Chapter X

AGENCY

[In the commentary on this chapter "Story on Agency" is referred to as S.A.]

Appointment and Authority of Agents

"Agent" and "principal" defined.

182. An "agent" is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal".

Principal and Agent.—Although the heading of the chapter mentions 'Agency' this chapter embodies the law relating to principal and agent. This chapter deals with the rights and liabilities and duties of principal and agent *inter se* as well as those of third parties.

Nature of agency in general.—The law stated in the introductory group of sections (182-189) under this heading is too elementary to need much exposition. The essential point about an agent's position is his power of making the principal answerable to third persons. A person does not become an agent on behalf of another merely because he gives him advice in matters of business.[1] The test of agency is whether the person is purporting to enter into the transaction on behalf of the principal or not.[2] In order to constitute an agency it is not necessary to have formal agreement.[3]

Agency sometimes has to be distinguished from facts more or less resembling it.[4]

The legal relation between a merchant in one country and a commission agent in another is that of principal and agent, and not seller and buyer.[5] A merchant, therefore, in this country who orders out goods through a firm of commission agents in Europe cannot hold the firm liable as if they were vendors for failure to deliver the goods.[6]

An agent may have, and often has, in fact, a large discretion, but he is bound in law to follow the principal's instructions, provided they do not involve anything unlawful. To this extent an agent may be considered as a superior kind of servant; and a servant who is entrusted with any dealing with third persons on his master's behalf is to that extent an agent. But a servant may be wholly without authority to do anything as an agent, and agency, in the case of partners, even an extensive agency, may exist without any contract

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[1] *Mohesh Chandra Basu* v. *Radha Kishore Bhattacherjee* (1908) 12 C.W.N. 28, 32.

[2] *State of Bihar* v. *Dukhulal Das* A.I.R. 1962 Patna 140.

[3] *Babulal Shah* v. *S. S. (Fixed Delivery) Merchants, Asson.* A.I.R. 1960 Bom. 548; *Lukshmi Ginning & Oil Mills* v. *Amrit Banaspati Co. Ltd.* A.I.R. 1962 Punj. 56.

[4] *Laxminarayan Ram Gopal* v. *Hyderabad State* (1954) A.S.C. 364: (1955) 1 S.C.R. 393.

[5] *Ireland* v. *Livingstone* (1872) L.R. 5 H.L. 395.

[6] *Mahomedally* v. *Schiller* (1889) 13 Bom. 470.

of hiring and service.[7]

Co-agents.—Two or more persons may be employed to act as agents jointly or severally, or jointly and severally. In the absence of circumstances indicating an intention to the contrary, an authority given to two or more persons is presumed to be given to them jointly and not severally, and in such case it is necessary that they should all concur in the execution of the authority in order to bind the principal.[8] Where authority is given to co-agents severally or jointly and severally, any one or more of them may exercise it so as to bind the principal without the concurrence of the other or others.[9]

Co-principals.—When an agent is appointed by more than one principal, he is liable to them jointly. He is not bound to account separately to any one of them and if he does so, he is not thereby absolved from his liability to others.[10]

Law of Principal and Agent

Definitions:

Agent is a person employed to do any act for another, or to represent another, in dealings with third persons. (s. 182)

Principal is the person who employs another person to do an act for him, or to represent him, in dealings with third persons. (s. 182)

Consideration: Nil.

Creation of agency: (1) by agreement. This may be (a) express, i.e., by words or by writing; or (b) implied, i.e. by conduct; (2) By estoppel; (3) By operation of law; (4) By necessary circumstances. (ss. 186-7)

Ratification of : ss. 196-200.

Revocation of: ss. 201-204.

Description of:

Adatia, attorney, auctioneer, broker, commission agent, counsel, *del credere*, factor, kacha adatia, muccadam, paka adatia, pleader, shipchandler, shipmaster, warehouseman. (s. 188)

Who may employ agent.

183. Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.

Who may be an agent.

184. As between the principal and third persons any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.

Qualifications of Principal and Agent.—The expression "any person may become an agent" has been construed to include a minor but having regard to the second part of this section, a minor's agency would be such that he would not be responsible to his prin-

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[7] *Govind Prasad* v. *Board of Revenue* ('65) A.S.C. 66.

[8] *Brown* v. *Andrew* (1849) 18 L.J.Q.B. 153; *In re Liverpool Household Stores* (1890) 59 L.J. Ch. 616.

[9] *Guthrie* v. *Armstrong*, (1820) 5 B. and Ald. 628.

[10] *Raghbar Dayal* v. *Firm Piare Lal* ('33) A.L. 93, 145 I.C. 178.

AGENT

Qualifications	*Power/authority/right*	*Duties*	*Liabilities*
(i) Must be major (s. 184) (ii) Of sound mind (s. 184)	(i) To do all lawful things needed for the purpose (s. 188). (ii) In emergency, to act prudently to protect principal (s. 189) (iii) to appoint agent for principal (s. 194) (iv) to renounce agency (s. 201) (v) to claim compensation for premature revocation of authority (s. 205) (vi) to take reasonable steps to protect interest of principal's heirs etc. (s. 209) (vii) to retain sums received for principal (s. 217) (viii) to claim remuneration (s. 217) (ix) Lien—to detain sale proceeds (ss. 219/221) (x) to claim indemnity (ss. 222/224) (xi) cannot enforce contract (ss. 230, 236)	(i) Not to delegate authority except when custom of trade permits (s. 190) (ii) to use discretion in selecting an agent for principal (s. 195) (iii) to take reasonable steps to protect interest of principal's heirs (s. 209) (iv) to conduct business as per directions/business custom/with skill/reasonable diligence (ss. 211-14) (v) to render proper a/c. on demand (s. 213) (vi) to communicate with principal (s. 214) (vii) not to deal on his own (s. 215) (viii) to disclose material facts to principal (s. 215) (ix) not to conceal dishonestly (s. 215)	(i) liable for acts of sub-agents (ss. 192/3) (ii) liable to a/c. for profit (s. 211) (iii) for loss due to acting contrary to directions (s. 211) (iv) for loss due to neglect/want of skill/misconduct (s. 212) (v) to pay all sums to principal (s. 218) (vi) not personally bound for principal's contract (ss. 230/233) (vii) liable for fraud (s. 238)

PRINCIPAL

Qualifications	*Rights/Power*	*Duties*	*Liabilities*
(i) Must be major (s. 183) (ii) Must be of sound mind (s. 183)	(i) to ratify agent's acts (s. 196) (ii) to disown agent's acts (s. 196) (iii) to revoke agent's authority (s. 201) (iv) to claim loss/profits due to acting against directions (s. 211) (v) to claim compensation for loss arising due to agent's neglect, want of skill, misconduct (s. 212) (vi) to repudiate certain transactions (s. 215) (vii) to claim secret benefits made by agent (s. 216) (viii) to enforce contracts entered by agent (ss. 226-227) (ix) may not recognise transactions beyond scope of authority (s. 228)	(i) to pay remuneration to agent (s. 217) (ii) to pay agent's dues viz. advances and expenses (s. 217) (iii) to indemnify agent for lawful acts (ss. 222-224) (iv) to compensate agent for injury to agent by principal's neglect or want of skill (s. 225)	(i) to pay agent's remuneration (s. 217) (ii) to pay agent's dues viz. advances and expenses (s. 217) (iii) to indemnify agent for lawful acts (ss. 222-24) (iv) to compensate agent for injury due to principal's neglect/want of skill (s. 225) (v) to be liable on contracts entered by agent (ss. 226-228) (vi) liable for fraud and misrepresentation of agent (s. 238) (vii) bound by notice/information to agent (s. 229) (viii) bound by unauthorized acts of agent if third person induced (s. 237)

THIRD PERSONS

Rights	*Liabilities*
(i) Enforceability of contract by (s. 226) (ii) To enforce contract against agent/-principal (s. 231) (iii) Entitled to equities against undisclosed principal (s. 232) (iv) To hold agent liable (ss. 233/234) (v) To hold principal liable (ss. 233, 234, 237) (vi) To claim compensation from agent (s. 235) (vii) Not to be prejudiced by ratification of unauthorised acts (s. 200) (viii) To give notice to agent (s. 229)	(i) Enforceability of contract against (s. 226)

cipal. Accordingly it has been held that all persons including infants and other persons either (i) with limited capacity to contract or (ii) with no capacity to contract on their own behalf are competent to act as agents so as not to be responsible to their principals but so as to bind their principals.[11] On this principle it has been held that notice to a father is duly served on his minor son as his agent.[12]

Consideration not necessary.

185. No consideration is necessary to create an agency.

Consideration not necessary.—By the Common Law no consideration is required to give a man the authority of an agent, nor to make him liable to the principal for negligence in that which he has already set about, for such liability, though it may be defined by the terms of a contract, is in its nature independent of contract; but a merely gratuitous employment or authority does not bind the agent to do anything.

Agent's authority may be expressed or implied.

186. The authority of an agent may be expressed or implied.

Definitions of express and implied authority.

187. An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

Illustration

A owns a shop in Serampore, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by *B*, and he is in the habit of ordering goods from *C* in

11 *Foreman* v. *Great Western Ry. Co.* (1878) 38 L.t. 851.

12 *In re De Souza* (1932) 54 All. 548 (552), 138 I.C. 70, ('32) A.A. 374.

the name of *A* for the purposes of the shop, and of paying for them out of *A*'s funds with *A*'s knowledge. *B* has an implied authority from *A* to order goods from *C* in the name of *A* for the purposes of the shop.

Agency, how constituted.—Relationship of principal and agent may be constituted by (a) express appointment; (b) by implication of law from the conduct or situation of parties or from the necessity of the case; or (c) by subsequent ratification by the principal. The actual relationship of the parties must be determined from all the circumstances and not merely from the use of the word 'agent' or 'agency agreement'.[13] The relationship of principal and agent can only be established by the consent of both of them. They will be held to have consented if they have agreed to what amounts in law to such relationship even if they do not recognise it themselves and even if they have professed to disclaim it.[14] But the consent must have been given by each of them, either expressly or by implication.

Authority implied.—"The ordinary course of affairs" must be regarded in order to ascertain the extent of an authority not defined except by the general nature of the business to be done. "A person who employs a broker must be supposed to give him authority to act as other brokers do."[15] If the drawing and accepting of bills drawn or accepted by the agent is incidental to the business entrusted to the agent, that would come within the words "the ordinary course of dealing."[16] Implied authority will include authority to act according to the usages and customs of the particular business, place or market in which he is engaged, such usages and customs must be well known and reasonable.

The acts of a manager of a hotel of purchasing articles on credit for running the business of a hotel would be within the authority "usually confided to such agent" and would fall within the words "inferred from the circumstances" and "the ordinary course of dealing." Where a principal carries on a general moneylending business the authority of the agent to borrow implies an authority to pledge the principal's credit for the purpose of obtaining or securing advances from others for the benefit of the principal's customers.[17]

Authority not implied.—A power of attorney authorising the holder "to dispose of" certain property in any way he thinks fit does not imply an authority to mortgage the property.[18] Nor does a power of attorney to an agent to carry on the ordinary business of a mercantile firm imply an authority to draw or indorse bills and notes.[19] Authority on dissolution of partnership to settle the partnership affairs does not authorise the drawing, accepting, or indorsing of bills of exchange in the name of the firm.[20] An authority

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[13] *Firm Purshottamdas* v. *Gulab Khan* (1963) A.P. 407; *Supdf. of Stamps, Bombay* v. *Breul & Co* A.I.R. 1944 Bom. 325; *Loon Karan* v. *Johar & Co.* (1967) A.A. 308 on app. A.I.R. 1969 S.C. 73.

[14] Ex parte Delhasse (1878) 7 Ch. D. 511, 526.

[15] *Sutton* v. *Tatham* (1839) 10 Ad. & E. 27.

[16] *Bunarasee Das* v. *Gholam Hoosein*, 13 Moore I.A. 358.

[17] *Bank of Bengal* v. *Ramanathan* (1916) 43 I.A. 48 (54): 43 Cal. 527 (540).

[18] *Malukchand* v. *Sham Mohan* (1890) 14 Bom. 590 and *Bank of Bengal* v. *Fagan* (1849) 5 M.I.A. 27, 41.

[19] *Pestonji* v. *Gool Mahomed* (1874) 7 M.H.C. 369.

[20] *Abel* v. *Sutton* (1800) 3 Esp. 108. For further illustrations see *Ramanathan* v. *Kumarappa* ('40) A.M. 650; *Ezekiel* v. *Carew & Co.* (1938) 2 Cal. 190, ('38) A.C. 423; *Goverdhandas* v. *Friedmans Diamond Trading Co. Ltd.* ('39) A.M. 543, *Paboodan* v. *Miller* (1938) 2 M.L.J. 688, ('38) A.M. 966; *Jaunpur Municipal Board*

to sell ready goods does not include a power to enter into a contract for the sale of future goods.[21]

Husband and wife.—This is a special and important case of implied authority. "The liability of a husband for a wife's debt depends on the principles of agency, and the husband can only be liable when it is shown that he has expressly or impliedly sanctioned what the wife has done."[22] "A person dealing with a wife and seeking to charge her husband must shew either that the wife is living with her husband and managing the household affairs—in which case an implied agency to buy necessaries is presumed[23]—or he must show the existence of such a state of things as would warrant her in living apart from her husband and claiming support or maintenance, when, of course, the law could give her an implied authority to bind him for necessaries supplied to her during such separation in the event of his not providing her with maintenance."[24] Where a European husband and wife, therefore, lived together, it was held that the husband was not liable for moneys borrowed by the wife to pay her previous debts, and not for the purpose of any household or necessary expenses.[25] Similarly, a European husband is not liable for the price of goods supplied to his wife, where the husband was remitting to her sums amply sufficient for her maintenance and had expressly forbidden his wife to pledge his credit, and, further, the wife kept a boarding school and was in receipt of payments made by the parents of children boarding with her.[26] Much the same principles apply to Hindus. A Hindu wife living separate from her husband because of his marriage with a second wife has no implied authority to borrow money for her support, as the second marriage does not justify separation.[27] There can be no presumption of agency where moneys are borrowed by a woman in her own right as heir to her husband under the belief that the husband is dead. In such a case the lender must be taken to have dealt with the woman in her own right, "and not looking in any way to the husband as responsible for the debt."[28]

It is now settled in England that "the question whether a wife has authority to pledge her husband's credit is to be treated as one of fact, upon the circumstances of each particular case, whatever may be the presumption arising from any particular state of circumstances,"[29] such as the presumption from a man and his wife living together in the ordinary way "that he entrusts her with such authorities as are commonly and ordinarily given by husband to wife,"[30] including authority to pledge his credit to a reasonable extent and in a reasonable manner for ordinary household expenses. Where such authority exists, it can be revoked; or its existence may be negatived by the husband supplying the wife an adequate allowance of ready money.[31]

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v. *Banwari Lal* (1939) A.L.J. 897, 184 I.C. 648, ('39) A.A. 623.

21 *Satyanarayan* v. *Vithal* ('59) A. Bom. 452.

22 *Girdhari Lal* v. *Crawford* (1885) 9 All. 147, 155.

23 Not conclusively: *Debenham* v. *Mellon* (1880) 6 App. Cas. 24.

24 *Viraswami* v. *Appaswami* (1863) 1 M.H.C. 375.

25 *Girdhari Lal* v. *Crawford* (1885) 9 All. 147, 155.

26 *Mahomed Sultan Sahib* v. *Horace Robinson* (1907) 30 Mad. 543.

27 *Nathubhai* v. *Jhaver* (1876) 1 Bom. 121, 122.

28 *Pusi* v. *Mahadeo Prasad* (1880) 3 All. 122; See *Kanhayalal* v. *Indarchandji* (1947) Nag. 154, 227 I.C. 58, ('47) A.N. 48.

29 *Debenham* v. *Mellon*, 6 App. Ca. 24, at p. 31 (Lord Selborne).

30 *Ib.*: 6 App. Ca. 24, at p. 36 (Lord Blackburn).

31 *Morel Brothers & Co.* v. *Earl of Westmoreland* (1903) 1 K.B. 64 C.A.

Extent of agent's authority.

188. An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act.

An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business.

Illustrations

(a) *A* is employed by *B*, residing in London, to recover at Bombay a debt due to *B*. *A* may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same.

(b) *A* constitutes *B*, his agent, to carry on his business of a ship-builder. *B* may purchase timber and other materials, and hire workmen for the purposes of carrying on the business. [It has been held, but contrary to English authority, that an agent having general authority to carry on the principal's business and receive and expend money therein has implied authority to borrow money so far as necessary for carrying on the business.[32]

Incidental authority.—This section refers to the incidental authority of an agent who has an authority to do the act or to carry on business. The limitations on this incidental authority are (i) to do every lawful thing and (ii) such lawful thing must be necessary or usually done in the course of such act or business. If the act is not lawful or is not necessary or is not usual in such matters, that would fall outside his authority. In a recent case it was held that the agent had an implied incidental authority to endorse cheques for principal and pay them into agent's own bank account as that was "necessary to give business efficacy to the transactions."[33]

Extent of incidental authority.—It is well settled that an agent's authority is in Story's words (s. 58), "construed to include all the necessary and usual means of executing it." If its terms are ambiguous, the principal will be held bound by that sense, in which the agent reasonably understood and acted upon them.[34] Further, an authority is generally construed in case of doubt according to the usual course of dealing in the business to which it relates,[35] partly because this may be presumed to have been really intended, and partly because third persons may reasonably attribute to an agent such authority as agents in the like business usually have.

The following are illustrations from the English authorities of the rule stated in the first paragraph of the section. An agent employed to get a bill discounted has authority to warrant it a good bill, but not to indorse it in the principal's name.[36] If employed to find a purchaser of property, he has authority to describe the property, and state any circumstances which may affect its value, to a proposed purchaser.[37] Authority to sell a horse implies authority to warrant its soundness if the principal is a horsedealer,[38] or

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[32] *Dhanput Rae* v. *Allahabad Bank* (1926) 2 Luck. 253, 98 I.C. 783; ('27) A.O. 44.

[33] *Australia & New Zealand Bank* v. *Ateliers de Constructions* (1967) A.C. 86.

[34] *Ireland* v. *Livingstone* (1872) L.R. 5 H.L. 395.

[35] *E.g., Pole* v. *Leask* (1860) 28 Beav. 562; *Ireland* v. *Livingstone* (1872) L.R. 5 H.L. 395.

[36] *Fenn* v. *Harrison* (1791) 3 T.R. 757, 4 T.R. 177.

[37] *Mullens* v. *Miller* (1882) 22 Ch. D. 194.

[38] *Howard* v. *Sheward* (1866) L.R. 2 C.P. 148.

the sale is at a fair or public market,[39] but not if the principal is unaccustomed to dealing in horses and the sale is a private one.[40]

Where an agent is authorised to receive payment of money on his principal's behalf, the payment, in order to bind the principal, must be in cash,[41] unless it can be shown that, by a reasonable custom or usage of the particular business in which the agent is employed, payment may be made in some other form; as, for instance, by cheque[42] or bill of exchange.[43]

Authority to do every lawful thing necessary for the purpose.—The authority conferred by this section to do things necessary for a business may be excluded either expressly or impliedly by the terms of the agency. Thus where *A* appointed *B* manager of silk factory, and executed to him a power of attorney specifying his powers and authority but the document gave no authority to *B* to borrow, it was held that *A* was not liable for money borrowed by *B* as manager and attorney of *A*.[44] Where an agent has been directed to take possession of land on the expiry of a lease, he has no authority to accept payment of rent.[45] Similarly, an agent of a corporation cannot have any authority to do any act as agent which is *ultra vires* of the powers of the corporation.[46]

Authority of counsel, attorney, and pleader.—Though the relation between a client and an attorney or pleader is that of principal and agent, it is not so in the case of counsel.[47] Nevertheless counsel, unless his authority to act for his client is revoked and such revocation is notified to the opposite side, has, without need of further authority, full power to compromise a case on behalf of his client.[48] But this authority does not extend to a compromise of matters outside the scope of the particular case in which he is retained or matters collateral to it,[49] nor to referring the case itself to arbitration on terms different from those which the client has authorised.[50] According to the Calcutta High Court the general authority of counsel (whether barrister or advocate) extends in India only to compromises in Court.[51] The whole subject has been reviewed by the Judicial Committee without mention of this distinction.[52] An attorney is entitled in the exercise of his discretion to enter into a compromise, if he does so in a reasonable, skillful, and *bona fide* manner, provided that his client has given him no express directions to the con-

[39] *Brooks* v. *Hassall* (1883) 49 L.T. 569.

[40] *Brady* v. *Todd* (1861) 9 C.B.N.S. 592.

[41] *Pape* v. *Westacott* (1894) 1 Q.B. 272; *Blumberg* v. *Life Interests, etc., Corporation* (1898) 1 Ch. 27; *Bharat Suryodaya Mills Co. Ltd.* v. *Shree Ram Mills* ('59) A. Bom. 309.

[42] *Bridges* v. *Garret* (1870) L.R. 5 C.P. 451.

[43] *Williams* v. *Evans* (1866) L.R. 1 Q.B. 352 (auctioneer has no authority to take bill of exchange in payment of deposit).

[44] *Ferguson* v. *Um Chand Boid* (1905) 33 Cal. 343.

[45] *Murugesa* v. *Province of Madras* ('47) A.M. 74, 231 I.C. 76.

[46] *Sutlej Cotton Mills Ltd.* v. *Ranjit Singh* ('52) A. Punj. 263.

[47] Per Lord Esher, M.R. in *Mathews* v. *Munster* (1887) 20 Q.B. Div. 141, 142.

[48] Bowen, L.J., 20 Q.B. Div. at p. 144; *Jang Bahadur* v. *Shankar Rai*, (1890) 13 All. 272; *Nundo Lal* v. *Nistarini* (1900) 27 Cal. 428.

[49] *Johurmull Bhutra* v. *Kedar Nath Bhutra* (1928) 55 Cal. 113, 104 I.C. 387, ('27) A.C. 714; *Sheonandan* v. *Abdul Fatesh* (1935) 62 I.A. 196, 14 Pat. 545 37 Bom. L.R. 845, 156 I.C. 694, ('35) A.P.C. 119.

[50] *Neale* v. *Gordon Lennox* (1902) A.C. 465; *Chuni Lal Mandal* v. *Hira Lal Mandal* (1928) 32 C.W.N. 44, 106 I.C. 309, ('28) A.C. 378.

[51] *Askaran Choutmal* v. *E.I.R. Co.* (1925) 52 Cal. 386, 88 I.C. 413, ('25) A.C. 696.

[52] *Sourendra Nath Mitra* v. *Tarubala Dasi* (1930) 57 I.A. 133, 57 Cal. 1311, 123 I.C. 545, ('30) A.P.C. 158.

trary.[53] In one case on the subject, the Court found that the client had authorised his attorney to compromise, and that the compromise was reasonable and proper.[54] The case of a pleader stands on a different footing, and he cannot enter into a compromise on behalf of his client without his express authority.[55] An authority to compromise includes authority to refer the dispute to arbitration.[56]

Authority of factor.—A factor to whom goods are entrusted for sale has authority to sell them in his own name on reasonable credit at such times and such prices as in his discretion he thinks best, to receive payment of the price where he sells them in his own name, and to warrant the goods sold, if in the ordinary course of business it is usual to warrant that particular kind of goods. But he has no implied authority to barter the goods nor to delegate his authority, even if acting under a *del credere* commission.

Authority of broker.—A broker authorised to sell goods has implied authority to sell on reasonable credit; to receive payment of the price if he does not disclose his principal, and to act on the usages and regulations of the market in which he deals, except so far as such usages or regulations are unlawful or unreasonable.[57] A usage which, by converting the broker into a principal, changes he intrinsic nature of the contract of agency is regarded as unreasonable.[58] He has no implied authority to cancel, or vary contracts made by him; nor to receive payment of the price of goods sold on behalf of a disclosed principal; nor, even when the principal is undisclosed, has he implied authority to receive payment otherwise than in accordance with the terms of the contract of sale. A broker has no implied power to delegate his authority even if acting under a *del credere* commission.

Authority of auctioneer.—An auctioneer has implied authority to sign a contract on behalf of both buyer and seller, an authority which does not, however, extend to his clerk.[59] The implied authority of an auctioneer to sign on behalf of the buyer does not, however, extend to a sale of unsold lots by private contract subsequently to the sale by auction. An auctioneer has no implied authority to take a bill of exchange in payment of the deposit, or of the price of goods sold, though it is provided by the conditions of sale that the price shall be paid to him;[60] but he may take a cheque in payment of the deposit according to the usual custom.[61] Authority to sell by auction does not imply any authority to sell by private contract, in the event of the public sale proving abortive, though the auctioneer may be offered a price in excess of the reserve.[62]

Authority of shipmaster.—The authorities indicating the extent of the implied authority of master of British ships are very numerous. For present purposes it seems sufficient to cite only some of the more important cases. Being appointed to conduct the voyage on which the ship is engaged to a favourable termination, a shipowner has implied authority to do all things necessary for the due and proper prosecution of the voyage.[63] He may also borrow money on the credit of his principals, if the advance is necessary for the prosecution of the voyage, communication with the principals is imprac-

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[53] *Prestwich* v. *Poley* (1865) 18 C.B.N.S. 806.

[54] *Jagannathdas* v. *Ramdas* (1870) 7 B.H.C.O.C. 79.

[55] *Jagapati* v. *Ekambara* (1897) 21 Mad. 274.

[56] *Jiwibai* v. *Ramkumar* (1947) Nag. 824, 229 I.C. 402, ('47) A.N. 17.

[57] *Robinson* v. *Mollett* (1874) L.R. 7 H.L. 802.

[58] *Robinson* v. *Mollett* (1874) L.R. 7 H.L. 802.

[59] *Bell* v. *Balls* (897) 1 Ch. 663.

[60] *Williams* v. *Evans* (1866) L.R. 1 Q.B. 352.

[61] *Farrer* v. *Lacy* (1885) 31 Ch. Div. 42.

[62] *Marsh* v. *Felf* (1862) 3 F. & F. 234.

[63] *Beldon* v. *Campbell* (1851) 6 Ex. 886.

ticable and they have no solvent agent on the spot.

The master of a British ship has also implied authority to give bottomry bonds, hypothecating ship, freight, and cargo, for necessary supplies or repairs in order to prosecute the voyage, when it is not possible to obtain them on personal credit, and communication with the respective owners is impracticable.[64] The cargo alone may be hypothecated (by a contract called *respondentia*) if necessary for the benefit of the cargo, or for the prosecution of the voyage, but the owners must in all cases be first communicated with if possible.[65]

In the case of absolute or urgent necessity, as where in consequence of damage it is impossible to continue the voyage, and the ship cannot be repaired except at such a cost as no prudent owner would incur, the master has implied authority to sell the ship. Where repairs are absolutely necessary in order to prosecute the voyage, and communication with the owners of the cargo is impracticable, the master has implied authority to sell a portion of the cargo to enable him to continue the voyage. But his authority as agent of the owners of the cargo is strictly one of necessity, and he is not justified in selling any portion thereof until he has done everything in his power to carry it to its destination.

A shipmaster has implied authority to enter into contracts for the carriage of merchandise according to the usual employment of the ship, and to enter into a charter-party on behalf of the owners if he is in a foreign port, and there is a difficulty in communicating with them. His authority to sign bills of lading is limited to signing for goods actually received on board,[66] and he has no authority to sign at a lower freight than the owners contracted for, or making the freight payable to any other person than the owners.

Agent's authority in an emergency.

189. An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.

Illustrations

(a) An agent for sale have goods repaired if it be necessary.

(b) *A* consigns provisions to *B* at Calcutta, with directions to send them immediately to *C* at Cuttack. *B* may sell the provisions at Calcutta, if they will not bear the journey to Cuttack without spoiling.

Protecting Principal in an emergency.—section is very important. The prior rules lay down duties and restrictions on powers or authority of an agent. In an emergency, those rules may become inapplicable or to follow those rules may jeopardise the interest of the principal.

The rule contained in this section is known as the rule relating to "authority of necessity" in English law.

This section may apply where in an emergency it is not possible to communicate with the principal or as a result of steep rise or fall of the market rate if instructions to

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[64] *Kleinwort* v. *Cassa Marittima Genon* (1877) 2 App. Cas. 156.

[65] *The Onward* (1873) L.R. 4 Ad. 38.

[66] *Cox* v. *Bruce* (1886) 18 Q.B. Div. 147. The master's signature is *prima facie* evidence against the owners that the goods signed for were put on board, but it is not conclusive against them; *Smith* v. *Bedouin Steam Navigation Co.* (1896) A.C. 70.

sell or purchase were carried out the principal may be put to a loss.

This section, therefore, lays down a very sensible and sound rule of acting prudently as it were a personal case of the agent himself.

Illustration (b) seems to be suggested by Story's opinion that, "if goods are perishable and perishing, the agent may deviate from his instructions as to the time or price at which they are to be sold": S.A. sec. 193. Under this head comes the authority by which the master of a ship may sell the goods of an absent owner in case of necessity when he is unable to communicate with the owner and obtain his direction.[67]

Where a principal's debtor is financially embarrassed, the agent to collect the principal's outstandings may collect from such debtor what cash amount he can and give credit for the rest.[68]

Sub-Agents

190. An Agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or, from the nature of the agency, a sub-agent must, be employed.

When Agent cannot delegate.

Delegatus non protest delegare.—This section embodies a very important principle viz. one who has a bare power or authority from another to do an act must execute it himself and cannot delegate his authority to another. The reason that no such power can be implied as an ordinary incident in the contract of agency is that confidence in the particular person employed is at the root of the contract. Accordingly, auctioneers, factors, directors of companies, brokers, and other agents in whom confidence is reposed have, generally speaking, no power to delegate their authority. "But the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case, the reason of the thing requires that the rule should be relaxed." And "an authority to the effect referred to may and should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where, in the course of the employment, unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute."[69] Authority to delegate is implied whenever the act to be done by the sub-agent is purely ministerial, and does not involve the exercise of any discretion.[70]

In some cases the custom of trade justifies the delegation of special branches of work. Thus it has been found to be a usage of trade for architects and builders to have the quantities taken out from their designs by surveyors, who are more expert in that work, for the purpose of enabling a proper estimate to be made; and the surveyor can sue

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[67] *Australian Steam Navigation Co.* v. *Morse* (1872) L.R. 4 P.C. 222.

[68] *Gokal Chand* v. *Nand Ram* (1939) A.C. 106 (113).

[69] *De Bussche* v. *Alt* (1878) 8 Ch. Div. 286, 310, 311.

[70] *Ex parte Birmingham Banking Co.* (1868) L.R. 3 Ch. 651; *Allam & Co. Ltd.* v. *Europa Poster Services Ltd.* (1968) 1 W.L.R. 639.

the architect's employer for his charges.[71]

"Sub-agent" defined.

191. A "sub-agent" is a person employed by, and acting under the control of, the original agent in the business of the agency.

Sub-agent.—The relation of the sub-agent to the original main agent is, as between themselves, that of agent to principal. "It may be generally stated that, where agents employ sub-agents in the business of the agency, the latter are clothed with precisely the same rights, and incur precisely the same obligations and are bound to the same duties, in regard to their immediate employers, as if they were the sole and real principals": S.A. sec. 386. In the three next following sections the Act has defined, in accordance with settled law, the relations of the ultimate principal to the sub-agent in different cases.

Representation of principal by sub-agent properly appointed.

192. Where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for acts, as if he were an agent originallv appointed by the principal.

Agent's responsibility for sub-agent.

The agent is responsible to the principal for the acts of sub-agent.

Sub-agent's responsibility.

The sub-agent is responsible for his acts to the agent, but not to the principal, except in case of fraud or wilful wrong.

Principal, Agent, Sub-agent, third party.—The last para of the section is based on the principle that there is no privity of contract between the principal and sub-agent. That is the reason why a sub-agent is responsible to the agent and not to the principal. A sub-agent is not accountable to the principal;[72] he is liable to account to the agent. The principal cannot proceed against the sub-agent except in case of fraud or wilful wrong.[72]

The second para emphasizes that the privity of contract exists between the agent and principal and therefore the agent is responsible for the acts of the sub-agent to the principal.

Despite this position *inter se* amongst the principal, agent and sub-agent, a third party cannot be made to suffer and hence *vis-a-vis* a third party, the principal is bound by the acts of the sub-agent provided the sub-agent is properly appointed. If the sub-agent is not properly appointed, sec. next section. This principle is laid down in the first para of the section. Where authority to appoint a sub-agent in the nature of a substitute for the first agent "exists" either by agreement or as implied in the nature of the business "and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which is employment casts upon him, as if he had been appointed agent by the principal himself."[73] This is the class of cases contemplated in sec. 194. Otherwise the sub-agent

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[71] *Moon* v. *Witney Union* (1837) 3 Bing. N.C. 814.

[72] *Calico Printers' Association Ltd.* v. *Barclay's Bank* (1931) 145 L.T. 51; *New Zealand and Australian Land Co.* v. *Watson* (1881) 7 Q.B.D. 374; *Nansukhdas* v. *Birelichand* 19 Bom. L.R. 948.

[73] *De Bussche* v. *Alt* (1878) 8 Ch. Div. 286, 311.

looks to and is controlled by the agent who appointed him, and is not under any contract with the principal. If money due to *A* is paid to *P*, who is Z's servant, Z having authority from *A* to collect it, *P* is accountable only to Z and *A* cannot recover the money direct from *P*.[74]

A sub-agent who does not know that his employer is an agent is entitled to the same rights as any other contracting party dealing with an undisclosed principal (sec ss. 231, 232 below).

Agent's responsibility for sub-agent.—A commission agent for the sale of goods, who properly employs a sub-agent for selling his principal's goods, is liable to the principal for the sub-agent's fraudulent disposition of the goods within the course of his employment. The last clause of this section, giving a principal in case of fraud or wilful wrong the right of recourse to the sub-agent, does not exclude the principal's normal right of recourse to his agent. In fact, the total effect of the section is to give an option to the principal where a fraud or wilful wrong is committed by the sub-agent.[72]

Agent's responsibility for sub-agent appointed without authority.

193. Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal.

Unauthorized sub-agent.—Preceding section dealt with the position when a sub-agent is duly appointed. This section deals with a situation arising in case a sub-agent is appointed without authority. In such an event, the principal is not bound by the acts of the sub-agent nor is the latter liable to the principal. In such an event, the agent is the principal of the sub-agent and the agent is responsible both to the principal and the third party. The responsibility to the third party is an additional one which was not under the preceding section.

As regards the ratification of unauthorised acts see sections 196-200 below.

Relation between principal and person duly appointed by agent to act in business of agency.

194. Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

Illustrations

(a) *A* directs *B*, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. *B* names *C*, auctioneer, to conduct the sale. *C* is not a sub-agent, but is *A*'s agent for the conduct of the sale.

(b) *A* authorises *B*, a merchant in Calcutta, to recover the moneys due to *A* from *C*

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[74] *Stephens* v. *Badcock* (1832) 3 B. & Ad. 354; *Summan Singh* v. *National City Bank of New York* ('52) A Punj. 172.

& Co. B instructs, *D*, a solicitor, to take legal proceedings against *C & Co.* for the recovery of the money. *D* is not sub-agent but is solicitor for *A*.

Substitute Agent.—In such cases as are put in the illustrations, *B*, as between *A* and the auctioneer or solicitor, is treated as merely the messenger of *A*'s direct authority. This section apparently means to draw a clearly marked line between an ordinary sub-agent and a person who is put in relation with the principal, a "substitute" as he is called in the passage already quoted above.[75]

The following section and this section, read together, show that they do not apply to the case of an agent being instructed to hand over all or part of the business to a certain named person and no other; in such case he is not answerable for the capacity or conduct of that person; his duty is done when he has established relation between the substituted agent and the principal, and the secs. 191, 192 have no place.[76] In the Calcutta Case *N* purchased from firm *C* at Calcutta some corrugated iron sheets. *N* instructed the firm to send the goods to his place at Khulana and collect the price through a local Bank at Khulana. The firm *C* thereupon sent goods to Khulana and dispatched the Railway Receipt, their bills and demand draft with a covering letter to National Bank of India, their bankers at Calcutta, instructing them to collect the Bill through the Bank at Khulana, i.e. Khulana Union Bank Ltd. The Bank at Khulana contrary to instructions made over goods to *N* and *N* delayed paying the amount. *C* brought a suit to recover the sum from *N* and National Bank of India. It was held that Khulana Union Bank Ltd. was the agent of *C* firm for the purpose of collecting the bills at Khulana and National Bank was merely the conduit pipe through which *C* firm of Calcutta communicated their instructions to Union Bank at Khulana and Union Bank at Khulana was not the sub-agent of National Bank, but the agent of the principal. Accordingly defendant Bank (National Bank of India) created privity of contract between plaintiff *C* firm and Union Bank at Khulana which became the agent of the plaintiff firm *C*, known as substituted agent and not as the sub-agent of defendant Bank. Hence the defendant Bank was not liable to the plaintiffs. According to Punjab High Court[76] to bring about privity of contract the naming of the substituted agent should be to the principal himself.

Agent's duty in naming such person.

195. In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and if he does this he is not responsible to the principal for the acts or negligence of the agent so selected.

Illustrations

(a) *A* instructs *B*, a merchant, to buy a ship for him. *B* employs a ship surveyor of good reputation to choose a ship for *A*. The surveyor makes the choice negligently and the ship turns out to be unseaworthy, and is lost. *B* is not, but the surveyor is, responsible to *A*.

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[75] *De Bussche* v. *Alt* (1878) 8 Ch. Div. 310, 311.

[76] *T. C. Chowdhury & Bros.* v. *Girindra Mohan Neogi* (1929) 56 Cal. 686, 121 I.C. 636, ('30) A.C. 10; *Central Bank of India* v. *Firm Rur Chand* ('58) A. Punj. 159; *Nensukhdas Shivnarain* v. *Birdichand* A.I.R. 1917 Bom. 19; *Mercantile Bank of India Ltd.* v. *Chelumal* A.I.R. 1930 Sind 247.

(b) *A* consigns goods to *B*, a merchant, for sale. *B*, in due course, employs an auctioneer in good credit to sell the goods of *A*, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. *B* is not responsible to *A* for the proceeds.

Discretion.—In properly electing a sub-agent, prudent man's discretion is to be exercised.

Ratification

Right of person as to acts done for him without his authority. Effect of ratification.

196. Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratifies them, the same effects will follow as if they had been performed by his authority.

Condition of Ratification.—These conditions are as under:—

(1) The act must have been done on behalf of another;

(2) The act must have been done without knowledge or authority of the person on whose behalf the act is done;

If the said conditions are satisfied such other person has two options either to ratify or to disown.

If the act is not done on behalf of another or the person has purported to act on his own behalf, the first condition is not satisfied.[77] In order to do the act on behalf of another, the latter must be legally in existence at the time the act is done.[78] Acts done prior to incorporation of a company cannot be said to have been done on behalf of the company which did not then exist.[79] A person in order to ratify the act must be competent to ratify.[80]

The principal on ratification of the act is bound by it whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract.[81] But an act which void *ab initio* and hence a nullity is not capable of ratification.[82] An act which is already unauthorised at the time it is done cannot be ratified.[83] An act done in excess of authority is capable of being ratified.[84]

Essence of ratification.—The essence of ratification is that there must be an intention to ratify. The ratifier must know that he is ratifying an act done on his behalf. If an act is illegal and the ratifier does not know of the illegality there is no intention to ratify

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[77] *Raja Rai Bhagwat Dayal* v. *Debi Dayal*, 10 Bom. L.R. 230 (P.C.): 35 I.A. 48: 12 C.W.N. 393.

[78] *Kelner* v. *Baxter* (1886) L.R. 2 C.P. 174 (185).

[79] *In re Empress Engineering Co.* (1880) 16 Ch. D. 125; *Ganesh Flour Mills Co.* v. *Puran Mal* (1905) Punj. Rec. No. 2.

[80] *Raja Rai Bhagwat Dayal* v. *Debi Dayal supra*. *Irvine* v. *Union Bank of Australia*, (1877) 3 Cal. 280 (285): 4 I.A. 86: 2 A.C. 366; *Tukaram Ramji* v. *Madhorao Manaji* (1948) A. Nag. 293; *Hari Mohan* v. *Sew Narayan* (1949) A. Ass. 57.

[81] *Wilson* v. *Tumman and Fretson*, (1843) 6 M. & Gr. 236 (243): 64 R.R. 770 (776).

[82] *Mauji Ram* v. *Tara Singh* (1881) 3 All. 852.

[83] *Raghavachari* v. *Fakkir Mahomed* (1916) 30 M.L.J. 497 (501); *Keighley Maxted & Co.* v. *Durant* (1901) A.C. 240.

[84] *Secretary of State* v. *Kamachee Boyce*, 7 M.I.A. 476.

for lack of knowledge of illegality[85] (see sec. 198).

Ratification may be express or may be effected impliedly by conduct[86] (see sec. 197).

Legal effect of Ratification.—Ratification must be by the person for whom the agent professes to act. "That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow authority."[87] Ratification of a part of a transaction may operate as a ratification of the whole transaction[88] (see sec. 199).

A ratification is in law equivalent to as if the act was done with previous authority.[89]

Time to ratify.—And where a time is limited for doing an act, and *A* does it on behalf of *B*, but without his authority, within that time, *B* can ratify it only before the time has expired.[90] The reason for this is not to prejudice a third party (see sec. 200). This section is subject to the succeeding provisions.

"Acts done without knowledge or authority."—An act done by an agent in excess of his authority may also be ratified.[91] But the ratification of an act done without authority does not confer authority to do similar acts in future.[92]

Retrospective effect.—Ratification, if effective at all, relates back to the date of the act ratified. If an action is brought in a man's name without his knowledge, he may adopt the proceedings and make them good at any time.[93] The rule goes so far that if *A* makes an offer to *B* which *Z* accepts in *B*'s name without authority, and *B* afterwards ratifies the acceptance, an attempted revocation of the offer by *A* in the time between *Z*'s acceptance and *B*'s ratification is inoperative.[94]

A owes money to *B*, and *Z* pays *B* on behalf of *A* but without authority from *A*. If *B* knowing that *Z* has no authority accepts payment, he is estopped from pleading *Z*'s want of authority and claiming payment again from *A*. If *B* on discovering *Z*'s want of authority returns the money to *Z*, there is nothing that *A* can ratify and *A* cannot rely on the payment as a discharge of his debt to *B*.[95]

What act cannot be ratified.—A transaction which is void *ab initio* cannot be ratified.[96] This is illustrated in England by a line of cases in company law marking the dis-

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[85] *Premila Debi* v. *People's Bank* (1938) A.P.C. 284: (1939) Lah. I: 178 I.C. 659; *U.P. Government* v. *Church Missionary Trust Association Ltd.* (1948) 22 Luck 93: 229 I.C. 421: (1948) A. Oudh. 54.

[86] *Bhavani Shankar* v. *Gordhandas*, 46 Bom. L.R. 228: 70 I.A. 50: (1943) A.P. C. 66.

[87] *Wilson* v. *Tumman* (1843) 6 Man. & Gr. 236, 243; 64 R.R. 770, 776, per Cur.

[88] *Commercial Banking Co. of Sydney* v. *Mann*. (1961) A.C. 1.

[89] *Bhavani Shankar* v. *Gordhanlal*, *supra*.

[90] *Dibbins* v. *Dibbins* (1896) 2 Ch. 348.

[91] *Secretary of State* v. *Kamachee Boyce* (1859) 7 M.I.A. 476.

[92] *Irvine* v. *Union Bank of Australia* (1877) 3 Cal. 280, 287; L.R. 4 I.A. 86; 2 App. Ca. 366, 375; *Pratt* v. *E. D. Sasoon* (1938) Bom. 421 (P.C.).

[93] *Danish Mercantile Bank* v. *Beaumont* (1951) Ch. 680.

[94] *Bolton Partners* v. *Lambert* (1889) 41 Ch. Div. 295.

[95] *Walter* v. *James* (1871) L.R. 6 Ex. 124.

[96] *Mauji Ram* v. *Tara Singh* (1881) 3 All. 852.

tinction between irregularities capable of being made good if the act is ratified by a general meeting, or the whole body of shareholders, and acts not within the company's object as defined by its original constitution, and therefore incapable of being made binding on the company by any ordinary means known to the law. (See section 200).

Agents of Government.—Acts done by public servants in the name of the Government may be ratified by subsequent approval in much the same way as private transactions [see *Secretary of State* v. *Kamachee Boyee*[97] and *Collector of Masulipatam* v. *Cavaly Vencata*[98]].

Ratification may be expressed or implied.

197. Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

Ilustrations

(a) *A*, without authority, buys goods for *B*. Afterwards *B* sells them to *C* on his own account; *B*'s conduct implies a ratification of the purchase made for him by *A*.

(b) *A*, without *B*'s authority, lends *B*'s money to *C*. Afterwards *B* accepts interest on the money from *C*. *B*'s conduct implies a ratification of the loan.

Express ratification.—An express ratification cannot become complete until it is communicated; till then it is liable to revocation.[99]

Implied ratification by conduct.—Assent to an act done on one's behalf, like consent to an agreement may be conveyed otherwise than in words; and taking the benefit of the transaction is the strongest, as it is the most usual evidence of tacit adoption. Accepting the results of the agent's proceeding, whether obviously beneficial to the principal or not, will have the same effect, e.g. receipt of money with the knowledge of the unauthorised contract[1] or disposal of goods received under unauthorised contract.[2] By silence or acquiescence on the part of a landlord in respect of unasked for improvements made by a tenant of the leasehold premises, ratification was implied.[3] The conduct must be such as to show an intention to adopt or recognise such act or transaction.[4]

Knowledge requisite for valid ratification.

198. No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

Knowledge of facts to precede ratification.—The Judicial Committee have laid down in general terms that "acquiescence and ratification must be founded on a full knowledge of the facts, and further it must be in relation to a transaction which may be valid in itself and not illegal, and to which effect may be given as against the party by his acquiescence in and adoption of the transaction."[5] Again, the Court of Appeal in

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[97] (1859) 7 M.I.A. 476.

[98] (1860) 8 M.I.A. 529, 554.

[99] *Rajagopalacharyulu* v. *The Secretary of State for India* (1915) 38 Mad. 997, 1008.

[1] *Hunter* v. *Parker* (1840) 7 M. & W. 322.

[2] *Allard* v. *Bourne* (1863) 15 C.B. (N.S.) 468; *Smith* v. *Hull Glass Co.* (1852) 11 C.B. 897.

[3] *Prince* v. *Clark* (1823) 1 B. & C. 186; *The Australia* (1859) 13 Moore P.C. 132, *Bank Meli Iran* v. *Barclay's Bank* (1951) 2 T.L.R. 1057; *Parker and Cooper Ltd.* v. *Reading* (1926) Ch. 975.

[4] *Lyell* v. *Kennedy*, (1899) 14 App. Cas. 437.

[5] *La Banque Jacques-Cartier* v. *La Banque D'Epargne, etc.* (1887) 13 App. Ca. 111;

England has said: "To constitute a binding adoption of acts *a priori* unauthorised these conditions must exist: (1) the acts must have been done for and in the name of the supposed principal, and (2) there must be full knowledge of what those acts were, or such an unqualified adoption that he inference may properly be drawn that the principal intended to take upon himself the responsibility for such acts, whatever they were."[6] *A* entrusted moneys to *B* for investment which *B* without the knowledge of *A* used in his own business. The privy Council held that whether the facts supported the plea of novation or not, the doctrine of ratification could not be applied so as to turn the fund held in a fiduciary capacity into a deposit on ordinary banking terms.[7]

Effect of ratifying unauthorised act forming part of a transaction.

199. A person ratifying any unauthorised act done on his behalf ratifies the whole of the transaction of which such act formed a part.

Effect of ratification of a part.—It is obvious that a man cannot at his own choice ratify part of a transaction and repudiate the rest.[8] A principal cannot ratify the favourable parts of a transaction and disaffirm the rest as that would enable him to make a partial or a heterogenous contract which the third party did not intend to make.[9]

Ratification of unauthorised act cannot injure third person.

200. An act done by one person on behalf of another without such other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.

Ilustrations

(a) *A*, not being authorised thereto by *B*, demands, on behalf of *B*, that the delivery of a chattel, be ratified by *B*, so as to make *C* liable for damages for his refusal to deliver.

(b) *A* holds a lease from *B*, terminable on three months' notice. *C* an unauthorised person, gives notice of termination to *A*. The notice cannot be ratified by *B*, so as to be binding on *A*.

Revocation not to prejudice a third party.—This is the converse of the principle that a voidable transaction cannot be rescinded to the prejudice of third person's right acquired under it in good faith. Rights of property cannot be changed retrospectively by ratification of an act inoperative at the time. The rule is also stated in the form that ratification, to make an act rightful which otherwise would be wrongful, must be at a time when the principal could still have lawfully done it himself.[10] The ratification of a contract does not give the principal a right to sue for a breach committed before the ratification.[11] *A* holds a lease from two joint receivers, *B* and *C*; *B*, without *C*'s authority,

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Premila Debi v. *People's Bank* (1939) Lah. 1, 178 I.C. 659, ('38) A.P.C. 284.

[6] *Marsh* v. *Joseph* (1897) 1 Ch. 213, 246; *Tukaram* v. *Madhorao* (1947) Nag. 710, ('48) A.N. 293.

[7] *Murugappa* v. *Official Assignee of Madras* (1937) 64 I.A. 343, 40 Bom. L.R. 1, 170 I.C. 329, ('37) A.P.C. 296.

[8] See *Keay* v. *Fenwick* (1876) 1 C.P.D. 745, 753.

[9] *Bristow* v. *Whitmore* (1861) 9 H.L. Cas. 391; *Fitmaurice* v. *Bayley* (1860) 9 H.L. Cas. 78 (112); *Commercial Banking Co. of Sydney* v. *Mann*, (1961) A.C.1.

[10] *Bird* v. *Brown* (1850) 4 Ex. 786, 80 R.R. 775.

[11] *Kidderminster* v. *Hardwick* (1873) L.R. 9. Ex. 13.

gives notice to *A*. The notice cannot be ratified by *C* so as to be binding on *A*.[12]

Revocation of and renunciation Authority

201. An agency is terminated by the principal revoking his authority; or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

Termination of agency.

Termination of Agency.—We have to read this section with the following ones to sec. 210 inclusive, which modify its effect in various ways.

Termination of agency.—This section has provided diverse modes of termination of agency as follows:-

(i) by the principal revoking the authority (by a notice of revocation);
(ii) by the agent renouncing the business of agency (by notice of renunciation);
(iii) by the completion of the business of agency (e.g. completion of the transaction; expiration of the period for which agency may have been given);
(iv) by death, insolvency or insanity of either the principal or agent; dissolution of an incorporated company.

Besides the above modes, it may be terminated in the following cases:—

(a) by destruction of the subject matter of agency (see sec. 56)
(b) by the happening of an event which renders agency or its objects unlawful (see sec. 56); and
(c) by frustration of the agency or its objects such as disability, misadventure, literal impossibility.

Revocation by principal.—For condition for exercise of this mode see sections 202 to 204. For the method of exercising this right see sections 206 to 208. Sections 208 involves notice to third persons also.

Renunciation by agent.—For the method of exercising this right see sections 206 and 207.

Completion of business of agency.—The Allahabad and Calcutta High Courts hold that where an agent for the sale of goods receives the price, the agency does not terminate on the sale of the goods, but continues until payment of the price to the principal S. 218 provides that "an agent is bound to pay to his principal all sums received on his account. Clearly then the business does not terminate on receipts of the money by the agent, inasmuch as there is a subsequent obligation to account for the sums and to pay them".[13] In a Madras case, Wallis, C.J. , expressed the opinion that the agency terminates when the sale is completed, and that it does not continue until payment of the price.[14] The authority of an agent for sale to contract on the principal's behalf ceases as soon as the sale is completed. He has no power to alter the terms of the contract without fresh authority from the principal.[15]

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[12] *Cassim Ahmed* v. *Eusuf Haji Ajam* (1916) 23 Cal. L.J. 453

[13] *Babu Ram* v. *Ram Dayal* (1890) 12 All. 541, followed in *Fink* v. *Buldeo Dass* (1899) 26 Cal. 715, 724, 725.

[14] *Venkatachalam* v. *Narayanan* (1916) 39 Mad. 376, 378-379.

[15] *Blackburn* v. *Scholes* (1810) 2 Camp. 343.

The authority of an agent to collect bills and to remit the amount, when realised, by drafts, terminates as soon as the drafts are despatched.[16]

Death of principal.—A power of attorney to an agent to present a document for registration is revoked by the death of the principal. It was accordingly held by the Judicial Committee that where the principal died before the presentation, and the Registrar, knowing of the principal's death, accepted and registered the document, the registration was invalid.[17] See notes to sec. 209 below.

Where the agency is for a fixed term.—"Where an agent has been appointed for a fixed term, the expiration of the term puts an end to the agency, whether the purpose of the agency has been accomplished or not; consequently where an agency for sale has expired by express limitation, a subsequent execution thereof is invalid, unless the term has been extended."[18]

Termination of agency where agent has an interest in subject-matter.

202. Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

Illustrations

(a) *A* gives authority to *B* to sell *A*'s land, and to pay himself, out of the proceeds, the debts due to him from *A*. *A* cannot revoke this authority, nor can it be terminated by his insanity or death.

(b) *A* consigns 1,000 bales of cotton to *B*, who has made advances to him on such cotton, and desires *B* to sell the cotton, and to repay himself, out of the price, the amount of his own advances. *A* cannot revoke this authority, nor is it terminated by his insanity or death.

If authority coupled with interest.—In these cases the current phrase is that the agent's authority is "coupled with an interest". The principle is thus stated: "that where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable."[19] In fact, the circumstances must be such that revocation of the authority would be a breach of faith against the agent. Illustration (b) is a variation of the facts of an English case[20] where, however, the authority was held to be revocable as it was not given as security for the advances. In the English case the advances were made after the authority had been given, and so the agent's interest arose afterwards and was incidental. In the illustration the advances are made first and then the authority is given for the purpose of being a security.

The expression "has an interest in the property" would include cases where authority is given, by deed or otherwise, giving an interest in the property such as a security or a lien or a special right in respect of advances upon the subject-matter of agency. This

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[16] *Alliance Bank of Simla, Ltd.* v. *Amritsar Bank* (1915) Punj. Rec. no. 79, p. 322.

[17] *Mujid-un-Nissa* v. *Abdur Rahim* (1900) 23 All. 233, L.R. 28 I.A. 15.

[18] Per Mookerjee, J., in *Lalljee* v. *Dadabhai* (1916) 23 Cal. L.J. 190, 202.

[19] *Smart* v. *Sandars* (1848) 5 C.B. at p. 917; *Carmichael's case* (1896) 2 Ch. 643, 648; *Chathu Kutti* v. *Kundan* (1931) 61 M.L.J. 852, 136 I.C. 776, ('32) A.M. 70.

[20] *Smart* v. *Sandars* (1848) 5 C.B. 895, 918. And see *Frith* v. *Frith* (1906) A.C. 254.

may include continuation of the subsistence of such security or interest thereon. ght to earn commission is not such as interest.[20] Irrevocable power of attorney ır of a purchaser for valuable consideration would be such an interest.

e interest which an agent has in effecting a sale and the prospect of remuneration therefrom do not constitute such an interest as would prevent the termination of ıcy.[21] Upon the same principle, where an agent is appointed to collect rents, and y is agreed to be paid out of those rents, it does not give the agent an interest ubject-matter of the agency within the meaning of this section.[22] But where an authorised to recover a sum of money due by a third party to the principal and imself, out of the amount so recovered, the debts due to him from the principal, t has an interest in the subject-matter of the agency, and the authority cannot be [23]

tors for sale of goods.—The question has often arisen as to whether a factor made advances as against goods consigned to him for sale has such an interest ods consigned as to prevent the termination of his authority to sell. The result ses appears to be that the authority of a factor to sell is in its nature revocable, mere fact that advances have been made by him, whether at the time of his ent as such or subsequently, cannot have the effect of altering the revocable the authority to sell, unless there is an agreement express or implied between s that the authority shall not be revoked.[24] Where the factor is expressly author- pay himself the advances out of the sale proceeds, as in illustration (b), he has st in the goods consigned to him for sale, and the authority to sell cannot be In such a case "an interest in the property" is expressly created. But the "inter- not be so created, and it is enough to prevent the termination of the agency that rest" could be inferred from the language of the document and from the course gs between the parties. Thus where a factor who had made advances as against nsigned to him for sale was authorised to sell them "at the best price obtain- d in the event of a shortfall to draw on the consignor, it was held that this ent gave an interest to the factor in the goods, and that the authority to sell could voked.[25]

. The principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

principal ke the hority.

t amounts "to exercise of authority."—An agent authorised to purchase behalf of his principal cannot be said to have exercised the authority so given o as to bind the principal" if he merely appropriates to the principal a contract entered into by himself with a third party. Such an appropriation does not

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nd v. *Chotooram* (1900) 24 Bom. lchand v. *Seth Hazarimal* ('32)

arya v. *Ramchandra* (1881) 5

. *Matchett* (1870) 7 B.H.C. A.C. also *Subramania* v. *Narayanan* (1901) 24 Mad. 130, and *Jagabhai* v. *Rustamji* (1885) 9 Bom. 311.

[24] *Jafferbhoy* v. *Charlesworth* (1893) 17 Bom. 520, 542.

[25] *Kondayya* v. *Narasimhulu* (1893) 20 Mad. 97.

create a contractual relation with the third party, and the principal, therefore, may revoke the authority.[26] In that case, before the revocation was received, contractual relationship involving an obligation to a third party was not entered into.[26]

Authority given to an auctioneer to sell goods by auction may be revoked at any time before the goods are knocked down to a purchaser,[27] and authority given to a policy broker to effect a policy at any time before the policy is executed so as to be legally binding. Authority to pay money in respect of an unlawful transaction may be revoked at any time before it has actually been paid, even if it has been credited in account.[28]

Revocation where authority has been partly exercised.

204. The principal cannot revoke the authority given to his agent after the authority has been partly exercised, so far as regards such acts and obligations as arise from acts already done in the agency.

Illustrations

(a) *A* authorises *B* to buy 1,000 bales of cotton on account of *A* and to pay for it out of *A*'s money remaining in *B*'s hands. *B* buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. *A* cannot revoke *B*'s authority so far as regards payment for the cotton.

(b) *A* authorises *B* to buy 1,000 bales of cotton on account of *A*, and to pay for it out of *A*'s money remaining in *B*'s hands. *B* buys 1,000 bales of cotton in *A*'s name, and so as not to render himself personally liable for the price. *A* can revoke *B*'s authority to pay for the cotton.

Authority partly exercised.—The rule here laid down is connected with the principal's duty to indemnify the agent (s. 222 below). "If a principal employs an agent to do something which by law involves the agent in a legal liability"—or even in a customary liability by reason of usage in that class of transactions known to both agent and principal—"the principal cannot draw back and leave the agent to bear the liability at his own expense."[29] If a principal revokes his agent's authority to carry on an enterprise, and the agent nevertheless carries it on and contrary to expectations makes a profit, the principal cannot then ignore his own revocation and claim the profit.[30]

Compensation for revocation by principal or renunciation by agent.

205. Where there is an express on implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

Compensation for revocation.—By this section "the principal is bound to make compensation to the agent whenever there is an express or implied contract that the

[26] *Lakmichand* v. *Chotooram* (1900) 24 Bom. 403.

[27] *In re Hare & O'More's Contract* (1901) 1 Ch. 93, *Warlow* v. *Harrison* (1859) 1 E. & E. 309.

[28] *Taylor* v. *Bowers* (1876) 1 Q.B.D. 291.

[29] *Read* v. *Anderson* (1884) 13 Q.B. Div. 779, 783.

[30] *Harihar Prasad Singh* v. *Kesho Prasad Singh*, (1925) 93 I.C. 454, 605, ('25) A.P. 68.

agency shall be continued for any period of time. This would probably always be the case when a valuable consideration had been given by the agent.[31]

In the absence of an express or implied contract, the mere undertaking of the agency is not a sufficient ground for compensation. *A* employed *B* as his sole agent for the sale of *A*'s coal for seven years. *B* was not entitled to compensation when *A* closed his colliery and ceased to supply coal before the end of the term of seven years. The House of Lords held that in the absence of a special term in the contract that *A* should continue to supply coal during the term, there was no implied obligation on *A* to carry on business for the benefit of the agent.[32]

There is a class of cases of which an agent for sale, having proceeded far enough in the transaction to be entitled to commission on its completion, has been deprived of his commission by the principal putting an end to the whole matter. But these cases do not depend on the rule here laid down, or on any rule peculiar to the law of agency. They are examples of the rule that one party to a contract must not prevent another from performing his part (ss. 53, 67 above), or "each party is entitled to the full benefit of his contract without hindrance from the other."[33] See further the commentary on sec. 219 below.

Sufficient Cause.—Where a principal refuses to pay the agent his remuneration without sufficient cause, or uses inexcusable language, or uses physical violence, an agent could be said to have a sufficient cause to terminate the agency.

Notice of revocation or renunciation.

206. Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

Notice before revocation.— An authority given by two or more principals jointly may be determined by notice of revocation or renunciation being given by or to any one of the principals. This section provides for giving notice before revoking the authority. If authority revoked without notice, damage, if any, to agent will have to be made good.

Revocation and renunciation may be expressed or implied.

207. Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively.

Illustration

A empowers *B* to let *A*'s house. Afterwards *A* lets it himself. This is an implied revocation of *B*'s authority.

Form of revocation/renunciation.—There is no special form. It may be express or specific or implied by conduct. See sec. 201. According to Madras High Court[34] no notice is required to be given when agency is not for a fixed duration. So where there is no express or implied contract that the agency should be continued for any specific period, the principal is entitled to terminate agency without any obligation to give a rea-

[31] Per Cur. in *Vishnucharya* v. *Ramchandra* (1881) 5 Bom. 253, 256.

[32] *Rhodes* v. *Forwood* (1876) 1 App. Ca. 256, per Lord Penzance at p. 272.

[33] *Prickett* v. *Badger* (1856) 1 C.B.N.S. 296.

[34] *Bright Bros (P) Ltd* v. *J. K. Sayani* A.I.R. 1976 Mad. 55

sonable notice. The court emphasized that the expression "such revocation or renunciation" occuring in S. 206 necessarily makes that Section applicable to the cases governed by S. 205 only and not to every revocation or renunciation dealt with by the Act.

When termination of agent's authority takes effect as to agent, and as to third persons.

208. The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

Illustrations

(a) *A* directs *B* to sell goods for him, and agrees to give *B* 5 per cent commission on the price fetched by the goods. *A* afterwards, by letter, revokes *B*'s authority. *B*, after the letter is sent, but before he receives it, sells the goods for 100 rupees. The sale is binding on *A*, and *B* is entitled to five rupees as his commission.

(b) *A*, at Madras, by letter, directs *B* to sell for him some cotton lying in a warehouse in Bombay, and afterwards, by letter, revokes his authority to sell, and directs *B* to send the cotton to Madras. *B*, after receiving the second letter, enters into a contract with *C*, who knows of the first letter, but not of the second, for the sale to him of the cotton. *C* pays *B* the money, with which *B* absconds. *C*'s payment is good as against *A*.

(c) *A* directs *B*, his agent, to pay certain money to *C*. *A* dies, and *D* takes out probate to his will. *B*, after *A*'s death, but before hearing of it, pays the money to *C*. The payment is good as against *D*, the executor.

Time from which revocation operates.—Revocation by the act of the principal takes effect as to the agent from the time when the revocation is made known to him; and as to third persons when it is made known to them, and not before. [S.A. s. 470.] It stands to reason that termination should operate when it is known to the agent or the third person, as the case may be. The reason is that for want of notice, he should not be prejudiced.

Except as to illustration (c), which removes an anomaly, this section is in accordance with the Common Law. When *A* trades as *B*'s agent with *B*'s authority (even though the business be carried on in *A*' name, if the agency is known in fact), all parties with whom *A* makes contracts in that business have a right to hold *B* liable to them until *B* gives notice to the world that *A*'s authority is revoked; and it makes no difference if an a particular case the agent intended to keep the contract on his own account.[35]

Agent's duty on termination of agency by principal's death or insanity.

209. When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

Agent to protect the interest of the legal representatives of the principal.—An agency is terminated under sec. 201 by the death of the principal. If the agent thereafter continues in service of the principal's heirs, a new agency is created. There is nothing in this section to indicate that the agency continues on the old terms.[36] See notes to sec.

[35] *Trueman* v. *Loder* (1840) 11 A. & E. 589.

[36] *Madhusudan* v. *Rakhal Chandra* (1916) 43 Cal. 248, 254-255.

208 above. This section provides that after the death of the principal, although agency is determined, the agent must take reasonable steps to protect the interests of the legal representatives.

Termination of sub-agent's authority.

210. The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

Automatic termination of sub-agent's authority.

Agent's Duty to Principal

Agent's duty in conducting principal's business.

211. An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.

Illustrations

(a) *A*, an agent engaged in carrying on for *B* a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investments. *A* must make good to *B* the interest usually obtained by such investment.

(b) *B*, a broker, in whose business it is not the custom to sell on credit, sells goods of *A* on credit to *C*, whose credit at the time was very high. *C*, before payment, becomes involvent. *B* must make good the loss *A*.

Additional Illustrations

(i) An agent, instructed to warehouse goods at a particular place, warehouses a portion of them at another place, where they are destroyed, without negligence. He is liable to the principal for the value of the goods destroyed. [*Lilley* v. *Doubleday* (1881) 7 Q.B.D. 510.]

(ii) An agent, instructed to insure goods, neglects to do so. He is liable to the principal for their value in the events of their being lost. [*Smith* v. *Lascelles* (1788) 2 T.R. 187.]

(iii) A broker, entrusted with goods for sale, sells them by auction at an inadequate price, not having made an estimate of the value in accordance with the custom of the particular trade. He must make good the loss. [*Solomon* v. *Barker* (1862) 2 F. & F. 926, 121 R. R. 828.]

(iv) An auctioneer, contrary to the usual custom, takes a bill of exchange in payment of the price of goods sold. He is liable to the principal for the amount of the bill in the event of its being dishonoured. [*Ferrers.* v. *Robins* (1835) 2 C.M. & R. 152.]

Obey directions.—The first part of this section contains a rule which is fundamental to a contract of agency. An agent must therefore comply with the directions of

his principal. If the directions of the principal are capable of two or more interpretations, he should either act under section 214 or he should act in a accordance with the interpretation which he honestly and fairly believes to be correct and proper.[37]

An agent is however not bound to obey directions which are unlawful.[38]

Acts otherwise or departure from instruction.—In *Bostock v. Jardine*[39] the defendants were authorised to buy a certain quantity of cotton for the plaintiff. "Instead of complying with their instructions they bought a much larger quantity for the plaintiff and divers other people," so that there was no contract on which the plaintiff could sue as principal. Accordingly, "though a contract was made, it was not the contract the plaintiff authorised the defendants to make," and the plaintiff was entitled to recover back a sum paid to the defendants on account of the purchase-money.[40]

If, at a sale by auction without reserve, the auctioneer is instructed not to sell for less than a certain price, he is not liable to the principal for accepting the highest *bona fide* bid, though it may be lower than that price.[41]

"If any loss be sustained"—measure of.—Where an agent in breach of his duty sells his principal's goods below the limit placed upon them by the principal, the measure of damages is the actual loss which the principal has sustained, and not the difference between the price at which they are sold and the limit of price placed on the goods. Where no loss is suffered, the principal is entitled at least to nominal damages, as the sale is wrongful.[42]

As regards remuneration, see section 220.

As to the duty to account for profits, see sec. 216 and commentary thereon.

As regards right to indemnity by agent see sections 222-226.

Customs of trade.—According to the custom of trade in Bombay, when a merchant requests or authorises a firm to order and to buy and send goods to him from Europe, at a fixed price, net free godown, including duty, or free Bombay harbour, and no rate of remuneration is specifically mentioned the firm is not bound to account for the price at which the goods were sold to the firm by the manufacturer. And it does not make any difference that the firm receives commission or trade discount from the manufacturer, either with or without the knowledge of the merchant.[43]

A stock broker instructed to sell or purchase shares is required to do so in accordance with the rules of the Stock Exchange.[44]

Del credere agent.—A *del credere* agent is one who, in consideration of extra remuneration, called a *del credere* commission, undertakes that persons with whom he enters into contracts on the principal's behalf will be in a position to perform their duties.[45] A *del credere* agency may be inferred from a course of dealing between the principal and agent showing that extra remuneration was charged for the risk of bad

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[37] *Woodhouse Etc. Ltd.* v. *Nigerian Produce Marketing Ltd.* (1972) A.C. 741 (771-77).

[38] *Cohen* v. *Kittell* (1889) 22 Q.B.D. 680; *T. Cheshire* v. *Vaughan Bros. & Co* (1920) 3 K.B. 240.

[39] (1865) 3 H. & C. 700.

[40] *Beaumont* v. *Boultbee* (1802) 7 Ves. 599, 608.

[41] *Bexwell* v. *Christie* (1776) Cowp. 395.

[42] *Manchubhai* v. *Tod* (1894) 20 Bom. 633; *Chelapathi* v. *Surayya* (1902) 12 M.L.J. 375; *Mathra Das Mutsaddi Lal* v. *Kishan Chand Ramji Das*, (1925) 7 Lah. L.J. 84, 86 I.C. 567, ('25) A.L. 332.

[43] *Paul Beier* v. *Chotalal Javerdas* (1906) 30 Bom. 1; *Ram Dev* v. *Seth Kaku* ('50) A. East. Punj. p. 92

[44] *Hawkins* v. *Pearse* (1903) 9 Com. Cas. 87.

[45] *Thomas Gabriel & Sons* v. *Churchill & Sim* (1914) 3 K.B. 1272, C.A.

debts.[46] A *del credere* agent incurs only a secondary liability towards the principal; he is in effect a surety for the person with whom he deals to the extent of any default by insolvency or something equivalent,[47] but not to the extent of a refusal to pay based on a substantial dispute as to the amount due.[48]

Usage of the Bombay market known as the pakki adat system.—The following are the incidents of a contract entered into on *pakki adat* terms:—

(1) The *pakka adatia* has no authority to pledge the credit of the up-country constituent of the Bombay merchant, and no contractual privity is established between the up-country constituent and the Bombay merchant.

(2) The up-country constituent has no indefeasible right to the contract (if any) made by the *pakka adatia* on receipt of the order, but the *pakka adatia* may enter into cross-contracts with the Bombay merchant, either on his own account or on account of another constituent, and thereby for practical purposes cancel the same.

(3) The *pakka adatia* is under no obligation to substitute a fresh contract to meet the order of his first constituent.

The relation between the *pakka adatia* and the up-country constituent is not the relation of agent and principal pure and simple. The precise relation may thus be described in the words of Jenkins, C.J.:—

"I think the contract between the parties was one of employment for reward, and the incidents proved appear to me to converge to the conclusion that the contract of a *pakka adatia*, in circumstances like the present, is one whereby he undertakes or—to use the word in its non-technical sense as businessmen on occasion do use it—guarantees that delivery should, on due date, be given or taken at the price at which the order was accepted, or difference paid: in effect he undertakes or guarantees to find goods for cash or cash for goods or to pay the difference.

"I do not say that there is no relation of principal and agent between the parties at any stage; there may be up to a point, and that this is legally possible is shown by Mellish, L.J. in *Ex parte White*[49] where he speaks of 'a person who is an agent up to a certain point.' So here there may have been that relation in its common meaning for the purpose of ascertaining the price at which the order was to be completed, and to this point of the transaction all the obligations of that relation perhaps apply. But when that stage is passed, I think the relation is not that of principal and agent, but of the nature I have indicated. Into this contract there is imported by the evidence of custom no such element of unreasonableness as would compel us to reject it on that score."[50] In *Manilal Raghunath* v. *Radha Kison Ramjiwan*,[51] Macleod, C.J., said the only distinction between a *pakka adatia* and a broker who is liable on his contract is that the former does not contract as agent, but as principal; in other words, the *pakka adatia* undertakes business for his principal but the particular contracts by which he carries out that business are his own affair.

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[46] *Shaw* v. *Woodcock* (1827) 7 B. & C. 73.

[47] *Thomas Gabriel & Sons* v. *Churchill & Sim* (1914) 3 K.B. 1272; *Rushalme & Bolton* v. *Read* (1955) 1 W.L.R. 146.

[48] *Churchill* v. *Goddard* (1937) 1 K.B. 92, 101.

[49] (1870-1871) L.R. 6 Ch. 397, at p. 403.

[50] *Bhagwandas Narotamdas* v. *Kanji Deoji* (1906) 30 Bom. 205, in app. from (1905) 7 Bom. L.R. 57; *Bhagwandas* v. *Burjorji* (1917) 45 I.A. 29, 32-33, 42 Bom. 377-378. See also *Kedarmal Bhuramal* v. *Surajmal Govindram* (1907) 33 Bom. 364; *Ram Dev* v. *Seth Kaku* ('50) A. East Punj. 92; *Sheo Narain* v. *Bhallar ('50)* A.A. 352.

[51] (1921) 45 Bom. 386.

Usage of the Bombay market known as the kachhi adat system in cotton business.—Under the *kachhi adat* system, when an *adatia* receives an order from an up-country constituent for the sale or purchase of cotton, he sends for a broker and settles the rate with him. The rate so settled[52] becomes from that moment binding upon both the *adatia* and the broker, and the broker remains personally bound until he brings a party willing to take up the contract. The broker in such a case adopts one of two ways: he either procures a party willing to take up the contract and introduces him to the *adatia*, and the party and the *adatia* thus exchange *kabalas* (contracts) with each other; or, where the broker has got a contract of his own ready, he agrees to transfer it to the *adatia* and brings together the *adatia* and the other party to his *(broker's)* contract, and these two then exchange *kabalas* with each other. If, when the party is brought to the *adatia* the market rate is the same as the rate settled by the *adatia* with the broker, the broker gets nothing beyond his commission. If, the market rate is less than the rate originally settled by the broker, the difference between the two rates has to be borne by the broker and paid to the person with whom the original rate was settled. If, on the other hand, it is more, that person has to bear the difference and pay it to the broker. There is nothing unreasonable in such a usage.[53]

Skill and diligence required from agent.

212. An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.

Illustrations

(a) *A*, merchant in Calcutta, has an agent, *B*, in London, to whom a sum of money is paid on *A*'s account, with orders to remit. *B* retains the money for a considerable time. *A*, in consequence of not receiving the money, becomes insolvent. *B* is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss—as, e.g. by variation of rate of exchange—but not further.

(b) *A*, an agent for the sale of goods, having authority to sell on credit, sells to *B* on credit, without making the proper and usual inquiries as to the insolvency of *B*. *B*, at the time of such sale, is involvent. *A* must make compensation to his principal in respect of any loss thereby sustained.

(c) *A*, an insurance broker, employed by *B* to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In con-

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[52] The rates are settled in consequence of constant fluctuation in the market, which may rise or fall every two minutes.

[53] *Fakirchand Lalchand* v. *Doolub Govindji* (1905) 7 Bom. L.R. 213. As to the discretion to call for margin in the Bombay Cotton Market, *Devshi* v. *Bhikamchand* (1926) 29 Bom. L.R. 147, 100 I.C. 993, ('27) A.B. 125.

sequence of the omission of the clauses nothing can recovered from the underwriters. *A* is bound to make good the loss to *B*.

(d) *A*, a merchant in England, directs *B*, his agent, at Bombay, who accepts the agency, to send him 100 bales of cotton by a certain ship. *B*, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival, the price of cotton rises. *B* is bound to make good to *A* the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

Use of skill.—"When a skilled labourer, artisan, or artist is employed, there is, on his part, an implied warranty that he is of skill reasonably competent to the art he undertakes. . . . An express promise or express representation in the particular case is not necessary. . . . The failure to afford the requisite skill which had been expressly or impliedly promised is a breach of legal duty and therefore misconduct." And the employer is justified in dismissing an employee who shows himself incompetent, though he may have been engaged for a term not expired.[54] How far an agent employed in the general supervision of work has to answer for the skill and diligence of workers under him must depend on the nature of the work and on local usage.[55] An agent is bound to know so much of the law material to the business in hand as will enable him to protect the principal's interest, and make the transaction binding on the other party.[56] Every person acting as a skilled agent is bound to bring reasonable skill and knowledge to the performance of his duties.[57]

Reasonable diligence.—An agent is under a duty to act with reasonable diligence. What is reasonable diligence, will depend upon the circumstances of each case. This rule requires on the part of an agent the exercise of the requisite degree of care in the performance of his duties. Failure to send the bill of lading within a reasonable time or failure to take special instructions in case the specific instructions cannot be carried out or failure to insure the goods may amount to acting without reasonable diligence.

The bank in remitting moneys must act as a prudent man would.[58] But an agent who is definitely authorised to enter into a particular transaction is not liable to the principal for any loss which may be suffered in consequence of the imprudent nature of the transactions;[59] nor is he liable for the consequence of a mere mistake or error of judgment provided he exercises such care and skill as may be reasonably expected under the circumstances.[60]

Payment of Compensation.—A gratuitous agent is liable for any loss sustained by his principal through the gross negligence of the agent.[61] As stated in the section the loss is recoverable only if it is the direct consequence of the agent's negligence.[62] In a case before the Supreme Court[63] the agent had been directed to insure the goods against fire, which he failed to do. Owing to an explosion in the Bombay docks the goods were

[54] *Hatmer* v. *Cornelius* (1858) 5 C.B.N.S. 236, 116 R.R. 654, *Cur.* per Wiles, J.

[55] *Nagendra Nath Singha* v. *Nagendra Bala Chowdhurani* (1926) 43 Cal. L.J. 479; 97 I.C. 200, ('26) A.C. 988.

[56] *Neilson* v. *James* (1882) 9 Q.B. Div. 546.

[57] *Lee* v. *Walker* (1872) L.R. 7 C.P. 121.

[58] *Bank of Bihar* v. *Tata Scob Dealers Ltd.* ('60) A. Cal. 475.

[59] *Overend* v. *Gibb* (1872) L.R. 5 H.L. 480.

[60] *Lagunas Nitrate Co.* v. *Lagunas Syndicate* (1899) 2 Ch. 392.

[61] *Agnew* v. *Indian Carrying Co.* (1865) 2 M.H.C. 449.

[62] *Narayan Deo* v. *Hanumantha* (1950) Cut. 174, ('50) A. Orissa 241.

[63] *Pannalal Jankidas* v. *Mohanlal* ('51) A.S.C. 144.

destroyed. Under a fire insurance policy, such a loss would not be recoverable, but Government passed an Ordinance that compensation for goods which were insured would be fully paid, and only half the value of goods would be paid, if the goods were not insured. The agent obtained half the value of the goods from Government, and it was held that he was liable to compensate the principal for the other half, as the loss inflicted upon the principal was the direct consequence of the agent not insuring the goods as directed.

Agent's accounts.

213. An agent is bound to render proper accounts to his principal on demand.

Agent's duty to account.—This section embodies a rule of rendering proper accounts to the principal. This rule therefore implies a duty on the part of an agent (i) to keep the property, effects and money of his principal separate from his own and from those of others and (ii) to keep and maintain proper accounts of the dealings, transactions, property and money of the principal. This may involve keeping special forms of accounts.

The duty to render accounts is to the principal and therefore not to a third person.[64] It is not discharged by merely delivering to the principal a set of written accounts without attending to explain them with the vouchers by which the items of disbursement are supported.[65] If an agent neglects to keep proper accounts, everything consistent with established facts will be presumed against him in the event of his being called upon for an account of the agency.[66] "The principle is well established that an agent entrusted with money or goods by a principal to be applied on his principal's account cannot dispute the principal's title unless he proves a better title in a third person and that he is defending on behalf of and with the authority of the third person. The same principle controls the relation of bailor and bailee.[67]

A principal may enforce his right to demand accounts by a suit.[68]

Where two or more co-sharers employ an agent, one of the co-sharers can file a suit for accounts making the other co-sharers defendants, if they are unwilling to join as plaintiffs.[69] A principal can enforce his remedy by following the property representing his money or goods in the hands of a third party.[70]

When a minor comes to Court to have an account taken as between himself and his agent, and it is found on taking that account that the agent has made certain advances to the guardian, and advances have been applied for the benefit of the minor, the agent ought to be allowed these advances in taking the accounts. Here the plaintiff seeks relief from a Court administering equity, and he must do equity himself.[71]

Where an agent enters into contract with a third person in his own name, and subsequently sues on the contract and obtains a decree, the principal is not entitled to maintain a suit for a declaration that he is beneficially interested in the decree and to recover the amount from the judgment-debtor. That the principal is entitled to an amount from the agent does not entitle him to maintain a suit of this kind. He could have adopted the

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[64] *Chidambaram* v. *Pichappa* (1907) 30 Mad. 243.

[65] *Annoda Persad* v. *Dwarknath* (1881) 6 Cal. 754. See also *Ram Das* v. *Bhagwat Das* (1904) 1 All. L.J. 347; *Madhusudan* v. *Rakhal* (1916) 43 Cal. 248, 259-260.

[66] *Gray* v. *Haig* (1854) 20 Beav. 219.

[67] *Bhawani Singh* v. *Maulvi Misbah-ud-din* (1929) 56 I.A. 170, 10 Lah. 352. 31 Bom. L.R. 762, 115 I.C. 729, ('29) A.P.C. 119.

[68] *Digamber* v. *Kallynath*, 7 Cal. 654.

[69] *Charu Chandra* v. *Sital Prasad* ('49) A.C. 656.

[70] *Chedworth* v. *Edwards* (1802) 8 Ves. 46.

[71] *Surendra Nath Sarkar* v. *Atul Chandra Roy* (1907) 34 Cal. 892.

contract and sued on it himself; after a decree is passed for the agent, he is too late.[72]

Suit by agent against principal.—Ordinarily an agent cannot file a suit against the principal for accounts, but in exceptional cases, as when he cannot claim a specific sum without the principal's accounts being gone into, he is entitled to file a suit for accounts against the principal.[73]

Legal representatives of agent.—Upon the death of an agent, his legal representatives are not bound to render accounts under this section. They would be liable to pay the dues of the principal out of the estate of the deceased agent.[74]

Liability to account bribe or Secret Commission received by agent.—To accept bribe or secret commission is inconsistent with the duty of even non-fiduciary agent and he cannot during the course of his agency be allowed to make profit out of his crime, as the House of Lords decided in *Reading* v. *Attorney General* [75] where an army sergeant was held accountable to the Crown for sums which he had illegally made for his assistance in smuggling illicit goods into Cairo as his presence in official uniform enabled the lorry carrying such goods to pass without being searched by the police.

See also the commentary on sec. 218 *post.*

Right of Agent to sue his principal for accounts.—The Supreme Court in *Narandas Gajiwala* v. *S.P.A.M. Papammal*[76] observed that the Indian Contract Act doe. not provide the right of agent to sue the principal for accounts. But the said Act is not exhaustive and guidance may be taken from the English Law where an agent has a right to have an account taken. There may be special circumstances rendering it equitable that the principal should account to the agent, e.g. where all the accounts are in the possession of the principal and the agent does not possess accounts to determine his claims for commission against his principal.

Agent's duty to communicate with principal.

214. It is the duty of an agent in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

Duty to communicate.—This section lays down an important duty of the agent to communicate with the principal for the purposes of obtaining his instructions.

In cases of difficulty the agent must use all reasonable diligence in communicating with the principal and obtain his instructions.

In an emergency, it may not be possible to communicate with the principal, and in such a case he should act in accordance with the rule contained in sec. 189.

Right of principal when agent deals, on his own account in business of agency without principal's consent.

215. If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly

[72] *Dodhanram* v. *Jaharmull* (1913) 40 Cal. 335.

[73] *Lakshmiji Sugar Mills Co. Ltd.* v. *Banwari Lal* ('59) A.A. 546.

[74] *Purshottam* v. *Ramkrishna,* 46 Bom. L.R. 649.

[75] (1951) A.C. 507 = (1951) 1 All E.R. 617; cf., *Lister & Co.* v. *Stubbs* (1890) 45 Ch. D.1.

[76] A.I.R. 1967 S.C. 333.

concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

Illustrations

(a) *A* directs *B* to sell *A's* estate. *B* buys the estate for himself in the name of *C*. *A* on discovering that *B* has bought the estate for himself, may repudiate the sale, if he can show that *B* has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

(b) *A* directs *B* to sell *A's* estate. *B*, on looking over the estate before selling it, finds a mine on the estate which is unknown to *A*. *B* informs *A* that he wishes to buy the estate for himself, but conceals the discovery of the mine. *A* allows *B* to buy in ignorance of the existence of the mine. *A*, on discovering that *B* knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

Agent not to deal on his own account.—This section and the next section are based upon an assumption that an agent owes fiduciary duties to his principal viz. complete loyalty and hence an agent cannot be allowed to deal on his own account in the business of the agency except with the previous consent of the principal obtained after a full disclosure of all material facts. An agent having a duty to discharge duty to his principal cannot be permitted to enter into engagements wherein he has a personal interest which is likely to conflict with the interest of his principal. As observed by the House of Lords "Nevertheless, even if the possibility of conflict is present between personal interest and the fiduciary position the rule of equity must be applied."[77] This would be so even though the agent acts in good faith and without fraud.[77]

Authoritative illustrations of the principle here laid down might be multiplied almost indefinitely from the English reports. The kind of case given in illustration (a) is the most common, but there is no doubt that the rule is general. "Where an agent employed to sell becomes himself the purchaser, he must show that this was with the knowledge and consent of his employer. or that the price paid was the full value of the property so purchased; and this must be shown with the utmost clearness and beyond all reasonable doubt."[78]

"It is an axiom of the law of principal and agent that a broker employed to sell cannot himself become the buyer, nor can a broker employed to buy become himself the seller, without distinct notice to the principal, so that the latter may object if he thinks proper."[79]

For like reasons an agent for sale or purchase must not act for the other party at the same time, or take a commission from him unknown to the principal,[80] or settle any claim against the principal on exorbitant terms thereby to increase his own profit.[81] An

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Boardman v. *Phipps* (1967) 2 A.C. 46: (1966) 3 All E.R. 721: (1966) 3 W.L.R. 1009:

Lord Lyndhurst, *Charter* v. *Trevelyan* (1844) 11 Cl. & F. at p. 732; 65 R.R. at p. 5. In India it seems to be an ordinary question of fact, see *Rameshardas Benrasi-* v. *Tansookhrai Bashesharlal*, 102 I.C. 366, ('27) A.S. 195.

79 Willies, J., in *Mollett* v. *Robinson* (1870) L.R. 5 C.P. at p. 655.

80 *Grant* v. *Gold exploration etc., Syndicate of British Columbia* (1900) 1 Q.B. 233.

81 *Mathra Das Jagan Nath* v. *Jiwan Mal-Gian Chand* (1927) 9 Lah. 7.

agent must give his principal "the free and unbiassed use of his own discretion and judgment."[82]

Rights of Principal.—Where an agent has dealt on his own account, the principal may either repudiate the transaction under this section. Or he may affirm the transaction and claim the benefits resulting from the transaction, under sec. 216.

A principal who seeks to set aside a transaction on the ground that the provisions of the section have been violated must take proceedings for that purpose within a reasonable time after becoming aware of the circumstances relied on as otherwise he may be deemed to have acquiesced.[83]

Besides the aforesaid rights, the principal may also claim damages for loss caused to him. The agent would not be entitled to claim his remuneration pursuant to the provisions of section 220.

Principal's right to benefit gained by agent dealing on his own account in his business of agency.

216. If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

Illustration

A, directs, *B*, his agent, to buy a certain house for him. *B* tells *A* it cannot be bought, and buys the house for himself. *A* may, on discovering that *B* has bought the house, compel him to sell it to *A* at the price he gave for it.

Additional Illustration

A, acting as *B*'s agent, agrees with *C* for the sale to him of fifty maunds of grain for future delivery. *A* delivers his own grain to *C* as against the contract. Subsequently he receives grain from *B* for delivery to *C* under the contract, which he sells in the market at a profit. *B* may, on discovering these facts, claim the profit from *A*. [*Damodar Das* v. *Sheoram Das* (1907) 29 All. 730.]

Principal's rights to profits.—"It may be laid down as general principle that in all cases where a person is, either actually or constructively, an agent for other persons, all profits and advantages made by him in the business, beyond his ordinary compensation, are to be for the benefit of his employers": S.A. sec. 211, adopted by the Court of Queen's Bench.[84] It is immaterial that in acquiring the profit the agent may have run the risk of loss,[85] and that the principal may have suffered no injury.[86] Accordingly, if an agent for sale receives a share of commission or extra profit from the buyer's agent without the knowledge of his own principal, the principal can recover the sum of money received to his use. Such extra profit or commission is called a secret profit or bribe. The agent and the briber are jointly and severally liable for any loss actually sustained by the principal, e.g. a fraudulent addition to the price of the goods in order to provide the secret

[82] *Clarke* v. *Tipping* (1846) Beav. 284, 292.

[83] *Wentworth* v. *Lloyd* (1864) 10 H.L. Cas. 589.

[84] *Morison* v. *Thompson* (1874) L.R. 9 Q.B. 480, 485; *Official Assignee* v. *R.M.P.V.M. Firm* (1929) 7 Rang. 61.

[85] *Williams* v. *Stevens* (1866) L.R. 1 P.C. 352.

[86] *Parker* v. *McKenna* (1874) L.R. 10 Ch. 96; *Kaluram Bholaram* v. *Chimaniram Motilal* (1934) 36 Bom. L.R. 68.

commission. Interest is recoverable on bribes and on all secret profits received by the agent.[87]

Forfeiture of commission.—An agent who has wrongfully dealt on his own account is obviously not entitled to recover any commission for the transaction even if the principal adopts it, for the principal could forthwith recover it back from him under this section. Moreover, he has no authority to make a contract with himself, and therefore has earned nothing as agent.[88]

Disclosure to principal.—A transaction of this kind may be approved or ratified by the principal,[89] but it must be upon full disclosure. It is not enough for the agent to tell the principal that he has some interest of his own. He must disclose all material facts, and be prepared to show that full information was given and the agreement made with perfect good faith. Notice sufficient to put the principal on inquiry will not do.[90] Thus where an agent employed to buy goods sells his own goods to the principal at a price higher than the prevailing market rates, the principal is entitled to repudiate the transaction, and he is not bound by a ratification made in the absence of knowledge that the agent was selling his own goods and was charging him in excess of the market price.[91]

An agreement between an agent and a third person which comes within the terms of the present section, or in any way puts the agent's interest in conflict with his duty, is not enforceable unless the principal chooses to ratify it. Where a *mehta* (clerk), without the knowledge of his master, agreed with his master's brokers to receive a percentage, called *sucri*, on the brokerage earned by them in respect of transactions carried out through them by the *mehta*'s master, and no express consideration was alleged or proved by the *mehta*, the Court refused to imply as a consideration an agreement by the *mehta* to induce his master to carry on business through those brokers, and was of opinion that such an agreement would be inconsistent with the duty a servant owes to his master.[92]

Agent selling his pre-agency property to principal.—It was decided in an English case[93] that an agent who without disclosure sells to his principal property which he had purchased before the commencement of the agency is not liable for the profit he has made. The Bombay High Court has held that sec. 216 makes no such qualification on the liability of an agent. In such a case the agent is liable for the difference between the price at which he supplies the goods to the principal and the market value at the date,[94] i.e. the true value of the goods at that date.

Agent's right of retainer out of sums received on principal's account.

217. An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

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[87] *Tota Ram* v. *Zalim Singh* (1939) A.L.J. 1065, 187 I.C. 277, ('40) A.A. 69.

[88] *Salomans* v. *Pender* (1865) 3 H. & C. 639: 34 L.J. Ex. 95: 159 E.R. 682; *Joachinson* v. *Meghjee Vallabhdas* (1909) 34 Bom. 292.

[89] *Re Haslam* (1902) 1 Ch. 765.

[90] *Gluckstein* v. *Barnes* (1900) A.C. 240.

[91] *Damodhar Das* v. *Sheoram Das* (1907) 29 All. 730.

[92] *Vinayakrav* v. *Ransordas* (1870) 7 Bom. H.C.R.O.C. 90.

[93] *In re Cape Breton Co.* (1885) 29 Ch. D. 795 C.A. doubted in *Re Olympia Ltd.* (1898) 2 Ch. 153 but followed in *Binland* v. *Earle* (1902) A.C. 83.

[94] *Kaluram Bholaram* v. *Chimniram Motilal* (1934) 36 Bom. L.R. 68.

Agent to retain his dues out of Principal's moneys.—The right conferred in terms by this section is in the nature of retainer, and assumes the agent to have money for which he is accountable to the principal in his hands or under his control. Sec. 221 below further gives the agent a possessory lien on the principal's property in his custody. Nothing in the Act expressly gives him an equitable lien, i.e. a right to have his claims satisfied, in priority to general creditors, out of specific funds of the principal which are not under his control. Such a right, however, may exist in particular cases. In the special case of a solicitor it is well settled that a judgment which he has obtained for his client by his labour or his money should stand, so far as needful, as security for his costs, and he is entitled to have its proceeds pass through his hands. The Court will not allow any collusive arrangement between parties to deprive the solicitor of his benefit.[95]

Right of retainer can be exercised provided the agent has received moneys on account of his principal. The 'expenses' are qualified by the condition that they should have been properly, incurred in conducting such business. The 'remuneration' has the qualification of "being payable to him for acting as agent" for which see sections 219 and 220.

Agent's duty to pay sums received for principal.

218. Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

Agents' duty to pay to Principal.—Any amount which an agent receives on behalf of the principal has to be paid to the principal. This rule is subject to the provisions of secs. 217 and 219, i.e., right of retention and detention in respect of the advances, expenses and remuneration.

Mode of payment.—It follows from his rule that an agent to receive money has generally no authority to receive anything else as equivalent. As between the principal and a third person, a set-off or balance of account between that person and the agent in his own right is not a good payment to the agent on behalf of the principal. The debtor "must pay in such a manner as to facilitate the agent in transmitting the money to his principal."[96]

Payments in respect of illegal transaction.—If an agent receives money on his principal's behalf under an illegal or void contract, the agent must account to the principal for the money so received and cannot set up the illegality of the contract as a justification for withholding payment, which illegality the other contracting party had waived by paying the money.[97] Upon this principle it has been held that an agent receiving money due to the principal under a wagering contract,[98] is bound under the provisions of this section to pay the same to the principal. But this rule does not apply where the contract of agency is itself illegal.[99]

When Agent's remuneration becomes due.

219. In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act; but an agent may detain moneys received by him on account of goods sold, although the

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[95] *Ex parte Morrison* (1868) L.R. Q.B. 153, 156. See *Cullianji Sangjibhoy* v. *Raghowji Vijpal* (1906) 30 Bom. 27.

[96] *Pearson* v. *Scott* (1878) 9 Ch. D. 102, 108.

[97] *Bhola Nath* v. *Mul Chand* (1903) 25 All. 639; *Palaniappa Chettiar* v. *Chokalingam Chettiar* (1921) 44 Mad. 334.

[98] *Bhola Nath* v. *Mul Chand, supra.*

[99] *Sykes* v. *Beadon* (1879) 11 Ch. D. 170.

whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

"Special contract."—When there is an express contract providing for the remuneration of the agent, the amount of the remuneration and conditions under which it becomes payable must primarily be ascertained from the terms of that contract.[1] In the absence of a special contract, the right to remuneration and conditions under which it is payable are held in English law to depend on the custom or usage of the particular business in which the agent is employed.[2] The words "special contract" in this section include a contract arising by implication from custom or usage. The same principle applies in India.[3]

"Completion of such act."—"The question whether or not an agent is entitled to commission . . . has repeatedly been litigated and it has usually been decided that, if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission, although the actual sale has not been effected by him."[4] In other words, the commission becomes due if the broker has induced in the party for whom he acts the contracting mind, the willingness to open negotiations upon a reasonable basis.[5] A broker employed to procure a loan on property becomes entitled to his commission if he finds a party willing to advance the money, even "if the contract were afterwards to go off from the caprice of the lender, or from the infirmity of the title."[6] He must show that the contract was brought about as a direct result of his intervention, although he may not have been the first or only source of the principal's information.[7] It is not sufficient to show that the transaction would not have been entered into but for his services, but he must go further and show that the transaction was the direct consequence of the agency.[8]

Agent prevented from earning remuneration.—If in breach of a contract, express or implied, with an agent, the principal, by refusing to complete a transaction or otherwise, prevents the agent from earning remuneration, the agent is entitled to damages.[9] If an agent seeks to claim damages from his principal, he must show that the principal has broken a term of the contract.[10] Appellant companies wished to dispose of a certain property and agreed to pay the respondent a commission on the completion of the sale to any purchaser whom he could introduce. He introduced a willing and able purchaser but the appellant Companies then decided to effect the transaction they had in mind by a sale of the shares of the companies and not to proceed with the sale of the property.

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[1] *Green* v. *Mules* (1861) 30 L.J.C.P. 343; (if it is agreed that commission shall be payable only in the event of success, the agent cannot claim a *quantum meruit* in the absence of success); *Cutter* v. *Powell* (1795) 6 T.R. 320; *Clack* v. *Wood* (1882) 9 Q.B.D. 276; *Ayyannath Chetty* v. *Subramania Iyer* (1923) 45 Mad. L.J. 409 [brokerage payable if title approved].

[2] *Read* v. *Rann* (1830) 10 B. & C. 438; *Baring* v. *Stanton* (1876) 3 Ch. D. 502.

[3] *Setchidananda Dutt* v. *Nritya Nath Mitter* (1923) 50 Cal. 878.

[4] Per Erle, C.J., in *Green* v. *Bartlett* (1863) 14 C.B.N.S. 681.

[5] *Municipal Corporation of Bombay* v. *Cuverji Hirji* (1895) 20 Bom. 124; *Abdulla* v. *Anjmendra* (1950) S.C.R. 30, ('50) A.S.C. 15.

[6] *Fisher* v. *Drewitt* (1878-79) 48 L.J. Ex. 32; *Elias* v. *Govind* (1902) 30 Cal. 202.

[7] *Jordon* v. *Ram Chandra Gupta* (1904) 8 C.W.N. 831.

[8] *Burchell* v. *Gowie & Blockhouse Collieries Ltd.* (1910) A.C. 614: 80 L.J. P.C. 41.

[9] *Turner* v. *Goldsmith* (1891) 1 Q.B. 541; *Mehta* v. *Cassumbhai* (1922) 24 Bom. L.R. 847.

[10] *Luxor (Eastbourne) Ltd.* v. *Cooper* (1941) A.C. 108: (1941) 1 All E.R. 33.

It was contended that there ought to be implied in the agreement with the respondent a term that the appellants would not without just cause so act as to prevent him from earning his commission. However the House of Lords held that there can be no implied term that the vendor will not refuse to go with a proposed sale so long as matters are still in negotiation and no binding contract has been made between the vendor and the purchaser. There was, therefore, no breach of contract by the appellant companies and they were not liable to respondent in damages. In a case where the contract provides that the agent would be paid his remuneration on completion of the transaction, there cannot be implied a term that the principal would not prevent the agent from having an opportunity to earn his remuneration.[10] It is not probable that the principal would fetter his freedom of choice by binding himself *vis-a-vis* his agent not to withdraw from the negotiations while he was free *vis-a-vis* the intending purchaser to withdraw at any time for any reason.[10] To imply such a term would be tantamount to giving a subordinate contract greater importance or dominance than to the main contract. This does not stand to reason.[10]

Quantum meruit remuneration.—Whether the parties intended to give to the agent reasonable remuneration or a fixed remuneration depends upon the facts of each case. Ordinarily if an intending purchaser withdraws before or at the time of the completion of the sale, the vendor may (i) forfeit the earnest money or (ii) sue for specific performance or (iii) sue for damages. In the last two categories, the agent would be entitled to his remuneration but in the first category, the agent would not be entitled to his commission unless it is possible to infer that in any event parties intended to give reasonable remuneration for his services, trouble and expense.[11] In *Boot* v. *E. Christopher & Co.* agents were to be paid a percentage of the purchase price if they introduced a person able and willing to purchase on the principal's term. Such an agreement was made and a deposit was given by the third party to the agents. But the third party failed to complete and directed the agents to hand the deposit to the principal. They did after deducting what they claimed was their commission. The principal sued to recover the entire amount from the hands of the agents without such deduction. It was held that the commission was payable out of the purchase price which made expressly clear that sale had to be effected before the agents were entitled to anything and so the principal was allowed to recover the sum from the agent.

Agent not entitled to remuneration for business misconducted.

220. An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which he has misconducted.

Illustrations

(a) *A* employs *B* to recover 1,00,000 rupees from *C*, and to lay it out on good security. *B* recovers the 1,00,000 rupees, and lays out 90,000 rupees on good security, but lays out 10,000 rupees on security which he ought to have known to be bad, whereby *A* loses 2,000 rupees. *B* is entitled to remuneration for recovering the 1,00,000 rupees and for investing the 90,000 rupees. He is not entitled to any remuneration for investing the 10,000 rupees, and he must make good the 2,000 rupees to *B* [*sic* in the Act, but it should obviously be *A*].

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[11] *Boots* v. *E. Christopher & Co.* (1952) 1 Q.B. 89 (98-99).

(b) *A* employs *B* to recover, 1,000 rupees from *C*. Through *B*'s misconduct the money is not recovered. *B* is entitled to no remuneration for his services, and must make good the loss.

No remuneration if agent guilty of misconduct.—"A principal is entitled to have an honest agent, and it is only the honest agent who is entitled to any commission." Accordingly where an agent for sale, having sold the property, retained half the deposit as commission with the principal's consent, and also, without the principal's knowledge, received a commission from the buyer, the agent was held liable not only to account for the secret commission to the principal, but to return the usual commission, which he had retained.[12] But an agent who retains discounts received by him from third persons, in the honest belief that he is entitled to retain them, does not thereby forfeit his commission, although he may be liable to account for the discounts as profits received without the knowledge or consent of the principal.[13]

Misconduct.—Misconduct of an agent may arise in various ways, such as unauthorised acts, failure to render proper accounts,[14] wrongfully delegating his duties,[15] dishonesty,[16] fraudulently overcharging his principal[17] sale to a company wherein he is a director and a large shareholder[18] or receiving secret commission from the other side.[12]

Agent's lien on principal's property.

221. In the absence of any contract to the contrary, an agent is entitled to retain[17] goods, papers and other property, whether movable or immovable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him.

Possessory and Particular lien.—The lien claimable under this section is confined to the commission, disbursements and services in respect of the specific property only in respect whereof such commission is earned, disbursements are made and services are rendered. The words "in respect of the same" indicate that the lien is particular and not general. The right of lien conferred by this section is possessory i.e. so long as the agent is in possession of the property, papers and goods. The possessory lien does not involve the right to sell the goods,[19] nor the right of stoppage in transit. The latter right arises between seller and purchaser only.

But a lien cannot be acquired by a wrongful act. Nor when property is entrusted to an agent for a special purpose, can the agent claim any lien, the existence of which is inconsistent with such purpose.[20] In order that an agent may have a valid lien on property in his hands, the following conditions must be satisfied: (1) there should be no arrangement inconsistent with the retention of such property in the exercise of his lien;

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12 *Andrews* v. *Ramsay & Co.* (1903) 2 K.B. 635.

13 *Hippisley* v. *Knee Bros.* (1905) 1 K.B. 1.

14 *White* v. *Lincoln* (1803) 8 Ves. 363.

15 *Beable* v. *Dickerson* (1885) 1 T.L.R. 654.

16 *Rhodes* v. *Macalister* (1923) 29 Com. Cas. 19; *Andrews* v. *Ramsay & Co.* (1903) 2 K.B. 635.

17 *Nitedals Taendstikfabrik* v. *Bruster* (1906) 2 Ch. 671.

18 *Salomons* v. *Pender* (1865) 3 H. & C. 639: 34 L.J. Ex. 95: 159 E.R. 682.

19 Not sell: *Mul Chand-Shib Dhan* v. *Sheo Mal Sheo Parshad*, 123 I.C. 867, ('29) A.L. 666.

20 *Buchanan* v. *Findlay* (1829) 9 B. & C. 738.

(2) the property on which the right to lien is claimed should belong to the principal to the knowledge of the agent; (3) it should have been received by the agent in his capacity as agent during the course of his ordinary duties as agent and (4) the agent should be holding the property for and on behalf of his principal and not for and on account of any known third party.[21] See further on this subject the commentary on sec. 171.

Agent's lien.—One practical consequence of this rule is that a buyer of property from an auctioneer, or other agent known to be in possession of the property and entitled to a lien on it, cannot set up payment to the principal as a defence to an action for the price at the suit of the agent.[22] Similarly, a subsequent charge given by the principal to a third person will be postponed to a factor's lien. An auctioneer, employed to sell furniture at the house of the owner, is sufficiently in possession of the furniture to entitle him to a lien thereon for his charges and commission.[23]

How far lien effective against third persons.—The lien, whether general or particular, of an agent attaches only on property in respect of which the principal has, as against third persons, the right to create a lien,[24] and, except in the case of money and negotiable securities, is confined to the rights of the principal in the property at the time when the lien attaches, and is subject to all rights and equities of third persons available against the principal at that time.[25]

Lien of sub-agents.—A sub agent who is employed by an agent without the authority, express or implied, of the principal has no lien, either general or particular, as against the principal.[26] But a sub-agent who is properly appointed has the same right of lien against the principal in respect of debts and claims arising in the course of the sub-agency, on property coming into his possession in the course of the sub-agency, as he would have had against the agent employing him if the agent had been the owner of the property; and this right is not liable to be defeated by a settlement between the principal and agent to which the sub-agent is not a party.[27]

Lien how lost or extinguished.—The lien of an agent, being a mere right to retain possession of the property subject thereto is, as a general rule, lost by his parting with the possessions.[28] But where possession is obtained from the agent by fraud, or is obtained unlawfully and without his consent, his lien is not affected by the loss of possession. An agent's lien is extinguished by his entering into an agreement, or acting in any character, inconsistent with its continuance; and may be waived by conduct indicating an intention to abandon it. If the goods are accidentally destroyed, the lien is extinguished, but the agent is entitled to claim his commission against the principal.[29]

The lien of an agent is not affected by the circumstances that the remedy for recovery of the debt or claim secured thereby becomes barred by the Statutes of Limitation,[30] or that the principal becomes bankrupt or insolvent,[31] not by any dealing by the principal with the property subject to the lien,[32] after the lien has attached.

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[21] *Pestonji* v. *Ravji Javerchand* ('33) A.S. 235.
[22] *Robinson* v. *Rutter* (1885) 4 E. & B. 954.
[23] *Williams* v. *Millington* (1788) 1 H.B.l. 81; 2 R.R. 724.
[24] *Cunliffe* v. *Blackburn Building Society* (1884) 9 App. Cas. 857.
[25] *London and County Bank* v. *Ratcliffe* (1881) 6 App. Cas. 722. *In re Llewellin* (1891) 3 Ch. 145.
[26] *Solly* v. *Rathbone* (1814) 2 M. & S. 298.
[27] *Fisher* v. *Smith* (1878) 4 App. Cas. 1.
[28] *Bligh* v. *Davies* (1860) 28 Beav. 211.
[29] *Kishun Das* v. *Ganesh Ram* ('50) A.P. 481.
[30] *Curwen* v. *Milburn* (1889) 42 Ch. Div. 424.
[31] *Ex parte Beall* (1883) 24 Ch. Div. 408.
[32] *West of England Bank* v. *Batchelor* (1882) 51 L.J. Ch. 199.

Principal's Duty to Agent

Agent to be indemnified against consequences of lawful acts.

222. The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

Illustrations

(a) *B*, at Singapur, under instructions from *A* of Calcutta, contracts with *C* to deliver certain goods to him. *A* does not send the goods to *B*, and *C* sues *B* for breach of contract. *B* informs *A* of the suit, and *A* authorises him to defend the suit. *B* defends the suit, and is compelled to pay damages and costs, and incurs expenses. *A* is liable to *B* for such damages, costs and expenses.

(b) *B*, a broker at Calcutta, by the orders of *A*, a merchant there, contracts with *C* for the purchase of 10 casks of oil for *A*. Afterwards *A* refuses to receive the oil, and *C* sues *B*. *B* informs *A*, who repudiates the contract altogether. *B* defends, but unsuccessfully, and has to pay damages and costs, and incurs expenses. *A* is liable to *B* for such damages, costs and expenses.

["For, *there*, i.e. Calcutta," in illustration (b), "we should probably read Singapur": Whiteley Stokes's note, referring to s. 230. Or it must be assumed that in some other way *B* has made himself personally liable on the contract.]

Limits of agent's indemnity.—"If an agent has, *without his own default*, incurred losses or damages in the course of transacting the business of his agency or in following the instructions of his principal, he will be entitled to full compensation therefor. . . . But is is not every loss or damage for which the agent will be entitled to re-imbursement from his principal. The latter is liable only for such losses and damages as are direct and immediate, and naturally flow from the execution of the agency."[33]

The right of indemnity extends to losses or liabilities incurred in the exercise of the authority according to the rules and customs of the particular trade or market in which the agent is authorised to deal, provided the rule or custom in question is a reasonable one,[34] or the principal had notice of it at the time when he conferred the authority;[35] but if the rule or custom is unlawful or unreasonable, and was unknown to the principal he is under no liability to indemnify the agent against the consequences of acting on it.[36]

The words "consequences of all lawful acts" would include payments which the agent is compelled to make although the principal would not be liable to pay to third person,[37] a payment made an authorised but gratuitous one[38] or where the agent though under a liability has as yet suffered no loss[39] or where the agent made a payment under a mistake but reasonably.[40]

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[33] S.A. s. 339 & 341 cited *arguendo* in *Duncan* v. *Hill*, L.R. 8 Ex. at p. 244.

[34] *Davis* v. *Howard* (1890) 24 Q.B.D. 691 *Ex parte Bishop* (1880) 15 Ch. Div. 400.

[35] *Seymour* v. *Bridge* (1885) 14 Q.B.D. 460.

[36] *Perry* v. *Barnett* (1885) 15 Q.B. Div. 388; *Sheffield Corporation* v. *Barclay* (1907) A.C. 392.

[37] *Adams* v. *Morgan & Co.* (1924) 1 K.B. 751 (payment of super tax).

[38] *Brittain* v. *Lloyd* (1845) 14 M. & W. 762 (773).

[39] *Lacey* v. *Hill*, Crowley's Claim, L.R. (1874) 18 Eq. 182 (Stock broker's liability).

[40] *Pellman* v. *Keble* (1850) 9 C.B. 701 (expenses to defend action).

Right to indemnity being restricted to "acts done in exercise of the authority conferred upon him" would not apply to unauthorised acts, or due to his own negligence, default, insolvency or breach of duty.[41]

Ratification by the principal will cure the agent's default and restore his ordinary right to indemnify.[42]

"Lawful."—A wagering contract is void, not unlawful (see s. 30). When therefore a suit is brought by a betting agent his principal to recover a loss on betting paid by the agent, the principal cannot escape liability on the ground that the agent's act was *unlawful*.[43] See notes to sec. 30 under the head "Agreements collateral to wagering contracts."

Agent to be indemnified against consequences of acts done in good faith.

223. Where one person employs another to do an act, and the agent does the act in good faith the employer is liable to indemnify the agent against the consequences of that act, though it causes an injury to the rights of third persons.

Illustrations

(a) *A*, a decree-holder and entitled to execution of *B*'s goods requires the officer of the Court to seize certain goods, representing them to be the goods of *B*. The officer seizes the goods, and is sued by *C*, the true owner of the goods. *A* is liable to indemnify the officer for the sum which he is compelled to pay to *C* in consequence of obeying *A*'s directions.

(b) *B*, at the request of *A*, sells goods in the possession of *A*, but which *A* had no right to dispose of. *B* does not know this, and hands over the proceeds of the sale to *A*. Afterwards *C*, the true owner of the goods, sues *B* and recovers the value of the goods and costs. *A* is liable to indemnify *B* for what he has been compelled to pay *C* and for *B*'s own expenses.[44]

Unlawful Acts.—This section is based upon equity. If a person asks another to do an act, of which the illegally does not appear *prima facie* but which turns out to be tortious and the other party doing the act does not in fact know that he was doing an unlawful act, the latter should have a redress or contribution from the party requesting to do the act.[45] This section must be read along with sec. 224.

The preceding section deals with indemnity against the consequences of lawful acts; this section with the consequences of unlawful acts done in good faith. It is clearly settled that an agent cannot claim indemnity in respect of acts which he knows to be unlawful, even if they are not criminal, whether on an express or implied promise.[46] Any such

[41] *Lewis* v. *Samuel* (1846) 8 Q.B. 685 (negligent drawing up of the indictment); *Duncan* v. *Hill* (1873) L.R. 8 Ex. 242 (broker becoming insolvent before the settlement day); *Ellis* v. *Pond* (1898) 1 Q.B. 426 (breach of duty).

[42] *Hartas* v. *Ribbons* (1889) 22 Q.B. Div. 254.

[43] *Behari Lal* v. *Parbhu Lal* (1908) Punj. Rec. no. 79; *Shibho Mal* v. *Lachman Das* (1901) 23 All. 165; *Chekka* v. *Gajjila (1904) 14* Mad. L.J. 326; *Pirthi Singh* v. *Matu Ram* ('32) A.L. 356; *Bhagwandas* v. *Deochand* ('51) A.N. 392; *Kishanlal* v. *Bhanwar Lal* (1955) 1. S.C.R. 439 = A.I.R. 1954 S.C. 500.

[44] *Adamson* v. *Jarvis* (1827) 4 Bing. 66.

[45] *Smith & Son* v. *Clinton & Harris* (1908) 99 L.T. 840: 25 T.L.R. 34.

[46] *Illegal insurance: Alkins* v. *Jupe* (1877) 2 C.P.D. 375. Illegal payment: *In re Parker* (1882) 21 Ch. Div. 408.

promise is void as being contrary to public policy.

Bailiff.—A judgment creditor who requires an officer of the law to take specified goods, pointing them out as the goods of the debtor, makes that officer his agent, and must indemnify him if, acting in good faith, he commits a trespass in obeying the instruction.[47]

Non-liability of employer of agent to do a criminal act.

224. Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.

Illustrations

(a) *A* employs *B* to beat *C*, and agrees to indemnify him against all consequences of the act. *B* thereupon beats *C* and has to any damages to *C* for so doing. *A* is not liable to indemnify *B* for those damages.

(b) *B*, the proprietor of a newspaper, publishes, at *A*'s request, liable upon *C* in the paper, and *A* agrees to indemnify *B* against the consequences of the publication, and all costs and damages of any action in respect thereof. *B* is sued by *C* and has to pay damages, and also incurs expenses. *A* is not liable to *B* upon the indemnity.

The rule in the text is elementary. The principal is not liable to indemnify the agent against criminal acts done at his instance.

Compensation to agent for injury caused by principal's neglect.

225. The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.

Illustration

A employs *B* as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskilfully put up, and *B* is in consequence hurt. *A* must make compensation to *B*.

Compensation to agent for injury by neglect or want of skill of principal.—This, as a general rule, needs no proof or illustration. But the agent may be disentitled to relief if the injury was due to his own contributory negligence. For the modern law of workmen's compensation, see Act VIII of 1923.

An agent is not, generally speaking, entitled to sue the principal on any contract made on his behalf, even if the agent is personally liable on the contract to the third party. If a merchant resident abroad employs an agent to buy goods, and the agent buys them and gives his own acceptance for the price, he cannot sue the principal as for goods sold, because the contract between them is not one of buying and selling but of agency.[48] Similarly, if a broker buys goods on behalf of an undisclosed principal, he cannot sue the principal for non-acceptance of the goods,[49] or for goods bargained and sold.[50] His only remedy is an action for indemnity under sec. 222.

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[47] *Collins* v. *Evans* (1844) 5 Q.B. 820. 829, 830.

[48] *Seymour* v. *Pychlau* (1817) 1 B. & Ald. 14.

[49] *Tetley* v. *Shand* (1872) 25 L.T. 58.

[50] *White* v. *Benekendorff* (1873) 29 L.T. 475.

Effect of agency on contracts with third persons

226. Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences, as if the contracts had been entered into and the acts done by the principal in person.

Enforcement and consequences of agent's contracts.

Illustrations

(a) *A* buys goods from *B*, knowing that he is an agent for their sale, but not knowing who is the principal. *B*'s principal is the person entitled to claim from *A* the price of the goods, and *A* cannot in a suit by the principal set off against that claim a debt due to himself from *B*.

(b) *A*, being *B*'s agent with authority to receive money on his behalf receives from *C* a sum of money due to *B*. *C* is discharged of his obligation to pay the sum in question to *B*.

Contracts and acts done through agent enforceable by or against principal.— This section lays down a general principle that where a contract is entered into by a principal through his agent or an act is done by a principal through his agent, the principal is bound by the same and they can be enforced by or against the principal. Acts and contracts contemplated by this section, in the light of the two succeeding sections, are those which fall within the authority of the agent. This authority may be actual or ostensible (see sec. 237). The section does not say whether the principal is disclosed or not disclosed at the time of the entering of the contract or at the time of the doing of the act. Sections 231 and 232 refer to situations relating to disclosed or undisclosed principals.

This section assumes that the contract or act of the agent is one which, as between the principal and third persons, is binding on the principal. If the contract is entered into or the act is done professedly on behalf of the principal, and is within the scope of the actual authority of the agent, there is no difficulty. The principal is bound though the contract may be entered into or act done fraudulently in furtherance of the agent's own interests, and contrary to the interests of the principal, provided the person dealing with the agent acts in good faith.[51] With regard to contracts and acts which are not actually authorised, the principal may be bound by them, on the principle of estoppel, if they are within the scope of the agent's ostensible authority; but in no case is he bound by any unauthorised act or transaction with respect to persons having notice that the actual authority is being exceeded. This subject is dealt with by sec. 237 and the commentary thereon.[52]

This section does not touch the conditions under which the agent can sue or be sued on the contract in his own name, as to which see secs. 230-234 below. The principal must be able to show that the third party dealt with the agent as such.[53]

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[51] *Hambro* v. *Burnard* (1904) 2 K.B. 10. See also *Fazal Ilahi* v. *East Indian Railway Co.* (1921) 43 All. 623.

[52] See also ss. 108 and 178 as to sales and pledges by persons having possession of goods or documents of title thereto.

[53] *Sims* v. *Bond* (1833) 5 B. & Ad. 389.

Principal how far bound when agent exceeds authority.

227. When an agent does more than he is authorised to do, and when the part of what he does, which is within his authority, can be separated, from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal.

Illustrations

A, being owner of a ship and cargo, authorises *B* to procure an insurance for 4,000 rupees on the ship. *B* procures a policy for 4,000 rupees on the ship, and another for the like sum on the cargo. *A* is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

"The principal is not bound by the unauthorised acts of his agent, but is bound where the authority is pursued, or so far as it is distinctly pursued": S.A. sec. 170. This and the following section must be read subject to sec. 237 below.

This section and section 228 lay down the principle of what is binding as between the principal and agent. It is only the acts within his authority that bind the principal but such acts may be separable and inseparable. This section refers to separable part while section 228 refers to inseparable act.

Principal not bound when excess of agent's authority is not separable.

228. Where an agent does more than he is authorised to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognise the transaction.

Illustration

A authorises *B* to buy 500 sheep for him. *B* buys 500 sheep and 200 lambs for one sum of 6,000 rupees. *A* may repudiate the whole transaction.

The law declared in this and the preceding section is concisely illustrated by an English case where *B*, an insurance broker at Liverpool, was authorised by *A* to underwrite policies of marine insurance in his name and on his behalf, the risk not to exceed £100 by any one vessel. *B* underwrote a policy for *Z* without *A*'s authority or knowledge for £150. *Z* did not know what the limits of *B*'s authority were, but it was well known in Liverpool that a broker's authority was almost invariably limited, though the limit of the authorised amount in each case was not disclosed. The Court held that *A* was not liable for the insurance of £150 which he had authorised, and the contract could not be divided so as to make him liable for £100.[54]

Further illustrations are supplied by Indian cases. *A* authorises *B* to draw bills to the extent of Rs. 200 each. *B* draws bills in the name of *A* for Rs. 1,000 each. *A* may repudiate the whole transaction.[55]

A instructs *B* to enter into a contract for the delivery of cotton at the end of January. *B* enters into a contract for delivery by the middle of that month. *A* is not bound by the contract, and any custom of the market allowing *B* to deviate from *A*'s instructions will

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[54] *Baines* v. *Ewing* (1866) L.R. 1 Ex. 320; See also *Praboodam* v. *Miller* (1938) A. Mad. 966.

[55] *Premabhai* v. *Brown* (1873) 10 B.H.C. 319.

not be enforced by the Court.[56]

Consequences of notice given to agent.

229. Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequences as if it had been given to or obtained by the principal.

Illustrations

(a) *A* is employed by *B* to buy from *C* certain goods, of which *C* is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, *A* learns that the goods really belonged to *D*, but *B* is ignorant of that fact. *B* is not entitled to set off a debt owing to him from *C* against the price of the goods.

(b) *A* is employed by *B* to buy from *C* goods of which *C* is the apparent owner. *A* was, before he was so employed, a servant of *C* and then learnt that the goods really belonged to *D*, but *B* is ignorant of that fact. In spite of the knowledge of his agent, *B* may set off against the price of the goods a debt owing to him from *C*.

Notice to Agent.—The rule laid down in this section is intended to declare a general principle of law. "It is not a mere question of constructive notice or inference of fact, but a rule of law which imputes the knowledge of the agent to the principal, or (in other words) the agency extends to receiving notice on behalf of his principal of whatever is material to be stated in the course of the proceedings."[57]

In course of business.—By the terms of the present section, which are cited in the same judgment the application of the principle is limited by the condition that the agent's knowledge must have been obtained "in the course of the business transacted by him for the principal."[58] This is further enforced by illustration (b). Knowledge prior to, or outside the course of business of agency may not suffice.[59]

The following are illustrations from the English authorities of the rule stated in the section. An agent of an insurance company having negotiated with a man who had lost the sight of an eye, it was held that the agent's knowledge of the fact must be imputed to the company, and that it could not avoid the contract on the ground of non-disclosure thereof by the assured.[60] A ship sustained damage in the course of a voyage, and the master subsequently wrote a letter to the owner, but did not mention the fact of the damage. It was held that the master ought to have communicated the fact, and, the owner having insured the ship after receipt of the letter, that the insurance was void on the ground of nondisclosure.[61]

When principal presumed to have notice.—When the knowledge of an agent is imputed to the principal, the principal, is considered to have notice as from the time when he would have received notice if the agent had performed his duty and communicated with him with reason able diligence.[62]

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[56] *Arlapa Nayak* v. *Narsi Keshavji* (1817) 8 B.H.C.A.C. 19.

[57] Judgement of Judicial Committee in *Rampal Singh* v. *Balbhaddar Singh* (1902) 25 All. 1, 17; L.R. 29 I.A. 203.

[58] See *Chabildas Lalloobhai* v. *Dayal Mowji* (1907) 31 Bom. 566, 581; L.R. 34 I.A. 179, 184.

[59] *Wylie* v. *Pollen* (1863) 32 L.J. Ch. 782.

[60] *Bawden* v. *London etc. Assurance Co.* (1892) 2 Q.B. 534.

[61] *Gladstone* v. *King* (1813) 1 M. & S. 35; 14 R.R. 392.

[62] *Proudfoot* v. *Montefiori* (1867) L.R. 2 Q.B. 511.

Duty to communicate and Material to business.—The knowledge of an agent is not imputed to the principal unless it is of something that it is his duty as agent to communicate to the principal. Nor will notice given to or information acquired by an agent of circumstances which are not material to the business in respect of which he is employed be imputed to the principal.[63]

Fraud on principal.—An important exception to the rule that the knowledge of an agent is equivalent to that of the principal exists in cases where the agent has taken part in the commission of a fraud on the principal. In such cases notice is not imputed to the principal of the fraud or the circumstances connected therewith because of the extreme improbability of a person communicating his own fraud to the person defrauded.[64] But the exception does not apply where the fraud is committed, not against the principal, but against a third person.[65]

230. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Agent cannot personally enforce, nor be bound by contracts, on behalf of principal.

Such a contract shall be presumed to exist in the following cases:—

Presumption of contract to contrary.

(1) where the contract is made by an agent for sale or purchase of goods for a merchant resident abroad;

(2) where the agent does not disclose the name of his principal;

(3) where the principal, though disclosed, cannot be sued.

Enforceability of Contracts by an agent.—This section lays down an uniform rule that in absence of a contract to the contrary, an agent cannot sue nor be sued in respect of a contract entered into on behalf of a principal and it is the principal who may sue thereon and who may be sued thereon. If an agent acts as a pretending agent, he is not entitled to sue thereon even though he may have acted as principal (see sec. 236) but he is liable thereon under the provisions of section 235.

The first part of the section does not restrict the rights and liabilities of a principal, whether he is disclosed or not. Section 231 provides for the rights of an undisclosed principal at the time of the entering into of a contract. Sections 231 and 232 both contemplate that an undisclosed principal may enforce a contract. The second part of the section lays down a legal fiction or presumption in respect of cases wherein an agent may be sued or may sue personally. Sections 233, 234 and 235 provide for a creditor's right to sue an agent but they do not provide for an agent's right to sue.

Contract to the contrary.—Whether an agent, apart from the cases specially mentioned, is to be taken to have contracted personally, or merely on behalf of the principal, depends on what appears to have been the intention of the parties, to be deduced from the nature and terms of the particular contract and the surrounding circumstan-

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[63] *Tate* v. *Hyslop* (1885) 15 Q.B.D. 368. See also *Texas Co., Ltd.* v. *Bombay Banking Co.* (1920) 44 Bom. 139; L.R. 46 I.A. 250.

[64] *Cave* v. *Cave* (1880) 15 Ch. D. 639.

[65] *Dixon* v. *Winch* (1900) 1 Ch. 736.

ces.[66] In the case of oral contracts the question is purely one of fact.[67] If the contract is in writing, the presumed intention is that which appears from the terms of the written agreement as a whole.[68]

An agent who signs a contract in his own name without qualification, though known to be an agent, is understood to contract personally, unless a contrary intention plainly appears from the body of the instrument,[69] and the mere description of him as an agent, whether as part of the signature or in the body of the contract, is not sufficient indication of a contrary intention to discharge him from the liability incurred by reason of the unqualified signature.[70] On the other hand, if words are added to the signature indicating that he signs "as an agent," or on account or behalf of the principal, he is considered not to contract personally, unless it plainly appears from the body of the contract, notwithstanding the qualified signature, that he intended to make himself a party.[71] An agent may be held liable personally under sections 233-235.

It is also settled law that when an agent "has made a contract in the subject-matter of which he has a special property he may, even though he contracted for an avowed principal, sue in his own name."[72] Such is the case of a factor,[73] and of an auctioneer, who "has a possession coupled with an interest in goods which he is employed to sell, not a bare custody, like a servant or a shopman," and a special property by reason of his lien.[74]

The like rule is laid down by Indian Courts: "Where an agent enters into a contract as such, if he has interest in the contract, he may sue in his own name."[75] This is not a exception to the rule laid down at the beginning of the section, the agent being in such a case virtually a principal to the extent of his interest in the contract.

Whenever an agent has entered into contract in such terms as to be personally liable, he has a corresponding right to sue thereon,[76] and this right is not affected by his principal's renunciation of the contract.[77]

Principle of the rule and exceptions.—The test question in cases within the principle of this section is always to whom credit was given by the other party, or, if that cannot be proved as a fact, to whom it may reasonably be presumed to have been given. Thus, in the cases here specially mentioned, the party cannot be supposed to rely exclusively on a foreign principal whom, by general mercantile usage, the agent's contract is not understood to bind, or on a person whose name he does not know, and whose standing and credit he therefore cannot verify, or on a person or body who, for whatever reason, is on the face of the transaction not legally liable.

Presumed exceptions: (i) Foreign principal.—This is based on convenience and general mercantile usage. In the case of a British merchant buying for a foreigner,

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[66] See Bowstead on Agency, 10th ed., p. 236.

[67] *Lakeman* v. *Mountstephen* (1874) L.R. 7 H.L. 17; *Long* v. *Millar* (1879) 4 C.P. Div. 650; *Mohanakrishnan* v. *Chemicals & Co.* ('60) A.M. 452.

[68] *Spittle* v. *Lavender* (1821) 5 Moore 270.

[69] *Calder* v. *Dobell* (1871) L.R. 6 C.P. 486.

[70] *Hutcheson* v. *Eaton* (1884) 13 Q.B. Div. 861.

[71] *Redpath* v. *Wigg* (1866) L.R. 1 Ex. 335; *Gnanasundara Nyagar* v. *Berton* ('64) A.M. 113.

[72] 2 Sm. L.C. 415.

[73] *Fisher* v. *Marsh* (1865) 6 B. & S. 411.

[74] *Williams* v. *Millington* (1788) 1 H. B1. 81, 2 R.R. 724.

[75] *Subramania* v. *Narayanan* (1900) 24 Mad. 130.

[76] *Agacio* v. *Forbes* (1861) 14 Moo. P. C. 160.

[77] *Short* v. *Spackman* (1831) 2 B. & Ad. 962.

"according to the universal understanding of merchants of and all persons in trade, the credit is then considered to be given to the British buyer, and not to the foreigner;"[78] for "a foreign constituent does not give the commission merchant any authority to pledge his credit to those" with whom the commissioner deals on his account.[79] Here, unless a contrary agreement appears, the foreign principal is not a party to the contract at all, and can neither sue[80] nor be sued[81] on it. On the question whether an agent is to be considered as having contracted personally the true intention has to be deduced as in other cases, from the terms of the contract and surrounding circumstances. The circumstance that the principal is a foreigner gives rise to a presumption, but only a presumption, of an intention to contract personally, and the presumption may be rebutted by indication of an intention to the contrary.[82]

A company having its registered office in England, but carrying on business in India, will be deemed to be resident in England for the purposes of this section. Where a contract, therefore, is entered into by the "managing agents" of such company in India, it can be enforced against the agents personally unless the foreign company is in writing made the contracting party, and the contract is made directly in its name.[83]

In the context of the changed circumstances of international commerce, the trend of modern authorities in England appears to be that where the intention of the parties is clear from the terms of the contract itself, there is no question of raising the presumption.[84] The presumption laid down by this section provides a useful safeguard against undue risks as to finding out the foreign principal, commencing proceedings against a defendant in a foreign country and consequential difficulties of executing a decree against a defendant in a foreign country.

(ii) **Principal undisclosed.**—The presumptive rule under this head is so well settled that it will suffice to refer to Indian cases without going back here to the ultimate authorities. The qualifications expressed in the following sections to sec. 233 inclusive are now part of the doctrine requiring most attention. The decisions establishing them contain ample proof of the rule. The same principles are followed in Indian Courts. The honorary secretary, therefore, of a school alleged to have been maintained by an association in London was personally liable for the rent of a house hired by him in his name although for the purposes of the school.[85] But if the other party knows that the agent is contracting as such, the presumption laid down in this clause does not arise, although at the time of making the contract the agent does not state the name of the principal, the knowledge being in such a case equivalent to disclosure.[86] Thus the secretary of a club cannot be sued personally for work done for the club, as he had not pledged his personal credit.[87] And similarly he cannot sue a member on behalf of the club for goods supplied to him

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[78] *Thompson* v. *Davenport* (1929) 9 B. & C. at p. 87; 32 R.R. at p. 585.

[79] *Armstrong* v. *Strokes* (1872) L.R. 7 Q.B. 598, 605.

[80] *Elbinger Actien-Gesellschaft* v. *Claye* (1873) L.R. 8 Q.B. 473.

[81] *Hutton* v. *Bullock* (1874) L.R. 9 Q.B. 572.

[82] See the authorites critically reviewed in *Miller, Gibb & Co.* v. *Smith & Tyren* (1917) 2 K.B. 141 C.A.

[83] *Tutika Basavaraju* v. *Parry & Co.* (1903) 27 Mad. 315.

[84] *Teheran-Europe* v. *S.T. Belton (Tractors) Ltd.* (1968) 2 W.L.R. 523; *Anglo-African Shipping Co. of New York Inc.* v. *Mortner (J) (1962) 1. Lloyd's Report 610 (616, 617, 619, 621).*

[85] *Bhojabhai* v. *Hayem Samuel* (1898) 22 Bom. 754.

[86] *Mackinnon* v. *Lang* (1881) 5 Bom. 584.

[87] *North-Western Provinces Club* v. *Sadullah* (1898) 20 All. 497.

by the club.[88]

A broker is an agent primarily to establish privity of contract between two parties. A broker when he closes a negotiation as the common agent of both parties usually enters it in his business book and gives to each party a note of the transaction which as given to the seller is the sold note and as given to the buyer the bought note. *Prima facie* a broker is employed to find a buyer or seller and as such is a mere intermediary. He is thus an agent to find a contracting party, and as long as he adheres strictly to the position of broker, his contract is one of employment between him and the person who employs him and not contract of purchase or sale with the party whom he in the courses of such employment finds. A broker may, however, make himself a party to the contract of sale or purchase, for he can go beyond his position of a negotiator or agent to negotiate and by the terms of the contract make himself the agent of his principal to buy or sell. Where he is merely an intermediary, he is not liable on the contract; but if he has entered into a contract of purchase or sale on behalf of his principal, the provisions of this section will apply.[89] Thus if the principal is undisclosed, and the note says "sold for you to my principals," i.e. "I, your broker, have made a contract for my principals, the buyers," the broker is merely an intermediary, and he is not personally liable to his employer.[90] For the same reason he is not liable if the contract says "bought for you from my principals,"[91] and the terms "sold by order and for account of transfer to selves for principal," the broker signing as broker, do not bind him personally, and also do not entitle him to sue in his own name for failure to deliver.[92] But the broker is personally liable if the contract says "bought of you for my principals," for here the contract is one of purchase by the broker on behalf of undisclosed principals.[93]

(iii) **Principal not liable to be sued.**—There is a rather curious class of cases in which agreements have been entered into by promoters on behalf of companies intended to be, but in fact not yet, incorporated. In such a case the alleged principal has no legal existence, and the agent is held to have contracted on his own account in order that there may not be a total failure of remedy.[94]

This sub-clause would cover a case of a company which may have either no capacity to make such a contract or no power to authorise delegation to a particular agent.[95] This is known as the doctrine of *ultra vires*. A company's public documents give notice of its objects[96] and a person dealing with such company is presumed to have notice of what is contained in such public documents. There cannot, therefore, arise a presumption of an apparent authority in an agent of a company to make a contract which is *ultra vires* the company.[97]

Sovereign States as principles.—Sovereign States and their rulers would seem to

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[88] *Michael* v. *Briggs* (1890) 14 Mad. 362.

[89] *Patiram* v. *Kanknarrah Co. Ltd.*, (1915) 42 Cal. 1050, 1065-1066.

[90] *Southwell* v. *Bowditch* (1876) L.R. 1 C.P.D. 374.

[91] *Patiram* v. *Kanknarrah Co. Ltd.*, (1915) 42 Cal. 1050.

[92] *Nanda Lal Roy* v. *Gurupada Haldar* (1924) 51 Cal. 583, 81 I.C. 721.

[93] *Southwell* v. *Bowditch* (1876) L.R. 1 C.P.D. 374. at. p. 379.

[94] *Re Empress Engineering Co.* (1880) 16 Ch. Div. 125; *Lakshmishankar* v. *Motiram* (1904) 6 Bom. L.R. 1106.

[95] *Freeman & Lockeyer* v. *Buckhurst Park Properties Ltd.* (1964) 2 Q.B. 480 (504): (1964) 1 All E.R. 630: (1964) 2 W.L.R. 618.

[96] *Ernest* v. *Nicholls* (1857) 6 H.L. Cas. 401; *Freeman & Lockyer, supra.*

[97] *Houghton & Co.* v. *Nothard, Lowe & Wills* (1927) 1 K.B. 246.

come within the description of possible principals who cannot be sued; but there is a special rule for this case, and it is settled, for sufficient reasons of good sense and policy, that an agent contracting even in his own name on behalf of a Government is not to be considered as personally a party to the contract. No man would accept public offer at such risk as a different rule would involve.[98] As regards British India the law was that a foreign or native ruler might be sued in a competent Court in India in certain cases with the consent of the Governor-General-in-Council. Where no such consent was given, it has been held that a suit might be brought against the agent appointed by the native ruler for the purposes of the business in respect of which the suit was brought.[99] See now the provisions of sec. 87B of the Code of Civil Procedure, 1908.

Rights of parties to a contract made by agents not disclosed

231. If an agent makes a contract with a person who neither knows, nor has reason to suspect that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent has been principal.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent has not a principal, he would not have entered into the contract.

Undisclosed principal's rights to sue—Where an undisclosed principal wants to sue, his right to sue is preserved but subject to the equities as between the agent and third party.

"Discloses himself."—The High Court of Bombay is of opinion that the right of the third party to repudiate the contract under the second paragraph arises only where the principal himself makes the disclosure, and that it does not arise where the disclosure is made by some other person or the information reaches him from some other source.[1]

Performance of contract with agent supposed to be principal.

232. Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.

Illustration

A, who owes 500 rupees to B, sells 1,000 rupees worth of rice to *B*. *A* is acting as agent for *C* in the transaction, but *B* has no knowledge no reasonable ground of suspicion that such is the case. *C* cannot compel *B* to take the rice without allowing him to set off *A*'s debt.

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[98] *Palmer* v. *Hutchinson* (1881) 6 App. Ca. at p. 626, *Grant* v. *Secretary of State for India* (1877) 2 C.P.D. at P. 461.

[99] *Abdul Ali* v. *Goldstein* (1910) Punj. Rec. No. 43.

[1] *Lakshmandas* v. *Lane* (1904) 32 Bom. 356; *Kapurji Magniram* v. *Panaji Devichand*, 53 Bom. 110.

Sections 231, 232 and 234, taken together, fairly represent modern English law as regards the rights of undisclosed principals.

Rights of a third party if undisclosed principal sues.—Sections 231 and 232 refer to a situation arising as a result of an undisclosed principal seeking to enforce the contract entered into by his agent. But for these sections, the third party cannot set off any claim he may have against the agent personally[2] nor can he rely upon a payment made to the agent. In *Montagu* v. *Forwood*[2] *A* Employed *B* to collect general average contributions under an insurance policy. *B* instructed a broker to collect the contributions, the broker believing *B* to be the principal. *B* owed the brokers some money. In an action by *A* against the broker for the contributions, as money received to his use, it was held that the broker was entitled to set off a debt due from *B*. The equitable rights created in favour of the third party are based upon the fact that at the time of entering into the contract he did not know, nor had he reason to suspect, that the person acting was an agent.

Equities between agent and third party.—An undisclosed principal coming in to sue on the contract made by the agent must take the contract, as the phrase goes, subject to all equities, that is, the third party may use against the principal any defence that would have availed him against the agent[3] before he had reasonable notice of the principal's existence.[4] The rule stated in these sections is based on the ground that the third party did not know, and had no reason to suspect, that the person contracting was acting for a principal.[5] The rule laid down in the said two sections is to be distinguished from that laid down in section 237 which is based on "estoppel" arising in consequence of "holding out with ostensible authority." "The law with respect to the right of set-off by a third person dealing with a factor who sells goods in his own name and afterwards becomes bankrupt is well established by *Hudson* v. *Granger*.[6]. . . That rule is founded on principles of common honesty. One who satisfies his contract with the person with whom he has contracted ought not to suffer by reason of its afterwards turning out that there was a concealed principal."[7]

Where, however, the seller's factor for sale told the agent of the buyer that the goods did not belong to him, the buyer cannot plead a set off of his claim against the factor personally in a suit by the seller for price of goods.[8]

The application of the rule of set off is limited to liquidated demands;[9] but it "is not confined to the sale of goods. If *A* employs *B* as his agent to make any contract for him, or to receive money for him, and *B* makes a contract with *C* or employs *C* as his agent, if *B* is a person who would be reasonably supposed to be acting as a principal, and is not known or suspected by *C* to be acting as an agent for anyone, *A* cannot make a demand against *C* without the latter being entitled to stand in the same position as if *B* had in fact been a principal. If *A* has allowed his agent *B* to appear in the character of a principal he must take the consequences."[10]

In England it is not to necessary for the third party who dealt with the agent as a

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[2] *Montagu* v. *Forwood* (1893) 2 Q.B. 350

[3] *George* v. *Clagett* (1797) 7 T.R. 359; *Sims* v. *Bond* (1833) 5 B. & Ad. 389, 393.

[4] *Sims* v. *Bond supra; Browning* v. *Provincial Insurance Co. of Canada*, L.R. (1873) 5. P.C. 253 (272-73).

[5] *Greer* v. *Downs Supply Co.* (1927) 2 K.B. 28.

[6] (1821) 5 B. & A. 27.

[7] *Turner* v. *Thomas* (1871) L.R. 6 C.P. 610, 613, per Willes., J.

[8] *Dresser* v. *Norwood* (1864) 17 C.B. (N.S.) 466: 142 R.R. 455.

[9] *Ib.*

[10] *Montagu* v. *Forwood* (1893) 2 Q.B. 350, 355.

principal to go beyond showing that he believed him to be a principal. Means of knowledge or "reason to suspect" appears to be material only as tending to negative the alleged belief.[11] The words of both secs. 231 and 232, however, are quite clear on this point. But there must be actual belief that one is dealing with a principal. Ignorance or doubt whether the apparent principal is a principal or an agent is not enough; for the ground of the rule is that the agent has been allowed by his undisclosed principal to hold out himself as the principal, and the third party has dealt with him as such.[12] The words "reason to suspect" or "reasonable ground to suspect" cannot cover a case where the third party is dealing with a known broker.[13] If the agent gives an invoice in the name of his principal, the third party cannot take recourse to the said expressions[14] because the invoice should leave no doubt in his mind.

The second paragraph of sec. 231 is really a branch of the general rule that agreements involving personal considerations of skill, confidence, or the like are not assignable or transferable.

Right of person dealing with agent personally liable.

233. In case where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.

Illustration

A enters into a contract with *B* to sell him 100 bales of cotton, and afterwards discovers that *B* was acting as agent for *C*. *A* may sue either *B* or *C*, or both, for the price of the cotton.

In cases where the agent is personally liable.—As to the cases where an agent is personally liable, see sec. 230 and commentary thereon.

This section is a clear departure from English law under which the liability of principal and agent is alternative and not joint.[15] According to this section the creditor may hold either principal or agent as severally liable in the alternative, or at his option hold them jointly liable. If he elects to hold them jointly liable, he can sue them both; but if he elects to sue one only he must be deemed to have given up his rights against the other, since in that case the liability is alternative and not joint.[16]

Case where the agent is so liable personally, the terms of his liability must be ascertained from the terms of the contract. The agent may as well have intended that both should be liable.[17] The agent may have intended to guarantee the performance.

Creditor's election.—A person who has made a contract with an agent may; if and when he pleases, look directly to the principal, unless the liability of the principal has been excluded by the express terms of the contract. He may look directly to the principal, ever though he was not aware of the existence of the principal when he made the contract, and even though the agent is personally liable. This is because the law which makes

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[11] *Borries* v. *Imperial Ottoman Bank* (1873) L.R. 9 C.P. 38.

[12] *Cooke* v. *Eshelby* (1887) 12 App. Ca. 271.

[13] *Cooke* v. *Eshelby* (1887) 12 App. Cas. 271; *Dresser* v. *Norwood* (1864) 17 C.B. (N.S.) 466.

[14] *Butwick* v. *Grant* (1924) 2 K.B. 483.

[15] *Morel Brothers & Co. Ltd.* v. *Earl of Westmoreland* (1904) A.C. 11.

[16] *Shamsuddin Ravuthar* v. *Shaw Wallace & Co.* (1939) Mad. 282, 184 I.C. 153, ('39) A.M. 520;. *Shivlal Motilal* v. *Birdichand* (1917) 19 Bom. L.R. 370, 40 I.C. 194.

[17] *International Rly. Co.* v. *Niagra Parks Commission* (1941) A.C. 328 (342).

the agent liable does not detract from the liability of the principal.[18] A company is, therefore, liable for moneys advanced in the course of voluntary liquidation to the liquidator authorised by the company to borrow for the purposes of the winding up.[19] Similarly a loan made to the Secretary, treasurer and agent of a company authorised to raise moneys for the Company may be recovered from the company.[20] But when once the creditor has elected to sue the agent, and sued him to judgment, he cannot afterwards bring a second action against the principal, though the judgment against the agent may not have been satisfied,[21] and though the creditor was not aware of the existence of a principal when he sued the agent.[22] This is on the principle that the signing of the judgment against one party extinguishes the liability of the other and the creditor's election has become final. But where the suit against the agent is dismissed the creditor may subsequently bring a fresh suit against the principal, the reason being that nothing short of a judgment against the agent can amount to a binding election on the part of the creditor to abandon the right to proceed against the principal.[23]

Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable.

234. When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

Estoppel against third party.—This section is a corollary to the preceding section. Although the third party has the option to proceed against the agent or the principal or both of them, this section restricts that right on the ground of estoppel if he has induced either of them to act on the belief that one of them shall not be held liable. The third party is estopped by its active representations in exercising its option contained in section 233.

If a third party knowing full well who the principal is prefers to give credit to the agent and debits the amount to the agent[24] or where a third party agrees to hold the agent for sale only liable for loss if the goods supplied by the supplier (principal) are not in accordance with the sample,[25] it can be stated that he induced the principal to act on the belief that he would not be held liable and that the agent alone would be held liable.

Inducing belief in agent/principal.—Unless there is an active representation, any unilateral act such as receiving a part payment[26] or proving in the bankruptcy of the agent[27] or initiation of proceedings against one of them[27] may not conclusively prove

[18] *Calder* v. *Dobell* (1871) L.R. 6 C.P. 486.

[19] *In re Ganges Steam Car Co.* (1891) 18 Cal. 31.

[20] *Purmanundass* v. *Cormack* (1881) 6 Bom. 326.

[21] *Shivlal Motilal* v. *Birdichand* (1917) 19 Bom. L.R. 370; *Bir Bhaddar* v. *Sarju Prasad* (1887) 9 All. 681; *Priestly* v. *Fernie* (1865) 3 H. & C. 977; and see *Morel Brothers & Co. Ltd.* v. *Earl of Westmoreland* (1904) A.C. 11.

[22] *Shivlal Motilal* v. *Birdichand* (1917) 19 Bom. L.R. 370, 380-381.

[23] *Raman* v. *Vairavan* (1883) 7 Mad. 392, citing *Curtis* v. *Williamson* (1874) L.R. 10 Q.B. 57.

[24] *Addison* v. *Gandasequi* (1812) 4 Taunt 574.

[25] *Mahadev* v. *Gauri Shankar* (1951) A. Assam 42.

[26] *Curtis* v. *Williamson* (1874) L.R. 10 Q.B. 57; *Fell* v. *Parkin* (1882) 52 L.J. Q.B. 99.

[27] *Clarkson Booker* v. *Andjel*, (1964) 2 Q.B. 775: (1964) 3 All. E.R. 76: (1964) 3 W.L.R. 466.

that he actively induced the belief in the agent or the principal, as the case may be.

Liability of pretended agent.

235. A person untruly representing himself to be the authorised agent of another, and thereby inducing a third person to deal with him as such agent, is liable if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

Liability of pretended agent to third person.—The law in England is established by *Collen* v. *Wright*.[28] It applies not only to the case of a person who represents that he has authority from another when he has no authority whatever, but to the case of a person who represents that he has a certain authority from another when he has authority of another description.[29] The duty is grounded on an implied warranty by the agent that he has authority, and the action, being in contract, lies even if the agent honestly believed he had authority. The doctrine has been fully confirmed by later authorities and by the House of Lords.[30] An agent reports to his principal that he has made a bargain for his principal with a third person. The report is incorrect for the contract is not complete and goes off altogether. In such a case the agent does not represent himself to be the agent of the third party, and is not liable under the rule in *Collen* v. *Wright*.

A public servant acting on behalf of the Government is not deemed to warrant his authority, nor does he make himself personally liable on the contract,[31] and for the same reason of policy.

If a man goes through the form of contracting as an agent, but warns the other party that he has at the time no authority, he is obviously not liable under this section.[32]

"Untruly representing himself".—The rule embodied in this section is based upon "an untrue representation of authority" and "the other party acting thereon." The representation may be expressed or implied. The words "untruly representing" in this section are intended to restrict the law in India, while in England the law is based on a wider doctrine of a breach of implied warranty of authority (16, 18). If unknown to the agent, his authority has ceased to exist because of principal has died or had become insane or insolvent, it cannot be said that he untruly represented his authority. In the Bombay case the agent was not authorised to sign the charter party and hence he untruly represented that he had authority to sign.[33] In the Allahabad case the agent was authorised to sell at a particular rate but he sold it at a lower rate and hence he untruly represented his authority to sell at a lower rate.[34] The use of the word 'untruly' is intended not to make an innocent agent liable. The Indian legislature might have contemplated that an agent should not be a guarantor of authority (a situation which would be unduly harsh) and hence it made a departure from the English law. This is evident from the measure of damages provided in this section which is different from the one under the English law. The liability of a pretended agent under this section does not arise, unless the rep-

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[28] (1857) 7 E. & B. 301, in Ex. Ch. 8 E. & B. 647. See *Hasonbhoy* v. *Clapham* (1882) 7 Bom. 61, 66.

[29] *Ganpat Prasad* v. *Sarju* (1911) 9 All. L.J. 8: 34 All. 168.

[30] *Starkey* v. *Bank of England* (1903) A.C. 114.

[31] *Dunn* v. *Macdonald* (1897) 1 Q.B. 555 C.A.

[32] *Halbot* v. *Lens* (1901) 1 Ch. 344.

[33] *Hasonbhoy* v. *Clapham* (1882) 7 Bom. 61.

[34] *Ganpat Prasad* v. *Sarju* (1911) 9 All. L.J. 8: (1912) 34 All. 168.

representation that he is the agent of another is false, and also induces the person to whom the representation is made to deal with him as such agent. A representation by the defendant to the plaintiff that she is the duly authorised agent of her minor son does not render her liable under this section, if the plaintiff knows that the son is a minor. For a minor cannot appoint an agent (s. 183 above), and consequently no warranty such as would support a suit could arise out of such a representation.[35]

Measure of damages.—In England, the action being founded on contract, and not on tort, the measure of damages is the loss sustained as the consequence of the breach of the implied warranty. In other words, the person acting on the misrepresentation is entitled not only to recover any loss actually sustained through being misled, but also any profit which he would have gained if the representation had been true.[36]

It is open to question whether in India the compensation recoverable under the section will be assessed on the same principle. The language used seems more appropriate to an action in the nature of an action of deceit than to one founded on a warranty.[37]

Person falsely contracting as agent not entitled to performance.

236. A person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account.

Agent acting on his own account not entitled to require performance.—English authorities make a distinction in this matter between contracts on behalf of a named principal and those in which the principal is not named. It does not seem possible, however, to read any such distinction into the perfectly general language of the present section; and, indeed, the English rule has never been settled by a Court of appeal. The High Court of Calcutta has held that this section is not restricted to cases where an agent purports to act for the named principal.[38] If a person professing to act as an agent for an undisclosed principal enters into a contract with another, and there is no undisclosed principal in fact, the present section at once applies, and he cannot sue on the contract.[39]

Conversely, where a man has contracted in writing in terms importing that he is the sole principal, e.g. made a charter-party "as owner of the ship A," another person cannot be allowed to sue on the contract as an undisclosed principal.[40]

Liability of principal inducing belief that agent's unauthorised acts were authorised.

237. When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

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35 *Shet Manibhai* v. *Bai Rupaliba* (1899) 24 Bom. 166, citing *Beattie* v. *Lord Ebury*, L.R. 7 H.L. 102.

36 *Firbank* v. *Humphreys* (1886) 18 Q.B. Div. 54.

37 See *Vairavan Chettiar* v. *Avicha Chettiar* (1915) 38 Mad. 275, 278.

38 *Sewdutt Roy Maskara* v. *Nahapiet* (1907) 34 Cal. 628; *Nanda Lal Roy* v. *Gurupada Haldar* (1924) 51 Cal. 588.

39 *Ramji Das* v. *Janki Das* (1912) 39 Cal. 802; *Nanda Lal Roy* v. *Gurupada Haldar, supra.*

40 *Humble* v. *Hunter* (1848) 12 Q.B. 310; *Rederi Aktienbolaget Trans-atlantic* v. *Fred Drughorn* (1918) 1 K.B. 394 C.A., affirmed in H.L. (1919) A.C. 203.

Illustrations

(a) *A* consigns goods to *B* for sale, and gives him instructions not to sell under a fixed price. *C*, being ignorant of *B*'s instructions, enters into a contract with *B* to buy the goods at a price lower than the reserved price. *A* is bound by the contract.

(b) *A* entrusts *B* with negotiable instruments indorsed in blank. *B* sells them to *C* in violation of private orders from *A*. The sale is good.

Ostensible authority.—This section can be called "agency by estoppel". This section requires that the principal should have by his conduct or words induced a third person and the third person was induced to act on the basis of such conduct or words.

The words or conduct on the part of the principal and inducement of belief in the third person thereby create an estoppel against the principal *vis-a-vis* the third person. This form of estoppel is called ostensible authority or apparent authority.

The words "by his words or conduct induced such third persons to believe" refer to specific representation and not a representation to the world. In other words "holding out to the world" is ruled out.[41] If a third person who is not induced to believe that such acts or obligations were within the scope of the agent's authority, this section would not apply.

This section must, in point of fact, overlap sec. 188 in many cases, but the principles are distinct. Under sec. 188 the question is of the true construction to be put upon a real, though perhaps not verbally expressed, authority. Here the liability is by estoppel, and independent of the apparent agent having any real authority at all; the question is only whether he was held out as being authorised; and this includes the case of secret restrictions on an existing authority of a well-known kind.

It is a "well-established principle that, if a person employs another as an agent in a character which involves a particular authority, he cannot by a secret reservation divest him of that authority."[42] "Good faith requires that the principal shall be held bound by the acts of the agent within the scope of his general authority, for he has held him out to the public as competent to do the acts and to bind him thereby." : S.A. sec. 127. Where a transaction undertaken by an agent on behalf of his principal is within his express authority, the principal is bound without regard to the agent's motives, and inquiry whether the agent was abusing his authority for his own purposes is not admissible.[43]

Very many illustrations of the principle are to be found in the English authorities, of which the following may be given as typical examples. Where a principal wrote to a third person saying he had authorised the agent to see him, and, if possible, to come to an amicable arrangement, and gave the agent instruction not to settle for less than a certain amount, it was held that he was bound by a settlement by the agent for less than that amount, the third person having no knowledge of the verbal instructions.[44] An agent was authorised, in cases of emergency, to borrow money on exceptional terms outside the ordinary course of business, and it was held that the principal was bound by a loan on such exceptional terms made by a third person who had no notice that the agent was exceeding his authority, although no emergency had in fact arisen.[45] Where a solicitor

41 *Farquharson Brothers & Co.* v. *King & Co.* (1902) A.C. 325 (341).

42 Cockburn, C.J., in *Edmunds* v. *Bushell* (1865) L.R. 1 Q.B. 97, 99.

43 *Hambro* v. *Burnard* (1904) 2 K.B. 10 C.A.

44 *Trickett* v. *Tomlinson* (1863) 13 C.B. N.S. 663. See also *National Bolivian Navigation Co.* v. *Wilson* (1880) 5 App. Cas. 176, 209.

45 *Montaignac* v. *Shitta* (1890) 15 App. Cas. 357; *Bryant* v. *Quebec Bank* (1893) A.C. 179.

was authorised to sue for a debt, it was held that a tender to his managing clerk was equivalent to a tender to the client, though the clerk was forbidden to receive payment, he not having disclaimed the authority at the time of the tender.[46]

It must be understood in illustration (b) that the instruments are not handed to *B* merely for safe custody.

The Privy Council case of *Ram Pertab* v. *Marshall*,[47] which, however, was not decided with reference to the section, affords an additional illustration. In that case the principal was held liable upon a contract entered into by his agent in excess of his authority, the evidence showing that the contracting party might honestly and reasonably have believed in the existence of the authority to the extent apparent to him. In *Fazal Ilahi* v. *East Indian Railway Company*[47] Act IV of 1894 prohibited parcel clerk from accepting consignment of fire works for carriage by passenger train. He by mistake accepted such consignment but kept quiet and did not send the consignment by goods train. It was held that the Railway Company was bound by the act of parcel clerk for not carrying out the contract as the latter was held out to the world by the Railway Company as a person authorised on behalf of Company to accept consignment for dispatch. The parcel clerk was acting on behalf of his principal in the exercise of his apparent authority and his acts thus bind the Railway Company which could have dispatched the consignment without unreasonable delay by the goods train. Where, however, a person is aware that the agent is acting under a power of attorney and does not trouble to read it, he cannot complain if the principal refuses to be bound by an act beyond the authority of the agent.[48]

Notice of excess of authority.—No act done by an agent in excess of his actual authority is binding on the principal with respect to persons having notice that the act is unauthorised. This proposition is so obvious that it would be superfluous to cite authorities in support of it.

"On behalf of his principal."—"A principal is not bound by any act done by his agent which he has not in fact authorised, unless it is done in the course of the agent's employment on his behalf,[49] and is within the scope of the agent's apparent authority."[50]

Effect, on agreement, of misrepresentation or fraud by agent.

238. Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals; but misrepresentations made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals.

Illustrations

(a) *A*, being *B*'s agent for the sale of goods, induces *C* to buy them by a misrepresentation, which he was not authorised by *B* to make. The contract is voidable as between *B* and *C* at the option of *C*.

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[46] *Moffat* v. *Parsons* (1814) 1 Marsh 55.

[47] (1899) 26 Cal. 701. See also *Fazl Ilahi* v. *East Indian Railway* (1921) 43 All. 62.

[48] *United Provinces Government* v. *Church Missionary Trust Association Ltd.* (1948) 22 Luck. 93, 229 I.C. 421, ('48) A.O. 54.

[49] *McGowan* v. *Dyer* (1873) L.R. 8 Q.B. 141.

[50] *Morarji Premji* v. *Mulji Ranchhod Ved & Co.* (1923) 48 Bom. 20.

(b) *A*, the captain of *B*'s ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between *B* and the pretended consignor.

Liability of principal for agent's fraud or misrepresentation.—In order that a principal be liable for misrepresentations or frauds of his agent, the essential requirements are that they should have been committed (i) "in the course of business of agency" and (ii) "in respect of matters within the agent's authority." The aforesaid two conditions indicate that the liability is not vicarious; the words "as is such misrepresentations or frauds had been made or committed by the principals" also indicate that if those two conditions are complied with, the principal is liable as if such acts are his own.

This section would cover cases as (1) a servant acting in the course of his employment of his master; and (2) an independent contractor acting for his principal.

In course of business.—An agent having control of his principal's business prefers fraudulently a particular creditor would be an act of fraudulent preference by the principal.[51]

In course of employment.—The accordance of this section with the modern Common Law is well shown in a judgment delivered in the Judicial Committee by Lord Lindley: "The law upon this subject cannot be better expressed than it was by the acting Chief Justice [of New South Wales] in this case. He said: 'Although the particular act which gives the cause of action may not be authorised, still, if the act is done in the course of employment which is authorised, then the master is liable for the act of his servant.' This doctrine has been approved and acted upon by this Board in *Mackay* v. *Commercial Bank of New Brunswick*,[52] *Swire* v. *Francis*,[53] and the doctrine is as applicable to incorporated companies as to individuals. All doubt on this question was removed by the decision of the Court of Exchequer Chamber in *Barwick* v. *English Joint Stock Bank*,[54] which is the leading case on the subject. It was distinctly approved by Lord Selborne, in the House of Lords, in *Houldsworth* v. *City of Glasgow Bank*,[55] and has been followed in numerous other cases."[56]

In the passage here referred to as now the leading authority, Willes, J., delivering the judgment of the Exchequer Chamber said:

"With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved.[57] That principle is acted upon every day in running down cases. It has been applied also [in various cases of trespass, false imprisonment by servants of corporations acting in supposed execution of their duties under by-laws, and the like]. In all these cases it may be said, as it was said here, that the master has not authorised the act. It is true, he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be ans-

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51 Re : *Drabble Bros.* (1930) 2 Ch. 211.
52 (1874) L.R. 5 P.C. 394.
53 (1877) 3 App. Ca. 106.
54 (1867) L.R. 2 Ex. 259.
55 (1880) 5 App. Ca. at p. 326.
56 *Citizens's Life Assurance Co.* v. *Brown* (1904) A.C. 423, 427.
57 See *Laugher* v. *Pointer* (1826) 5 B. & C. 547, at p. 554, 29 R.R. at pp. 320, 321.

werable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."[58] The words "for the master's benefit," which occur in this judgment, were applicable to the case before the Court, but must not be taken as restricting the scope of the rule, though there was for some time considerable authority for that reading. If the act belongs to an authorised class, it is not material whether the agent intends the principal's benefit or not, not whether the principal in fact derives any benefit. A solicitor's managing clerk, having authority to transact conveyancing business on behalf of the firm, took a client's instructions to sell some property (by his own advice, given with fraudulent intent) and got the deeds from her (which he might properly have done). Then he procured her execution of instruments, being in fact conveyances to himself, which the client supposed (as intended by him) to be merely formal papers; and having thus obtained the means of making an apparently good title in his own name, he dealt with the property for his own purposes. The House of Lords[59] held that this was a fraud committed by the manager in the course of his employment for which the principal was answerable. It is clear from the judgments that the rule applies to ostensible as well as to actual authority.

Bribery of agent.—The rights of the principal against an agent is respect of bribes received in the course of the agency are dealt with in the commentary to sec. 213 and sec. 216. In addition to what is said there it may be mentioned that the receipt of a bribe by an agent justifies his immediate dismissal without notice, although the contract of agency may provide for its continuance for a specified time.[60]

As against the person promising or giving anything in the nature of a bribe to an agent, the principal may avoid any contract made or negotiated by the agent, or in the making of which the agent was in any way concerned, whether he was in fact influenced by the bribery or not, it being conclusively presumed against the briber that he was so influenced.[61] In *Shipway* v. *Broadwood*[61] *A* agreed to buy a pair of horses from *B*, if *A's* agent certified that they were sound. *B* secretly offered the agent a certain sum if the horses were sold, and the agent accepted the offer. The agent certified that the horses were sound. It was held that *A* was not bound by the contract, whether the agent was in fact biased by the offer made to and accepted by him, or not.

An agent cannot maintain any action for the recovery of money promised to be given to him by way of a bribe whether he was induced by the promise to depart from his duty to the principal or not.[62] Such a promise, being founded on a corrupt consideration, cannot be enforced by law.

Right of principal to follow property into hands of third persons.—Where the property of the principal is disposed of by an agent in a manner not expressly or ostensibly authorised the principal is entitled, as against the agent and third person, subject to any enactment to the contrary,[63] to recover the property, wheresoever it may be found.[64]

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[58] L.R. 2 Ex. 259 at pp. 265, 266.

[59] *Lloyd* v. *Grace Smith & Co.* (1912) A.C. 716, reversing the decision of the C.A. (1911) 2 K.B. 489; *Dina Bandhu Saha* v. *Abdul Latif Molla* (1923) 50 Cal. 258.

[60] *Bostan Fishing Co.* v. *Ansell* (1888) 39 Ch. Div. 339.

[61] *Shipway* v. *Broadwood* (1899) 1 Q.B. 369; *Bartram* v. *Lloyd* (1904) 90 L.T. 357.

[62] *Harrington* v. *Victoria Dock Co.* (1878) 3 Q.B.D. 549.

[63] See, for instance, sec 178; and sec. 27 of Indian Sale of Goods Act as to sales and pledges by persons in possession of goods or of the documents of title thereto.

[64] *Farquharson* v. *King* (1902) A.C. 325;

Personal liability of agent to repay money received to principal's use.—If money is paid to an agent on the principal's behalf, and the payer becomes entitled, as against the principal, to repayment, the agent, as a general rule, is not liable to repay it even though the money is still in his possession.[65]

But an agent is personally liable to repay money paid to him under a mistake of fact,[66] unless he has paid it over to the principal in good faith, or unless he has dealt to his detriment with the principal in the belief that the payment was a valid one, before receiving notice of the intention of the payer to demand repayment.[67] Similar principles apply where the money is paid in respect of a voidable transactions,[68] or for a consideration which totally fails,[69] or under duress,[70] or in consequence of any fraud or wrong to which the agent is not a party.[71] But if the agent has been a party to the wrongful act, payment over is no defence in the case of wrong-doers.[72] An agent is also personally liable, notwithstanding that he may have paid the money over in good faith, if it was paid to him in regard to a contract made in his personal capacity.[73]

Money received by agent from a third person by fraud.—In a Bombay case an agent defrauded a third party of a sum of money and then used the money to discharge *pro tanto* a debt which he owed to the principal. The Court held that as the principal did not know, and had not the means of knowing that the money was wrongfully obtained, the third party had no right to follow the money and to require the principal to repay it.[74]

Chapter XI

OF PARTNERSHIP (Repealed)

This chapter of the Act, comprising ss. 239 to 266, has been repealed by the Indian Partnership Act, 1932, s. 73 and Sch. II.

Colonial Bank v. *Cady* (1890) 15 App. Cas. 267; *Mussammat Ram Kaur* v. *Raghbir Singh* (1920) 2 Lah. L.J. 516; *Karala Valley Tea Co.* v. *Lachmi Narayan* (1939) 68 Ca. L.J. 94. 180 I.C. 141, ('39) A.C. 14.

65 *Taylor* v. *Metropolitan Ry. Co.* (1906) 2 K.B. 55.

66 *Newall* v. *Tomlinson* (1871) L.R. 6 C.P. 405.

67 *Holland* v. *Russell* (1863) 4 B. & S. 14.

68 *Holland* v. *Russell*, note (a) above.

69 *Ex parte Bird* (1851) 4 De G. & S. 273.

70 *Owen* v. *Cronk* (1895) 1 Q.B. 265.

71 *East India Co.* v. *Tritton* (1824) 5 D. & R. 214.

72 *Ex parte Edwards* (1884) 13 Q.B.D. 717.

73 *Newall* v. *Tomlinson* (1871) L.R. 6 C.P. 405.

74 *Morarji* v. *Mulji Ranchhod Ved & Co.* (1923) 48 Bom. 20.

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