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Apparent Authority Of Agent To Transfer Stock Owned By Principal - Henry v. Auchincloss, Parker and Redpath

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Apparent Authority Of Agent To Transfer Stock Owned By Principal

Henry v. Auchincloss, Parker and Redpath[1]

Plaintiff, an elderly lady over 100 years old, was the owner of certain securities. It was her custom to rely upon her son to handle her monetary affairs.[2] They jointly signed a lease for a safe deposit box and the securities were kept therein. In 1955 the son arranged for the opening of an account in plaintiff's name with the defendant stock brokerage house. The application for the opening of the account was signed by the plaintiff personally. Subsequently, the plaintiff and her son opened a joint checking account. In 1958 the son removed the stock certificates from the safe deposit box, forged plaintiff's signature to provide an indorsement, and delivered the certificates to the defendant stock brokers with instructions to sell them. The proceeds of such sales were turned over to the son in the form of checks made out to the order of plaintiff. These checks were deposited in the heretofore mentioned joint bank account and the son and a grandson, who had a power of attorney to sign checks on the account, drew checks against this account for their own purposes. Plaintiff sued the stock brokerage house for conversion, alleging that the stock certificates were wrongfully delivered to the defendants by her son and that defendants wrongfully sold those securities. The defendant's motion for a directed verdict was granted by the United States District Court for the District of Columbia on the basis that:

> "[B]y leasing a safe deposit box jointly with the son, by permitting her securities to be kept in this safe deposit box, and by opening an account with the defendants as well as a joint checking account with her son . . . , the plaintiff, unwittingly perhaps, conferred upon the son apparent or ostensible authority to handle the securities for her. The fact that some of the indorsements on the certificates were clever forgeries does not change the situation."[3]

An agent may receive express authorization to sign his principal's name. Actual authority to indorse commercial

[1] 193 F. Supp. 413 (D.C.D.C. 1961).
[2] *Id.* The court did not indicate that this included signing plaintiff's name on stock certificates or any like matter.
[3] *Supra*, n. 1, 415.

paper may also be established by implication, when implied "from the very nature of the agency created," or as "an actual incident to an established course of dealing."[4] It has been said in many cases that authority to indorse commercial paper will be implied only where it is manifestly necessary to enable the agent to perform his duties.[5] An agent's mere possession of commercial paper does not in itself suggest authority to indorse.[6] Forgery requires an unauthorized making or alteration and thus can never be within the actual authority of an agent.[7]

In the present case, the United States District Court in reaching its decision, maintained that plaintiff was bound by the transfer. The Court reached this result in spite of the rule that, when an agent's forgery is required to effect a transfer of the principal's stock certificates to a third person (even a holder in due course), the principal is not bound when nothing more suggestive of negligence is shown than that the agent was permitted access to the stock.[8] First, the Court relied upon and quoted the RESTATEMENT OF AGENCY, where it is stated that:

> "[A]pparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him."[9]

Bronson's Executor v. Chappell[10] was cited as having previously approved and applied this doctrine.[11] While this case clearly did apply the doctrine of apparent authority,

[4] Bortner v. Leib, 146 Md. 530, 538, 126 A. 890 (1924).

[5] 12 A.L.R. 111, 119 (1921); see also 37 A.L.R. 2d 453, 479 (1954); 2 C.J.S. 1300, Agency, § 112.

[6] Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 59 L.R.A. 657, 93 Am. St. Rep. 113, 65 N.E. 136 (1902); Security National Bank of Duncan v. Johnson, 195 Okl. 107, 155 P. 2d 249 (1944); 12 A.L.R. 111, 120 (1921). *Cf.* RESTATEMENT, AGENCY (2d ed. 1958) § 69, comment c: "an agent authorized to take charge of . . . securities has thereby no authority to . . . transfer the subject matter."

[7] "[W]hen a forgery is committed there can be no pretense of authority. . . ." Morse v. United States, 265 F. 2d 788, 797 (9th Cir. 1959).

[8] 2 Am. Jur. 274, Agency, § 352.

[9] RESTATEMENT, AGENCY (2d ed. 1958) § 27, p. 103.

[10] 12 Wall. 681 (U.S. 1870).

[11] *Id.*, 683:

> "[I]f he has justified the belief of a third party that the person assuming to be his agent was authorized to do what was done, it is no answer for him to say that no authority had been given, or that it did not reach so far, and that the third party had acted upon a mistaken conclusion. He is estopped to take refuge in such a defense. If the loss is to be borne, the author of the error must bear it."

it concerned a sale of land where the agent acted beyond his scope of authority in taking purchase money, and was not concerned with the present problem of the effect of forgery on apparent authority in the sale of stock securities. Thus the cases are distinguishable on the facts involved.

The RESTATEMENT also states:

> "For apparent authority there is the basic requirement that the principal be responsible for the information which comes to the mind of the third person. . . . Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief."[12]

Sometimes apparent authority is derived not from express manifestations of the principal to the third person, but from the agent's status; the agent has those powers which are normally expected to be exercised by an agent in a similar position unless the third person is otherwise informed. Briefly, to create apparent authority the principal must directly or indirectly make the representations to the third party from which the third party infers authority in the agent. Thus the doctrine is based upon appearances which are created by the principal, and an appearance of authority created by the agent's acts and representations alone, does not suffice to created apparent authority.[13] It should be remembered in the present case that there is no indication that the plaintiff, the principal, had never made any manifestation that her son could sign her name on any stock certificates, or that her son was authorized to sell any of the certificates listed in her name. The case cites no authority to suggest that a third person could reasonably suppose, from the agent's position or known actual authority, that he was authorized to indorse the certificates.

But there is authority for finding that a principal is not bound under the circumstances here. In *Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Franklin Fire Insurance Co.*,[14] a father, as trustee, kept shares of stock in a vault to which he gave his son access. The son, who apparently conducted most of his father's business affairs including the trust, stole the stock certificates, forged a power of attorney, and secured a transfer of the

[12] RESTATEMENT, AGENCY (2d ed. 1958) § 27, p. 104.
[13] MECHEM, OUTLINES OF AGENCY (4th ed. 1952) § 94, p. 61.
[14] 181 Pa. St. 40, 37 A. 191 (1897).

shares on the corporate books. The court refused to impose liability upon the father, saying the loss was occasioned not by the act of the father in giving the son access to the vault and stock, but because the defendant, without inquiry, accepted the forged signatures as genuine. The court also said:

> "[B]ut even if the father had authorized the son, in some instances, to write his name to a power authorizing a sale or transfer of some other security, having no connection with these . . . shares of stock, that fact would not warrant the inference that such authority had been given in this case."[15]

In the similar case of *Townsend v. Union Trust Co. of Donora,*[16] a stockholder was induced by a *stock salesman* to turn over her stock to him. The stockholder did *not* assign the certificates, sign a power of attorney, authorize indorsement or in any way seek to divest herself of title or ownership. The salesman pledged the stock with a trust company to obtain a personal loan by using a forged power of attorney. The trust company made no inquiry as to the genuineness of the stockholder's signature. The stockholder was held not to be estopped from asserting title as against the pledgee who took under the forged powers of attorney. The court said that the general rule (*i.e.,* where one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it) "cannot prevail in a case of forgery."[17]

The second authority relied upon by the District Court in reaching its decision was *National Safe Deposit, Saving & Trust Co. v. Hibbs,*[18] "a case that is practically on all fours [with the principal case] both as to the facts and the law."[19] In that case, the plaintiff bank had made a loan to a customer who gave as collateral security, certain stock certificates. A trusted employee of the bank took the certificates and delivered them to the defendant stockbrokers with instructions to sell them, which the defendants did, and delivered the proceeds to the dishonest employee. Suit was brought by the plaintiff bank against the defendant

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[15] *Id.,* 194.

[16] 2 F. Supp. 734 (W.D. Pa. 1933).

[17] *Id.,* 736; Hartford Accident & Indemnity Co. v. Feilback Co., 39 F. Supp. 740, 742 (N.D. Ohio 1941). RESTATEMENT, AGENCY (2d ed. 1958) §§ 176, 177, and 202 also suggest that the agent in the subject case had no power to defeat his principal's title.

[18] 229 U.S. 391 (1913).

[19] *Supra,* n. 1, 415.

brokers to recover the value of the stolen stock certificates. The court refused to allow the bank to recover. However, this case may be distinguished from the principal case for an important reason. The stock certificates involved were indorsed by the owner *in blank*. In the principal case there was no such indorsement; indeed the signature of the plaintiff was forged. It is a well recognized rule that a stockholder who delivers stock to another party, indorsed or assigned in blank, gives the party to whom the certificates are delivered, such indicia of ownership that an innocent purchaser for value, can retain the certificates and the true owner is estopped from asserting title.[20] However, such a claim of estoppel "has rarely prevailed where the indorsement or transfer was forged."[21] Thus, the rule applied in the *Hibbs* case is applicable only in situations where the certificates were indorsed in blank, and would not be controlling here.

The decision in the principal case is difficult to reconcile with the provisions of the Uniform Stock Transfer Act,[22] since the stock involved herein was not transferred as required by that statute. There was neither a certificate indorsed in blank, a delivery by the person appearing by the certificates to be the owner of the shares represented thereby, nor a separate document containing a written assignment or power of attorney.

A case very similar to the principal case is *Telegraph Co. v. Davenport*.[23] This was a suit to compel the defen-

[20] 2 Am. Jur. 97, Agency, § 116; 13 Am. Jur. 423, Corporations, § 350; 73 A.L.R. 1405, 1407 (1931).

[21] 13 Am. Jur. 423, 424, Corporations, § 350.

[22] DISTRICT OF COLUMBIA CODE (1951) Title 28, § 2901:

"§ 28 — 2901. How title to certificates and shares may be transferred. Title to a certificate and to shares represented thereby can be transferred *only* —

(a) by delivery of the certificate endorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or

(b) by delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign, or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignmnt or power of attorney may be either in blank or to a specific person.

The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and the certificate itself provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent. (Dec. 23, 1944, 58 Stat. 927, ch. 729, § 1.)" Emphasis supplied.

[23] 97 U.S. 369 (1878).

dant company to replace, in the names of the plaintiffs, certain shares of stock transferred without their authority. A widow was left certain shares of capital stock of the Western Union Telegraph Company, for herself and as guardian for two children. The certificates were placed in a tin box which was deposited in a bank for safekeeping, where the widow's brother, an officer of the bank, had access to it. On two different occasions when the widow was absent from the city, she gave the key to the box to her brother so that he could obtain collection coupons for bonds in the box when they became due. On each occasion the brother took certificates from the box and forged the childrens' names to the transfer and power of attorney. The brother sold the certificates and the purchasers, using the forged power of attorney, obtained a transfer of the shares on the books of the defendant company. The Supreme Court of the United States held, "upon the facts stated here there ought to be no question as to the right of the plaintiffs [the widow and the two children] to have their shares replaced on the books of the corporation. . . ."[24] The court also stated:

> "Neither the absence of blame on the part of the officers of the company in allowing an unauthorized transfer of stock, *nor* the good faith of the purchaser of stolen property, will avail as an answer to the demand of the true owner. The great principle that no one can be deprived of his property without his assent, except by the processes of the law, requires in the cases mentioned, that the property wrongfully transferred or stolen should be restored to its rightful owner. The maintenance of that principle is essential to the peace and safety of society, and the insecurity which would follow any departure from it would cause greater injury than any which can fall, in cases of unlawful appropriation of property, upon those who have been misled and defrauded."[25]

The recent case of *Hurley v. Southern California Edison Co.*,[26] followed the *Telegraph Company* case and quoted at length from the latter case including part of the quotation above.[27] In *Prince v. Childs Co.*,[28] a case in which the

[24] *Id.*, 371.
[25] *Supra*, n. 23, 372.
[26] 183 F. 2d 125 (9th Cir. 1950).
[27] *Id.*, 130-131.
[28] 23 F. 2d 605 (2d Cir. 1928).

court said "there seems to be no substantial difference between the present case and *Telegraph Co. v. Davenport*,"[29] the plaintiff stockholder gave her secretary access to a safe-deposit box containing stock certificates, ordered purchases of stock through the secretary, and allowed the secretary to deposit dividend checks in the plaintiff's account. The secretary subsequently took some of the certificates, forged the plaintiff's signature, and sold the certificates without authority. In compelling the defendant corporation to issue new stock to the plaintiff, the court said, "Here was no apparent authority, but a bare forgery."[30]

In Maryland it has been clearly established that an agent's authority to indorse negotiable instruments will be implied only where such power is necessary to performance of duties which are customarily incident to the agency established,[31] or where such is shown to be an actual incident to an established course of dealing.[32] In the case of *Trust Co. v. Subscribers Etc.*,[33] the Maryland Court of Appeals indicated that a principal was under no duty to keep watch of his agent's transactions to protect third persons from an unauthorized indorsement of a negotiable instrument from subsequent misappropriations. In addition Maryland has also adopted the Uniform Stock Transfer Act,[34] including the sections referred to previously.[35] In *Hambleton v. Cent. Ohio R.R. Co.*,[36] the court said that "[i]t being conceded that the stock belonging to [the principal], had been transferred without his knowledge and consent, by means of the forgery of his name upon the powers of attorney, it is clear that his title was not divested thereby."[37] If the principles in these Maryland cases were applied to the facts of the principal case, it would be difficult to affirm the decision reached by the United States District Court.

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[29] *Id.*, 608.
[30] *Supra*, n. 28, 608.
[31] Trust Co. v. Subscribers, Etc., 150 Md. 470, 133 A. 319 (1926); also see 12 A.L.R. 111, 119 (1921).
[32] Bortner v. Leib, 146 Md. 530, 126 A. 890 (1924).
[33] *Supra*, n. 31.
[34] 2 MD. CODE (1957) Art. 23, §§ 100-122.
[35] *Supra*, n. 22.
[36] 44 Md. 551 (1876). See also Brown v. Howard Fire Ins. Co., 42 Md. 384, 20 Am. Rep. 90 (1875).
[37] Hambleton v. Cent. Ohio R.R. Co., *id.*, 558.