Michigan Law Review

Volume 55 | Issue 3

1957

Agency - Apparent Authority - Liability of Corporation on Unauthorized Note of General Manager

Thomas A. Troyer
University of Michigan Law School

AGENCY — APPARENT AUTHORITY — LIABILITY OF CORPORATION ON UNAUTHORIZED NOTE OF GENERAL MANAGER — Welch, the general manager, executive vice-president, treasurer, and director of petitioner corporation, requested that respondent, a salesman employed by the corporation, loan

petitioner $25,000. Respondent complied, and Welch executed and delivered to respondent a note for the amount of the loan, signed by himself as vice-president and treasurer. After Welch had appropriated the money to his own uses, respondent obtained a judgment by confession against petitioner on the note. On trial of a petition to open the judgment, *held,* dismissed. Welch had acted with apparent authority in giving respondent petitioner's note, respondent had reasonably relied upon this appearance in accepting the note, and petitioner was therefore bound by the note. *Petition of Mulco Products, Inc.,* (Del. 1956) 123 A. (2d) 95.

The doctrine of "apparent authority" has been rationalized almost universally by the theory of estoppel in pais.[1] Under this view a principal is estopped from denying the authority of an apparent agent because some manifestation by the principal has caused a third party to rely upon the authority of the agent. The elements necessary to create the estoppel are (a) act or negligence of the principal creating an appearance of authority in the agent; (b) actual reliance by a third party upon the appearance so created; (c) reasonableness of this reliance; (d) consequent detriment to the third party. A large body of case authority, however, has confused the theory of apparent authority with that of "implied authority,"[2] so that there are decisions which purport to rely upon apparent authority analysis, or which are cited as relying thereon, which fail to consider the reasonable appearance of the situation to the third party,[3] or in which the facts lack the element of reliance[4] or of detriment.[5] The court in the principal case makes explicit and lucid distinction between apparent authority and implied authority,[6] but fails to specify the reasons for its application of the former doctrine to the instant facts. Assuming that the court does not take into account the appearance of authority created by the representations of

1 Because of certain minor technical difficulties in applying the rationale of estoppel there has been some effort on the part of a few students of agency to explain the results of the doctrine of apparent authority on the basis of the objective theory of contracts. See Cook, "Agency by Estoppel," 5 COL. L. REV. 36 (1905). But other authorities have repudiated this explanation, and the cases almost without exception ignore it. See MECHEM, AGENCY, 4th ed., §90 (1952).

2 The confusion is especially pronounced in the Pennsylvania decisions, Williams v. Getty, 31 Pa. 461 (1858); Empire Implement Mfg. Co. v. Hench, 219 Pa. 135, 67 A. 995 (1907); Bayne v. Proctor and Gamble Distributing Co., 87 Pa. Super. 195 (1926). Mechem suggests confining use of the term "implied authority" to situations in which authority is actually conferred by the conduct of the parties (thus giving "implied" the same meaning which it has in contract law), and using "incidental authority" to denote that authority which accompanies express authority to perform a particular act or occupy a particular status. See MECHEM, AGENCY, 4th ed., §43 and §§51 to 56 (1952). But almost all of the cases use "implied authority" to include both of these meanings.

3 Shircliff v. Dixie Drive-In Theater, Inc., 7 Ill. App. (2d) 370, 129 N.E. (2d) 346.

4 Groda v. American Stores Co., 315 Pa. 484, 173 A. 419 (1934); Farneth v. Commercial Credit Co., 313 Pa. 433, 169 A. 89 (1933).

5 Williams v. Getty, note 2 supra.

6 Principal case at 103 and 104.

Welch himself,[7] the only possible basis for an estoppel of petitioner is its act of placing Welch in his various corporate offices, notably that of general manager. It has been almost uniformly held that the general agent or manager of a corporation has, simply by virtue of his position, the reasonable appearance of authority to do any act in the normal course of the corporation's business other than to borrow money or execute negotiable instruments.[8] It has also been generally held that a corporation president or general manager may acquire the apparent authority to borrow money or execute negotiable paper through a deceptive course of conduct on the part of the corporation.[9] But the very few cases which hold the apparent authority of an officer to borrow money or make negotiable instruments solely on the basis of his corporate office[10] are subject to criticism and of little value as authority for the proposition of the principal case.[11] There is a good deal of authority to the effect that the position of general manager carries with it the implied authority to borrow on behalf of the corporation,[12] but the court in the principal case makes quite clear the fact that it is willing to rest its decision upon the ground of apparent authority alone.[13] In addition, there is much respectable authority denying the im-

7 There were in fact such representations, principal case at 101, but it is well settled that the estoppel of the principal must be based upon an appearance created by his own actions, rather than those of the apparent agent. Home Owners' Loan Corp. v. Thornburgh, 187 Okla. 699, 106 P. (2d) 511 (1940). See also MECHEM, AGENCY, 4th ed., §94 (1952).

8 E.g., Sheldon Petroleum Co. v. Empire Gas and Fuel Co., 112 Kan. 73, 209 P. 826 (1922); Mass. Bonding and Ins. Co. v. Transamerican Freight Lines, Inc., 286 Mich. 179, 281 N.W. 584 (1938). This class of cases, however, has been one of the major sources of the confusion of implied authority with apparent authority, so that there is not so much real support for the point as might at first appear. See O'Donnell v. Union Paving Co., 121 Pa. Super. 68, 182 A. 709 (1936); Greenspon's Iron and Steel Co. v. Pecos Valley Gas Co., 4 W.W. Harr. (34 Del.) 567, 156 A. 350 (1931).

9 County First Nat. Bank v. Coast Dairies and Land Co., 46 Cal. App. (2d) 355, 115 P. (2d) 988 (1941); Sachs v. Ewing, (D.C. Cir. 1943) 133 F. (2d) 403. See also American Nat. Bank v. Bartlett, (10th Cir. 1930) 40 F. (2d) 21.

10 Arts, Inc. v. Bowles, (Mun. Ct. App. D.C. 1944) 38 A. (2d) 660; Bacon v. Montauk Brewing Co., 130 App. Div. 737, 115 N.Y.S. 617 (1909); Barnard, Phillips Factors, Inc. v. Kaplan Silk Corp., 28 N.Y.S. (2d) 696 (1939).

11 In the three such cases found by the writer, note 10 supra, the officer was the president of the corporation. All were decisions of lower courts. In none did the court explore the problem, or give reasons for this part of its decision. Both New York cases were based upon very broad dicta found in earlier decisions involving third party bona fide holders of negotiable instruments executed by corporate officers. In one case the court assumed that bad faith, rather than simple lack of reasonableness, would be necessary to preclude the recovery of the person who had accepted the instrument. Barnard, Phillips Factors, Inc. v. Kaplan Silk Corp., note 10 supra.

12 Glidden & Joy Varnish Co. v. Interstate Nat. Bank, (8th Cir. 1895) 69 F. 912. Humphreys & Son, Inc. v. Broughton, 149 Va. 789, 141 S.E. 764 (1928). See also 2 FLETCHER, CYC. CORP. (1954 ed.) §679.

13 Principal case at 105.

plied authority of a general manager to borrow money,[14] and a strong majority of the decisions reject any implied authority to execute negotiable paper when such action is not an ordinary feature of the business.[15] Consequently, in holding that his office alone is sufficient to vest a general manager with the appearance of authority to borrow money and make negotiable instruments for the corporation, the principal case amounts to a real extension of the doctrine of apparent authority. In view of the fact that this holding imposes upon the corporation a risk from which it has no way of protecting itself,[16] it would seem that such an extension is not justified by policy considerations, for a contrary rule would merely subject the third party to a readily fulfilled duty of inquiry.

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14 Alton Banking and Trust Co. v. Alton Building and L. Assn., 289 Ill. App. 177, 6 N.E. (2d) 921 (1937); N.Y. Iron Mine v. First Nat. Bank of Negaunee, 39 Mich. 644 (1878). See also MECHEM, AGENCY, 4th ed., §68 (1952).

15 See 2 FLETCHER, CYC. CORP. (1954 ed.) §680, listing the authorities in various jurisdictions.

16 Under this rule the corporation must have the good fortune to choose a general manager not only completely honest, but also possessed of business judgment precisely corresponding to that of the board of directors, for no restriction that the board might place upon his authority will protect the corporation. The board would be providing for potential unlimited estoppel liability to third parties by its single act of appointing a general manager.