. 1358, 203 N.W. 826 (1925); Johnson v. Evans, 134 Minn. 43, 158 N.W. 823 (1916); Columbia Mill Co. v. National Bank,

out a distinction between estoppel and implied authority by stating that in the latter, being circumstantially proven from other facts, it is not essential that the third person seeking to establish the authority should have known and relied upon the circumstances from which the inference of authority is drawn. Obviously, if the agent has actual authority, even though it be not express, the third person need not know the source of the agent's authority in order to bind the principal.[4] But where reliance is upon agency by estoppel, the principal is not bound because his agent had actual authority to deal with the third person, but because the principal has made a representation of such authority to a third person upon which the latter reasonably relied to his detriment.[5]

Yet this court, despite its professed desire to reach a standard definition, is perfectly willing to allow "apparent authority" to stand for either implied authority or authority by estoppel. In a draft of the restatement, subsequent to the one relied upon by the court, it is stated that implied or inferred authority, i.e., "authorization created otherwise than by express language," should be distinguished from "apparent authority" which is synonymous with "ostensible authority."[6] But, while the restatement will not grant that "apparent authority" means implied or inferred authority, neither will it allow "apparent authority" to be synonymous with estoppel. In both the proposed final draft and the final draft of the restatement, a vital distinction is made between "apparent authority" and authority by estoppel. It is stated that where there is "apparent authority," the principal may be bound irrespective of a detrimental change of position by the third party in reliance upon the appearance of authority.[7] It may well be questioned whether the restatement's distinction between "apparent authority" and authority by estoppel is justified by either precedent or necessity.[8]

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52 Minn. 224, 53 N.W. 1061 (1893); Austin-Western Co. v. Commercial Bank, 255 S.W. 585 (Mo. 1923); Shippers' Compress Co. v. Northern Assur. Co., 208 S.W. 939 (Tex. Civ. App. 1919); Mechem, *op. cit., supra*, note 1, § 723.

[4] North Ala. Grocery v. Lysle Milling Co., 205 Ala. 484, 88 So. 590 (1921); Austin-Western Co. v. Commercial Bank, 255 S.W. 585 (Mo. 1923); Continental Oil Co. v. Baxter, 59 S.W. (2d) 463 (Tex. Civ. App. 1933); Mechem, *op. cit., supra*, note 1, § 717; 2 C.J. 444, § 42; 35 Harv. L. Rev. 201 (1921).

[5] Birmingham News Co. v. Birmingham Printing Co., 213 Ala. 256, 104 So. 506 (1925); Ky.-Penn. Oil Corp. v. Clark, 57 S.W. (2d) 65 (Ky. 1933); Ferguson v. Majestic Amusement Co., 171 N.C. 663, 89 S.W. 45 (1916); Shippers' Compress Co. v. Northern Assur. Co., 208 S.W. 939 (Tex. Civ. App. 1919); Guaranty Bank v. Beaumont Cadillac Co., 218 S.W. 638 (Tex. Civ. App. 1920); Mechem, *op. cit., supra*, note 1, §§ 245, 724, 725.

[6] Restatement of Agency (Proposed Final Draft), special note, part II, 39.

[7] Restatement (May, 1933, Final), § 8 Comment (c), § 159 Comment (e); Proposed Final Draft, part II, 38.

[8] See Ky.-Penn. Oil Corp. v. Clark, 57 S.W. (2d) 65 (Ky. 1933); Moore v. Switzer, 78 Colo. 63, 239 Pac. 874 (1925); Continental Oil Co. v. Baxter, 59 S.W. (2d) 463 (Tex. Civ. App. 1933); Hobby v. King Trailer Co., 273 S.W. 650 (Tex. Civ. App. 1925); Guaranty Bank v. Beaumont Co., 218 S.W. 638 (Tex. Civ. App. 1920); Mechem, *op. cit., supra*, note 1, §§ 244, 721, 723, 722, 729.

The court in the case under review also seems to contradict itself by saying that evidence that defendant Ellett received premiums and allowed a discount on payments before they were due was not relevant because this was not known to the insurance company. Under the court's definition of implied authority it is conceivable that Ellett might have implied authority to receive the premiums in advance and give a discount thereon, despite the fact that his principal did not have actual knowledge of the transaction. If it had been the general custom for an insurance agent to give discounts upon receipt of advance payments of premiums, the failure of the principal to be cognizant of the general custom would not have made it less liable to the third persons.[9] Whether the insurance company would be liable under such a general custom despite the clause in the insurance policy concerning the method of payment is another and distinct question.

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[9] Cawthon v. Lusk, 97 Ala. 674, 11 So. 731 (1892); Wind v. Bank of Maplewood, 58 S.W. (2d) 332 (Mo. App. 1933); Carver Bros. v. Merrett, 184 S.W. 741 (Tex. Civ. App. 1916); Mechem, *op. cit., supra,* note 1, § 716.